No. _______

In the Supreme Court of the United States

JAMES J. THOLE AND SHERRY SMITH, 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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS 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?

PARTIES TO THE PROCEEDING BELOW

Petitioners are James J. Thole and Sherry Smith, the plaintiffs-appellants below.

Respondents are U.S. Bank, N.A., individually and as successor-in-interest to FAF Advisors, Inc.; U.S. Bancorp; Nuveen Asset Management, LLC, as successor-in-interest to FAF Advisors, Inc.; Richard K. Davis; Douglas M. Baker, Jr.; Y. Marc Belton; Peter H. Coors; Joel W. Johnston; Olivia F. Kirtley; O'Dell M. Owens; Craig D. Schnuck; Arthur D. Collins, Jr.; Victoria Buyniski Gluckman; Jerry W. Levin; David B. O'Maley; Patrick T. Stokes; Richard G. Reiten; Warren R. Stayle; and Does 1-20, the defendants-appellees below.

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James J. Thole and Sherry Smith respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The order denying panel rehearing and rehearing en banc (App., *infra*, 53a-54a) is unreported. The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 873 F.3d 617. The district court's order (App., *infra*, 28a-50a) is unreported but available at 2015 WL 11217175.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2017. The court of appeals denied a petition for panel rehearing and rehearing en banc on February

22, 2018. App., *infra*, 53a-54a. On May 3, 2018, Justice Gorsuch extended the time to file a petition for certiorari to and including June 22, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, and the United States Constitution are reproduced in the appendix to this petition (App., *infra*, 55a-56a).

INTRODUCTION

ERISA was enacted to ensure that participants in employee benefit plans receive the benefits promised them. The "crucible of congressional concern was" plan administrators' "misuse and mismanagement of plan assets." *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 140 n.8 (1985). Congress thus imposed strict duties of loyalty and prudence on the fiduciaries who manage plans, and enforced those protections by empowering plan participants to sue fiduciaries who breach their duties. Congress expressly authorized suits to obtain both injunctive relief (29 U.S.C. 1132(a)(3)) and restoration of plan losses caused by the violations (29 U.S.C. 1132(a)(2)).

This case involves obvious ERISA violations—investing in respondents' own funds (one such investment *still* remains) and flouting the most basic asset-allocation principles by investing the *entirety* of the plan's assets in equities—that caused massive plan losses. Yet the Eighth Circuit held that petitioners cannot maintain claims under 29 U.S.C. 1132(a)(3) or (a)(2) without first suffering the individual financial harm that ERISA is manifestly designed to *prevent*.

Each of the court's holdings—on the Section 1132(a)(3) injunctive-relief claim and the Section 1132(a)(2) loss-restoration claim—is directly at odds with decisions of other courts of appeals and eviscerates enforcement mechanisms whose importance the Department of Labor has repeatedly emphasized to the circuit courts.

Petitioners accordingly raise two certworthy issues that are critical to ERISA's regulatory scheme.

First, the Eighth Circuit's dismissal of petitioners' claim for injunctive relief is particularly disruptive to ERISA and easily satisfies all the Court's traditional criteria for plenary review. The issue is obviously important, and the Eighth Circuit itself acknowledged a split existed (although it incorrectly thought that the Sixth Circuit was on its side). In fact, the court's holding that participants cannot seek *injunctive* relief absent individual *financial* injury squarely conflicts with decisions from the Second, Third, and Sixth Circuits. Those courts hold that no individual financial loss is necessary; violation of petitioners' rights under ERISA is enough to show standing. And there is no chance the Eighth Circuit will reverse course—it denied rehearing over two votes from judges on opposite ends of the jurisprudential spectrum.

Nor will this conflict be difficult for the Court to resolve. The Eighth Circuit stands alone for good reason: Its position severely undermines ERISA's protections and the very rationale for authorizing injunctive relief. According to the majority below, no matter how willful the breach was or whether the fiduciary is still conducting the plan's affairs in the same egregious manner, a participant has no recourse until she actually suffers the exact financial harm Congress wanted to avoid. As every other court of appeals to address the question has recognized, Article III is not so inflexible to demand such a nonsensical result.

A participant suffers harm when her plan's fiduciary breaches his duties, and she may sue to stop him. Indeed, Congress's choice of remedies fits well within the Article III boundaries that this Court has defined. ERISA implements centuries-old traditions of trust law that regularly allowed just such relief even without individual financial harm.

Review is therefore warranted to restore uniformity to ERISA's injunctive-relief remedies and require courts to hear the merits of cases that Congress has validly asked the judiciary to decide.

Second, this case also provides an ideal vehicle for the Court to finally resolve the longstanding confusion over the second question presented: whether a plan participant has standing to sue to restore a plan's losses under Section 1132(a)(2) without alleging individual financial harm. For decades, under Republican and Democratic administrations, the Department of Labor has told the courts of appeals that such standing is proper as a matter of doctrine and essential as a matter of policy. Yet the circuits disagreed until last year, when an unpublished Second Circuit decision adopted the government's position. This Court denied review of that decision, but no one disputed the issue's exceptional importance or frequent recurrence. Rather, percolation supplied the only plausible reason to deny.

It is now clear, however, that this issue will not be resolved without this Court's involvement. Rather than weigh in on Article III standing, the Eighth Circuit took itself off the table. It did so by adopting an indefensible *statutory* interpretation that conflicts with the unanimous views of all five other circuits to consider the issue. Citing the same absence of individual financial harm, the Eighth Circuit held that petitioners did not come within the class of plaintiffs ERISA authorized to sue—even though petitioners sought to restore to the plan the $750 million in losses caused by respondents' breaches of fiduciary duties. That view is plainly incorrect, yet the Eighth Circuit denied rehearing and avoided the Article III morass.

Not only does percolation accordingly lack any meaningful benefit, it is affirmatively harmful. Under the dominant view among the circuits, fiduciaries can brazenly mismanage ERISA plans without fear of liability, so long as they stop short of putting the plan at imminent risk of default. That state of affairs contravenes ERISA's goals, and Article III poses no obstacle to the judiciary faithfully applying ERISA's text. Review is warranted on this question as well.

STATEMENT

A. Statutory Background

ERISA is a landmark federal statute enacted "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 carefully circumscribing plan administration. It requires that plan assets be held in trust, 29 U.S.C. 1103, and imposes strict fiduciary duties on those who manage plan assets, 29 U.S.C. 1104. Fiduciaries owe participants a duty of loyalty, 29 U.S.C. 1104(a)(1)(A), and are expressly forbidden to engage in certain self-dealing transactions absent qualification for an enumerated exemption, 29 U.S.C. 1106. It is widely understood that Congress derived those duties from the common law of trusts. See *Varity Corp.* v. *Howe*, 516 U.S. 489, 496 (1996).

To enforce these duties, ERISA relies heavily on private litigation. For example, the statute imposes personal monetary liability on any fiduciary whose breach causes losses to a covered plan. 29 U.S.C. 1109. It expressly authorizes plan participants and beneficiaries to sue on behalf of their plan to recover such losses. 29 U.S.C. 1132(a)(2) (providing "[a] civil action" "for appropriate relief under section 1109"). It also permits plan participants to seek injunctive relief against fiduciary misconduct. 29 U.S.C. 1132(a)(3) (authorizing lawsuits "to enjoin any act or practice which violates [ERISA]"). The participant may seek removal of the fiduciary and appointment of an independent fiduciary. 29 U.S.C. 1109.

As the Department of Labor has explained across administrations, this private right of action is crucial: "The Secretary depends on participant suits to enforce ERISA, because she lacks the resources to do so singlehandedly, and plan fiduciaries are commonly defendants in such cases." Sec'y of Labor Amicus Br. at 12, *David* v. *Alphin*, No. 11-2181 (4th Cir. Dec. 28, 2011); see also, *e.g.*, Sec'y of Labor Amicus Br. at 1-2, *Thole* v. *U.S. Bank*, No. 16-1928 (8th Cir. May 2, 2017).

Given ERISA's history, that statutory design is unsurprising. Congress simply adopted the longstanding 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, 177-79 (1966-1967) (tracing such suits to the 15th century).

B. Facts And Procedural History

1. Respondent U.S. Bank is among the largest banks in the country. It employs over 70,000 people and offers a pension plan for them. Respondents are sponsors and fiduciaries of that plan, and petitioners are participants in it. App., *infra*, 4a-5a. The plan is a "defined benefit" pension plan, meaning it pays participants a set amount of

benefits fixed by contract. As of 2007, the plan had $2.8 billion in assets. C.A. Rec. 69. But that was soon to change.

Contrary to the Securities and Exchange Commission's "Beginners' Guide to Asset Allocation," and against the warnings of the plan's own investment consultants, respondents invested the *entirety* of the plan's assets in high-risk equities. App., *infra*, 7a-8a; see C.A. Rec. 34, 54, 67, 199. Among these investments was a stake in respondents' own proprietary mutual funds amounting to *over 40%* of the plan's total assets. App., *infra*, 9a. Respondents chose their own funds even though they were more expensive than similar alternatives and doing so flouted ERISA's prohibited-transaction rules. *Ibid.*

These investments violated basic fiduciary principles of prudence and loyalty, and when equity markets crashed in 2008, predictable consequences ensued. The plan lost $1.1 billion dollars—$748 million more than an adequately diversified plan would have. App., *infra*, 8a; C.A. Rec. 70. That loss left the plan reeling: virtually overnight, the plan went from significantly overfunded to 84% underfunded. App., *infra*, 8a.

2.a. Petitioners filed suit, seeking (1) an injunction under 29 U.S.C. 1132(a)(3) to stop the misconduct, remove the fiduciaries, and have an independent fiduciary appointed; and (2) restoration to the plan of the $748 million in losses under 29 U.S.C. 1132(a)(2). After the lawsuit commenced, however, respondents contributed $339 million to the plan, bringing it back to "overfunded" status. U.S. Bancorp 2013 Form 5500. The district court concluded that this robbed the case of any Article III case or controversy (App., *infra*, 40a-46a)—even though subsequent contributions do not offset liability for the losses and respondents remained free to resume their improper actions going forward. In fact, respondents are still violating ERISA's prohibited-transaction rules by investing in a proprietary mutual fund.

b. A partially divided Eighth Circuit panel affirmed. First, the court addressed the loss-restoration claim under Section 1132(a)(2). On that issue, the panel was bound by two Eighth Circuit decisions holding that participants lack a cause of action under the *statute* unless they have suffered an individual financial loss. App., *infra*, 14a-18a. see *Harley* v. *Minn. Mining & Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002); *McCullough* v. *AEGON USA Inc.*, 585 F.3d 1082 (8th Cir. 2009). Following those precedents, the court wrote that a contrary construction would raise Article III concerns, as it thought that a participant in an overfunded defined-benefit plan suffered no actual injury. App., *infra*, 15a. The court also worried about policy implications of "subjecting the Plan and its fiduciaries to costly litigation." *Id.* at 16a. The court thus concluded that a participant who had suffered no financial loss does not "fall[] within the class of plaintiffs authorized under § 1132(a)." *Id.* at 18a. The panel struggled to identify which text supported its holding, instead "presum[ing]" "that the suit would not be one 'for appropriate relief' under the circumstances." *Id.* at 16a n.9.

Second, the panel split on the question of petitioners' standing to bring their Section 1132(a)(3) injunctive-relief claim. The majority held that petitioners lack standing to pursue *injunctive* relief under ERISA unless they have suffered individual *monetary* harm. In reaching this conclusion, the majority recognized that "[c]ases from other circuits have concluded that a plan participant may seek injunctive relief under § 1132(a)(3) against fiduciaries of an overfunded plan" without showing harm to their monetary interests in the plan. *Id.* at 19a (brackets omitted) (citing *Loren* v. *Blue Cross Blue Shield of Mich.*, 505 F.3d 598, 607-10 (6th Cir. 2007); *Horvath* v. *Keystone Health Plan E., Inc.*, 333 F.3d 450, 455-56 (3d Cir. 2003)).

But the majority then concluded the Sixth Circuit had changed course after *Loren*, now requiring individual monetary harm even to seek injunctive remedies. *Id.* at 19a-20a (citing *Soehnlen* v. *Fleet Owners Ins. Fund*, 844 F.3d 576, 583 (6th Cir. 2016)). Believing it was picking one side of a circuit split, the majority concluded that petitioners must show that the "investment loss * * * cause[d] *actual injury* to plaintiffs' interests in the Plan"—*i.e.*, a diminution in their own pensions or the imminent risk thereof. *Id.* at 20a (citation omitted).

c. Judge Kelly dissented in part. She agreed that the panel was bound by *Harley* and *McCullough* on Section 1132(a)(2)'s interpretation. But regarding petitioners' Section 1132(a)(3) claim, she thought the majority was wrong to require individual monetary harm to seek injunctive relief. Given the "unambiguous statutory text" authorizing petitioners' suit, Judge Kelly wrote that petitioners "f[ell] within 'the zone of interests to be protected or regulated'" by Section 1132(a)(3). *Id.* at 25a-26a (Kelly, J., dissenting). Judge Kelly also explained that petitioners had "shown an actual or imminent injury" that could be redressed by an injunction under Section 1132(a)(3). *Id.* at 26a. "The relief sought is not monetary, but injunctive, and the injury alleged is not speculative. Moreover, the complaint alleges that at least some of the defendants continue to serve as Plan fiduciaries and remain positioned to resume their alleged ERISA violations." *Ibid.*

3. Petitioners timely sought rehearing en banc. After calling for a response, the Eighth Circuit denied the petition over the votes of Judge Kelly and Judge Stras. App., *infra*, 54a.

REASONS FOR GRANTING THE PETITION

I. Further Review Of The First Question Presented Is Warranted.

According to the panel majority below, an ERISA plan participant lacks standing to seek injunctive relief under Section 1132(a)(3) against fiduciary misconduct unless she has suffered individual money injury. That holding created a square conflict with the Second, Third, and Sixth Circuits. Each of those courts has explicitly rejected such a requirement; instead, a plaintiff need allege only that the defendant violated a specific fiduciary duty owed to the plaintiff. Indeed, the majority below acknowledged the conflict with the Third and Sixth Circuits (before incorrectly concluding that the Sixth Circuit had changed course).

The Eighth Circuit's position undermines the uniformity that is paramount under ERISA and severely hamstrings Congress's carefully designed ERISA enforcement regime, leaving the Department of Labor to perform a task—policing fiduciary misconduct—it has repeatedly said it cannot do without the help of suits like petititioners'. This entrenched conflict on a substantial question of federal law is accordingly the archetypal question warranting this Court's review.

A. The Eighth Circuit's Resolution Of The First Question Presented Created A Circuit Conflict.

1. As the majority recognized, its dismissal of petitioners' injunctive-relief claim is directly at odds with the Third Circuit's decision in *Horvath*. App., *infra*, 19a. There, a member of an ERISA-governed healthcare plan sued the plan fiduciary for failing to disclose certain material information. 333 F.3d at 452-453. She sought equitable relief under Section 1132(a)(3) in the form of restitution, disgorgement, and an injunction. *Id.* at 455. The

Third Circuit had little trouble concluding that she satisfied Article III's requirements without showing individual monetary harm. It sufficed that "ERISA create[d] in Horvath certain rights, including the rights to receive particular information and to have Keystone act in a fiduciary capacity." *Id.* at 456. The court contrasted the claims for restitution and disgorgement, which did "require [the plaintiff] to demonstrate individual loss." *Ibid.*

The Third Circuit has since reaffirmed *Horvath*'s holding. In *Perelman* v. *Perelman*, 793 F.3d 368, 373 (3d Cir. 2015), the court addressed participants' standing to bring a claim under Section 1132(a)(3) "in the form of restitution or surcharge." In that limited context, the Third Circuit concluded standing depended on individual monetary loss. *Id.* at 373-76. But in reaching that conclusion, the court confirmed that plaintiffs seeking *injunctive* relief need not show individual monetary loss to establish an Article III injury: "With respect to claims for injunctive relief, such injury may exist simply by virtue of the defendant's violation of an ERISA statutory duty." *Id.* at 373.

Petitioners thus would have been able to maintain their injunctive-relief claim had they brought suit within the Third Circuit. They plausibly alleged that respondents breached their fiduciary duties, and the overfunded status of the plan would not have justified dismissal. Contra App., *infra*, 20a. The decision below therefore conflicts directly with the Third Circuit's longstanding view.

2. The Eighth Circuit also departed from decisions of the Sixth Circuit. The court correctly recognized the contrary holding in *Loren*. *Id.* at 19a. Quoting *Horvath*, *Loren* held that a Section 1132(a)(3) injunctive-relief claim does not require "individualized" financial harm; standing validly rested on the "violation of the fiduciary duty owed to [plaintiffs] as a participant in and beneficiary of their

respective ERISA plans." 505 F.3d at 609-610.

The Sixth Circuit cemented that position in *Soehnlen*. Discussing the holdings in *Loren* and *Horvath* that permitted suits "to go forward without compelling plaintiffs to show individualized injury," the court explained that those plaintiffs articulated a "theory of liability" that the "defendants breached their fiduciary duties" (844 F.3d at 584)—the exact theory petitioners advance here. The Sixth Circuit thus held that plaintiffs assert a viable injunctive-relief claim under Section 1132(a)(3) when they "show[] which specific fiduciary duty or specific right owed to them was infringed." *Id.* at 585. The court affirmed the dismissal, however, because the *Soehnlen* plaintiffs, participants in an ERISA-governed health plan, "merely" stated that "the plan is deficient" and failed to identify the breach of any specific fiduciary duty imposed by Sections 1104 or 1106. *Id.* at 580-81, 584-85. By contrast, petitioners' complaint readily satisfies *Soehnlen*'s test.

The Eighth Circuit was thus wrong to think that *Soehnlen* backtracked from *Loren*. The majority mistakenly focused on *Soehnlen*'s *alternative* basis for establishing standing, *i.e.*, by showing that the defendants' "misconduct" "'create[d] or enhance[d] a risk of default by the entire plan.'" 844 F.3d at 585; compare App., *infra*, 19a-20a. The plaintiffs' "speculative" contentions on that front did not suffice. 844 F.3d at 585. But *Soehnlen* left no doubt that a participant *also* may allege breach of a specific fiduciary duty imposed by ERISA; the *Soehnlen* plaintiffs simply failed to do so. Petitioners thus plainly would have secured a favorable result under *Soehnlen*.[1]

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[1] Even were the Eighth Circuit correct about the Sixth Circuit's position, an entrenched circuit split would exist with the Second and Third Circuits.

3. Also in direct conflict with the decision below, the Second Circuit has rejected individual monetary harm as a prerequisite to seeking injunctive relief under Section 1132(a)(3). Agreeing with *Horvath*, the Second Circuit held that an ERISA plaintiff "may have Article III standing to obtain injunctive relief related to ERISA's * * * fiduciary duty requirements without a showing of individual [monetary] harm." *Cent. States Se. & Sw. Areas Health & Welfare Fund* v. *Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 199 (2d Cir. 2005). And the court later clarified that the plaintiff "must allege some injury or deprivation of a specific right that arose from a violation of [a fiduciary] duty," but need not allege individual economic harm. *Kendall* v. *Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009); see also, *e.g.*, *Gates* v. *United Health Grp., Inc.*, No. 11 Civ. 3487 (KBF), 2012 WL 2953050, at *9 (S.D.N.Y. July 16, 2012).

The panel majority thus did not take one side of an existing circuit split; the Second, Third, and Sixth Circuits all agree that a plaintiff has standing to seek injunctive relief under Section 1132(a)(3) based on a breach of fiduciary duty specifically codified by ERISA, regardless of individual financial harm. In holding otherwise, the Eighth Circuit stands in conflict with every other circuit to address the issue.

B. The First Question Presented Frequently Recurs, And The Department Of Labor Has Repeatedly Explained Its Exceptional Importance To ERISA's Enforcement Scheme.

An ERISA plan participant's ability to sue for injunctive relief is an obviously important question that arises with a frequency commensurate with that magnitude.

First, this Court has emphasized the significance of maintaining uniformity in the ERISA context. See, *e.g.*, *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379

(2002). The Eighth Circuit alone demands that a participant show individual money injury to obtain injunctive relief, even though such relief would plainly remedy the fiduciary misconduct that ERISA so carefully guards against. That misunderstanding of Article III's case-and-controversy requirement leaves a gaping hole in the enforcement of ERISA's protections.

Second, claims like petitioners are indeed critical to ERISA's comprehensive regulatory scheme. ERISA's overriding purpose is to protect employee benefits and give participants the tools to enforce those protections. 29 U.S.C. 1001(b). Although a participant also may seek restoration of losses caused by fiduciary breach, heading off fiduciary misconduct *before* it causes losses is even more fundamental to safeguarding benefits. That is precisely why Congress broadly authorized participants "to enjoin any act or practice that violates [ERISA]." 29 U.S.C. 1132(a)(3). The upshot of the Eighth Circuit's rule, however, is that fiduciary breaches will go unchecked *unless and until* they cause the very problem ERISA was designed to prevent—lost pensions.[2]

In amicus briefs across multiple administrations, the Secretary of Labor has confirmed the need for these claims: "The Secretary depends on participant suits to enforce ERISA, because she lacks the resources to do so singlehandedly, and plan fiduciaries are commonly defendants in such cases." Sec'y of Labor Amicus Br. at 12, *David*

[2] Moreover, once a fiduciary's malfeasance has reached the point of causing losses to participants' pensions, there can be no guarantee the fiduciary will have the wherewithal to repay the plan. Although the Pension Benefit Guaranty Corporation (PBGC) attempts to mitigate this risk, the PBGC has itself explained that it is chronically underfunded and cannot reliably prevent participants from losing their pensions. See PBGC Amicus Br. at 3, 5, *David* v. *Alphin*, No. 11-2181 (4th Cir. Dec. 23, 2011).

v. *Alphin*, No. 11-2181 (4th Cir. Dec. 28, 2011); see also Sec'y of Labor Amicus Br. at 1-2, *Thole* v. *U.S. Bank, N.A.*, No. 16-1928 (8th Cir. May 2, 2017). The Secretary has further explained that "[t]he constraints on the Secretary's ability to bring suit are recognized by the statute's authorization of suits by private litigants as well as its legislative history." Sec'y of Labor Amicus Br. at 12, *David*, No. 11-2181. Thus, holding that participants lack standing unless they have suffered individual financial harm "permit[s] obvious harms to plans to go unremedied except in the relatively few cases the Secretary is able to pursue." *Ibid.*

Third, the Eighth Circuit has "'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Sprint Commc'ns, Inc.* v. *Jacobs*, 571 U.S. 69, 77 (2013); see *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (while Congress may not expand federal courts' jurisdiction beyond its constitutional limits, "'a federal court's obligation to hear and decide' cases" that *are* within its jurisdiction "'is virtually unflagging'"). The Eighth Circuit's refusal to hear claims that Congress has authorized, in contrast with every other circuit to consider them, warrants review.

Fourth, in light of the obvious importance of participant suits for remedying ERISA violations, it is no surprise that this issue frequently recurs. Indeed, since the decision below issued, it has arisen twice more in the Eighth Circuit *alone*. See *Erickson* v. *AmeriCold Logistics, LLC*, 2018 WL 204883, at *3 (D. Minn. May 2, 2018); *Innis* v. *Bankers Trust Co. of S. Dak.*, No. 4:16-cv-00650-RGE-SBJ, 2017 WL 4876240, at *6 (S.D. Iowa Oct. 13, 2017). It also arises regularly in other courts across the country. See, *e.g.*, *Wit* v. *United Behavioral Health*, No. 14-cv-02346-JCS, 2017 WL 3478775, at *15 (N.D. Cal.

Aug. 14, 2017); *Harper* v. *Everson*, No. 3:15-CV-00575-JHM, 2016 WL 8201785, at *5 (W.D. Ky. June 27, 2016); *A.F.* ex rel. *Legaard* v. *Providence Health Plan*, 300 F.R.D. 474, 480-481 (D. Or. 2013); *Gates*, 2012 WL 2953050, at *9; *Wells* v. *Cal. Physicians' Serv.*, No. C-05-01229-CRB, 2007 WL 926490, at *3-*5 (N.D. Cal. Mar. 26, 2007). The issue's frequent recurrence, coupled with Congress's and the Secretary's reliance on such suits to enforce ERISA, confirms the need for this Court's review.[3]

C. The Court's Resolution Of The First Question Presented Is Incorrect.

Review is also warranted because the Eighth Circuit's decision is incorrect. Congress's reliance on participant suits to remedy ERISA violations was not of its own creation. That enforcement mechanism derives from the centuries-old trust-law tradition of beneficiaries suing breaching trustees even absent individualized money harm. See, *e.g.*, H.R. Conf. Rep. 93-1280, 1974 U.S.C.C.A.N. 5038, 5087 (1974) (explaining that ERISA's "prohibited transaction rules * * * correspond[] to the traditional focus of trust law and of civil enforcement of fiduciary responsibilities through the courts"). This tradition shows that Congress stayed well within the bounds of Article III in authorizing such lawsuits.

1. To ensure courts stay within Article III's cases-and-controversies limit, this Court has "established that 'the irreducible constitutional minimum' of standing consists of three elements. The plaintiff must have (1) suffered an

[3] *Innis* incorrectly stated that the decision below held a plaintiff under Section 1132(a)(3) need show financial harm only to *the plan*. If that were correct, petitioners would indisputably have had standing: everyone agrees that the plan suffered a loss (of approximately $750 million). The decision below in fact explained that, to have standing to seek injunctive relief under Section 1132(a)(3), the plan's loss must affect "the plaintiffs' interest in the Plan." App., *infra*, 20a.

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, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

The issue here primarily concerns "injury 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). The Court has made clear that, in the eyes of Article III, intangible injuries can be no less concrete than straightforward, tangible economic or physical injuries. *Spokeo*, 136 S. Ct. at 1549.

"In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Ibid.* "Congress [has the] power to define injuries and articulate chains of causation that will give rise to a case or controversy." *Ibid.* (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)). And courts also must "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." *Ibid.*; see also *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 274 (2008); *Vt. Agency of Nat. Res.* v. *United States* ex rel. *Stevens*, 529 U.S. 765, 774 (2000).

2. Here, both considerations—history and Congress's judgment—show Congress permissibly authorized participants to seek an injunction against fiduciary misconduct regardless of individual financial ham.

a. First, it is beyond reasonable dispute that Congress authorized suits like this one to vindicate participants' concrete, real-world—and, indeed, common-sense—interest in having pension plans free from fiduciary misconduct. This Court has observed that "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future." *Russell*, 473 U.S. at 140 n.8; see also, *e.g.*, *Metro. Life Ins. Co.* v. *Glenn*, 554 U.S. 105, 114 (2008); H.R. Rep. No. 533, 93d Cong., 1st Sess. 1, 3 (1973). Congress expressly declared ERISA's goal of protecting participants from such malfeasance "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 implemented 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. Second, Congress gave participants a tool to protect their interest in having an ERISA plan free from fiduciary misconduct: a private cause of action to enjoin that misconduct. See 29 U.S.C. 1132(a)(3).

Congress's judgment is thus clear: Fiduciary breaches (like the ones here) harm participants' interests and should be redressable in the federal courts regardless of individual financial loss. Section 1132(a)(3) 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 petitioners'. Comparable suits have been permitted at common law for centuries. See Scott, *supra*, 39 U. Colo. L. Rev. at 177-179.

Petitioners allege that respondents violated, among other things, the fiduciary duty of loyalty by engaging in self-dealing transactions. 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).

It is also blackletter law that injunctive relief is an appropriate remedy in such cases. See, *e.g.*, Restatement (Third) of Trusts §§ 93, 94(1) (explaining that a beneficiary may sue a trustee "to enjoin or redress a breach of trust," which is "a failure by the trustee to comply with any duty that the trustee owes, as trustee, to the [trust's] beneficiaries"). Trust law is thus clear that the breach of fiduciary duty is *itself* a remediable harm, regardless of any financial injury.

3. This historical tradition, alongside Congress's clear judgment, settle the matter with respect to injury in fact. And as Judge Kelly observed in dissent below, injunctive relief is also perfectly tailored to redress petitioners' injuries. Indeed, her observations on this score highlight a simple practical reality that the majority ignored: it makes no sense to premise a participant's ability to seek *injunctive* relief on whether the participant suffered *monetary* harm.

Judge Kelly aptly summarized the obvious way that injunctive relief would redress petitioners' injuries:

> [T]he defendants invested the entirety of the Plan's assets in high-risk/high-reward equities, in violation of their fiduciary duties under §§ 1104-1106, and that as a result the Plan suffered a loss of $1.1 billion, causing the Plan to fall from being significantly overfunded in 2007 to being 84 percent underfunded in 2008. The relief sought is not monetary, but injunctive, and the injury alleged is not speculative. Moreover, the complaint alleges that at least some of the defendants continue to serve as Plan fiduciaries and *remain posi-*

> *tioned to resume their alleged ERISA violations*.

App., *infra*, 26a (Kelly, J., dissenting) (citations omitted) (emphasis added).

Such injunctive relief is particularly necessary here. Respondents remain in violation of ERISA's prohibited-transaction rules by maintaining an investment in a mutual fund that U.S Bancorp manages. As of December 31, 2016, that investment totaled nearly $40 million.[4] Moreover, petitioners sought both removal of the offending fiduciaries and appointment of an independent fiduciary, neither of which has occurred. Given, as Judge Kelly put it, that "defendants continue to serve as Plan fiduciaries and remain positioned to resume their alleged ERISA violations," such injunctive relief is entirely likely to redress petitioners' injuries.

D. This Case Is The Ideal Vehicle To Address The First Question Presented.

This case provides a perfect vehicle to address the question presented. This issue was outcome-determinative on petitioners' claim for injunctive relief; it was the sole basis for the Eighth Circuit's decision on this claim; both sides of the issue were vetted by thorough majority and dissenting opinions; and the court both recognized and evaluated the existing circuit split. The issue is thus perfectly teed up for this Court's resolution.

Nor will the conflict resolve itself through additional percolation. Petitioners sought rehearing en banc, arguing that the Eighth Circuit stands alone on this issue. But after calling for a response, the court denied rehearing

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[4] See U.S. Bancorp Form 5500 for the U.S. Bank Pension Plan, Schedule H, Line 4i (Financial Statements and Supplemental Schedules p.19) (filed Oct. 3, 2017), available at https://www.efast.dol.gov/portal/app/disseminatePublic?execution=e2s1.

over the votes of two judges from opposite ends of the jurisprudential spectrum (Judge Kelly and Judge Stras). The decision below will remain the court's last word unless this Court intervenes.

And given that the three other circuits to address the issue have agreed unanimously and repeatedly with the contrary view, it is inconceivable that every one of them will reconsider. Therefore, until this Court steps in, cases like this one will come out differently depending on the circuit in which they are filed. Such division is particularly intolerable in the context of ERISA. Review is warranted.

II. Further Review Of The Second Question Presented Is Also Warranted.

The Eighth Circuit's dismissal of petitioners' injunctive-relief claim under Section 1132(a)(3) plainly satisfies all the Court's usual criteria for certiorari. This case, however, also cleanly presents a second, independent question that warrants the Court's review: May an ERISA plan participant seek restoration of plan losses caused by fiduciary breach under 29 U.S.C. 1132(a)(2) without demonstrating individual financial harm?

The lower courts are deeply confused about that question, and after the Eighth Circuit's decision here, it is clear that this confusion will persist without this Court's involvement. For decades the Department of Labor has argued that participants have Article III standing to bring these claims. Recently, in *Fletcher* v. *Convergex Grp., L.L.C.*, 679 F. App'x 19 (2d Cir. 2017) (unpublished), *cert. denied* 138 S. Ct. 644 (Jan. 8, 2018), the Second Circuit adopted the government's position. The Fourth, Fifth, Sixth, and Ninth Circuits, however, have held the opposite.

Rather than offer its views on Article III, the Eighth Circuit here sidestepped the debate by adopting an indefensible reading of Section 1132(a)(2) that every other circuit has rejected, and that cannot be reconciled with this Court's statement that "[t]here can be no disagreement" that Section 1132(a)(2) "authorizes a beneficiary to bring an action against a [breaching] fiduciary." *Russell*, 473 U.S. at 140. There is accordingly no point to further percolation. The Eighth Circuit will not change its mind, and nobody denies that the loss-restoration issue is enormously significant to ERISA's reticulated scheme.

This Court's review is thus warranted to resolve both the split over Section 1132(a)(2)'s meaning and the intolerable lower court division over Article III standing.[5]

A. The Second Question Presented Has Long Confounded The Lower Courts.

1. The circuits are hopelessly confused about whether a plan participant has Article III standing to seek loss restoration under Section 1132(a)(2) absent individual monetary harm. This question is cleanly presented here, and it has divided courts nationwide and spurred amicus filings by the Department of Labor in multiple circuits across multiple administrations.

a. On one side of the issue are the Second Circuit and the government. Two Second Circuit decisions have unequivocally found Article III standing for participants in cases like this one. In *Fletcher*, the court evaluated a defined-benefit plan participant's Article III standing to

[5] Although the Court should review the second question presented, alternatively, the Court should summarily reverse the Eighth Circuit for reaching Section 1132(a)(2)'s meaning before addressing Article III standing. After *Steel Co.*, it is hornbook law "that Article III jurisdiction is always an antecedent question." 523 U.S. at 101. And after *Lexmark*, it is clear that the zone-of-interests inquiry "'does not implicate * * * the court's statutory or constitutional *power* to adjudicate the case.'" 134 S. Ct. at 1387 n.4.

bring a claim under Section 1132(a)(2) without demonstrating individual financial loss. The court expressly held that constitutional standing existed based on the participant's "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" plan. 679 F. App'x at 20-21. The court reached that holding even though the plan's loss did not create a risk of default. Cf. *Fletcher* v. *Convergex Grp. LLC*, 164 F. Supp. 3d 588, 591 (S.D.N.Y. 2016).

Although *Fletcher* itself was an unpublished decision, it relied on a footnote from an earlier published decision that also unequivocally found standing absent individualized financial harm:

> We also reject the Administrators' argument that LIHS and the Class lack constitutional standing because they have not suffered an injury-in-fact. As discussed, LIHS and the Class have asserted their claims in a derivative capacity, to recover for injuries to the Plan caused by the Administrators' breach of their fiduciary duties. This is injury-in-fact sufficient for constitutional standing.

L.I. Head Start Child Dev. Servs., Inc. v. *Econ. Dev. Comm'n of Nassau Cty., Inc.*, 710 F.3d 57, 67 n.5 (2d Cir. 2013) (citation omitted).

District court decisions have read these cases as establishing standing for claims like petitioners'. See *Carver* v. *Bank of N.Y. Mellon*, No. 15 Civ. 10180 (JPO), 2017 WL 1208598, at *4 (S.D.N.Y. Mar. 31, 2017); *Allen* v. *Bank of Am. Corp.*, No. 15 Civ. 4285 (LGS), 2016 WL 4446373, at

*5 (S.D.N.Y. Aug. 23, 2016).[6]

These decisions adopt the government's longstanding view on this issue. Under the administrations of Presidents Bush, Obama, and Trump, the Department of Labor (along with the PBGC) has repeatedly argued that Article III permits participants to sue for restoration of plan losses under Section 1132(a)(2) regardless of individual financial harm. See Sec'y of Labor Amicus Br. at 8-28, *Thole* v. *U.S. Bank*, No. 16-1928 (8th Cir. May 2, 2017); Sec'y of Labor Amicus Br. at 6, *Fletcher* v. *Convergex Grp., LLC*, No. 16-734 (2d Cir. June 27, 2016); Sec'y of Labor Amicus Br. at 15-17, *David* v. *Alphin*, No. 11-2181 (4th Cir. Dec. 28, 2011); Sec'y of Labor Amicus Br. at 1-12, *Harley*, No. 00-2214 (8th Cir. May 22, 2002) (brief filed by then-solicitor of Labor Eugene Scalia); see also PBGC Amicus Br. at 8-15, *David* v. *Alphin*, No. 11-2181 (4th Cir. Dec. 23, 2011). This side of the division is accordingly well vetted. See also, *e.g.*, *McCullough*, 585 F.3d 1088-1091) (Bye, J., dissenting) (explaining that a participant may sue based on "the Plan's injuries" because "he possesses the right to prosecute the Plan's claim pursuant to § 1132(a)(2)").

b. Contrary to the Second Circuit and the Department, the Fourth, Fifth, Sixth, and Ninth Circuits have rejected participant standing in this context. See *Lee* v. *Verizon Commc'ns, Inc.*, 837 F.3d 523, 544-548 (5th Cir. 2016); *David* v. *Alphin*, 704 F.3d 327, 334-339 (4th Cir.

[6] Although two district courts *before Fletcher* concluded that *Long Island Head Start* did not speak definitively to the Second Circuit's position on this issue, petitioners are unaware of any post-*Fletcher* case that has done so. *Forte* v. *U.S. Pension Comm.*, No. 1:15-CV-4936, 2016 WL 5922653, at *7 (S.D.N.Y. Sept. 30, 2016); *In re UBS ERISA Litig.*, No. 1:08-CV-06696, 2014 WL 4812387, at *7 (S.D.N.Y. Sept. 29, 2014).

2013); *Loren*, 505 F.3d at 608-609; *Glanton* v. *AdvancePCS Inc.*, 465 F.3d 1123, 1125-1127 (9th Cir. 2006); see also *Duncan* v. *Muzyn*, 885 F.3d 422, 428-29 (6th Cir. 2018) (reaffirming the Sixth Circuit's position in the specific context of a defined-benefit pension plan). *Duncan*, the most recent decision, encapsulates this position. The court wrote (over a dissent) that a participant lacks an Article III injury because he "has an interest only in his defined benefits—not in the entirety of the plan's assets." 885 F.3d at 428. If the plan's loss does not "put[] his defined benefits in jeopardy," then no individual injury occurred. *Ibid.*

The disagreement among the circuits is accordingly clear: the Second Circuit stands on one side (with the government), while the Fourth, Fifth, Sixth, and Ninth Circuits stand on the other. That conflict, particularly in the context of ERISA and on a question of such importance, warrants review by this Court.

c. Petitioners acknowledge that the Court denied the petition in *Fletcher* on this identical issue, but at that time the benefit of further percolation outweighed the need for the Court's review on this important question. That is no longer so, as the case for additional percolation has evaporated. First, by sidestepping the Article III issue, the Eighth Circuit has effectively removed itself from the debate. Its decision is thus percolation *defeating*; there is no longer any possibility the Eighth Circuit will reconsider its position. Second, the Sixth Circuit—which was among the most likely circuits to reconsider its view on Section 1132(a)(2) in light of its position on Section 1132(a)(3), *supra* at 11-12—instead recently reaffirmed its position over a vigorous dissent, signaling that its view will also remain entrenched until this Court intervenes. *Duncan*, 885 F.3d at 428-29. Given the decades-old, pitched battle on this issue, and multiple circuits' recent decisions reaffirming their positions, it is now clear this question will not be resolved without this Court's review.[7]

2. In addition to the disagreement over Article III, the circuits are divided over how to read 29 U.S.C. 1132(a)(2). The Eighth Circuit's interpretation of that provision plainly conflicts with that of every other circuit to address it. Indeed, in opposing rehearing below, respondents did not even attempt to defend the correctness of the Eighth Circuit's construction.

Section 1132(a)(2) authorizes a "participant" to sue a plan "fiduciary for appropriate relief under section 1109." In turn, Section 1109 requires a fiduciary who has violated his duties "to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. 1109. Despite petitioners' allegations that respondents breached their duties and that the plan consequently incurred losses, the Eighth Circuit concluded that petitioners did not "f[all] within the class of plaintiffs whom Congress has authorized under § 1132(a)(2) to bring suit." App., *infra*, 17a. Without parsing any particular language, the court reasoned that where a plan is "overfunded," any "investment loss [does] not cause actual injury to plaintiffs' interests in the Plan"—*i.e.*, financial loss to the participants' pensions or the imminent risk thereof. *Id.* at 15a

[7] Counsel for petitioners here opposed the petition for certiorari in *Fletcher*, arguing (1) that *Fletcher*, as an unpublished decision, did not definitively announce the Second Circuit's position and (2) that further percolation was warranted. Resp. Br. in Opp. at 8-17, *Convergex Grp., LLC* v. *Fletcher*, No. 17-343 (U.S. Nov. 27, 2017). But counsel never disputed that *Fletcher* and *Long Island Head Start* conflict with the positions of the Fourth, Fifth, Sixth, and Ninth Circuits. The conflict is clear and beyond dispute, and, as noted, further percolation would be fruitless.

(quoting *Harley*, 284 F.3d at 907).[8]

Every other circuit to address this question of statutory interpretation has reached the opposite conclusion from the Eighth Circuit. The Second, Fourth, Fifth, Sixth, and Ninth Circuits have all agreed that the statute permits these claims (even if some circuits have said Article III does not). For instance, the Ninth Circuit found that a participant "easily fit[]" Section 1132(a)(2) for the simple reason that it was suing for a loss to the plan caused by a breach of fiduciary duty. *Glanton*, 465 F.3d at 1124. And the Second Circuit similarly interpreted the statute to cover suits by "participants" that "prayed for relief inuring to the Plan." *L.I. Head Start*, 710 F.3d at 65-66. Other circuits have held likewise. See, *e.g.*, *Lee*, 837 F.3d at 544, 546-47; *David*, 704 F.3d at 332; *Loren*, 505 F.3d at 607-08.

The Eighth Circuit's interpretation is also irreconcilable with this Court's precedents. For example, in analyzing a different question under Section 1132(a)(2), this Court has said "[t]here can be no disagreement with the * * * conclusion that § [1132](a)(2) authorizes a beneficiary to bring an action against a fiduciary who has violated § [11]09." *Russell*, 473 U.S. at 140; see also *id.* at 141 n.9 (Section 1132(a)(2) "authorizes suits by * * * participants."); *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 53 (1987) ("A participant or beneficiary may also bring a cause of action for breach of fiduciary duty" under Sections 1132(a)(2) and 1109). Although these statements are dicta, they reflect a straightforward reading of the statute that forecloses the Eighth Circuit's position.

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[8] The court emphasized that it resolved the Section 1132(a)(2) issue "on statutory grounds, not Article III grounds." App., *infra*, 15a. It "presume[d]" that the claim "would not be one 'for appropriate relief.'" *Id.* at 16a n.9.

The Eighth Circuit has accordingly created a clear circuit conflict regarding the meaning of Section 1132(a)(2). Resolving that split is simple—the Eighth Circuit's reading of the statute is plainly incorrect—and it is worthy of this Court's review.

B. The Second Question Presented Arises In Virtually Every ERISA Defined-Benefits Case, And The Department Of Labor Has Consistently Emphasized Its Exceptional Importance.

Although "defined contribution plans" "dominate the retirement plan scene today," *LaRue* v. *DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008), defined-benefit plans continue to form a critical part of the nation's retirement system—they are typically quite large (the plan here has billions of dollars in assets), and they collectively have over $2.8 trillion in assets and 37 million participants.[9]

As the numerous decisions cited above reveal, cases involving fiduciary misconduct in the management of defined benefit plans arise regularly. But given the size and design of such plans, even in cases (like this one) where the fiduciary misconduct is obvious and the losses are in the hundreds of millions of dollars, the effect on any individual's pension may not immediately come to bear. See PBGC Amicus Br., *supra*, at 7-13. Accordingly, the question of participants' standing to seek restoration of plan losses absent individual loss (or imminent risk thereof) arises constantly in defined-benefit cases.

Yet the Eighth Circuit's denial of participants' inabil-

[9] Employee Benefits Security Administration, *Private Pension Plan Bulletin* Table A1 (Feb. 2018), https://www.dol.gov/sites/default/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2015.pdf.

ity to seek restoration of plan losses leaves the Department of Labor with the impossible task of litigating all such cases itself. As discussed *supra* at 14-15, however, the Secretary lacks the resources to do this—Congress and the Department contemplate participant suits to police the vast majority of fiduciary misconduct. That is why the Secretary has filed an amicus brief in support of participant standing in nearly every case that has reached the courts of appeals over the last two decades. That sustained effort itself confirms the importance of this issue.

Nonetheless, except in the Second Circuit, participants remain unable to play the role that Congress and the Department envision. The result is that even egregious fiduciary misconduct will often go unpunished. Indeed, under the majority rule, bad-faith fiduciaries can openly take tens or hundreds of millions of dollars from ERISA plans for themselves, in blatant contravention of ERISA's fiduciary standards. But until that misconduct results in actual pension reductions, it will be remedied only in the few cases the Secretary can pursue. That result directly frustrates Congress's unambiguously expressed intent and the needs of the executive agency tasked with carrying out Congress's enforcement scheme.

C. The Court's Resolution Of The Second Question Presented Is Incorrect.

This Court's review is also warranted because the decision below was incorrect.

1. The question whether ERISA plan participants can bring suit under Section 1132(a)(2) absent individual financial injury involves both a statutory and a constitutional component. The Eighth Circuit's conclusion that petitioners fell outside the statute's zone of interests because they had not suffered individual financial harm is indefensible.

Section 1132(a)(2) provides that "[a] civil action may be brought * * * *by a participant* * * * for appropriate relief" against a breaching fiduciary, including restoration of losses caused by the breach. 29 U.S.C. 1132(a)(2), 1109 (emphasis added). The statute speaks plainly and broadly. It does not turn on the participant's own loss; it expressly contemplates participants seeking recovery on behalf of *the plan* for *the plan*'s losses.

Based on this expansive language, the Court has explained that "[t]here can be no disagreement with the * * * conclusion that § [1132](a)(2) authorizes a beneficiary to bring an action against a fiduciary who has violated § [11]09." *Russell*, 473 U.S. at 140; see also *id.* at 141 n.9. And every other circuit to address the issue has held that the statute authorizes participant suits regardless of individual financial harm. *Supra* at 28. The answer to this question is so clear that respondents did not even try to defend the Eighth Circuit's reading of the statute below. The Eight Circuit plainly erred.

2. Petitioners also have Article III standing to pursue their Section 1132(a)(2) claim.

The Article III analysis under Section 1132(a)(2) largely mirrors the analysis under Section 1132(a)(3). The participant's injury is the invasion of her right to a plan free from fiduciary misconduct—an intangible injury that Congress has made actionable based on centuries of common-law precedent. *Supra* at 16-20.

The inquiry under Section 1132(a)(2), however, also raises another factor: participants suing under Section 1132(a)(2) seek recovery in a representative capacity *on behalf of the plan*. See *Russell*, 473 U.S. at 142 n.9. Standing in this context—sometimes referred to as "representational standing"—is hardly unusual. This Court has recognized a number of contexts in which it is appropriate. 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."); *Vt. Agency*, 529 U.S. at 765 (representational suits by *qui tam* relators on behalf of the United States); *McCullough*, 585 F.3d at 1089-1091 (Bye, J., dissenting). So, too, here.

Again, the strong historical tradition underpinning this type of representational suit shows that petitioners have standing. As discussed above, trust law has been clear for centuries that trust beneficiaries alleging a breach of loyalty may sue to restore trust losses without *any inquiry* into whether the fiduciary's misconduct caused the beneficiary financial harm. See *supra* at 18-20. 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 777-78). Accordingly, Congress stayed well within the confines of Article III in authorizing representational suits under Section 1132(a)(2).

D. This Case Is An Ideal Vehicle To Address The Second Question Presented.

This case is an optimal vehicle for resolving this important issue. The question was dispositive of petitioners' loss-restoration claim and provided the sole basis for the Eighth Circuit's decision. The parties, along with the Department of Labor, joined issue on both the meaning of the statute and Article III. And there are no unresolved factual issues that could hamper this Court's ability to resolve those legal issues. This significant question is accordingly ripe for the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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