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Supreme Court, U.S.
FILED
AUG - 6 2007
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No. 06-1608

IN THE

Supreme Court of the United States

TOMMIE GLANTON, ON BEHALF OF THE ALCOA PRESCRIPTION DRUG PLAN, AND ALL OTHER SIMILARLY-SITUATED PLANS, AND TARA MACKNER, ON BEHALF OF THE KMART COMPREHENSIVE HEALTH PLAN,

Petitioners,

v.

ADVANCEPCS HEALTH, L.P.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT ADVANCEPCS HEALTH, L.P. IN OPPOSITION

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QUESTION PRESENTED

Whether a participant in a plan covered by the Employee Retirement Income Security Act ("ERISA") has standing under Article III to litigate claims for breach of fiduciary duty under ERISA's civil enforcement scheme where he has not suffered a judicially cognizable injury to himself, much less, an injury likely to be redressed by a favorable outcome in the case.

RULE 29.6 STATEMENT

AdvancePCS Health, L.P., now known as CaremarkPCS Health, L.P. ("Caremark"), is a wholly owned indirect subsidiary of CaremarkPCS, which is a wholly owned subsidiary of Caremark Rx, LLC ("Caremark Rx"). Caremark Rx is a wholly owned subsidiary of CVS Caremark Corporation ("CVS Caremark"), which does not have any parent corporations. No publicly held company owns 10 percent or more of CVS Caremark's stock.

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OPINIONS BELOW AND JURISDICTION

The opinions below and the basis for this Court's jurisdiction are set forth in the petition. Pet. at 1. However, 28 U.S.C. § 2403(a) (2000) is inapplicable because the decision below does not draw into question the constitutionality of an Act of Congress. Service of the petition upon the United States Solicitor General was therefore unnecessary.

COUNTER STATEMENT OF THE CASE

1. Respondent AdvancePCS is a pharmaceutical benefits management company ("PBM"). PBMs administer prescription drug benefit programs for their clients. In addition to basic claims processing, they, among other things, seek to reduce their customers' drug costs by pooling claims and negotiating volume rebates or discounts with pharmaceutical companies. Pet., App. A at 2a. Their clients are *not* consumers but rather are insurance companies, Health Maintenance Organizations, employer plan sponsors, and, in some cases, employee benefit plans themselves.

In this case, AdvancePCS contracted with two employers, Kmart and ALCOA, to provide pharmacy benefits management services. Both sponsor employee welfare benefit plans that provide medical and other benefits to eligible employees. Petitioner Tara Mackner ceased to be a participant in the Kmart health benefit plan shortly after this suit was filed. Petitioner Tommie Glanton was a participant in the ALCOA Prescription Drug Plan at the time of the decisions below. Both plans are subject to ERISA, and, as permitted by ERISA, are funded from the employer's general assets rather than a separate trust fund.

2. ERISA governs the administration of pension and welfare benefit plans established by employers for their employees. 29 U.S.C. § 1001(a) (2000). "Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); *see also Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003) (ERISA permits the voluntary establishment of plans on whatever terms are chosen by plan sponsors).

This freedom is particularly expansive in the case of employee welfare benefit plans such as those involved in this case. ERISA defines an "employee welfare benefit plan" as "any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries . . . medical, surgical, or hospital care or benefits . . . ." 29 U.S.C. § 1002(1) (2000). While ERISA requires welfare benefit plans to comply with federal standards governing reporting, disclosure and fiduciary responsibilities, 29 U.S.C. §§ 1021-1030, 1101-1114 (2000), it does not prescribe, or otherwise regulate, substantive plan terms.[1] *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 514 (1997).

Employers thus have "large leeway to design . . . welfare plans as they see fit." *Black & Decker Disability Plan*, 538 U.S. at 833. As a result, they have discretion to determine those who will be eligible to participate in their plans, the kinds of medical services that will be covered, and the amounts that employees must contribute to the costs of their health care through payroll contributions, co-payments and deductibles.

3. The civil enforcement provisions of ERISA are set forth in Section 502, 29 U.S.C. § 1132 (2000). Subsection (a) of Section 502 (entitled "Persons empowered to bring a civil action") identifies nine causes of action that may be brought by various specified persons. In this case, petitioners filed their actions under Sections 502(a)(2) and (a)(3).

Section 502(a)(2) authorizes an action by the Secretary, or by a plan participant, beneficiary or fiduciary for appropriate relief under Section 409 of the Act. 29 U.S.C. § 1132(a)(2). Section 409 (entitled "Liability for breach of fiduciary duty") in turn provides relief to an employee benefit plan itself for fiduciary breaches that occur in the management of plan

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[1] Indeed, ERISA expressly exempts such plans from its vesting, participation and funding provisions. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

assets. 29 U.S.C. § 1109(a). As this Court has made clear, Section 502(a)(2) authorizes only "plan-related" relief and does not authorize relief to an individual beneficiary. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-42 (1985).

Section 502(a)(3) is a "catchall" relief provision that "act[s] as a safety net" for "injured" plan participants. *Varity Corp. v. Howe*, 516 U.S. 489, 512-13 (1996). Section 502(a)(3) authorizes a suit by "a participant, beneficiary, or fiduciary" to obtain "appropriate equitable relief" to redress "any act or practice which violates any provision of this subchapter." 29 U.S.C. § 1132(a)(3). The referenced "subchapter" is Subchapter I of Chapter 18 of Title 29, which includes ERISA's fiduciary responsibility provisions, 29 U.S.C. §§ 1101-1112. When a breach of that duty causes distinct harm to individual participants or beneficiaries, the breach is "appropriate[ly]" subject, under Section 502(a)(3), to suit by the injured individuals, but only for equitable relief. *See Varity Corp.*, 516 U.S. at 515.

4. Petitioners filed separate actions in federal district court under Sections 502(a)(2) and (a)(3). Both sued "on behalf of" their respective plans. The district court consolidated the two cases. Pet., App. B at 10a-11a.

Petitioners alleged that respondent AdvancePCS is a fiduciary under ERISA.[2] Pet., App. A at 3a; App. B at 10a. According to the complaints, AdvancePCS allegedly engaged in hidden profit-making transactions falling into two general

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[2] The Seventh Circuit ruled to the contrary in *Chicago District Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463, 476-77 (7th Cir. 2007), holding that AdvancePCS's successor did not act as an ERISA fiduciary in providing PBM services to an ERISA-covered health benefit plan. *See also Pharmaceutical Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 301 (1st Cir. 2005) (PBMs are not ERISA fiduciaries because they lack discretionary authority or control over plan administration), *cert. denied* 126 S. Ct. 2360 (2006).

categories at the expense of the benefit programs it served: (1) receiving rebates and other compensation from drug manufacturers that AdvancePCS, to a large extent, keeps without disclosing to the plans; and (2) pocketing "secret[] . . . spread[s]" between actual drug costs and the prices charged to plans and their members, in both retail and mail-order operations. Pet., App. A at 2a; App. B at 10a. Maintaining that these practices increased the cost of prescription drugs for the benefit programs involved, petitioners sought recovery of losses, disgorgement of profits, injunctive and other equitable relief.

Significantly, petitioners did not allege that they were denied benefits or that they received inferior drugs. Pet., App. A at 4a. Nor were they joined as plaintiffs by the "financial victims" of AdvancePCS's alleged wrongdoing who have a direct and immediate interest in the outcome of this case—the employer plan sponsors who financed the employee benefit programs involved and bore the expense of the alleged increased benefit costs. Rather, petitioners alleged that they had standing under ERISA to sue "on behalf of" the plans "irrespective" of whether they themselves "suffered a loss or injury." They later alleged in an amended complaint that, if their suit was successful, the plans' drug costs would decrease, and participant contributions or co-payments might be reduced. Pet., App. A at 4a.

AdvancePCS moved to dismiss the complaints pursuant to Fed. R. Civ. P. 12(b)(1) for lack of Article III standing. AdvancePCS argued that the complaints relied on an alleged injury to the plans rather than to petitioners individually. Moreover, petitioners had no assurance that they would benefit personally from any relief awarded in the lawsuit because the plan sponsor had no obligation to reduce petitioners' contributions or co-payments as a result of any recovery by the plan. Instead, the plan sponsor could simply stop using its general assets to pay benefits until any recovery was exhausted.

At oral argument on the motion to dismiss, petitioners effectively conceded that their claims of personal injury were sheer speculation. Specifically, petitioners' counsel admitted that they did not know whether ALCOA or Kmart, who were not parties to this litigation, would reduce employee contributions or co-payments if the requested relief were awarded: "Your Honor, we don't know what the fiduciaries are going to do with the money." Supplemental Excerpts of Record ("SER") 56.

The district court dismissed the complaints with prejudice for failure to establish Article III standing. The court rejected petitioners' argument that Congress can create Article III standing simply by granting a procedural right to a private party. Pet., App. B at 11a-15a. Moreover, even if an uninjured participant might have Article III standing in *some* situations to sue on a plan's behalf under ERISA, the court concluded that petitioners lacked such standing "under the circumstances of this case." Pet., App. B at 15a. The petitioners here not only suffered no injury, but also did "not allege wrongdoing or failure to act by the named plan fiduciaries," the parties with statutory responsibility for protecting the plan's interest. Pet., App. B at 15a-16a.

The court also rejected petitioners' suggestion that Article III should be deemed satisfied under a "representational standing" theory, emphasizing that petitioners "are not statutorily designated as fiduciaries and are not assigned the legal responsibility to represent others." Pet., App. B at 16a. Rather, the legal duty to represent all of a plan's participants and beneficiaries is assigned by ERISA Section 402 to the plan's named fiduciaries. *Id.*

5. The court of appeals affirmed in an unanimous decision authored by Judge Kozinski. Pet., App. A at 1a-8a.

First, the court ruled that petitioners had not shown the type of redressable injury to themselves that would satisfy the traditional standing requirements outlined in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Pet., App. A at 3a-4a. The court rejected petitioners' argument that their only asserted injury—having to pay higher co-payments and contributions—would be redressed by a favorable decision. Pet., App. A at 4a. Nothing would require ALCOA or Kmart to reduce participant co-payments or contributions. *Id.* Even if monetary relief were awarded to the plans to reimburse them for past overpayments in covering prescription drug costs, "ALCOA or K-Mart would be free to reduce their contributions or cease funding the plans altogether until any such funds were exhausted." *Id.* Under these circumstances, the court found that there was no redressability because "any prospective benefits depend on an independent actor who retains 'broad and legitimate discretion the courts cannot presume either to control or to predict.'" *Id.* (quoting *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 615 (1989)).

The court then turned to petitioners' alternative argument that they have standing as "congressionally authorized representatives of the injured plans." Pet., App. A at 3a. The court rejected petitioners' attempt to draw an analogy to *qui tam* actions under the False Claims Act ("FCA"), which this Court upheld against an Article III standing challenge in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). Pet., App. A at 4a-5a. Unlike *qui tam* actions, which have existed for centuries, "there is no similar tradition of unharmed ERISA beneficiaries bringing suit on behalf of their plans." Pet., App. A at 5. Moreover, the FCA "assigns relators a concrete stake in *qui tam* cases by giving them a piece of the action," whereas any recovery under ERISA would be paid to the plans, not petitioners. *Id.*

The court also rejected petitioners' contention that their ERISA suit is similar to other "representative damages litigation," such as Rule 23(b)(3) class actions, suits by trustees representing creditors in bankruptcy, *parens patriae* actions by state governments, and suits by and against executors. Pet., App. A at 6a. None of these examples was particularly relevant, the court explained, "because in each the plaintiff has a direct stake in the outcome of the litigation." *Id.* The court also distinguished "associational standing" cases, noting that the theory of those cases—that by joining the association, an individual member authorizes the association to represent the member's interests—"does not operate in reverse." Pet., App. A at 8a. "Thus, a health plan might be able to sue on behalf of its injured subscribers even if the plan suffered no injury, but not vice versa." *Id.*

Finally, the court indicated that it had "no quarrel" with the proposition that ERISA plan beneficiaries may sue in a representative capacity on their plan's behalf, as long as the beneficiary "otherwise meets the requirements for Article III standing." Pet., App. A at 8a. In this case, however, the petitioners had no "concrete stake in the outcome of the proceedings," and therefore lacked Article III standing. *Id.*

REASONS FOR DENYING THE PETITION

Recognizing the absence of any circuit conflict, petitioners attempt to depict the unanimous decision below as one that "invalidates a federal statute" or "declar[es] a statute unconstitutional." Pet. at 10-11. But the decision below cannot be so characterized—nowhere does it invalidate Section 502(a) of ERISA or hold that any portion of the statute is unconstitutional. Rather, consistent with every other court of appeals that has addressed the issue, the court below held simply that Section 502(a) does not abrogate traditional Article III standing requirements. Pet., App. A at 3a ("Plaintiffs, nevertheless, cannot proceed unless they have Article III standing."). The decision itself turns on petitioners' inability to demonstrate the type of redressable injury to themselves that would satisfy Article III. Pet., App. A at 4a. It does not conflict with the decisions of this Court, and otherwise raises no issue warranting this Court's review.

I. Petitioners Have Mischaracterized the Decision Below and Overstated Its Implications.

1. Petitioners' contention that the court of appeals has "invalidat[ed]" or "struck down" Section 502(a) of ERISA and "[made] the substantive provisions of ERISA effectively unenforceable" both mischaracterizes the decision below and overstates its implications. Pet. at 13, 26; *see also* Pet. at 10, 13, 14, 15, 17, 21-22, 30. The court did not hold that any portion of Section 502(a) "violates Article III of the United States Constitution." Pet. at i; *see also id.* at 9, 10, 12, 13, 30. On the contrary, the Ninth Circuit held simply that petitioners failed to demonstrate the type of redressable injury to themselves that would satisfy Article III standing requirements under the circumstances of this case.

As this Court's prior decisions make clear, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *id.* at 830 n.1 (Souter, J., concurring); *see also Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 100 (1979) ("In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered a distinct and palpable injury to himself . . . .") (internal quotation marks and citation omitted); *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Courts no more have the power to disregard the injury-in-fact standard at Congress' directive than they do on their own initiative: "Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement . . ., they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch . . . ." *Lujan*, 504 U.S. at 576.

Consistent with this Court's precedents, petitioners were required to establish "a likelihood that the injury they have suffered will be redressed by a favorable outcome to the litigation." Pet., App. A at 3a-4a (citing *Lujan*, 504 U.S. at 560-62); *see also Raines*, 521 U.S. at 818 ("'plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief'") (citation omitted). Petitioners' *only* claimed injury is that they had to pay higher co-payments and contributions because "AdvancePCS charged the plans too much for drugs." Pet., App. A at 4a. The court below found that this alleged injury is not "redressable" because any benefit from a favorable decision depends on "an independent actor who retains 'broad and legitimate discretion the courts cannot presume either to control or to predict.'" *Id.* (quoting *ASARCO*, 490 U.S. at 615).

Although petitioners argued that a favorable decision might reduce prescription drug costs, they failed to establish any likelihood that such cost reduction would be passed through to participants in the form of reduced co-payments or contributions. Nor could they. As the Ninth Circuit pointed out, "nothing would force ALCOA or K-Mart to do this." Pet., App. A at 4a. Rather "ALCOA and K-Mart would be free to reduce their contributions or cease funding the plans altogether until any such funds were exhausted." Pet., App. A at 4a. Indeed, the Department of Labor conceded as much in the *amicus* brief that features prominently throughout the petition. Pet., App. E at 31a ("the Plans' sponsors may take any recovered rebates and discounts and use these funds at their own disposal"). Not surprisingly then, Petitioners *nowhere* argue that the "injuries" they allegedly suffered would be necessarily redressed by a favorable disposition of this case.[3]

Thus, Judge Kozinski's decision below simply does not present the question concerning "the constitutional validity of section 502(a)" that petitioners would have this Court address. Pet. at 11. Indeed, the court of appeals had "no quarrel" with the proposition that a participant may sue on the plan's behalf under Section 502(a), as long as the participant meets Article III standing requirements. Pet., App. A at 8a; *see also* App. A at 3a-4a. The court's fact-specific determination that the petitioners here failed to meet Article III standing requirements does not warrant this Court's review.

2. Contrary to petitioners' contention (Pet. at 13-17), the decision below raises no enforcement concern in this or any other case. Far from "invalidat[ing] participant and beneficiary standing under Section 502(a)" (Pet. at 14), the Ninth Circuit simply determined that petitioners had no "concrete stake in the outcome" under the circumstances of this case. Pet., App. A at 8a. The fact-specific nature of that determination is reinforced by the court's recognition that "ERISA plans are organized in a variety of ways, and no doubt some would give participants a stake in a lawsuit against fiduciaries." *Id.*[4] Moreover, as the court emphasized at the outset,

[3] Petitioner Mackner lacks Article III standing for the additional reason that she is no longer a participant in the Kmart Plan and thus could not possibly benefit from any recovery awarded to the Plan. As the district judge stated at oral argument: "[Mackner] wouldn't be the one that, if I were a part of the K-Mart Comprehensive Healthcare Plan, that I would want representing me as a participant in this lawsuit." SER 58.

[4] *See, e.g., Graden v. Conexant Sys., Inc.*, No. 06-2337, 2007 U.S. App. LEXIS 18179, at *5-6 (3d Cir. July 31, 2007) (cashed-out former employee had both Article III standing and statutory standing to bring an action against the administrator of his former employer's 401(k) plan under ERISA § 502(a)(2) seeking to recover losses on employer stock holdings that reduced the value of his individual account).

petitioners here "don't claim they were denied benefits or received inferior drugs." Pet., App. A at 4a.

Petitioners' related contention (Pet. at 14 n.30) that plan fiduciaries "are likely to lack incentive" to take any legal action on the plan's behalf turns the reality of this case on its head. Unlike petitioners, the plan fiduciaries who retained AdvancePCS to provide services to the plans, ALCOA and Kmart, have a duty under Sections 404(a)(1) and 405(c)(2) of ERISA to monitor AdvancePCS's performance of those services.[5] To the extent AdvancePCS may have engaged in any improper transactions, ALCOA and Kmart have a fiduciary responsibility to call AdvancePCS to account in a breach of contract or Section 502(a) action. Moreover, because of their fiduciary duty to monitor AdvancePCS's performance, ALCOA and Kmart have a direct and palpable interest in the outcome. *See* Pet., App. A at 6a-7a ("Trustees and executors . . . have a stake in the litigation because they are acting on behalf of the estate, which owns the claims being litigated."). Indeed, as the employer plan sponsors who finance the benefit plans in question, ALCOA and Kmart have a direct financial interest in challenging any alleged wrongdoing by AdvancePCS that increases benefit costs. That ALCOA and Kmart have taken no such action against AdvancePCS indicates that they have no substantial concern with its performance.

In addition to the plan's fiduciaries, the Secretary of Labor has authority to bring suit under Sections 502(a)(2) and (a)(5) of ERISA,[6] without the restrictions applied to private parties.

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[5] 29 U.S.C. §§ 1104(a) & 1105(c)(2); *see also* 29 C.F.R. § 2509.75-8, Q-FR-14 & Q-FR-17 (2003); 29 C.F.R. § 2509.96-1(e) (2003).

[6] 29 U.S.C. §§ 1132(a)(2) & (a)(5). Petitioners' argument (Pet. at 15) that the Secretary is not permitted to bring actions under Section 502(a)(3) ignores the Secretary's separate authority under Section 502(a)(5) to bring an action "(A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress

Petitioners' suggestion that the Secretary would lack Article III standing under the court of appeals' analysis (Pet. at 15) is misplaced. The government has a *prima facie* interest in enforcing its own laws. *See Vermont Agency*, 529 U.S. at 771 ("It is beyond doubt that the complaint asserts an injury to the United States . . . the injury to its sovereignty arising from violation of its laws . . . ."). As the court below observed, States have standing in *parens patriae* actions because they have a similar "concrete stake in the proper application of the laws of their jurisdiction." Pet., App. A at 7a (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)).

Hence, if a rare situation were to arise where plaintiffs suffered no personal injury, but the Department of Labor believed the conduct of a fiduciary sufficiently serious or troubling, the Secretary could elect to bring suit. While the Secretary's enforcement resources are limited, so are the resources of the federal courts. How the Secretary's resources are allocated for various enforcement ends is a matter decided by Congress and the Executive Branch officials assigned to make those policy decisions. There is no evidence that Congress in ERISA prescribed a proliferation of suits by uninjured participants for alleged fiduciary violations that federal regulators—like the plan's fiduciaries—deemed unworthy of their own action.

II. The Decision Below Is Consistent With, and Does Not Conflict With the Decisions of Other Courts of Appeals.

The Ninth Circuit's holding that petitioners could not proceed without Article III standing is consistent with the decisions of every other court of appeals that has addressed the issue. In addition to the Ninth Circuit, three other circuit

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such violation or (ii) to enforce any provision of this title." 29 U.S.C. § 1132(a)(5).

courts have ruled squarely that Section 502(a) does not permit plan participants to seek relief only for others (or based on the injuries of others) when they themselves have not suffered a concrete injury that is capable of redress. *Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care*, 433 F.3d 181 (2d Cir. 2005); *Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450 (3d Cir. 2003); *Harley v. 3M*, 284 F.3d 901 (8th Cir. 2002).

In *Central States*, participants brought a class action against Medco Health Solutions, a PBM, for allegedly violating fiduciary duties to ERISA plans by promoting drugs made by its parent company and diverting rebates from other manufacturers to itself. 433 F.3d at 187. One issue on appeal was whether the participants had Article III standing to litigate the claims on behalf of the plans. *Id.* at 185. The participants "premised their assertion on statutory standing under ERISA," but the Second Circuit found this was not sufficient to confer jurisdiction. *Id.* at 201. "[S]tatutory standing will not suffice to substitute for Article III standing." *Id.* The Second Circuit found that the record was unclear as to "whether the Plaintiffs have demonstrated the requisite injury-in-fact for supporting a finding of constitutional standing," and therefore remanded the case for the district court to rule in the first instance. *Id.* at 200.

In *Horvath*, a welfare plan participant sought restitution and disgorgement of alleged excessive premiums paid by her employer for plan coverage as a result of the fiduciary's failure to disclose information about physician incentives adversely impacting quality of care. 333 F.3d at 452. The Third Circuit found that while the participant had statutory standing, she lacked Article III standing because she did not allege that she was personally affected by the alleged breach. *Id.* at 455-57. The court rejected the participant's argument that, if relief were granted, her employer would pass the savings to its employees in the form of a higher salary or additional benefits. "We find this reasoning far too speculative to serve as the basis for a claim of individual loss and thus conclude that Horvath lacks standing to seek restitution or disgorgement." *Id.* at 457.

In *Harley*, participants in a "richly funded" defined-benefit pension plan that had a substantial surplus sued to recover investment losses sustained by the plan as a result of an allegedly imprudent investment. Rejecting arguments advanced by the plaintiffs and their *amicus*, the Department of Labor, the Eighth Circuit held that plaintiffs lacked Article III standing because the "Plan's surplus was sufficiently large that the Granite investment loss did not cause actual injury to plaintiffs' interests in the plan." 284 F.3d at 907. "[T]he limits on judicial power imposed by Article III counsel against permitting participants or beneficiaries who have suffered no injury in fact from suing to enforce ERISA fiduciary duties on behalf of the Plan." *Id.* at 906.[7] Petitioners have not cited a single case that reached a contrary result.

III. The Decision Below Does Not Conflict With Any Prior Decision of This Court

1. Petitioners argue (Pet. at 17-26) that the Ninth Circuit misapplied this Court's "injury-in-fact" precedents in holding that they failed to establish a redressable injury to themselves. An alleged misapplication of a correctly stated legal principle, however, does not ordinarily merit review by this Court. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

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[7] Other courts have also ruled that plan participants cannot proceed on claims under Section 502(a) without satisfying Article III standing requirements. *See Doe v. Blue Cross Blue Shield*, 173 F. Supp. 2d 398, 404, 407 (D. Md. 2001); *Caranci v. Blue Cross & Blue Shield*, 194 F.R.D. 27, 32 (D.R.I. 2000); *Ehlmann v. Kaiser Found. Health Plan*, 20 F. Supp. 2d 1008, 1010 (N.D. Tex. 1998), *aff'd*, 198 F.3d 552 (5th Cir. 2000).

In any event, the court below correctly determined that petitioners suffered no redressable injury to themselves that would satisfy Article III standing requirements. Pet., App. A at 4a. Petitioners' contention (Pet. at 18-20) that *the plans* would benefit from an "infusion" of "millions of dollars" in additional funds if petitioners were to prevail on their claims falls far short of establishing a redressable injury to themselves individually. As the court below recognized, infusing the Plans with additional funds would not require ALCOA and Kmart to reduce petitioners' co-payments and contributions, which is the only way to redress their sole claimed injury. Pet., App. A at 4a. Indeed, rather than reduce petitioners' co-payments and contributions, "ALCOA and K-Mart would be free to reduce their contributions or cease funding the plans altogether until any such funds were exhausted." *Id.* Moreover, as the Department of Labor has conceded, the Plans would not violate ERISA's anti-inurement rule[8] by using any such additional funds to pay prescription drug benefits without reducing participant co-payments and contributions. *See* Pet., App. E at 31a ("the Plans' sponsors may take any recovered rebates and discounts and use these funds at their own disposal").

The Ninth Circuit's determination that petitioners failed to establish "redressability" is consistent with this Court's precedents. Where, as here, a plaintiff's claimed injury arises from decisions made by an independent actor not before the court, "it becomes the burden of the plaintiff to adduce facts showing that" the third party can be expected to behave "in such a manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562 (citations omitted). No standing exists when the independent actor retains "broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO*, 490 U.S. at 615; *Lujan*, 504

[8] ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1).

U.S. at 562; *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-44 (1976).

Petitioners confirm the speculative nature of their theory of redressability by quoting the following passage from the Department of Labor's *amicus* brief in the court below: "If the rebates and discounts are returned to the Plans, *it is possible* that the resulting cost reductions or monetary relief to the Plans will benefit the participants and beneficiaries in the form of lower co-payments and less restrictive formularies, and *possibly* a more comprehensive benefit structure." (Pet. at 8-9 n.18, 24 (citation and internal quotations omitted; emphasis added)). Plan sponsors, of course, have complete discretion to adjust employee co-payments and contributions or leave them unchanged as they see fit. *See Black & Decker Disability Plan*, 538 U.S. at 833. That there is no redressability under these circumstances is underscored by petitioners' admission that "[w]e don't know what the fiduciaries are going to do with the money." SER 56.

This Court has affirmed the dismissal of cases based upon similarly speculative theories of injury. In *Warth v. Seldin*, 422 U.S. 490 (1975), for example, the plaintiffs challenged the legality of exclusionary zoning practices by Penfield, a suburban community near Rochester, New York. The plaintiffs included Rochester taxpayers who claimed to be injured financially by Penfield's exclusionary regulations. *Id.* at 508. The Rochester taxpayers asserted that "Penfield's persistent refusal to allow or facilitate construction of low-and moderate-cost housing force[d] the city of Rochester to provide more such housing than it otherwise would do," *ibid.*, and that Rochester taxpayers would be required to bear higher local property taxes to pay for such housing. *Id.* at 508-09. The Court held that these allegations failed to establish the requisite causal nexus between Penfield's zoning regulations and the taxpayers' alleged injury:

> Apart from the conjectural nature of the asserted injury, the line of causation between [the suburb's] actions and such injury is not apparent from the complaint. Whatever may occur in Penfield, the injury complained of—increases in taxation—results only from decisions made by the appropriate Rochester authorities, who are not parties to this case.

Id. at 509; *see also ASARCO*, 490 U.S. at 614-15; *Simon*, 426 U.S. at 28-33; *Allen v. Wright*, 468 U.S. 737, 752-53 (1984).

The cases cited by petitioners (Pet. at 20-22) did not present such speculative theories of redressability. In *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), the Court held that Massachusetts had standing to challenge the EPA's refusal to regulate greenhouse gases under the Clean Air Act. In particular, the Court determined that EPA's conduct created an "'actual'" and "'imminent'" risk of harm to Massachusetts from global warming, and that there was a "'substantial likelihood that the judicial relief requested' will prompt EPA to take steps to reduce that risk." *Id.* at 1455 (citation omitted). The EPA did not dispute the existence of a causal connection between greenhouse gas emissions and global warming. *Id.* at 1457. Although China and India are likely to increase greenhouse emissions over the next decade, the Court determined that the redressability requirement was satisfied because "[a] reduction in domestic emissions would slow the pace of global emissions increases, *no matter what happens elsewhere*." *Id.* at 1458 (emphasis added). In this case, by contrast, petitioners' only purported injury is that their co-payments and contributions have been increased, and there is simply no evidence that ALCOA or Kmart are likely to do anything different with respect to petitioners' co-payments and contributions if they prevail.

The other cases cited by petitioners—*Bryant v. Yellen*, 447 U.S. 352 (1980) and *Clinton v. City of New York*, 524 U.S. 417 (1998)—also presented injuries that were likely to be redressed by a favorable decision. In *Bryant*, the district court held that a rule generally limiting water deliveries from reclamation projects to 160 acres under single ownership did not apply to much larger tracts of the Imperial Irrigation District in southeastern California. Application of that 160-acre limit would have given owners of these larger tracts an incentive to sell excess lands at prices below the prevailing market price for irrigated land. The Court held that farmers who hoped to purchase the excess lands had standing to appeal because it was "likely that excess lands would become available at less than market prices" if the judgment were reversed. 447 U.S. at 368. Again, petitioners in this case failed to establish any such likelihood that their co-payments or contributions would be reduced if they were to prevail.

In *Clinton*, the Court held that a farmers' cooperative had standing to challenge the President's exercise of authority under the Line Item Veto Act to cancel a tax provision that Congress enacted to permit sellers of food processing facilities to defer recognition of gain if they sell their stock to a cooperative. 524 U.S. at 432. Under existing law, sellers of such processing facilities could obtain the benefits of tax deferral only by selling to a business corporation, not by selling to a farmers' cooperative. *Id.* at 423-24. The Court held that, by depriving the farmers' cooperative of a statutory "bargaining chip" in its negotiations, the cancellation inflicted an "immediate" and "concrete" injury sufficient to satisfy Article III standing requirements. *Id.* at 432-34; *see also id.* at 435 n.23 ("The injury in the present case is comparable to the repeal of a law granting a subsidy to sellers of processing plants if, and only if, they sell to farmers' cooperatives."). Unlike the farmers' cooperative in *Clinton*, petitioners in this case were never deprived of a "bargaining chip"—instead, they argue that the recovery they seek for the plans would *create* some type of "bargaining chip" that would enable them to put "pressure" on their employers. Pet. at 22-23. Apart from the lack of evidence that the ALCOA and Kmart plans have ever been the subject of any such "bargaining," this argument just ignores the Article III "injury" requirement altogether.

2. Contrary to petitioners' argument (Pet. at 26-30), the decision below is entirely consistent with this Court's "representational standing" precedents. As the Court explained in *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996), representational standing is confined to relationships "recognized either by common-law tradition or by statute" that "rebut the background presumption . . . that litigants may not assert the rights of absent third parties." *Id.* at 557 (footnotes omitted). Petitioners cannot satisfy that requirement.

This Court has been reluctant to allow persons to claim standing to vindicate the rights of a third party on the grounds that third parties are generally the most effective advocates of their own rights and that such litigation will result in an unnecessary adjudication of rights which the holder does not wish to assert. *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). As uninjured plan participants, petitioners are not the best proponents of the plan's rights. Unlike the plan's fiduciaries, participants have no duty to represent the interest of the plan or its participants and beneficiaries. Nor do participants have any authority to bind the plan to a judgment or settlement of claims they purport to assert on the plan's behalf. *See Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (citing Restatement (Second) of Judgments § 41(1) (1980)); *see also Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 880-883 (6th Cir. 1997). "The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them." *Singleton*, 428 U.S. at 114.

That the Secretary of Labor, plan fiduciaries, and participants and beneficiaries all have *statutory* standing to bring an action for relief to the plan does not establish Article III standing. Petitioners' argument to the contrary (Pet. at 26-27) is nothing more than a variant of the "statutory abrogation of Article III" approach to standing that this Court has repeatedly rejected. *See Gladstone, Realtors*, 441 U.S. at 100; *Blatchford v. Native Village*, 501 U.S. 775, 785 (1991). Following petitioners' argument, Congress could simply eliminate the constitutional requirement of injury in fact and authorize any private person to bring actions for violations of federal employment laws. The bedrock standing principles recognized by this Court cannot be evaded so easily.

Petitioners' analogy of ERISA plan participants to "executors, trustees and guardians *ad litem*" is likewise misplaced. Pet. at 26. Petitioners not only fail to provide any law supporting this analogy, but they ignore the fact that it is only the plan fiduciary who, like an executor, trustee or guardian, has an obligation to act on behalf of the plan and the authority to bind the plan to a judgment or settlement. *See Bittinger*, 123 F.3d at 880. As the court below observed, "[t]rustees and executors . . . have a stake in the litigation because they are acting on behalf of the estate, which owns the claims being litigated." Pet., App. A at 6a-7a.

Nor do petitioners identify any common-law tradition that permits a plan participant to sue or be sued on behalf of the entire plan. ERISA's provisions "are guided by principles of trust law." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989); *see also Varity Corp.*, 516 U.S. at 497. Under the common law of trusts, beneficiaries whose interests in a trust are not injured do not have standing to bring an action for fiduciary breach on behalf of the plan. Restatement (Second) of Trusts § 214 cmt. b (1959) ("A particular beneficiary cannot maintain a suit for breach of trust which does not involve any violation of duty to him."); A. Scott & W. Fratcher, *Law of Trusts* § 214 (4th ed. 1988) ("In order to maintain a suit . . . the beneficiary must show that his interest is involved").

Furthermore, there is no basis for petitioners' contention (Pet. at 27-28) that they have "representational standing" to sue on behalf of the Secretary of Labor. On the contrary, "private plaintiffs do not adequately represent, and are not charged with representing, the broader national public interests represented by the Secretary." *Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413, 1424 (11th Cir. 1998). Recognizing that the Secretary's interests are "wholly distinct and separate" from those of plan participants, courts have uniformly held that ERISA actions brought by plan participants do not bind the Secretary under principles of res judicata or claim preclusion. *Id.* (citing cases).

Petitioners' invocation of *Vermont Agency* (Pet. at 28) is likewise unavailing. There, the Court upheld the standing of a private relator to bring a qui tam civil action "for the person and for the United States Government . . . in the name of the Government." 529 U.S. at 769 (citation omitted). If the government declines to intervene, the relator stands to recover 25-30% of the total award as a "bounty"; if the government takes over the case, the relator still gets 15-25% for his whistleblowing. *Id.* at 769-70. Hence, the Court had little trouble concluding that as to his portion of the recovery, "a qui tam relator has a 'concrete private interest in the outcome of [the] suit.'" *Id.* at 772 (quoting *Lujan*, 504 U.S. at 573) (alteration in original).

In seeking to identify the origin and nature of a relator's rights, the *Vermont Agency* Court expressly rejected the idea that the relator acts merely as agent of the United States and that the "bounty" is simply a fee received "out of the United States' recovery . . . ." 529 U.S. at 772. The Court pointed out that the statute itself gives the relator "an interest in the lawsuit, and not merely the right to retain a fee out of the recovery." *Id.* *Vermont Agency* thus involved a markedly different statute that actually assigned part of the government's claim to the plaintiffs. Petitioners have no statutory basis to assert such a claim here, and cannot show that they would receive a portion of any monies that would be recovered by the plan in this lawsuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 6, 2007

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