

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-1712

JAMES J. THOLE, ET AL., PETITIONERS,

v.

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

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

MOTION OF THE UNITED STATES
FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT
AS AMICUS CURIAE AND FOR DIVIDED ARGUMENT

Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves for leave to participate in the oral argument in this case as amicus curiae supporting petitioners and for divided argument, and requests that the United States be allowed ten minutes of argument time. Petitioners have agreed to cede ten minutes of argument time to the United States, and thus consent to this motion.

This case concerns whether a participant or beneficiary in a defined-benefit pension plan governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 et seq., has Article III standing to sue plan fiduciaries for alleged breaches

of fiduciary duties in the event the plan is overfunded. It also concerns whether such claims are authorized under ERISA Sections 502(a)(2) and 502(a)(3), 29 U.S.C. 1132(a)(2) and (3). The United States has filed a brief as amicus curiae supporting petitioners, arguing that such participants and beneficiaries have standing for at least three reasons: they have standing to assert claims on behalf of the plan for the plan's injuries; a breach of fiduciary duty, standing alone, constitutes a cognizable injury to a plan participant or beneficiary; and a material increase in risk of monetary injury constitutes a cognizable injury even for participants and beneficiaries in a defined-benefit plan. The United States also argues that the plain text of Section 502(a)(2) and (3) authorizes such participants and beneficiaries to bring suit.

The United States has a substantial interest in the resolution of the issues presented in this case. The Secretary of Labor has primary authority for administering ERISA. 29 U.S.C. 1002(13), 1132-1135. As noted, the United States has filed an amicus brief supporting petitioners, and at the Court's invitation, the United States filed an amicus brief at the petition stage of this case as well.

The United States has participated in oral argument as amicus curiae in previous cases involving the interpretation and application of ERISA. E.g., Retirement Plans Comm. of IBM v. Jander, No. 18-1165 (argued Nov. 6, 2019); Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017); Montanile v. Board of Trustees of Nat'l Elevator Indus. Health Benefit Plan, 136 S. Ct. 651 (2016); Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014). The United States' participation in oral argument is therefore likely to be of material assistance to the Court.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

NOVEMBER 2019