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.,

Respondents.

On Writ of Certiorari To
The United States Court of Appeals
For the Eighth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

This case presents two independent, substantial legal issues that have divided the courts of appeals regarding when an ERISA plan participant may invoke the remedies Congress explicitly authorized to police fiduciary misconduct and protect federally guaranteed benefits.

Petitioners are participants in a pension plan managed by respondents. After respondents' fiduciary breaches caused $750 million in losses to the plan, petitioners sued, seeking injunctive relief under 29 U.S.C. 1132(a)(3) and restoration of the plan's losses under 29 U.S.C. 1132(a)(2). The Eighth Circuit affirmed dismissal of both claims because petitioners had not yet suffered any individual financial harm-the plan did not (yet) face a risk of default.

In so holding, the Eighth Circuit departed from holdings of other circuits under both Sections 1132(a)(3) and 1132(a)(2), and rejected the long-held position of the Department of Labor, which has repeatedly urged the courts of appeals to let these claims proceed.

The questions presented are:

1. May an ERISA plan participant or beneficiary seek injunctive relief against fiduciary misconduct under 29 U.S.C. 1132(a)(3) without demonstrating individual financial loss or the imminent risk thereof?

2. May an ERISA plan participant or beneficiary seek restoration of plan losses

caused by fiduciary breach under 29 U.S.C. 1132(a)(2) without demonstrating individual financial loss or the imminent risk thereof?

IN ADDITION TO THE QUESTIONS PRESENTED BY THE PETITION, THE PARTIES ARE DIRECTED TO BRIEF AND ARGUE THE FOLLOWING QUESTION: WHETHER PETITIONERS HAVE DEMONSTRATED ARTICLE III STANDING.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus* National Association of Home Builders of the United States ("NAHB") states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Home Builders of the United States ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and construct 80% of all homes in the United States.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and amicus curiae to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated. As such, NAHB is concerned with any decision that impacts its ability to initiate lawsuits on behalf of its members.

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[1] Counsel for *Amicus Curiae* has obtained consent from both parties to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The elements that constitute the "irreducible constitutional minimum" of standing – injury, causation, redressability – must be present in every case or controversy before a federal court. *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560 (1992). Standing can be analyzed at any time, and must be present throughout all phases of the litigation. At the earliest stages of litigation, such as the motion to dismiss phase, the standing hurdle should not be difficult for plaintiffs to overcome.

In this case, the Court is faced with the second of two distinctly different motions to dismiss, each with a different line of inquiry. NAHB urges this Court to clearly delineate between *facial* and *factual* motions to dismiss, and to address only the factual motion to dismiss at issue in this case.

ARGUMENT

I. BACKGROUND

The Respondents challenged the Petitioners' Article III standing in two separate motions. Initially, the Respondents made a facial challenge under Federal Rule of Civil Procedure 12(b)(1). *Adedipe v. U.S. Bank, National Ass'n*, *et al.,* No. CV 13-2687 (JNE/JJK), 2015 WL 11217175, at *1 (D. Minn. Dec. 29, 2015), *aff'd on other grounds sub nom., Thole v. U.S. Bank, National Ass'n*, 873 F.3d 617 (8th Cir. 2017). With respect to that motion, the U.S. District Court for the District of Minnesota ruled that the Petitioners had alleged sufficient facts to confer standing; that is, they were injured due to the increased risk that the defined benefit pension plan (the "Plan") would default due to the Respondents' ERISA violations. *Thole v. U.S. Bank, National Ass'n*, 873 F.3d 617, 625 (2017).

Subsequently, in 2015, the Respondents again moved to dismiss Petitioners' case. *Thole*, 873 F.3d at 625. In that motion, the Respondents made a factual challenge to the Complaint because, according to Respondents, the Plan had gone from underfunded (when the Petitioners filed the Complaint) to overfunded. *Id.* at 626.

Neither the District Court, nor the Eighth Circuit Court of Appeals, addressed Petitioners' Article III standing with respect to the second motion. The District Court dismissed the case as moot. *Thole*, 873 F.3d at 626. In contrast, the Eighth Circuit Court of Appeals found that Petitioners did not "fall within the class of plaintiffs whom Congress has authorized to sue under the statute." *Id*. at 630.

Thus, with respect to the Petitioners' standing, this case comes to the Court on a Rule 12(b)(1) factual motion to dismiss.

II. A COMPLAINT REQUIRES GENERAL FACTUAL ALLEGATIONS OF INJURY.

A. FRCP 8 and Article III Govern Standing Allegations

Federal Rule of Civil Procedure 8(a)(2) provides that a complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). That statement must simply provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Yet, "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atl. Corp.,* 550 U.S. at 555) (internal quotation marks omitted). As this Court has explained:

> This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. . . . Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that "[n]o technical forms of pleading or motions are required," and Rule 8(f) provides that [a]ll pleadings shall be so construed as to do substantial justice.

Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512-14 (2002) (internal quotation marks omitted). The Federal Rules of Civil Procedure

> were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits.

Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966).

However, Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It requires enough factual content that a court can draw reasonable inferences. *Id.* Moreover, Rule 8 does not relieve the plaintiff of its responsibility to demonstrate Article III standing to the court's satisfaction.

With respect to standing, the plaintiff's complaint must provide "general factual allegations of injury resulting from the defendant's conduct . . .." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Warth v. Seldin*, 422 U.S. 490, 518 (1975). However, the plaintiff need not "allege all of the facts supportive of the chain of causation upon which his allegation of injury rests" because that "would return [the courts] to the unpredictable and fact-laden system of code pleading." *American Soc'y of*

Travel Agents, Inc. v. Blumenthal, 566 F.2d 145, 156 (D.C. Cir. 1977) (Chief Judge Bazelton dissenting). Thus, when combined, FRCP 8 and Article III do not require a technical form to plead standing. A plaintiff is simply required to allege enough facts to allow a court (by making reasonable inferences) to satisfy itself that the plaintiff is entitled to judicial action.

B. A Plaintiff's Injuries Need Not Be Significant

This Court has explained that while an "interest" in a problem does not suffice as an injury, the harm incurred by a plaintiff need not be "significant." It has "allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, *see Baker v. Carr*, 369 U.S. 186 (1962); a $5 fine and costs, *see McGowan v. State of Maryland*, 366 U.S. 420 (1961); and a $1.50 poll tax, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966)." *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669, 690 n.14 (1973) (additional citations omitted). "'The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.'" *Id.* (quoting Kenneth C. Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 613 (1968)). In other words, "[i]njury-in-fact is not Mount Everest." *Danvers Motor Co. v. Ford Motor Co., Inc.,* 432 F.3d 286, 294 (3d Cir. 2005).

Furthermore, plaintiffs do not need to allege monetary harm to support the injury in fact requirement. The injury only needs to be concrete and particularized. *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1548, (2016), *as revised* (May 24, 2016). This Court has recognized injuries based on such things as recreation, aesthetics, electoral districts, and unfair competition. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 183 (2000); *Northeastern Fla. Chapter of Associated Gen. Contractors of America v. City of Jacksonville,* 508 U.S. 656, 666 (1993); *United States v. Hays,* 515 U.S. 737, 744–745 (1995). And those injuries can be intangible. *Spokeo*, 136 S. Ct. at 1549 (explaining that "intangible injuries can . . . be concrete.").

III. THE STANDARDS OF REVIEW FOR FACIAL AND FACTUAL CHALLENGES TO STANDING SHOULD NOT BE ENTANGLED.

In responding to a complaint, a defendant that wishes to challenge a plaintiff's standing has two options. The defendant may make either a *facial* or a *factual* challenge to the allegations. The judicial standards of review differ depending on the nature of the defendant's challenge. *See Constitution Party of Pennsylvania v. Aichele,* 757 F.3d 347, 357 (3d Cir. 2014) ("A district court has to first determine, however, whether a Rule 12(b)(1) motion presents a "facial" attack or a "factual" attack on the claim at issue, because that distinction determines how the pleading must be reviewed.")

If a defendant makes a facial challenge, then a court need only "look to the complaint and see if the plaintiff has sufficiently *alleged* a basis of subject matter jurisdiction." *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009) (emphasis in original); *E.g. Lawrence v. Dunbar*, 919 F.2d 1525, 1528 (11th Cir. 1990); *Menchaca v. Chrysler Credit Corp.,* 613 F.2d 507, 511 (5th Cir. 1980). Furthermore, "courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth,* 422 U.S. at 501. Additionally, at this stage, the courts "presume[] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 889 (1990). Thus, in a facial challenge, courts should fill in the gaps to find that standing exists. They should not conduct lengthy analyses to create reasons that it does not.

In contrast, a defendant may also challenge the plaintiff's standing factually by attacking the underlying assertion of jurisdiction in the complaint. A factual attack "allows the defendant to present competing facts." *Hartig Drug Co. Inc. v. Senju Pharm. Co., Ltd.,* 836 F.3d 261, 268 (3d Cir. 2016); s*ee also Houston v. Marod Supermarkets, Inc.,* 733 F.3d 1323, 1336 (11th Cir. 2013) (providing that a court can review extrinsic evidence); *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991) (explaining that a court may "consider evidence outside the pleading."). Furthermore, a court "need not presume the truthfulness of the plaintiffs' allegations." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

Consequently, when faced with a factual 12(b)(1) motion to dismiss for standing, a plaintiff is forced to provide a factual response. The Court recognized this in *Warth* when it explained there are instances where the trial court may allow the plaintiff to provide evidence beyond the complaint to further its assertion of standing. *Warth*, 422 U.S. at 501. Finally, when a defendant raises a factual challenge to standing a court is naturally free to weigh the evidence. *See Land v. Dollar*, 330 U.S. 731, 735 n.4, (1947) (explaining that "[w]hen a question of the District Court's jurisdiction is raised, . . . [a] court may inquire by affidavits or otherwise, into the facts as they exist."); *Houston,* 733 F.3d at 1336 (explaining that when faced with a factual challenge a court may weigh the evidence and is free to weigh the facts.); *see also Laurens v. Volvo Cars of N. Am., LLC*, 868 F.3d 622, 625 (7th Cir. 2017) (explaining that if "a defendant raises a factual challenge to standing, the plaintiff bears the burden of proving standing by a preponderance of the evidence."); *Superior MRI Servs., Inc. v. All. Healthcare Servs., Inc.*, 778 F.3d 502, 504 (5th Cir. 2015) (same); *McCrory v. Adm'r of Fed. Emergency Mgmt. Agency of U.S. Dep't of Homeland Sec.,* 600 F. App'x 807, 808 (2d Cir. 2015) (same); *United States v. $8,440,190.00 in U.S. Currency*, 719 F.3d 49, 57 (1st Cir. 2013) (same).

Thus, plaintiffs confronting facial 12(b)(1) challenges to standing are provided certain safeguards (i.e. the allegations are presumed true and that they embrace specific facts to support the claim) that are not available when faced with a factual challenge. These safeguards are at risk if

courts do not respect the differences between facial and factual challenges to standing. If a court were to weigh each party's arguments or require a plaintiff to provide evidence in response to a facial challenge, then many proper lawsuits would be dismissed before the discovery phase. Here, the Court is addressing a factual challenge to Petitioners' standing. In addressing the matter, the Court should be careful not to inadvertently elevate the obligations of plaintiffs that confront facial Rule 12(b)(1) challenges to standing.

CONCLUSION

A plaintiff need only provide an identifiable trifle of an injury to satisfy Article III. Furthermore, when a court is reviewing a Rule 12(b)(1) motion to dismiss for lack of Article III standing, the standard of review depends on whether the defendant has made a facial or a factual challenge. It is important that the low standard for a facial challenged not be raised by a decision in this factual challenge case.

Respectfully Submitted,

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