No. 17-1712

In The
Supreme Court of the United States

JAMES J. THOLE, ET AL., PETITIONERS

v.

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

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

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF

Despite its ultimate conclusion, the United States' brief reads like a recommendation against certiorari. The United States correctly determines the Eighth Circuit's decision implicates no split. It admits the Eighth Circuit passed on no Article III questions and that this Court is not ordinarily one of first review. And it suggests the Court consider the additional question whether the Eighth Circuit properly addressed statutory standing first—which could preclude any need to decide the actual questions presented.

Nevertheless, the United States recommends the Court grant certiorari to address what amounts to a potential alternative ground for affirmance—an unaddressed question of Article III standing. It presses three abstract legal "theories" conceivably relevant to some plaintiffs, somewhere. But it fails to explain how *this* petition presents a vehicle for addressing these theories. It does not.

The United States asserts, for example, that ERISA plaintiffs have injury-in-fact when they face an "increased risk of future nonpayment." U.S. Br. 11. True enough—but Plaintiffs here expressly *disclaimed* this argument, and the district court found as fact that they faced no such risk. Similarly, the United States invokes an exceptional common-law "derivative" procedure, along with the categorical prohibition on certain trustee self-dealing. U.S. Br. 7-11. Yet Plaintiffs' claims do not remotely resemble either of these supposed antecedents. And while the United States contends its theories apply to claims for prospective relief (U.S. Br. 17), it ignores the district court's factual finding that the challenged conduct will not recur—an independent jurisdictional defect.

The United States says these Article III issues "arise[] with some frequency." U.S. Br. 5. If the Court wishes to address these (splitless) questions, it thus may await a petition that cleanly presents them. This petition does not. It should be denied.

ARGUMENT

I. THE SECOND QUESTION PRESENTED DOES NOT WARRANT REVIEW

A. The United States concentrates on the second question presented: whether uninjured plan beneficiaries have standing under Section 1132(a)(2). It readily concedes the traditional requirement for review—a concrete split of authority—is absent. As it recognizes, the Eighth Circuit's holding is grounded in statutory rather than constitutional standing. U.S. Br. 16. It correctly dismisses Plaintiffs' contentions (Pet. 27-28) that other circuits reject the Eighth Circuit's reading of Section 1132(a)(2). U.S. Br. 16. There is thus "no square circuit conflict." U.S. Br. 16.

The United States gestures at a supposed "tension" among *other* courts of appeals on Article III standing. U.S. Br. 15-16. Even this "tension" is illusory. Numerous courts have indeed rejected the United States' arguments, holding that defined-benefit-plan beneficiaries cannot sue absent concrete harm. U.S. Br.

15 (collecting cases). Yet no published circuit opinion reaches a contrary conclusion. The United States invokes a three-sentence Second Circuit footnote containing the word "derivative" in saying the plaintiffs there—who stood to personally recover roughly $700,000—had standing. *L.I. Head Start Child Development Services, Inc. v. Economic Opportunity Commission of Nassau County, Inc.*, 710 F.3d 57, 67 n.5 (2d Cir. 2013). Courts in the Second Circuit have, however, rejected the United States' over-reading of this cursory footnote. Pet. 25 n.6; *see*, *e.g.*, *Taveras v. UBS AG*, 612 F. App'x 27, 29 (2d Cir. 2015) ("An ERISA plan participant lacks standing to sue for ERISA violations that cause injury to a plan but not individualized injury to a plan participant."). That leaves the United States with *Fletcher v. Convergex Group, LLC*, 679 F. App'x 19 (2d Cir. 2017), cert. denied, 138 S. Ct. 644 (2018)—an unpublished opinion that cannot create any split.

B. The core of the United States' case for certiorari is thus error correction: it insists the courts of appeals' (unanimous) position is wrong. U.S. Br. 6-14. But even if the United States were correct on the merits—and it is not—it cannot explain how this petition is a vehicle for correcting these supposed errors.

1. The United States only briefly addresses the Eighth Circuit's actual rationale, and it does not meaningfully engage with the court's reasoning. Instead, it simply asserts that because Section 1132(a)(2) generally authorizes "beneficiaries" to sue for fiduciary breaches, Congress must have intended beneficiaries

to bring such suits in any and all circumstances. U.S. Br. 13-14.

Section 1132(a)(2) does not say that. It requires that beneficiary actions be for "*appropriate* relief"—a condition that imposes real limits. *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996). Construing this limitation to preclude suits by uninjured plaintiffs is consistent with the presumption that Congress restricts statutory rights of action to individuals with "personal stake[s]" in the outcome. *Gollust v. Mendell*, 501 U.S. 115, 125-26 (1991). To simply say Congress' general purpose was to "prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid" (U.S. Br. 14) is little help here, where the question is whether employees who face *no* risk of "personal tragedy" may still bring suit.

The United States' failure to engage in the statutory-standing analysis betrays its disinterest in the Eighth Circuit's actual holding.

2. The United States' primary interest, instead, is securing this Court's review of *other* circuits' constitutional decisions. In particular, the United States advances three "theories" under which, it claims, beneficiaries of defined-benefit plans may experience injury-in-fact. U.S. Br. 7.

The Eighth Circuit, however, did not pass on any of these "theories." As the United States acknowledges (U.S. Br. 16), this Court typically refuses to consider Article III questions until the court of appeals has done so. *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019).

This case illustrates the wisdom of that practice: even assuming these abstract "theories" are viable in some cases, *none* is applicable to the facts here.

a. The United States' first two "theories" rely on trust-law analogies. At common law, trust beneficiaries could challenge fiduciary breaches only when their "rights [were] or may be adversely affected." Restatement (Third) Trusts, § 94, comment b. Thus, as in negligence or similar actions, beneficiaries were required to show both that the defendant breached a duty to them *and* that this breach caused them harm. For common-law trust beneficiaries, that showing may be simple enough: because they generally have an "interest in the trust property," fiduciary breaches affecting trust property "adversely affect[]" them personally. *Scanlan v. Eisenberg*, 669 F.3d 838, 843 (7th Cir. 2012).

ERISA defined-benefit plans are different. Beneficiaries of such plans have an interest only in their individualized payments, not the "general pool" of plan assets. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-40 (1999); *Duncan v. Muzyn*, 885 F.3d 422, 429 (6th Cir. 2018). Here as elsewhere with ERISA, courts must "bear[] in mind the special nature and purpose of employee benefit plans," because "trust law does not tell the entire story." *Varity*, 516 U.S. at 497.

i. The United States' first theory is grounded in supposed "derivative" beneficiary suits. U.S. Br. 7-8. Typically, only *trustees* may sue on the trust's behalf. 17 George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 869, at 113 (2d rev. ed.

1995). The United States invokes a narrow "emergency" exception: where the trustee "cannot or will not" sue a third party, and the delay from enjoining the trustee to act might preclude meaningful relief given the third party's financial deterioration or ability to assert procedural bars, the beneficiary may sue as "temporary representative of the trust." *Id.* § 869, at 119.

But even assuming Section 1132(a)(2) establishes an analogous "derivative" action, that would not resolve the Article III question. The United States cites nothing suggesting beneficiaries may bring "derivative" suits even when not personally affected by the defendant's actions. With shareholder derivative suits (to which the United States analogizes, U.S. Br. 8-9), this Court has emphasized that plaintiff shareholders *must* maintain "some continuing financial interest in the outcome of the litigation." *Gollust*, 501 U.S. at 126. While beneficiaries of traditional trusts might satisfy that requirement by invoking an interest in the trust corpus, defined-benefit-plan beneficiaries have no such interest. *Supra* p. 5.[1]

Regardless, the United States' theory, even if possibly relevant to standing in some cases, has no

[1] Although the United States also attempts to analogize to assignees (U.S. Br. 9), it does not identify historical precedent for "*assigning*" trust claims to beneficiaries or support the proposition that Congress can generate justiciable cases by assigning claims from one third party to another. *Compare Vermont Agency of Natural Resource v. U.S. ex rel. Stevens*, 529 U.S. 765, 773-78 (2000) (given long history of qui tam actions, Congress could assign *the government's* claims to third-party relators).

application here: Plaintiffs' suit bears no resemblance to these common-law "derivative" actions. Plaintiffs did not sue a third party, but the Plan trustees—just the sort of *direct* claim common-law beneficiaries could press on their *own* behalf when injured. Restatement (Second) Trusts, § 199. Plaintiffs also made no demand on the trustees, nor any showing the trustees could not address their claims. And the record lacks any indication that delay might preclude meaningful relief for the Plan; U.S. Bank's liquid assets dwarf any liability that could be imposed here. *See* BIO 4 & n.1.

If this Court wishes to address this "derivative" theory, it should await a vehicle that implicates it.

ii. The United States' "no further inquiry" theory runs aground on the same shoals. Under this rule, self-dealing trustees cannot defend their actions as being fair to the trust. Bogert § 543. Instead, the transaction is held to "carr[y] fraud on the face of it" and conclusively presumed detrimental to the trust. *Michoud v. Girod*, 45 U.S. 503, 553 (1846).

This common-law presumption has no bearing on the Article III standing of ERISA defined-benefit-plan beneficiaries. Even if a trustee's self-dealing is conclusively presumed to reduce plan assets, defined-benefit-plan beneficiaries (unlike common-law trust beneficiaries) have no interest in the plan's general asset pool. *Supra* p. 5. So absent a threat to their benefits, they still suffer no injury-in-fact.

In any event, whatever this theory's abstract validity, it cannot establish Plaintiffs' standing here.

Plaintiffs' principal contention is that Respondents improperly invested Plan assets entirely in equities—a garden-variety duty-of-care claim not subject to the "no further inquiry" rule or any standing-conferring powers it might provide. Complaint ¶¶162-163. Nor can Plaintiffs' second contention—concerning investments in FAF equity-backed mutual funds, and nominally a self-dealing claim (Complaint ¶¶132-135)—support standing. ERISA regulations expressly *permit* such investments under certain conditions. *See* Class Exemption Involving Mutual Fund In-House Plans Requested by the Investment Company Institute, 42 Fed. Reg. 18,734, 18,734-35 (April 8, 1977). Addressing the merits, the district court viewed this regulation as an affirmative defense and thus excused Plaintiffs' failure to plead facts suggesting these conditions were not satisfied. *Adedipe v. U.S. Bank N.A.*, 62 F. Supp. 3d 879, 902 (D. Minn. 2014). But if Plaintiffs' *standing* is to be based on the presumptive injury that arises when trustees engage in ERISA-prohibited self-dealing, it is *Plaintiffs'* burden to set forth facts showing these investments were improper. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Because the record contains nothing of the sort, this case is a poor vehicle for addressing the United States' second theory.

b. The United States' last "theory" is that "ERISA beneficiaries have standing to sue for breach of fiduciary duty when the breach results in a materially increased risk of monetary loss." U.S. Br. 11. Exactly right. No one, including the Eighth Circuit, questions that principle. The United States appears to quibble only with the particular line the Eighth Circuit (relying on Congress' assessment) may have drawn in separating speculative from nonspeculative risk. U.S. Br. 12.

This petition is a remarkably defective vehicle for addressing the government's risk-based contentions. *First*, Plaintiffs have not advanced a risk-based theory of injury-in-fact; to the contrary, their questions presented expressly *disclaim* it. Pet. i ("May an ERISA plan participant or beneficiary seek restoration of plan losses . . . without demonstrating individual financial loss *or the imminent risk thereof*?") (emphasis added). Plaintiffs argue only that trustees' fiduciary breaches alone constitute injury-in-fact. Pet. 16-21, 31-32. The Court does not ordinarily consider issues not raised in the petition, *Chandris, Inc. v. Latsis*, 515 U.S. 347, 353 n.* (1995), much less ones petitioners expressly disavow.

Second, Plaintiffs abandoned risk-based arguments for good reason: the record forecloses them. The Plan is not just overfunded, it has reached a FTAP of 115.3%. Pet. App. 38a. And if all Plan assets somehow vanished, U.S Bancorp would still have sufficient liquid assets—$86 billion worth—to meet its pension obligations many times over. BIO 4. Thus, Plaintiffs would face no risk of default even were the Plan *underfunded*. *See Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 546 (5th Cir. 2016), cert. denied, 137 S. Ct. 1374 (2017). The district court, emphasizing that "[t]he financial strength of a plan sponsor is relevant to determining if there is any increased risk of plan default once a plan is overfunded," specifically found Plaintiffs offered no evidence they could ever be deprived of their benefits. Pet. App. 39a. Plaintiffs have waived any challenge to that factual finding. And the United States does not suggest this finding was clearly erroneous or otherwise attempt to explain how the Court could disregard it when addressing the government's "risk" theory.

The Court will undoubtedly have future opportunities to clarify how defined-benefit-plan beneficiaries can establish that fiduciary breaches put their benefits at risk. Any comment on the issue here would be purely advisory.

II. THE FIRST QUESTION PRESENTED DOES NOT WARRANT REVIEW

A. The United States likewise does not claim any circuit disagrees with the Eighth Circuit's holding that individuals in Plaintiffs' circumstances lack statutory standing for prospective relief under Section 1132(a)(3). The United States succinctly rejects Plaintiffs' contention that the court below actually addressed Article III standing. *Compare* Reply 2, *with* U.S. Br. 17. As a result, there is again no split that might warrant this Court's review.

To the extent the United States contends there is "some divergence of analysis" with decisions confronting Article III issues (U.S. Br. 17), it fails to meaningfully analyze these authorities. No court of appeals has accepted the broad theory that abstract fiduciary breaches are themselves sufficient to supply defined-benefit-plan beneficiaries with injury-in-fact for an injunction. Although the Third Circuit in *Horvath v. Keystone Health Plan East, Inc.* invoked an "invasion-of-a-legal-right" theory (U.S. Br. 18), the *only* "legal right" at issue was the right to receive information—deprivation of which courts have long held to be cognizable injury. 333 F.3d 450, 453 (2003); *see* BIO 17. The United States may hope the Third Circuit would extend that straightforward holding into uncharted territory, but it has not taken that step.

While the Second and Sixth Circuits have cited *Horvath* with approval (U.S. Br. 18), both circuits have expressly *rejected* the Unites States' contentions. The Second Circuit has rebuffed the argument that "a breach of fiduciary duty in and of itself could constitute an injury-in-fact," holding beneficiaries must instead "allege some injury in the form of a deprivation of a right as a result of a breach of fiduciary duty." *Kendall v. Employees Retirement Plan of Avon Products*, 561 F.3d 112, 120 (2009). The Sixth Circuit—following *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)—similarly made clear that beneficiaries cannot satisfy Article III simply by "alleging a violation of ERISA rights," but must "show precisely what concrete harm they suffer as a result of [d]efendants' violations of their ERISA rights." *Soehnlen v. Fleet Owners Insurance Fund*, 844 F.3d 576, 582 (2016). The United States does not even attempt to address these decisions, which remove any hint of "divergence."

B. The United States' case for certiorari is thus again entirely merits-based. Its arguments are misplaced for all the merits and vehicle-specific reasons above. But an additional problem cements the case against certiorari: a factual finding the challenged conduct will not recur.

The district court made that finding based on the evidentiary record. Pet. App. 48a. Because there is no "real and immediate threat" Respondents will again take the actions that (according to Plaintiffs) breached their fiduciary duties, Plaintiffs cannot pursue injunctive relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). Plaintiffs can no more seek an order requiring appointment of new trustees than the *Lyons* plaintiff could have sought an injunction compelling termination of the officers who put him in a chokehold: no prospective remedy would redress Plaintiffs' injuries (if any) because Plaintiffs face no risk of *future* misconduct.

Because this jurisdictional defect is so glaring, the Court would have no need to address the government's theories of injury-in-fact for prospective relief. While Respondents emphasized this obvious vehicle issue (BIO 29-31), the United States does not even try to explain why this case nevertheless merits review.

III. THE UNITED STATES' PROPOSED QUESTION CONFIRMS CERTIORARI SHOULD BE DENIED

The United States suggests the Court add another question presented: whether the Eighth Circuit erred in resolving statutory standing first. U.S. Br. 19-22. The United States does not point to any split on this question; no court of appeals rejects this Court's precedent holding that "statutory standing . . . may properly be treated before Article III standing." *Ortiz v. Fibreboard Corp*, 527 U.S. 815, 831 (1999). Nor does the United States explain why this question is sufficiently important to warrant review.

The United States' suggestion only confirms the Court should not use this petition to attempt to resolve Article III questions unaddressed below. The United States is, in effect, asking the Court to add a self-destruct button: if it holds the Eighth Circuit erred in considering statutory standing first, the Court may simply reverse on that basis and direct the court of appeals to address constitutional standing instead. That would obviate the need to consider the issues the United States claims are important. The United States' suggestion that this vehicle problem be elevated to question-presented status does not make it any less of a problem. It is a reason to deny review, not grant it.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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