No. 26-1021

In the United States Court of Appeals
for the Second Circuit

CHARLES DOHERTY AND MICHAEL J. NOEL,
individually, and as representatives on behalf of a class of similarly situated persons,

Plaintiffs-Appellees,

v.

BRISTOL-MYERS SQUIBB CO., BRISTOL-MYERS SQUIBB CO. PENSION COMMITTEE, BRISTOL-MYERS SQUIBB COMPENSATION AND MANAGEMENT DEVELOPMENT COMMITTEE, AND STATE STREET GLOBAL ADVISORS TRUST CO.,

Defendants-Appellants,

and

JOHN DOE 1–10,

Defendant.

AMICUS CURIAE BRIEF
OF THE ACTING U.S. SECRETARY OF LABOR
IN SUPPORT OF THE APPELLANT AND REVERSAL

Appeal from the United States District Court
for the Southern District of New York, Case No. 24-CV-06628-MMG
(Hon. Margaret M. Garnett)

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

As the United States Officer with chief authority over Title I of the Employee Retirement Income Security Act ("ERISA"), the Acting Secretary of Labor has a profound interest anytime an opportunity arises to "assur[e] the . . . uniformity of enforcement of . . . the ERISA statutes." *See Sec'y of Lab. v. Fitzsimmons*, 805 F.2d 682, 693 (7th Cir. 1986) (en banc). This includes all instances in which "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans" may be clarified. *See* 29 U.S.C. § 1001(b). The fiduciary-centered issue in this case—one of many similar putative class actions to reach the federal courts of appeal—resides in the heartland of the sort of standards in which clarity, uniformity, and consistency must prevail. For that reason, the Acting Secretary offers the following to aid the Court's deliberation.

[1] The Acting Secretary files this brief under Federal Rule of Appellate Procedure 29(a)(2), which provides that a United States Officer "may file an amicus brief without the consent of the parties or leave of court."

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case involves a process, expressly permitted by ERISA, called a "pension risk transfer," or "PRT." Distilled to its core, the PRT concept is straightforward. No employer has an obligation to sponsor a pension plan for its employees. So to incentivize more employers to do so, ERISA provides them with an off-ramp for pension liabilities that they no longer wish to manage—the right to transfer some or all the assets and liabilities of their defined-benefit pension plans to an annuity provider (typically, an insurance company).[2] For a plan's participants and beneficiaries, a PRT changes nothing material; they remain entitled to the same benefits irrespective of whether their employer or an annuity provider pays what they are owed. For the plan's original sponsor, in contrast, PRTs allow employers to safely manage financial risks by moving pension-plan obligations off their books without jeopardizing the benefits owed to their employees.

And, to put it bluntly, PRTs work—swimmingly. Over the last three decades, no annuity selected in a PRT transaction has defaulted or failed. During the same period, by contrast, participants and beneficiaries who remained in employer-run

[2] There are two primary types of employer-sponsored retirement plans—defined-benefit plans and defined-contribution plans. This case concerns a defined-benefit plan, a contract-based arrangement by which employers promise their employees a certain monthly payment or specific healthcare benefits for the rest of their lives in exchange for their employment. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439–40 (1999).

pension plans have lost at least $8.5 billion because their employers were not able to fully fund their plans and the Pension Benefit Guaranty Corporation's minimum guarantee did not cover all of the funding shortfall.[3] PRTs thus have a proven track record of guaranteeing participants' and beneficiaries' benefits while allowing employers to effectively steward company finances.

And this makes sense. Here, for instance, Bristol-Myers Squibb is a biopharmaceutical company in the business of discovering, developing, manufacturing, and selling medicines to treat serious diseases—not providing retirement benefits, whether through annuities or otherwise.[4] After opting to help ensure the long-term financial security of thousands of its employees by creating defined-benefit pension plans, Bristol-Myers Squibb made the business decision to entrust payment of those earned benefits to an annuity provider—i.e., the sort of company that specializes in paying out earned financial benefits.

PRTs benefit employers and participants/beneficiaries alike when left undisturbed, which is why ERISA provides for them (and the Acting Secretary

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[3] *See* ERISA Advisory Council, U.S. Dep't of Lab., Statement of the 2023 Advisory Council on Employee Welfare and Pension Benefit Plans to the U.S. Department of Labor Regarding Interpretive Bulletin 95-1 (Aug. 29, 2023) at 4, available at https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/about-us/erisa-advisory-council/statement-regarding-interpretive-bulletin-95-1.pdf.

[4] *See* BRISTOL-MYERS SQUIBB, *Our mission, vision, values, and commitment*, https://www.bms.com/about-us/our-company/our-mission.html (last visited July 20, 2026).

supports businesses' right to engage in them). When opportunistic plaintiffs' lawyers force PRT decisions like Bristol-Myers Squibb's into the crucible of federal-court litigation, however, those upsides are (at best) obstructed or (at worst) obliterated. And when that occurs, the damage does not stop with employers like Bristol-Myers Squibb or its employees. Congress intended that states be insurance and annuity products' primary regulators. So, if the ever-present specter of litigation thwarts employers from conducting PRTs, the delicately calibrated balance Congress established between federal and state regulatory prerogatives will deteriorate.

And, more perversely, if employers cannot conduct PRTs, they are far less likely to offer pension plans to their employees in the first place. Cases like this (and the other putative class actions trending behind it) do nothing but punish employers for their considered choice to protect the long-term financial health of their aging workforce through a PRT, as they are entitled to do under ERISA. The result: employees like the thousands at Bristol-Myers Squibb who benefited from the company's decision to offer pension plans for decades will suffer, as opportunistic litigants (or more precisely, opportunistic litigators) erode incentives for employers to enter the pension-plan market at all.

Given the stakes and his duty to protect the American worker, the Acting Secretary offers his views on the issue of standing; specifically, how the district court misread the Supreme Court's decision in *Thole v. U.S. Bank N.A.*, 590 U.S. 538

(2020). Read faithfully, *Thole* did no more than apply uncontroversial and bedrock standing precedents, all of which require plausible allegations that a threatened injury is "certainly impending" before it can trigger federal-court subject-matter jurisdiction. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013). Contrary to what the district court believed, the principles in *Thole* do, in fact, govern the outcome of this case.

BACKGROUND

A. As noted above, ERISA explicitly gives employers, as plan sponsors, the right to perform pension risk transfers. *See* 29 U.S.C. § 1341(b)(3)(A)(i). In a PRT, a plan's sponsor (usually an employer) transfers the plan's assets and liabilities to an insurance company in exchange for an annuity contract covering the plan's liabilities. *See Beck v. PACE Int'l Union*, 551 U.S. 96, 99 (2007). Nothing about the benefits provided by the plan itself changes except for which entity has responsibility for making payments. *See id*. at 103 (citing 29 U.S.C. § 1341(b)(3)(A)(i)–(ii)).

For purposes of this case, a crucial point bears emphasizing at the outset: the decision to transfer a plan to an insurance company through a PRT is not a fiduciary act of the employer who sponsors the plan. In ERISA parlance, this is a "settlor decision," which means that it remains in the sole discretion of the employer.[5] When

[5] The settlor is the entity, usually the employer, that makes the initial, discretionary decision to create the plan, and other decisions about the form, design, or structure of the plan are similarly made in a settlor capacity and are likewise

the settlor exercises that discretion, it bears no fiduciary responsibility whatsoever for that settlor decision.[6] *Hughes Aircraft Co.*, 525 U.S. at 444. So, the fiduciary duties at issue in this case (and all other PRT cases) arise *only* when examining the process of selecting one annuity provider over another. And given that ERISA gives plan sponsors complete discretion to enter into a PRT, any legal standard for the subsequent fiduciary considerations that would meaningfully interfere with that front-end decision should be immediately considered suspect. That is exactly the case here, where the district court's expansive approach to standing and the Plaintiffs' misreading of Department guidance threatens to leave every plan sponsor who enters a PRT open to vexatious litigation.

Because ERISA's fiduciary duties apply to the selection decision, an employer (and any other plan fiduciary for the decision) must act "with the care,

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completely elective. *Hughes Aircraft Co.*, 525 U.S. at 444. Because settlor decisions are not encumbered by fiduciary duties, the consequences of settlor decisions necessarily cannot give rise to a breach of fiduciary duty claim. *Id.* Because Bristol-Myers Squibb's decision to undertake a PRT, which as a matter of law transfers regulatory authority from the federal Department of Labor to state insurance regulatory apparatuses, is a settlor decision, the switch from federal to state oversight cannot form the basis of an Article III injury in fact. Thus, the district court was wrong insofar as it seemed to suggest that the switch from federal regulation to state regulation could bolster the Plaintiffs' standing allegations with regard to a breach of fiduciary duties.

[6] In this case, Bristol-Myers Squibb was the plan sponsor and, through the Pension Committee it established, the plan administrator, thereby making it the plan's fiduciary.

skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use," 29 U.S.C. § 1104(a)(1)(B), and "solely in the interest of the participants and beneficiaries" of that plan, *id.* § 1104(a)(1), in selecting an annuity provider. These are, respectively, the fiduciary duties of prudence and loyalty.

ERISA (and the cases interpreting it) recognize that, when a fiduciary acts, there is generally a "range of reasonable judgments a fiduciary may make," based on factual predicates of the decision in question. *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022). In other words, ERISA creates a process-based regulatory scheme, not an ends- or results-based one. *In re Quest Diagnostics ERISA Litig.*, 179 F.4th 217, 224 (3d Cir. 2026) ("[I]f the fiduciary's process was prudent, that ends the inquiry and plaintiffs lose.") (citing *Renfro v. Unisys Corp.*, 671 F.3d 314, 322 (3d Cir. 2011)).[7] If the *means* through which a fiduciary acts are conducted with the requisite prudence and loyalty, the relative success of the *ends* matters far less for purposes of, among other things, legal liability under the statute. "[W]hether a fiduciary's actions are prudent cannot be measured from the vantage point of hindsight" because "'the prudent person standard is not concerned with results; rather it is *a test of how*

[7] *Accord Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022) (noting that for the duty of prudence, "[t]he process is what ultimately matters").

the fiduciary acted [when] viewed from the perspective of the time of the challenged decision . . .'" *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 424 (4th Cir. 2007) (quoting *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917–18 (8th Cir. 1994) (emphasis added)).

After a PRT concludes, so too does ERISA coverage. This, however, is a feature, not a bug, of the system. Once an annuity provider assumes the plan's assets and liabilities, it becomes immediately subject to rigorous state regulatory regimes, including state guarantee associations ("SGAs") that provide protection to persons receiving annuity payments and to other insurance company beneficiaries.

B. This case centers around Bristol-Myers Squibb's decision to move, via a PRT, the liabilities of its defined-benefit plan to an annuity provider. JA21 (Am. Compl. ¶ 3). In a defined-benefit plan, participants and beneficiaries are typically promised by the plan sponsor a consistent stream of income during retirement. *Hughes Aircraft Co.*, 525 U.S. at 439–40. Defined-benefit plans differ from defined-contribution plans, in which plan participants and beneficiaries have individual accounts that are attributable to them. *Id*. In a defined-benefit plan (at issue here), the value of the plan's total assets has no effect whatsoever on the amount due to

any specific participant or beneficiary. In a defined-contribution plan (not at issue here), the value of the plan's total assets generally does have such an effect.[8]

Bristol-Myers Squibb hired State Street Advisors as an independent fiduciary to select an annuity provider. JA61 (Am. Compl. ¶ 173). It recommended, and Bristol-Myers Squibb selected, Athene Annuity and Life Company and Athene Annuity & Life Assurance Company of New York ("Athene"). JA21, 62 (Am. Compl. ¶¶ 3, 183). According to Plaintiffs' complaint, Athene has an A+ credit rating from Standard & Poor's and an A1 rating from Moody's. JA57 (Am. Compl. ¶ 161). It has performed annuity transfers totaling more than $50 billion and covering more than half a million pension-plan participants and beneficiaries. Athene, *Pension Group Annuities*, https://www.athene.com/pension-group-annuities (last visited July 20, 2026). As of 2023, neither Athene nor any other PRT annuity provider had a single default or failure.[9]

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[8] *See Thole v. U. S. Bank N.A.*, 590 U.S. 538, 540 (2020) ("In a defined-benefit plan, retirees receive a fixed payment each month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions. By contrast, in a defined-contribution plan, such as a 401(k) plan, the retirees' benefits are typically tied to the value of their accounts, and the benefits can turn on the plan fiduciaries' particular investment decisions.") (first citing *Beck*, 551 U.S. at 98 (2007), then citing *Hughes Aircraft Co.*, 525 U.S. at 439–40).

[9] *See* ERISA Advisory Council, U.S. Dep't of Lab., Statement of the 2023 Advisory Council on Employee Welfare and Pension Benefit Plans to the U.S. Department of Labor Regarding Interpretive Bulletin 95-1 (Aug. 29, 2023) at 1, available at https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/about-us/erisa-advisory-council/statement-regarding-interpretive-bulletin-95-1.pdf.

Plaintiffs Charles Doherty, Michael J. Noel, and their putative class are former participants in or beneficiaries of the plan that Bristol-Myers Squibb transferred to Athene. JA728. Their putative class action alleges that Bristol-Myers Squibb violated its ERISA-imposed fiduciary duties by choosing Athene, which, in their view, was not the "best or safest" annuity provider. JA24–25 (Am. Compl. ¶ 29). Although they acknowledge that Athene has paid all benefits to date and remains contractually obligated to do so, the Plaintiffs allege that choosing Athene "substantially increased the risk" that they will fail to receive their benefits in the future. JA28 (Am. Compl. ¶ 47). This, according to the Plaintiffs, violated Bristol-Myers Squibb's fiduciary duties. JA75 (Am. Compl. ¶ 266). Bristol-Myers Squibb moved to dismiss, arguing that the Plaintiffs lacked standing to challenge the selection of Athene because they failed to allege a concrete injury in fact. *See generally* ECF No. 51.

The district court denied Bristol-Myers Squibb's motion, concluding that the Plaintiffs had plausibly alleged that Bristol-Myers Squibb's choice of Athene "created a substantial risk that Plaintiffs will not receive their benefits and that the Athene transaction diminished the value of Plaintiffs' benefits." SA6. In so doing, it reasoned that "all else being equal[,] an agreement or contract for monthly payments with a panoply of robust protections and guarantees is more financially valuable than a contract with the same monthly payments with unambiguously weaker protections

and guarantees." SA14. It also found relevant that "the Athene transaction ejected Plaintiffs from the ambit of ERISA and its protections." SA15. And, finally, it concluded that the Supreme Court's decision in *Thole v. U.S. Bank N.A.* did not "establish[] a baseline rule that former or current plan beneficiaries lack any Article III standing unless they stop receiving monthly benefits." SA18.

This interlocutory appeal followed.

ARGUMENT

I. THE PLAINTIFFS LACK STANDING.

Supreme Court jurisprudence makes clear this fundamental point: plaintiffs alleging fiduciary mismanagement of a defined-benefit pension plan must plead either that (1) they have not received the benefits their plan sponsor promised them or (2) a default is "certainly impending." If the Plaintiffs cannot plausibly allege either, they have not demonstrated that they have Article III standing. The district court erred in concluding otherwise, and if this error metastasizes to more courts, PRT litigation will obstruct the use of this crucial, ERISA-approved process, all to American worker's detriment. As discussed at greater length below, *see infra* at 22–26, any such hindrance will inflict a grave wound on the pension system writ large not only because it will impermissibly restrict the ability of plan sponsors to responsibly manage their finances and pension liabilities, but also because it will severely disincentivize employers to adopt retirement plans in the first place.

A. Under *Thole* and *Clapper*, the Plaintiffs have not alleged a sufficiently concrete injury in fact.

In *Thole*, the Supreme Court decided a case with standing issues materially identical to those here. *Thole*'s plaintiffs were pensioners who sued their employer after a series of bad investments resulted in a $750-million loss to the employer's pension plan. 590 U.S. at 540–41. Although the plaintiffs continued to receive the benefits owed to them, they alleged that the loss to the plan's overall worth amounted to a violation of the employer's ERISA-imposed fiduciary duties, which, in their view, was a cognizable injury in fact. *Id.*

The Supreme Court disagreed. Because a "defined-benefit plan is . . . in the nature of a contract" and "[t]he plan participants' benefits are fixed and will not change, regardless of how well or poorly the plan is managed," the Court reasoned that plan participants and beneficiaries have an interest only in the benefits their employer promised them—and *not* the overall value of the plan itself. *Id.* at 542–43. Without more than a nonconcrete apprehension that, someday, their employer might not be able to live up to the terms of the pension plan, the plaintiffs in *Thole* had no injury that a federal court could redress. So far, so good.

In so doing, however, *Thole* mused about how "the plaintiffs' amici" had surmised that "plan participants in a defined-benefit plan" might have "standing to sue if the mismanagement of the plan was so egregious that it substantially increased the risk that the plan and the employer would fail and be unable to pay the

participants' future pension benefits." *Id*. Because the plaintiffs themselves in *Thole* had not made either this argument or the purported requisite showing to satisfy it, the *Thole* Court did not hazard a guess as to whether a circumstance like that could indeed give rise to a cognizable injury in fact. *Id*. at 546. And because the Court's passing cogitation on that question formed no part of *Thole*'s holding, it constitutes dicta. *See Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated").

Even though this stray language had nothing to do with *Thole*'s holding (recall that it was merely a recitation of an argument floated by *Thole*'s amici), it has nonetheless been exploited quickly and mercilessly. The Supreme Court decided *Thole* in 2020. By 2026, *thirteen* putative class action complaints (consolidated to ten) cited *Thole*'s egregious-mismanagement dicta to support standing in PRT-stymying lawsuits. And in this case, the district court bit, concluding that the Plaintiffs had sufficiently alleged an egregious-mismanagement injury in fact because "*Thole* did not disavow the premise that a fiduciary's misconduct that substantially increased the risk of default could comprise an injury." SA18 (citing *Thole*, 590 U.S. at 546).

That was error. Above and beyond the district court's confusion of dictum and binding precedent, the fatal flaw in the district court's reasoning was in treating

Thole as if it deviated from the Supreme Court's otherwise-unbroken line of threatened injury-in-fact jurisprudence. *Thole* did no such thing.

Instead, *Thole* faithfully applied *Clapper*, which held that *some* threatened injuries may be so pressing and so certain that they have coalesced to the point of a concrete injury in fact. *Clapper* emphasized, however, that those instances are the rare exception to the general rule.[10] According to *Clapper*, a "threatened injury must be *certainly impending* to constitute injury in fact." 568 U.S. at 409 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (emphasis in original). "Allegations of *possible* future injury," in contrast, "are not sufficient." *Id*. (quoting *Whitmore*, 495 U.S. at 158) (emphasis in original). *Thole* was in accord; there, the plaintiffs failed to show any non-speculative risk that they may not receive "monthly benefits that they are already slated to receive." *Thole*, 590 U.S. at 541. Accordingly, the Court rightly held that they had "no concrete stake in th[e] lawsuit." *Id*.

Thole, read faithfully, controls this case. Here, the Plaintiffs alleged that Bristol-Myers Squibb's PRT created a "substantial risk that Athene will default and

[10] Even if there existed any tension between *Clapper* and *Thole* (and there is none), *Thole* did not sub silentio overrule *Clapper* or create an ERISA-based exception to the general rule that the irreducible constitutional standing requirement now, in the context of ERISA, requires something less than a certainly impending threatened injury. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority sub silentio.").

that, as a result, Plaintiffs will not receive [their] benefits." SA9. What they have not alleged, as required by *Thole* and *Clapper*, is a "certainly impending" risk that Bristol-Myers Squibb's PRT will result in their failure to receive the "fixed payment each month" their defined-benefit plan promised them. As noted above, Bristol-Myers Squibb chose an annuity provider with an A+ credit rating from Standard & Poor's and an A1 rating from Moody's. JA57 (Am. Compl. ¶ 161). Those ratings are investment grades indicating a strong capacity to meet obligations, low risk, and a potential for a 5-percent default rate over a twenty-year period, which comes nowhere near *Clapper*'s "certainly impending" bar. *Bueno v. Gen. Elec. Co.*, No. 1:24-CV-0822 (GTS/DJS), 2025 WL 2719995, at *18 (N.D.N.Y. Sept. 24, 2025).[11] At bottom, the Plaintiffs have failed to allege that they are facing a certainly impending risk that they will not receive their annuity because of Bristol-Myers Squibb's PRT. That failure commands dismissal for lack of standing along with this Court's emphatic clarification regarding the harmony between *Thole* and *Clapper*.

B. Plaintiffs cannot state an Article III injury by alleging PRTs' regulatory effects as one

Nor do the Plaintiffs' allegations about losing Pension Benefit Guaranty Corporation coverage and similar regulatory effects suffice to fabricate a cognizable

[11] *See also Beck v. McDonald*, 848 F.3d 262, 266–67 (4th Cir. 2017) (holding that a thirty-three percent chance of the alleged injury occurring was not enough to show the injury was certainly impending for Article III standing)

injury in fact. The Plaintiffs argue, and the district court agreed, that "eject[ion] from the ambit of ERISA and its protections," SA15, resulted in "diminished value" of their benefits, which in turn constituted an independent injury, SA14. According to the district court, this was "common sense" because "[b]eneficiaries who will rely on their retirement benefits to support them through their senior years of course have a strong interest in not only the amount of the[] monthly benefits [but] also the security of their monthly benefits." SA17 (emphasis omitted).

But *all* PRTs result in the regulatory changes that the Plaintiffs describe. Any time a PRT occurs, SGA protections are substituted for ERISA protections. As previously noted, however, the decision to engage in a PRT is a settlor decision not subject to *any* ERISA's fiduciary duties; thus, the decision to engage in a PRT alone cannot, as a matter of law, give rise to any liability whatsoever. And because it cannot, the attendant regulatory changes similarly cannot, as a matter of law, constitute a legally cognizable injury in fact for purposes of Article III standing.

Congress expressly intended to allow employers to engage in PRTs. And when it did so, Congress was keenly aware of the effects on regulatory protections that PRTs entail. 29 U.S.C. § 1341(b)(3)(A)(i). Plaintiffs' regulatory-change standing theory, then, is no more than a policy disagreement with Congress's prerogative that masquerades as an injury. 29 U.S.C. § 1341(b)(3)(A)(i). The district court erred when it adopted this theory.

Characterizing the regulatory effects' impact on the Plaintiffs' benefits as a "diminished value" does not improve their theory. As *Thole* made clear, defined-benefit plans' quasi-contract structure entitles plan participants only to the benefits the plan promises them. 590 U.S. at 542–43. In other words, "[t]he plan participants' benefits" in a defined pension plan "are fixed and will not change, regardless of how well or poorly the plan is managed." *Id*. at 543. With or without the regulatory effects that the Plaintiffs lament, they are entitled to receive, and have continued to receive, "the exact same monthly benefits that they [were] already slated to receive" both before and after Bristol-Myers Squibb effectuated its PRT. *See id*. at 541. Because the Plaintiffs have nothing more than an interest in receiving their contractually guaranteed defined benefits, their claims of "diminished value" cannot conjure an injury sufficient for Article III standing.

C. Plaintiffs cannot manufacture standing by alleging a bare fiduciary-duty breach without a certainly impending risk that the breach will prevent them from receiving their plan benefits.

The district court also held that the Plaintiffs have statutory standing to sue for all counts under 29 U.S.C. § 1132(a)(9), which states who can sue when a PRT constitutes a violation of fiduciary duties. SA19–20. To the extent this could be interpreted to hold that Plaintiffs have Article III standing merely because they allege a breach of fiduciary duty, this was an error. As noted above, "alleged instability and

potential risk of failure" do not cut it under *Clapper* or *Thole*. Simply adorning that insufficient allegation with the "fiduciary duty" moniker changes nothing.

Standing requires a *concrete* injury. The Supreme Court has explained that a concrete injury is one that has "traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) (citing *Vt. Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 775–77 (2000)). Historically, this has meant harm to one's person, finances, reputation, or other interests. Breach of an abstract legal principle *without* any accompanying concrete harm, however, has never sufficed.

For that reason, even though there exist many "legal prohibitions and obligations," it remains true that "an injury in law is not an injury in fact." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 427 (2021). "[O]nly those plaintiffs who have been concretely harmed by a defendant's [legal] violation may sue that private defendant over that violation in federal court." *Id*. "As then-Judge Barrett succinctly summarized, 'Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions.'" *Id.* (quoting *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 332 (7th Cir. 2019) (Barrett, J.)).

Fiduciary-breach allegations are not talismanic phrases by which Plaintiffs can conjure Article III standing where none otherwise exists. Even if Bristol-Myers

Squibb acted imprudently or disloyally in selecting Athene (and the Acting Secretary respectfully asserts that the Plaintiffs have not adequately pled that Bristol-Myers Squibb did either), the Plaintiffs still lack standing because they have not shown, and cannot show, that Bristol-Myers Squibb's purported breach caused any monetary harm or has created a certainly impending threat of monetary harm. Without more, the Plaintiffs stand in the same place as the *Thole* plaintiffs; i.e., because "[t]hey have received all of their vested pension benefits so far, and they are legally entitled to receive the same monthly payments for the rest of their lives," they have "no concrete stake in this dispute." *Thole*, 590 U.S. at 547.

II. THE PLAINTIFFS MISINTERPRETED INTERPRETIVE BULLETIN 95-1.

Above and beyond the opportunity for this Court to clarify the correct Article III inquiry in this case, it should also crystallize what Interpretive Bulletin 95-1 ("IB 95-1") does and, more importantly, what it does not do. IB 95-1 was a hotly debated point of contention among the parties before the district court. For that reason, the Court should not miss this opportunity to clarify this important interpretive device.

IB 95-1 (codified at 29 C.F.R. § 2509.95-1) explains the Department's views on how the duties of loyalty and prudence apply to a fiduciary's selection of an annuity provider.[12] Specifically, IB 95-1 advises fiduciaries to "take steps calculated

[12] Although interpretive bulletins are guidance documents that do not have the force of law under the Administrative Procedure Act, they "receive 'Skidmore deference,'" *Humana Health Plan, Inc. v. Nguyen*, 785 F.3d 1023, 1027 (5th Cir.

to obtain the safest annuity available, unless under the circumstances it would be in the interests of participants and beneficiaries to do otherwise." 29 C.F.R. § 2509.95-1(c). In so doing, IB 95-1 does little more than restate a fiduciary's general duty of loyalty and process-based duty of prudence; then, it applies those duties to the specific PRT context.

The process IB 95-1 articulates states that a fiduciary should consider (among other things, such as cost savings) the following six factors when selecting an annuity provider:

> (1) The quality and diversification of the annuity provider's investment portfolio;
>
> (2) The size of the insurer relative to the proposed contract;
>
> (3) The level of the insurer's capital and surplus;
>
> (4) The lines of business of the annuity provider and other indications of an insurer's exposure to liability;
>
> (5) The structure of the annuity contract and guarantees supporting the annuities, such as the use of separate accounts;

2015) (internal citation omitted), and are therefore entitled to consideration as "a body of experience and informed judgment to which courts and litigants may properly resort for guidance . . . depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade," *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 297 (5th Cir. 2000) (applying *Skidmore* deference to IB 95-1 governing annuity selection). For that reason, its misinterpretation can (and here, did) lead to grievous errors.

> (6) The availability of additional protection through state guaranty associations and the extent of their guarantees.

Id. § 2509.95-1(c)(1)–(6).

IB 95-1 does not weigh these factors for fiduciaries—it does not instruct, for instance, that low "capital and surplus" necessarily trumps "the size of the insurer relative to the proposed contract," or vice versa. Instead, IB 95-1 requires fiduciaries to weigh these factors for themselves. So long as the process is followed (and, specifically, followed in accordance with the fiduciary duty of loyalty to try to identify the safest option), different fiduciaries may end up opting for different annuity providers.

For that reason, the Secretary deliberately opted not to endorse (and continues to explicitly disclaim) the proposition that there is one single "safest" annuity that a fiduciary must select on pain of legal liability, without regard to whether the fiduciary properly followed a prudent process. Indeed, IB 95-1 emphasizes that "[a] fiduciary may conclude, after conducting an appropriate search, that more than one annuity provider is able to offer the safest annuity available." *Id*. § 2509.95-1(c)(6). This statement reflects the Supreme Court's observation that "the circumstances facing an ERISA fiduciary" will at times "implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes*, 595 U.S. at 177.

The process is what matters, and because IB 95-1 has been exploited by opportunistic litigants who foresee monetary windfalls in asking federal courts to engage in post hoc second-guessing of fiduciary actions, the Court should take this opportunity to emphasize that fiduciaries are to enjoy flexibility and discretion, so long as they follow the prudent process described in IB 95-1, and do so loyally. Because here (and elsewhere) IB 95-1 has been used as a sword in ways that are inconsistent with its text read as a whole, now is the time to clarify that IB 95-1 has never stood either for the proposition that there is necessarily a single safest annuity in all cases or that a PRT fiduciary that otherwise loyalty follows IB 95-1 can be sued for violating their ERISA duties if they do not choose it.

III. THIS CASE AND THE OTHERS THAT FOLLOW WILL WREAK HAVOC ON THE AMERICAN PENSION-PLAN SYSTEM (AND AS A RESULT, THE AMERICAN WORKER) IF THEY ARE NOT CURTAILED.

The magnitude of this case and these issues are hard to overstate. Both the district court and this Court have already recognized as much by virtue of allowing this appeal to proceed under 28 U.S.C. § 1292(b).[13] And since doing so, four district courts have addressed materially identical motions to dismiss.[14] They are not in

[13] *See* 28 U.S.C. § 1292(b) (allowing an interlocutory appeal of "an order not otherwise appealable" if it "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.").

[14] *See Bueno v. Gen. Elec. Co.*, No. 1:24-cv-822-GTS-DJS, 2025 WL 2719995, at *19 (N.D.N.Y. Sep. 24, 2025) (finding plaintiffs lacked Article III standing); *Schoen v. ATI, Inc.*, No. 2:24-cv-1109-NR-KT, 2025 WL 2970339, at *7

accord: two (like the district court below) have (incorrectly) found that plaintiffs have standing, and two have (correctly) found that they lack it.

While the Court resolves these issues, the Acting Secretary urges it to keep in mind a fundamental thread that the Supreme Court pronounced more than fifteen years ago. "Congress enacted ERISA to ensure that employees would receive the benefits they had earned." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010). ERISA puts the American worker first. The Acting Secretary, as ERISA's steward, takes this responsibility more seriously than all others.

It remains true that the American workers' interests reach their apex when their employers provide them with pension plans. That said, "Congress did not require employers to establish benefit plans in the first place." *Id*. at 516–17 (citing *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996)). Because employers cannot be forced to offer their employees pension plans, it necessarily follows that the employees benefit the most when their employers are incentivized to do so.

Incentivization requires tradeoffs, and, accordingly, "ERISA represents a 'careful balancing' between ensuring fair and prompt enforcement of rights under a

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(W.D. Pa. Oct. 7, 2025) (same); *Konya v. Lockheed Martin Corp.*, No. 24-750-BAH, 2025 WL 962066, at *9 (D. Md. Mar. 28, 2025) (finding plaintiffs had Article III standing); *Piercy v. AT&T Inc.*, No. 24-CV-10608-NMG, 2025 WL 2505660, at *12 (D. Mass. Aug. 29, 2025), report and recommendation adopted, 2025 WL 2809008 (D. Mass. Sept. 30, 2025) (same).

plan and the encouragement of the creation of such plans.'" *Id.* (quoting *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004)). That was intentional; "Congress sought 'to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'" *Id.* (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)). And since ERISA took effect in 1974, it has served the purpose that Congress intended, all to the advantage of the American worker.

PRTs are a vital component of the delicate calibration established by Congress. Suffice it to say, creating and running pension plans for (as is the case here) more than thirty-thousand participants and beneficiaries represents a tremendous, and tremendously unpredictable, financial undertaking. This is especially true for the employee-friendly defined-benefit plans, through which participants and beneficiaries are guaranteed a fixed payment each month, irrespective of the plan's overall worth. If companies like Bristol-Myers Squibb have no meaningful way to eliminate oversized financial risks by engaging in a PRT, they will have terrifically reduced incentives to provide their employees with defined-benefit pension plans in the first place.

And it bears repeating: defined-benefit plan participants and beneficiaries lose *nothing* if their employer undertakes a PRT. They remain contractually entitled to receive the exact same annuity they had before the PRT; the only thing that changes

is which entity pays what they are owed. And setting aside the Plaintiffs' handwringing, it remains true that not one plan participant/beneficiary has lost even a single red cent due to a PRT in the last thirty years.

Industry experts have recognized the inherent risks in overregulation for the pension market (particularly overregulation achieved by litigation). A decade ago, the American Academy of Actuaries noted that, "[i]n light of the voluntary nature of sponsorship, plan sponsors generally believe that the ability to close a plan to new entrants, reduce or freeze benefits, or completely terminate a plan (after providing for all accrued benefits) if business conditions dictate such actions has been and remains necessary to encourage adoption and continuation of plans."[15] Stated more bluntly, "a rational business person would not adopt a plan with uncertain future costs and no ability to control those costs if the business can no longer afford them."[16] And for that reason, "it is important to keep in mind that existing regulatory restrictions on unwinding or de-risking plans might further reduce employers' willingness to offer defined-benefit plans, and further proposals to restrict

[15] American Academy of Actuaries, Issue Brief, Pension Risk Transfer (Oct. 2016), available at https://actuary.org/wp-content/uploads/2017/11/PensionRisk Transfer10.16.pdf.

[16] *Id*.

employers' flexibility in this area could produce a rush to exit sponsorship of plans."[17]

The Academy sounded this warning years before the current PRT litigation blitzkrieg, which has besieged several of the globe's biggest employers: e.g., Bristol-Myers Squibb, Lockheed Martin, Verizon, and IBM, among others. In other words, the precarious situation described by the Academy is primed to get much, much worse—unless this Court steps up. The time to do so is now, and the American worker is counting on this Court getting it right.

CONCLUSION

Reversing the district court's wayward standing conclusion is right as a matter of blackletter law and unbroken Supreme Court standing precedent. It is right as a matter of fact. It is right as a matter of our Nation's structural separation of powers. And is it right as a matter of American worker protection.

For all these reasons, the Acting Secretary respectfully urges the Court to reverse the district court's order and remand with instructions to dismiss this case for lack of subject-matter jurisdiction.

[17] *Id.*

July 21, 2026

Respectfully submitted,

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/s/ Edward M. Wenger
July 21, 2026

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 21st day of July, 2026, a true copy of the foregoing brief was filed electronically with the Clerk of Court using the Court's CM/ECF system, which will send by email a notice of docketing activity to all registered attorney filers.

/s/ Edward M. Wenger
July 21, 2026