No. 13-1339

In The
Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

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

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

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INTEREST OF AMICUS CURIAE[1]

The Pension Rights Center ("the Center") is a Washington, D.C. nonprofit, nonpartisan consumer organization that has been working for nearly 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.

The issue presented here arises under the Fair Credit Reporting Act ("FCRA"), and asks whether the violation of a legal right conferred upon a plaintiff by Congress constitutes injury in fact for purposes of Article III standing. Although this case does not interpret the Employee Retirement Income Security Act of 1974 ("ERISA"), it nonetheless may be relevant to the participants in and beneficiaries of ERISA-covered plans around the country, depending on how broadly or narrowly the Court resolves the constitutional question presented. If interpreted broadly, the constitutional question presented could potentially implicate claims brought under ERISA, and thus,

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

affect the retirement income security of millions of employees.[2]

The Center has a strong interest in ensuring that Article III is not interpreted to procedurally deny ERISA plan participants standing to sue, thus preventing them from remedying alleged fiduciary breaches or other violations of their statutory rights or enforcing reporting, disclosure, vesting and funding obligations under ERISA. While we write because of our concerns about the implication of this case on people who depend on ERISA protections, ERISA is just one illustration of how a narrow construction of injury for standing purposes would create massive amounts of confusion and uncertainty around statutory law. In light of the significance of the issues presented by this case, the Center respectfully submits this brief to facilitate a full consideration by the Court of these issues.

The Center believes that the Ninth Circuit Court of Appeals' decision in this case – determining that the violation of Respondent's individual statutory right is a concrete, *de facto* injury that satisfies the injury in fact requirement of Article III – should not be disturbed, as it is supported by longstanding precedent.

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[2] Petitioners acknowledge that the question presented could have relevance beyond the FCRA, including ERISA claims. *See* Brief for Petitioner ("Pet'r's Br.") at 10, 17.

Contrary to Petitioner's assertion, the Ninth Circuit did not hold that "a violation of his statutory rights – standing alone – sufficed to establish injury in fact." Pet'r's Br. at 8 (internal quotations omitted). Rather the Ninth Circuit applied the test set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992): "(1) the plaintiff has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014) (internal quotation marks omitted).

The court acknowledged that "the Constitution limits the power of Congress to confer standing." *Id.* at 413. The court explained, however, that those limits do "not prohibit Congress from 'elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" *Id.* The court further held that "the interests protected by the statutory rights at issue are sufficiently concrete and particularized that Congress can elevate them" by statute to Article III injuries. *Id.*

SUMMARY OF THE ARGUMENT

In examining this FCRA matter, the Court of Appeals correctly determined that "alleged violations of [a plaintiff's] statutory rights are sufficient to satisfy the injury in fact requirement of Article III." *Id.* at 413-14. Viewed in the context of ERISA claims, accepting Petitioner's argument could drastically limit a plan participant's ability to enforce critical fiduciary duties and other ERISA 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 information about plan benefits, the right to adequately funded benefits, the right to benefit insurance through Pension Benefit Guaranty Corporation ("PBGC"), and 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 Tele. 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 Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

If adopted, Petitioner's position would deny employees the opportunity to enforce and address violations of these rights *before* they result in pecuniary harm – *i.e.*, the opportunity to *avoid* being "left empty-handed" in retirement. *Lockheed Corp.*, 517 U.S. at 887. 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 this 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).

The Court of Appeals' decision should be affirmed. If, however, the Court narrows the Ninth Circuit's holding, it should do so in a manner that does not disturb or weaken participants' rights under ERISA.

ARGUMENT

A. A 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*, 504 U.S. at 560-61. 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). Petitioner's argument, distilled to its simplest form, is that where the interest of a plaintiff is "legally protected" by virtue of congressional action, Article III requires *two discrete* injuries: (i) the actual, concrete and particularized invasion of the statutorily protected interest, *see id.*, at 560-61; and (ii) some *additional* monetary or other harm that was recognized by the "English legal tradition." Pet'r's Br. at 17-26. Nothing in the Constitution or this Court's jurisprudence supports this position.

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)). Petitioner conflates this well-recognized concept with impermissible congressional attempts to "convert the undifferentiated public interest" into standing to redress "generalized grievance[s]." *Lujan*, 504 U.S. at 575, 577.

Petitioner essentially reduces the injury in fact test enunciated in *Lujan* into a "concrete harm" requirement, pursuant to which the only injuries that qualify are those that existed in the English Legal Tradition. Not only does Petitioner's unworkably narrow approach fail to recognize the many new injuries that have surfaced in the modern world, it is contrary to the well-established principle that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Massachusetts v. E.P.A.*, 549 U.S. 497, 516-17 (2007).

Petitioner ignores the fact that many statutes, including the FCRA and ERISA, create *individual* rights, the invasion of which constitute *personal* injuries. *Lujan* has already set forth the standard to determine whether Congress has properly established a statutory right, the invasion of which causes injury in fact: a court must ask if the invasion of a statutory right in question is "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560 (citations and quotations omitted).

In the case at bar, the violation of Respondent's statutory right under the FCRA was a concrete and particularized injury because it involves the specific and non-abstract act of disseminating information about Respondent.

Similarly, the invasion of an ERISA plan participant's right to the prudent and loyal management of his or her retirement plan is a "concrete and particularized" injury, given that the fiduciaries of the plan owe the fiduciary duties directly to plan participants. Thus any breach of fiduciary duty affects plan participants in a personal and individual way. *Lujan*, 504 U.S. at 560 n.1 (explaining the invasion of legal right is "particularized" if it "affect[s] the plaintiff in a personal and individual way."). To hold otherwise would deprive participants of rights that they would have had before ERISA was passed.

B. Spokeo's Argument, if Adopted by this Court, Would Eviscerate ERISA's Comprehensive and Reticulated Scheme.

Prior to ERISA, an employee's right to her pension benefit was contingent on the good will and financial security of the employer (the plan sponsor); there was no requirement that an employer fully fund the pension trust from which workers' benefits were paid. After several high-profile pension plan failures, including that of the Studebaker Corporation (where most employees received only 15 cents for each pension dollar promised),[3] 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).

"[T]he crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 n.1 (1985) (citation omitted). In that vein, ERISA codified fiduciary duties derived from the common law of trusts, prohibiting plan assets from inuring to the employer, requiring assets to be held in trust until the plan is terminated and all liabilities have been paid, and requiring

[3] *See* John H. Langbein et al., PENSION AND EMPLOYEE BENEFIT LAW 67-71 (6th ed. 2015). ERISA forbids "fund-specific" defined benefit plans, such as the Studebaker plan, which limit the sponsor's liability to the assets in the fund. *Id*. at 71.

fiduciaries to manage plan assets prudently and solely in the interest of plan participants and beneficiaries. ERISA §§ 403, 404, 406, 29 U.S.C. §§ 1103, 1104, 1106. *See Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) ("[R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."); *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015) (explaining that "[i]n determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts") (quoting *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985).

Congress also recognized that additional protections were necessary to protect employee retirement security. *See* ERISA § 2(a), 29 U.S.C. § 1001(a) (noting "the lack of employee information and adequate safeguards," the "inadequacy of current minimum standards," and the "depriv[ation] of anticipated benefits" due to "the termination of plans before requisite funds have been accumulated."). To address these concerns, Congress enacted numerous additional procedural and substantive protections for plan participants and beneficiaries, including minimum funding, participation, and vesting requirements, insurance of plan benefits through the PBGC, and rules concerning reporting and disclosures.[4] *See also Lockheed Corp.*, 517 U.S. at 887.

Congress provided plan participants with the ability to enforce these procedural and substantive rights through "six carefully integrated civil enforcement provisions found in § 502(a) of the statute." *Russell*, 473 U.S. at 146 (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 to the Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b).

As this Court recently recognized, the "actual harm" caused by a breach of fiduciary duty may "come from the loss of a right protected by ERISA or its trust-law antecedents." *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1881 (2011). Consequently, in order to show injury for Article III purposes, a participant should not be required to show anything more than the violation of a statutory right.

If Spokeo's position were adopted by this Court, many of the protections which Congress believed were essential to protect the interests of participants and beneficiaries would be crippled. Such a holding would put into doubt the opinions of numerous courts that have recognized that the violation of

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[4] *E.g.*, 29 U.S.C. §§ 1021-26, 1053, 1083, 1104-06, 1109, 1307, 1322.

ERISA-conferred disclosure rights, without more, constitutes injury in fact for the purposes of claims seeking equitable and other injunctive relief pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). *See Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 456 (3d Cir. 2003) (holding that because "the disclosure requirements and fiduciary duties contained in ERISA create in [a plan participant] certain rights, including the rights to receive particular information and to have [fiduciaries] act in a fiduciary capacity," a plan participant "need not demonstrate actual harm in order to have standing to seek injunctive relief requiring that [a fiduciary] satisfy its statutorily-created disclosure or fiduciary responsibilities"); *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 610 (6th Cir. 2007) (where a plaintiff seeks equitable relief to enforce ERISA, "violation of the fiduciary duty owed to [plaintiff] as a participant in and beneficiary of their respective ERISA plans" is "sufficient to establish injury-in-fact for purposes of constitutional standing"); *Central States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 199 (2d Cir. 2005) ("a plan participant may have Article III standing to obtain injunctive relief related to ERISA's disclosure and fiduciary duty requirements without a showing of individual harm"); *Pender v. Bank of Am. Corp.*, 788 F.3d 354, 366 (4th Cir. 2015) (holding that participant need not show financial loss to sue for disgorgement of profits because "to have any teeth, the available remedies [under ERISA] must be able to reach situations . . . where a plan sponsor benefits from an

ERISA violation, but plan participants – perhaps through luck or agency intervention – suffer no monetary loss").

C. Denying ERISA Plan Participants the Ability to Assert Fiduciary Breach Claims Based on Statutory Violations Alone Makes the Statute 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). As described above, this complex scheme was designed to insure that plan participants will never be in a position where they have lost benefits. To require participants to show more than the violation of a statutory duty owed to them in order to establish Article III standing destroys this carefully crafted scheme.

David v. Alphin, relied upon by Petitioner to establish a circuit split, demonstrates the harm that results when courts require ERISA participants to establish an injury beyond the violation of a statutory right for Article III standing purposes. There, the court held that a participant did not have standing to sue for a fiduciary breach that caused losses to his defined benefit pension plan because he had not shown that the plan was underfunded or that he had lost benefits. *David v. Alphin*, 704 F.3d 327, 336-38 (4th Cir. 2013). *See also Perelman v. Perelman*, 793

F.3d 368 (3d Cir. 2015); *Harley v. Minnesota Mining & Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002).

Requiring participants to show that they have lost benefits in order to sue for fiduciary breaches not only adds a pleading element to ERISA section 502 that Congress did not include, but it also 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 he is first required to show that he has lost benefits as a result of the breach.

Similarly, to require the plan to be underfunded in order to establish Article III injury is not only inconsistent with ERISA's statute of limitations provisions as described above, but also requires courts to resolve complex issues that the statute does not address. Under ERISA's funding standards, a plan may be fully funded one day and, due to market conditions and interest rate changes, underfunded the next day. Thus, a plan could be "overfunded at the time of the breach, underfunded when losses were incurred, overfunded at the initiation of litigation, and underfunded when the benefit payments become due." *Alphin*, 704 F.3d at 337 (citing Br. of the Sec'y of Labor as Amicus Curiae in Support of

Plaintiffs-Appellants Urging Reversal). Moreover, Congress has at times provided temporary funding relief to plans, making it unclear what funding standard should apply to determine whether the plan is underfunded. *See, e.g.*, H.R. Rep. No. 113-520, pt. 1, at 19 (2014) (explaining the purpose of recent legislation which temporarily "modified the interest rates used in valuing pension liabilities to give employers the option to effectively spread out the higher contributions over a longer period of time" than otherwise required under ERISA). Requiring a plan to be underfunded in order to establish Article III injury requires a court to resolve these complex legal and factual issues without any guidance from the statute as to the relevant considerations.

Finally, requiring a plan participant to show more than the violation of a statutory right for Article III purposes puts the participant in a worse position than before the statute was passed. Trust law recognized that beneficiaries have an equitable interest in the prudent and loyal management of trust assets, and that violations of those fiduciary standards is enough to establish injury for Article III purposes. *See Scanlan v. Eisenberg*, 669 F.3d 838, 843-46 (7th Cir. 2012). 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.

These problems would be resolved if this Court re-affirms that the violation of a statutory right is sufficient to establish Article III standing. This Court has reiterated its reluctance to add remedies and causes of action to ERISA because its "carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.' " *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (citing *Russell*, 473 U.S. at 146-47 (emphasis in original)). So too, additional requirements should not be added to this carefully crafted and detailed enforcement scheme that stand in the way of participants and beneficiaries enforcing their statutory rights under the guise of Article III standing requirements.

CONCLUSION

Because Respondent sufficiently satisfies Article III standing by virtue of the alleged violations of his individual statutory rights under the FCRA, the Court of Appeals' decision should be affirmed. If, however, the Court further narrows the Ninth Circuit's holding, it should do so in a manner that confirms that participants in ERISA cases have standing under Article III to sue to redress ERISA procedural and substantive violations, including fiduciary breaches that have put their retirement security at risk.

Respectfully submitted,

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