No. 16-1928

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SHERRY SMITH and JAMES J. THOLE, on behalf of themselves individually, and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

U.S. BANK, NATIONAL ASSOCIATION, individually and as successor in interest to FAF ADVISORS, INC., and U.S. BANCORP,
Defendants-Appellees.

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
No. 0:13-cv-02687-JNE-JJK

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS

Kate Comerford Todd
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 463-5337

Brian D. Netter
Travis Crum
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

Counsel for Chamber of Commerce of the United States of America

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1A, the undersigned counsel certifies that the Chamber of Commerce of the United States of America is not a subsidiary of any other corporation, and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes and Rules

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1] It represents approximately 300,000 direct members and has an underlying membership of more than three million businesses and organizations of every size, in every industry, sector, and geographic region of the country—making it the principal voice of American business.

The Chamber regularly files *amicus* briefs in federal and state courts throughout the country in cases of national concern. This is one such case. The decision below implicates the minimum requirements for standing under Article III of the Constitution and the Employee Retirement Income Security Act of 1974 ("ERISA"). This is of grave concern to the business community. As this case illustrates, violations of regulatory statutes can be alleged by large numbers of people who were not actually injured. If such people can nevertheless bring lawsuits—without the need to demonstrate any injury beyond the alleged statuto-

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amicus* states that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or person or entity other than *amicus*, *amicus*'s members, and its counsel, contributed money intended to fund preparing or submitting this brief. The parties consent to the filing of this brief.

ry violation itself—businesses will predictably be tied up in litigation, diverting their resources from more productive uses.

INTRODUCTION AND SUMMARY OF ARGUMENT

"'[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). "[A]n essential and unchanging part of the case-or-controversy requirement" is a plaintiff's obligation to establish standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), which requires that a plaintiff have "'such a personal stake in the outcome of the controversy' so as to warrant *his* invocation of federal-court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (emphasis added) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

This case concerns whether a participant in a previously underfunded but now overfunded defined benefit plan may bring suit pursuant to ERISA to enforce alleged breaches of fiduciary duty.

This Court has already answered that question with a resounding "no" in the context of a defined benefit plan that was overfunded at the

time the lawsuit was brought. Insofar as standing is concerned, now that the defined benefit plan at issue here is overfunded, the situation is indistinguishable. The plaintiffs have suffered no concrete and cognizable injury that can be redressed through litigation.

Nothing in the Supreme Court's recent decision in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), dictates otherwise. Rather, *Spokeo* reinforces the constitutional concerns that led this Court to carefully circumscribe when plaintiffs may bring an ERISA suit. Were this Court nevertheless to find standing here, it would needlessly create a circuit split and would invite wasteful, abusive, and profligate litigation based on mere allegations of breaches of fiduciary duties without any showing of financial harm to the plan's beneficiaries. Such a result would harm—not help—employees and retirees, and would further accelerate the market trend away from defined benefit plans.

ARGUMENT

ERISA provides for two primary types of retirement plans: defined benefit plans and defined contribution plans. A defined benefit plan "consists of a general pool of assets," which "may be funded by employer or employee contributions, or a combination of both." *Hughes Aircraft*

Co. v. Jacobson, 525 U.S. 432, 439 (1999). Upon retirement, a participant in a defined benefit plan "is entitled to a fixed periodic payment." *Id.* If a "Plan's assets [are] more than sufficient to pay out all vested benefits," then a plan is considered to be "overfunded" or to have a "surplus." *David v. Alphin*, 704 F.3d 327, 330 (4th Cir. 2013). And if a plan is underfunded, the employer "must cover any underfunding as the result of a shortfall that may occur from the plan's investments." *Hughes Aircraft*, 525 U.S. at 439.

To ensure that retirees receive their defined benefit, Congress "require[d] defined benefit plans (but not defined contribution plans) to satisfy complex minimum funding requirements, and to make premium payments to the Pension Benefit Guaranty Corporation [("PBGC")] for plan termination insurance." *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255 (2008). And even in a scenario in which a defined benefit plan becomes insolvent and can no longer make payments, "participants' vested benefits are guaranteed by the PBGC up to a statutory minimum." *David*, 704 F.3d at 338.

In contrast, defined contribution plans—such as 401(k) plans—provide participants with individual accounts in which they accrue

"benefits based solely upon the amount contributed to the participant's account." 29 U.S.C. § 1002(34). An employer's contribution to an employee's defined contribution plan "is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide." *Hughes Aircraft*, 525 U.S. at 439.

This case concerns a defined benefit plan that was underfunded at the time the complaint was filed but that now has a surplus. In other words, at present, the plan is so well-funded that it projects to be able to satisfy all of its current obligations without requiring any additional employer contributions—and to have money left over at the end. Although the district court reached its conclusion based on mootness, we write to explain why this Court could also appropriately affirm on the ground that plaintiffs lack standing. As to the standing inquiry, nothing in the U.S. Supreme Court's recent decision in *Spokeo* undermines this Court's prior determination that a plan participant suffers no injury as long as the plan is overfunded. Indeed, *Spokeo* reaffirms this Court's prior analysis and underscores the need for plaintiffs to demonstrate actual injury, which is clearly lacking in this case.

I. Plaintiffs Have Not Suffered An Injury In Fact Sufficient To Confer Standing.

In order to bring suit, a plaintiff must have constitutional and statutory standing. "Th[e] 'irreducible constitutional minimum of standing' requires a showing of 'injury in fact' to the plaintiff that is 'fairly traceable to the challenged action of the defendant,' and 'likely [to] be redressed by a favorable decision.'" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009) (quoting *Lujan*, 504 U.S. at 560-61) (first alteration added). The Supreme Court has repeatedly instructed that an "injury in fact" must be "concrete and particularized" as well as "actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180 (2000).

Although Congress "can loosen the strictures of the redressability prong," "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009); *see also Raines*, 521 U.S. at 820 n.3 ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); John G. Roberts, Jr., *Article III Limits on Statutory*

Standing, 42 Duke L.J. 1219, 1226 (1993) ("If Congress directs the federal courts to hear a case in which the requirements of Article III are not met, that Act of Congress is unconstitutional.").

It is thus well established that "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers*, 555 U.S. at 496. That is because only a "'person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy.'" *Id.* (quoting *Defenders of Wildlife*, 504 U.S. at 572). And because "[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 (emphases added), the standing inquiry in ERISA cases involving defined benefit plans looks to whether there is a plan surplus, not whether a loss has occurred due to the alleged breach of fiduciary duty.

In addition to satisfying these constitutional requirements, plaintiffs must establish statutory standing. To do so, plaintiffs must estab-

lish that their "complaint fall[s] within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (quoting *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). That inquiry "requires [courts] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014).[2]

A. This Court's Precedents Make Clear that Plaintiffs Lack Standing.

This Court addressed the intersection of ERISA, defined benefit plans, and Article III standing in *Harley v. Minnesota Mining & Manufacturing Co.*, 284 F.3d 901 (8th Cir. 2002). In that case, the plaintiffs alleged violations of ERISA's prudent-person standard of care. According to the plaintiffs, a breach of fiduciary duty resulted in a $20 million loss to their defined benefit plan. *Id.* at 905. Despite this sizable loss,

[2] Statutory standing is sometimes referred to as prudential standing, but, as the Supreme Court recently explained, that term is a misnomer as applied to the zone-of-interests test. *See id.* at 1387 & n.4.

the plan had a surplus and "never failed to pay benefits to its beneficiaries." *Id.* at 904.

In addressing whether the plaintiffs had standing to bring an ERISA action under Section 1132(a)(2) to seek monetary relief for the alleged breach of fiduciary duty, the *Harley* Court focused on the "unique features of a defined benefit plan." *Id.* at 906. In a defined benefit plan, "if plan assets are depleted but the remaining pool of assets is more than adequate to pay all accrued or accumulated benefits, then any loss is to plan surplus." *Id.* And because defined benefit plans (as their name implies) promise a specific monetary payment to beneficiaries, "plaintiffs as Plan beneficiaries have no claim or entitlement to [a] surplus." *Id.* Indeed, if there is a surplus, this Court explained, then the employer can reduce or suspend contributions. *Id.* at 906. And even in the alternative scenario where "the Plan's surplus disappears," this Court noted that it is "[the employer's] obligation to make up any underfunding with additional contributions." *Id.*

Given these considerations, the *Harley* Court determined that the plaintiffs had not suffered "any cognizable harm." *Id.* As such, this

Court held that the plaintiffs lacked standing to sue under Section 1132(a)(2) for two reasons.

First, the Court stated that allowing plaintiffs to sue under such circumstances would "raise serious Article III case or controversy concerns." *Id.* As this Court saw it, "the limits on judicial power imposed by Article III counsel against permitting participants or beneficiaries who have suffered *no* injury in fact from suing to enforce ERISA fiduciary duties on behalf of the Plan." *Id.* The Court, therefore, relied on the constitutional avoidance doctrine in determining that the plaintiffs lacked standing. *See, e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *Ashwander v. Tenn. Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

In response to the dissenting judge's contention that the plaintiffs had standing to sue, the *Harley* Court explained that "the law of trusts is the starting point in interpreting and applying ERISA's fiduciary du-

ties" and that, "[u]nder the law of trusts, '[a] particular beneficiary cannot maintain a suit for a breach of a trust which does not involve any violation of duty to him.'" *Harley*, 284 F.3d at 907 (quoting Restatement (Second) of Trusts § 214 cmt.b). In light of this background understanding of the law of trusts, this Court concluded that the dissent's analogy to a plaintiff's standing to sue in *qui tam* actions—which have a lengthy history dating back to the common law and have been accepted by the Supreme Court, *see Vermont Agency of Natural Resources v. United States ex. rel Stevens*, 529 U.S. 765 (2000)—was inapt, *see Harley*, 284 F.3d at 905-06.

Second, the Court looked to ERISA's purpose in determining whether the plaintiffs had standing. ERISA's "'primary purpose . . . is the protection of individual pension rights.'" *Id.* at 907 (quoting H.R. Rep. No. 93-533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639). Accordingly, "the basic remedy for a breach of fiduciary duty is 'to restor[e] plan participants to the position in which they would have occupied but for the breach of trust.'" *Id.* (quoting *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992)). Because the plan at issue in *Harley* retained "a substantial surplus before and after the alleged breach and a financially

sound settlor responsible for making up any future underfunding," the Court concluded that "the purposes underlying ERISA's imposition of strict fiduciary duties are not furthered by granting plaintiffs standing to pursue these claims." *Id.* In other words, the plaintiffs' claims were not within the zone of interests protected by ERISA. *See id.*

This Court has reaffirmed *Harley*'s holding. In *McCullough v. AEGON USA Inc.*, 585 F.3d 1082 (8th Cir. 2009), a participant in an overfunded defined benefit plan brought suit under ERISA Section 1132(a) alleging that plan fiduciaries breached their duties by engaging in prohibited transactions. The plaintiff argued that this Court should reconsider *Harley* in light of the Supreme Court's (then recent) decision in *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269 (2008), holding that assignees of a legal claim had Article III standing to bring suit even though the assignee itself did not suffer harm.

This Court declined the plaintiff's invitation to reconsider *Harley*. Significantly for this case, this Court emphasized that *Harley* was a *statutory* holding that was unaffected by *Sprint*. *See McCullough*, 585 F.3d at 1087 ("The statutory holding of *Harley* did not rest solely on constitutional avoidance."); *accord id.* at 1085. To the extent that *Harley*

invoked principles of constitutional avoidance that may have been indirectly affected by *Sprint*, this Court explained that *Harley*'s reliance on "ERISA's primary purpose" "survives, no matter how broadly one interprets *Sprint* and its discussion of Article III standing." *Id.* at 1087.

Not only did the Court reaffirm *Harley* in *McCullough*, it also expanded its holding. *Harley* involved a claim for monetary relief whereas the plaintiff in *McCullough* sought both monetary *and* injunctive relief. Because *Harley* was premised on a "holding that a participant suffers no injury as long as the plan is substantially overfunded," this Court "s[aw] no basis to construe § 1132(a)(2) to authorize an action against fiduciaries of an overfunded plan for injunctive relief, but not for the monetary relief sought in *Harley*." *Id.*

To be sure, the defined benefit plans at issue in *Harley* and *McCullough* were overfunded at the time the respective complaints were filed, whereas here the plan was underfunded at the time the complaint was filed. But, as found by the district court, the plan now has a surplus, meaning that, under the analysis articulated in *Harley* and *McCullough*, the plaintiffs here no longer suffer the effects of any concrete injury. *See Harley*, 284 F.3d at 905 ("If there is no loss to the

plan, then no one may recover from the fiduciary on behalf of the plan.").

Although this Court has found a lack of statutory standing when a plaintiff seeks to replenish an already-overfunded pension plan, other courts have reached the same outcome under Article III. *See Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1125-26 (9th Cir. 2006); *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 608-09 (6th Cir. 2007); *David*, 704 F.3d at 334-39 (4th Cir.); *Perelman v. Perelman*, 793 F.3d 368, 373-76 (3d Cir. 2015). As the Fourth Circuit aptly stated: when a plan is overfunded, any "alleged risk" to a beneficiary is "insufficiently 'concrete and particularized' to constitute an injury-in-fact for Article III standing purposes." *David*, 704 F.3d at 338. And as the Ninth Circuit explained, "trust law, on which ERISA is based, does not allow beneficiaries to bring suit on behalf of the trust" and thus "there is no [historical] tradition of unharmed ERISA beneficiaries bringing suit on behalf of their plans." *Glanton*, 465 F.3d at 1125 & n.2. There is, therefore, a broad judicial consensus that plan participants may not bring an action under ERISA

for breach of fiduciary duty where, as here, they would not stand to benefit from an ultimate victory.

In sum, whether evaluated under ERISA or Article III, plaintiffs lack a sufficient stake in the outcome of this case to proceed. Given the plan's surplus—not to mention the layers of statutory protections should the plan later become underfunded—the risk that plaintiffs will not receive their defined benefits is "too speculative to give rise to . . . standing." *David*, 704 F.3d at 338; *accord Perelman*, 793 F.3d at 375.

B. The Supreme Court's Recent Decision in *Spokeo* Reinforces *Harley* and *McCullough*.

This Court's precedents are bolstered—not undermined—by *Spokeo v. Robins*, 136 S. Ct. 1540 (2016). In that case, the Supreme Court elaborated on Article III's requirements of concreteness and particularity. There, the plaintiff brought a putative class action against the search-engine company Spokeo, alleging that Spokeo issued consumer reports that violated the Fair Credit Reporting Act ("FCRA"). *Id.* at 1544, 1546. The plaintiff alleged that Spokeo's search results associated with his name included inaccurate information, indicating that he had more education and professional experience than he actually pos-

sessed; that he was married; and that he was better off financially than he actually was. *Id.* at 1546.

The Ninth Circuit concluded that the plaintiff had suffered an injury in fact because he had alleged that Spokeo had violated his personal rights under the FCRA and that the handling of his credit information was particularized to him. *See id.* at 1548. The Supreme Court faulted this approach because it "concern[ed] particularization" and "elided" concreteness. *Id.* In other words, because "[i]njury in fact must be both concrete *and* particularized," *id.*, the Ninth Circuit erred by considering only part of that inquiry.

Critically for this case, the *Spokeo* Court explained that "[a] 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Id.* at 1548. Although concreteness "is not . . . necessarily synonymous with 'tangible,'" a plaintiff "c[an] not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement." *Id.* at 1549. Applying those constitutional principles to the statutory violation at issue in the case, the Court noted that "[a] violation of one of the FCRA's procedural requirements may result in no harm" since "not all inaccuracies cause harm or present any material

risk of harm." *Id.* at 1550; *see also id.* at 1549 ("Article III standing requires a concrete injury even in the context of a statutory violation."). The Court thus remanded the case to the Ninth Circuit to consider whether the plaintiff suffered a concrete injury.

Contrary to the claims of the plaintiffs and *amici*, *Spokeo* does not require this Court to reconsider *Harley* or to conclude that the plaintiffs have standing to sue.

First, as this Court made clear in *McCullough*, its decision in *Harley* rested on statutory grounds. *See McCullough*, 585 F.3d at 1087. Thus, *Spokeo* speaks to a different, constitutional question than the statutory issue addressed in *Harley*. Just as in *McCullough*, where this Court declined to reconsider *Harley* in light of *Sprint*, so, too, should this Court decline to reconsider *Harley* in response to *Spokeo*. *Harley*'s statutory holding and its analysis of the law of trusts remains unaffected by *Spokeo*'s discussion of the constitutional requirements for Article III standing.

Second, to the extent that *Harley* relies on principles of constitutional avoidance, *Spokeo* reinforces—rather than weakens—those constitutional concerns. *Spokeo* makes crystal clear that concreteness and

particularity are distinct and necessary inquiries under Article III—and that plaintiffs must suffer a concrete injury aside from a statutorily conferred right to maintain Article III standing. As this Court explained in *Harley*: "the limits on judicial power imposed by Article III counsel against permitting participants or beneficiaries who have suffered *no* injury in fact from suing to enforce ERISA fiduciary duties on behalf of the Plan." *Harley*, 284 F.3d at 906.

Nothing in *Spokeo* is to the contrary. Indeed, *Spokeo* amplifies the constitutional concerns voiced in *Harley*. As this Court recently explained, "[i]n *Spokeo* . . . the Supreme Court rejected th[e] absolute view" that "'the actual-injury requirement may be satisfied *solely* by the invasion of a legal right that Congress *created*.'" *Braitberg v. Charter Comm., Inc.*, __ F.3d __, 2016 WL 4698283, *4 (8th Cir. Sept. 8, 2016) (quoting *Hammer v. Sam's East, Inc.*, 754 F.3d 492, 498 (8th Cir. 2014)). Accordingly, this Court concluded that prior precedent espousing a more permissive view of the injury-in-fact requirement had been "superseded" by *Spokeo*. *Id.* (citing *Hammer*, 754 F.3d at 498-99; *Charvat v. Mutual First Federal Credit Union*, 725 F.3d 819, 822 (8th Cir. 2013)). Such a holding cannot be squared with plaintiffs' and *amici*'s

suggestion that *Spokeo* has loosened the strictures of Article III standing. And, surely, nothing in *Spokeo* detracts from *Harley*'s interpretation of trust law to foreclose standing when the beneficiary cannot show that the breach of trust violated a duty owed to him. *See Harley*, 284 F.3d at 907.

Third, plaintiffs' reliance (Br. at 33-35) on the Supreme Court's post-*Spokeo* order granting certiorari, vacating the decision, and remanding ("GVR") to the Fifth Circuit in *Pundt v. Verizon Communications, Inc.*, 136 S. Ct. 2448 (2016), is misplaced. Contrary to plaintiffs' insinuations, a "GVR is not the equivalent of a reversal on the merits." *United States v. Norman*, 427 F.3d 537, 538 n.1 (8th Cir. 2005). Rather, "a GVR disposition is appropriate where intervening developments, such as a new decision of the Court . . . , call into question the lower court's ruling." *Id.* The Supreme Court "remands for the sake of judicial economy—so that the lower court can more fully consider the issue with the wisdom of the intervening development." *Id.*

And in any event, the Fifth Circuit recently re-instated its prior decision. *Lee v. Verizon Communications, Inc.*, __ F.3d __, 2016 WL 4926159 (5th Cir. Sept. 15, 2016). On remand, the Fifth Circuit ex-

plained that "*Spokeo* maps surprisingly well onto the present case" and reinforced the reasoning of the prior decision. *Id.* at 2. According to the Fifth Circuit, "[a] bare allegation of improper defined-benefit-plan management under ERISA, without concomitant allegations that any defined benefits are even potentially at risk, does not meet the dictates of Article III." *Id.* The Fifth Circuit stated that a contrary holding "would vitiate the Supreme Court's explicit pronouncement that 'Article III standing requires a concrete injury even in the context of a statutory violation.'" *Id.* (quoting *Spokeo*, 136 S. Ct. at 1549)). The Fifth Circuit thus re-joined the Third, Fourth, Sixth, and Ninth Circuits in holding that plaintiffs lack Article III standing when a defined-benefit plan is overfunded. *See supra* at p. 14 (collecting cases).

II. Conferring Article III Standing On Plaintiffs Who Have Not Suffered An Injury In Fact Will Result In Profligate Litigation And Harm Plan Beneficiaries.

Although "[d]efined contribution plans dominate the retirement plan scene today," *LaRue*, 552 U.S. at 255, defined benefit plans remain a vital component of retirement savings for millions of families. As of 2013, there were 44,163 defined benefits plans covering over 39 million participants and holding approximately $2.9 trillion in assets. U.S.

Dep't of Labor, *Private Pension Plan Bulletin Historical Tables and Graphs*, 1975-2013, at 1, 5, 13 (Sept. 2015), http://goo.gl/49h49K.

In addition to their importance to the retirements of millions of families, defined benefit plans have certain built-in advantages in comparison to defined contribution plans. "The defined benefit configuration principally assigns risk to the employer because the employer guarantees the employee a specified benefit, while the more privatized defined contribution approach apportions risk to the employee." Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 Yale L.J. 451, 453 (2004); *see also Hughes Aircraft*, 525 U.S. at 439 (explaining that, for defined benefit plans, "the employer typically bears the entire investment risk and—short of the consequences of plan termination—must cover any underfunding as a result of a shortfall that may occur from the plan's investments"). Moreover, defined benefit plans can utilize "economies of scale [that] can [be] achieve[d] through centralized investment of a single pooled fund" whereas defined contribution plans "entail proportionately higher transaction costs because retirement resources are managed on a dispersed basis by individual employees in their own separate accounts." Zelinsky, *supra*, at 459.

Profligate and unconstitutional litigation brought by uninjured plaintiffs against defined benefit plan administrators would harm—not help—the beneficiaries of such plans. That is because the interests of the beneficiaries would be "adversely affected by subjecting the Plan and its fiduciaries to costly litigation brought by parties who have suffered no injury from a relatively modest but allegedly imprudent investment." *Harley*, 284 F.3d at 907. If plaintiffs could bring suit merely on the allegation of a breach of fiduciary duty, then plans could be subjected to costly discovery requests, unnecessary attorney's fees and costs, and exorbitant settlement demands. Given plaintiffs' attorneys' tendency to file cookie-cutter complaints making similar allegations, loosening the strictures of standing in the ERISA context would have disastrous results. *See, e.g.*, Anne Tergesen, *Suits Target University Retirement Plans*, Wall St. J. (Aug. 19, 2016), http://goo.gl/1U8elY (stating that a "dozen big-name universities" were named defendants in separate ERISA lawsuits filed within a two-week period); Joe Lustig, *Plan Fees Still Lawsuit Trigger For Retirement Plan Sponsors*, Bloomberg BNA Pension and Benefits Blog (June 22, 2016), https://goo.gl/wJvT0K ("Since September 2015, more than a dozen lawsuits have been filed

challenging the fees paid by 401(k) plans of large companies like Intel Corp., Anthem, Inc., Verizon Communications and Chevron Corp.").

A holding that participants in a defined benefit plan could bring suit without showing a concrete injury would only serve to further accelerate the shift away from defined benefits plans and toward defined contribution plans. *Cf.* Zelinsky, *supra* at 472 ("ERISA's fiduciary rules incented employers to shift to self-directed defined contribution arrangements under which participants control the investment of their own retirement resources.").[3] Indeed, an overly expansive—and unduly costly—right to sue may lead many employers to simply not offer retirement plans; nothing in ERISA, after all, requires that employers set up retirement plans for their employees. *See Hughes Aircraft Co.*, 525 U.S. at 443. Such a result would undermine the retirement security of working families.

[3] In 1975, the year after ERISA's enactment, there were over 33 million participants in defined benefit plans and over 11 million participants in defined contribution plans. By contrast, in 2013, there were only 39 million participants in defined benefit plans and over 92 million participants in defined contribution plans. *See Private Pension Plan Bulletin Historical Tables and Graphs*, *supra*, at 5.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Dated: September 19, 2016

Respectfully submitted,
/s/ Brian D. Netter

Kate Comerford Todd
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H Street N.W.
Washington, DC 20062
(202) 463-5337

Brian D. Netter
Travis Crum
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
Tel: (202) 263-3000

Counsel for Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

I certify that the foregoing *Amicus* Brief:

1. complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 4,591 words, including footnotes and excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii);

2. complies with typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2007, in 14-point Century Schoolbook for both the text and footnotes; and

3. complies with Eighth Circuit Rule 28A(h)(2) because it was scanned for viruses with the most recent version of System Center Endpoint Protection (with last update 9/19/16) and, according to the program, is free of viruses.

Dated: September 19, 2016

Respectfully submitted,
/s/ Brian D. Netter
Brian D. Netter
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
Tel: (202) 263-3000
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2016, I caused the *Amicus Curiae* Brief for the Chamber of Commerce to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. I certify that service will be accomplished by the CM/ECF system, which will send notice to all users registered with CM/ECF.

Dated: September 19, 2016

Respectfully submitted,
/s/ Brian D. Netter
Brian D. Netter
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
Tel: (202) 263-3000
Counsel for Amicus Curiae