No. 17-1712

In the Supreme Court of the United States

JAMES J. THOLE AND SHERRY SMITH, PETITIONERS

v.

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

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

REPLY BRIEF FOR THE PETITIONERS

KAREN L. HANDORF
MICHELLE C. YAU
MARY J. BORTSCHELLER
COHEN & MILSTEIN
West Tower, Suite 500
1100 New York Avenue, N.W.
Washington, D.C. 20005

PETER K. STRIS
Counsel of Record
BRENDAN S. MAHER
RACHANA A. PATHAK
DOUGLAS D. GEYSER
JOHN STOKES
STRIS & MAHER LLP
777 S. Figueroa Street
Suite 3850
Los Angeles, CA 90017
(213) 995-6800
peter.stris@strismaher.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

Introduction 1

Argument 2

I. Respondents all but concede that ERISA defined-benefit plan participants have Article III standing to pursue injunctive relief to undo conflicted investments 3

II. Petitioners have Article III standing to seek make-whole relief for their ERISA plan 4

A. Petitioners are not mere bystanders to fiduciary breaches that deplete plan assets 4

1. Petitioners' equitable interest in plan assets supplies the necessary personal stake 5

2. Independently, petitioners' interest in enforcing respondents' fiduciary duties supplies the necessary personal stake 10

B. Petitioners' suit resembles those heard at common law 13

1. Beneficiaries have long sued trustees as the trust's representatives 14

2. Respondents are wrong about the "no further inquiry" rule 15

C. Congress plainly authorized petitioners' suit under Section 1132(a)(2) 17

III. Petitioners have Article III standing to seek removal of respondents as fiduciaries of their ERISA plan 18

IV. ERISA authorizes petitioners to seek each remedy 19

V. Respondents concede that their position renders ERISA's duties effectively unenforceable by defined-benefit participants 22

Conclusion 22

TABLE OF AUTHORITIES

Page(s)

Cases

FEC v. *Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985) 20

Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989) 2

Gaither v. *Aetna Life Ins. Co.*, 394 F.3d 792 (10th Cir. 2004) 12

Gollust v. *Mendell*, 501 U.S. 115 (1991) 20

Haines v. *Elliot*, 58 A. 718 (Conn. 1904) 19

Harris Tr. & Sav. Bank v. *Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000) 8, 11

Harrison v. *Randall*, 68 Eng. Rep. 562 (1852) 13

Hughes Aircraft Co. v. *Jacobson*, 525 U.S. 432 (1999) 6, 7

Johnson v. *Superior Ct.*, 199 P.2d 827 (Ariz. 1948) 9

LaRue v. *DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008) 12

Magruder v. *Drury*,
235 U.S. 106 (1914) 16

Mass. Mut. Life Ins. Co. v. *Russell*,
473 U.S. 134 (1985) .... *passim*

McChord v. *Caldwell Ex'r*,
29 S.W. 440 (Ky. 1895) 9

Moore v. *Bowes*,
64 P.2d 423 (Cal. 1937) 18

Nielsen v. *Preap*,
139 S. Ct. 954 (2019) 21

Raines v. *Byrd*,
521 U.S. 811 (1997) 21

Scanlan v. *Eisenberg*,
669 F.3d 838 (7th Cir. 2012) 6, 7, 10

Spokeo v. *Robins*,
136 S. Ct. 1540 (2016) 17, 21

Terry v. *Allen*,
23 A. 150 (Conn. 1891) 9

Varity Corp. v. *Howe*,
516 U.S. 489 (1996) 12

Statutes

26 U.S.C. 401(a)(2) 1, 5, 7

29 U.S.C. 1001(b) 11

29 U.S.C. 1103 .... 1, 5, 7

29 U.S.C. 1104(a)(1) 1, 11

29 U.S.C. 1109 .... 12, 20

29 U.S.C. 1132(a)(2) 1, 14, 17, 20

29 U.S.C. 1132(a)(3) 20

Other Authorities

26 C.F.R. 1.401-1(3)(iv) 7

Am. Jur. 2d Trusts (2019) 7

Austin W. Scott et al., *Scott & Ascher on Trusts* (5th ed. 2007) 5, 7, 8

Austin W. Scott et al., *Scott & Ascher on Trusts* (5th ed. 2016) 9, 15

George G. Bogert et al., *The Law of Trusts & Trustees* (3d ed. 2019) .... *passim*

John H. Langbein, *Questioning the Trust-Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929 (2005) 16

Restatement (Second) of Contracts (1981) 11

Restatement (Second) of Trusts (1959) 13

Restatement (Third) of Trusts (2003) 7, 16, 17

INTRODUCTION

Petitioners have demonstrated standing to sue based on ERISA's unambiguous text and its undisputed incorporation of trust-law principles.

On the central question of common-law tradition, respondents agree in all the critical particulars: common-law trust beneficiaries typically had equitable ownership interests in the trust corpus; trustees owed fiduciary duties to beneficiaries; and in light of these interests, beneficiaries could sue trustees for exactly the remedies petitioners seek here—make-whole monetary relief, fiduciary removal, and injunctive relief.

Respondents' position thus reduces to the argument that, in passing ERISA, Congress adopted trust law but excised the very interests that had created standing for common-law beneficiaries in cases like this one. According to respondents, whereas common-law beneficiaries typically held an equitable interest in the trust corpus, ERISA participants have no interest in plan assets held in trust for their benefit. And whereas common-law beneficiaries enjoyed the protections of fiduciary duties, Congress withheld those protections from ERISA participants.

Respondents' view is just as backwards as it sounds. ERISA requires plan assets to be held "in trust" "for the exclusive benefit of" the participants. 26 U.S.C. 401(a)(2); 29 U.S.C. 1103. Fiduciary duties must be discharged "solely in the interest of the participants." 29 U.S.C. 1104(a)(1). And Congress explicitly allowed participants to sue breaching fiduciaries on behalf of their plans. 29 U.S.C. 1132(a)(2).

These are some of ERISA's central features. They were enacted when defined-benefit plans were the norm. And they map directly onto trust law. It thus defies reality

to say that Congress eschewed the elements of trust law that gave beneficiaries the right to sue. The Court should reject respondents' position, which would wrongly "afford less protection to [participants] than they enjoyed before ERISA was enacted." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 114 (1989). Just as trust beneficiaries could sue breaching trustees, so can petitioners.

That result should be unsurprising on these facts. Petitioners have alleged staggering misconduct: abject imprudence and unadorned self-dealing that caused a $748 million loss. That is undisputed for this Court's purposes. It is easy to see an individual's concrete interest in ensuring that the assets backing her benefits are not treated this way.

Yet according to respondents, defined-benefit participants are mere "bystanders" to their own pension plans. Br. 46. That view leads to respondents' most striking concession: under their rule, defined-benefit plan participants can virtually never redress ERISA violations. Respondents could have bet $750 million on black, could indeed have put $750 million in their own pockets—and participants could do nothing.

But never fear, say respondents, because *their own shareholders* can sue instead. Pause here: Respondents argue that the better understanding of Article III and ERISA is that U.S. Bank's shareholders should enforce ERISA's fiduciary duties rather than the plan participants whose interests are the subject of those duties.

Respondents declare that "[e]quity is not blind to the real world." Br. 2. Neither is Article III. The court of appeals' judgment should be reversed.

ARGUMENT

Petitioners seek injunctive relief requiring divestiture from a conflicted investment, monetary make-whole relief

for the plan, and removal of the fiduciaries who violated their duties. Petitioners seek these remedies on behalf of the plan, and their standing to do so turns on whether: (1) they have a sufficient personal stake (monetary or otherwise) in the suit; (2) analogous suits were recognized at common law; and (3) Congress authorized the suit. Opening Br. 6-10; cf. Br. 20-21. Here, for all remedies sought, the answer to these questions is yes.

I. RESPONDENTS ALL BUT CONCEDE THAT ERISA DEFINED-BENEFIT PLAN PARTICIPANTS HAVE ARTICLE III STANDING TO PURSUE INJUNCTIVE RELIEF TO UNDO CONFLICTED INVESTMENTS

For injunctive relief regarding the affiliated FAF fund, the analysis is simple—respondents do not even attempt to argue that defined-benefit participants lack standing. Thus, at the very least, reversal is warranted regarding this request.[1]

Respondents' only argument is that this relief is no longer at issue (Br. 57 n.7), but that is plainly incorrect. The Eighth Circuit held petitioners lack standing to pursue this relief (Pet. App. 9a, 19a-21a), and this Court granted certiorari to address that holding (Pet. i). The lower courts can resolve the merits of petitioners' allegations on remand. But respondents' silence on the standing question means that reversal is proper here.[2]

---

[1] Respondents aren't alone. The Chamber of Commerce expressly refuses to address petitioners' "forward-looking relief." Chamber Br. 10 n.5.

[2] Respondents are wrong to say the issue isn't live. Petitioners' complaint challenged *all* of U.S. Bank's conflicted investments. J.A. 124-125, ¶¶ 283-284, 286-287. Yet the plan still invests in a FAF fund managed by U.S. Bank. Opening Br. 13 & n.3. Petitioners nowhere defined the relevant funds to exclude non-equity mutual funds. J.A. 79, 81, ¶¶ 133-135, 141.

The reason respondents don't muster a legal argument is because none exists. If a fiduciary makes an illegal investment with the assets backing participants' payments, then participants naturally have a concrete interest in stopping that illegal conduct.

What's more, respondents' effective concession on injunctive relief exposes the flaws in their challenge to petitioners' other remedies. As to loss restoration and fiduciary removal, respondents contend that defined-benefit participants lack any interest in plan assets that supplies an Article III injury. But were that correct, then participants also could not pursue injunctive relief regarding those assets, for the very same reason—no conflicted investment would be large enough to threaten payments. Respondents' inability to contest injunctive-relief standing thus puts the lie to their loss-restoration and fiduciary-removal arguments as well.

II. PETITIONERS HAVE ARTICLE III STANDING TO SEEK MAKE-WHOLE RELIEF FOR THEIR ERISA PLAN

Just as petitioners have standing to seek injunctive relief, they also may sue to recover the losses caused by (and profits earned from) respondents' fiduciary breaches.

A. Petitioners Are Not Mere Bystanders To Fiduciary Breaches That Deplete Plan Assets

Respondents suggest that petitioners are simply "bystanders" (Br. 46) to the mishandling of their pension plan. That contention flouts both ERISA and trust law, and ignores the real-world benefits to participants of remedying fiduciary misconduct.

1. Petitioners' equitable interest in plan assets supplies the necessary personal stake

Petitioners explained that both ERISA and trust law recognize that pension-plan participants hold a real interest in all plan assets. Opening Br. 23-28. Respondents acknowledge this equitable ownership interest for trust beneficiaries generally—and that it provides a personal stake sufficient for standing—but assert that defined-benefit participants are different. *E.g.*, Br. 22-24. Their effort to isolate defined-benefit plans misunderstands the nature of trusts and ERISA's adoption of that common law.

a. Respondents' bottom-line contention is that, unlike typical beneficiaries, defined-benefit participants lack "personal rights to the *plan's* assets." Br. 45. But respondents elide the difference between beneficiaries' equitable interest in the corpus (which all beneficiaries have) and a claim to payment of those assets (which only certain beneficiaries have). Contrary to respondents' implication, petitioners do not argue that they have a present possessory right to plan assets. Br. 43. Rather, like beneficiaries generally, they have an *equitable* ownership interest.

That type of ownership is well-settled in trust law and incorporated into ERISA. As petitioners detailed (Opening Br. 23-25), common-law trust beneficiaries held "a proprietary interest in the subject matter of the trust." Austin Wakeman Scott et al., *Scott & Ascher on Trusts* § 13.1 (5th ed. 2007). ERISA imported that concept by providing that plan assets are held in trust for the exclusive benefit of participants. 29 U.S.C. 1103(a), (c)(1); 26 U.S.C. 401(a)(2). That is presumably why this Court explained that participants hold an interest "in the financial integrity of the plan." *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 142 n.9 (1985).

Indeed, respondents concede that beneficiaries with no legal claim to trust assets nonetheless held an equitable interest permitting them to sue. Br. 31-32. For example, contingent and discretionary beneficiaries lacked a claim to any particular asset or even any assets at all. They might well receive nothing—the trustee might exercise her discretion to pay other beneficiaries instead, or the contingency might not occur. Opening Br. 32-33; George G. Bogert et al., *The Law of Trusts & Trustees* § 871 (3d ed. 2019). They accordingly suffer no personal financial loss, imminent or otherwise, when the corpus is depleted. But they could still sue to protect the trust corpus. The same is true here: even if petitioners never suffer individual financial loss, they have a personal stake in protecting their interests in the plan's assets as a whole. See *Scanlan* v. *Eisenberg*, 669 F.3d 838, 846 (7th Cir. 2012).

b. Respondents wrongly contend that ERISA upended the trust-law paradigm. Their argument rests primarily on *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432 (1999), which they say held that defined-benefit participants lack equitable ownership in plan assets. Respondents' misreading of *Hughes Aircraft* again reflects their conflation of a claim to payment from a trust and an equitable (or beneficial) interest in its corpus.

When the Court said that the participants lacked any "claim to any particular asset," it was explaining a merits holding that the participants had no legal claim to plan surplus. 525 U.S. at 438-440. That comports with the centuries-old principle that beneficiaries have an *equitable* interest in the entire trust corpus but typically no *legal* right to payment beyond the trust instrument's specific requirements. Opening Br. 23-26. A trust beneficiary did not lose her equitable ownership interest just because she lacked a legal claim to payment of every dollar in the trust.

So too here: that participants might lack a legal claim to particular assets does not mean they lack an interest in the general pool. Cf. *Russell*, 473 U.S. at 142 n.9; *Scanlan*, 669 F.3d at 843. Nothing in *Hughes Aircraft* suggests otherwise.

c. Respondents are just as wrong to argue that ERISA's plain text deprives participants of an equitable interest. Just the opposite: ERISA confirms that participants maintain an equitable interest in all plan assets, including "surplus," regardless of the contours of their legal claim to payment. *All* plan assets are held in trust "for the exclusive benefit of" the participants. 26 U.S.C. 401(a)(2); see 29 U.S.C. 1103; SG Br. 21. The employer has no right to use that surplus itself. In fact, to constitute a qualified plan, the trust instrument must provide that both corpus and income are held solely for participants' benefit until all plan liabilities are satisfied post-termination. 26 U.S.C. 401(a)(2); see 26 C.F.R. 1.401-1(3)(iv). It should thus be undisputed that defined-benefit participants are beneficiaries of a trust that includes *all* plan assets. Restatement (Third) of Trusts § 3(4) (2003) ("A person for whose benefit property is held in trust is a beneficiary.").

Despite that straightforward statutory language, respondents argue Congress restructured trust law by making the plan its own entity with legal status. Br. 44-45 (citing 29 U.S.C. 1132(d)(1)). But that arrangement reflects only that "equitable ownership" is "not coextensive with * * * legal ownership." *Scott & Ascher*, *supra*, § 13.1. Again, nobody thinks petitioners have legal title to the plan's assets. That's not how trusts work: legal title to trust assets is *never* vested in the beneficiaries, so it is irrelevant whether the entity holding legal title is the trustee or a creature of federal statute. See Am. Jur. 2d Trusts § 259 (2019). Either way, all assets are held in trust for

the participants, meaning participants maintain an equitable interest in those assets. Indeed, under respondents' view, *nobody* has equitable title to plan surplus. But Congress did not depart so radically from trust law's fundamentals.

d. Respondents' view is further irreconcilable with the trust-law tradition that ERISA deliberately incorporated. Opening Br. 23-25, 30-33. Respondents say that defined-benefit participants do not map precisely onto any type of common-law beneficiary who held an equitable interest in the corpus, but they fail to marshal support for their position.

First, respondents note that common-law beneficiaries' interests varied between present or future, vested or contingent, and so on. Br. 26, 43-44. None of those differences, however, erases the beneficial interest in the trust—respondents overlook a key point that they themselves quote, namely, that each of these interests still represents an "equitable interest" held by the beneficiary. Br. 26; see Bogert, *supra*, § 181 (beneficiary's interest "must always be equitable"); cf. *Scott & Ascher*, *supra*, § 13.1 p. 808.

The same is true of defined-benefit participants. Because ERISA plans are trusts in which participants are beneficiaries, participants hold an equitable interest in the trust corpus. Opening Br. 23-26. The Court should not infer that Congress discarded that principle simply because defined-benefit plans didn't exist in 18th-century England. See *Harris Tr. & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 252 (2000) (applying "common-law analogy" even where ERISA provision "was unknown at common law").

Second, respondents identify a couple ostensible deviations from the general common-law rule, but these get them nowhere. For example, respondents explain that a

contingent beneficiary may not sue after the contingency has definitively turned against the beneficiary. Br. 32. But that is because where the contingency has failed, "she 'no longer has a beneficial interest,'" *i.e.*, she is not a beneficiary at all. *Ibid.* (quoting 4 *Scott & Ascher* § 24.19); cf., *e.g.*, *Johnson* v. *Superior Ct.*, 199 P.2d 827, 829 (Ariz. 1948) (beneficiary may sue "however minute or remote" her interest). There is no serious dispute that defined-benefit participants are beneficiaries.[3]

Terry v. *Allen*, 23 A. 150 (Conn. 1891), is similar. Br. 27. The remainderman could not sue because a bond covered the entire corpus that could have gone to him, insulating his entire equitable interest from any loss. 23 A. at 151, 153. Here, by contrast, the plan corpus obviously suffered a loss. And as Bogert explains, the bond in *Terry* effectively made it so the remainder was "not a beneficiary." Bogert, *supra*, § 871 n.12. Again, petitioners here are obviously beneficiaries.[4]

That these outlier cases are the best respondents can find ultimately proves petitioners' point. There is no reason to think Congress designed ERISA using those cases,

---

[3] The same logic dispels respondents' argument (at 32) about contingencies so remote they effectively have turned against the (ex-)beneficiary—a scenario Bogert says only "possibly" prevents the beneficiary from suing. Bogert, *supra*, § 871 n.12. In *McChord* v. *Caldwell Ex'r*, respondents' only case on this point, the "contingency" was actually pure speculation about the contents of a sealed envelope. 29 S.W. 440, 441 (Ky. 1895). And, unsurprisingly, *McChord* doesn't appear to have ever been cited except by Bogert as a "[b]ut see" that is, again, only "possibly" correct. Bogert, *supra*, § 871 n.12.

[4] The better analogy to *Terry* helps petitioners. Whereas there the bond meant the trust corpus could never suffer harm, here respondents' misconduct plainly harmed the plan's assets—thereby harming petitioners' interest. It is irrelevant that U.S. Bank has sufficient assets to repay the loss. No case holds that a trustee's ability to repay the trust robs the beneficiary of standing to seek loss restoration.

rather than the basic rule that beneficiaries hold an equitable interest in the trust. On the contrary, that fundamental principle is equally fundamental to ERISA.[5]

2. Independently, petitioners' interest in enforcing respondents' fiduciary duties supplies the necessary personal stake

Respondents make a similar maneuver regarding participants' interest "in ensuring that [respondents] discharge [their fiduciary] duties." *Scanlan*, 669 F.3d at 846. Again, respondents concede the basic trust-law principle but argue that ERISA is more restrictive. They acknowledge that common-law trustees owed fiduciary duties to beneficiaries, but declare that ERISA severed that relationship by placing the plan between fiduciaries and participants so that fiduciary duties actually run to the plan. *E.g.*, Br. 35-36. Respondents' position fails.

a. Respondents' argument that duties run directly to the plan, not to participants, misses the point. The question for standing purposes is whether fiduciary breaches affect participants' interests. The answer is so obviously yes that respondents say so themselves: "ERISA fiduciaries must act in the interests of participants because an ERISA plan's purpose is to benefit those participants * * * ." Br. 38.

---

[5] Respondents claim that beneficiaries may sue only when the "wrongdoing may or has affected [them] adversely financially." Br. 44 (quoting Bogert, *supra*, § 871). Respondents misunderstand the import of that rule in two respects. First, a beneficiary suffers "financially" whenever her equitable interest is harmed. Opening Br. 31-32 & n.6. Because petitioners have such an interest and the corpus was unquestionably harmed here, they satisfy that rule. Second, regardless, this requirement governs only prudence claims. Under the "no further inquiry" rule, loyalty claims may be pursued for a breach of duty alone, even if the trust (and thus the beneficiary) benefits. *Infra* Part II.B.2.

Fiduciary duties plainly protect participants. Section 1104 mandates that those duties be discharged "solely in the interest of the participants" (even if they are performed "with respect to a plan"). 29 U.S.C. 1104(a)(1); see *Harris Tr.*, 530 U.S. at 250. Because those duties must be discharged solely in participants' "interests," it is participants' "interests" that suffer when those duties are breached.

Respondents' relegation of defined-benefit participants to "'concerned bystanders'" (Br. 46) thus cannot be taken seriously. Congress didn't enact ERISA to protect plans as detached entities; it enacted ERISA to protect the "participants in employee benefit plans." 29 U.S.C. 1001(b). Plans as entities matter only insofar as they facilitate protecting participants.

Because fiduciary duties exist to protect participants, participants can enforce those duties when they are breached. In the same way, a third-party beneficiary under a contract is not a party to the contract but may still enforce a contractual promise. Restatement (Second) of Contracts § 304 (1981).

b. In any event, fiduciaries do owe duties directly to participants under ERISA. The Court said as much in *Harris Trust*. Respondents state that *Harris Trust* was "describing the 'common law of trusts,' not ERISA." Br. 37. They are incorrect. *Harris Trust* described the common law to *establish what ERISA prescribes*. That same paragraph explains that trust law "offers a 'starting point for analysis of [ERISA]'" and nowhere indicates a departure on this issue. 530 U.S. at 250.

To that end, there is no question that trust beneficiaries are the direct common-law analog to ERISA participants, and there is likewise no question that trustees owed fiduciary duties to beneficiaries. ERISA did not alter that

basic connection. When an ERISA participant sues for fiduciary breach, he thus vindicates the same harm that traditionally allowed trust beneficiaries into court.

Respondents nevertheless continue their assault on ERISA's incorporation of trust law by citing the Court's statement that "the relevant fiduciary relationship [is] characterized at the outset [of 29 U.S.C. 1109] as one 'with respect to a plan.'" *Russell*, 473 U.S. at 140; see Br. 36-37. Respondents, however, miss that statement's context.

As the Tenth Circuit explained in rejecting an identical argument, *Russell* addressed only Section 1109(a)'s *remedy*: The Court "held merely that § 1109(a) did not provide a remedy for individual beneficiaries." *Gaither* v. *Aetna Life Ins. Co.*, 394 F.3d 792, 808 n.6 (10th Cir. 2004) (McConnell, J.). Further, in *Varity Corp.* v. *Howe*, 516 U.S. 489 (1996), this Court "decisively rejected the claim that 'Congress intended ERISA's fiduciary standards to protect only the financial integrity of the plan, not individual beneficiaries.'" *Gaither*, 394 F.3d at 808 n.6 (quoting *Varity*, 516 U.S. at 507-515). On the contrary, a fiduciary "owes fiduciary duties to each individual beneficiary." *Ibid.*

Likewise, the fact that relief inures to the plan as a whole—that "the 'plan'" is "the victim," *LaRue* v. *DeWolff, Boberg & Assocs.*, 552 U.S. 248, 254 (2008)—does not undercut the principle that fiduciary duties protect participants. The plan holds the assets, but it does so for participants' benefit. So when a fiduciary breach occurs, participants incur harm. And as at common law, that harm is redressed by remedies that inure to the plan. The reason is simple: these duties run to participants as a group,

and their breach injures participants' shared, undivided interest in the corpus.[6]

Respondents accordingly misplace reliance on Restatement (Second) of Trusts § 214 comment b, which they wrongly declare is the exclusive provision circumscribing "who may *seek* such remedies." Br. 27-28. That comment merely addresses the limited scenario presented by competing interests between a life estate and remainder. Petitioners explained why that rule actually supports their view (Opening Br. 33 n.7), and aside from complaining that this point was made in a footnote, respondents have no answer.

* * *

These two factors—(1) enforcing fiduciary obligations that (2) preserve assets in which petitioners have an equitable interest—show that petitioners are not mere "'bystanders'" seeking "to vindicate a general interest in" proper plan administration. Br. 21, 46. Respondents' contrary view has no basis in ERISA or trust law.

B. Petitioners' Suit Resembles Those Heard At Common Law

Respondents admit they lose if petitioners have an equitable interest in plan assets. Br. 24 ("[A] trust beneficiary may challenge fiduciary breaches only when they implicate that beneficiary's 'interest' in the trust."), 28, 31, 33, 58. So given the discussion above, the Eighth Circuit's judgment should be reversed.

---

[6] Respondents (at 24) quote *Harrison* v. *Randall*, 68 Eng. Rep. 562, 567 (1852), to argue that trustees are not "'liable upon the mere ground of having deviated from the strict letter of his trust.'" They should have included *Harrison*'s next sentence: "The deviation may be necessary, or may be beneficial[]; but, when a trustee ventures to deviate from the letter of his trust, he does so under the obligation and at the peril of afterwards satisfying the Court that the deviation was necessary or beneficial * * * ." *Ibid.*

Respondents are also wrong, however, about the history of suits like petitioners'. That history is unassailable, and it provides an Article III foundation for Congress's decision to permit participant suits under Section 1132(a)(2). Opening Br. 29-38.

1. Beneficiaries have long sued trustees as the trust's representatives

Respondents have no persuasive answer to the history of beneficiaries suing as representatives of the trust to remedy injury to the trust caused by a trustee's breach. Opening Br. 33-34; SG Br. 10-15; Public Citizen Br. 21-28. That tradition was codified in Section 1132(a)(2), and it undergirds Congress's decision to permit ERISA participants to sue fiduciaries on the plan's behalf.

At common law, the trustee ordinarily vindicates injuries to the trust. But that arrangement is ineffectual when the trustee is the wrongdoer. A beneficiary accordingly may "act[] as a temporary representative of the trust" when "the trustee cannot or will not enforce the cause of action" that would ordinarily "run[] to him." Bogert, *supra*, § 869.

That mechanism perfectly matches suits under Section 1132(a)(2). When a fiduciary's breach harms the plan, ERISA authorizes participants to sue on the plan's behalf for make-whole relief. 29 U.S.C. 1132(a)(2), 1109(a). Such actions (like their common-law counterparts) are *always* representative in nature, and the relief "inures to the benefit of the plan as a whole." *Russell*, 473 U.S. at 140. Section 1132(a)(2) thus codifies the traditional common-law rule that beneficiaries may sue as trust representatives when the trustee is the culprit.

Respondents argue that beneficiaries still must "show *their* rights are or may be adversely affected by the matter(s) at issue." Br. 48. That gets respondents nowhere. Such suits (both under ERISA and at common law) are

representative in nature, so the relevant "right" is not the beneficiary's individual monetary loss. Br. 48. Rather, participants' personal stake comes from their "interest * * * in the financial integrity of the plan" as a whole. *Russell*, 473 U.S. at 142 n.9. Because ERISA participants, like common-law beneficiaries, hold an interest in the plan's financial integrity, they are the proper parties to sue on the trust's behalf when the trustee injures the trust. *Supra* Part II.A.1.

Respondents also dismiss the tradition of representative suits by arguing that, at the time of the Founding, beneficiaries could not sue *third parties* who injured the trust. Br. 48. "[B]eneficiaries' *sole* remedy," rather, "was to sue the trustees." *Ibid.* (citing 5 *Scott & Ascher* § 28.2.1).

This argument is self-defeating. Its premise concedes the question at issue here: if beneficiaries could sue the trustee for failing to pursue a third party, it is self-evident that the beneficiaries had suffered a legally cognizable injury. Otherwise, they could not have sued even the trustee. The beneficiary's injury, however, is exactly the same regardless of whether the appropriate defendant is the trustee or the third party.

For centuries, that injury permitted a beneficiary's representational suit; so too under ERISA.

2. Respondents are wrong about the "no further inquiry" rule

Petitioners' standing also rests on another trust-law tradition. Under the "no further inquiry" rule, a beneficiary could sue for a breach of loyalty (which covers all of respondents' misconduct here) without showing any financial loss at all—to herself or the trust. The breach alone permitted suit. Opening Br. 29-30, 35-38; SG Br. 16-18.

Respondents' contrary assessment of the "no further inquiry" rule fails on two levels: even under respondents' cramped view of the rule, petitioners have standing; and regardless, the rule is broader than respondents contend.

a. According to respondents, the rule "does not erase the consequential-harm requirement"; it simply provides a "conclusive presumption" that harm occurred. Br. 28. Yet respondents concede that defined-benefit participants *can* suffer harm from a fiduciary breach; their position here is that petitioners have failed to make that factual showing. But under respondents' own view of the "no further inquiry" rule, petitioners *need not make that showing*, and it is no response that respondents can "prove" petitioners suffered no harm. Harm is conclusively presumed. Petitioners thus need cite only the disloyal transactions to demonstrate standing.

b. In any event, the "no further inquiry" rule is broader than respondents describe. Beneficiaries could invoke the rule to redress any breach of loyalty, regardless of its effect on trust assets. That understanding is clear for several reasons.

First, the rule applied even when the trustee's action *benefitted* the trust. See, *e.g.*, John H. Langbein, *Questioning the Trust-Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 931, 952 (2005) (rule applies even where "'actual benefit accrued to the trust'" or where trustee's self-dealing was "more beneficial to the trust than any other") (citation omitted); *id.* at 954-955; Bogert, *supra*, § 543; Restatement (Third) of Trusts § 78 cmt. b (2003). Despite that benefit, the transaction was subject to attack merely due to the trustee's personal interest in the transaction—no harm was contemplated.

Second, the rule also applied where it was conclusive that the trust suffered no harm. See, *e.g.*, *Magruder* v. *Drury*, 235 U.S. 106, 120 (1914) (no wrong "was in fact

done to the estate"); Restatement (Third) of Trusts § 78 cmt. b.

Third, respondents offer an incomplete justification for the rule. They reason that it aimed to avoid difficult problems of proof, and so must have envisaged injury to the corpus. Br. 28-29. But given the importance of the duty of loyalty, the rule also allowed suit based on the breach alone as deterrence against future breaches. See, *e.g.*, Bogert, *supra*, § 543 n.14 ("the courts are not concerned with the question of actual damage to the beneficiaries in the case at hand, but rather in the preventative aspects of the application of the rule and with possibilities of loss in trust administration in general"); *id.* § 543(V); Langbein, *supra*, at 950-951. The rule thus looks to prevent *future* misconduct—precisely why it applied when the trust received a benefit or was unharmed.

In sum, regardless of how the rule is framed, petitioners have standing to pursue their loyalty claims.

C. Congress Plainly Authorized Petitioners' Suit Under Section 1132(a)(2)

The foregoing makes clear that (1) petitioners have a personal stake in obtaining monetary make-whole relief, and (2) courts have long entertained suits like petitioners'. The final piece of the standing inquiry—Congress's judgment—is easy. "There can be no disagreement * * * that § [1132](a)(2) authorizes a beneficiary to bring an action against a fiduciary who has violated § 409." *Russell*, 473 U.S. at 140; see *infra* Part IV. Section 1132(a)(2) simply reflects Congress's power to "define injuries and articulate chains of causation that will give rise to a case or controversy." *Spokeo* v. *Robins*, 136 S. Ct. 1540, 1549 (2016).

III. PETITIONERS HAVE ARTICLE III STANDING TO SEEK REMOVAL OF RESPONDENTS AS FIDUCIARIES OF THEIR ERISA PLAN

For largely the same reasons, petitioners may also pursue removal of respondents as fiduciaries. Opening Br. 39-40. Respondents' opposition misstates the bases for fiduciary removal. They insist that beneficiaries may seek removal only when there is imminent threat to trust property. *E.g.*, Br. 32-33. That is wrong as a matter of law and common sense.

At common law, trustees could be removed solely for past misconduct and misconduct that did not harm the trust. For instance, a trustee could be removed for misconduct "involving dishonesty," even if her "actions were not connected with the trust administration." Bogert, *supra*, § 527. Removal was also proper for disobeying the trust instrument, even where the trustee caused "an increase in the trust estate." *Ibid.* ("[t]he basis of removal is not that the estate has been depleted or is in danger of depletion").

Similarly, trustees could be removed for misappropriating trust property even if they restored that property. Bogert, *supra*, § 527 & nn.71-73 (citing, *inter alia*, *Atty. Gen.* v. *Armstrong*, 120 N.E. 678, 685 (Mass. 1918) (trustee properly removed even after repaying loss that resulted from breach; no indication that similar loss was imminent); *Moore* v. *Bowes*, 64 P.2d 423 (Cal. 1937)).

Aside from cherry-picking a single sentence, respondents have no answer for *Moore*. They quote *Moore* for the proposition that the purpose of fiduciary removal "is the preservation of trust property." 64 P.2d at 424. But respondents ignore *Moore*'s facts—the trustees acted in good faith in withdrawing trust money as an advance on a salary raise, and they returned the money when the raise

wasn't approved. That was the entirety of their misconduct: a one-time, good-faith action that they immediately fixed. There was thus no "prospective harm" (Br. 32) from leaving the trustees in place.[7]

These principles vindicate the beneficiary's commonsense interest in preventing an incompetent or disloyal fiduciary from managing property that backstops the beneficiary's benefits. By contrast, under respondents' view, it is difficult to see a realistic scenario where they could ever be removed. As respondents trumpet, U.S. Bank has over $100 billion in assets, enough to "cover the Plan's liability dozens of times over." Br. 8. It would take misconduct causing greater losses than the Madoff Ponzi scheme to satisfy respondents' rule. But ERISA does not await the "apocalyp[se]" to authorize suit (Br. 1), nor does Article III require it.

Respondents' position means that fiduciaries could invest hundreds of millions in an obvious Ponzi scheme, yet defined-benefit participants could not act. No more need be said to realize that respondents' position is meritless.

IV. ERISA AUTHORIZES PETITIONERS TO SEEK EACH REMEDY

Respondents' challenge to petitioners' "statutory standing" can be quickly dismissed. Section 1132's text is so clear that "[t]here can be no disagreement * * * that § [1132](a)(2) authorizes a beneficiary to bring an action against a fiduciary who has violated § 409," *Russell*, 473 U.S. at 140, and every other circuit to consider the issue has agreed with petitioners' construction. Opening Br. 45-46.

---

[7] *Haines* v. *Elliot* shows only that the ultimate decision whether to remove the trustee is within the trial court's discretion. 58 A. 718, 721 (Conn. 1904); see Bogert, *supra*, § 527 & n.43 (citing *Haines*).

A. Section 1132(a)(2) authorizes "a participant" to seek "appropriate relief under section 1109." 29 U.S.C. 1132(a)(2). Petitioners are surely "participants," and they seek the exact relief Section 1109 provides, namely, restoration to the plan of "losses to the plan" and "profits of such [breaching] fiduciary," plus "removal of such fiduciary." Likewise, Section 1132(a)(3) authorizes "a participant" to "enjoin" practices that violate ERISA and "other appropriate equitable relief." 29 U.S.C. 1132(a)(3)(A), (B). That language leaves no wiggle room.

Bizarrely, respondents fault petitioners for "contending 'appropriate' limits the *type* of relief that may be sought rather than the *parties* who can seek it." Br. 61. Theirs is an odd understanding of basic grammar. "Appropriate" obviously modifies "relief"—"relief" is literally the next word. No complicated statutory-interpretation tools are needed to understand how those words work together.

FEC v. *National Conservative Political Action Committee* is thus easily distinguishable. There the statute authorized "such actions * * * as may be appropriate to implement" the statute. 470 U.S. 480, 484 (1985). An "action" necessarily varies with the party bringing it, so whether the *action* was appropriate depended on who the plaintiff was. But "relief" does not similarly vary with the plaintiff.

Respondents' reliance (at 60) on *Gollust* v. *Mendell*, 501 U.S. 115 (1991), assumes the conclusion. *Gollust* would deny standing to plaintiffs who were no longer shareholders. *Id.* at 126. Respondents thus conclude that ERISA excludes "uninjured plaintiffs." Br. 60. But the whole question here is whether defined-benefit participants have suffered an injury. Petitioners say yes, because their equitable interest in the plan has been harmed. Thus, the proper analogy to *Gollust* would be a

former participant who left the plan entirely, thereby abandoning his interest in the suit.[8]

B. Respondents' policy arguments likewise fail. First, petitioners would "receive nothing" (Br. 62) only if standing depended on putting a dollar in their pockets. Standing is not so limited, and petitioners will receive plenty: increase in assets in which they hold equitable title; additional security for their benefits; assets managed by competent, loyal stewards; and freedom from conflicts of interest. Any rational participant would value those remedies.

Second, respondents' fear-mongering about attorneys' fees (Br. 63) ignores that district courts control fee awards. If plaintiffs waste time filing a "strike suit[]" (*ibid.*), the court will deny fees. But if plaintiffs remedy true malfeasance—like placing *all* plan assets in equities in defiance of their own consultants' warnings and elementary investment advice (Opening Br. 10)—then they deserve fees. Congress sought to provide "ready access to federal courts" to redress precisely the kinds of violations respondents committed.

C. Respondents' resort to constitutional avoidance falls flat. Br. 62. Not only is there no serious constitutional doubt given ERISA's plain text and the trust-law tradition, but that "canon 'has no application' absent 'ambiguity,'" and here there is none. *Nielsen* v. *Preap*, 139 S. Ct. 954, 972 (2019). ERISA unequivocally says petitioners can bring these exact claims.

---

[8] *Raines* v. *Byrd* holds only that Congress cannot create an injury out of whole cloth. 521 U.S. 811, 820 n.3 (1997) ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."). That is a proposition *Spokeo* makes clear and nobody disputes.

V. RESPONDENTS CONCEDE THAT THEIR POSITION RENDERS ERISA'S DUTIES EFFECTIVELY UNENFORCEABLE BY DEFINED-BENEFIT PARTICIPANTS

The consequences of respondents' position confirm its flaws. ERISA's anti-inurement prohibition would become a dead letter for defined-benefit plans, as would basically every other restriction on fiduciary misconduct. Opening Br. 26-28.

Respondents' solution to that problem blinks reality. Respondents aver that ERISA's obligations will remain robust because "any number of parties may challenge [fiduciary] misconduct." Br. 55. That number, however, is essentially two, and both are plainly inadequate. First, respondents observe that ERISA authorizes the Department of Labor to sue. The Department, of course, supports petitioners, and it lacks the resources to police every defined-benefit plan's management.

Second, remarkably, respondents leave it to the employer's shareholders to sue. Br. 55-56. Respondents have forgotten the nature of their misconduct. They exploited plan assets to increase corporate income and raise stock prices. Opening Br. 10-12. Those consequences provide shareholders powerful incentives *not* to interfere. Participants are thus far better situated to enforce ERISA's obligations, exactly as Congress envisioned.

Respondents' contrary position would leave defined-benefit participants all but unprotected from fiduciary malfeasance. That result manifestly violates ERISA, and Article III readily embraces Congress's judgment.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted.

PETER K. STRIS
Counsel of Record
BRENDAN S. MAHER
RACHANA A. PATHAK
DOUGLAS D. GEYSER
JOHN STOKES
STRIS & MAHER LLP
777 S. Figueroa Street
Suite 3850
Los Angeles, CA 90017
(213) 995-6800
peter.stris@strismaher.com

KAREN L. HANDORF
MICHELLE C. YAU
MARY J. BORTSCHELLER
COHEN & MILSTEIN
West Tower, Suite 500
1100 New York Avenue, N.W.
Washington, D.C. 20005

DECEMBER 2019