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

BRIEF OF THE PENSION RIGHTS CENTER AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Pension Rights Center ("the Center") is a Washington, D.C. nonprofit, nonpartisan consumer organization that has been working for forty years to protect and promote the retirement security of American workers, retirees, and their families. The Center provides legal and strategic advice on retirement income issues, and helps individuals communicate their concerns about these issues to policymakers, courts, and the public.[1]

The Center has a significant interest in ensuring that defined benefit pension plan assets will be available to pay the benefits to which plan participants and beneficiaries are entitled and that these assets are used exclusively for the benefit of participants. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

The Center also has a strong interest in ensuring that Article III is not interpreted to procedurally deny ERISA plan participants standing to sue to remedy alleged fiduciary breaches or other violations of their statutory rights.

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[1] The Petitioner and the Respondents have consented to the filing of this brief, written evidence of which accompanies the filing. The parties received notice at least 10 days prior to the due date of amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no person (other than amicus curiae or its counsel) made a monetary contribution intended to fund the preparation or submission of this brief.

Without participants' ability to straightforwardly challenge the actions of plan fiduciaries who improperly manage plan assets, one of the primary goals of ERISA will be undermined – protecting the assets of pension plans from misuse and mismanagement. *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 254 (2008).

Thus, resolution of the issues in this case will have a direct and vital bearing on defined benefit plan participants' ability to police and protect their pension plans from mismanagement, to guard the integrity of the administration of their plans, and to ensure the preservation of their retirement benefits. Amicus curiae respectfully submits this brief to facilitate a full consideration by the Court of these issues.

REASONS FOR GRANTING THE PETITION

Before ERISA, employers who sponsored private pension plans were not required to fund them adequately or to provide insurance to make sure that participants would receive their benefits if the employer went bankrupt. *See generally* Michael S. Gordon, *Overview: Why Was ERISA Enacted*?, in U.S. Senate, Special Committee on Aging, *The Employee Retirement Income Security Act of 1974: The First Decade*, at 6-25 (1984).

After several high-profile pension plan failures, including that of the Studebaker Corporation, which left long-term employees at the end of their careers without their promised benefits,[2] Congress enacted ERISA to ensure "that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it." *Nachman Corp. v. PBGC*, 446 U.S. 359, 375 (1980).

The purpose of ERISA was expressed in the statute as "improving the equitable character and the soundness of [pension] plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance." 29 U.S.C. § 1001(c). The primary vision that drove ERISA's legislative sponsors was this: that participants in private pension plans should be able to count on the pension benefits that their employers promised to them in exchange for their labor.

Congress provided plan participants with the ability to enforce ERISA's procedural and substantive rights through "six carefully integrated civil enforcement provisions found in § 502(a) of the statute." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) (citing 29 U.S.C. § 1132(a)). The civil enforcement provisions of ERISA accomplished one of the major purposes of the statute – to provide for "appropriate remedies, sanctions and ready access

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[2] *See* John H. Langbein, *et al.*, *Pension and Employee Benefit Law* 67-71 (6th ed. 2015).

to the Federal courts." ERISA § 2(2)(b), 29 U.S.C. § 1001(2)(b).

This case raises the issue of whether a beneficiary of a defined benefit trust has standing to pursue ERISA's civil enforcement provisions where the security of their benefits is compromised by reduced funding.

In addition to the substantial conflict between the circuit courts of appeals on the question presented by the petitioners, a writ of certiorari is appropriate because the issue presented by petitioners affects a significant number of participants and a substantial amount of retirement plan assets.

Accepting the Fifth Circuit's position would drastically limit a plan participant's or beneficiary's ability to enforce ERISA's fiduciary duties and other statutory requirements designed "to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Once an employer decides to offer its employees retirement benefits, ERISA provides employees with a number of enforceable rights, including the right to have their pensions and retirement accounts administered prudently and "with an eye single to the interests of [plan] participants and beneficiaries." *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1162 (6th Cir. 1988) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982). Fiduciary duties and obligations towards participants and beneficiaries are the "highest known to the law." *See Bierwirth*, 680 F.2d at 272 n.8.

The Fifth Circuit's position denies employees the opportunity to enforce and address violations of these rights *before* they result in immediate pecuniary harm to the employee. In the context of defined benefit pension plans, this could mean that participants could not seek redress for fiduciary mismanagement until they have been deprived of their benefits in retirement – at which point it would almost certainly be too late to seek redress for a breach of fiduciary duty or other statutory violations because the statute of limitations would have run. Such a standing requirement would be completely contrary to ERISA's express statutory provisions and policy. ERISA provides that:

> It is hereby declared to be the policy of [the Act] to protect . . . the interests of the 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.

ERISA § 2(2)(b), 29 U.S.C. § 1001(2)(b).

ARGUMENT

A. An ERISA Plaintiff Has Standing to Redress Actual, Concrete and Particularized Violations of Statutory Rights.

There are three requirements for Article III standing – injury in fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An "injury in fact" is an "invasion of a *legally protected interest*" that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id*. at 560 (emphasis added).

The Court has long recognized 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 v. Seldin*, 422 U.S. 490, 500 (1975).

A fiduciary's violation of ERISA constitutes just such an invasion of a statutory right that creates standing. Specifically, ERISA fiduciary violations create an injury-in-fact giving an individual plan participant standing to sue without having to establish personal economic harm. *Financial Insts. Ret. Fund v. Office of Thrift Supervision*, 964 F.2d 142, 148-49 (2d Cir. 1992) (holding same and endorsing a "broad view of participant standing under ERISA" given its "goal of deterring fiduciary misdeeds").

Under trust law, upon which ERISA is drawn, beneficiaries have long had a right to sue trustees for mismanagement of a plan, regardless of economic loss. *See, e.g.*, *Scanlan v. Eisenberg*, 669 F.3d 838, 846

(7th Cir. 2012) (in trust law context, the court held that plaintiff had "legally protected interest . . . in the proper administration of [the trust]," the invasion of which is alone sufficient injury-in-fact for Article III standing purposes).

B. Denying ERISA Plan Participants the Ability to Assert Fiduciary Breach Claims Makes ERISA's Statute of Limitations Unworkable.

As this Court has noted, ERISA has an "interlocking, interrelated, and interdependent remedial scheme" which is in turn part of a "'comprehensive and reticulated statute.'" *Russell*, 473 U.S. at 146 (quoting *Nachman*, 446 U.S. at 361). This complex scheme was designed to insure that plan participants will never be in a position where they have lost benefits.

Because of the nature of a defined benefit plan, a participant may not incur a loss to her individual benefits due to defendants' breaches until she retires at age 65 and begins to receive her monthly pension benefits. Requiring participants to wait until they retire to sue makes ERISA's statute of limitations for fiduciary breaches unworkable.

ERISA, with exceptions for fraud and concealment, requires participants to bring fiduciary breach claims within three years of actual knowledge of the breach or six years from the last act that constitutes the breach. ERISA § 413, 29 U.S.C. § 1113. The statute of limitations will likely have expired *before* the participant has standing to sue for even the most disloyal fiduciary acts if she is first required to show that she has lost benefits as a result of the breach.

Taking the Fifth Circuit opinion to its logical conclusion can lead to the bizarre and perverse result that fiduciaries could breach their duties of prudence and loyalty accountability-free so long as they committed their breaches far enough in advance, because participants would be time barred from bringing claims at age 65 when they retire and receive either a reduced benefit or no benefit as a result of the breaches. Such a result is counter to the policy of ERISA, to protect the interests of plan participants and beneficiaries by establishing standards of conduct for plan fiduciaries and providing ready access to the courts. 29 U.S.C. § 1001(b).

C. Petitioner's Position Is Supported by Public Policy.

Additionally, requiring an ERISA participant to have suffered loss to her individual benefits in order to have standing to challenge an ERISA violation is counter to public policy.

The Fifth Circuit has determined that the wrongdoer who has caused a loss to a defined benefit plan should be absolved of his or her breach of fiduciary duty because the PBGC will be there as the payer of last resort. *Lee v. Verizon Commc'ns, Inc.*, 623 F. App'x 132, 148 (5th Cir. 2015). It is dreadful public policy to say that the wrongdoer should escape liability because the government stands behind the obligation.[3]

The Fourth and the Eighth Circuits also suggest that no such problems should ensue because the Secretary of Labor's standing to sue provides sufficient protection. *David v. Alphin*, 704 F.3d 327, 339 (4th Cir. 2013); *Harley v. Minnesota Mining and Mfg. Co.*, 284 F.3d 901, 908 n.5 (8th Cir. 2002). This does equal injustice to ERISA's enforcement scheme. The Secretary has acknowledged that the Department of Labor has insufficient resources and "must rely on private plaintiffs to vindicate their own rights." DOL Br. Amicus Curiae in Supp. of Pet. for Reh'g, *Harley v. Minnesota Mining and Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002), at 12. Given that the PBGC's 2015 Annual Report reflects over 23,400 single-employer and multiemployer defined benefit pension plans (combined), covering around 40 million employees, the Secretary makes a valid point.

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[3] Additionally, the Fifth Circuit does not consider the harm that would result to participants whose benefits exceed the PBGC limits if the plan and Verizon were to fail. 29 U.S.C. § 1132 & 1132(a). Further, the decision ignores the collateral source rule, under which a wrongdoer is not allowed to benefit from the actions of another entity. *See, e.g.*, *Chao v. Merino*, 452 F.3d 174, 184-85 (2d Cir. 2006) (the fiduciary "should not be permitted to escape liability because [her] victims may have made double contributions to make up for some of the losses [she] caused. . . . The underlying purposes of ERISA would not be furthered by awarding an errant fiduciary credit for [double] contributions made by an employer or others concerned about continuing health care coverage for employees.").

Also, ERISA § 502(a)(2) provides equal enforcement authority to participants, beneficiaries and the Secretary. On the other hand, § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes participants and beneficiaries, but not the Secretary, to sue for "appropriate equitable relief" to redress violations of either ERISA or the terms of the plan while § 502(a)(5), 29 U.S.C. § 1132(a)(5), authorizes the Secretary to sue only for violations of ERISA. It was Congress's intent to provide broader enforcement authority to participants and beneficiaries than to the Secretary.

Finally, requiring a plan participant to show lost benefits before she has standing to sue puts the participant in a *worse* position than before the statute was passed, because a non-ERISA trust beneficiary would have standing. *See Scanlan*, *supra*. *See also Giagnorio v. Emmett C. Torkelson Trust*, 292 Ill. App. 3d 318, 324, 686 N.E.2d 42 (1997) ("[A] contingent beneficiary should not be denied the right to bring an action against the trustees merely because his interest is remote and contingent, but that he should have the right to such relief as is necessary to protect his possible eventual interest, *i.e.*, protect and preserve the trust res. A trustee owes the same fiduciary duty to a contingent beneficiary as to one with a vested interest in so far as necessary for the protection of the contingent beneficiary's rights in the trust property.") (citing *Burrows v. Palmer*, 5 Ill.2d 434, 440, 125 N.E.2d 484 (1955). To require more in the ERISA context makes a mockery of Congress's carefully crafted scheme to give ERISA participants and beneficiaries added protections and to provide ready access to the federal courts to protect their interests.

D. Reasons for Granting the Petition for Certiorari.

ERISA's core goal is spelled out in its title: employee retirement income security. Resolution of the issues in this case is enormously important, as it potentially affects the retirement income security of millions of plan participants.

Too much protection is given to fiduciaries, and insufficient protection to participants and beneficiaries, when a participant in a defined benefit plan is required to show loss to individual benefits in order to having standing.

The lack of unanimity between the courts of appeals, as detailed in the Petition for Certiorari, require this Court to enunciate clear, uniform standards that provide adequate guidance for fiduciaries and adequate protection for plan participants and beneficiaries.

The Fifth Circuit's holding should be rejected by the Court and the lower courts instructed to allow a participant in an ERISA defined benefit plan to have standing to challenge an ERISA violation, regardless of loss to her individual benefits.

CONCLUSION

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

Respectfully submitted,

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