No. 17-343

In The Supreme Court of the United States

CONVERGEX GROUP LLC, CONVERGEX EXECUTION SOLUTIONS LLC, CONVERGEX GLOBAL MARKETS LTD., CONVERGEX HOLDINGS LLC, G-TRADE SERVICES LLC,

Petitioners,

v.

LANDOL FLETCHER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Seven circuits, including the Second Circuit, have considered whether a participant in a defined-benefit ERISA plan may bring a "representational" or "derivative" action to recover for financial injuries to the plan even when the participant himself has lost nothing. The Second Circuit permits these claims. E.g., *L.I. Head Start Child Dev. Servs.* v. *Econ. Opportunity Comm'n of Nassau Cty., Inc.*, 710 F.3d 57, 67-68 & n.5 (2d Cir. 2013) ("LIHS and the Class have asserted their claims in a derivative capacity, to recover for injuries to the Plan * * * * This injury-in-fact is sufficient for constitutional standing."); App. 3-4 ("financial loss sustained by the Central States Plan [was] sufficient to confer Article III standing on [respondent] in his representative capacity as a Plan participant"). The Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits do not permit these claims, rejecting the same merits arguments respondent brings now. Pet. at 4-5; BIO at 17-26.

Respondent's flouting of ERISA uniformity aside (at 16), the importance of certainty and uniformity regarding ERISA plan liability is indisputable. The Second Circuit's approach threatens the "efficiency, predictability, and uniformity" that this Court has held ERISA plans and their administration to require. *Conkright* v. *Frommert*, 559 U.S. 506, 518 (2010). Respondent cannot explain how such an important question, cleanly presented and passed on by seven circuits, is unready or unworthy of this Court's review. The petition should be granted.

I. The Pressing Need To Restore Uniformity On An Important Issue Of ERISA Law Renders Further Percolation Unnecessary.

Since at least 2013, the Second Circuit has broken with every other circuit to have considered the issue and allowed defined-benefit beneficiaries who have suffered no personal losses themselves to bring ERISA suits on a representational basis. See, e.g., *Head Start*, 710 F.3d 57. In *Head Start*, the Second Circuit conferred standing in ERISA suits to challenge "misuse of plan assets" based merely on the plaintiff's "common interest * * * in the financial integrity of the plan." *Id.* at 65 (citation omitted_. Per the Second Circuit, this interest establishes constitutional standing for defined-benefit beneficiaries to "assert[ ] their claims in a derivative [or representational] capacity, to recover for injuries to the Plan caused by the Administrators' breach of their fiduciary duties." *Id.* at 67 n.5.[1] The panel here relied on this holding to recognize ERISA representational standing for defined-benefit beneficiaries. See App. 3-4.

Respondent primarily contends (at 10) that it "remains debatable whether the decision below represents the view of the Second Circuit." District courts in the Second Circuit disagree: "the Second Circuit's holding in *Head Start* is neither ambiguous nor dictum. Absent clear authority from either the Supreme Court or a subsequent Second Circuit panel, *Head*

[1] No petition for *certiorari* was filed in *Head Start*.

Start's holding controls—i.e., plan participants have constitutional standing to sue in a derivative capacity for injuries to a Plan." *Allen* v. *Bank of Am. Corp.*, No. 15 Civ. 4285 (LGS), 2016 WL 4446373, at *5 (S.D.N.Y. Aug. 23, 2016) (applying *Head Start* after this Court's decision in *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016)). As one district court observed, "although * * * *Head Start* * * * has been called into question, the decision has not been displaced as Second Circuit precedent." *Leber* v. *Citigroup 401(k) Plan Inv. Comm.*, No. 07-CV-9329 (SHS), 2017 WL 5664850, at *7 (S.D.N.Y. Nov. 27, 2017) (citing the Second Circuit's decision in the instant case); see also *Moreno* v. *Deutsche Bank Ams. Holding Corp.*, No. 15 Civ. 9936 (LGS), 2017 WL 3868803, at *3 (Sept. 5, 2017). The effect of *Head Start* may be unclear to respondent, but not to courts in the Second Circuit—including the panel below.

Respondent next relies on attempts by parties to distinguish *Head Start*—beginning with petitioners below—to argue that the Second Circuit's approach accords with its sister Circuits. BIO at 9-10. Given that the Second Circuit necessarily *rejected* petitioners' attempt to distinguish *Head Start*, that argument goes nowhere. Respondent similarly relies on a brief in opposition in another case disclaiming the existence of a circuit split as proof that such a split does not exist. BIO at 10. But that type of argument in a BIO is hardly uncommon—and hardly dispositive. Even less persuasive are respondent's citations (at 10) of several filings *before* the Second Circuit decided *Head Start*.

Respondent cannot seriously fault those litigants for failing to rely on a split that did not yet exist.

Having disavowed that the Second Circuit has cleanly embraced "representational" suits, respondent then pulls an about-face, suggesting (at 11-15) that this Court's decision in *Spokeo* will cause other circuits to do so. Respondent provides nothing to support this speculation—and the only circuit to have entertained such an argument rejected it. *Lee* v. *Verizon Commc'ns, Inc.*, 837 F.3d 523, 530 (5th Cir. 2016) (an "allegation of an 'invasion of [a] statutory right[ ] to proper [p]lan management' under ERISA was not alone sufficient" for standing, absent "a real risk that [the plan-holder's] defined-benefit-plan payments would be affected"), cert. denied, 137 S. Ct. 1374 (2017). That rejection is not surprising, given that respondent's argument relies on the mistaken notion (at 11) that *Spokeo* expanded constitutional standing for statutory rights—while if anything, *Spokeo* narrowed it. *Spokeo* surely did nothing to alter the logic of other circuits' opinions on representational standing. See, e.g., *Lee*, 837 F.3d at 529 (noting "*Spokeo* maps surprisingly well onto" its prior ERISA representational standing case law).

Respondent has offered no convincing reason why any of the other five circuits that have already "reject[ed]" respondent's familiar "trust-law argument and conclud[ed] that defined-benefit-plan participants lack[ ] Article III standing to sue based solely" on fiduciary misconduct, *id.* at 530 (citing *David* v. *Alphin*, 704 F.3d 327, 336-37 (4th Cir. 2013)), would reverse course

in light of *Spokeo*.[2] The split between the Second Circuit and six others is clean, and the need for uniformity on this important issue of ERISA law is pressing. See Pet. at 5, 9, 19-23.[3] This Court should not wait until "dire consequences * * * come to bear" (BIO at 7) before it resolves a circuit split in this area of ERISA law which this Court has noted is in special need of national uniformity and predictability. See, e.g., *Conkright*, 559 U.S. at 517-18; *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002).

II. Respondent's Merits Arguments Only Confirm That This Court's Review Is Warranted.

Respondent's lengthy discussion of the merits (at 17-26) only confirms the need for this Court's review. Respondent initially errs on first principles. He does not dispute that Article III requires a plaintiff to allege a particularized and concrete injury-in-fact—that any injury must be "*personal*" to the plaintiff himself, *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997), as this Court

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[2] Far from arguing that "*Spokeo* is irrelevant" to this question, as respondent claims (at 12), petitioners argue that *Spokeo*'s focus on particularized and concrete injuries reinforces the majority view *rejecting* ERISA defined-benefit plan standing. Pet. at 3, 11, 18-19.

[3] Respondent does not deny the need for uniformity in ERISA law, but merely speculates (at 16-17) that forum-shopping will not be a problem in light of forum-selection clauses. Besides being a *non sequitur*, respondent's argument implicitly acknowledges that the Second Circuit is the primary forum for suits against financial services firms for fiduciary breaches. See Pet. at 22-23. This is yet another reason why no further percolation is needed.

confirmed in *Spokeo*. 136 S. Ct. at 1548. Yet respondent attempts to replace these traditional requirements altogether (at 19), focusing solely on "Congress's judgment" and "the common law tradition underpinning the suit Congress has chosen to license." This seriously misunderstands this Court's cases. This Court *always* requires a personal harm for Article III standing: Congress's judgment simply helps this Court ascertain whether an "intangible harm"—which is otherwise "concrete, *de facto*"—suffices for purposes of standing. *Spokeo*, 136 S. Ct. at 1549. Respondent's incantation (at 19-21) that "Congress authorized [these] suits," then, does nothing to answer the central question: whether respondent can rely on *his Plan*'s loss as his own. He cannot.

Thus one searches respondent's lengthy merits arguments in vain for evidence that he has suffered any harm *himself*. Respondent admits (at 4), as he must, that "not all [Convergex] losses were suffered by [its] ERISA plans," and (at 5) that most of the losses were felt by "many other pension plans" separate from respondent's plan. Moreover, respondent has not disputed that the total loss to his entire plan was only $1,577.93, see BIO at 5 n.3, and does not even claim any serious increased risk that his defined benefits will not issue based on this sixteen-hundred-dollar plan hit.[4]

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[4] Respondent goes out of his way to describe petitioners as "disgraced" (at 1), to assert wholly unsupported loss figures (at 1-2, 4-5), and to proclaim that "it is undisputed that petitioners violated a fiduciary duty." BIO at 22 n.9. It suffices to say that

As this Court has made clear, this failure is fatal to respondent's ERISA claim. As petitioner explained (at 15-18), ERISA defined-benefit plan-holders have no "claim to any particular asset that composes a part of the plan's general asset pool." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 440 (1999). Unlike defined-contribution plans, defined-benefit plans confer a "right to a certain defined level of benefits" only—a fixed payment stream from a general pool owned by no plan-holder in particular. *Id.* at 440. Because "[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 by the entire plan," *LaRue* v. *DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008), such a risk is necessary for a member of a defined-benefit plan to suffer a concrete injury—or any injury, for that matter.

Respondent unpersuasively attempts to evade *Hughes Aircraft* and *LaRue*, claiming (at 24) that "this Court has *never* drawn *any* such distinction" between defined-benefit plans and defined-contribution plans "in the Article III context." This grasps at straws. Both cases unquestionably differentiated between the types of "harms" (if any) suffered as a result of fiduciary misconduct by the two types of plan participants, *LaRue*, 552 U.S. at 254-56, given their different-in-kind entitlement to plan assets (i.e., a specific defined benefit

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these points are very much disputed—and respondent's resort to sources outside the record in making these accusations only confirms that the accusations are ill-founded and irrelevant sideswipes.

versus an individual participant's account), *Hughes Aircraft*, 525 U.S. at 440. Unhelpful to respondent, that distinction is central to both his claims and the Second Circuit's flawed *Head Start* doctrine. If a defined-benefit plan participant suffers an injury only when fiduciary conduct "creates or enhances the risk of default by the entire plan," *LaRue*, 552 U.S. at 255, then there is no room for "representational" standing for lesser losses. Simply put, *Head Start* cannot coexist with *Hughes Aircraft*. See *Lee*, 837 F.3d at 530 (relying on *Hughes Aircraft* to find no concrete injury to "defined-benefit-plan participant[s'] 'interest' in the plan").[5]

Like anyone else, respondent cannot establish Article III standing for a statutory violation that nevertheless "may result in no harm" to respondent himself. *Spokeo*, 136 S. Ct. at 1550. Without losses to the plan sufficient to reduce his likelihood of receiving his defined benefits, respondent has suffered nothing. See Pet. at 18. Respondent has not shown that the loss to the Plan put his defined benefit at risk in any material way—nor could he, based on an increase of the Plan's deficiency by only one-one-hundred-thousandth of a percent. See *Lee*, 837 F.3d at 530 (focusing on lack of risk to future benefit disbursement); *Alphin*, 704 F.3d at 338 (concluding no Article III standing given the "speculative" nature of "the risk that [the plaintiffs']

[5] Even if these cases are mere "*statutory interpretation*" as respondent suggests (at 23), they demonstrate this Court's view that Congress limited respondent's concrete interest in his plan's management to his "defined level of benefits." *Hughes Aircraft*, 525 U.S. at 440.

pension benefits will at some point in the future be adversely affected as a result of the present alleged ERISA violations"); see also *Perelman* v. *Perelman*, 793 F.3d 368, 375 (3d Cir. 2015) (same).

Respondent's only response (at 25) to the argument that the risk of default on *his* future payments was not increased by petitioners' alleged conduct is that this risk-based framework represents an "intolerable line-drawing exercise." But this Court has already drawn the line. *LaRue*, 552 U.S. at 255 (noting defined-benefit plan-holder is only harmed by "risk of default by the entire plan"); see also *Spokeo*, 136 S. Ct. at 1550 (requiring, in the context of a violation of a procedural right, a "material risk of harm" and noting the "degree of risk" will be determinative of the "concreteness" inquiry). That respondent finds this "intolerable" surely explains his opposition to certiorari, but is otherwise beside the point.

In a last-ditch effort to resist this Court's review, respondent cites a hodgepodge of this Court's other cases to no apparent purpose. Respondent cites the true (but irrelevant) fact (at 18) that this Court sometimes permits one person to sue on another's behalf. Respondent never establishes, however, why *this* is such a case. And if it ought to be, it should only be after this Court considers the question through full briefing and argument—especially if, as respondent declares incorrectly, this Court has never resolved such an important question. See BIO at 19 ("none of this Court's precedents definitively announces a test for determining whether Article III permits Congress to license *this*

sort of representational suit"). It has. See *LaRue*, 552 U.S. at 255; *Hughes Aircraft*, 525 U.S. at 440.

The question presented in this case is whether respondent, a defined-benefit ERISA beneficiary, articulated a cognizable harm when he relied on his Plan's losses as his own. Six Circuits have answered no; the Second Circuit has answered yes. This case cleanly presents that question—and respondent's reliance (at 7, 16) on the fact that the decision below is unpublished changes nothing because the Second Circuit's position is well established. *Allen*, 2016 WL 4446373, at *5 ("*Head Start*'s holding controls—i.e., plan participants have constitutional standing to sue in a derivative capacity for injuries to a Plan."). The Second Circuit has denied rehearing, and there is no reason to think the split will resolve itself. This Court should grant the petition to restore uniformity, predictability, and stability on this issue of nationwide importance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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