No. 15-785

In The Supreme Court of the United States

EDWARD PUNDT, Individually, and as Representative of Plan Participants and Plan Beneficiaries of the VERIZON MANAGEMENT PENSION PLAN,

Petitioner,

v.

VERIZON COMMUNICATIONS, INCORPORATED; VERIZON CORPORATE SERVICES GROUP, INCORPORATED; VERIZON EMPLOYEE BENEFITS COMMITTEE; VERIZON INVESTMENT MANAGEMENT CORPORATION; VERIZON MANAGEMENT PENSION PLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' attempts to erase clear conflicts are belied by real and deepening divisions among the circuit courts. Petitioner would have Article III standing for his ERISA §502(a)(2), 29 U.S.C. §1132(a)(2) claims in the Second Circuit, which correctly holds that a fiduciary breach satisfies the injury-in-fact requirement without a showing that participants' benefits are at risk. Because his plan was significantly underfunded, Petitioner would also have standing for his §502(a)(2) claims in the Third and Eighth Circuits, both of which require participants to show their benefits are at risk with evidence that the plan is underfunded. Diverging from both the above approaches, the Fifth Circuit below held that "regardless of whether the plan is allegedly under- or overfunded," or fiduciary breaches are alleged, Petitioner lacked standing to pursue all his claims. Pet. App. ("App.") 38. Nothing in Respondents' Brief in Opposition ("BIO") undermines the clear division among the circuits on whether underfunding is dispositive, or even relevant, when deciding standing for §502(a)(2) claims.

Respondents do not even address the circuit splits regarding ERISA §502(a)(3), 29 U.S.C. §1132(a)(3) claims for injunctive relief and disgorgement: that Petitioner would have had standing for his §502(a)(3) injunctive claims in the Second, Third, and Sixth Circuits, and for his §502(a)(3) disgorgement claims in the Third and Fourth Circuits. By contrast, the Fifth Circuit did not distinguish Petitioner's §502(a)(3) from his §502(a)(2) claims, dismissing them all on the

grounds that Petitioner must show a "direct effect on [his] benefits." App. 36.

Finally, Respondents appear to concede that the circuits are divided on the relevance of trust law and whether it confers standing to participants to enforce ERISA's fiduciary provisions.

The confusion among the circuit courts largely stems from misconstruction of *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999). There, this Court rejected plaintiffs' attempt to ***increase their benefit levels*** due to an alleged surplus in plan assets; however, it did not hold or imply that defined benefit participants do not have a right to restore losses to plan assets, including surplus, caused by fiduciary breach. *Hughes* certainly did not hold that "participants in a typical defined benefit plan have no interest ***whatsoever*** in the assets underlying the plan." BIO 18-19 (emphasis added). Such a holding would conflict with ERISA's requirement that Plan assets be held in trust on behalf of the participants, which gives them an equitable interest in the trust corpus. Pet. Br. ("Pet.") 36-37 (discussing ERISA §403, 29 U.S.C. §1103).

Contrary to the views of Respondents and the Fifth Circuit, participants' benefits are at risk even with the Pension Benefit Guaranty Corporation ("PBGC") backstop, because the PBGC's benefit guarantee is capped, which results in benefit reductions when plans terminate underfunded. For example, after several airlines terminated their underfunded

pension plans, participants lost more than $5 billion of "guaranteed" benefits.[1] Over 6,000 United Airlines employees suffered benefit reductions of over 50%[2] and Delta Airlines employees lost as much as 24% of their benefits.[3] Here, the Plan was left non-diversified in violation of §404(a)(1)(C)-(D) and severely underfunded after $1 billion of Plan assets were wasted on excessive and unlawful annuitization fees.[4] If undisturbed, the Fifth Circuit's holding allows plan fiduciaries to use pension assets for any purpose – from lottery tickets to roulette – with impunity until benefits can no longer be paid.

Review is plainly warranted.

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[1] U.S. Gov't Accountability Office, GAO-05-835T, Commercial Aviation: Preliminary Observations on Legacy Airlines' Financial Condition, Bankruptcy, and Pension Issues, http://www.gao.gov/products/GAO-05-835T.

[2] *Id.* at tbl. 2.

[3] Melissa McNamara, *Delta Pilots Face Pension Sting*, CBS News (June 19, 2006) http://www.cbsnews.com/news/delta-pilots-face-pension-sting.

[4] Respondents' assertion that this case is a "poor vehicle" for the question presented is unavailing. BIO 25. Any purported evidence that the Plan was 100% funded on January 1, 2012, long before the annuity transaction, is irrelevant because Petitioner Pundt did not bring claims on behalf of the Non-Transferee class until January 2013, after the Plan was disclosed to be 66% funded. App. 38; Record on Appeal 1337. Even using Respondents' funding assumptions (BIO 24 n.4), the Plan was significantly underfunded at 73.46%, as Verizon reported to the Department of Labor. 2013 Form 5500 for the Plan, Schedule SB, line 14, https://www.efast.dol.gov/portal/app/disseminate?execution=e1s1.

I. Circuits Are Divided On Whether Funding Status Of Defined Benefit Plans Is Dispositive Or Relevant For Fiduciary Breach Claims

The circuits are divided on whether participants' standing depends on underfunding. The Third and Eighth Circuits treat funding status as dispositive on standing. *Perelman v. Perelman*, 793 F.3d 368, 375 (3d Cir. 2015) ("the controlling yardstick" is "whether the plan's funding levels triggered minimum required contributions"); *Harley v. Minnesota Mining & Mfg. Co.*, 284 F.3d 901, 908 (8th Cir. 2002) ("absence of adequate surplus is . . . ***proof*** [plaintiffs] are suing to redress a loss to the Plan that is an actual injury *to themselves*") (first emphasis added).

The Fourth Circuit treats funding status as relevant but not dispositive. *David v. Alphin* suggests participants must allege not only current underfunding, but also that the plan will terminate underfunded and that the PBGC will not pay participants' full benefits. 704 F.3d 327, 338 (4th Cir. 2013).

By contrast, the Fifth Circuit did not find funding status relevant, denying standing for the first time to participants in an ***underfunded*** plan. The Fifth Circuit's finding that Petitioner lacked standing "regardless of whether the plan is allegedly under- or over-funded" plainly diverges from the Third and Eighth Circuits. App. 38.

Respondents disguise these fractures by repeatedly quoting the Third Circuit's roundup of circuit

decisions as "unanimously" rejecting what Respondents misstate as Petitioner's theory. BIO 6, 13. This is disingenuous; the quotation referred only to the rejection of Petitioner's "representational standing" argument, which is only one of several standing arguments Petitioner made below.

Respondents also attempt to diminish the circuit conflict by narrowly reading *Harley* and *Perelman* to hold that *over*funded plans do *not* confer standing, without also instructing that *under*funded plans do. BIO 14-15. This reading strains credulity and ignores district court practice applying the decisions. Both opinions clearly instruct lower courts that the "controlling yardstick" for standing is underfunding. *Perelman*, 793 F.3d at 375. In *Harley*, underfunding was not just "an *element*," as Respondents contend, BIO 15, it was "proof" of "actual injury *to themselves*," *Harley*, 284 F.3d at 908. *Harley* focused entirely on surplus, without once implying that an allegation of lost benefits was necessary to show injury-in-fact. *See id.* at 906-909. Following this precedent, an Eighth Circuit district court found standing where fiduciary breaches caused the plan to become underfunded and rejected arguments that sponsor funding requirements and PBGC stop-gap insurance deprived plaintiffs of standing. *Adepipe v. U.S. Bank, Nat'l Ass'n*, 62 F. Supp. 3d 879, 893 (D. Minn. 2014); *cf. Commc'ns Workers of Am. v. Alcatel-Lucent USA Inc.*, No. 15-CV-8143, 2015 WL 7573206, at *4 (D.N.J. Nov. 25, 2015) (determining standing based solely on underfunding).

Finally, Respondents' assertion that Petitioner has failed to show any risk to his benefits is incorrect. As the Third and Eighth Circuits held, underfunding is sufficient evidence of risk to benefits. Indeed, ERISA recognizes the significant risk to participants in underfunded plans by requiring such plans to pay higher PBGC insurance premiums than fully funded plans. 29 C.F.R. §4006.3 (all plans pay per-head premiums, but underfunded plans ***also*** pay variable rate premiums that increase with every additional $1,000 of underfunding).

II. Second Circuit Law Holds That A Fiduciary Breach Itself Can Constitute Injury-In-Fact, Diverging From The Third, Fourth, Fifth, And Eighth Circuits

The Second Circuit recognizes that a fiduciary breach alone constitutes injury-in-fact when the breach injures an individual's equitable interest in trust assets or deprives an individual of a legally enforceable right. The Second Circuit thus disagrees with the Third, Fourth, Fifth, and Eighth Circuits' holdings limiting injury-in-fact to lost financial benefits or underfunding.

A. *Kendall* And *Central States* Reaffirmed *FIRF*'s Holding: A Fiduciary Breach Can Itself Constitute Injury-In-Fact

Respondents thrice repeat a falsehood: that the Second Circuit holds that a fiduciary breach alone is

insufficient to establish injury-in-fact. BIO 10, 12. This plainly contradicts the opinions they cite, which reaffirmed the earlier Second Circuit "holding that a violation of §404 . . . satisfies the injury requirement of Article III" in *Fin. Insts. Ret. Fund v. Office of Thrift Supervision* ("*FIRF*"), 964 F.2d 142, 149 (2d Cir. 1992). *Cent. States Se. and Sw. Areas Health and Welfare Fund v. Merck-Medco Managed Care, L.L.C.* ("*Central States*"), 433 F.3d 181, 200 (2d Cir. 2005) (summarizing *FIRF*); *see also Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) ("We held [in *FIRF*] the employees had standing to bring a breach-of-fiduciary-duty claim because they were theoretically injured by the funds' mismanagement of assets. . . .").

FIRF rejected the district court's finding "that injuries cognizable under ERISA must entail at least some risk to plan assets." 964 F.2d at 147. Directly contradicting the Third, Fourth, Fifth, and Eighth Circuits, *FIRF* held that plaintiffs, by alleging deprivations of rights made legally enforceable by ERISA §404, 29 U.S.C. §1104, sufficiently pled injury-in-fact. *See* 964 F.2d at 149.

Kendall and *Central States* did not "read *FIRF* narrowly." BIO 12. They clarified that the fiduciary breach allegation must specifically demonstrate how the breach injured the plaintiff, but neither case held that fiduciary breaches can *never* constitute injury-in-fact. *Kendall*, 561 F.3d at 120-121; *Central States*, 433 F.3d at 202-203.

Kendall's plaintiff only alleged a nebulous "right to a plan that complies with ERISA" without identifying a specific fiduciary breach.[5] 561 F.3d at 121. She did not allege a loss to her plan's assets caused by fiduciary breach, but instead alleged that she might have received "an as-yet-to-be-determined increase in benefits" if fiduciaries had structured the plan differently. *Id.* at 121; *cf. Hughes*, 525 U.S. at 443 (ERISA's fiduciary provisions are not applicable to settlor decisions). *Central States* involved a self-funded health plan, so the plan's assets were not held in trust and, therefore, the wrongdoing did not injure participants' equitable interest in plan assets. *See* 433 F.3d at 202-203.

As Respondents note, *Kendall* distinguished the *FIRF* plaintiffs as being able to "point to an identifiable and quantifiable pool of assets to which *they* had colorable claims." BIO 12. Similarly, Petitioner here points to $1 billion of wasted Plan assets – an identifiable and quantifiable pool of assets in which *he* has an equitable interest.

Kendall, *Central States*, and *FIRF* are harmonious, establishing that Petitioner would have standing

[5] The Second Circuit subsequently recognized that the *Kendall* claim failed because of its generality, not because bare fiduciary breach claims can never establish standing. *Donoghue v. Bulldog Investors Gen. P'ship*, 696 F.3d 170, 178 (2d Cir. 2012) (distinguishing *Kendall* and holding that a bare breach of statute-imposed fiduciary duty created sufficient injury-in-fact).

in the Second Circuit and departing from the Third, Fourth, Fifth, and Eighth Circuits.[6]

B. *Lujan* And *Warth* Support, Not Undermine, Petitioner's Standing

Respondents attempt to distinguish *FIRF* because it was issued one month before *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), claiming *FIRF* relied on "oft-misunderstood language from *Warth v. Seldin*, 422 U.S. 490 (1975)." BIO 11. Respondents' framing of *Lujan*, as cabining *Warth* and thus undermining *FIRF*, is incorrect. *Lujan* explicitly embraced *Warth*'s language: "Nothing in this contradicts the principle that '[t]he . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'" *Lujan*, 504 U.S. at 578 (quoting *Warth*, 422 U.S. at 500). Despite Respondents' suggestion otherwise, BIO 11, *FIRF* recognized that "Congress may not

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[6] Respondents also challenge *Long Island Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cnty., Inc.* ("*LIHS*"), 710 F.3d 57, 67 n.5 (2d Cir. 2013). BIO 12-13. Matching the cases above, *LIHS* recognized that claims for fiduciary breach causing quantifiable losses to plan assets in which participants have an equitable interest sufficiently allege injury-in-fact. *See* 710 F.3d at 67 n.5. *LIHS* never tied plaintiffs' standing to the outstanding judgment against their plan. *See id.* at 65-67 & n.5. There, as here, the plaintiffs had standing because a fiduciary breach depleted plan assets and, as plan participants, plaintiffs had an equitable interest in restoring those assets to the plan.

dispense with the dictates of Article III," 964 F.2d at 147. The Second Circuit's post-*Lujan* decisions cite both *Warth* and *FIRF* approvingly. *Kendall*, 561 F.3d at 118-121; *Central States*, 433 F.3d at 198-200.

While *Lujan* recognized that Congress has "elevat[ed] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law," it did not state that "Congress *may only*" elevate such injuries, despite Respondents' rewording. BIO 11-12 (emphasis added). But even if *Lujan* had held that Congress may *only* elevate *de facto* injuries, the injury caused to a trust beneficiary by a breaching fiduciary is clearly such an injury. *Lujan* specifically referenced the divided bench, noting that Congress may elevate to *legally* cognizable injuries those *previously* inadequate *at law*. Breaches of fiduciary duties are quintessential *de facto* injuries actionable in courts of equity but previously inadequate at law.[7] *See* Pet. 32-33. Thus even the most conservative reading of *Lujan*'s impact on *Warth* supports Petitioner's standing.

[7] Thus, the Fifth Circuit erred when it held fiduciary breaches are not *de facto* injuries without citing any authority beyond *Lujan* itself. App. 39.

III. The Courts Diverge On Whether Different Standing Analyses Apply To §502(A)(3) Claims For Injunctive Or Disgorgement Relief

Another "fault line" dividing the circuits is whether ERISA §502(a)(3) claims seeking injunctive relief or disgorgement are analyzed under a different standard than §502(a)(2) claims for losses or other relief to the plan. Pet. 16 n.3.

Petitioner would have standing to pursue his §502(a)(3) claims for injunctive relief in the Second, Third, and Sixth Circuits, without alleging more than the fiduciary breach itself. *See, e.g.*, *Perelman*, 793 F.3d at 373 ("for injunctive relief, such injury may exist simply by virtue of the defendant's violation of an ERISA statutory duty"); *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 456 (3d Cir. 2003) (same); *Central States*, 433 F.3d at 199 (ERISA plaintiff "may have Article III standing to obtain injunctive relief related to ERISA's . . . fiduciary duty requirements without a showing of individual harm"); *Kendall*, 561 F.3d at 121 (same); *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 610 (6th Cir. 2007) ("Plaintiffs need not demonstrate individualized injury to proceed with their claims for injunctive relief under §1132(a)(3); they may allege only violation of the fiduciary duty owed to them as a participant").

Petitioner would also have standing to pursue his §502(a)(3) claims for disgorgement in the Third and Fourth Circuits. *Edmonson v. Lincoln Nat'l Life Ins.*

Co., 725 F.3d 406, 417 (3d Cir. 2013) ("financial loss is not a prerequisite for standing to bring a disgorgement claim under ERISA"); *Pender v. Bank of Am. Corp.*, 788 F.3d 354, 365-366 (4th Cir. 2015) (same).

The Fifth Circuit did not analyze Petitioner's claims under §502(a)(3) for injunctive relief or disgorgement differently; rather it dismissed them together with his §502(a)(2) claims, all on the grounds that Petitioner did not show "direct effect on [his] benefits." App. 36. That holding is in direct conflict with the Second, Third, and Sixth Circuits on injunctive relief and the Third and Fourth Circuits on disgorgement.

To distinguish *Pender* and *Edmonson*, Respondents argue that Petitioner has no personal interest in the profits he seeks to disgorge. BIO 9-10. To the contrary, based on Petitioner's personal equitable interest in the corpus of the Plan, he has a personal interest in all profits derived from Respondents' use of the Plan's assets. Pet. 36.

IV. Circuits Disagree About Whether Trust Law Is Relevant To ERISA Participants' Standing

Citing *Scanlan v. Eisenberg*, 669 F.3d 838 (7th Cir. 2012), the Third and Fourth Circuits found that ERISA participants have standing to sue for disgorgement because of ERISA's trust law antecedents. *Edmonson*, 725 F.3d at 416 n.5; *Pender*, 788 F.3d at 367 n.11 ("Courts have also looked to trust principles

to answer questions regarding Article III standing in appropriate cases."). Although Respondents argue *Scanlan* "says nothing about ERISA," BIO 17, *Scanlan* involved the exact question at issue here: whether a trust beneficiary can sue to restore losses to the trust without alleging trust assets are insufficient to pay her benefits, 699 F.3d at 840. Respondents concede that *Scanlan* found standing based on plaintiff's "equitable interest in the corpus of the Trusts," BIO 17, which is the same equitable interest ERISA participants have in plan assets held in trust. ERISA §403; 29 U.S.C. §1103 (requiring plan assets to be held in trust for participants).

The Eighth Circuit in *Harley* and the Fourth in *David* considered trust law but came to different conclusions than the Seventh Circuit in *Scanlan* and the Fourth in *Pender*, finding that trust law did not lead to standing. *Harley*, 284 F.3d at 907; *David*, 704 F.3d at 336. Indeed, Respondents appear to concede the split between the Seventh Circuit and the Eighth when they note that *Harley* applied the same Restatement section as *Scanlan* yet they came to entirely different conclusions. BIO 17 n.2.

Departing from the Third, Fourth, and Eighth Circuits, the Fifth Circuit below did not consider trust law at all, even though Petitioner argued that

trust law principles demonstrated Petitioner's standing.[8] App. 33-43.

CONCLUSION

The petition for a writ of certiorari should be granted. Additionally, given the Department of Labor's and PBGC's longstanding interest in this issue, the Court should invite the Solicitor General to express the views of the United States.

Respectfully submitted,

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[8] Contrary to Respondents' assertion, Petitioner relied on trust law as a basis for standing below. *See* Appellants' Br. 54-56, *Lee v. Verizon Commc'ns, Inc.*, No. 14-10553 (5th Cir. Aug. 4, 2014) (arguing trust law demonstrates Pundt has Article III standing); *id.* at 51 ("Courts have traditionally avoided undue benefit to a fiduciary by asserting jurisdiction over cases against a trustee 'even though the trust itself ha[d] suffered no loss.' ") (quoting George G. Bogert et al., Law of Trusts & Trustees §861 (2013)).

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