No. 17-343

In the Supreme Court of the United States

CONVERGEX GROUP, L.L.C., ET AL., PETITIONERS

v.

LANDOL FLETCHER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Petitioners are Convergex Group LLC, Convergex Execution Solutions LLC, Convergex Global Markets Ltd., Convergex Holdings LLC, and G-Trade Services LLC, the defendants-appellees below.

Respondent is Landol Fletcher, the plaintiff-appellant below.

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INTRODUCTION

Petitioners are a group of disgraced securities brokers that "inflated fees when trading for clients, bilking charities and other big investors in what prosecutors called an 'astonishingly brazen' scheme." Jean Eaglesham & Bradley Hope, *ConvergEx Settles Fraud Charges for $151 Million*, Wall Street Journal (Dec. 18, 2013), https://goo.gl/37g6Lf.

The scheme resulted in settlements with the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) totaling nearly $140 million, including a $108 million victim fund that the SEC predicts "will cover substantially less than half" of the losses associated with trades of non-U.S. securities. C.A. App. 214 (SEC Proposed Plan of Distribution).

Petitioners' investing clients included numerous pension plans governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Respondent is a participant in one of those plans. Respondent brought this putative class action seeking restoration to his ERISA plan of the losses caused by petitioners, as well as restoration of losses to other ERISA plans that are petitioners' victims. Although the losses to any given plan may be modest, the aggregate losses likely exceed $100 million.

Despite Congress's express authorization of respondent's suit and five centuries of comparable suits at common law, petitioners insist that respondent lacks Article III standing to sue on behalf of his plan for the loss caused by petitioners' fiduciary breach. In an unpublished decision, the Second Circuit correctly rejected petitioners' argument. Further review of that decision is unwarranted.

First, the law on this question remains unsettled, and it is not yet clear whether a circuit split even exists. The non-precedential decision below, although correct, does not definitively establish the Second Circuit's position. And the ramifications of this Court's decision in *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016), are still unknown. *Spokeo* could very well cause the circuits that have rejected representational standing to change course. This Court should wait to address the question presented until the law in the courts of appeals has settled.

Second, review is unwarranted because the decision below is correct. Congress stayed well within the bounds of Article III when it licensed suits like this one. Comparable actions have been permitted at common law for centuries. And it is beyond reasonable dispute that, based on this tradition, Congress authorized suits like respondent's to vindicate plan participants' concrete, real-world inter-

est in having retirement plans free from fiduciary misconduct.

The petition for a writ of certiorari should be denied.

STATEMENT

A. Statutory Background

ERISA is a landmark federal statute designed by Congress "to protect * * * the interests of participants in employee benefit plans * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries * * * and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b).

ERISA accomplishes this goal by requiring that plan assets be held in trust (29 U.S.C. 1103), and by imposing strict fiduciary duties on those who manage plan assets (29 U.S.C. 1104). It is widely understood that those duties are derived from the common law of trusts. See *Varity Corp.* v. *Howe*, 516 U.S. 489, 496 (1996).[1]

As an enforcement mechanism, ERISA relies on private litigation. 29 U.S.C. 1132 ("Civil enforcement"). For example, the statute imposes personal monetary liability on any fiduciary whose breach causes losses to a covered plan. 29 U.S.C. 1109 (any breaching fiduciary "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach."). And it expressly authorizes plan participants and beneficiaries to sue on behalf of their ERISA plan to recover such losses. 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").

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[1] In addition to imposing a fiduciary duty of loyalty on all fiduciaries (29 U.S.C. 1104(a)(1)(A)), ERISA also expressly prohibits fiduciaries from engaging in certain self-dealing transactions absent an exemption (29 U.S.C. 1106).

Given ERISA's history, that statutory design is hardly surprising. Congress simply adopted the long-standing common law rule that trust beneficiaries may sue to remedy a trustee's breach of fiduciary duty. See Austin W. Scott, *Importance of the Trust*, 39 U. Colo. L. Rev. 177, 177-179 (1967) (tracing such suits to the 15th century).

B. Facts And Procedural History

1. Petitioners are a group of disgraced securities brokers that "inflated fees when trading for clients, bilking charities and other big investors in what prosecutors called an 'astonishingly brazen' scheme." *ConvergEx Settles Fraud Charges for $151 Million*, Wall Street Journal.

According to the SEC, petitioners' scheme worked as follows: Petitioners ostensibly offered "transition management services" to institutional investors like "charities, religious organizations, retirement plans, universities and governments." C.A. App. 54 (SEC Cease & Desist Order). When such investors changed investment strategies or fund managers, they hired petitioners to help them move large amounts of money from one set of investments to another. Petitioners charged a disclosed fee for this service. *Ibid.*

In addition to this disclosed fee, however, petitioners also took an undisclosed cut from the trades it executed on their clients' behalf. C.A. App. 54-55. Petitioners then went to great lengths to conceal this practice from their clients—fabricating sales reports and lying when their clients asked about this practice. *Id.* at 59-60.

The scheme resulted in settlements with the SEC and DOJ totaling nearly $140 million, including a $108 million victim fund that the SEC predicts "will cover substantially less than half" of the losses associated with trades of non-U.S. securities. C.A. App. 214 (SEC Proposed Plan of Distribution). Although not all losses were suffered by ERISA plans, it is undisputed that the plans account for a

substantial portion of the total.

Respondent is a participant in the Central States, Southeast and Southwest Areas Pension Plan (Central States Plan), and has been since 1980. The Central States Plan is a defined benefit plan governed by ERISA, meaning it makes fixed benefits payments to its participants once they retire. As they did with many other pension plans, petitioners took an undisclosed cut from certain trades they executed on behalf of the Central States Plan.

2. On December 26, 2013, respondent filed suit against petitioners in the U.S. District Court for the Southern District of New York. Respondent also sought to represent a class of participants in the other ERISA plans that suffered losses from petitioners' fiduciary breach.[2]

Notwithstanding petitioners' indisputable obligation under ERISA to repay the plans for their losses, this case has hardly left the starting blocks in the district court.[3]

Petitioners moved to dismiss for lack of subject matter jurisdiction, arguing that respondent lacks Article III

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[2] Although the class claims remain to be litigated in the district court, it has become commonplace for participants in different plans to bring their claims as a class where each plan's loss results from the same conduct of the defendant. See, *e.g.*, *Santomenno* v. *Transamerica Life Ins. Co.*, 316 F.R.D. 295 (C.D. Cal. 2016); *In re Beacon Assocs. Litig.*, 282 F.R.D. 315 (S.D.N.Y. 2012); *Glass Dimensions, Inc.* v. *State St. Bank & Tr. Co.*, 285 F.R.D. 169 (D. Mass. 2012).

[3] Only limited jurisdictional discovery has been undertaken. And although this has revealed a small loss to respondent's plan ($1,577.93), the precise number of plans involved and the losses attributable to each remain unknown. Indeed, the SEC Proposed Plan of Distribution explains that only petitioners' records will reveal this information. C.A. App. 214. It is thus respondent's expectation that once proceedings recommence in the district court, discovery will uncover significantly larger losses to class plans, potentially including Central States.

standing to obtain restoration of losses to his plan. The district court agreed and granted petitioners' motion. The district court reasoned that the loss petitioners' scheme caused the Central States Plan was too small to create a constitutionally cognizable risk to respondent's benefits. Pet. App. 11. The court rejected respondent's argument that he nonetheless could sue for restoration of plan losses because petitioners had violated a fiduciary duty they owed him. *Ibid.*

3. The Second Circuit vacated in an unpublished, summary disposition and remanded for further proceedings in the district court. Relying on a footnote from a published decision, the panel "conclude[d] that allegations describing Convergex's breach of fiduciary duties of prudence and loyalty under ERISA, its violation of ERISA's prohibited transactions provision, and the resulting financial loss sustained by the Central States Plan are sufficient to confer Article III standing on Fletcher in his representative capacity as a Plan participant." Pet. App. 3-4 (citing *L.I. Head Start Child Dev. Servs., Inc.* v. *Econ. Opportunity Comm'n of Nassau Cty., Inc.*, 710 F.3d 57, 67 n.5 (2d Cir. 2013) (*Head Start*)).

The Second Circuit denied a petition for rehearing en banc. Pet. App. 15-16.

ARGUMENT

This case arises at a moment when the law is in flux. The alleged circuit split does not yet have published opinions on both sides, and the likelihood of further development in the circuit courts is high. This is accordingly a textbook circumstance warranting further percolation—and one where the benefits of waiting come at little cost. No published decision has altered the representational standing landscape since this Court last denied certiorari

on this issue, and the dire consequences predicted by petitioners here simply have not come to bear.

Waiting to address this issue in another case is also warranted because the decision below is correct. Congress stayed well within the bounds of Article III when it authorized participants to sue for restoration of plan losses caused by fiduciary breach. Congress recognized fiduciary breaches like petitioners' for what they are: concrete, real-world injury to plan participants. Comparable suits have been permitted at common law for centuries—a tradition more than adequate to justify Congress's judgment. Thus, Congress's decision satisfies whatever strictures Article III places on its authority to permit representational suits. The petition should be denied.

A. The Unpublished Decision Below Did Not Create A Circuit Split

The Second Circuit's position on the question presented remains open to debate. To be sure: respondent believes that the decision below correctly held that Article III permits a defined benefit plan participant to sue on behalf of his ERISA plan seeking restoration of plan losses caused by fiduciary breach. See pp. 17-23, *infra*. But one panel's non-precedential view does not definitively resolve the issue for the entire Second Circuit.

The decision below relied on a footnote from a published decision, the meaning of which has divided district courts and litigants alike. See *Head Start*, 710 F.3d at 67 n.5. And stakeholders—including petitioners—have told this Court and circuit courts for a decade that the Second

Circuit's position on representational standing is the opposite of the panel's holding in this case.[4]

Petitioners could have moved for publication of the decision below. See, *e.g.*, *Guan* v. *Bd. of Immigration Appeals*, 345 F.3d 47, 48 n.1 (2d Cir. 2003) (granting government's motion to publish and noting the court's practice of granting such motions where the "decision may have some precedential value"); *Nicole Rose Corp.* v. *Comm'r of Internal Revenue*, 320 F.3d 282, 283 n.2 (2d Cir. 2003) (same). They did not. As such, it remains unclear whether the alleged circuit split exists at all. That uncertainty alone warrants denial of the petition.

1. With sparse analysis, the decision below cited a footnote from *Head Start* for the proposition that respondent may sue on his plan's behalf to recover losses caused by petitioners' fiduciary breach. *Head Start*, in turn, involved a Section 1132(a)(2) suit brought by participants in a welfare benefits plan, who alleged that plan administrators had breached their fiduciary duties by failing to ensure the plan had adequate reserves to satisfy a judgment against the plan from a prior lawsuit. 710 F.3d at 61. As required by Section 1132(a)(2), the participants brought suit on their plan's behalf. The defendants moved to dismiss on the ground that the plaintiffs lacked Article III standing to sue in such capacity.

Head Start's Article III analysis was relatively spartan: "[The plaintiffs] have asserted their claims in a derivative capacity, to recover for injuries to the Plan caused

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[4] To be sure, respondent argued below, and will continue to argue, that the Second Circuit permits defined benefit plan participants to sue on their plans' behalf for plan losses caused by fiduciary breach. But that is precisely the point—like the district courts, litigants are divided over the state of the law in the Second Circuit. Respondent's position on the merits of this issue is an entirely distinct question from whether the decision below warrants review by this Court.

by the Administrators' breach of their fiduciary duties. This is injury-in-fact sufficient for constitutional standing." 710 F.3d at 67 n.5.

Petitioners initially explain that neither this footnote nor any other published decision establishes the Second Circuit's position on representational standing. Pet. 14 ("Until now, no circuit has endorsed a representational theory of standing."). Later on, however, petitioners portray the question as settled, relying on a district court's statement that *Head Start* controls and permits representational suits by ERISA plan participants. Pet. 22 (citing *Allen* v. *Bank of Am. Corp.*, No. 1:15-CV-4285, 2015 WL 4446373, at *5 (S.D.N.Y. Aug. 23, 2016), argued, No. 16-3327 (2d Cir. June 22, 2017)).

Petitioners fail to note that two other district courts have suggested *Head Start* does not authorize participants to sue on behalf of their plans absent individual economic harm. See *Forte* v. *U.S. Pension Comm.*, No. 1:15-CV-4936, 2016 WL 5922653, at *7 (S.D.N.Y. Sept. 30, 2016) (dismissing action under Section 1132(a)(2) for lack of Article III standing because plaintiff did not suffer individual economic harm; concluding the plaintiffs in *Head Start* had alleged individual economic harm); *In re UBS ERISA Litig.*, No. 1:08-CV-06696, 2014 WL 4812387, at *7 (S.D.N.Y. Sept. 29, 2014) (same).

2. The district courts are not the only ones divided over whether the Second Circuit has endorsed representational standing. Both before and after *Head Start*, stakeholders have told this Court and the circuit courts that the Second Circuit's position on representational standing is the opposite of the panel's holding below.

In this case, petitioners argued to the Second Circuit that *Head Start* "does not hold that ERISA plan participants can assert representational standing claims on behalf of their plans," and that respondent's argument to the

contrary "mischaracterize[d] this [decision]." Pet. C.A. Br. 36.

Petitioners are not alone. Earlier this year (but after the decision below came down), this Court was told that "the position of the Second Circuit * * * is consistent with the unanimous rule that the claim of an ERISA violation, without more, does not give rise to standing," and that the "*Head Start* footnote did not purport to announce a broad rule that plan participants with no such [individual financial] stake can sue to recover funds for the plan." Resp. Br. at 12, 15, *Pundt* v. *Verizon Commc'ns, Inc.*, 137 S. Ct. 1374 (2017) (No. 16-762). The *Pundt* brief in opposition to certiorari further argued that the Second Circuit's decision in this case is "entirely consistent with the rule that a defined benefit plan participant lacks standing in the absence of a material risk to benefits." *Id.* at 16 n.2.

Litigants have long made similar arguments to this Court and the circuit courts. Ten years ago, for example, this Court was told that the Second Circuit had "ruled squarely" against representational standing. Resp. Br. at 13-14, *Glanton* v. *AdvancePCS Inc.*, 552 U.S. 820 (2007) (No. 06-1608). And the Fourth Circuit has been told that the Second Circuit does not recognize "Article III standing to sue without a further showing of individualized harm." Appellee's Br. at 36-37 & n.14, *David* v. *Alphin*, 704 F.3d 327 (4th Cir. 2013) (No. 11-2181).

In sum, although respondent strongly believes the decision below is correct, it remains debatable whether the decision below represents the view of the Second Circuit. No published decision has definitively addressed the issue, and further percolation is necessary to ensure the

split alleged by petitioners exists.[5]

B. In Any Event, Other Circuits Are Likely To Revisit The Question Presented In Light Of *Spokeo*

Petitioners correctly observe that several circuits have expressly rejected the holding of the Second Circuit panel below. Pet. 10-11. The holding of those courts, however, is questionable and likely to be revisited in light of this Court's recent decision in *Spokeo*.

In *Spokeo*, this Court explained that "[i]n determining whether an intangible harm" such as a breach of fiduciary duty "constitutes injury in fact, both history and the judgment of Congress play important roles." 136 S. Ct. at 1549. *Spokeo* identified these two considerations as paramount for good reason:

> 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

[5] Petitioners also seek to frame the split as one between the Department of Labor and the circuit courts, pitting the "the Department of Labor's nationwide effort via amicus briefs to urge courts of appeal to adopt representational standing in ERISA cases" against the circuits that have thus far rejected the Department's position. Pet. 20 n.5. That argument is a curious one. The rejection by appellate courts of an agency's litigation position is hardly grounds for intervention by this Court.

> requirements, its judgment is also instructive and important.

Ibid. (citing *Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 775-777 (2000)).

As explained below, both of those considerations counsel strongly in favor of standing here. Congress authorized participants to sue on behalf of their plans because it correctly viewed fiduciary breaches as concrete, real-world harms to plan participants regardless of individual financial loss. See pp. 19-21, *infra*. And this decision rests on a centuries-old trust law foundation. See, *e.g.*, Scott, 39 U. Colo. L. Rev. at 177-179 (tracing suits by beneficiaries against trust fiduciaries to the 15th century).

1. In a pair of footnotes, the petition suggests that *Spokeo* is irrelevant to the question presented. See Pet. 22 n.8, 23 n.9. Not so. Indeed, this Court has itself made plain that *Spokeo* could alter the circuit courts' positions on that very question. See *Pundt* v. *Verizon Commc'ns, Inc.*, 136 S. Ct. 2448 (2016) (granting certiorari, vacating the Fifth Circuit's judgment on the question presented in this case, and remanding for further consideration in light of *Spokeo*).

Nonetheless, no circuit has yet had the opportunity squarely to address *Spokeo*'s relevance. Admittedly, the Fifth Circuit concluded on remand that *Spokeo* left intact its previous decision that a defined benefit plan participant lacks standing to sue on his plan's behalf absent individual financial harm. 837 F.3d 523, 529 (5th Cir. 2016). But that was because the relevant arguments were deemed waived. *Id.* at 530 ("Pundt did not adequately raise his trust-law theory in the district court and did not press it in his opening brief to this court beyond making a passing reference to 'historical authorities.'").

The Fifth Circuit has accordingly had no opportunity to address the considerations *Spokeo* identified as critical.

There is every reason to believe future plaintiffs will raise these considerations, at which point the Fifth Circuit may well reconsider its position.[6]

The situation in other circuits is no different. For example:

The Third Circuit has thus far rejected representational standing on claims for monetary relief. However, it holds that "[w]ith respect to claims for injunctive relief, [Article III] injury may exist simply by virtue of the defendant's violation of an ERISA statutory duty." *Perelman* v. *Perelman*, 793 F.3d 368, 373 (3d Cir. 2015). The court has recognized in this context that "the fiduciary duties contained in ERISA create in [participants] certain rights, including the right[] * * * to have [plan fiduciaries] act in a fiduciary capacity." *Horvath* v. *Keystone Health Plan East, Inc.*, 333 F.3d 450, 456 (3d Cir. 2003). *Spokeo* could easily cause the Third Circuit to expand this reasoning to claims for monetary relief under Section 1132(a)(2).

In the Fourth Circuit, pre-*Spokeo* decisions have already begun to undermine the conclusion in *David* v. *Alphin*, 704 F.3d 327 (4th Cir. 2013), that defined benefit plan participants lacked Article III standing to sue for restoration of plan losses absent individual financial harm. For example, in *Pender* v. *Bank of America Corp.*, the Fourth Circuit held "that a financial loss is *not* a prerequisite for Article III standing to bring a disgorgement claim under ERISA." 788 F.3d 354, 365-366 (4th Cir. 2015) (quoting *Edmonson* v. *Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 417 (3d Cir. 2013), cert. denied, 134 S. Ct. 2291 (2014)) (emphasis added).[7] Albeit in a somewhat different

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[6] Pundt filed a second petition for certiorari, which this Court denied. *Pundt* v. *Verizon Commc'ns, Inc.*, 137 S. Ct. 1374 (2017).

[7] Following "traditional trust law principles," the court reasoned

context, *Pender* severely undercuts the *David* court's reasoning. *Spokeo* promises only further to alter the Fourth Circuit's position.

The Ninth Circuit has not addressed representational standing under Section 1132(a)(2) since before this Court's decision in *Sprint Communications Co.* v. *APCC Services, Inc.*, 554 U.S. 269 (2008). In *Glanton* v. *AdvancePCS Inc.*, the Ninth Circuit concluded participants in an ERISA-governed health plan lacked Article III standing to sue on behalf of their plan because the participants received no "piece of the action" (i.e., had no right to any portion of the recovery, which flowed instead to their plan). 465 F.3d 1123, 1125-1126 (9th Cir. 2006), cert. denied, 552 U.S. 820 (2007). *Sprint* roundly rejected this precise reasoning, concluding that Article III permitted contractual assignees to sue in a representational capacity on behalf of their assignors, notwithstanding their promise to remit any recovery to their assignors. The Court concluded this argument "misconstrue[s] the nature of our redressability inquiry[, which] focuses * * * on whether the *injury* that a plaintiff alleges is likely to be redressed through the litigation," not on the party who ultimately receives the recovery. *Sprint*, 554 U.S. at 286-287.

Although *Glanton* remains good law in the Ninth Circuit, a review of circuit case law shows it is rarely cited—and never for its conclusion on representational standing.

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that "when a trustee [i.e., an ERISA plan fiduciary] commits a breach of trust, he is accountable for the profit regardless of harm to the beneficiary." *Pender*, 788 F.3d at 367. The court therefore permitted the participants to sue on their plan's behalf. It is irrelevant that the plan in *Pender* was a defined contribution plan, as opposed to a defined benefit plan like respondent's, because the Fourth Circuit assumed there was no tangible harm to the participant beyond the defendant's fiduciary breach. See *Pender*, 788 F.3d at 366-367.

Post-*Spokeo* decisions in other contexts augur a different outcome when this issue next arises. *E.g.*, *Syed* v. *M-I, LLC*, 853 F.3d 492, 499 (9th Cir. 2017) (holding violation of statutory disclosure requirements under the Fair Credit Reporting Act creates concrete injury-in-fact), cert. denied, No. 16-1524, 2017 WL 2671483 (Nov. 13, 2017); *Robins* v. *Spokeo, Inc.*, 867 F.3d 1108, 1113-1115 (9th Cir. 2017) (concluding on remand from this Court that Robins suffered concrete injury-in-fact based on statutory violations). Thus, the law in the Ninth Circuit stands to change not only in light of *Spokeo*, but also in light of *Sprint*'s clear rejection of *Glanton*'s reasoning.

The Sixth Circuit arguably sits in the same boat, having adopted *Glanton*'s position on representational standing without analysis in *Loren* v. *Blue Cross and Blue Shield of Michigan*, 505 F.3d 598, 608-609 (6th Cir. 2007). And although *Loren* remains good law, no court has had occasion to address whether its holding survives *Sprint* and *Spokeo*. Undoubtedly, that day will soon come.[8]

[8] The Sixth Circuit also cited decisions from the Second and Eighth Circuits, again without analysis. As discussed, the Second Circuit's position on this question is uncertain. And although the petition claims the Eighth Circuit is among those that have rejected representational standing, just weeks ago that court made clear that none of the cases cited by petitioners advances an Article III holding at all. See *Thole* v. *U.S. Bank, N.A.*, 873 F.3d 617, 628 (8th Cir. 2017). Moreover, although the Sixth Circuit's decision in *Soehnlen* v. *Fleet Owners Ins. Fund*, 844 F.3d 576 (6th Cir. 2016), post-dates *Spokeo*, that case did not present an opportunity to revisit *Loren*. *Soehnlen* involved allegations that a health-care plan did not comply with the Affordable Care Act. *Id.* at 580. Plaintiffs did not allege any breach of the fiduciary duties enumerated in 29 U.S.C. 1104 and 1106. *Id.* at 584-585. Thus, *Soehnlen* did not implicate the common law tradition underpinning suits like this one.

In short, the law in the circuit courts is poised for significant developments that will either establish, realign, or resolve the split on the question presented. Given this uncertain and unstable state of the law, the Court should await review until that development has had an opportunity to unfold.

2. The substantial benefits to additional percolation come at almost no cost. The landscape has not changed since the Court last denied certiorari on this issue in *Pundt* v. *Verizon Communications, Inc.*, 137 S. Ct. 1374 (2017), and the dire consequences predicted by petitioners here have not been realized. Petitioners offer no colorable reason to think this will change based on the unpublished decision below. That no amici supported the petition further underscores that there is no harm in waiting to review this question another day.

Petitioners' suggestion that the decision below will engender forum shopping among plaintiffs is particularly hard to take seriously. Petitioners offer no evidence of forum shopping whatsoever—notwithstanding that *Head Start* (the published decision relied on below) was decided four years ago, ample time for such evidence to surface. Two district court decisions citing *Head Start* or the decision below hardly establish the Second Circuit as a "magnet" for ERISA class actions. Contra Pet. 20.

The irony of petitioners' argument is that if anyone is subject to accusations of forum shopping, it is *defendants* in ERISA litigation. Increasingly, ERISA plans contain mandatory forum selection clauses that require litigation to take place in the *defendant fiduciary*'s preferred venue. Despite the Department of Labor's objection to this practice, no circuit has yet condemned it. See *In re Mathias*, 867 F.3d 727 (7th Cir. 2017) (en banc), petition for cert. filed sub nom. *Mathias* v. *U.S. Dist. Court for the Cent. Dist. of Ill.*, No. 17-740 (Nov. 14, 2017); *In re Clause*,

No. 16-2607 (8th Cir. Sept. 27, 2016) (denying mandamus), cert. denied, 137 S. Ct. 825 (2017); *Smith* v. *Aegon Cos. Pension Plan*, 769 F.3d 922 (6th Cir. 2014), cert. denied, 136 S. Ct. 791 (2016); *Smith* v. *Aegon Cos. Pension Plan*, No. 14-1168 (U.S. June 1, 2015) (calling for the views of the Solicitor General). This trend, although unfortunate, further mitigates any risk that the decision below might improperly shift the balance of ERISA litigation toward the Second Circuit.

In short, petitioners identify no real harm in a modest delay permitting the law to crystallize in the circuit courts. To weigh in now, however, would preclude the law from further developing as it is now poised to do. The petition should be denied.

C. The Decision Below Is Correct

Congress stayed well within the bounds of Article III when it authorized defined benefit plan participants to sue for restoration of plan losses caused by fiduciary breach. Because the decision below correctly drew this conclusion, this Court should wait to resolve the question presented in a different case.

1. Article III limits "[t]he judicial Power of the United States" to "Cases" and "Controversies." The doctrine of standing is derived from this requirement. To ensure courts limit the exercise of their power to cases and controversies, this Court has "established that 'the irreducible constitutional minimum' of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547 (quoting *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

The question presented here primarily concerns "in-

jury in fact, the 'first and foremost' of standing's three elements." *Spokeo*, 136 S. Ct. at 1547 (quoting *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 103 (1998)) (brackets omitted). Often, a plaintiff will satisfy the injury-in-fact requirement with a straightforward, tangible economic or physical injury. But that is not always so. In many cases, the plaintiff's injury may be intangible but nonetheless concrete in the eyes of Article III. *Spokeo*, 136 S. Ct. at 1549 ("Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete.").

This Court has also recognized that, in many circumstances, Article III countenances suits to vindicate an injury suffered by another party. See, *e.g.*, *Sprint*, 554 U.S. at 287-288 ("[F]ederal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit. Trustees bring suits to benefit their trusts; guardians ad litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; executors bring suit to benefit testator estates; and so forth."). This is known as representational standing. See also *Vt. Agency*, 529 U.S. at 765 (concluding Article III permits representational suits by *qui tam* realtors on behalf of the United States).

This case brings these two lines of authority together: In Section 1132(a)(2), Congress authorized ERISA plan participants to sue on behalf of their plans for breaches of fiduciary duty that cause *monetary* loss to the plan, but often only *intangible* harm (i.e., the fiduciary breach) to the participant himself.

Although none of this Court's precedents definitively announces a test for determining whether Article III permits Congress to license this sort of representational suit,

three of the Court's Article III decisions are instructive: *Spokeo*, *Sprint*, and *Vermont Agency*.

These decisions reveal two critical considerations governing the Article III question presented here: (1) Congress's judgment and (2) the common law tradition underpinning the suit Congress has chosen to license. See *Spokeo*, 136 S. Ct. at 1549 ("In determining whether an intangible harm" such as a breach of fiduciary duty "constitutes injury in fact, both history and the judgment of Congress play important roles."); *Sprint*, 554 U.S. at 274 ("We have often said that history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider."); *Vt. Agency*, 529 U.S. at 774 ("[H]istory is particularly relevant to the constitutional standing inquiry since * * * Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by the judicial process'" (citation omitted)).

Here, both considerations show Congress permissibly authorized defined benefit plan participants to sue for restoration of plan losses caused by fiduciary breach.

a. First, it is beyond reasonable dispute that Congress authorized suits like this one to vindicate what it viewed as participants' concrete, real-world interest in having pension plans free from fiduciary misconduct. As this Court has observed, ERISA's statutory scheme reflects "Congress' desire to offer employees enhanced protection for their benefits." *Metro. Life Ins. Co.* v. *Glenn*, 554 U.S. 105, 114 (2008) (quoting *Varity*, 516 U.S. at 497). This desire was not abstract—it was motivated by "certain defects in the private retirement system," including "malfeasance and improper activities by pension administrators, trustees, or fiduciaries." H.R. Rep. No. 533, 93d Cong., 1st Sess. 1, 3 (1973).

Congress's intent that ERISA protect participants from such malfeasance is evident throughout ERISA's text. Congress indeed

> declared [it] to be the policy of [ERISA] to protect * * * the interests of participants in employee benefit plans and their beneficiaries, * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. 1001(b); see also *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 207 (2004).

After years of "comprehensive and exhaustive study" (H.R. Rep. No. 533, *supra*, at 11), Congress elected to carry out this policy in two key ways. First, it required that plan assets be held in trust "solely in the interest of [plan] participants and beneficiaries," and it imposed strict fiduciary duties of prudence and loyalty on those who manage plan assets, along with a *per se* prohibition against certain self-dealing transactions. 29 U.S.C. 1104, 1106. Congress derived these duties from the common law of trusts. *Varity*, 516 U.S. at 496.

Second, Congress gave participants a tool to protect their interest in having an ERISA plan free from fiduciary misconduct: a cause of action. Section 1132(a)(2) permits participants to bring suit against "a fiduciary * * * who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries" to recover "any losses to the plan resulting from each such breach." 29 U.S.C. 1132(a)(2), 1109. As this Court has explained, suits under Section 1132(a)(2) are *always* brought in a representative capacity on behalf of the plan in order to protect participants' interest "in the [plan's] financial integrity." *Mass.*

Mut. Life Ins. Co. v. *Russell*, 473 U.S. 134, 142 n.9 (1985). It is undisputed that Congress chose not to make individual financial loss a prerequisite to suit under Section 1132(a)(2).

Congress's judgment is thus clear: Fiduciary breaches (like the one here) harm participants' interests and should be redressable in the federal courts regardless of individual financial loss. Section 1132(a)(2) is accordingly a straightforward exercise of "Congress['s] * * * power to define injuries and articulate chains of causation that will give rise to a case or controversy." *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)).

b. Nor did Congress break new ground in permitting suits like respondent's. Comparable suits have been permitted at common law for centuries. See Scott, 39 U. Colo. L. Rev. at 177-179.

Respondent's suit alleges that petitioners violated the fiduciary duty of loyalty, and it is blackletter law that a trust beneficiary may sue a trustee for breach of the fiduciary duty of loyalty without showing harm to the beneficiary's economic interest in the trust corpus. This is known as the "no further inquiry" rule. See, *e.g.*, 3 Austin W. Scott et al., *Scott and Ascher on Trusts* § 17.2 (5th ed. 2007) ("[A] trustee who has violated the duty of loyalty is liable without further inquiry into whether the breach has resulted in any actual benefit to the trustee * * * [or] whether the breach has caused any actual harm to either the trust or its beneficiaries."); Restatement (Third) of Trusts § 78 cmt. b. (2007) ("In transactions that violate the trustee's duty of undivided loyalty, under the so-called 'no further inquiry' principle it is immaterial that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee."); Robert H.

Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. Corp. L. 565, 573 (2003) ("Under the no-further-inquiry rule, even if the self-dealing transaction is objectively fair, the beneficiaries need only show the existence of the trustee's self-interest in order to prevail. Once the beneficiaries prove the fact of self-dealing, there is 'no further inquiry' and the transaction is voided" (footnote omitted)); see also *Scanlan* v. *Eisenberg*, 669 F.3d 838, 845-847 (7th Cir. 2012) (concluding under common law trust principles that a beneficiary has Article III standing to sue a trustee for breach of fiduciary duty even without harm to her monetary interest in the trust).[9]

Common law claims sounding in restitution or unjust enrichment (an apt comparison to this case, where the plan's losses went directly into respondents' pockets) likewise do not require a plaintiff to show any loss beyond the intrusion on his rights. See 1 Dan B. Dobbs, *Law of Remedies* § 1.1 at 5 (2d ed. 1993) ("[R]estitution is measured by the defendant's gains, not by the plaintiff's losses."); 1 George E. Palmer, *Law of Restitution* § 2.1 at 51 (1978) ("[I]n the damage action the plaintiff seeks to recover for the harm done to him, whereas in the restitution action he seeks to recover the gain acquired by the defendant through the wrongful act."); see also Amicus Br. of Restitution and Remedies Scholars, *Spokeo* v. *Robins*, 136 S.

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[9] One court has cited the Restatement (Second) of Trusts for the proposition that no suit would be permissible here, because a "particular beneficiary cannot maintain a suit for a breach of trust which does not involve any violation of a duty to him." See *Harley* v. *Minn. Mining & Mfg. Co.*, 284 F.3d 901, 907 (8th Cir. 2002) (citing Restatement (Second) of Trusts § 214 cmt. b. (1959)). That is plainly incorrect—it is undisputed that petitioners violated a fiduciary duty owed to respondent. See 29 U.S.C. 1104.

Ct. 1540 (2016) (No. 13-1339). Thus, not only is respondent's suit permitted under Section 1132(a)(2), it would without doubt have been permitted at common law. Petitioners cannot credibly argue otherwise.[10]

As the Court has stated in its other representational standing cases, "this history and precedent [are] 'well nigh conclusive' in respect to" participants' standing to sue on behalf of their plans. *Sprint*, 554 U.S. at 285 (quoting *Vt. Agency*, 529 U.S. at 777-778). And here, history is not all that counts in favor of standing. Based on that history, Congress has made a clear judgment that suits like this one redress real-world harm.[11] Accordingly, any reasonable articulation of an Article III limit on Congress's ability to authorize representational suits must permit suits under Section 1132(a)(2). *Spokeo*, *Sprint*, and *Vermont Agency* license no other outcome.

2. Rather than address any of the considerations identified in *Spokeo*, *Sprint*, or *Vermont Agency*, petitioners mistakenly rely on this Court's *statutory interpretation* decisions to argue respondent lacks *Article III* standing. Pet. 15-18; see *LaRue* v. *DeWolff, Boberg, & Assocs., Inc.*, 552 U.S. 248 (2008); *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432 (1999).

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[10] Of course, in light of ERISA's strong preemptive effect, federal court is the *only* place respondent may bring his suit today. See *Davila*, 542 U.S. at 209.

[11] Congress's reliance on common law tradition in authorizing suits under Section 1132(a)(2) is clear. This Court has emphasized that "rather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility." *Cent. States, Se. & Sw. Areas Pension Fund* v. *Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985). And the House Conference Report on ERISA shows Congress was aware of "the traditional focus of trust law and of civil enforcement of fiduciary responsibilities through the courts." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 306 (1974).

Based on *LaRue* and *Hughes Aircraft*, petitioners argue that the decision below elides the critical distinction this Court has drawn between defined benefit plan participants (like respondent) and participants in defined contribution plans. Pet. 17. But this Court has *never* drawn *any* such distinction in the Article III context, and petitioners misapprehend the relevance of this Court's ERISA decisions to the Article III question presented here.

In *LaRue*, this Court analyzed whether Section 1132(a)(2) authorized a defined contribution plan participant to sue for a fiduciary breach related only to his individual account (i.e., the breach did not affect other participants' accounts). 552 U.S. at 252-253. In answering this question, the Court drew a distinction between defined benefit and defined contribution plans. But it did so entirely for the purpose of evaluating whether loss related to an *individual* account satisfies Section 1132(a)(2)'s requirement that suit be brought to recover "losses to the plan." See *id.* at 255-256. *LaRue* therefore concerned participants' authority to sue under the statute, not their Article III standing.

Hughes Aircraft is even less relevant to this case. It addressed whether a plan administrator's disposition of a defined benefit plan's surplus assets constituted a fiduciary breach under ERISA. 525 U.S. at 760-761. That plan participants were entitled only to fixed payments (i.e., had no entitlement to plan surplus) was important to the Court's statutory analysis, *id.* at 439-441, but it was in no way related to the participants' Article III standing. The word "standing" does not appear in the opinion. *Hughes Aircraft* is entirely about the scope of ERISA's fiduciary duties—it has no bearing on the Article III question presented here.

Petitioners' extended discussion of *LaRue* and

Hughes Aircraft is essentially irrelevant to this case: It is undisputed that respondent seeks relief on behalf of his plan (as required by *LaRue*), and even if this case were not at the pleading stage, it is beyond reasonable dispute that petitioners violated an ERISA fiduciary duty (as required by *Hughes Aircraft*).

3. Based on their misreading of *LaRue* and *Hughes Aircraft*, petitioners derive a proposed standing test as unworkable as it is doctrinally untethered. Petitioners would require courts to ask whether a fiduciary breach caused sufficient plan losses to register some unspecified degree of risk to the individual participant's economic interests. In petitioners' view, an identifiable but small loss like the one to respondent's plan does not suffice. But petitioners never say how large the Central States Plan's loss must have been to create a constitutionally adequate risk to respondent's benefits.

This intolerable line-drawing exercise lacks anything but the barest trace of grounding in this Court's Article III decisions. True, Article III requires a concrete injury in fact, but petitioners' theory rests entirely on the mistaken premise that only an ERISA plan participant's economic interests can suffer concrete harm.

Although petitioners cherry-pick quotations from *LaRue* and *Hughes Aircraft* that appear to support this proposition, neither of those cases purports to address the full scope of a participant's actionable Article III interests under ERISA. And petitioners altogether omit mention of *Russell*, where this Court stated plan participants share a "common interest" with plan fiduciaries (whose Article III standing is undisputed) "in the financial integrity of the plan." 473 U.S. at 142 n.9. As discussed above, that is the very interest Congress—resting on centuries of common law precedent—said was actionable. See, *e.g.*, 29 U.S.C. 1001(b).

Petitioners, however, devote not a single sentence to Congress's judgment or the history that supports it, except to say respondent's position "is precluded by this Court's decision in *Spokeo*." Pet. 19. As explained above, that is not so. And while petitioners may offer further analysis in reply, the petition's bald dismissal is telling. It betrays the doctrinal vacuum in petitioners' argument—and the simple fact that this Court's relevant precedents counsel strongly in favor of respondent's standing here. The decision below correctly drew the same conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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