No. 15-785

IN THE

Supreme Court of the United States

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

Petitioner,

v.

VERIZON COMMUNICATIONS INC., *et al.*,

Respondents.

On Petition For a Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This case concerns a defined benefit plan under the Employee Retirement Income Security Act of 1974 ("ERISA"). In a defined benefit plan, participants have no "claim to any particular asset that composes a part of the plan's general asset pool." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440 (1999). Instead, participants have only "a right to a certain defined level of benefits." *Id.* If the plan becomes underfunded (*i.e.*, its assets are insufficient to pay the guaranteed benefits), the employer has an "obligation to make up any shortfall" by contributing to the plan. *Id.*

Petitioner challenges certain expenses incurred by a defined benefit plan. Petitioner, however, concedes that he continues to receive the benefits he is owed under the plan and does not allege that the plan's sponsor is unable to meet its obligation to ensure that the plan remains adequately funded. The question presented is:

Whether a participant in a defined benefit plan under ERISA has Article III standing to sue over an alleged misuse of plan assets without any allegation that the participant's benefits are at risk.

CORPORATE DISCLOSURE STATEMENT

Respondent Verizon Communications Inc. is a publicly-traded corporation, and no other publicly traded corporation owns 10% or more of the stock of Verizon Communications Inc. Respondent Verizon Corporate Services Group, Inc. is a wholly-owned subsidiary of Verizon Communications Inc.

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INTRODUCTION

Petitioner asks this Court to decide whether a participant in an ERISA defined benefit plan has Article III standing "regardless" of whether there is a concrete risk to his future benefits. Pet i. He asks that ERISA plan participants be exempt from the constitutional requirement that a plaintiff allege an "actual or imminent injury" in order to seek relief from a federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). No court of appeals follows this approach. Instead, the circuit courts properly consider the likelihood that benefits will not be delivered, and apply that inquiry to the factual circumstances before them. Intervention by this Court is not warranted.

STATEMENT

1. The Employment Retirement Income Security Act of 1974 ("ERISA") divides pension plans into two categories: defined contribution plans and defined benefit plans.

In a defined contribution plan, a participating employee's benefit is based on an allocation of the plan's assets to an individual account maintained for the benefit of that employee. *See* 29 U.S.C. § 1002(34). Participants are not assured a fixed benefit at retirement; instead, their benefits depend on the amounts allocated to their individual accounts, together with any income, expenses, gains or losses on those amounts. *See id.*; *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 250 n.1 (2008).

Defined benefit plans, like the pension plan at issue in this case, are different. A defined benefit plan "consists of a general pool of assets rather than individual dedicated accounts." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999); *see also* 29 U.S.C. § 1002(35). Under a defined benefit plan, the employer "typically bears the entire investment risk" and therefore "must cover any underfunding as the result of a shortfall that may occur." *See Hughes*, 525 U.S. at 439. "Given the employer's obligation to make up any shortfall, no plan member has a claim to any particular asset that composes a part of the plan's general asset pool." *Id.* at 440. Instead, participants have a right only to "a certain defined level of benefits" payable upon retirement. *See id.* at 439-40. Because of this unique structure, "[m]isconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances a risk of default by the entire plan." *LaRue*, 552 U.S. at 255.

In order to address the risk of default by a defined benefit plan, Congress required employers to "satisfy complex minimum funding requirements, and to make premium payments to the Pension Benefit Guaranty Corporation for plan termination insurance." *Id.* Specifically, under ERISA and the Internal Revenue Code, "an employer must make 'minimum required contribution[s]' to its defined benefit plan whenever 'the value of plan assets' is less than the plan's yearly 'funding target,' defined as 'the present value of all benefits accrued or earned under the plan as of the beginning of the plan year.'" *Perelman v. Perelman*, 793 F.3d 368, 374 (3d Cir. 2015) (quoting 26 U.S.C. § 430(a)(1), (d)(1); 29 U.S.C.

§ 1083(a)(1), (d)(1)). The statutes also classify certain plans that are less than 80% funded as "at risk," and impose additional requirements and restrictions on those plans and their sponsors. 26 U.S.C. § 430(i); 29 U.S.C. § 1083(i)(4), (f)(3)(C).

2. The Verizon Management Pension Plan (the "Plan") is an ERISA defined benefit plan sponsored by a subsidiary of Verizon Communications Inc. ("Verizon"). In late 2012, the Plan purchased a group annuity contract from Prudential Insurance Company of America ("Prudential"). Pet. App. 4-5. Prudential irrevocably assumed the obligation to pay monthly benefits to approximately 41,000 Verizon management retirees, in exchange for which the Plan transferred approximately $8 billion in assets to Prudential. *Id.* Approximately 50,000 retirees remained in the Plan. *Id.* at 4.

Prior to the annuity purchase transaction, Verizon committed to make additional contributions to the Plan to ensure that its funded status would not decrease (on a financial accounting basis) as a result of the transaction. Dist. Ct. R. 1-10, 1-11, Compl. App. 212, 230. In accordance with this commitment, Verizon made over $2.6 billion in voluntary contributions to the Plan between September and December of 2012. Dist. Ct. R. 64-2, Decl. of James Kelly Hartnett. Based in part on these contributions, the Plan's enrolled actuary certified that the Plan's funding ratio – calculated using assumptions permitted for purposes of ERISA's minimum funding rules – was in excess of 100 percent for the 2012 Plan year. *Id.*

3. Petitioner Edward Pundt is among the group of participants who remained in the Plan. He filed a class action lawsuit alleging that the Plan's fiduciaries breached their fiduciary duties by incurring approximately $1 billion in unreasonable "corporate expenses" that should have been paid by Verizon. *See* Pet. 7.[1]

Petitioner did not explain how, given Verizon's $2.6 billion in voluntary contributions, the Plan was harmed by the allegedly improper use of $1 billion in Plan assets. Nor did Petitioner allege that the annuity transaction impacted his benefits or jeopardized the Plan's ability to meet its future benefit payment obligations. Moreover, Petitioner never questioned Verizon's ability to make contributions to the Plan as required under ERISA's minimum funding requirements. To the contrary, Petitioner described Verizon in his complaint as a "very wealthy, solid corporation." Dist. Ct. R. 78, Sec. Am. Compl. ¶ 66.

Verizon moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), arguing that Petitioner had not established that his future benefits were compromised, and so had experienced no injury in fact giving rise to Article III standing. The district court agreed. It noted that "[c]ourts have consistently held

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[1] In the courts below, the litigation focused primarily on the class action claims of two retirees whose benefit payment obligations were transferred to Prudential as a result of the annuity transaction. The district court dismissed those claims and the Fifth Circuit affirmed. That decision is not challenged before this Court. *See* Pet. ii.

that a loss that merely affects plan assets is insufficient to confer standing." Pet. App. 89. The court held that even if the Plan was underfunded (which it assumed without deciding), Petitioner had "failed to allege that its members have not received the plan benefits to which they are entitled, or, for example, that Verizon as plan sponsor cannot make the necessary contributions to the Plan so that reductions are avoided." *Id.* at 92. It also rejected Petitioner's argument that he had standing based solely on his statutory "right to have plan assets managed" in accordance with ERISA. *Id.* at 92-93. As the court explained, this argument improperly "conflates statutory standing with constitutional standing." *Id.* at 93 (citation and internal quotation marks omitted).

The Fifth Circuit affirmed. The court of appeals held that "regardless of whether the plan is allegedly under- or over-funded, the direct injury to a participant's benefits is dependent on the realization of several additional risks, which collectively render the injury too speculative to support standing." *Id.* at 38. Even if the plan were underfunded, that "merely increases the relative likelihood that Verizon will have to cover a shortfall." *Id.* Petitioner, however, "does not allege . . . an inability by Verizon to address a shortfall," and in fact "concede[s] on appeal that [any] actuarial underfunding resulted in no direct injury to [Petitioner]." *Id.* at 39. The court of appeals further rejected arguments that Petitioner had standing merely by virtue of an "invasion of his statutorily created right[s]." *Id.*

ARGUMENT

I. There Is No Split In Authority Warranting This Court's Review.

A. No Court Of Appeals Follows Petitioner's View That A Bare Allegation Of A Fiduciary Breach Establishes Article III Standing.

Petitioner asks this Court to decide whether a plan participant has Article III standing "regardless" of whether there is an actual or imminent threat to his benefits. Pet. i. He contends that decisions of the Second and Fourth Circuits have adopted his position. On the other side of a purported split, Petitioner alleges, is a *different* decision of the Fourth Circuit, as well as decisions of the Third, Eighth, and now Fifth Circuits.

The alleged split here is illusory – the no-injury-required rule that Petitioner asks this Court to adopt is not the law in any court of appeals. That is why the Third Circuit just last year observed that "other federal appellate courts have *unanimously* rejected" the theory that an uninjured participant, whose benefits are not jeopardized, may sue for a fiduciary breach on behalf of a defined benefit plan. *Perelman v. Perelman*, 793 F.3d 368, 375-76 (3d Cir. 2015) (emphasis added).

<u>Third, Fifth, and Eighth Circuits</u>. Petitioner recognizes that the Third, Fifth, and Eighth Circuits all require a threat to the plaintiff's benefits before that plaintiff may sue under ERISA for monetary relief. Pet. 17. In *Perelman*, for example, the Third

Circuit held that "a diminution in Plan assets" is "insufficient to confer standing" on a plaintiff "absent a showing of individualized harm." 793 F.3d at 374. Where the plaintiff can only allege a "risk of default" by a plan that is "entirely speculative," there is no Article III standing. *Id.* at 374-75.

The Eighth Circuit likewise recognizes that defined benefit plan participants are not injured by a depletion of plan assets when the plan remains able to "pay all accrued or accumulated benefits." *Harley v. Minnesota Mining and Manufacturing Co.*, 284 F.3d 901, 906 (8th Cir. 2002). It would transgress "the limits on judicial power imposed by Article III" to permit such uninjured plan participants to sue under ERISA. *Id.* And in the decision below, the Fifth Circuit agreed that a defined benefit plan participant may not sue without a threat to benefits. Pet. App. 35-43.

<u>Sixth and Ninth Circuits</u>. Although Petitioner does not include the Sixth and Ninth Circuits in his analysis of the alleged circuit split, both of these courts have joined the consensus in rejecting no-injury standing for ERISA plaintiffs. The Sixth Circuit has held that "[m]erely because Plaintiffs claim that they are suing on behalf of their respective ERISA plans does not change the fact that they must also establish individual standing." *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 608-09 (6th Cir. 2007) (citing decisions of the Second, Eighth, and Ninth Circuits). Likewise, the Ninth Circuit has rejected the notion that plan participants automatically "have standing to bring [a] lawsuit as representatives of the plan." *Glanton ex rel. ALCOA*

Prescription Drug Plan v. AdvancePCS Inc., 465 F.3d 1123, 1125 (9th Cir. 2006). Where a participant personally has "a concrete stake in the outcome of the proceedings" she may "also sue on behalf of the plans," but the plaintiff must individually "meet the requirements for Article III standing." *Id.* at 1127.

Fourth Circuit. Contrary to Petitioner's assertion, the Fourth Circuit agrees that a defined benefit plan participant must show a genuine threat to her benefits to have standing. In *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013), the court rejected the argument that standing exists based on a mere "deprivation of the[] statutory right to have the Pension Plan operated in accordance with ERISA's fiduciary requirements," considering it a "non-starter." *Id.* at 338-39. The court likewise rejected the arguments that all plan participants have "representational" standing to bring suit on behalf of their plan and that trust law mandates a departure from ordinary Article III principles. *Id.* at 334-36. Instead, the court held – just as all other circuit courts to consider the question have held – that individual plaintiffs must show a "direct injury" to their future benefits in order to have standing. *Id.* at 336-38.

Petitioner contends that his more expansive view of standing was adopted by the Fourth Circuit two years later, in *Pender v. Bank of America Corp.*, 788 F.3d 354 (4th Cir. 2015). That decision, Petitioner maintains, "conflict[s]" with the same court's decision in *David*. Pet. 17. No such intra-circuit conflict exists.

Pender did not concern a traditional defined benefit plan. Under the *Pender* plan, participants were permitted to select investment options for "notional" investment accounts, and the value of their accrued benefits "reflected the *hypothetical* gains and losses" associated with their selections (subject to a guaranteed minimum benefit). *See* 788 F.3d at 358-59. The assets of the *Pender* plan, however, were not actually invested in accordance with the participants' elections. Instead, the assets were invested as the defendants saw fit, and any "spread" between "the actual investment returns" and a participant's "hypothetical returns" was not passed on to the participant. *See id.* at 359-60.

The *Pender* plaintiffs claimed that this plan design violated ERISA. Specifically, they argued that participants were entitled to the "full value of the investment gains" realized on the actual investment of plan assets. *Id.* at 361.

The Fourth Circuit held that these plaintiffs had alleged an injury in fact "because they 'suffered an *individual* loss, measured as the 'spread' or difference between the profit the [defendant] earned by investing the retained assets and the [amount] it paid to [them].'" *Id.* at 367 (emphasis added) (quoting *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 417 (3d Cir. 2013) (alterations in original)). In other words, *individual* participants in the *Pender* plan had an "equitable interest in [the] profits" on the investments made with their contributions, and so had standing based on their *individual* claims to those profits. *Id.*

Pender thus follows (and extensively cites) the rule recognized in the Third Circuit: "an ERISA beneficiary suffers an injury-in-fact sufficient to bring a disgorgement claim when a defendant allegedly breaches its fiduciary duty, profits from the breach, *and the beneficiary, as opposed to the plan, has an individual right to the profit*." *Edmonson*, 725 F.3d at 418 (emphasis added). At the same time, the Third Circuit has made equally clear that a plan participant whose benefits are not threatened, and who could have no individual claim to the employer's allegedly wrongful profits, cannot establish standing simply by casting her claim as "disgorgement." *Perelman*, 793 F.3d at 375. Nothing in *Pender* contradicts this rule, conflicts with the Fourth Circuit's own prior decision in *David*, or adopts Petitioner's sweeping contention that a bare ERISA violation is enough to give rise to standing.

<u>Second Circuit</u>. Petitioner also misapprehends the position of the Second Circuit, which is consistent with the unanimous rule that the claim of an ERISA violation, without more, does not give rise to standing.

No decision in that circuit directly confronts the situation presented here, *i.e.*, whether a participant in a defined benefit plan may sue for an alleged fiduciary breach without evidence that the future flow of benefits is jeopardized. That court has, however, squarely rejected Petitioner's view that a fiduciary breach alone is sufficient injury to give rise to standing: "[o]btaining restitution or disgorgement under ERISA requires that a plaintiff satisfy the strictures of constitutional standing by 'demon-

strat[ing] individual loss.'" *Central States Se. and Sw. Areas Health and Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 200 (2d Cir. 2005); *see also id.* (favorably citing the Eighth Circuit's holding in *Harley* that "an ERISA Plan participant or beneficiary must plead a direct injury in order to assert claims on behalf of a Plan"). The Second Circuit went on in another case to confirm that a plaintiff "cannot claim that either an alleged breach of fiduciary duty to comply with ERISA, or a deprivation of her entitlement to that fiduciary duty, in and of themselves constitutes an injury-in-fact sufficient for constitutional standing." *Kendall v. Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009).

Petitioner ignores both of these cases. Instead, Petitioner cites two other decisions that, he claims, stand for the proposition that an ERISA violation is itself "sufficient injury in fact to give participants Article III standing." Pet. 17. Petitioner is mistaken.

The first decision cited by Petitioner pre-dates this Court's seminal standing decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *See Fin. Instits. Ret. Fund v. Office of Thrift Supervision* ("*FIRF*"), 964 F.2d 142 (2d Cir. 1992). *FIRF* arguably suggested that constitutional and statutory standing under ERISA are coterminous, relying on oft-misunderstood language from *Warth v. Seldin*, 422 U.S. 490 (1975), that Article III injury "'may exist solely by virtue of statutes creating legal rights.'" *FIRF*, 964 F.2d at 147 (quoting *Warth*, 422 U.S. at 500). But *Lujan* subsequently clarified that Con-

gress may only "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." 504 U.S. at 578; *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."). Unsurprisingly, the Second Circuit has read *FIRF* narrowly since *Lujan* was decided, noting that the plaintiffs in *FIRF* "could point to an identifiable and quantifiable pool of assets to which *they* had colorable claims." *Kendall*, 561 F.3d at 121 (emphasis added). Petitioner's reading of *FIRF* cannot be squared with the Second Circuit's post-*Lujan* holding that an "alleged breach of fiduciary duty" is not enough to establish Article III standing. *Id.*

Petitioner's reliance on a cursory and inconclusive footnote in *Long Island Head Start Child Development Services, Inc. v. Economic Opportunity Commission of Nassau County*, 710 F.3d 57 (2d Cir. 2013), is equally unavailing. There, a non-profit organization withdrew from a multiemployer ERISA plan, and when the plan refused to refund its contributions, the non-profit and a class of its employees won a judgment against the plan. *Id.* at 61-62. The plan was unable to pay and, in a separate case, the non-profit and its employees sued the plan's fiduciaries for depleting the plan's reserves. *Id.* at 63. The fiduciaries' main standing argument (which the court rejected) was statutory, questioning whether the plaintiffs could sue on behalf of the plan where the recovery might "ultimately be used to satisfy the judgment" they were owed. *Id.* at 65.

In a brief footnote, the court added that the plaintiffs had constitutional standing to sue "in a derivative capacity" based on "the injuries to the Plan." *Id.* at 67 n.5. That conclusion was plainly correct. As the court had previously recognized, a recovery for the plan could have enabled it to pay the judgment, so the non-profit and its employees had an individual stake in the recovery. *Id.* at 65; *accord Glanton*, 465 F.3d at 1127 (noting "no quarrel with the proposition" that "plan beneficiaries may bring suits on behalf of the plan in a representative capacity" – "so long as plaintiffs otherwise meet the requirements for Article III standing" by having a personal "stake"). The *L.I. Head Start* footnote did not purport to announce a broad rule, well beyond what was necessary to resolve the case, that plan participants with no such stake can sue to recover funds for the plan. Neither has any court read that footnote as establishing such a rule in the Second Circuit. To the contrary, the Third Circuit recently noted that "other federal appellate courts have unanimously rejected" a rule of blanket derivative standing, without suggesting that the Second Circuit stood outside "the reasoned consensus of our sister circuits." *Perelman*, 793 F.3d at 375-76.

B. The Courts Of Appeals Have Not Articulated Conflicting Methodologies For Assessing Risk To Future Benefits.

Although not specifically encompassed in the question he presents to this Court, *see* Pet. i, Petitioner alleges further differences in the way courts evaluate the risk to future benefits. Pet. 15-17.

Here too, the alleged split is illusory. Each of the cases Petitioner identifies asks the correct question (whether there is a sufficiently concrete threat to the plaintiff's future benefits) and provides a fact-specific answer. None of these cases purports to adopt a bright-line rule applicable in all cases. And none disagrees with the Fifth Circuit's basis for deciding this case: that benefits are not in jeopardy where the employer has the unquestioned duty and ability to ensure the uninterrupted flow of benefits to plan participants.

Petitioner claims that the Fifth Circuit broke new ground, becoming the "first to hold" that alleging a plan is underfunded is insufficient to establish that future benefits are at risk. Pet. 15. Specifically, the decision below observed that "regardless of whether the plan is allegedly under- or over-funded, the direct injury to a participant's benefits is dependent on the realization of several additional risks." Pet. App. 38. One such risk is that the employer would be unable to meet its obligation to "cover any shortfall resulting from plan instability." *Id.* Absent an allegation that the employer is unable to do so, the Fifth Circuit concluded that the threat to benefits remains "too speculative." *Id.* at 38-39.

Contrary to Petitioner's claim, no court has adopted a rule that an underfunded plan *per se* creates an imminent threat to benefits. In fact, the Fourth Circuit in *David* made the exact same points relied on in the decision below. The *David* court noted that if "the Plan becomes underfunded," the employer "will be required to make additional contributions," and even if it is unable to do so benefits

would be guaranteed by the PBGC up to the statutory minimum. *David*, 704 F.3d at 338. As in the decision below, the Fourth Circuit held that it was "too speculative" to predict that all of these contingencies would fail and benefits would be affected "at some point in the future." *Id.*

No other court of appeal has rejected this holistic approach. Petitioner points out that the Third and Eighth Circuits have found *no* standing when the Plan is adequately funded. But while a showing that the plan is underfunded is certainly *necessary* to establish a threat to benefits, no circuit has held that it is *sufficient*.

In *Perelman*, the Third Circuit held that "[u]nder the circumstances" of the case the risk of plan default was too "speculative," because "the Plan was appropriately funded, and [the employer therefore] had no obligation to make further contributions." 793 F.3d at 375. It did not purport to decide whether a plaintiff would have standing in a scenario not before it – where the plan is not adequately funded but the employer is able to meet its obligation to cover the shortfall. Similarly, the Eighth Circuit in *Harley* held that the plaintiff had failed to "prove the absence of a substantial surplus," which was "an *element* of plaintiffs' standing." 284 F.3d at 908 (emphasis added). It did not hold that if the surplus had not existed, standing would automatically be established.

Petitioner misreads these cases even further to allege a split-within-a-split, contending that the Third and Eighth Circuit disagree over *how* they

"measur[e] funded status." Pet. 15. Once again, Petitioner mistakes the facts of these cases with their holdings. *Harley* did not hold that "participants have standing in the Eighth Circuit if they can show the employer is required to make additional contributions under *any* one accounting method." *Id.* at 17 (emphasis added). It simply held that the plaintiffs in that case had *failed* to show underfunding "under any relevant valuation method." *Harley*, 284 F.3d at 908. It did not say whether a plaintiff would have standing if only some methods established proper funding, or if other factors eliminated the threat to benefits.

Notably, the courts of appeals have given no indication that they follow different standards in assessing a threat to benefits. To the contrary, all of the decisions cited by Petitioner indicate agreement with one another. *See* Pet App. 37-38 n.98 (citing *Perelman*, *David*, and *Harley*); *Perelman*, 793 F.3d at 375 (citing *David* and *Harley*). If the circuits were truly in a state of "mass confusion" (Pet. 11), it is likely that one of these courts would have noticed.

C. The Courts Of Appeals Are Not Divided On The Abstract Question Of Trust Law's Relevance To Standing.

Finally, Petitioner asserts that the "Fifth Circuit's failure to consider trust law" in its standing analysis "has added to the disarray among the circuits' positions on ERISA standing," and that this Court should "remind the circuits, yet again, to look to trust law." Pet. 20. As an initial matter, while this alleged error is central to Petitioner's argument

before this Court, it was at most an afterthought in the court of appeals. *See infra* Part III. In any event, Petitioner has not identified any split in authority over trust law's relevance to a plan participant's standing.

Petitioner's primary support is not even an ERISA case, but a decision that a discretionary beneficiary of a trust had Article III standing to sue the trustee. *See Scanlan v. Eisenberg*, 669 F.3d 838 (7th Cir. 2012). In that case, the plaintiff had standing based on her "equitable interest in the corpus of the Trusts," which she was "currently eligible to receive" in its entirety. *Id.* at 843, 846. That decision not only says nothing about ERISA, but its focus on the beneficiary's *personal* stake is consistent with the way the courts of appeals approach ERISA cases.[2]

The reference to trust law in the Fourth Circuit's *Pender* decision is no more helpful to Petitioner. As explained above, *Pender* stands for the limited proposition that a plan participant with a personal claim to plan assets has standing to sue. *See supra* pp. 9-10. The court looked to trust law to confirm that the "plan beneficiaries ha[d] an equitable interest in profits arrived at by way of a decrease in their benefits." *Pender*, 788 F.3d at 367. It did not hold that trust law requires permitting *any* par-

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[2] Petitioner argues that the Eighth and Ninth Circuits "read trust law differently" because they follow the Restatement rule that a beneficiary cannot sue when the breach does not involve a duty owed to him. Pet. 19. He neglects to mention that *Scanlan* quotes and applies the same Restatement principle. *See Scanlan*, 669 F.3d at 842-43.

ticipant to sue for *any* fiduciary breach, a position the same court had recently rejected. *See David*, 704 F.3d at 327.

II. The Court Of Appeals Correctly Concluded That Petitioner Lacks Standing.

1. No one may sue in an Article III court without suffering an "injury in fact," *i.e.*, an "actual or imminent" harm that is "concrete and particularized." *Lujan*, 504 U.S. at 560. The injury-in-fact requirement "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) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.").

The Fifth Circuit, like every other court of appeals to consider the issue, applied these principles to the participants in a defined benefit plan under ERISA. Each of these courts has properly begun with the principles established in *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999). *Hughes* explained that participants in a defined benefit plan "have a right to a certain defined level of benefits." *Id.* at 440. Short of plan termination, the benefits that participants receive have nothing to do with the "general pool of assets" in the plan – "the employer typically bears the entire investment risk and . . . must cover any underfunding as the result of a shortfall that may occur." *Id.* at 439. Accordingly, participants in a typical defined benefit plan have no

interest whatsoever in the assets underlying the plan. *See id.* at 440.

The determination whether a defined benefit plan participant has suffered a concrete "injury in fact" flows directly from these principles. As this Court has recognized, an alleged fiduciary breach might impact a participant's defined benefit only if the breach "creates or enhances the risk of default by the entire plan." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008). Accordingly, standing exists where an alleged fiduciary breach gives rise to an actual or imminent risk of default by the plan.

By contrast, if an alleged breach merely diminishes a plan's assets without jeopardizing benefits, then participants lack constitutional standing. Congress has imposed minimum funding requirements on defined benefit plans to ensure that they are able to meet future obligations. *See, e.g.*, 29 U.S.C. § 1082(a)(1). And if a plan "becomes underfunded, the [employer] will be required to make additional contributions." *David*, 704 F.3d at 338. Accordingly, a reduction in a plan's general asset pool does not in itself have any impact on plan participants; it "merely increases the relative likelihood that [the employer] will have to cover a shortfall." Pet. App. 38. Absent any allegation that the employer might be unable to cover this shortfall, there is no concrete threat to participants' benefits, and thus no Article III standing.

2. Petitioner's heavy reliance on the common law of trusts, *see* Pet. 29-38, does not alter this conclusion.

Petitioner argues that the Fifth Circuit "ignored this Court's repeated instructions to consider trust law when interpreting ERISA." Pet. 29-30, *see id.* at 32. The decision below, however, is not based on an interpretation of ERISA – there was no dispute that Petitioner had *statutory* standing to assert his fiduciary breach claim. Pet. App. 34. Rather, the Court followed this Court's jurisprudence to hold that the Petitioner lacked *constitutional* standing under Article III. *Id.* at 34-43.

Petitioner is in any event wrong to assert, *see* Pet. 29-34, that trust law establishes a blanket rule authorizing every trust beneficiary to sue for every breach of fiduciary duty, irrespective of any actual harm. To the contrary, "[a] suit to enforce a private trust" may be maintained under the common law of trusts only by a "beneficiary *whose rights are or may be adversely affected* by the matter(s) at issue." Restatement (Third) of Trusts § 94, cmt. b (2012) (emphasis added).

To be sure, the beneficiaries of a typical common-law trust would almost invariably be "adversely affected" by an injury to the corpus of the trust. For example, where a beneficiary holds a life interest in the income of a trust, the beneficiary undisputedly is entitled to "obtain redress in case of breach." *Blair v. Comm'r of Internal Revenue*, 300 U.S. 5, 13, (1937) (cited at Pet. 36). But this is because the beneficiary has a concrete interest in the trust corpus.

A defined benefit plan trust, however, is different. Unlike a traditional trust, participants in an ERISA defined benefit plan have no interest (equitable or otherwise) in the corpus of the trust. *See Hughes*, 525 U.S. at 439. Nor is there any analogue in the common law of trusts to ERISA's minimum funding requirements, which are designed to ensure that impairments to trust assets are replenished by the employer, thereby preventing risk to the plan. *See supra* pp. 2-3.

Under these circumstances, alleged misconduct by a plan fiduciary "*will not affect* an individual's entitlement to a defined benefit unless it creates or enhances a risk of default by the entire plan." *LaRue*, 552 U.S. at 255 (emphasis added). In other words, a defined benefit plan participant cannot be harmed by an alleged fiduciary breach unless the breach jeopardizes the participant's benefits. There is no traditional rule of trust law that a beneficiary can sue even though his interests are "not affected" by the alleged breach. *See* Restatement, *supra*, § 94, cmt. b.

3. Petitioner fares no better in asserting that respect for Article III principles will "undermine[] ERISA." Pet. 21 (arguing that the decision below "plac[es] trillions of dollars in retirement assets at risk"). A plan participant whose future benefits are genuinely threatened in a concrete way should have no difficulty establishing standing. The only reason Petitioner lacks standing here is because he did not allege (and could not have alleged) that his monthly benefit payments were ever in any jeopardy.

Petitioner's *amicus* is similarly mistaken in warning that, without an immediate right to sue for any breach, fiduciaries would be "accountability-free so long as they committed their breaches far enough in advance," leaving participants with no recourse when years later the breach results in lost benefits. Amicus Br. 8. That is not how ERISA works, because "an employer is required to contribute to a plan whenever the plan's liability exceed its assets." *Perelman*, 793 F.3d at 374. Specifically, for any "plan year" where the plan's assets are insufficient, the employer must make a "minimum required contribution" to the plan. 26 U.S.C. § 430(a)(1), (d)(1); 29 U.S.C. § 1083(a)(1), (d)(1). If an employer contributes sufficient funds for the plan to avoid being designated as "at risk" under the standards established by Congress, then by definition the plan is not at risk, irrespective of the reduction in assets allegedly caused by the breach. *See Perelman*, 793 F.3d at 374 ("plan does not qualify as 'at-risk' or 'underfunded' . . . unless the value of plan assets is less than 80% of the plan's funding target"). If, on the other hand, the employer is unable to replenish the plan and avoid at-risk treatment, participants may well be able to establish standing based on that fact. But the hypothesized scenario where a fiduciary breach jeopardizes benefits but leaves the participants with no remedy until after the statute of limitations has run would simply not happen in the real world.

III. This Case Would Be A Poor Vehicle To Consider The Question Presented.

Even if the question presented warranted review, this case would be a poor vehicle, for two reasons.

First, Petitioner has failed to preserve an argument that he claims is central to the case. A significant portion of the Petition is devoted to arguing that trust law controls the analysis of an ERISA plan participant's Article III standing. Pet. 18-21, 29-37. Indeed, his bottom-line conclusion is that "[t]he Fifth Circuit erred by not applying . . . basic trust law principles to find standing." Pet. 37. In the court below, however, Petitioner failed to present trust law as a basis for finding standing.[3] If trust law is as central to the question presented as Petitioner now believes, the Court should not decide the question in a case where such a key argument was not developed below. *See Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived.").

Second, this case is a poor vehicle because a fundamental factual premise of Petitioner's argu-

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[3] Petitioner did assert that "[c]ourts 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.'" Pet'r CA5 Br. at 51 (quoting George G. Bogert et al., *Law of Trusts and Trustees* §861 (2013)). But that passing assertion gave no indication of the argument now featured in the Petition.

ments – that the Plan was not adequately funded – is incorrect. In support of its Rule 12(b)(1) motion, Verizon submitted evidence from its enrolled actuary certifying that the Plan's funding ratio for purposes of ERISA's minimum funding requirements was in excess of 100 percent for the 2012 Plan year. Dist. Ct. R. 64-2, Ex. B. Verizon further submitted evidence that it made over $2.6 billion in voluntary contributions to the Plan between September and December of 2012. Dist. Ct. R. 64-2, Decl. of James Kelly Hartnett.

To be sure, Petitioner has alleged that the Plan was "only about 66% funded" in 2012, Pet. 7, based on a year-end "market value" estimate of the Plan's assets and liabilities, *see* Dist. Ct. R. 75, Petr's Surreply Br. 2. That estimate, however, is calculated using assumptions that differ substantially from those used to calculate whether a plan is adequately funded for purposes of ERISA's minimum funding rules.[4] Plaintiff does not identify any basis to conclude that the Plan failed to satisfy ERISA's minimum funding requirements or was "at risk" as a

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[4] *Compare* Dept. of Labor Field Assistance Bulletin 2009-01, Q&A-7, 2009 WL 501046, at *4 (setting forth permissible interest rate and asset valuation assumptions for purposes of the year-end market value estimate), *with* 29 U.S.C. § 303(g) & (h) (setting forth permissible interest rate and asset valuation assumptions for purposes of the minimum funding requirement). *See also* Dept. of Labor Field Assistance Bulletin 2009-01, App. A, Model Annual Funding Notice, 2009 WL 501046, at *11 ("Because market values can fluctuate daily based on factors in the marketplace, such as changes in the stock market, pension law allows plans to use actuarial values that are designed to smooth out those fluctuations for funding purposes.").

result of the Prudential annuity transaction – nor could he. A case in which the plan was adequately funded under applicable rules is a poor vehicle for the Court to consider the arguments that Petitioner wishes to press.[5]

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[5] It is not necessary for the Court to hold the Petition pending resolution of *Spokeo v. Robins*, No. 13-1339. As *Spokeo* was briefed and argued, the primary issue is not whether a statutory violation alone constitutes an injury in fact, but whether Congress was authorized to recognize the publication of inaccurate information about an individual as a concrete harm for Article III purposes. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondent, at 11-12, *Spokeo v. Robins*, No. 13-1339 (2015) (recognizing that "Congress does not have *unlimited* power to define the class of plaintiffs who may sue in federal court to redress an alleged violation of law," but that the statutory right "to be free from . . . reporting of inaccurate information" about oneself is "a concrete and particularized injury" (internal quotation marks omitted)); Tr. of Oral Argument in *Spokeo* at 11 (Kagan, J.: "I agree with very large portions of [Spokeo's] brief when you say [Congress has] to have identified a concrete harm. . . . [Y]es, they do. But now the question is, did they identify one?").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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