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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in holding that plan participants who face no risk of actual injury from a purported breach of fiduciary duty lack statutory standing to seek injunctive relief under 29 U.S.C. § 1132(a)(3).

2. Whether the Eighth Circuit erred in holding that plan participants who suffered no actual injury from a purported breach of fiduciary duty lack statutory standing to seek monetary relief under 29 U.S.C. § 1132(a)(2).

CORPORATE DISCLOSURE STATEMENT

Respondent U.S. Bank National Association is a wholly-owned subsidiary of Respondent U.S. Bancorp, a publicly held Delaware corporation. U.S. Bancorp is traded on the New York Stock Exchange under the symbol "USB." No publicly held corporation owns ten percent or more of the stock of U.S. Bancorp.

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INTRODUCTION

Petitioners (referred to here as Plaintiffs) are participants in respondent U.S. Bancorp's defined-benefit retirement Plan. They are entitled to fixed benefits—which they have received, and will continue to receive, for the rest of their lives.

Plaintiffs challenge certain investment decisions Plan fiduciaries made more than a decade ago, claiming those decisions reduced the Plan's assets. Because Plaintiffs' benefits are fixed, however, these purported Plan losses have had (and will have) no effect on Plaintiffs themselves—as they do not now dispute. The district court also found there is no reasonable possibility that the challenged investment practices will again be implemented. Nevertheless, Plaintiffs claim that ERISA authorizes them to seek both monetary and injunctive relief for the wholly abstract breaches of fiduciary duty they allege.

The Eighth Circuit correctly rejected that proposition, holding that neither ERISA provision Plaintiffs invoke authorizes suits brought by individuals with no injury or risk of future injury. As the court emphasized, a contrary conclusion would raise serious constitutional concerns.

Plaintiffs' efforts to transform this straightforward holding into a question demanding this Court's review are unavailing. Indeed, this Court denied a petition raising the same ERISA Section 1132(a)(2) claim earlier this year. *Convergex Grp., L.L.C. v. Fletcher*, 138 S. Ct. 644 (2018). As remains true, no court of appeals has held that plan participants in Plaintiffs' circumstances can satisfy Article III's injury-in-fact requirement. Nothing in the Eighth Circuit's decision reaching the same result on statutory-standing grounds renders the issue now worthy of review.

The Eighth Circuit's rejection of Plaintiffs' claim for injunctive relief under Section 1132(a)(3) also does not merit review. Contrary to Plaintiffs' contentions, no court of appeals has held that uninjured plan participants may seek to enjoin any and all breaches of fiduciary duty. And even if there were some division on this question, this case would be a poor vehicle in which to address it given the district court's factual finding that there is no threat the challenged practices will recur.

The petition should be denied.

STATEMENT

A. Statutory Background

ERISA governs two types of retirement plans: defined-contribution and defined-benefit plans. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999). A defined-contribution plan, such as a 401(k), offers "an individual account for each participant" and provides benefits based on "the amount contributed to the participant's account, and any income, expenses, gains and losses." 29 U.S.C. § 1002(34). "[E]ach beneficiary is entitled to whatever assets are dedicated to his individual account," and thus the risk of a decline in asset value falls on the beneficiary. *Hughes*, 525 U.S. at 439.

By contrast, a defined-benefit plan guarantees participants a "fixed periodic payment" upon retirement. *Ibid.* (quotation marks omitted); *see* 29 U.S.C. § 1002(35). This payment does not depend on the value of individual beneficiary accounts, and participants have no right to any surplus plan assets. Because participants' retirement benefits are fixed and do not depend on the value of the plan's "general pool of assets," the "employer typically bears the entire investment risk." *Hughes*, 525 U.S. at 439. That is, the employer "must cover any underfunding as the result of a shortfall that may occur from the plan's investments." *Ibid.*

To ensure employers can meet these obligations, ERISA "require[s] defined benefit plans (but not defined contribution plans) to satisfy complex minimum funding requirements." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008). A measurement called the Funding Target Attainment Percentage, or "FTAP," determines whether a plan is on track. 29 U.S.C. § 1083(d). FTAP is a ratio that compares the actuarial value of a plan's assets to the actuarial value of its liabilities. *Id.* §§ 1083(d), (g), (h). If a plan's FTAP is under 100%, the plan is said to be "underfunded," and the plan's sponsor must make a contribution. *See id.* § 1083(a). If the FTAP is over 100%, the plan is actuarially "overfunded," and the sponsor need not make additional contributions. *Hughes*, 525 U.S. at 440.

B. Factual Background

1. The Plan

The U.S. Bank Pension Plan (the "Plan") is a defined-benefit Plan sponsored by U.S. Bancorp. Complaint ¶¶53-56. U.S. Bancorp contributes to a Plan trust, and various directors and employees act as fiduciaries to manage the assets. Pet. App. 5a. When the operative complaint in this case was filed, U.S. Bancorp's liquid assets—nearly $87 billion—were sufficient to cover the Plan's liabilities dozens of times over. U.S. Bancorp 2014 Annual Report at 60.[1]

2. The "100% Equities Strategy"

According to Plaintiffs' complaint, the Plan's assets were invested almost entirely in equities as of 2004. Complaint ¶91. U.S. Bancorp's 2003 annual report explained: "Based on an analysis of historical performance by asset class, over any 20-year period since the mid-1940s, investments in equities have outperformed other investment classes but are subject to higher volatility." Complaint ¶103. Through 2008, these investments yielded substantial returns, leaving the Plan "significantly overfunded." Complaint ¶109.

But the 2008 stock market crash caused the Plan's assets to lose substantial value. Pet. App. 8a. The Plan thus became underfunded, with an FTAP of 84%. Pet. App. 8a.

[1] *Available at*: https://www.usbank.com/en/annual_report/investor/resources/doc/USBank_AR14.pdf.

Because of U.S. Bancorp's contributions, investment returns, and other factors, the Plan again became overfunded over time. As measured by FTAP, the Plan reached 105.18% funding in 2014 and 115.30% in 2015. Pet. App. 38a.

During this same post-crash period, the Plan invested in asset classes other than equities. By the end of 2012, only 75% of the Plan's value was allocated to equities, with the remaining 25% divided between "debt/fixed income" and "real estate." Complaint ¶145.

3. FAF Advisors

In 2007, Plan fiduciaries appointed FAF Advisors, Inc.—then a U.S. Bancorp affiliate—to manage the Plan's assets. Complaint ¶77. At that time, a substantial portion of these assets were invested in FAF-managed equity-backed mutual funds. Complaint ¶80. ERISA regulations expressly permit such investments in affiliate-managed mutual funds so long as specified conditions are met (none of which were alleged to be absent here). 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).

In 2010, FAF's mutual-fund business was sold to an unaffiliated entity. Complaint ¶83. The Plan then "disposed of all of its investments in FAF Mutual Funds that were backed by equities." Complaint ¶146.

4. The Plaintiffs

Plaintiffs James Thole and Sherry Smith are former employees of U.S. Bancorp and current participants in the Plan. Pet. App. 4a-5a. Thole has received a monthly retirement benefit of $2,198.38 since his 2011 retirement. Pet. App. 5a. Smith has received a monthly benefit of $42.26 since her 2010 retirement. Pet. App. 5a. Under the terms of the Plan, both will continue to receive these benefits for the rest of their lives. Pet. App. 5a-6a. Neither alleges that the Plan has missed any payments or is at meaningful risk of doing so in the future.

C. Procedural Background

1. Plaintiffs' claims

Plaintiffs filed suit in 2013. In the operative complaint, they challenged two relevant aspects of the Plan's management. Pet. App. 2a. First, Plaintiffs asserted the U.S. Bank Defendants breached their fiduciary duties by failing to anticipate the 2008 financial crisis, claiming they should have terminated the Plan's "100% Equities Strategy" before then. Complaint ¶¶162-163. Second, Plaintiffs contended the Plan's investments in FAF equity-backed mutual funds contravened ERISA's prohibitions on interested transactions. Complaint ¶¶132-135. While Plaintiffs did not plead any way in which these alleged actions had or would affect them personally, they did allege the Plan remained underfunded under FTAP when they filed suit. Complaint ¶¶172-173.

As authorization for their action, Plaintiffs invoked two ERISA provisions, 29 U.S.C. Sections 1132(a)(2) and 1132(a)(3). Complaint 76. Section 1132(a)(2) provides that a "participant" may bring a civil action "for appropriate relief" under 29 U.S.C Section 1109. Because Section 1109 governs fiduciaries' duties with respect to the plan, relief under Section 1132(a)(2) must redound to the plan itself. *LaRue*, 552 U.S. at 1025-26; *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985). Section 1132(a)(3), in turn, provides that a "participant" may bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

Plaintiffs sought monetary relief in the form of restoration of the Plan's supposed losses. Complaint 77. They also requested injunctive relief—specifically, an order appointing new Plan fiduciaries and precluding reinstatement of the "100% Equities Strategy" or investment in affiliated mutual funds. Complaint 77.

2. The district court's partial dismissal

The district court granted an initial motion to dismiss in part. *Adedipe v. U.S. Bank N.A.*, 62 F. Supp. 3d 879 (D. Minn. 2014). The court first concluded the Plaintiffs had Article III standing, focusing on Plaintiffs' contentions that "'the risk of default of the Plan' has 'significantly increased.'" *Id.* at 891 (alteration omitted). The court reasoned that because

Plaintiffs alleged the Plan remained underfunded, they sufficiently pleaded a risk of default. *Id.* at 894-95. The court also concluded that Plaintiffs' requested monetary relief would "remedy the underfunding that is at the root of their injury." *Id.* at 896. The court did not address whether Plaintiffs had standing to seek injunctive relief. *Ibid.*

On the merits, the district court dismissed Plaintiffs' claims regarding the "100% Equities Strategy," concluding ERISA's six-year statute of limitations barred them. *Id.* at 897 (citing 29 U.S.C. § 1113(1)(A)). As the court explained, the "decision to invest the Plan's assets only in equities" had been made in 2004, and Plaintiffs failed to plead any facts suggesting a fiduciary duty to end these investment practices during the class period. *Id.* at 898-900. ERISA did not require Plan fiduciaries "to have predicted and avoided the consequences of the financial crisis," and the complaint's allegations regarding supposed "warning signs" were "far too conclusory to survive" a motion to dismiss. *Id.* at 899-900.

The district court permitted the claims related to the investments in FAF mutual funds to proceed. *Id.* at 902. The court characterized the regulation that generally authorizes such investments as establishing an affirmative defense. *Ibid.*; *see supra* p. 5. On that basis, the court concluded Plaintiffs need not plead any allegations that the regulation was violated. *Adedipe*, 62 F. Supp. 3d at 902.

3. The district court's final dismissal

The U.S. Bank Defendants later moved to dismiss under Federal Rule of Civil Procedure 12(b)(1). Pet. App. 29a. They pointed to evidence demonstrating the Plan had become overfunded and was thus at no conceivable risk of default. Pet. App. 38a.

The district court granted the motion, deeming the case moot. Pet. App. 50a. The court found the evidence established the Plan was overfunded. Pet. App. 39a-40a. As a result, the court concluded, "Plaintiffs no longer have a concrete interest in any monetary relief that might be awarded to the Plan," which would "simply add to the Plan's now-existing surplus." Pet. App. 40a-41a. For the same reasons, the court found Plaintiffs had no interest in securing injunctive relief. Pet. App. 41a-42a.

The district court rejected Plaintiffs' arguments that the U.S. Bank Defendants had not met their burden of demonstrating mootness under the voluntary cessation doctrine. Pet. App. 46a. The court found it " 'absolutely clear that the allegedly unlawful activity cannot be reasonably expected to recur.' " Pet. App. 48a. As the court determined, Plaintiffs had not alleged or "offered any evidence to suggest" that the U.S. Bank Defendants would re-adopt the "100% Equities Strategy" they "abandoned in 2011." Pet. App. 48a. Likewise, the court found, any supposed misconduct related to affiliated mutual funds "ended by 2011 at the latest." Pet. App. 49a. The court concluded Plaintiffs had offered nothing "but speculation that the alleged misconduct will resume." Pet. App. 49a. In particular, the court rejected as a "red herring" Plaintiffs' attempt to invoke the Plan's current investment in an FAF "Prime Obligation Fund Cl Z," explaining this fund had nothing to do with Plaintiffs' claims. Pet. App. 49a n.6.[2]

4. The court of appeals' decision

The Eighth Circuit affirmed. Pet. App. 4a. The court first addressed Plaintiffs' Section 1132(a)(2) claims. As the court held, well-established Eighth Circuit precedent made clear that participants in defined-benefit plans may not bring suit under Section 1132(a)(2) "when the plan is overfunded." Pet. App. 14a.

Specifically, in *Harley v. Minnesota Mining and Manufacturing Company*, the Eighth Circuit rejected the argument that plan participants could invoke Section 1132(a)(2) even where a plan's surplus meant that any supposed investment loss "did not cause actual injury to [the participants'] interests." 284 F.3d 901, 907 (2002). In *McCullough v. AEGON USA Inc.*, the Eighth Circuit reaffirmed this rule, clarifying it was grounded in principles of statutory, rather than Article III, standing. 585 F.3d 1082, 1087 (2009). These prior decisions recognized that a "contrary construction [of Section 1132(a)(2)] would raise serious" constitutional concerns: it would enable plan

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[2] The district court subsequently rejected Plaintiffs' request for $31 million in attorneys' fees. Pet. App. 12a; Dct. Dkt. 252 at 14. The court concluded Plaintiffs achieved no success in the litigation, making a factual finding that the U.S. Bank Defendants' contributions to the Plan were not responses to Plaintiffs' suit. Plaintiffs' C.A. Add. 73-74.

participants "who have suffered *no* injury in fact" to bring suit. *Harley*, 284 F.3d at 906. Moreover, because ERISA is intended to protect "'individual pension rights,'" individuals whose pensions were "fully protected" fell outside "'the zone of interests to be protected or regulated by the statute'"; indeed, their lawsuits might even harm the interests ERISA protects by subjecting plans to costly litigation. *Id.* at 907. This understanding was further supported by Section 1132(a)(2)'s text, which provides only "for *appropriate* relief," not any and all relief plan participants might request. *McCullough*, 585 F.3d at 1084-85 (emphasis added).

Here, the Eighth Circuit deemed this precedent dispositive of Plaintiffs' Section 1132(a)(2) claims. Pet. App. 18a. In so holding, the court noted that its prior references to "standing" may have generated confusion. Pet. App. 17a. The court acknowledged that the term "statutory standing" is rightly subject to criticism, but observed that the concept's "purpose is clear: a plaintiff who seeks relief for violation of a statute must 'fall[] within the class of plaintiffs whom Congress has authorized to sue' under that statute." Pet. App. 17a (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014)).

The Eighth Circuit also held that Plaintiffs' Section 1132(a)(3) claims failed at the threshold. Pet. App. 19a. It recognized that courts have concluded that defined-benefit plans' overfunded status does not categorically preclude plan participants from seeking injunctive relief. Pet. App. 19a (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 one of those courts (the Sixth Circuit) had later rejected the argument that plan participants "'need not show individual injury to obtain injunctive relief for a breach of fiduciary duty.'" Pet. App. 19a (quoting *Soehnlen v. Fleet Owners Ins. Fund*, 844 F.3d 576, 584 (6th Cir. 2016)).

In accord with the Sixth Circuit and its own *Harley* and *McCullough* decisions, the Eighth Circuit held that "[u]nder both § 1132(a)(2) and (a)(3), the plaintiffs must show actual injury * * * to fall within the class of plaintiffs whom Congress has authorized to sue." Pet. App. 20a-21a. The court determined that, "[g]iven that the Plan is overfunded, there is no 'actual or imminent injury to the Plan itself.'" Pet. App. 21a (quoting *Soehnlen*, 844 F.3d at 585). Thus, "dismissal of [Plaintiffs'] claims for relief under § 1132(a)(3) was also proper." Pet. App. 21a.

Judge Kelly dissented in part. Pet. App. 25a. She agreed that *Harley* and *McCullough* precluded Plaintiffs' Section 1132(a)(2) claims, but she would have allowed the Section 1132(a)(3) injunctive-relief claims to proceed. Pet. App. 25a. Although she asserted Plaintiffs had shown the necessary "actual or imminent injury," she relied almost entirely on allegations of *past* harm—namely, the 2008 Plan losses. Pet. App. 26a. As for the *prospective* harm injunctive relief might address, Judge Kelly observed only that "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." Pet. App. 26a. She cited no allegations (let alone evidence) that there was any likelihood these fiduciaries would engage in such misconduct or that the Plan would therefore be at risk of default. Pet. App. 26a. Nor did she address the district court's factual finding that " 'the allegedly unlawful activity cannot be reasonably expected to recur.' " Pet. App. 48a.

REASONS FOR DENYING THE PETITION

I. PLAINTIFFS CANNOT SEEK INJUNCTIVE RELIEF

A. The Eighth Circuit's Decision Conflicts With No Other Section 1132(a)(3) Decision

Plaintiffs claim there is a 3-1 split on when a "plaintiff has standing to seek injunctive relief under Section 1132(a)(3) based on a breach of fiduciary duty." Pet. 13. They contend the Eighth Circuit held that ERISA plan participants must suffer "individual money injury." Pet. 10. They assert that, in contrast, the Second, Third, and Sixth Circuits have held that such plaintiffs need allege only that the defendant violated an abstract fiduciary duty. Pet. 10.

Each of these propositions is wrong. The Eighth Circuit did not hold that plaintiffs invoking Section 1132(a)(3) must demonstrate "money injury" to secure injunctive relief; it held only that they must point to some individualized injury, whether monetary or otherwise. No court of appeals has rejected that straightforward proposition and held that the breach of an abstract fiduciary duty alone will suffice. And the Second, Third, and Sixth Circuit decisions Plaintiffs cite do not even address the question of *statutory* standing upon which the Eighth Circuit grounded its decision. There is no conflict.

1. Plaintiffs conflate statutory and Article III standing

The decision below could not have created any conflict because it addressed a legal question different from the one in Plaintiffs' other cited cases. Plaintiffs' cited authorities all address *constitutional* standing issues, determining whether particular ERISA plaintiffs satisfied Article III's case-or-controversy requirements. *See Horvath*, 333 F.3d at 456; *Perelman v. Perelman*, 793 F.3d 368, 373 (3d Cir. 2015); *Loren*, 505 F.3d at 610; *Soehnlen*, 844 F.3d at 584; *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 199 (2d Cir. 2005); *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009). None of these decisions confronted the distinct issue of whether these plaintiffs fell within the "zone of interests" protected by ERISA and thus had "a right to sue under this substantive statute." *Lexmark*, 134 S. Ct. at 1387 (quotation marks omitted). The closest any of these authorities came to addressing *that* issue was *Horvath*'s observation that the defendant there made "no claim that [the plaintiff] lacks statutory standing." 333 F.3d at 455; *cf. Kendall*, 561 F.3d at 118 (using the phrase "statutory standing" in setting forth Section 1132(a)(3)'s text).

By contrast, the Eighth Circuit's rejection of Plaintiffs' Section 1132(a)(3) claim rests on *statutory* standing grounds. Pet. App. 20a-21a. The court described the Sixth Circuit's decision in *Soehnlen* as "phrased in terms of Article III standing." Pet. App. 20a. The Eighth Circuit deemed *Soehnlen*'s reasoning to be similar to the statutory holding in *Harley* regarding Section 1132(a)(2)'s scope. Pet. App. 20a. It then concluded—as had *Harley* with respect to Section 1132(a)(2)—that plaintiffs who invoke Section 1132(a)(3) without showing actual injury fall outside "the class of plaintiffs whom Congress has authorized to sue under the statute." Pet. App. 20a-21a. In other words, the Eighth Circuit held not that such plaintiffs lack Article III standing—an issue it did not resolve—but rather that they are outside the "zone of interests" to which the Section 1132(a)(3) cause of actions extends. *Lexmark*, 134 S. Ct. at 1388.[3]

As Plaintiffs elsewhere recognize (*e.g.*, Pet. 22-23), this statutory question is distinct from any underlying issue of Article III jurisdiction. Plaintiffs who establish Article III standing may fail to satisfy the "zone-of-interests" test with respect to a particular statutory cause of action, and plaintiffs who fall within a statute's "zone of interests" may lack Article III standing. *See Lexmark*, 134 S. Ct. at 1386-88 & n.4; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992).

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[3] As explained *infra* pp. 28-29, the Eighth Circuit properly reached the statutory standing issue without addressing Article III jurisdiction. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 97 n.2 (1998).

Because the Eighth Circuit resolved only the statutory question, it could not have created a conflict with decisions addressing constitutional standing.

2. The Eighth Circuit's decision is consistent with Article III decisions

Even if statutory and constitutional standing were interchangeable, the Eighth Circuit's decision would create no conflict. No court of appeals has diverged from the Eighth Circuit's holding that ERISA plaintiffs must identify some actual injury to advance claims under Section 1132(a)(3). And even if any courts of appeals had, this Court's recent clarification in *Spokeo, Inc. v. Robins* that "Article III standing requires a concrete injury even in the context of a statutory violation" would lead them to revisit any contrary holdings. 136 S. Ct. 1540, 1549 (2016).

1. Any confusion on this issue stems from the misinterpretation of two sentences in the Third Circuit's *Horvath* decision. There, the beneficiary of a healthcare plan claimed the defendant violated ERISA by failing "to disclose to plan beneficiaries 'all material facts relating to the insurance benefits' it provides," including "information on physician incentives." *Horvath*, 333 F.3d at 453. The plaintiff invoked Section 1132(a)(3) in seeking "injunctive relief requiring the disclosure of information regarding physician incentives." *Id.* at 453. The Third Circuit held the plaintiff had established Article III standing to pursue this claim, explaining that "the disclosure requirements and fiduciary duties contained in ERISA create

in [the plaintiff] certain rights, including the rights to receive particular information." *Id.* at 456. The court continued: "Thus, [the plaintiff] need not demonstrate actual harm in order to have standing to seek injunctive relief requiring that [the defendant] satisfy its statutorily-created disclosure or fiduciary responsibilities." *Ibid.*

Disregarding the information-disclosure context in which the Third Circuit made these statements, Plaintiffs contend the court held that ERISA plaintiffs necessarily have Article III standing to challenge *any* breach of fiduciary duty, even if it had no effect on those plaintiffs. Pet. 11. But *Horvath* need not—and should not—be read so broadly. The *Horvath* plaintiff did not complain of the mere breach of an abstract fiduciary duty. Instead, she experienced a well-recognized cognizable injury: the denial of information to which she was entitled. As this Court has long held, "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Atkins*, 524 U.S. 11, 21 (1998); *see Public Citizen v. U.S. DOJ*, 491 U.S. 440, 449-50 (1989). Thus, in stating the plaintiff need not show "actual harm," the *Horvath* court did not hold she was exempt from Article III's injury-in-fact requirement, but only that she need not demonstrate any *financial* harm—the deprivation of information to which she was entitled was sufficient. *Horvath*, 333 F.3d at 456.

The Third Circuit's subsequent decision in *Perelman* is consistent with this understanding of *Horvath*. Far from concluding that ERISA plaintiffs may challenge any and all breaches of fiduciary duty, *Perelman* held that the plaintiffs in that case failed to establish Article III injury (relying in substantial part on the Eighth Circuit's decisions in *McCullough* and *Harley*). *Perelman*, 793 F.3d at 375-76. In the snippet of the opinion on which Plaintiffs rely (Pet. 11), the Third Circuit observed only: "With respect to claims for injunctive relief, such injury may exist simply by virtue of the defendant's violation of an ERISA statutory duty, such as failure to comply with disclosure requirements." *Perelman*, 793 F.3d at 373 (citing *Horvath*, 333 F.3d at 456). But because the *Perelman* plaintiffs did not press such claims on appeal, the Third Circuit had no opportunity to address whether and how *Horvath*'s holding extended beyond challenges to violations of ERISA's disclosure requirements. *Id.* at 372-73, 376 n.8.

The Eighth Circuit here did not deny that violations of ERISA's disclosure requirements could give rise to Article III injury (even assuming, for present purposes, that the Eighth Circuit addressed the Article III issue at all). Plaintiffs nevertheless attempt to generate a conflict by insisting the Eighth Circuit believed it was departing from Third Circuit precedent, and that it did so by requiring Plaintiffs to demonstrate "individual money injury." Pet. 10. But this supposed "money injury" limitation appears nowhere in the Eighth Circuit's opinion. Rather, the court held only that "plaintiffs must show *actual* injury," and that Plaintiffs here had not. Pet. App. 20a-21a (emphasis added). And although the court stated that *Horvath* "concluded that a plan participant may seek injunctive relief under § 1132(a)(3) against fiduciaries of an overfunded plan" (Pet. App. 19a (alterations omitted)), the Eighth Circuit did not categorically reject that holding. Rather, the court held that because the Plaintiffs challenged how the Plan's assets were invested, they could not demonstrate any "actual injury" when the Plan was "overfunded." Pet. App. 20a-21a. Plaintiffs did not claim they were deprived of information to which they were entitled, so the Eighth Circuit had no opportunity to decide whether this sort of non-monetary injury—which would exist whether or not the Plan was overfunded—would suffice.

2. Nor does the Eighth Circuit's decision conflict with the Second Circuit precedent on which Plaintiffs rely. In *Central States*, the Second Circuit did not resolve any Article III standing issue, but remanded for the district court to do so. 433 F.3d at 203 (expressly "leaving the District Court free to resolve the Article III standing question identified in this Opinion in any way it deems proper"). In its opinion, the court described *Horvath* as indicating that ERISA plan participants may seek "injunctive relief related to ERISA's disclosure and fiduciary duty requirements without a showing of individual harm." *Id.* at 199. But this description of *Horvath* was not a holding or an endorsement of Plaintiffs' erroneous interpretation of the Third Circuit's decision.

The other Second Circuit decision on which Plaintiffs rely makes that plain. In *Kendall*, the plaintiff argued she established constitutional standing to seek injunctive relief merely by alleging that plan administrators violated their fiduciary obligations. 561 F.3d at 121. The Second Circuit dismissed that argument, holding that plaintiffs must "allege some injury in the form of a deprivation of a right *as a result* of a breach of fiduciary duty." *Id.* at 120 (emphasis added). Rejecting the plaintiff's invocation of *Central States*, the court held this prior decision had not "addressed or decided whether a breach of fiduciary duty in and of itself could constitute an injury-in-fact." *Ibid.* And rejecting the plaintiff's reliance on *Horvath*, the court explained that "[w]hile the participants [there] did not have to show that they were specifically injured, pecuniarily or otherwise, they did have to show that they were generally harmed by the deprivation of a specific right to receive information." *Id.* at 120-21. The Eighth Circuit here created no conflict in similarly holding that Plaintiffs were required to demonstrate some "actual injury" (whether monetary or otherwise) resulting from the alleged fiduciary breaches they challenged.

3. As the Eighth Circuit explained, its holding was also consistent with Sixth Circuit precedent. Pet. App. 20a-21a. In the Sixth Circuit's earlier *Loren* decision, the plaintiffs alleged the administrator of their employer-funded health care plan violated its fiduciary duties by charging excessive rates to their employers. 505 F.3d at 603. *Loren*, citing *Horvath*, concluded the plaintiffs had Article III standing to seek injunctive relief under Section 1132(a)(3). *Id.* at 609-10. The court used language that could be read to suggest

that the mere breach of a fiduciary duty confers standing. *Id.* at 610.

But after this Court decided *Spokeo*, the Sixth Circuit revisited the issue. In *Soehnlen*, the Sixth Circuit recognized that *Spokeo* holds that Article III requires plaintiffs to "show that the deprivation of a right created by statute is accompanied by 'some concrete interest that is affected by the deprivation.'" *Soehnlen*, 844 F.3d at 582 (quoting *Spokeo*, 136 S. Ct. at 1548). *Soehnlen* thus concluded that plaintiffs cannot establish Article III standing merely by showing "[d]efendants' violations of their ERISA rights"; they must also demonstrate "what concrete harm they suffer as a result." *Ibid.*; *see id.* at 583 (recognizing *Kendall* reached the same conclusion).

Soehnlen applied this post-*Spokeo* reasoning in rejecting the plaintiffs' Section 1132(a)(3) claim premised on the allegation that the defendants "breached their fiduciary obligations" to the ERISA plan in question, thereby "subjecting it to over $15,000,000 in taxes and penalties." *Id.* at 584. The court noted its prior opinion in *Loren* might have "engendered" some "ambiguity," and it took the "opportunity to provide clarification." *Id.* at 585. Citing the Second Circuit's *Kendall* decision, the court explained that ERISA plaintiffs cannot merely allege a plan is "deficient," but must instead show that a "specific right owed to them"—*e.g.*, the right to the disclosure of particular information, or to the payment of particular benefits—"was infringed." *Ibid.* Otherwise, a plaintiff's claim would suffer from a "lack of concreteness." *Ibid.* And although the court recognized that more general fiduciary misconduct might "create an injury if 'it creates or enhances a risk of default by the entire plan,'" the court held the particular plaintiffs before it had made "no showing of actual or imminent injury to the Plan itself." *Ibid.* They therefore lacked standing. *Ibid.*

Soehnlen thus specifically rejected the proposition that ERISA plaintiffs need allege only that "defendants breached their fiduciary duties"—the very principle Plaintiffs contend the Sixth Circuit accepted. Pet. 12. Plaintiffs' assertion that the claim in *Soehnlen* failed because plaintiffs did not "identify the breach of *any* specific fiduciary duty" stems from their misunderstanding of the Sixth Circuit's distinction between duties owed to the *plan* and duties owed to the *plaintiffs* specifically. Pet. 12 (emphasis added). The *Soehnlen* plaintiffs alleged the defendants breached their specific fiduciary duties to the plan (allegations Plaintiffs erroneously believe would suffice). 844 F.3d at 584. But because the *Soehnlen* plaintiffs did not identify any specific right "owed to them" that was infringed, and did not show any way that the supposed harm to the plan itself could result in individual harm, they established no concrete injury. *Id.* at 585; *see Springer v. Cleveland Clinic Emp. Health Plan Total Care*, No. 17-4181, 2018 WL 3849376, *3 (6th Cir. Aug. 14, 2018) (emphasizing this distinction). Like the Eighth Circuit, therefore, the Sixth Circuit concluded that allegations of fiduciary misconduct are insufficient unless accompanied by some individual injury. Pet. App. 20a-21a.

4. *Soehnlen*'s discussion of *Spokeo* also demonstrates why certiorari would be unwarranted even if this petition implicated some division among the courts of appeals. In *Spokeo*, this Court clarified that "Article III standing requires a concrete injury even in the context of a statutory violation," and that plaintiffs cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of concreteness." 136 S. Ct. at 1549. To the extent any of the decisions on which Plaintiffs rely articulated the rule Plaintiffs advocate, it was only because those courts applied reasoning that cannot survive *Spokeo*'s holding that a statutory violation unaccompanied by concrete injury does not support Article III jurisdiction. Were these courts to revisit the issue in light of *Spokeo*, they would reach a different conclusion—just as the Sixth Circuit did in *Soehnlen*. 844 F.3d at 582, 585. Accordingly, even if there were a split, it might soon dissipate. This Court's intervention is not needed.

B. The Eighth Circuit Was Correct

1. The Eighth Circuit's decision was correct: plaintiffs who face no risk of injury from supposed breaches of fiduciary duty fall outside Section 1132(a)(3)'s zone of interests. Pet. App. 20a-21a.

First, principles of constitutional avoidance support that conclusion. As numerous courts have recognized, not every breach of fiduciary duty will cause ERISA plan participants to suffer concrete injuries satisfying Article III. *E.g.*, *Soehnlen*, 844 F.3d at 582;

Lee v. Verizon Communications, Inc., 837 F.3d 523, 529 (5th Cir. 2016); *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013). And as *Spokeo* held, Congress cannot enable plaintiffs who suffer no concrete injury to bring suit in federal court. 136 S. Ct. at 1549. Were Section 1132(a)(3) read to allow plan participants to sue even when they lack the requisite "*de facto*" injury, it would contravene these constitutional limits—or at least raise serious constitutional questions. *Ibid.* Faced with such grave constitutional concerns, the Eighth Circuit properly interpreted Section 1132(a)(3) to avoid them. Pet. App. 21a; *see Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Second, allowing injury-free lawsuits would be inconsistent with ERISA's "primary purpose," which is "the protection of individual pension rights." H.R. Rep. No. 93-533, at 1 (1974). Suits attacking fiduciary misconduct that poses no threat to individual pensions do not serve that goal. Rather, such suits may undermine ERISA's central purpose "by subjecting the Plan and its fiduciaries to costly litigation brought by parties who have suffered no injury"—litigation that might benefit attorneys, but not beneficiaries. *Harley*, 284 F.3d at 907; *see David*, 704 F.3d at 336.

Third, this interpretation is confirmed by Section 1132(a)(3)'s text. Congress "is presumed to legislate against the background of the zone-of-interests limitation, which applies unless it is expressly negated." *Lexmark*, 134 S. Ct. at 1388 (quotation marks and alterations omitted). Rather than negate that presumption, Congress expressly contemplated that the equitable remedies authorized by Section 1132(a)(3) would be limited to "appropriate" relief. 29 U.S.C. § 1132(a)(3)(B); *see Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996) (recognizing and relying on Section 1132(a)(3)'s requirement that relief be "'*appropriate*'"); *accord LaRue*, 552 U.S. at 258 (Roberts, C.J., concurring in part and concurring in the judgment). As the Eighth Circuit recognized, relief sought by plan participants who suffer no "actual injury" is not "appropriate" given Article III's requirements and ERISA's aims. Pet. App. 20a-21a.

The Eighth Circuit correctly applied this legal rule in holding that Plaintiffs could establish no such "actual injury." Pet. App. 21a. Regardless of any alleged fiduciary violations, Plaintiffs will receive the specific benefits to which they are entitled as participants in a defined-benefit plan (something they do not now dispute). Pet. App. 5a-6a. As this Court has observed, "[m]isconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan." *LaRue*, 552 U.S. at 255. Because the Plan is overfunded, it faces no "risk of default," and Plaintiffs face no risk of actual harm. Pet. App. 21a. Indeed, although the Eighth Circuit had no need to reach the issue, Plaintiffs would lack both statutory and Article III standing even if the Plan were *underfunded* given U.S. Bancorp's ability to satisfy all Plan obligations—there is no prospect that Plaintiffs will be denied their benefits. *Lee*, 837 F.3d at 546.

2. Plaintiffs' contrary arguments are meritless. Plaintiffs contend Congress designed ERISA to protect plan participants from fiduciaries' misconduct. Pet. 18. True enough. But it does not follow, as Plaintiffs assert, that Congress thereby deemed each and every fiduciary breach to cause concrete injury to individual plan participants, even when those participants will never suffer any actual harm. Plaintiffs cite nothing to support this far broader proposition regarding "Congress's judgment" other than Section 1132(a)(3) itself and their own say-so. Pet. 18. And again, even if Congress intended to take such a step, its "role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 136 S. Ct. at 1549.

Nor do common-law trust principles support Plaintiffs' contention that every abstract breach of fiduciary duty necessarily grants plan participants both statutory and constitutional standing. Pet. 19-20. Indeed, courts have consistently rejected that proposition. *E.g.*, *Duncan v. Muzyn*, 885 F.3d 422, 429 (6th Cir. 2018); *David*, 704 F.3d at 336. That is because even at common law, only a "beneficiary whose rights are or may be *adversely affected* by the matter(s) at issue" may bring "suit to enforce a private trust." Restatement (Third) of Trusts § 94 cmt. b. (2007) (emphasis added). While beneficiaries of common-law trusts may have "an equitable interest in the trust corpus," participants in ERISA defined-benefit plans "have an interest solely in their defined benefits, not in the 'general pool' of Plan assets." *Duncan*, 885 F.3d at 429; *see Hughes*, 525 U.S. at 440 ("Given the employer's obligation to make up any shortfall, no plan member has a claim to any particular asset that composes a part of the plan's general asset pool.").[4] Unless the challenged conduct puts their individual benefits at risk, participants' rights are not "adversely affected." Restatement (Third) of Trusts § 94 cmt. b.

None of this is to say that plan participants cannot challenge fiduciary misconduct "*unless and until* they cause the very problems ERISA was designed to prevent—lost pensions." Pet. 14. The Eighth Circuit did not adopt that rule. To the contrary, the court recognized that plaintiffs may bring suit if they point to sufficiently "imminent" injury. *See* Pet. App. 21a. That limitation is consistent with this Court's admonishment that threatened future injury must be "imminent" to "constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Plan participants who confront a potential loss of pension benefits may satisfy this requirement. Plaintiffs here did not. Pet. App. 21a.

3. Separately, Plaintiffs complain that the Eighth Circuit disposed of their appeal on statutory standing without addressing Article III jurisdiction. They go so

[4] *Scanlan v. Eisenberg*, on which Plaintiffs rely (Pet. 19-20), supports this understanding: the individual plaintiffs were the sole trust beneficiaries and "currently eligible to receive all of the [t]rusts' corpus," so they necessarily had an interest in the trusts' assets. 669 F.3d 838, 841, 843, 846 (7th Cir. 2012).

far as to assert this Court should summarily reverse on that ground. Pet. 23 n.5.

The Eighth Circuit committed no error in not reaching the Article III issue. *Steel Co.* holds only "that Article III jurisdiction is always an antecedent question" to the *merits* of a dispute. Pet. 23 n.5 (quoting *Steel Co.*, 523 U.S. at 101). This Court has made clear that "a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." *Sinochem Int'l Co. v. Malay Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quotation marks omitted). And as this Court recognized in *Steel Co.* itself, 523 U.S. at 97 n.2, and has since expressly reaffirmed, "statutory standing" is a threshold issue that "may properly be treated before Article III standing." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999); *see Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) ("the prudential standing doctrine[] represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction").

Contrary to Plaintiffs' suggestion (Pet. 23 n.5), this Court did not *sub silentio* overrule these holdings in *Lexmark*. *Lexmark* observed only that the phrase "statutory standing" may be "misleading" because the issue "does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate a case." 134 S. Ct. at 1387 n.4. But as this Court has repeatedly held, a question that does not "implicate subject-matter jurisdiction" can still be a "threshold" issue proper for resolution before subject-matter jurisdiction. *See, e.g.*, *Sinochem*, 549 U.S. at 433 (because *forum non conveniens* is a "nonmerits issue," it may be decided before jurisdiction). *Lexmark* does not speak to that sequencing question. After *Lexmark*, courts have thus continued to hold that statutory-standing questions may be resolved before difficult jurisdictional questions. *E.g.*, *Johnson v. Comm'n on Presidential Debates*, 869 F.3d 976, 982 (D.C. Cir. 2017); *In re Facebook, Inc., IPO Derivative Litig.*, 797 F.3d 148, 155-56 (2d Cir. 2015).

In any event, even if the Eighth Circuit erred in not addressing constitutional standing, reversal would serve little purpose. The court on remand would and should reach the same result on Article III grounds (just as the *Soehnlen* decision on which it relied did). Pet. App. 20a-21a.

C. This Petition Is A Poor Vehicle For Addressing Section 1132(a)(3)'s Scope

Regardless, this petition is a particularly bad vehicle for addressing the question presented. Article III requires plaintiffs seeking injunctive relief to demonstrate a "real and immediate threat" the challenged conduct will recur. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). Even assuming Section 1132(a)(3) plaintiffs can enjoin fiduciary violations that cause them no actual injury, there is no threat of any recurring fiduciary violations here.

To the contrary, the district court found it "'absolutely clear that the allegedly unlawful activity cannot be reasonably expected to recur.'" Pet. App. 48a. This finding was a factual one, based on evidence presented pursuant to Federal Rule of Civil Procedure 12(b)(1), and thus is reviewed for clear error. 5B Wright & Miller, Federal Practice & Procedure § 1350 & n.79 (3d ed. 2018). This Court rarely if ever sets aside such findings. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996). Unless it did so here, Plaintiffs could not seek injunctive relief.

Yet Plaintiffs do not address the district court's factual finding that the alleged fiduciary violations will not recur, and they offer no basis for concluding the district court clearly erred.[5] Instead, Plaintiffs simply quote the Eighth Circuit dissent's assertion that the U.S. Bank Defendants "remain positioned" to resume the strategy of investing in equities alone. Pet. 20-21 (emphasis omitted). As the district court found, however, Plaintiffs admitted this strategy was "abandoned" in 2011, and they submitted no evidence suggesting it might be readopted. Pet. App. 48a-49a. The district court did not commit clear error in rejecting such pure "speculation." Pet. App. 49a.

Similarly, Plaintiffs repeatedly and incorrectly assert that the U.S. Bank Defendants continue to violate "ERISA's prohibited-transaction rules." Pet. 21. Plaintiffs' prohibited-transaction claims pertain to the Plan's investments in FAF's equity-backed mutual funds. Complaint ¶132. The district court found that

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[5] Nor, for that matter, do Plaintiffs address the district court's independent conclusion that their "100% Equities Strategy" claims are time-barred—yet another reason this case is a bad vehicle to address the question presented. *Adedipe*, 62 F. Supp. 3d at 900; Plaintiffs' C.A. Add. 68.

if such "misconduct" occurred, it "ended by 2011 at the latest": by then, the Plan was no longer invested in these funds, which were also no longer affiliated with U.S. Bancorp following its sale of this part of FAF's business. Pet. App. 49a; *see* Complaint ¶¶83, 146.

Plaintiffs now point to a single $40 million investment. Pet. 21 & n.4. But the district court found that this fund is a "red herring" because it is a *money-market* fund—entirely different from the equity investments Plaintiffs challenge. Pet. 49a n.6. The court explained: "The pertinence of this distinction is evidenced by the fact that the Plan has invested in th[is fund] since at least 2007, yet Plaintiffs did not allege that the investment in this fund, unlike others, was problematic." Pet. App. 49a n.6 (internal citation omitted). Once again, Plaintiffs identify no flaw in this reasoning, and they supply no basis to conclude the court clearly erred in finding "nothing in the record showing more than a 'speculative possibility' that Defendants' unlawful activity will recur." Pet. App. 49a n.6.

II. PLAINTIFFS CANNOT SEEK MONETARY RELIEF

A. The Eighth Circuit's Decision Conflicts With No Other Section 1132(a)(2) Decision

1. No circuit holds that uninjured plaintiffs have statutory standing

Plaintiffs also fail to establish that the Eighth Circuit's rejection of their Section 1132(a)(2) claims implicates a circuit split. Plaintiffs recognize that this holding rested on statutory rather than Article III grounds. Pet. 27. But they again cannot identify any court of appeals that disagrees with the Eighth Circuit's conclusion that plaintiffs who experience no actual injury fall outside Section 1132(a)(2)'s zone of interests. Pet. App. 17a-18a.

Instead, Plaintiffs cite a series of decisions that—to the extent they address Section 1132(a)(2)'s scope at all—discuss separate issues of statutory interpretation. *Glanton v. AdvancePCS, Inc.* is a good example. 465 F.3d 1123 (9th Cir. 2006). Plaintiffs assert that *Glanton* held 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." Pet. 28 (quoting *Glanton*, 465 F.3d at 1124). In fact, *Glanton* concluded that the *defendant* in that case "easily fit[]" ERISA's definition of a "plan fiduciary." 465 F.3d at 1124 (citing 29 U.S.C. § 1002(21)(A)). *Glanton* nowhere directly confronted whether the plaintiffs satisfied the requirements of statutory standing, instead affirming dismissal on Article III grounds. *Id.* at 1124-25.

The other decisions Plaintiffs cite are similar. In *L.I. Head Start Child Development Services, Inc. v. Economic Opportunity Commission of Nassau County, Inc.*, the Second Circuit described decisions defining the word "participant" as used in Section 1132(a)(2) and rejected the defendants' argument that the plaintiffs' claims failed because benefits would inure to them and not to the plan itself. 710 F.3d 57, 65-66 (2013). In *Lee*, the Fifth Circuit quoted Section 1132(a)(2)'s text, then observed that the parties had not disputed statutory standing. 837 F.3d at 544. In *David*, the Fourth Circuit did the same. 704 F.3d at 332-33. And in *Loren*, the Sixth Circuit simply quoted the statute's text and described this Court's precedent holding that any relief must inure to the plan. 505 F.3d at 607-08. None of these decisions addressed, let alone rejected, the conclusion that participants who suffer no individual harm lack statutory standing.

2. There is no split on Article III standing

Unable to identify any split of authority on the statutory question the Eighth Circuit addressed, Plaintiffs again attempt to support their case for certiorari by invoking Article III decisions. As before, however, the Eighth Circuit's decision could not conflict with any of these decisions because it did not confront that issue.

Moreover, if relevant, these decisions only support the Eighth Circuit's conclusion. As Plaintiffs all but concede, every court of appeals that has considered claims similar to Plaintiffs' in a published opinion has held that no Article III case or controversy exists when participants in overfunded defined-benefit plans seek monetary relief under Section 1132(a)(2). *See Perelman*, 793 F.3d at 376 (explaining that "federal appellate courts have unanimously rejected" such claims). To be sure, these courts have rejected arguments advanced by the Department of Labor in amicus briefs, but that is not a division of authority warranting this Court's review. *Contra* Pet. 25. Thus, even if the Eighth Circuit's statutory holding were in conflict with any circuit's construction of Section 1132(a)(2), that supposed split would not be outcome-determinative, as other courts of appeals would simply reject the same claim on Article III grounds.

Stretching to find some contrary authority, Plaintiffs focus on *Fletcher v. Convergex Group, L.L.C.*, 679 Fed. App'x 19 (2d Cir. 2017). Pet. 24. *Fletcher*, however, was unpublished, and it therefore cannot have engendered any circuit split. Befitting its unpublished status, *Fletcher* also contained little or no analysis. 679 Fed. App'x at 21. And because the plan in *Fletcher* was actually "*underfunded*," the result the Second Circuit reached does not conflict with other circuits' decisions respecting *overfunded* defined-benefit plans. *Fletcher v. Convergex Grp. LLC*, 164 F. Supp. 3d 588, 591 (S.D.N.Y. 2016) (emphasis added).

Plaintiffs also seize on a footnote in *L.I. Head Start*. Pet. 24. There, however, there was little question that any harm to the plan harmed the plaintiffs themselves: the defendants' alleged misconduct left the plan unable to satisfy a judgment to the plaintiffs of over $700,000. 710 F.3d at 63. Thus, the conclusory footnote on which Plaintiffs rely does not stand for the proposition that plan participants who suffer no actual injury have Article III standing to sue for breaches of fiduciary duty. *Id.* at 67 n.5. Indeed, as Plaintiffs acknowledge (Pet. 25 n.6), district courts in the Second Circuit have rejected the contention Plaintiffs now advance. *See*, *e.g.*, *In re UBS ERISA Litig.*, No. 08-6696, 2014 WL 4812387, *7 (S.D.N.Y. Sept. 29, 2014) (holding plaintiffs lacked standing because they failed to identify individual harm, distinguishing *L.I. Head Start* as involving circumstances where "each participant's financial fortune [was] tied to the plan's overall success"), *aff'd sub nom. Taveras v. UBS AG*, 612 Fed. 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."). If other Second Circuit district courts remain uncertain (Pet. 24), that ambiguity is for the Second Circuit to resolve.

Given the absence of any circuit split, it is no surprise that this Court has twice rejected similar petitions seeking review of this question. *See Convergex Grp.*, 138 S. Ct. 644; *Pundt v. Verizon Communications, Inc.*, 137 S. Ct. 1374 (2017). Plaintiffs optimistically suggest that this Court's certiorari denial in *Convergex* rested on a need for "further percolation" rather than the fact that "*Fletcher*, as an unpublished decision, did not definitively announce the Second Circuit's position." Pet. 26-27 & n.7. Even if Plaintiffs were right, they point to nothing in the roughly eight months since that denial that has caused the "case for additional percolation" to "evaporate[]." Pet. 26.

B. The Eighth Circuit Was Correct

Given the lack of any division of authority on Section 1132(a)(2), Plaintiffs' arguments amount to a request for error correction. Once again, however, the Eighth Circuit's decision was correct.

Indeed, the same reasons that support the Eighth Circuit's holding that plaintiffs who face no actual injury lack statutory standing under Section 1132(a)(3) support that conclusion for Section 1132(a)(2). *First*, principles of constitutional avoidance counsel against construing the statute to permit plaintiffs who suffer no concrete injury to nevertheless bring suit. Pet. App. 15a; *supra* pp. 23-24. *Second*, allowing such suits might defeat ERISA's purpose of protecting *individual* pension rights. Pet. App. 16a; *supra* p. 24. *Third*, Congress did nothing to negate the presumption that the "zone-of-interests" limitation applies, but instead expressly limited Section 1132(a)(2) to "appropriate" relief. Pet. App. 16a n.9; *supra* pp. 24-25. *Fourth*, especially given the clarity of Eighth Circuit precedent, the court did not err by addressing statutory standing rather than Article III jurisdiction. *Ortiz*, 527 U.S. at 831; *supra* pp. 28-29.[6]

Plaintiffs offer little response to these points. The Eighth Circuit's application of the zone-of-interests test is not, as Plaintiffs claim, "irreconcilable with this Court's precedents." Pet. 28, 31. Not only are the opinion snippets on which Plaintiffs rely "dicta" (as Plaintiffs acknowledge, *see* Pet. 28), they are inapposite. This Court has indeed observed that Section 1132(a)(2) authorizes plan beneficiaries to sue for breaches of fiduciary duty—a straightforward and noncontroversial description of the provision's effect.

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[6] Contrary to Plaintiffs' contentions (Pet. 27, 31), the U.S. Bank Defendants defended the Eighth Circuit panel's statutory holding below. *See* Appellees' Rehearing Opp. 7-10.

See Russell, 473 U.S. at 140, 141 n.9; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 53 (1987). Nowhere has the Court suggested that such statutory authorization (which, again, is limited to "appropriate" relief) extends to plaintiffs who suffer no concrete injury from the misconduct they challenge.

Plaintiffs also provide no basis to think the Eighth Circuit was wrong to hold that a contrary conclusion would raise constitutional concerns. Aside from their trust-law arguments—misguided for the reasons explained above, *supra* pp. 26-27—Plaintiffs contend that Article III's requirements are satisfied because plan participants can invoke the injury experienced by the plan itself. Pet. 31-32. But the courts that have considered this contention have unanimously rejected it. *Lee*, 837 F.3d at 547-48; *Perelman*, 793 F.3d at 376; *David*, 704 F.3d at 335-36; *McCullough*, 585 F.3d at 1085-86; *Glanton*, 465 F.3d at 1125-26. For good reason. Unlike qui tam suits (*Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773-74 (2000)), or suits brought by contractual assignees (*Sprint Communications Co. v. APCC Servs., Inc.*, 554 U.S. 269, 283 (2008)), there is no "tradition" of allowing "beneficiaries to bring suit on behalf of the trust." *Glanton*, 465 F.3d at 1125 & n.2. And if Congress's mere enactment of Section 1132(a)(2) were deemed an "assignment" of a plan's right to sue that afforded plan beneficiaries a constitutionally sufficient injury-in-fact, "what principled reason would preclude Congress from assigning the claim to any stranger?" *Lee*, 837 F.3d at 548 (quotation marks omitted).

Plaintiffs' policy concern that "even egregious fiduciary misconduct will often go unpunished" is also misplaced. Pet. 30. Again, if plan participants confront some actual risk to their benefits, they may bring suit. *Supra* p. 27. If they face no such risk notwithstanding fiduciary misconduct (as may often be true with defined-benefit plans), that is only because it is the *employer* that both bears the investment risk and has a direct interest in ensuring plan assets are properly managed. *Hughes*, 525 U.S. at 439. Indeed, for that reason, Plaintiffs' requested monetary relief would have no meaningful effect: compelling a payment to the Plan would simply increase the Plan's surplus, allowing U.S. Bancorp to forgo making additional payments it would have otherwise made. *Id.* at 440 ("[I]f the defined benefit plan is overfunded, the employer may reduce or suspend his contributions."). There is no reason to require the U.S. Bank defendants to make what would in effect be a payment to themselves.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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