

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.

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

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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KATE S. O'SCANNLAIN  
*Solicitor of Labor*  
G. WILLIAM SCOTT  
*Associate Solicitor*  
THOMAS TSO  
*Counsel for Appellate and  
Special Litigation*  
STEPHEN SILVERMAN  
*Attorney*  
*Department of Labor*  
*Washington, D.C. 20210*

NOEL J. FRANCISCO  
*Solicitor General*  
*Counsel of Record*  
EDWIN S. KNEEDLER  
*Deputy Solicitor General*  
SOPAN JOSHI  
*Assistant to the Solicitor  
General*  
*Department of Justice*  
*Washington, D.C. 20530-0001*  
*SupremeCtBriefs@usdoj.gov*  
*(202) 514-2217*

## QUESTIONS PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, authorizes participants and beneficiaries to bring a civil action “for appropriate relief” against fiduciaries of employee benefit plans who violate their duties, responsibilities, and obligations under the statute. 29 U.S.C. 1132(a)(2). Participants and beneficiaries also may bring a civil action for injunctive and “other appropriate equitable relief” to remedy any act or practice that violates the plan or ERISA. 29 U.S.C. 1132(a)(3). The questions presented are:

1. Whether defined-benefit plan participants and beneficiaries may seek relief under 29 U.S.C. 1132(a)(3) when the plan is overfunded.
2. Whether defined-benefit plan participants and beneficiaries may seek relief under 29 U.S.C. 1132(a)(2) when the plan is overfunded.

**TABLE OF CONTENTS**

	Page
Statement .....	1
Discussion .....	5
I. The second question presented warrants this Court’s review .....	6
A. An ERISA plan participant or beneficiary has standing to sue for breach of fiduciary duty even without a monetary loss.....	6
B. The court of appeals erred in holding that petitioners lacked “statutory standing” .....	13
C. Lower courts disagree on this question.....	15
II. The first question presented also warrants this Court’s review .....	17
III. The Court should direct the parties to brief the additional question whether the court of appeals erred in addressing “statutory standing” before Article III standing .....	19
Conclusion .....	23

**TABLE OF AUTHORITIES**

Cases:

<i>Aberdeen Ry. Co. v. Blaikie, Bros.</i> , (1854) 2 L.R.Eq. 1281 (H.L.).....	10, 11
<i>Central States Se. &amp; Sw. Areas Health &amp; Welfare Fund v. Merck-Medco Managed Care, LLC</i> , 433 F.3d 181 (2d Cir. 2005) .....	18
<i>Central States, Se. &amp; Sw. Areas Pension Fund v. Central Transp., Inc.</i> , 472 U.S. 559 (1985).....	6
<i>Clapper v. Amnesty Int’l USA</i> , 568 U.S. 398 (2013).....	12
<i>Commissioner v. Keystone Consol. Indus., Inc.</i> , 508 U.S. 152 (1993) .....	2
<i>David v. Alphin</i> , 704 F.3d 327 (4th Cir. 2013) .....	15, 16

IV

Cases—Continued:	Page
<i>Davoue v. Fanning</i> , 2 Johns. Ch. 252 (N.Y. Ch. 1816) .....	11
<i>Dodge v. Woolsey</i> , 59 U.S. (18 How.) 331 (1856) .....	8
<i>Duncan v. Muzyn</i> , 885 F.3d 422 (6th Cir. 2018) .....	15
<i>Firestone Tire &amp; Rubber Co. v. Bruch</i> , 489 U.S. 101 (1989) .....	6
<i>Fletcher v. ConvergeX Grp., LLC</i> , 679 Fed. Appx. 19 (2d Cir. 2017), cert. denied, 138 S. Ct. 644 (2018) .....	15
<i>Frank v. Gaos</i> , 139 S. Ct. 1041 (2019) .....	16
<i>Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.</i> , 465 F.3d 1123 (9th Cir. 2006), cert. denied, 552 U.S. 820 (2007) .....	15
<i>Gollust v. Mendell</i> , 501 U.S. 115 (1991) .....	9
<i>Harley v. Minnesota Mining &amp; Mfg. Co.</i> , 284 F.3d 901 (8th Cir. 2002), cert. denied, 537 U.S. 1106 (2003) .....	4, 7, 11
<i>Harris Trust &amp; Sav. Bank v. Salomon Smith Barney Inc.</i> , 530 U.S. 238 (2000) .....	9, 18
<i>Horvath v. Keystone Health Plan E., Inc.</i> , 333 F.3d 450 (3d Cir. 2003) .....	17, 18
<i>Hughes Aircraft Co. v. Jacobson</i> , 525 U.S. 432 (1999) .....	2, 12
<i>Jackson v. Smith</i> , 254 U.S. 586 (1921) .....	11
<i>Keech v. Sandford</i> , (1726) 25 Eng. Rep. 223 (Ch.) .....	10
<i>L.I. Head Start Child Dev. Servs., Inc. v. Economic Opportunity Comm’n of Nassau Cnty., Inc.</i> , 710 F.3d 57 (2d Cir. 2013) .....	15
<i>LaRue v. DeWolff, Boberg &amp; Assocs., Inc.</i> , 552 U.S. 248 (2008) .....	9, 18
<i>Lee v. Verizon Commc’ns, Inc.</i> , 837 F.3d 523 (5th Cir. 2016), cert. denied, 137 S. Ct. 1374 (2017) .....	15

Cases—Continued:	Page
<i>Lexmark Int’l, Inc. v. Static Control Components, Inc.</i> , 572 U.S. 118 (2014).....	14, 17, 20, 21
<i>Loren v. Blue Cross &amp; Blue Shield of Mich.</i> , 505 F.3d 598 (6th Cir. 2007).....	18
<i>Magruder v. Drury</i> , 235 U.S. 106 (1914) .....	11
<i>Massachusetts Mut. Life Ins. Co. v. Russell</i> , 473 U.S. 134 (1985) .....	8, 13
<i>Merchants’ Cotton Press &amp; Storage Co. v. Insurance Co. of N. Am.</i> , 151 U.S. 368 (1894).....	9
<i>Mertens v. Hewitt Assocs.</i> , 508 U.S. 248 (1993).....	8
<i>Michoud v. Girod</i> , 45 U.S. (4 How.) 503 (1846) .....	11
<i>Nachman Corp. v. Pension Benefit Guar. Corp.</i> , 446 U.S. 359 (1980) .....	14
<i>Pegram v. Herdrich</i> , 530 U.S. 211 (2000).....	8
<i>Pilot Life Ins. Co. v. Dedeaux</i> , 481 U.S. 41 (1987) .....	14
<i>Riviera Cong. Assocs. v. Yassky</i> , 223 N.E.2d 876 (N.Y. 1966).....	8
<i>Ruhrgas AG v. Marathon Oil Co.</i> , 526 U.S. 574 (1999) .....	20
<i>Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.</i> , 549 U.S. 422 (2007) .....	20
<i>Spokeo, Inc. v. Robins</i> , 136 S. Ct. 1540 (2016) .....	6, 9, 11
<i>Steel Co. v. Citizens for a Better Env’t</i> , 523 U.S. 83 (1998) .....	16, 20, 21, 22
<i>Tenet v. Doe</i> , 544 U.S. 1 (2005).....	21
<i>United States v. Emor</i> , 785 F.3d 671 (D.C. Cir. 2015).....	21
<i>Varsity Corp. v. Howe</i> , 516 U.S. 489 (1996) .....	2, 5, 7, 18, 19
<i>Vermont Agency of Natural Res. v. United States ex rel. Stevens</i> , 529 U.S. 765 (2000) .....	9, 21, 22
<i>Western R.R. v. Nolan</i> , 48 N.Y. 513 (1872).....	8

VI

Case—Continued:	Page
<i>Whelpdale v. Cookson</i> , (1747) 27 Eng. Rep. 856 (Ch.) .....	10
Constitution, statute, and rules:	
U.S. Const.:	
Art. III .....	<i>passim</i>
Amend. XI .....	21
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 <i>et seq.</i> .....	
Tit. I.....	18
29 U.S.C. 1001(b) .....	1, 9, 14
29 U.S.C. 1002(7).....	7
29 U.S.C. 1002(8).....	7
29 U.S.C. 1081-1085a .....	12
29 U.S.C. 1104(a).....	2, 9
29 U.S.C. 1106 .....	2
29 U.S.C. 1109 (§ 409) .....	2, 13
29 U.S.C. 1109(a).....	2, 8, 13
29 U.S.C. 1132 (§ 502) .....	5
29 U.S.C. 1132(a)(2) (§ 502(a)(2)) .....	<i>passim</i>
29 U.S.C. 1132(a)(3) (§ 502(a)(3)) .....	<i>passim</i>
Tit. IV:	
29 U.S.C. 1344(d)(1).....	12
Fed. R. Civ. P.:	
Rule 23.1.....	9
Rule 23.2.....	9
Miscellaneous:	
16 George Gleason Bogert & George Taylor Bogert, <i>The Law of Trusts and Trustees</i> (2d rev. ed. 1995) .....	7, 8, 10

VII

Miscellaneous—Continued:	Page
John H. Langbein, <i>Questioning the Trust Law</i> <i>Duty of Loyalty: Sole Interest or Best Interest?</i> , 114 Yale L.J. 929 (2005) .....	10
Restatement (Second) of Trusts (1959).....	8, 10, 12
1 Joseph Story, <i>Commentaries on Equity</i> <i>Jurisprudence</i> (1836) .....	11

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## **BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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This brief is submitted in response to the Court’s order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted. The Court also may wish to direct the parties to brief an additional question as described herein.

### **STATEMENT**

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, protects “the interests of participants in employee benefit plans and their beneficiaries” by “establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.” 29 U.S.C. 1001(b). ERISA fiduciaries must adhere to the duties of loyalty and care and must not en-



gage in certain “prohibited transactions,” which “categorically” bar transactions by insiders “likely to injure the pension plan.” *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 155, 160 (1993); see 29 U.S.C. 1104(a), 1106.

Section 502(a)(2) of ERISA authorizes a “civil action” by “the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section [409] of” ERISA. 29 U.S.C. 1132(a)(2). Section 409 in turn provides that plan fiduciaries who breach their duties “shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits” from the breach. 29 U.S.C. 1109(a). It also provides for other appropriate “equitable or remedial relief,” including “removal of such fiduciary.” *Ibid.*

Section 502(a)(3) authorizes “a participant, beneficiary, or fiduciary” to bring a “civil action” “to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or \* \* \* to obtain other appropriate equitable relief.” 29 U.S.C. 1132(a)(3). This Court has described subsection (a)(3) as a “‘catch-all’ provision[]” that “act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy.” *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996).

2. Respondents are sponsors and administrators of a defined-benefit pension plan regulated under ERISA. Pet. App. 4a-6a. A defined-benefit plan “consists of a general pool of assets, rather than individual dedicated accounts. Such a plan, ‘as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment.’” *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999) (citation omitted).

Petitioners are participants and beneficiaries in the plan who have thus far received all payments to which they are entitled. Pet. App. 4a-6a. In 2014, they filed an amended class action complaint under Sections 502(a)(2) and 502(a)(3). *Id.* at 2a-4a, 7a; see Am. Compl. ¶¶ 328-330. The complaint alleged that respondents violated ERISA’s duties of loyalty and prudence and caused the plan to engage in prohibited transactions between 2007 and 2010. Pet. App. 2a. In particular, petitioners alleged that respondents adopted an overly risky and undiversified strategy of investing plan assets exclusively in equities, *id.* at 30a, resulting in a \$748 million loss, see Am. Compl. ¶ 168. Petitioners also alleged that respondents violated ERISA “based on the purported conflicts of interest associated with the Plan’s assets being heavily invested in [respondents’] own mutual funds.” Pet. App. 9a.

Respondents moved to dismiss the claims, arguing that petitioners lacked Article III standing because they did not suffer an injury in fact. See Pet. App. 29a-30a, 34a. The district court denied the motion because the complaint alleged “that [respondents’] conduct caused the Plan to become underfunded in 2008 and remain underfunded through the commencement of the lawsuit.” *Id.* at 34a. According to the court, “[petitioners’] injury in fact was that [respondents’] actions caused an ‘alleged increased risk of default’ and ‘the concomitant increase in the risk that the participants will not receive the level of benefits they have been promised.’” *Ibid.* (citation omitted).

Respondents, as plan sponsors, subsequently made a substantial contribution to the plan, which resulted in its being overfunded. Pet. App. 3a, 38a-39a. The district court then dismissed the case as moot, concluding that petitioners no longer had “a concrete interest in the

monetary damages they seek, and their other requests for relief do not work independently to keep the controversy live.” *Id.* at 43a.

3. The court of appeals affirmed, but not on Article III grounds. Pet. App. 1a-25a. Instead, the court applied its earlier decision in *Harley v. Minnesota Mining & Manufacturing Co.*, 284 F.3d 901 (8th Cir. 2002), cert. denied, 537 U.S. 1106 (2003) (No. 02-566), which “concluded that [Section 502(a)(2)] does not permit a participant in a defined-benefit plan to bring suit \* \* \* for alleged breaches of fiduciary duties when the plan is overfunded.” Pet. App. 14a (citation omitted). The court made clear that “‘*Harley* was decided on *statutory* grounds,’ not on Article III standing.” *Id.* at 17a (citation omitted). Acknowledging that “some references in *Harley* to standing may have caused some confusion,” *ibid.*, the court explained that resolving the case on statutory grounds was required by principles of “constitutional avoidance” and to “advanc[e] ERISA’s primary purpose of protecting individual pension rights,” *id.* at 18a n.10 (citation omitted).

The court of appeals also affirmed dismissal of petitioners’ claims under Section 502(a)(3) on statutory grounds. Pet. App. 19a-21a. The court acknowledged that “[c]ases from other circuits have concluded that a plan participant may seek injunctive relief under [Section 502(a)(3)] against fiduciaries of an overfunded plan.” *Id.* at 19a (brackets and citation omitted). Nevertheless, the court determined that when a plan is overfunded, “there is no ‘actual or imminent injury to the Plan itself’” and therefore petitioners were not “within the class of plaintiffs whom Congress has authorized to sue under the statute.” *Id.* at 21a (citation omitted).

Judge Kelly concurred in part and dissented in part, agreeing that under circuit precedent, petitioners lacked authorization to sue under subsection (a)(2), but concluding that petitioners had alleged “an actual or imminent injury” to support their claim under subsection (a)(3). Pet. App. 26a; see *id.* at 25a-27a.

#### DISCUSSION

Whether a participant or beneficiary in an overfunded defined-benefit ERISA plan may maintain a suit for breach of fiduciary duty is an important question that arises with some frequency. Most courts of appeals have addressed it under Article III, asking whether the participant or beneficiary has suffered a cognizable injury in fact. The court of appeals here concluded as a statutory matter that such a participant or beneficiary has not suffered an “actual injury” and therefore is not “within the class of plaintiffs whom Congress has authorized to sue under” ERISA. Pet. App. 20a-21a. However framed, the issue has generated tension, if not an outright conflict, among the courts of appeals. Moreover, most lower courts have decided the issue incorrectly. Accordingly, the Court should grant the petition for a writ of certiorari. And the Court may wish to direct the parties to brief an additional question: whether the court of appeals erred in addressing the issue under the rubric of “statutory standing” instead of under Article III.

Because Section 502(a)(3) is a “‘catchall’ provision[]” that “act[s] as a safety net” only when other provisions of Section 502 do not provide a remedy, *Varsity Corp. v. Howe*, 516 U.S. 489, 512 (1996), determining whether relief is available under Section 502(a)(2) is a logically antecedent inquiry. Accordingly, the government begins by addressing the second question presented in the petition, which concerns Section 502(a)(2).

**I. THE SECOND QUESTION PRESENTED WARRANTS  
THIS COURT'S REVIEW**

**A. An ERISA Plan Participant Or Beneficiary Has Standing  
To Sue For Breach Of Fiduciary Duty Even Without A  
Monetary Loss**

To have Article III standing, a plaintiff must show, among other things, that he suffered a “concrete” injury. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). A concrete injury is one that is “‘real,’ and not ‘abstract.’” *Ibid.* (citation omitted). Generally that means the injury must be tangible, but an “intangible” injury can be concrete under some circumstances. *Id.* at 1549. “[B]oth history and the judgment of Congress play important roles” in determining whether an intangible injury is sufficiently concrete. *Ibid.* Courts thus ask “whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” *Ibid.* And “because Congress is well positioned to identify intangible harms that meet minimum Article III requirements,” it “may ‘elevate to the status of legally cognizable injuries’” certain intangible harms “‘that were previously inadequate in law.’” *Ibid.* (brackets and citation omitted).

History and congressional judgment are intertwined here because “ERISA abounds with the language and terminology of trust law.” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). As this Court has explained, “rather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility.” *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985). Trust law is

thus the “starting point” for analysis under ERISA. *Varsity*, 516 U.S. at 497.

Reflecting both traditional trust law and congressional judgment, ERISA supports a participant or beneficiary’s standing to sue a plan fiduciary under three distinct yet overlapping theories. First, a participant or beneficiary may sue on behalf of the plan in a representative capacity. Second, a participant or beneficiary may sue on his own behalf because a breach of fiduciary duty constitutes an invasion of his own legal right. Third, a participant or beneficiary may sue because of an increased risk of monetary harm resulting from a breach of fiduciary duty. All three theories support standing regardless of whether the defined-benefit plan is overfunded or underfunded. (The distinction between a participant and beneficiary generally is immaterial for these purposes, cf. 29 U.S.C. 1002(7) and (8), so for simplicity’s sake this brief will henceforth refer only to beneficiaries.)

1. Section 502(a)(2) of ERISA authorizes a beneficiary to bring suit for breach of fiduciary duty on behalf of the plan. Courts, including the court of appeals here, agree that even an overfunded plan suffers a cognizable injury when a fiduciary’s act reduces the plan’s assets. *E.g.*, *Harley v. Minnesota Mining & Mfg. Co.*, 284 F.3d 901, 905 (8th Cir. 2002), cert. denied, 537 U.S. 1106 (2003) (No. 02-566). So the key question is whether a beneficiary may sue in a representative capacity to seek redress for that injury. He may.

Under the common law, the right to sue on behalf of the trust “in the ordinary case vests in the trustee.” 16 George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 869, at 113 (2d rev. ed.

1995). But under a well-established exception, a beneficiary may bring suit in a derivative capacity to vindicate the trust's interests when the trustee will not. *Id.* at 118-123; see, e.g., *Riviera Cong. Assocs. v. Yassky*, 223 N.E.2d 876, 879-880 (N.Y. 1966). In such cases “[t]he beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust.” Bogert & Bogert § 869, at 119; see, e.g., *Western R.R. v. Nolan*, 48 N.Y. 513, 518 (1872) (beneficiary may sue on behalf of trust if “trustees refuse to perform their duty,” in which case “the trustees should be brought before the court as parties defendant”); Restatement (Second) of Trusts § 199 (1959).

Section 502(a)(2) incorporates that fundamental principle of trust law, expressly assigning to beneficiaries the right of the plan to sue and recover for breach of fiduciary duty. 29 U.S.C. 1132(a)(2). The remedies available in a suit under Section 502(a)(2) then “inure[] to the benefit of the plan as a whole.” *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985); see 29 U.S.C. 1109(a). Indeed, suits to preserve the integrity of the plan are all the more important under ERISA than under traditional trust law, for not only does the statute “expand[] the universe of persons subject to fiduciary duties,” *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993), it allows an ERISA fiduciary, unlike a “traditional trustee,” to “have financial interests adverse to beneficiaries,” *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000).

Analogous derivative suits are common features of other areas of the law, and plaintiffs who satisfy the applicable procedural prerequisites unquestionably have standing to bring those suits. *E.g.*, *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 356 (1856) (shareholder deriva-

tive suit); *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. Am.*, 151 U.S. 368, 384 (1894) (suit in subrogation); *Gollust v. Mendell*, 501 U.S. 115, 127 (1991) (derivative suit under federal securities laws); see Fed. R. Civ. P. 23.1, 23.2. And ERISA's authorizing beneficiaries to sue on behalf of the trust to recover for the trust's injuries is not unlike the assignment in *qui tam* statutes of claims belonging to the United States to private relators. See *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-774 (2000). Both enjoy a "long tradition" in the law and thus present "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Id.* at 774 (citation omitted).

2. An ERISA beneficiary also has standing in his own right to sue a fiduciary that breaches its duties. As in traditional trust law, an ERISA fiduciary owes duties not just to the trust, but "to the beneficiaries" as well. *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000); see 29 U.S.C. 1104(a). Accordingly, a breach of fiduciary duty itself constitutes "an invasion of a legally protected interest" belonging to the beneficiary. *Spokeo*, 136 S. Ct. at 1548 (citation omitted). And that is true for defined-contribution and defined-benefit plans alike; indeed, when ERISA was enacted, "the defined benefit plan was the norm of American pension practice." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008) (brackets and citation omitted). Nothing in the text of ERISA conditions a fiduciary's duties to beneficiaries on whether the plan is a defined-benefit or defined-contribution plan, or whether the plan is overfunded or underfunded. See 29 U.S.C. 1001(b) ("establishing standards of conduct \* \* \* for fiduciaries" to further ERISA's "policy").



Historical trust law reinforces the conclusion that a breach of fiduciary duty, standing alone, permits a beneficiary to sue irrespective of any monetary loss. For instance, courts traditionally have entertained suits by a beneficiary alleging that the trustee violated its duty not to engage in conflicted transactions or disloyal conduct, with “no further inquiry” into whether the conflicted conduct caused any harm other than the breach itself. See Restatement (Second) of Trusts § 170(1) & cmt. b. Under the “no further inquiry” rule, “a beneficiary is given a judgment against a wrongdoing trustee though the beneficiary has not suffered any damage and the trustee has not made any profit from the transaction.” Bogert & Bogert § 862, at 67-68.

Despite some scholarly criticism, the “no further inquiry” rule has a strong pedigree in English and American law. See generally John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929 (2005). For example, in *Keech v. Sandford*, (1726) 25 Eng. Rep. 223 (Ch.), after a lessor refused to renew a lease to the trust, the trustee took the lease himself. *Ibid.* Even though neither the trust nor the beneficiary suffered any harm (because the trust was unable to renew the lease itself), the Chancellor ordered the trustee to assign the lease to the beneficiary along with all the profits he had earned from it. *Id.* at 223-224. “This may seem hard,” the Chancellor acknowledged, “that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed.” *Id.* at 223. Similar cases abound. *E.g.*, *Whelpdale v. Cookson*, (1747) 27 Eng. Rep. 856 (Ch.) 856; see *Aberdeen Ry. Co. v. Blaikie, Bros.*, (1854) 2 L.R.Eq. 1281 (H.L.) 1286-1287 (summarizing cases).

This Court, too, has long recognized the no-further-inquiry rule. For example, in *Michoud v. Girod*, 45 U.S. (4 How.) 503 (1846), the Court acknowledged that if a trustee “becomes himself interested in [a] purchase,” the beneficiary would have a cause of action to void the transaction “without any further inquiry” into the nature of the sale or the fairness of the price. *Id.* at 553, 557. That rule, the Court explained, has “been applied by the English courts of chancery from an early day, and has been received, with very few exceptions, by our State chancery courts, as altogether putting the rule upon its proper footing.” *Id.* at 556 (citing *Davoue v. Fanning*, 2 Johns. Ch. 252 (N.Y. Ch. 1816)); see, e.g., *Jackson v. Smith*, 254 U.S. 586, 588-589 (1921); *Magruder v. Drury*, 235 U.S. 106, 118-120 (1914).

A breach of fiduciary duty—without any additional harm beyond the breach itself—has thus “traditionally been regarded as providing a basis for a lawsuit in English [and] American courts” by beneficiaries of the trust. *Spokeo*, 136 S. Ct. at 1549; see *Aberdeen Ry.*, 2 L.R.Eq. at 1286-1287; *Michoud*, 45 U.S. (4 How.) at 553-558; see also 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 322, at 318 (1836).

3. Finally, in light of the express statutory cause of action and ERISA’s comprehensive and prophylactic provisions to protect plan benefits, ERISA beneficiaries have standing to sue for breach of fiduciary duty when the breach results in a materially increased risk of monetary loss. Even the Eighth Circuit recognizes that if a fiduciary’s breach causes a defined-benefit plan to become *underfunded*—as initially happened here—beneficiaries would have standing to sue based on the increased risk of future nonpayment. See *Harley*, 284 F.3d at 905.

That conclusion remains true even if the plan remains overfunded. To be sure, beneficiaries of an overfunded defined-benefit plan are entitled only to their “accrued benefit,” not to the “plan’s surplus.” *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440 (1999). But that means only that a beneficiary has no individual claim to a plan’s general asset pool or to residual assets remaining upon the plan’s termination. See 29 U.S.C. 1344(d)(1). A beneficiary still could maintain a suit alleging that the trustee had improperly used an overfunded plan’s surplus funds, in violation of its duties under ERISA. See *Hughes*, 525 U.S. at 441-442.

Moreover, the risk of underpayment does not vanish the instant a plan crosses the threshold from underfunded to overfunded under a statutory formula. A plan that is underfunded by a dollar has virtually the same risk of future insolvency as one that is overfunded by a dollar. That marginal difference cannot affect standing; if the risk is sufficiently non-speculative in the one case, it is equally non-speculative in the other. Cf. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 411 (2013); Restatement (Second) of Trusts § 214(1) & cmt. a (even a contingent beneficiary may sue a trustee). Statutory funding status and minimum-funding requirements are based on actuarial tables, inflation, interest rates, and other economic factors and predictions. See 29 U.S.C. 1081-1085a; see also Pet. App. 32a-33a (describing some of these calculations). Given normal fluctuations in those bases and assumptions, it is easy to imagine a plan toggling somewhat frequently between overfunded and underfunded. It would be bizarre to tether a plaintiff’s standing—and thus a federal court’s power to hear a case—to such a volatile and arbitrary metric. Nothing in ERISA or Article III compels such a result.

**B. The Court Of Appeals Erred In Holding That Petitioners Lacked “Statutory Standing”**

Contrary to the principles set forth above, the court of appeals incorrectly held that beneficiaries of an overfunded defined-benefit plan are not “within the class of plaintiffs whom Congress has authorized to sue under” ERISA. Pet. App. 21a. Congress could not have been clearer: “A civil action may be brought” under Section 502(a)(2) “by the Secretary, or by a *participant, beneficiary* or fiduciary.” 29 U.S.C. 1132(a)(2) (emphasis added); see *Russell*, 473 U.S. at 142 n.9 (recognizing that Section 502(a)(2) expressly “authorizes suits by four classes of party-plaintiffs,” including “participants” and “beneficiaries”). Nothing in the text or structure of ERISA purports to limit such suits based on the type or status of the plan—be it retirement or welfare; defined-benefit or defined-contribution; or underfunded or overfunded.

Instead, Section 502(a)(2) authorizes any suit by a beneficiary seeking “appropriate relief under section [409] of” ERISA. 29 U.S.C. 1132(a)(2). Section 409 in turn provides that a plan fiduciary that “breaches any of the responsibilities, obligations, or duties imposed upon” it “shall be personally liable to make good to such plan any losses to the plan resulting from each such breach.” 29 U.S.C. 1109(a). As the Court concluded in *Russell*, “[t]here can be no disagreement \* \* \* that § 502(a)(2) authorizes a beneficiary to bring an action against a fiduciary who has violated § 409.” 473 U.S. at 140. That is precisely what petitioners allege here. See Pet. App. 29a. Petitioners are thus squarely within the class of plaintiffs Congress has authorized to sue under ERISA.

In concluding otherwise, the court of appeals set aside the statute's plain text in favor of what it viewed as "ERISA's primary purpose—the protection of individual pension rights." Pet. App. 16a (citations omitted). Those rights would be "adversely affected," the court reasoned, were plans and fiduciaries subjected "to costly litigation." *Ibid.* (citation omitted).

The government agrees that one of ERISA's "central purposes" is "to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980) (footnote omitted). But given limited resources, the Secretary of Labor cannot police every plan in the country. Congress thus reasonably determined that the *best* means of protecting individual pension rights was to authorize beneficiaries to sue fiduciaries who breach their duties, notwithstanding the inevitable litigation costs. Indeed, Congress expressly declared ERISA's "policy" to be "to protect \* \* \* the interests of participants in employee benefit plans and their beneficiaries \* \* \* by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b); see *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987). "Identifying the interests protected by" a statute "requires no guesswork" when there is a "detailed statement of the statute's purposes." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131 (2014). Here, that detailed statement makes clear that providing beneficiaries "ready access" to the courts furthers, not hinders, ERISA's purposes. 29 U.S.C. 1001(b).

### C. Lower Courts Disagree On This Question

Petitioners correctly identify (Pet. 23-29) disagreement in the lower courts on the question whether beneficiaries of an overfunded defined-benefit plan have standing to bring suit under Section 502(a)(2). The Fourth Circuit has squarely answered no. *David v. Alphin*, 704 F.3d 327, 334-339 (2013). Other circuits have declined to find standing in analogous contexts based on reasoning that likely would apply equally to the situation here. *E.g.*, *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 545-546 (5th Cir. 2016) (underfunded defined-benefit plan), cert. denied, 137 S. Ct. 1374 (2017) (No. 16-762); *Duncan v. Muzyn*, 885 F.3d 422, 428-429 (6th Cir. 2018) (governmental non-ERISA plan); *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1125-1127 (9th Cir. 2006) (welfare plan), cert. denied, 552 U.S. 820 (2007) (No. 06-1608).

By contrast, the Second Circuit held in *L.I. Head Start Child Development Services, Inc. v. Economic Opportunity Commission of Nassau County, Inc.*, 710 F.3d 57 (2013), that a class of plan participants and a former trustee had standing to sue the current fiduciaries “in a derivative capacity” on behalf of the plan, *id.* at 67 n.5, in accord with the representational theory of standing outlined above, see pp. 7-9, *supra*. Although *L.I. Head Start* arose in the context of a welfare plan, the Second Circuit applied the holding in that case to a defined-benefit retirement plan in *Fletcher v. Convergex Group, LLC*, 679 Fed. Appx. 19 (2017), cert. denied, 138 S. Ct. 644 (2018) (No. 17-343), concluding that allegations of “breach of fiduciary duties of prudence and loyalty” and of “prohibited transactions” may be brought by a plan participant “in his representative capacity.” *Id.* at 20-21. *Fletcher* did not involve an overfunded plan; but the

plan's funding status was immaterial to the decision and, indeed, has no logical bearing on whether a participant can represent the plan in litigation.

In light of the tension among the courts of appeals, and given that several courts have decided the issue incorrectly, this Court's review is warranted. To be sure, those cases involved Article III standing, not "statutory standing," and there is no square circuit conflict on the latter question. Cf. *David*, 704 F.3d at 333 (remarking in dicta that it was "undisputed that [plaintiffs] have statutory standing to assert claims \* \* \* on behalf of the" overfunded plan in a representative capacity). Yet the absence of a square conflict likely is because the court of appeals here refused to address Article III standing before addressing "statutory standing." That issue is further discussed at pp. 19-22, *infra*.

In any event, the statutory analysis overlaps considerably with the Article III analysis; even the court of appeals acknowledged that *Harley*, the precedent it relied upon, contained "some references \* \* \* to standing," Pet. App. 17a, and the court expressly analyzed the issue by citing cases from the Third and Sixth Circuits that were about Article III standing, not "statutory standing," see *id.* at 19a-20a. Also, the district court resolved the case on Article III grounds. See *id.* at 40a-46a. And both the statutory and Article III issues are fairly encompassed within the question presented. See Pet. I. Accordingly, despite the Court's ordinary reluctance to address questions of Article III standing when the court of appeals has not, see, e.g., *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (per curiam); but see, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-110 (1998) (addressing Article III stand-

ing for the first time in this Court), it should grant review to do so here. Denying review would permit a plainly incorrect decision to stand merely because the court of appeals clothed its decision in the statute rather than the Constitution, with no meaningful difference in its underlying analysis or practical effect.

## II. THE FIRST QUESTION PRESENTED ALSO WARRANTS THIS COURT'S REVIEW

The first question presented, involving petitioners' ability to seek relief under Section 502(a)(3), warrants this Court's review largely for the same reasons as the Section 502(a)(2) question. The issues concerning standing are similar under the two provisions, and it would make sense for the Court to consider the two together. As with claims for relief under Section 502(a)(2), all three theories of standing, see pp. 7-12, *supra*, may support a beneficiary's standing to bring the particular claims for injunctive or other equitable relief under Section 502(a)(3) that petitioners brought here. And as with petitioners' claims under Section 502(a)(2), the court of appeals here incorrectly concluded that petitioners lacked "statutory standing" for their claims under Section 502(a)(3). See Pet. App. 19a-20a. Like subsection (a)(2), subsection (a)(3) expressly authorizes "participant[s]" and "beneficiar[ies]" to bring suit for injunctive and "other appropriate equitable relief" without any limitation based on the plan type or status. 29 U.S.C. 1132(a)(3). Petitioners purport (Pet. 7) to seek such relief. See Pet. App. 29a. They are thus among "the class of plaintiffs whom Congress has authorized to sue under" ERISA. *Lexmark*, 572 U.S. at 128.

Petitioners also correctly identify (Pet. 10-13) some divergence of analysis in the circuits concerning Section 502(a)(3). In *Horvath v. Keystone Health Plan East*,



*Inc.*, 333 F.3d 450 (2003), the Third Circuit applied the invasion-of-a-legal-right theory of standing, see pp. 9-11, *supra*, to find that beneficiaries of a welfare plan had standing under Section 502(a)(3) to seek injunctive relief to remedy an alleged breach of fiduciary duty—namely, a failure to comply with ERISA’s reporting and disclosure requirements. 333 F.3d at 456. The Sixth Circuit adopted that position in *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 609-610 (2007), and the Second Circuit also has favorably cited *Horvath*, see *Central States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 433 F.3d 181, 199-200 (2005). Although those decisions were in the context of a welfare plan, nothing in their reasoning suggests that the invasion of a *different* legal right created by ERISA would be insufficient to support standing.

To be sure, certain differences between subsections (a)(2) and (a)(3) might affect a beneficiary’s standing in a particular case. For example, whereas subsection (a)(2) authorizes a plaintiff to bring only claims on behalf of the plan, see *LaRue*, 552 U.S. at 253-256, subsection (a)(3) permits claims for individual relief too, *Varsity*, 516 U.S. at 492, 508-515. And while a claim under subsection (a)(2) may be filed only against a fiduciary for violations of fiduciary duties, subsection (a)(3) “admits of no limit \* \* \* on the universe of possible defendants,” *Harris Trust*, 530 U.S. at 246, and permits recovery for violations of “any provisions” of Title I of ERISA and of the plan itself, 29 U.S.C. 1132(a)(3). In a given case, the applicability of each of the theories of standing discussed at pp. 7-12, *supra*, may depend on these variables.

Here, it appears that petitioners’ claims under subsection (a)(3), like their claims under subsection (a)(2),

seek plan-wide relief for violations of fiduciary duties, making it unnecessary to explore any of those potential differences. Specifically, petitioners' claims under subsection (a)(3) seek "to stop the misconduct, remove the fiduciaries, and have an independent fiduciary appointed." Pet. 7. That relief would inure to the benefit of the entire plan, not just individual beneficiaries. Accordingly, petitioners would have standing to pursue their claims under subsection (a)(3) for the same reasons as under subsection (a)(2).

True, as a "catchall" provision[] that "act[s] as a safety net," subsection (a)(3) ordinarily does not provide relief if "Congress elsewhere provided adequate relief for a beneficiary's injury." *Varsity*, 516 U.S. at 512, 515. Given the nature of petitioners' claims under subsection (a)(3), subsection (a)(2) may well "provide[] adequate relief" to petitioners, rendering relief under subsection (a)(3) unavailable. *Id.* at 515. The government expresses no opinion on that issue; whether relief under subsection (a)(3) is available here is a question on the merits, not of standing, and so should not complicate the Court's review of the first question presented. That said, if the Court were to reverse on the second question presented, it might obviate the need to address the first.

**III. THE COURT SHOULD DIRECT THE PARTIES TO BRIEF THE ADDITIONAL QUESTION WHETHER THE COURT OF APPEALS ERRED IN ADDRESSING "STATUTORY STANDING" BEFORE ARTICLE III STANDING**

In addition to addressing petitioners' ability to seek relief under Sections 502(a)(2) and 502(a)(3) on both statutory and Article III grounds, this Court should consider addressing the propriety of the court of appeals' deciding the statutory question in the first place.

*Steel Co.* made clear that courts may not address a “question whether [a statute] permits th[e] cause of action” before addressing a “threshold question” of Article III jurisdiction. 523 U.S. at 88-89. Whether a statute creates a cause of action is a merits question, not a jurisdictional question, *id.* at 92-93, and addressing a merits question before a jurisdictional one would “carr[y] the courts beyond the bounds of authorized judicial action,” *id.* at 94. When facing multiple jurisdictional or other threshold non-merits questions, however, a court may address them in any order, as long as the court does not resolve any merits issues. *Id.* at 100 n.3; see *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431-432 (2007) (*forum non conveniens*); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584-585 (1999) (personal jurisdiction).

Whether the “statutory standing” issue the court of appeals addressed here may be addressed before Article III standing is unclear. *Steel Co.* acknowledged that sometimes “a statutory standing question can be given priority over an Article III question.” 523 U.S. at 97 n.2. And *Lexmark* recognized that the Court has “on occasion” treated questions of “‘statutory standing’ \* \* \* as effectively jurisdictional.” 572 U.S. at 128 n.4 (citing *Steel Co.*, 523 U.S. at 97 & n.2; and *id.* at 114-117 (Stevens, J., concurring in the judgment)).

But *Lexmark* then called the label “misleading” because such questions “do[] not implicate subject-matter jurisdiction.” 572 U.S. at 128 n.4. And the Court explained that the question whether a plaintiff “falls within the class of plaintiffs whom Congress has authorized to sue under” a statute is the same as the question whether the plaintiff “has a cause of action under the statute”—

an inquiry requiring the Court to “determine the meaning of the congressionally enacted provision creating a cause of action.” *Id.* at 128. Yet that is the sort of question *Steel Co.* said a court may not address before addressing a threshold Article III jurisdictional question. See 523 U.S. at 92-94; see also *Tenet v. Doe*, 544 U.S. 1, 12 (2005) (Scalia, J., concurring) (“whether a cause of action exists” is a “run-of-the-mill, nonthreshold *merits* question” that may not be addressed before Article III standing). Accordingly, in the wake of *Lexmark*, many lower courts have concluded that “statutory standing ‘is itself a merits issue.’” *United States v. Emor*, 785 F.3d 671, 677 (D.C. Cir. 2015) (citation omitted); see, e.g., Reply Br. 2-3 (citing cases).

Also relevant is *Vermont Agency*, which held that addressing the question whether a “statute itself *permits* the cause of action it creates to be asserted against States” may be addressed before the question whether “the Eleventh Amendment forbids [that] particular statutory cause of action” against nonconsenting States. 529 U.S. at 779. The Court so held because the statutory inquiry was “‘logically antecedent’” to the Eleventh Amendment inquiry and the two questions shared a “virtual coincidence of scope.” *Id.* at 779-780 (citation omitted). Accordingly, addressing the statutory question posed no “realistic possibility” of “expand[ing] the Court’s power beyond the limits that the jurisdictional restriction has imposed.” *Id.* at 779.

The court of appeals in this case believed that addressing “statutory standing” before Article III standing was not just permitted but *required* in part by the doctrine of constitutional avoidance. Pet. App. 15a. But *Steel Co.* indicated that constitutional avoidance is not a

justification for deciding a merits issue when the constitutional question is a threshold one of the court's jurisdiction. See 523 U.S. at 94. Then again, as in *Vermont Agency*, the court of appeals' analysis of the statutory issue is "virtual[ly] coinciden[t]" with the analysis it would have undertaken had it addressed the Article III question. 529 U.S. at 780; see Pet. App. 17a-20a. Accordingly, the court of appeals here might have been justified in addressing "statutory standing" first.

Given the uncertainty surrounding this issue, the Court may wish to direct the parties to brief the additional question whether the court of appeals erred in addressing "statutory standing" before Article III standing. Indeed, as in *Ruhrigas* and *Sinochem*, such a question could independently warrant this Court's review. Of course, the Court could avoid the need to answer that question if it were to address first Article III standing and then "statutory standing" in its ultimate decision here. Regardless, the question might benefit from a fuller analysis in the merits-stage briefing.

**CONCLUSION**

The petition for a writ of certiorari should be granted. The Court may wish to direct the parties to brief an additional question whether the court of appeals erred in addressing “statutory standing” before Article III standing.

Respectfully submitted.

KATE S. O’SCANNLAIN  
*Solicitor of Labor*  
G. WILLIAM SCOTT  
*Associate Solicitor*  
THOMAS TSO  
*Counsel for Appellate and  
Special Litigation*  
STEPHEN SILVERMAN  
*Attorney  
Department of Labor*

NOEL J. FRANCISCO  
*Solicitor General*  
EDWIN S. KNEEDLER  
*Deputy Solicitor General*  
SOPAN JOSHI  
*Assistant to the Solicitor  
General*

MAY 2019