No. 17-1712

In the Supreme Court of the United States

JAMES J. THOLE AND SHERRY SMITH, PETITIONERS

v.

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

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

REPLY BRIEF FOR THE PETITIONERS

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This case involves the dismissal of an ERISA complaint seeking injunctive relief and restoration of plan losses for fiduciary breaches that caused the plan to lose $750 million. As the petition explained, the Eighth Circuit affirmed that dismissal by deciding two pure questions of law that check all the usual boxes for plenary review.

In opposition, respondents' newly-retained Supreme Court counsel employs all the usual devices to avoid review of a meritorious petition. Respondents deny each circuit split by trotting out 'distinctions' that nobody, least of all the courts writing the opinions or the district courts applying them, thinks matter to their outcomes. Respondents manufacture vehicle arguments that represent more hand-waving—they have no answer for petitioners' unequivocal allegations that would entitle them to relief should this Court agree petitioners suffered injuries. And perhaps most significantly, unable to dispute these issues' obvious importance, respondents advance a robust merits discussion; but firm belief in the correctness of the underlying decision provides no grounds to deny review.

Accordingly, while the lower courts are deeply confused over these issues, the path for this Court is clear: grant the petition to provide certainty for the millions of ERISA stakeholders whom Congress wanted to police fiduciary misconduct.

I. The Clear And Entrenched Circuit Conflict On The First Question Presented Warrants Review.

Regarding standing for petitioners' injunctive-relief claim under 29 U.S.C. 1132(a)(3), respondents deny the circuit split, raise baseless vehicle concerns, and contest the merits. Each objection fails.[1]

[1] Respondents' assessment of the Eighth Circuit's decision is at war with itself. They repeatedly assert the court did not require a

A. 1. a. Respondents try to remove the Eighth Circuit from the split by contending that the court resolved petitioners' Section 1132(a)(3) claim "on *statutory* standing grounds" rather than Article III. Opp. 15. Not so. The court began its analysis by contrasting two decisions that respondents admit (at 14) addressed Article III. Pet. App. 19a; see *Loren* v. *Blue Cross Blue Shield of Mich.*, 505 F.3d 598 (6th Cir. 2007); *Horvath* v. *Keystone Health Plan E., Inc.*, 333 F.3d 450 (3d Cir. 2003). And the court phrased its holding in Article III language and quoted a case that respondents (again) admit is a constitutional one: "there is no 'actual or imminent injury to the Plan itself' that caused injury to the plaintiffs' interests in the Plan." Pet. App. 21a (quoting *Soehnlen* v. *Fleet Owners Ins. Fund*, 844 F.3d 576, 585 (6th Cir. 2016)). At best, respondents might argue the Eighth Circuit resolved *both* statutory and constitutional questions, but that would simply create two splits.

b. Were respondents correct, the opinion below would contain an even more glaring error: Courts may not decide merits issues before establishing Article III jurisdiction. Pet. 23 n.5.

Respondents assert (at 28-29) that statutory standing remains a "threshold" question after *Lexmark International, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), but that is incorrect. It is beyond cavil that "the zone of interest test is now 'a merits issue.'" *Crossroads Policy Strategies* v. *FEC*, 788 F.3d 312, 319 (D.C. Cir. 2015); accord, *e.g.*, *Nagravision SA* v. *Gotech Int'l Tech. Ltd.*, 882 F.3d 494, 497 (5th Cir. 2018); *Marathon*

"monetary" injury (*e.g.*, Opp. 13), but they defend the decision by arguing that petitioners failed to show a "prospect that [they] will be denied their benefits"—*i.e.*, a monetary injury.

Petroleum Corp. v. *Sec'y of Fin. for Del.*, 876 F.3d 481, 492 n.13 (3d Cir. 2017); *Mantena* v. *Johnson*, 809 F.3d 721, 731 n.10 (2d Cir. 2015); *Galaria* v. *Nationwide Mut. Ins. Co.*, 663 F. App'x 384, 391 (6th Cir. 2016).[2]

If the Eighth Circuit did not address Article III, then this Court should summarily reverse for a ruling on that antecedent question.[3]

2. Because the Eighth Circuit's decision plainly rested on constitutional grounds, however, the conflict on the Section 1132(a)(3) claim is just as plain. Respondents' resistance rests on hiding from other circuits' unambiguous holdings that no individual monetary loss (or risk thereof) is necessary to sue for a specific fiduciary breach.[4]

a. As the Eighth Circuit explained, its decision directly departs from *Horvath*. Respondents incorrectly claim that *Horvath* addressed only "the denial of information." Opp. 17. *Horvath* also addressed *other* fiduciary breaches while making clear that no "individual loss" was required: "[T]he disclosure requirements *and fiduciary duties* contained in ERISA create *in Horvath* certain rights, including the rights to receive particular information *and* to have Keystone act in a fiduciary capacity." 333 F.3d at 456 (emphases added). The dispositive language from *Perelman* v. *Perelman* is likewise unequivocal: "With respect to claims for injunctive relief, such injury may exist *simply*

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[2] The two post-*Lexmark* cases respondents cite do not counsel otherwise. Opp. 29. Neither the majority in *Johnson* v. *Comm'm on Presidential Debates*, 869 F.3d 976 (D.C. Cir. 2017), nor the court in *In re Facebook, Inc. IPO Derivative Litig.*, 797 F.3d 148 (2d Cir. 2015), even cited *Lexmark*.

[3] Alternatively, the Court could determine this issue on plenary review.

[4] Respondents say no court has allowed "uninjured plan participants" to sue (Opp. 2), but that begs the question—the point is that the specific breach causes personal injury, just not a financial one.

by virtue of the defendant's violation of an ERISA statutory duty, *such as* failure to comply with disclosure requirements." 793 F.3d 368, 373 (3d Cir. 2015) (emphases added). Information disclosure represented one example of a violation, but *Perelman* did not limit *Horvath*'s rule to that context. Indeed, that limitation would make no sense given that *Horvath* approved standing for fiduciary breaches apart from disclosure requirements. The Eighth Circuit properly acknowledged the division with the Third. Pet. App. 19a.

b. Respondents all but concede that the Sixth Circuit's decision in *Loren* supports petitioners' view, but maintain that *Soehnlen* changed course. Opp. 20-22. Again, respondents' argument cannot be squared with the opinion's plain language. *Soehnlen* explained that plaintiffs must allege a "specific fiduciary duty or specific right owed to them [that] was infringed." 844 F.3d at 585. Here respondents "owed to" petitioners a duty (among others) not to engage in self-dealing transactions. Pet. 19-20. That is a "specific fiduciary duty" that fits *Soehnlen*'s requirements but flunked the Eighth Circuit's test.[5]

c. Also conflicting with the decision below, the Second Circuit, agreeing with *Horvath*, held that plaintiffs "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, LLC*, 433 F.3d 181, 199 (2d Cir. 2005); see *Kendall* v. *Emps. Ret. Plan of Avon Prods.*, 561

[5] Contrary to respondents' characterization, *Springer* v. *Cleveland Clinic Emp. Health Plan Total Care*, No. 17-4181, 2018 WL 3849376, *3 (6th Cir. Aug. 14, 2018), reaffirmed *Soehnlen*'s holding that plaintiffs need allege only that a "'specific fiduciary duty or specific right owed to them was infringed,'" and *found* standing without individual monetary loss.

F.3d 112, 121 (2d Cir. 2009). Respondents, mystifyingly, claim that this statement wasn't a holding at all because the court left "the District Court free to resolve the Article III standing question identified in this Opinion." 433 F.3d at 203. But the Second Circuit enunciated the legal standard for injunctive-relief standing for the district court to apply on remand. That is a holding. Remand was necessary only because "factual and legal issues bearing on the Article III standing of the Plaintiffs remain[ed] unresolved in the District Court." *Ibid.*; see *id.* at 200 ("we do not have the benefit of the District Judge's views").

As to *Kendall*, respondents cannot sidestep the straightforward statement that an ERISA plaintiff need only "allege some injury *or deprivation of a specific right* that arose from a violation of that duty" imposed by ERISA. 561 F.3d at 121 (emphasis added); see, *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) ("In order to have standing to seek injunctive relief based on defendants' statutorily-created disclosure or fiduciary responsibilities, plaintiff need only allege that she was 'generally harmed by the deprivation of a specific right;' she need not show that she was 'specifically injured, pecuniarily or otherwise.'" (quoting *Kendall*, 561 F.3d at 120-21)). The *Kendall* plaintiff lost because she alleged only "a general fiduciary duty to comply with ERISA." *Id.* at 120. By contrast, petitioners allege specific violations that harmed them. That would satisfy *Kendall*, but it failed to satisfy the Eighth Circuit simply because the plan was overfunded. Pet. App. 21a.

It is thus no surprise the Eighth Circuit recognized that other courts had reached a contrary conclusion on standing for injunctive relief. While respondents have an understandable interest in papering over that conflict,

any reasonable reading of the cases' plain language supports the Eighth Circuit's candid acknowledgment. A circuit split exists, and its undisputed importance warrants this Court's review.

3. Respondents' effort to avoid review by invoking *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016), merely begs the question on the merits. Respondents assert that "a statutory violation unaccompanied by concrete injury does not support Article III jurisdiction." Opp. 23. But plaintiffs do allege concrete injury. The merits question is whether that concrete injury—the violation of specific fiduciary duties owed to them, consistent with centuries of trust law—satisfies Article III. The Second, Third, and Sixth Circuits say yes; the Eighth says no. *Spokeo* does not undermine that conflict, which is precisely why *Soehnlen* reaffirmed *Loren* after *Spokeo* (see *supra*). The conflict is ripe for review.

B. Respondents' vehicle objections are entirely bankrupt. Opp. 29-31. First, petitioners alleged egregious conduct that warrants removal of the offending fiduciaries and appointment of an independent one. See Pet. 7, 21; Pet. App. 26a (Kelly, J., dissenting). Respondents do not mention this relief, yet it alone suffices to eliminate any vehicle problem.

Second, respondents indicate that the district court made a fact finding that their continued $40 million investment in their own affiliated fund, which plainly violates ERISA's prohibited-transaction rules, is a red herring because it is a type of investment petitioners' complaint did not challenge. Opp. 31. This part of the district court's opinion was not a factual determination, however, but a misreading of the complaint. Petitioners challenged "all transactions" in which respondents were "acting on both sides" (Compl. ¶ 135), not just "equity investments" (Opp. 31). See Compl. ¶¶ 110, 141, 293-294.

Third, in all events, even were respondents correct, this alternative ground for dismissing petitioners' claims would not affect the Court's resolution of the circuit split. As the Court often does, it could resolve the conflict then remand for the Eighth Circuit to address this separate objection in the first instance.

C. That respondents so strenuously defend the Eighth Circuit's holding only highlights the need for plenary review. Opp. 23-29. None of respondents' arguments overcome the history and congressional judgment that support petitioners' standing. Pet. 17-20.

As to history, respondents rely on a single comment in the restatement that says a beneficiary may sue only if her rights "may be adversely affected." Restatement (Third) of Trusts § 94 cmt. b. (2007); Opp. 26. But that again begs the question whether rights are "adversely affected" *absent* individual *financial* harm. On that merits point, respondents fail even to address the "no further inquiry" rule. See Pet. 19-20.

As to Congress's judgment, respondents profess disbelief that Congress would allow beneficiaries to sue without "a potential loss of benefits." Opp. 27; see *id.* at 25-26. But Congress expressly sought to provide "ready access to the Federal courts" to police fiduciaries' "standards of conduct" and "obligation[s]." 29 U.S.C. 1001(b). And nobody denies that Congress contemplated the remedies petitioners seek—removing disloyal fiduciaries and divesting conflicted funds. ERISA allows beneficiaries to obtain relief *before* misconduct puts beneficiaries at imminent risk of financial harm. That ounce of prevention is worth a pound of cure for vulnerable ERISA beneficiaries who cannot risk an imminent loss becoming a realized one.

Respondents brush aside their breaches as effectively inconsequential. But it is not an "abstract" injury (Opp. 1,

26) to have the security for one's retirement benefits managed by fiduciaries who egregiously violated their duties. Nor is it "abstract" to have that security invested in conflicted funds for the fiduciaries' improper benefit. Congress authorized private suits to ensure that plans were managed properly. Only the Eighth Circuit has failed to appreciate that fact.

II. The Second Question Presented Also Warrants Review.

The second question presented equally deserves review. Respondents again do not dispute its importance, and their attempts to undermine the conflict are fruitless.

Respondents trumpet the Court's denial in *Convergex Grp., LLC* v. *Fletcher*, 138 S. Ct. 644 (2018), but the most plausible reason the Court denied was to allow further percolation on an issue that affects trillions of dollars and tens of millions of Americans. As petitioners explained, however, the subsequent decisions by the Eighth Circuit here and the Sixth Circuit in *Duncan* v. *Muzyn*, 885 F.3d 422 (6th Cir. 2018), make additional percolation pointless. Pet. 26-27 & n.7; contra Opp. 35 (wrongly claiming "nothing" has changed). Without review, the confusion on this issue will persist, while courts other than the Second Circuit will follow their precedent to reject the Department of Labor's longstanding position. Pet. 25. The only consequence of additional percolation will be harming the ERISA stakeholders Congress meant to protect. The time for review has come.

A. 1. Petitioners demonstrated hopeless confusion among the lower courts over Article III standing on Section 1132(a)(2) claims, including two Second Circuit decisions that conflict with decisions from the Fourth, Fifth, Sixth, and Ninth Circuits. Pet. 23-27. The Second Circuit, adopting the Department's position, definitively held that

a participant has Article III standing without demonstrating individual financial loss. *Fletcher* v. *Convergex Grp., LLC*, 679 F. App'x 19 (2d Cir. 2017); see *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). Respondents' attempts to obscure the Second Circuit's holdings are inadequate.

Respondents claim that *Fletcher* does not engender a conflict because the plan there was "underfunded." Opp. 34. But that was immaterial to the decision, for the complained-of conduct was so small it "increased the plan's deficiency by less than one hundred-thousandth of one percent." *Fletcher* v. *Convergex Grp., LLC*, 164 F. Supp. 3d 588, 591 (S.D.N.Y. 2016). Accordingly, there, as here, the defendants' actions did not affect the plan's default risk. Pet. 24. The conflict is square.

Respondents' attempt to evade *Head Start* also fails. They say the plan was "unable to satisfy a judgment to the plaintiffs" (Opp. 34), but the Second Circuit concluded that any individual loss was irrelevant; the "injury-in-fact" that was "sufficient for constitutional standing" was the loss "to the Plan." 710 F.3d at 63, 65, 67 n.5. That is why *Fletcher* cited that decision with approval and district courts charged with applying *Fletcher* have read these decisions as establishing standing in identical situations as here. Pet. 24-25 & n.6.

2. Respondents' resistance to the split on statutory standing is wholly meritless. To be sure, these courts' analysis is brief, but that is because the interpretive exercise is simple. There can be no serious question that every court other than the Eighth Circuit held that statutory standing exists absent individual financial loss (or risk thereof). Contra Opp. 33 (claiming no decision addressed "participants who suffer no individual harm").

Respondents' opposition ignores these opinions' unambiguous language. See *Glanton* v. *AdvancePCS Inc.*, 465 F.3d 1123, 1124 (9th Cir. 2006) ("plaintiffs here are authorized to sue" simply because the defendant was a fiduciary and the plaintiffs sued for *the plan's* loss); *David* v. *Alphin*, 704 F.3d 327, 332-333 (4th Cir. 2013) ("Appellants may bring suit under § 502(a)(2) on behalf of the Pension Plan"); *Loren*, 505 F.3d at 608 ("Plaintiffs may bring suit under § 1132(a)(2) *on behalf of* their respective plans"); *Lee* v. *Verizon Commc'ns, Inc.*, 837 F.3d 523, 546 (5th Cir. 2016) (statutory standing didn't "confer[]" constitutional standing); *L.I. Head Start*, 710 F.3d at 66 ("Section 502(a)(2) confers standing on a 'participant' to seek relief under § 409(a)").

B. Respondents' merits arguments again show the need for plenary review and are effectively rebutted by the discussion above and the petition. Pet. 30-32. A few brief points:

Respondents attack statutory standing by claiming petitioners "suffer[ed] no concrete injury from [respondents'] misconduct." Opp. 37. This assumes that the only concrete injury is a financial one. But as discussed, it is common sense that a beneficiary has a personal stake in policing misconduct that threatens the security for her benefits *before* that misconduct causes individual loss.

That simple logic also refutes respondents' constitutional objection. Congress could not "assign[] the claim to any stranger" (Opp. 37) because a stranger has no interest in preserving beneficiaries' security. And restoring plan losses does not effectuate "a payment to themselves" (Opp. 38) because they do not have free reign over plan assets. Cf. 29 U.S.C. 1103(c). Review is warranted.

III. Alternatively, The Court Should Invite The Solicitor General's Views.

Respondents concede that multiple courts have rejected the Department of Labor's views, advanced for decades across Democratic and Republican administrations. Pet. 14-15, 25. But in this complicated regulatory area, the Department is uniquely positioned to understand ERISA's text and purpose, and its advocacy for petitioners' position has been unwavering. This situation is thus tailor-made for a definitive statement from the government. Indeed, there is precedent for the Court adopting the Department's position on an ERISA issue that lower courts have repeatedly rejected. Compare Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3)*, 39 John Marshall L. Rev. 827, 864-865 (2006) ("courts have consistently rejected" the Department's "vigorous[] advoca[cy]" on Section 1132(a)(3) interpretation), with *CIGNA Corp.* v. *Amara*, 563 U.S. 421 (2011) (adopting that interpretation). Therefore, should the Court not outright grant the petition, it should CVSG.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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