

No. 17-1712

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**In the Supreme Court of the United States**

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JAMES J. THOLE, et al.,

*Petitioners,*

v.

U.S. BANK, N.A., et al.,

*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
For the Eighth Circuit**

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**BRIEF OF THE CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA,  
THE AMERICAN BENEFITS COUNCIL, AND  
THE ERISA INDUSTRY COMMITTEE AS  
*AMICI CURIAE* IN SUPPORT OF  
RESPONDENTS**

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**QUESTION PRESENTED**

This brief is limited to the following question:

Whether petitioners have demonstrated Article III standing.

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**BRIEF OF THE CHAMBER OF COMMERCE OF  
THE UNITED STATES OF AMERICA, THE  
AMERICAN BENEFITS COUNCIL, AND THE  
ERISA INDUSTRY COMMITTEE AS *AMICI  
CURIAE* IN SUPPORT OF RESPONDENTS**

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**INTEREST OF THE *AMICI CURIAE*<sup>1</sup>**

The **Chamber of Commerce of the United States of America** (Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Its members include many employers that offer ERISA-governed benefit plans to their employees, as well as companies that fund or administer those plans.

The **American Benefits Council** (Council) is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. Its approximately 440 members are primarily large, multistate employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee-benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering

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<sup>1</sup> Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties have consented to the filing of this brief.

virtually every American who participates in employer-sponsored benefit programs.

The **ERISA Industry Committee** (ERIC) is a national nonprofit organization exclusively representing the Nation's largest employers that sponsor employee benefit plans for their nationwide workforce. With member companies that are leaders in every sector of the economy, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans for active and retired workers, as well as their families. In addition to participating as *amicus curiae* in cases that have the potential for far-reaching effects on employee benefit plan design or administration, ERIC initiates litigation to protect ERISA preemption against state mandates.

The Chamber, the Council, and ERIC regularly participate as *amici curiae* in cases concerning employee-benefit design or administration under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*<sup>2</sup> This case, which implicates the Article III prerequisites for standing in such suits, is of special concern to *amici's* members. The claims here illustrate how violations of regulatory statutes can be alleged by large numbers of people who were not actually injured and who do not face any reasonable prospect of injury. If such people can bring lawsuits without the need to demonstrate any harm beyond the alleged statutory violation itself,

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<sup>2</sup> See, e.g., *Retirement Plans Comm. of IBM v. Jander*, No. 18-1165; *Intel Corp. Inv. Policy Comm. v. Sulyma*, No. 18-1116; *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014); *Conkright v. Frommert*, 559 U.S. 506 (2010); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008).

businesses will predictably be tied up in meritless litigation and employers, employees, and beneficiaries will suffer.

### STATEMENT

ERISA provides a nationwide regulatory framework for employer-sponsored retirement plans. ERISA-governed retirement plans have two basic structures: *defined benefit* and *defined contribution*. See 29 U.S.C. § 1002(34), (35). The differences between such plans bear on the application of Article III standing principles.

**Defined Benefit Plans.** In a defined benefit plan, such as a traditional pension, plan participants are entitled to a specified benefit at retirement. The amount of the benefit might depend on the number of years that the participants worked before retirement, or the participant's salary in the years leading up to retirement, see *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 154 (1993), but there will always be "a known, established formula by which benefits may be determined." 1 Ronald J. Cooke, *ERISA Practice & Procedure* § 2.4 (Oct. 2019 ed.).

Structurally, a defined benefit plan consists of "a general pool of assets" that backs the employer's obligation to pay future benefits. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999). Although a shortfall in the available assets does not by itself violate the statute, ERISA imposes minimum funding obligations to ensure that the asset pool is on pace to satisfy the plan's future obligations. See *LaRue v. DeWolff, Bobert & Assocs., Inc.*, 552 U.S. 248, 255 (2008). To determine whether that obligation has been satisfied, employers must compare the trust's balance



to the actuarial present value of the plan's anticipated future obligations. See 29 U.S.C. §§ 1081-1085a.

If a plan's assets are "more than sufficient to pay out all vested benefits," the plan is considered to be "overfunded" or to have a "surplus." *David v. Alphin*, 704 F.3d 327, 330 (4th Cir. 2013). If a plan's assets fall below the amount needed to pay expected benefits, then the plan is "underfunded" and the employer is required to make an additional contribution.<sup>3</sup>

Functionally, this structure subjects the employer to the upside and downside risks of the plan. It is "the employer who enjoys the fruits (whether in the form of lower plan contributions or sometimes a reversion of assets) if plan investments perform beyond expectations," but it is also "the employer who must make up for any deficits." *Beck v. PACE Int'l Union*, 551 U.S. 96, 98-99 (2007); see also *Hughes Aircraft*, 525 U.S. at 439; *Alabama Power Co. v. Davis*, 431 U.S. 581, 593 n.18 (1977).

Plan participants have no particular stake in their plan's funding status—which indicates only whether the employer will be obligated to make future contributions. The participant does not have a claim to any particular assets held within the plan's trust

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<sup>3</sup> In particular, an employer's funding obligations are determined by a number called the Funding Target Attainment Percentage (or FTAP), which reflects the ratio of (1) the total value of plan assets to (2) the plan's "funding target," which is the present value of all benefits accrued or earned under the plan as of the beginning of the plan year. 29 U.S.C. § 1083(d). If the FTAP is less than 100%—if the plan assets are projected to be insufficient to pay the promised benefits—the sponsor must make a "minimum required contribution" to remedy the deficiency. 29 U.S.C. § 1083(a).

and does not experience investment risk; whether the trust's investment performance is strong or weak, the participant is entitled to the same benefit.<sup>4</sup>

**Defined Contribution Plans.** A defined contribution plan is the mirror image of a defined benefit plan. Instead of being promised a certain level of benefits in retirement, a plan participant receives only the amount contained in his or her account. An employer in a defined contribution plan may agree to contribute a specified amount of money on the employee's behalf; an employee may also contribute through payroll withholdings. The employee is then entitled to whatever level of retirement benefits those contributions will buy. Examples of defined contribution plans include 401(k) plans (which allow the employee to make tax-advantaged pre- or post-tax contributions) and similar 403(b) plans, which are available to public education organizations, certain nonprofits, and others.

Instead of a general pool of assets, as in a defined benefit plan, ERISA requires defined contribution plans to provide "an individual account for each participant" and mandates that each participant's benefits be based "solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of

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<sup>4</sup> ERISA requires the employer or the defined benefit plan "to make premium payments to the Pension Benefit Guaranty Corporation for plan termination insurance" as a further backstop. *LaRue*, 552 U.S. at 255. When the sponsor of a single-employer plan declares bankruptcy and an underfunded plan is terminated, workers typically "receive the full pension benefit" that they earned during their working years, if the full benefit does not exceed the maximum PBGC guarantee prescribed by ERISA. Congressional Research Service, *Pension Benefit Guaranty Corporation (PBGC): A Primer* at 1 (Mar. 21, 2019).

accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34). Put another way, at retirement, "each beneficiary is entitled to whatever assets are dedicated to his individual account." *Hughes Aircraft*, 525 U.S. at 439.

Also in contrast to a defined benefit plan, ERISA imposes no ongoing funding obligation for a defined contribution plan. The hallmark of such a plan is that "the employer's obligation to fund is over because the employee is not guaranteed a particular benefit, just a specified input." Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 Yale L.J. 451, 455 (2004). As such, "there can never be an insufficiency of funds in the plan to cover promised benefits." *Hughes Aircraft*, 525 U.S. at 439 (quotation marks omitted).

Participants in defined contribution plans often exercise choice over how the funds contributed on their behalf are invested. That means that a participant benefits directly from the performance of the investments in his or her account. The participant's "ultimate economic entitlement" is equal to "the amount to which the defined contributions for her, plus earnings, grow or shrink." Zelinsky, 114 Yale L.J. at 455.

This case concerns only defined benefit plans.

### **SUMMARY OF ARGUMENT**

A participant in a defined benefit retirement plan does not suffer a cognizable injury for breach of fiduciary duty under Article III unless the alleged breach materially increases the risk that the participant will not receive his or her promised benefits.

Plaintiffs here allege that the plan fiduciaries pursued a risky investment strategy that caused the trust to lose more money during the economic downturn than would have occurred with a more conservative strategy. But the allegation that the plan allegedly lost money is not enough to create standing. Plan assets fluctuate all the time, for all sorts of reasons. These fluctuations do not injure plan participants entitled to a fixed benefit, because the employer is statutorily obligated to make up for any shortfall, thereby ensuring that the defined benefits get paid.

Plaintiffs did not plead any facts to show that their plan sponsor was unable or unwilling to make any necessary contributions; or that Plaintiffs were unlikely to obtain their promised benefits as a result of the alleged fiduciary misconduct; or even that the alleged fiduciary misconduct would likely recur. In fact, Respondents made the requisite payments and Plaintiffs' plan is now fully funded.

As this case comes to the Court, therefore, Plaintiffs' only "harm" is an alleged prior deprivation of their statutory right in "having fiduciary duties fulfilled." Pet. Br. 20. But as a matter of history and logic, that abstract interest is not a *de facto* injury that can open the door to federal court. Permitting such suits to proceed is not only contrary to law but will have serious practical implications in a wide variety of ERISA lawsuits.

In the defined benefit context, fiduciaries must take risks to maximize the value of the assets under their control. Some risks will be rewarded and others will be penalized. Over time, history has proven that diversified portfolios must take some risks to improve returns. In the short run, certain investments will

underperform; when they do, the employer will need to make additional contributions. A standing rule that permits lawsuits challenging unrewarded risks whenever they occur, even risks that do not implicate participants' benefits, would generate a vast amount of costly litigation without a practical benefit. Indeed, such litigation would counterproductively incentivize fiduciaries to adopt conservative investment strategies.

Plaintiffs' case should therefore be dismissed for lack of Article III standing.

### 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, 341-342 (2006). In service of this principle, a plaintiff in federal court must allege and ultimately establish standing—that he or she (1) has suffered an injury in fact that (2) is fairly traceable to the challenged conduct of the defendant and (3) is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

Article III's standing requirements ensure that a plaintiff has “such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975). If a plaintiff cannot satisfy Article III's prerequisites, a federal court cannot hear the case even if Congress has purported to give the plaintiff a statutory right to sue. *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1547-1548 (2016); *Summers*

v. *Earth Island Inst.*, 555 U.S. 488, 497 (2009); *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997).

This case turns on the “[f]irst and foremost” of standing’s elements: injury in fact. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 103 (1998). As this Court has often reiterated, the injury-in-fact requirement demands a showing that the plaintiff has suffered an invasion of a legally protected interest that is “concrete,” “particularized,” and “actual or imminent.” *Spokeo*, 136 S. Ct. at 1548. An injury is concrete when it is *de facto*—“real” rather than “abstract,” something that “actually exist[s].” *Ibid.* An injury is particularized when it “affect[s] the plaintiff in a personal and individual way.” *Ibid.* And an injury is actual or imminent when it exists or is at least “certainly impending.” *Clapper v. Amnesty Int’l, USA*, 568 U.S. 398, 409 (2013).

These principles compel the conclusion that Plaintiffs—participants in a defined benefit plan whose sponsor, U.S. Bancorp, is a going concern with over \$80 billion in liquid assets—have not demonstrated Article III standing.

### **I. Plaintiffs Do Not Have Individual Standing.**

Article III demands that ERISA plaintiffs face a *realistic* and *imminent* risk that they will not receive the retirement benefits they have been promised. As applied here, this means that participant-plaintiffs in defined benefit plans whose sponsors are capable of making all required contributions cannot establish standing for Article III purposes. Unless the sponsor lacks sufficient resources to make ongoing contributions, such plaintiffs can expect to receive

everything to which they are entitled regardless of their allegations of fiduciary misconduct.<sup>5</sup>

**A. Plaintiffs have not suffered a tangible injury.**

In *Spokeo*, this Court recognized that a “concrete” injury will often—though not always—be tangible, such as a loss of money or property. 136 S. Ct. at 1549.

Plaintiffs no longer assert that they are seeking to redress a tangible injury.

The Government nevertheless contends that a material increase in the risk of monetary loss confers standing. U.S. Br. 20. Although the Government’s principle is correct, its application of that principle is wrong. In a defined benefit plan, “[m]isconduct by the administrators \* \* \* 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). Here, even assuming that Plaintiffs could prove a fiduciary breach that diminished plan assets, the risk of default was materially unchanged because the employer was able to make the required contributions.

To the extent fiduciary misconduct results in any loss to the plan in the case of a non-terminated defined

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<sup>5</sup> This brief addresses Plaintiffs’ claim for backward-looking relief. Because the plan’s fiduciaries have changed investment policies since the period in question, Resp. Br. 56-58, there is no risk that the challenged conduct will recur. The Court therefore need not decide, in this case, whether the same standards apply to forward-looking relief. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-106 (1983); see also *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (a plaintiff “must demonstrate standing for each claim he seeks to press and for each form of relief that is sought”) (quotation marks omitted).

benefit plan, it will be in one of two forms, neither of which categorically inflicts a tangible injury on plan participants.

First, fiduciary misconduct might result in a diminution of plan *surplus*. But as this Court’s decision in *Hughes Aircraft* makes clear, participants have no claim to that surplus. As the Court there explained, “[s]ince a decline in the value of a plan’s assets does not alter accrued benefits, members similarly have no entitlement to share in a plan’s surplus—even if it is partially attributable to the investment growth of their contributions.” 525 U.S. at 440. For that reason, it does not matter to participants if plan surplus is *diminished* due to investment performance, so long as sufficient funds remain to pay out their accrued benefits. By definition, an overfunded plan has assets exceeding the actuarial present value of future payments. When a defined benefit plan is fully funded, therefore, participants can expect to receive all of their promised benefits.

Second, fiduciary misconduct might create or exacerbate a plan’s funding deficit, when compared to its actuarially projected liabilities. An underfunded plan triggers “the employer’s obligation to make up any shortfall.” *Hughes Aircraft*, 525 U.S. at 440. When the plan sponsor has sufficient assets, the shortfall may be quite short-lived and would be subject to ERISA’s minimum funding requirements. Because only a material risk of default would injure the interests of plan participants, a shortfall would not necessarily cause tangible injury.

The Government argues that “[a] plan that is underfunded by a dollar has virtually the same risk of future insolvency as one that is overfunded by a dollar.” U.S. Br. 22. The Government then contends



that this means that a participant in a defined benefit plan always has standing to bring a claim under § 1109. To the contrary, where (as here) the plan sponsor is well-capitalized, the risk of tangible injury to individual participants—future insolvency or loss of benefits—is remote without regard to whether the plan is overfunded or underfunded. See *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 546 (5th Cir. 2016) (“regardless of whether the plan is allegedly under- or over-funded, the direct injury to a participants’ benefits is dependent on the realization of several additional risks”).

If anything, the Government’s hypothetical about a plan toggling between over- and under-funded status proves too much. If an underfunded plan always gave rise to a tangible injury regardless of any actual diminution of participant benefits, a breach of fiduciary duty resulting in a loss of \$100 in assets would be just as actionable as a breach of duty resulting in a loss of \$100 million. Lawsuits could be filed based simply on small daily fluctuations in asset values that could not possibly affect the participants’ benefits.

That is why—whatever the alleged monetary loss—Article III demands plausible factual allegations that the sponsor is unlikely to meet its ongoing funding obligations, *i.e.*, that a plaintiff will suffer *some* concrete and imminent harm.

**B. Plaintiffs’ alleged intangible injuries are not sufficient to create standing.**

Although concrete injuries often are tangible, this Court has recognized that *intangible* injuries can in some circumstances also create standing. In assessing whether an alleged intangible injury constitutes a *de*

*facto* harm, both history and congressional judgments are instructive, but not dispositive. *Spokeo*, 136 S. Ct. at 1549.

The fact that ERISA provides a cause of action to plan participants for breach of fiduciary duty (29 U.S.C. §§ 1109, 1132(a)(2))—standing alone—does not satisfy Article III. Congress cannot create standing merely by creating a cause of action. “[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.” *Summers*, 555 U.S. at 497; see also *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). Thus, a plaintiff cannot “allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement.” *Spokeo*, 136 S. Ct. at 1549.

Both Plaintiffs and the Government assert that sponsors and fiduciaries owe fiduciary duties to beneficiaries as well as the plan, 29 U.S.C. § 1104(a), such that, they contend, the mere existence of a fiduciary breach is itself an “injury” sufficient to create standing for participants. Pet. Br. 20; U.S. Br. 15-16. They rely on the historical precedent of breach-of-duty claims in the trust context as well as contentions regarding imminent intangible injuries. Neither suffices to satisfy Article III.

*1. Historical practice does not support standing.*

Plaintiffs and the Government place great weight on an analogy to trust law, which they claim has traditionally allowed suits alleging fiduciary breaches against trustees to proceed in the absence of concrete injury. Pet. Br. 35-38; U.S. Br. 16-18.

This argument, focusing principally on trust law’s duty of loyalty, is unavailing. First, at common law, a

beneficiary could not bring *prudence*-type claims against a trustee unless the beneficiary had a tangible interest in the trust assets being mismanaged. Second, the trust law doctrines of loyalty on which Plaintiffs rely are not applicable in the ERISA context.

***Prudence.*** ERISA’s duty of prudence requires fiduciaries to act “with the care, skill, prudence, and diligence” that a prudent person would use in similar circumstances. 29 U.S.C. § 1104(a)(1)(B).

At common law, a beneficiary with a concrete interest in particular trust assets could maintain a suit against the trustee for mismanagement. But a beneficiary whose interest was unaffected by the alleged mismanagement suffered no cognizable harm and could not sue merely for the alleged breach of duty.

Thus, as the treatises recognize, “[a]ny beneficiary who can prove that the threatened or actual wrongdoing *may or has affected him adversely financially* may bring an action for relief.” Bogert on Trusts and Trustees § 871 (June 2019 ed.) (emphasis added); see also Restatement (Third) of Trusts § 94 cmt. b (2012); Restatement (Second) of Trusts § 214 cmt. b (1959).

Courts applying this common law rule have routinely held that a beneficiary is not entitled to sue a trustee for mismanagement of trust assets if the alleged misconduct does not pose an immediate risk to the beneficiary’s financial interest. *E.g.*, *In re Ledyard’s Estate*, 21 N.Y.S.2d 860, 874-875 (Sur. Ct. 1939), *aff’d*, 259 A.D. 892 (2d Dep’t 1940); *McChord v. Caldwell’s Ex’r*, 29 S.W. 440, 441-442 (Ky. Ct. App. 1895); *Terry v. Allen*, 23 A. 150 (Conn. 1891). As the

South Dakota Supreme Court recently explained, where certain beneficiaries “had no interest” in particular distributions of trust income, those beneficiaries “d[id] not have standing to assert a claim” against the trustee for its failure to make those distributions. *In re Florence Y. Wallbaum Revocable Living Tr. Agmt.*, 813 N.W.2d 111, 121 (S.D. 2012).<sup>6</sup>

**Loyalty.** Under principles of equity, “a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties.” *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). “To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties [was] enforced with ‘uncompromising rigidity.’” *Id.* at 329-330 (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, C.J.)).

In view of that “uncompromising rigidity,” it was presumed at common law that disloyal conduct caused injury to the trust corpus, and no separate proof was required. Plaintiffs and the Government ask the Court to extrapolate from equity’s “no further inquiry” rule a tradition of permitting no-injury lawsuits for fiduciary disloyalty.

There are two basic flaws in that theory.

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<sup>6</sup> Plaintiffs argue that this exception is inapplicable to a claim that involves (1) a breach of a duty owed to the beneficiary that (2) reduces the trust corpus. Pet. Br. 33 n.7. But that was exactly the fact pattern at issue in, for example, *Terry v. Allen*, which held that the plaintiff, a remainderman, could not maintain a cause of action against the trustee for waste where the trustee was required to provide a bond that would protect the plaintiff against any risk of loss. 23 A. at 152-53.

*First*, the “no further inquiry” rule is a consequence of the English chancery courts’ historical impotence in resolving factual disputes, a concern that is “archaic” today. John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 947 (2005). Even so, that rule did not permit lawsuits when the claimant *knew* that there was no injury. Rather, it stemmed from a presumption that disloyal acts were injurious. *Id.* at 944 (citing 4 James Kent, *Commentaries On American Law*, at 438 (the sole interest rule “is founded on the danger of imposition and the presumption of the existence of fraud, inaccessible to the eye of the court”)).

*Second*, equity’s “unyielding” standard of loyalty that produced the “no further inquiry” rule is not the standard adopted in ERISA. The statute does contain a duty of loyalty, see 29 U.S.C. § 1104(a)(1), but under ERISA, “a fiduciary may have financial interests adverse to beneficiaries.” *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000); see also, *e.g.*, *Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996). Indeed, ERISA specifically contemplates that officers and employees of the plan sponsor will serve as fiduciaries. 29 U.S.C. §§ 1102(16), 1108(c)(3).

ERISA fiduciaries accordingly need not exhibit perpetual loyalty to plan participants; they are entitled to wear two hats—a fiduciary hat and a non-fiduciary hat—so long as they wear the fiduciary hat when making fiduciary decisions. *Pegram*, 530 U.S. at 225. As such, ERISA does not prohibit fiduciaries from having conflicts of interest, and it does not violate ERISA for a third party or sponsor to benefit incidentally from a fiduciary’s action, so long as the fiduciary is acting to benefit the plan’s interests, too.

*Flanigan v. General Elec. Co.*, 242 F.3d 78, 88 (2d Cir. 2001); *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 302 (5th Cir. 2000); *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987).

Given these limitations on ERISA's duty of loyalty, courts have recognized that "ERISA holds a trustee liable for a breach of fiduciary duty only to the extent that losses to the plan result from the breach." *Friend v. Sanwa Bank Cal.*, 35 F.3d 466, 469 (9th Cir. 1994).<sup>7</sup>

This Court has recognized that, although the common law will often guide the analysis of ERISA, courts must be mindful of Congress's intentional departures from common-law norms. *Varity*, 516 U.S. at 497. Even if the "no further inquiry" rule authorized no-loss equitable actions against trustees, the differing rationale underlying ERISA's duty of loyalty weighs heavily against recognizing no-loss actions by plaintiff-participants here.<sup>8</sup>

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<sup>7</sup> See *Holliday v. Xerox Corp.*, 732 F.2d 548, 552 (6th Cir. 1984) ("Congress did not intend the Act to penalize employers for exercising their discretion to make rational economic decisions which are both in the best interest of the preservation of the fund and which are also not adverse to the employer's interest."); John H. Langbein, *Trust Law As Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 Nw. U. L. Rev. 1315, 1335 n.128 (2007) ("Because ERISA expressly permits employer personnel to serve as plan administrators, \* \* \* it authorizes the very sort of conflicts of interest that the no-further-inquiry rule attempts to deter in trust administration.").

<sup>8</sup> In practice, because ERISA's loyalty standard does not prohibit conflicts of interest, plaintiffs will frequently press "loyalty" claims that "piggyback" off "prudence claims" without plausibly alleging that the fiduciary sold out plan participants to serve

2. *Plaintiffs cannot show the required imminent risk of intangible harm.*

Because they cannot rely on the particular history of actions under trust principles, plaintiffs must satisfy the general test set forth in *Spokeo*: demonstrating that the purported violation of a statutory right “entail[s] a degree of risk [of intangible harm] sufficient to meet the concreteness requirement.” 136 S. Ct. at 1550.

Given that the interests of plan participants remain protected unless the employer is unable to fund the plan and the plan becomes insolvent, see pages 10-12, *supra*, the intangible harm of a fiduciary breach would be sufficiently concrete only if there were a materially enhanced risk of default. Here, Plaintiffs have not alleged any such risk.

## **II. Plaintiffs Lack Representative Standing.**

Plaintiffs’ standing deficit cannot be overlooked simply because Plaintiffs purport to bring their claim in a “representative” capacity. Pet. 33-34. Article III still applies when plaintiffs seek to bring a representative action; as Plaintiffs themselves implicitly concede (at 34 n.8), an ongoing personal interest is as much a prerequisite for representative litigation as it is for individual litigation.

Of course, Article III does not categorically prohibit plaintiffs from suing in a representative

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another’s interests. *Cassell v. Vanderbilt Univ.*, 285 F. Supp. 3d 1056, 1062 (M.D. Tenn. 2018); see also, *e.g.*, *Sacerdote v. New York Univ.*, 2017 WL 3701482, at \*5 (S.D.N.Y. Aug. 25, 2017); *White v. Chevron Corp.*, 2016 WL 4502808, at \*5 (N.D. Cal. Aug. 29, 2016). Such is the case here, too. If Plaintiffs cannot plausibly allege that Defendants injured their interests by advancing their own agenda, then Plaintiffs lack standing to proceed.

capacity. But this Court has repeatedly concluded that even where the plaintiff seeks to represent the interests of a third party, a continuing personal interest on the part of the plaintiff is still required.

In the *qui tam* context, for example, the Court has stressed that Article III permits suits by the relator on behalf of the United States because “the statute gives the relator himself an interest in the lawsuit, and not merely the right to retain a fee out of the recovery.” *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) (emphasis omitted). So too in class actions, where the named plaintiff must establish individual standing before he or she can serve as a representative for absent members of the class. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976). And in securities cases, this Court has observed that “if a security holder were allowed to maintain a [derivative] action after he had lost any financial interest in its outcome, there would be serious constitutional doubt whether that plaintiff could demonstrate the standing required by Article III.” *Gollust v. Mendell*, 501 U.S. 115, 125 (1991).

As discussed above, historical practice confirms that (outside the limited exceptions for disloyal conduct, which do not apply here) a plan participant must have a personal stake in the action to bring a representative claim. “Traditionally, trust law, on which ERISA is based, does not allow beneficiaries to bring suit on behalf of the trust”—unless the beneficiary was personally affected by the misconduct. *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1125 n.2 (9th Cir.



2006) (citing Restatement (Second) of Trusts § 214 cmt. b).<sup>9</sup>

In short, if (as here) the plan participants do not have standing in their own right, Article III prohibits a plan participant from bringing a “representative” action as an end-run around the injury-in-fact requirement.

### **III. Plaintiffs’ Theory of Standing Will Invite Wasteful and Abusive Litigation.**

Plaintiffs’ theory that a participant can sue based on alleged violations of fiduciary duty that do not materially affect beneficiaries’ future payments is not only contrary to this Court’s precedents. It would throw open the floodgates to a host of unwarranted ERISA claims of all sorts.

The Government, in particular, has taken a breathtakingly expansive definition of standing in ERISA cases. Under its theory, Article III allows *any* suit for fiduciary breach by *any* participant, regardless of the relationship between the plaintiff and the supposed harm. See U.S. Br. 15.

In the defined benefit context, such a rule would multiply litigation exponentially, particularly given ERISA’s attorney’s-fee provision, 29 U.S.C. § 1132(g)(1). One of the benefits of pooling retirement assets in a trust is that the assets can be managed to a longer time-horizon than an individual retiree

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<sup>9</sup> An ERISA fiduciary, by contrast, has standing to sue on behalf of the plan because trust law recognizes an “independent, personal benefit” to the fiduciary that stems from the “discharge of its legal obligation” to sue to preserve plan assets. *Sprint Commc’ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 304 n.3 (2008) (Roberts, C.J., dissenting).

would tolerate. Sound management requires long-horizon investors to expose assets to calculated risks—because, over the long-run, investments with higher risk profiles are very likely to generate greater returns. In the short run, however, some risks will be rewarded and others will be penalized; such is the nature of risk.

The Government’s approach to standing would incentivize entrepreneurial attorneys to mine the investment decisions of even the most generously overfunded pensions to demand repayment for risks that did not pan out—even after the employer’s subsequent contributions returned the plan to the same funding status.

Every time a plan dipped below (or, on the Government’s theory, close to below) full funding, no matter how temporarily, a lawsuit apparently could be maintained on the theory that the temporary dip in fund value—even for a week, or just a day—resulted from a breach of duty. Given the volatile nature of many asset values, it is not an exaggeration to predict that multiple lawsuits could be brought each year against a very large number of plans.<sup>10</sup>

As a practical matter, such a litigation environment would prompt fiduciaries to adopt conservative investment strategies designed to minimize risk—and not to maximize wealth—which

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<sup>10</sup> Such suits would be equally wasteful for plans that are underfunded but that do not imperil benefit payments. For example, a plan might be perpetually funded at the 80% level, which means that 80% of future benefit payments have been prepaid by the employer into the trust. So long as the plan is not terminated and the employer continues to make contributions, the plan would have no difficulty meeting its ongoing obligations.

would make the voluntary provision of desirable benefits even more cost prohibitive. Paradoxically, such an investment strategy could increase the risk that the plan would be unable to pay benefits by causing the plan to earn an inappropriately low return on its investments, creating greater expense for the sponsor.

Suits like the present case are especially wasteful. As a practical matter, if uninjured participants in defined-benefit plans funded by well-capitalized employers are allowed to bring claims based solely on allegations of breaches of fiduciary duty, “successful” lawsuits will simply result in an order for the employer to make a contribution to the plan that it is legally obligated to make absent any lawsuit. Plaintiffs’ lawyers will seek their fees under 29 U.S.C. § 1132(g)(1). But to the plan’s participants, this relief will make no real-world difference—because the payment would have been made anyway based on ERISA’s funding requirements.

It is true that enforcing Article III’s requirements will require dismissal of some lawsuits challenging alleged fiduciary errors.<sup>11</sup> Such is the nature of the injury-in-fact requirement. But misconduct that

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<sup>11</sup> Congress contemplated as much. See *Mertens v. Hewitt Associates, Inc.*, 508 U.S. 248, 262 (1993) (recognizing that “ERISA [was] an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs”). Congress chose to protect pensions under ERISA through a gauntlet of “fail-safes”—mandated disclosures, vesting and accrual requirements, minimum standards of conduct, adequate funding to pay promised benefits, and a termination insurance program. 29 U.S.C. §§ 1001(c), 1001b. Without an allegation that their pension benefits materially are at risk, Plaintiffs have not suffered a cognizable injury.

actually imperils benefit payments will remain subject to judicial review; moreover, as noted above (see *supra*, at 10 n.5), a future case may present an occasion for this Court to address standing for forward-looking equitable relief. In any event, to the extent the fiduciaries in this case did err, the party that would have been injured was U.S. Bank itself; although a plan sponsor cannot file suit for fiduciary breach under ERISA, it does have the authority to designate new fiduciaries for the future.

In the defined contribution context, which the Government says should be no different, U.S. Br. 15, the potential for abuse of lax standing rules is even greater. Over 100 new complaints related to 401(k) plans alone were filed in 2016 and 2017. George S. Mellman & Geoffrey T. Sanzenbacher, Center for Ret. Research at Boston College, *401(k) Lawsuits: What Are the Causes and Consequences*, at 2 (May 2018).

It has become commonplace, for instance, for participants in both 401(k) and 403(b) plans to file lawsuits alleging that particular investment options were imprudent and caused losses. *E.g.*, *White v. Chevron Corp.*, 752 F. App'x 453 (9th Cir. 2018), *aff'g* 2017 WL 2352137 (N.D. Cal. May 31, 2017). Participants in such plans have individual accounts and no interest in the accounts of their fellow beneficiaries. Yet many plaintiffs file suits seeking hundreds of millions of dollars of damages on behalf of the “plan” for a feature—a particular investment option—that did not affect that particular plaintiff at all.<sup>12</sup>

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<sup>12</sup> See, e.g., *Sweda v. University of Pa.*, 923 F.3d 320 (3d Cir. 2019); *Patterson v. Morgan Stanley*, 2019 WL 4934834 (S.D.N.Y. Oct. 7, 2019); *Cervantes v. Invesco Holding Co. (US), Inc.*, 2019

These complaints frequently use cookie-cutter allegations and are filed against multiple defendants.<sup>13</sup> A holding that plan participants can sue without even a plausible showing that they will suffer concrete harm from the challenged practice will inevitably increase the number of poorly founded suits that employers and plan fiduciaries must face.

Moreover, the broadest theories advanced by Plaintiffs and the Government would permit ERISA plaintiffs to file class-action lawsuits challenging investment options that they, themselves, never elected. Here, too, the consequences of loosening the strictures of standing would be predictable and severe. Plaintiffs' attorneys will scour plan offerings for supposedly imprudent investment options that, in hindsight, did not perform as well as expected. And plans and plan fiduciaries will face even more pressure to minimize litigation risk by limiting the

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WL 5067202 (N.D. Ga. Sept. 25, 2019); *Beach v. JPMorgan Chase Bank, N.A.*, 2019 WL 2428631 (S.D.N.Y. June 11, 2019); *Cassell v. Vanderbilt Univ.*, 2018 WL 5264640 (M.D. Tenn. Oct. 23, 2018); *Hay v. Gucci Am., Inc.*, 2018 WL 4815558 (D.N.J. Oct. 3, 2018); *Henderson v. Emory Univ.*, 2018 WL 6332343 (N.D. Ga. Sept. 13, 2018); *Johnson v. Providence Health & Services*, 2018 WL 1427421 (W.D. Wash. Mar. 22, 2018); *Leber v. Citigroup 401(k) Plan Inv. Comm.*, 323 F.R.D. 145 (S.D.N.Y. 2017).

<sup>13</sup> See, e.g., Anne Tergesen, *Suits Target University Retirement Plans*, Wall St. J. (Aug. 19, 2016), <https://on.wsj.com/33QVxpb> (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), <http://bit.ly/2CNzmEk> (“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.”).

number or types of investment options offered, hurting plan participants.

Allowing uninjured plaintiffs to force open the doors to federal court serves none of the interests of Article III. A plaintiff who has not invested in a purportedly imprudent option has no “personal stake in the outcome of the controversy” (*Warth*, 422 U.S. at 498) and no obligation to represent the interests of the persons whose interests allegedly *were* wronged. Moreover, allowing plaintiffs to multiply their claims by suing for investment options that do not impact them personally creates strong incentives for opportunistic, lawyer-driven lawsuits, virtually always brought as class actions in order to exert maximum settlement pressure. The same is true of the defined benefit claims at issue here.

As courts have recognized, the prospect of discovery in ERISA actions is “ominous,” entailing “probing and costly inquiries” and the need to retain expensive fiduciary and financial experts. *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt., Inc.*, 712 F.3d 705, 719 (2d Cir. 2013). Those burdens are significant enough for large companies. But for the plan sponsors that are small or mid-sized entities—a number that has already decreased in recent years<sup>14</sup>—the impact of these suits is even more pronounced. Cf. Greg Iacurci, Investment News, *401(k) Lawsuits Creeping Down to Smaller Plans* (Aug. 6, 2019), <http://bit.ly/2Knz2QS>

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<sup>14</sup> Deloitte Development LLC, *Defined Contribution Benchmarking Survey 6* (2017 ed.), <http://bit.ly/2BW7z6d> (reporting that more than one-third of plan sponsors surveyed in 2013 and 2014 employed 500 or fewer employees, while just one-fifth employed the same number of employees in 2017).

(noting that several 401(k) “lawsuits filed in recent weeks have moved down market to smaller plans”).

The Court’s decision on standing is thus of great practical importance to *amici* and their members. Congress enacted ERISA “to create a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place.” *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (alterations omitted). But requiring employers to bear the costs of meritless litigation will inflate costs, lead to less generous defined-benefit or defined-contribution offerings, and discourage employers from offering plan options that are attractive to many participants. See *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 907 (8th Cir. 2002) (participant rights “would if anything 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”); Mellman & Sanzenbacher, *supra*, at 6 (observing that fear of litigation may be dissuading fiduciaries from offering innovative products, like annuitization options, to participants).<sup>15</sup>

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<sup>15</sup> The need to defend meritless and harm-free lawsuits may even discourage some sponsors from offering, or continuing to offer, employer-sponsored retirement plans. Nothing in ERISA, after all, requires that employers set up retirement plans in the first place. See *Hughes Aircraft*, 525 U.S. at 443. This risk is particularly apparent for defined benefit plans like the one in this case. Defined benefit plans have been eclipsed by defined contribution plans in recent decades. See *LaRue*, 552 U.S. at 255. In 1975, the year after ERISA’s enactment, there were more than 33 million participants in defined benefit plans and more than 11 million participants in defined contribution plans. By

## CONCLUSION

The judgment of the court of appeals should be affirmed.

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contrast, in 2016, there were only 36 million participants in defined benefit plans compared to more than 100 million participants in defined contribution plans. U.S. Dep't of Labor, *Private Pension Plan Bulletin Historical Tables and Graphs, 1975-2016* (Dec. 2018), at tbl. E4, <http://bit.ly/33RqueS>.



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