TO PROCEED OR DISMISS: ARTICLE III STANDING IN ERISA FIDUCIARY INVESTMENT CLAIMS LITIGATION INVOLVING DEFINED-CONTRIBUTION PLANS

Dylan A. White

Since the Supreme Court's decision in Thole v. U.S. Bank N.A., the issue of Article III standing for claims made against defined-contribution plan sponsors challenging investment options that named plaintiffs personally did not invest in has been litigated in dozens of district court cases. The main result in many of these cases is that standing is gained from a purported lack of governance by Thole due to its association with defined-benefit plans. However, this Note's conclusions can be reached regardless of whether Thole governs claims asserted against defined contribution plan sponsors. Precedential Article III jurisprudence (often referred to as "standing doctrine") unquestionably applies to these lawsuits with its associated mandatory authority. Therefore, many district courts have erred when not dismissing claims for which named plaintiffs lacked personal investments in the options they challenged on behalf of the plan. Adjudicating such claims on the merits is unconstitutional due to the absence of subject matter jurisdiction that follows from those plaintiffs' lack of Article III standing.

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I. Introduction

The Employee Retirement Income Security Act of 1974 ("ERISA")[1] regulates private employers' retirement plans in a multitude of ways.[2] This statutory scheme was enacted to protect employee benefit plan participants and their beneficiaries.[3] It provides integrity and accountability with respect to the benefit plans that make retirement possible for many individuals.[4]

Today, most retirement plans are defined-contribution plans,[5] which provide investment choices to their participants from a plan provided menu.[6] These plans have tremendous purchasing power in the public and private markets.[7] Total assets under management within American defined-contribution plans have risen in recent years to several trillions of dollars.[8] Therefore, the financial well-being of the elderly correlates to the integrity of ERISA plans.[9]

In its 2020 term, the Supreme Court granted certiorari to a record number of ERISA cases compared to the number of those that have appeared on past terms' dockets.[10] One of those cases—*Thole v. U.S. Bank N.A.*[11]—has altered the legal framework for private litigants' ability to bring an ERISA suit in federal court. [12] In the world of ERISA, *Thole* has

1. 29 U.S.C. §§ 1001–1461 (1978); *see also Employee Retirement Income Security Act (ERISA)*, U.S. DEP'T LAB., https://www.dol.gov/general/topic/retirement/erisa (last visited Feb. 21, 2023) (defining ERISA as "federal law that sets minimum standards for most voluntarily established retirement and health plans . . . .").

2. *See generally FAQs about Retirement Plans and ERISA*, U.S. DEP'T LAB., https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-for-workers.pdf (last visited Apr. 18, 2023).

3. *See* 29 U.S.C. § 1001(c).

4. *See* U.S. DEP'T LAB., *supra* note 2.

5. Samuel Estreicher & Laurence Gold, *The Shift From Defined Benefit Plans to Defined Contribution Plans*, 11 LEWIS & CLARK L. REV. 331 (2007). *See infra* Part II.B.

6. *See, e.g.*, Hughes v. Nw. Univ., 142 S. Ct. 737, 740 (2022).

7. *See, e.g.*, John Sullivan, *401k Assets Totaled $5.6 Trillion in First Quarter 2020*, 401KSPECIALIST (June 17, 2020), https://401kspecialistmag.com/401k-assets-totaled-5-6-trillion-in-first-quarter-2020/.

8. *Id.*

9. *See* FINANCIAL WELL-BEING OF OLDER AMERICANS, CONSUMER FIN. PROT. BUREAU (Dec. 2018), https://files.consumerfinance.gov/f/documents/bcfp_financial-well-being-older-americans_report.pdf.

10. *See 2020 Year-End ERISA Disputes Update*, GIBSON DUNN (Feb. 11, 2021), https://www.gibsondunn.com/2020-year-end-erisa-disputes-update/ (observing that "the Court decided four ERISA cases in 2020, which is more than the Court has decided in any other year of the statute's 45-year existence.").

11. Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020).

12. *Id.* at 1618.

been considered a landmark decision.[13] Since *Thole* was decided, numerous interpretational issues have emerged in ERISA fiduciary litigation with respect to standing.

This Note addresses the central issue of whether certain claims asserted against defined-contribution plan fiduciaries may be decided on the merits, which has frequently arisen in motions to dismiss for lack of Article III standing.[14]

In *Thole*, the Supreme Court held that participants in a different type of retirement plan—a defined-benefit plan[15]—lack Article III standing if they do not establish injury-in-fact from an individualized financial loss.[16] District Court and Circuit Courts of Appeals decisions both before and after *Thole* have reached differing outcomes with respect to claims involving defined-contribution plans.[17] *Thole* may continue to encourage litigation regarding whether it governs Article III standing of defined-contribution participants who seek to challenge investment options in which their individualized accounts had no stake.[18] This Note attempts to explain and reconcile the competing judicial interpretations of a consequential point of mandatory constitutional authority which will play a major role in benefit plan litigation for years to come.

In Part II, the two basic types of retirement plans—defined-benefit plans and defined-contribution plans—are introduced and described. Part II also discusses the ERISA breach of fiduciary duty cause of action against retirement plan defendants, with a focus on claims of imprudence related to investment options.

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13. *Thole* could be considered a watershed case to the extent that it illuminated the statutory versus Article III standing inquiries' individuality in the specific context of ERISA, to the contrary of many prior rulings of lower courts. *Thole*'s significance has also been recognized across a multitude of legal publications.

14. *See, e.g.*, Shain v. Ellison, 356 F.3d 211, 215 (2d Cir. 2004) (noting if a plaintiff lacks Article III standing, courts "lack subject matter jurisdiction . . . ."); *see also* FED. R. CIV. P. 12(h)(3) (providing that lack of subject matter jurisdiction warrants dismissal.).

15. *See infra* Part II.A.

16. *Thole*, 140 S. Ct. at 1618.

17. *See infra* Part III(b)–(c).

18. *U.S. Supreme Court Limits Standing for ERISA Plan Participants to Sue for Breach of Fiduciary Duties*, PAUL WEISS (June 11, 2020), https://www.paulweiss.com/media/3980299/11june20-thole-alert.pdf (citing Brief of the Chamber of Commerce of the United States et al. at 23–24 & n.12, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712)). This has already been taking place at the motion to dismiss stage, *see e.g.*, *infra* Part III(b)–(c).

Part II also summarizes the framework of Article III standing, which has evolved over many years from U.S. Supreme Court decisions. Additionally, Part II briefly describes statutory standing requirements under ERISA.

Part III analyzes when standing is or is not established, in light of the ruling in *Thole*, in cases with varying factual underpinnings. ERISA Section 1132 litigation involves different claims across differing plan attributes, including some that contain allegations of excessive fees incurred by the plan due to the investment options selected, and others where the named plaintiffs were not personally invested in options that their claims cite as the basis of fiduciary misconduct. The latter type of case has been the subject of a proliferation of litigation at the district court level in the past few years.

A non-party Amicus brief suggested that *Thole*'s judicial resolution posed dire consequences if Article III standing was held to be established.[19] Since then, the defined-contribution plan district court litigation discussed in Part III has been illustrative of that amici's assertion. This trend has potential to continuously erode the judicial economics of ERISA fiduciary litigation.[20] Several courts have held that *Thole* is not governing law with respect to the legal issue discussed in this Note,[21] necessitating a closer examination of the case-law spectrum.

Part IV provides two recommendations, the first of which addresses the situation in which the named plaintiff-participants do not have a stake in some investments that underpin a subset of their fiduciary breach claims. Under certain Article III jurisprudence, this would result in a dismissal of those claims due to a lack of standing. There is a simple litigation strategy that may cure the constitutional defect present in many of the cases discussed in Part III.

19. Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Defendants, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712) (arguing that if the court held that Article III standing was satisfied in *Thole*, "it would . . . invite wasteful, abusive, and profligate litigation based on mere allegations of breaches of fiduciary duties without *any* showing of financial harm to the plan's beneficiaries." (emphasis added)).

20. *See id* at *3; *see also* Anthony Chereso, Comment Letter on Proposed Rule for Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, 2020 WL 4593915, at *7 (July 10, 2020) (noting "there has been a *significant* rise of 401(k) plan investment litigation. Defined contribution plans face scrutiny for the investment alternatives that they make available on an almost daily basis." (endnote omitted) (emphasis added)).

21. *See e.g.*, Cates v. Trs. Columbia Univ., 16 Civ. 6524, 2021 WL 964417, at *2 (S.D.N.Y. Mar. 15, 2021); *see also infra*, note 343 (collecting cases).

Part IV's second recommendation describes some questions regarding how a defined-contribution participant might allege future injury by seeking equitable relief under ERISA.[22] It is possibly uncertain how such a plaintiff would comply with the concreteness requirement of Article III. This resolution could involve the creation of a new limited administrative remedy under ERISA. If there are standing issues here, ideally participants could have claims adjudicated through an alternative dispute resolution process.

Part V will briefly conclude by describing standing doctrine's effects on participants' abilities to protect their retirement assets and by reiterating the possible need for administrative attention, consistent with ERISA's intent.[23]

II. Background

ERISA plans are tasked with the goals of "maximiz[ing] retirement savings for [plan] participants" and "avoiding excessive risk."[24] Below, the two main types of plans are described.

A. Defined-Benefit Plans

Defined-benefit plans are structured such that participants[25] "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."[26] This means that a plan participant's entitlement to their benefits is affected by their plan fiduciary's misconduct only if it "creates or enhances the risk of default by the entire [defined-benefit] plan."[27] Whether a defined-benefit plan is over or under-funded may be affected by factors other than investment performance, including the level of long-term corporate bond interest rates.[28] The

22. 29 U.S.C. § 1132(a)(3).
23. 29 U.S.C. § 1001(b).
24. Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 420 (2014).
25. *See* 29 U.S.C. § 1002(7) (defining ERISA plan participant).
26. Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1618 (2020).
27. LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 255 (2008).
28. *See* Mark Maurer, *Companies' U.S. Pensions Plans Are More Overfunded Than They've Been in Years*, WALL ST. J. (Jan. 24, 2022), https://www.wsj.com/articles/companies-u-s-pension-plans-are-more-overfunded-than-they-have-been-in-years-11642950001.

thresholds that underpin funding status determinations are prescribed by ERISA.[29]

Importantly, unlike defined-contribution plans, defined-benefit plans "consist[] of a general pool of assets, rather than individual dedicated accounts."[30] Defined-benefit plan participant benefit levels lack the capacity to fluctuate upwards from positive investment performance.[31]

Recent years have displayed that there is a continuing decline in the number of employers who offer defined-benefit plans.[32] While still relevant, defined-benefit plans had greater significance in the past, particularly around the time that Congress promulgated ERISA.[33] On average, the remaining defined-benefit plans active today have substantial assets under management, such as the U.S. Bank plan in *Thole*.[34]

B. Defined-Contribution Plans

In defined-contribution plans, which include "401(k) plan[s], the [participants'] benefits are typically tied to the value of their accounts, and the benefits can turn on the plan fiduciaries' particular investment decisions."[35] Under ERISA, a defined-contribution plan is "a pension plan which provides for an individual account for each participant and benefits based solely upon the amount contributed to those accounts, and any income, expense, gains and losses, and any forfeitures of accounts of the participants which may be allocated to such participant's account."[36] These plans have significant structural differences when compared to defined-benefit plans. Notably, the Supreme Court has recognized that "[d]efined contribution plans dominate the retirement plan scene today."[37]

In defined-contribution plans, plan participants have individual accounts and have the ability to decide how their funds are invested by

29. *See, e.g.*, 29 U.S.C. § 1083.
30. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439 (1999).
31. *See LaRue*, 552 U.S. at 250 n.1 (citation omitted).
32. *See* Barbara A. Butrica, Howard M. Iams, Karen E. Smith, & Eric J. Toder, *The Disappearing Defined Benefit Pension and Its Potential Impact on the Retirement Incomes of Baby Boomers*, 69 SOC. SEC. BULL. 3 (2009).
33. *LaRue*, 552 U.S. at 255.
34. Thole v. U.S. Bank Nat'l Ass'n, 873 F.3d 617, 624 (8th Cir. 2017).
35. Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1618 (2020) (citations omitted).
36. 29 U.S.C. § 1002(34); *see* 26 U.S.C § 414(i) (2020).
37. *LaRue*, 552 U.S. at 255 (endnote omitted).

electing into investment options across the plan provided menu.[38] Ideally, this provides varying choices for the participants.[39] Relatedly, under ERISA, a plan's menu of investment options must have enough variation across the product offerings such that it is sufficiently diversified.[40] Defined-contribution plan participants may change their investments over time by altering allocations within the plan's menu.[41] Participants in these plans are enabled to make such decisions due to the individualized nature of their account.[42]

A defined-contribution plan participant's benefits available for retirement is the balance of their individual account, which is affected by the performance of their elected investment choices and offset by the fees associated with those particular menu options.[43] Participants' account balances also experience an offset for fees assessed to the entire defined-contribution plan, such as recordkeeping fees, which have the potential to affect participants identically regardless of their option choices.[44] In legal challenges brought against plans in recent years, participants have more often alleged excessive fees as the basis for breach

38. *See, e.g.*, *Definitions*, IRS, https://www.irs.gov/retirement-plans/plan-participant-employee/definitions (updated Nov. 21, 2022).

39. *See* Brief for the Petitioner at *11, Thole v. U.S. Bank N.A., 140 S. Ct. at 1615 (2020) (No. 17-1712) (noting that "diversifying investments is important to reduce risk and uncertainty because different asset classes generally do not increase in value at the same time."); *see generally* Clemens Sialm, *Menu Choices in Defined Contribution Pension Plans*, NAT'L BUREAU ECON. RSCH., Dec. 2015, n.4, https://www.nber.org/reporter/2015number4/menu-choices-defined-contribution-pension-plans.

40. 29 U.S.C. § 1104(a)(1)(C) (providing that the duty of prudence includes "diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so . . . ."); 29 C.F.R. § 2550.404c-1(b)(3) ("Broad range of investment alternatives").

41. *Cf.* Noah Zuss, *Few Participants Changed the Asset Allocation of Their Contributions Through Q3 2022*, PLANSPONSOR (Dec. 2, 2022), https://www.plansponsor.com/participants-changed-asset-allocation-contributions-q3-2022/.

42. *See* Alicia H. Munnell, Jean-Pierre Aubry, Josh Hurwitz, & Laura Quinby, *A Role for Defined Contribution Plans in the Public Sector*, CTR. FOR RET. RSCH., Apr. 2011, at 2, https://crr.bc.edu/wp-content/uploads/2011/04/slp_16-508.pdf (explaining that defined-contribution participants must decide "whether to join the plan, how much to contribute, how to allocate those contributions among different investment options, how to change those allocations over time, and how to withdraw the accumulated funds at retirement.").

43. *See* Hughes v. Nw. Univ., 142 S. Ct. 737, 740 (2022).

44. *See, e.g.*, Boley v. Univ. Health Servs., Inc., 498 F. Supp. 3d 715, 723 n.50 (E.D. Pa. 2020).

of the fiduciary duty of prudence claims under ERISA; this proliferation of litigation is mostly beyond the scope of this Note.[45]

Pertinent to Part III's analysis is how fiduciary breaches causing losses have a potentially significantly varied impact on the participant due to the main differentiating factor between defined-benefit and defined-contribution plans. Defined-benefit plans possess a unitary structure, they "consist[] of a general pool of assets . . . funded by employer or employee contributions, or a combination of both."[46] A defined-benefit plan's participants could be unaffected by fiduciary misconduct that causes losses to the plan if such losses are minimal enough that liquidity issues do not arise, and benefits payouts follow their schedule.[47] Even when a defined-benefit plan becomes underfunded, the plan's employer is then legally obligated to restore the funding level difference that is attributed to the plan's investments.[48]

By contrast, defined-contribution plans lack uniformity with respect to asset pooling due to the individual account and investment option menu framework that is present.[49] As a result, a breach of fiduciary duty with respect to a single option has the potential to reduce the benefits of participants invested in that option.

The Supreme Court has recognized that sponsor misconduct takes different forms and that the "fiduciary breach [could diminish] plan assets payable to all participants and beneficiaries, or only to persons tied

45. *See* Glick v. Thedacare Inc., No. 20-C-1236, 2022 WL 3682863, at *2–4 (E.D. Wis. Aug. 25, 2022) (holding that the plaintiff had standing for all claims against defined contribution plan sponsor because he alleged, excessive fees and expenses, and explaining "[b]ecause Plaintiff has alleged his own injury in fact, he has standing to assert claims on behalf of other affected plan participants."); *see generally* Christopher Hughes & Nina Nisanova, *Excessive Fees, Excessive Litigation: The Impact of ERISA Litigation In 2021*, BEECHER CARLSON (Oct. 28, 2021), https://info.beechercarlson.com/hubfs/Excessive%20Fees%20Excessive%20Litigation%20White%20Paper.pdf?hsCtaTracking=80fe7ef7-3633-484d-8c12-7c5b1be6c0cc%7C10dee995-14e2-4893-adf3-bdfae22ab71e.

46. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439 (1999).

47. LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 255 (2008) (recognizing that fiduciary malfeasance may affect defined-benefit participants in situations where "it creates or enhances the risk of default by the entire plan[.]").

48. *Hughes Aircraft Co.*, 525 U.S. at 439.

49. *See* Mike Enright, *Understanding Defined Benefit and Defined Contribution Plans*, WOLTERS KLUWER (Feb. 10, 2021), https://www.wolterskluwer.com/en/expert-insights/understanding-defined-benefit-and-defined-contribution-plans (noting that defined-contribution plans provide "[e]ach participant [with] an individual, separate account[,]" unlike defined-benefit plans, where "[t]he assets of the plan are held in a pool, rather than individual accounts for each employee . . . .").

to particular accounts [or individual investment options] . . . ."[50] *Thole* involved allegations of the former, while the defined-contribution plan litigation discussed in Part III concerned the latter.

C. Pension Benefit Guaranty Corporation ("PBGC")

The PBGC, a U.S. Government Agency,[51] is a backstop in events of ERISA plan failures. The PBGC operates with the goal of ensuring that participants' benefits are paid out if circumstances beyond the retirees' control, such as trustee malfeasance in asset management activities, cause catastrophic financial losses to the plan. However, there are substantial concerns regarding the PBGC's low funding levels.[52] Most importantly, for purposes of this Note, defined-contribution plans are *not* eligible for coverage.[53]

The PBGC was established in and is overseen by the Department of Labor[54] ("DOL"). The DOL is the federal agency authorized to promulgate regulations and to enforce statutory and regulatory obligations under ERISA.[55]

PBGC guarantees benefits only up to a certain level,[56] and the premiums are paid by the plan associated employer, not the participants.[57] The PBGC was discussed in *Thole* oral arguments[58] because the case involved a defined-benefit plan. As the Court recognized, a defined-benefit plan possesses multiple sources of funds (PBGC, employer) which could alleviate underfunding issues.[59]

50. *LaRue*, 552 U.S. at 256.
51. *See About PBGC*, PENSION BENEFIT GUAR. CORP., https://www.pbgc.gov/about (last visited Apr. 17, 2023).
52. *See* Press Release, Pension Benefit Guar. Corp., PBGC Projections: Multiemployer Program Insolvent in FY 2025 (May 31, 2018), https://www.pbgc.gov/news/press/releases/pr18-02.
53. *Pension Benefit Guaranty Corporation (PBGC): A Primer*, CONG. RSCH. SERV. 1 [*hereinafter* PBGC Primer], https://sgp.fas.org/crs/misc/95-118.pdf (Jan. 8, 2021).
54. 29 U.S.C. § 1302(a).
55. 29 U.S.C. § 1002(2)(B); 29 U.S.C. § 1132(a)(2).
56. *See, e.g.*, *Maximum Monthly Guarantee Tables*, PENSION BENEFIT GUAR. CORP., https://www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee (Oct. 19, 2021).
57. *See* PBGC Primer, *supra* note 53, at 3.
58. Transcript of Oral Argument at 18, 27, 66–67, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712).
59. *Id.* at 67–68.

D. Breach of fiduciary duty actions under ERISA

Allegations of breach of fiduciary duty are pervasive in ERISA litigation.[60] To bring this cause of action in the Eighth Circuit, for example, a plaintiff must effectively plead "that the defendant acted as a fiduciary, breached its fiduciary duties, and thereby caused a loss to the [p]lan."[61]

ERISA prescribes duties including those of loyalty and prudence[62] to its statutorily defined fiduciaries.[63] The breach of those duties may render that fiduciary liable to its plan participants.[64]

The duty of loyalty for ERISA plan fiduciaries requires that they "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries . . . ."[65] Additionally, this duty requires the plan sponsor to act "for the exclusive purpose of"[66] "providing benefits to participants and their beneficiaries"[67] and "defraying reasonable expenses of administering the plan . . . ."[68]

ERISA's duty of prudence requires plan sponsors to act "with the care, 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 in the conduct of an enterprise of a like character and with like aims . . . ."[69] This duty of prudence also includes the responsibility to monitor plan investments.[70]

The Supreme Court's decision in *Hughes v. Northwestern University*[71] elaborated upon what is required of plan fiduciaries with respect to the intersection of the duty of prudence and that of monitoring the menu.[72] However, some in the pension sector have found the Court's

60. *See* Craig C. Martin & Amanda S. Amert, *ERISA Benefits Litigation Answer Book 2013*, PRACTICING L. INST. 1, 2 (2013), https://legacy.pli.edu/product_files/Titles/4950/36141_sample01_20141011115534.pdf (noting that fiduciary claims are one of "[t]he most common ERISA causes of action . . . .").

61. Braden v. Wal-Mart Stores, Inc. 588 F.3d 585, 595–96 (8th Cir. 2009).

62. *See, e.g.*, 29 U.S.C. § 1104(a)(1)(B).

63. 29 U.S.C. § 1002(21)(A)–(B).

64. 29 U.S.C. § 1109(a).

65. 29 U.S.C. § 1104(a)(1).

66. 29 U.S.C. § 1104(a)(1)(A).

67. 29 U.S.C. § 1104(a)(1)(A)(i).

68. 29 U.S.C. § 1104(a)(1)(A)(ii).

69. 29 U.S.C. § 1104(a)(1)(B).

70. Tibble v. Edison Int'l, 575 U.S. 523, 530 (2015) (noting the duty of prudence includes a fiduciary's responsibility to remove imprudent investments).

71. Hughes v. Nw. Univ., 142 S. Ct. 737 (2022).

72. *Id.* at 741–42. Following this decision, the Seventh Circuit issued their opinion on remand, *see* Huges v. Nw. Univ., 63 F.4th 615 (7th Cir. 2023).

unanimous opinion to have left open specific questions on what is required under ERISA.[73]

A plaintiff-participant may assert a fiduciary investment claim against the plan sponsor or other fiduciary.[74] Co-fiduciaries are also authorized to seek relief under Section 1132.[75] These claims may enable equitable relief or damages upon a breach by the plan sponsor or other plan fiduciary.[76]

In the context of the cases discussed in Part III, breaches may stem from inclusion of imprudent investment options, mismanagement of plan assets, or disloyal actions. If ERISA plaintiffs prevail in court with respect to their claim(s), liability for losses caused to the plan is assessed against fiduciaries of the plan as prescribed by Section 1109.[77] Additionally, Section 1109 gives courts the ability to grant these plaintiffs "such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary."[78]

Under ERISA, participants may seek disgorgement of a fiduciary's profits that resulted from a breaching activity, such as a self-dealing transaction that violated affiliate rules or constituted a prohibited transaction, the return of which would inure to the plan.[79] Prohibited transactions under ERISA Section 1106[80] are governed extensively by regulations and administrative exemptions.[81]

Plaintiffs asserting Section 1132 claims may allege that the plan fiduciary neglected to thoroughly investigate an investment option at issue.[82] Plaintiffs may also allege a breach asserting that the sponsor failed to monitor an appointed investment committee, causing losses

73. *See* Robert Steyer, *Supreme Court backs DC participants, but industry members left wanting more guidance*, PENSIONS & INVESTMENTS (Jan. 28, 2022, 8:30 AM), https://www.pionline.com/courts/supreme-court-backs-dc-participants-industry-members-left-wanting-more-guidance.

74. 29 U.S.C. § 1132(a)(2).

75. *Id.*

76. *Id.*; 29 U.S.C. § 1109(a).

77. 29 U.S.C. § 1109(a) (providing for plan fiduciaries' personal liability that follow from breaching "any of [ERISA's prescribed] responsibilities, obligations, or duties imposed upon fiduciaries . . . .").

78. *Id.*

79. *See* Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993).

80. 29 U.S.C. § 1106.

81. *Cf.* 29 C.F.R. § 2570 (2010) (detailing rules of practice applicable to prohibited transaction penalty proceedings under ERISA).

82. *See, e.g.*, Marshall v. Northrop Grumman Corp., No. CV 16–06794, 2017 WL 2930839, at *10 (C.D. Cal. Jan. 30, 2017).

and reduced benefits to defined-contribution participants with personal stakes in those options of the menu.[83]

E. Enforcement

The DOL, plan participants, and the plan itself are authorized plaintiffs under ERISA who may bring lawsuits pursuant to the Civil Enforcement guidelines set forth in Section 1132.[84] The fiduciary investment litigation discussed in Part III sometimes occurs in the class action context.[85] In such cases, the class representatives may bring the lawsuit on behalf of other plan-participants and the plan itself.[86] However, these cases are controlled by Article III requirements and certain constitutional precedent imposed thresholds to class action litigation, discussed below in the standing background.[87]

Participants that assert 1132(a)(2) claims may also seek equitable relief under 1132(a)(3), which has been described by the Supreme Court as a "catchall" for other claims outside of the more specific subsections of 1132(a).[88] Under 1132(a)(3), participants, beneficiaries, and fiduciaries are authorized to sue to "enjoin any act or practice which violates" ERISA or "terms of the plan."[89] Under ERISA Section 1132(a)(3), plaintiffs may also seek "other equitable relief."[90] Claims are routinely brought under both Section 1132(a)(2) and (3); the Fourth Circuit dismissed claims seeking relief under 1132(a)(3) after deciding that the plaintiff's claims would be adequately redressed through relief

83. *See, e.g.*, *id.* at *11–12 (noting that courts have recognized that ERISA fiduciary appointed positions such as an investment committee impart on the plan sponsor the duty to monitor.).

84. *See* 29 U.S.C. § 1132(a)(1)–(2).

85. *See, e.g.*, *Marshall*, 2017 WL 2930839, at *1; McDonald v. Edward D. Jones & Co., L.P., No. 4:16 CV 1346 RWS; 2017 WL 372101, at *1 (E.D. Mo. Jan. 26, 2017); Wilcox v. Georgetown Univ., No. 18-422 (RMC), 2019 WL 132281 (D.D.C. Jan. 8, 2019).

86. *See, e.g.*, Brotherston v. Putnam Investments, LLC, 907 F.3d 17, 22–23 (1st Cir. 2018).

87. *See infra* Part II (F)(2) ("Article III Standing").

88. Varity Corp. v. Howe, 516 U.S. 489, 512 (1996). *See also* 29 U.S.C. § 1132(a)(3)(A) (stating that participants, beneficiaries, and fiduciaries are authorized to sue to "enjoin any act or practice which violates" ERISA or "terms of the plan and that plaintiffs may also seek "other equitable relief").

89. 29 U.S.C. § 1132(a)(3)(A).

90. 29 U.S.C. § 1132(a)(3)(B).

awarded under 1132(a)(2).[91] Claims alleging Section 1106 prohibited transactions[92] may be asserted under 1132(a)(3).[93]

In *LaRue v. DeWolff, Boberg & Assocs., Inc.*, the Supreme Court considered whether Section 1132(a)(2) "authorizes a participant in a defined contribution pension plan to sue a fiduciary whose alleged misconduct impaired the value of plan assets in the participant's individual account."[94] The Court held that Section 1132(a)(2) does provide statutory authorization for such plaintiffs.[95]

LaRue differed from the Court's prior decision in *Mass. Mut. Life Ins. Co. v. Russell*, which interpreted Section 1132(a)(2) as authorizing *plan* relief which may *not* inure to an individual participant.[96] The key distinction, according to the Court, was that *LaRue* involved a defined-contribution plan, and *Russell* involved a defined-benefit plan.[97] The *LaRue* Court noted that statutory authorization for participants to seek individual relief in the defined-contribution context is fully supported by the congressional intent underpinning ERISA Section 1109.[98]

F. Standing

Plaintiffs must establish both Article III standing and a statutory cause of action for their claims to be permissibly decided on the merits.[99] Article III standing is analyzed separately from[100] and decided prior to statutory standing.[101]

91. Korotynska v. Metro. Life Ins. Co., 474 F.3d 101, 102–03 (4th Cir. 2006).
92. 29 U.S.C. § 1106.
93. *See, e.g.*, Concha v. London, 62 F.3d 1493, 1499 (9th Cir. 1995).
94. LaRue v. DeWolff, Boberg & Assocs, Inc., 552 U.S. 248, 250 (2008).
95. *Id.* at 256 (noting that this is so despite the fact that Section 1132(a)(2) "does not provide a remedy for individual injuries distinct from plan injuries . . . .").
96. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140, 148 (1985).
97. *LaRue*, 552 U.S. at 253–55.
98. *Id.* at 255–56.
99. Warth v. Seldin, 422 U.S. 490, 498 (1975). *See also* Faber v. Metro. Life Ins. Co., No. 08 Civ. 10588, 2009 WL 3415369, at *3 (S.D.N.Y 2009) (explaining that "constitutional standing is a question of whether the court has jurisdiction to determine the merits of an action . . . .").
100. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021).
101. Lujan v. Defs. of Wildlife, 504 U.S. 555, 570 n.5 (noting that "standing is to be determined as of the commencement of the suit."); *see also* Winsor v. Sequoia Benefits & Insurance Servs., LLC, No. 21-cv-00227-JSC, 2021 WL 5053087 (N.D. Cal. Nov. 1, 2021) (citing *TransUnion*, 141 S. Ct. at 2205, noting that "Article III standing is a distinct requirement [from that of statutory standing], and it comes first."). *But see* Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 97 n.2 (1998) (recognizing that a statutory standing question can be given priority over an Article III question.").

1. STATUTORY STANDING

ERISA authorizes various plaintiffs[102] to sue fiduciaries who commit statutory violations with respect to a plan [103] for different forms of relief.[104] For example, courts in the Third Circuit examining standing under ERISA will consider "whether [the statutorily specified] remedies provided for [] allow the particular plaintiff to bring the particular claim."[105]

Importantly, a statutorily conferred private right of action does not, on its own, provide Article III standing.[106] In other words, an alleged legal injury alone is not necessarily an injury-in-fact.[107] This rule has been reaffirmed in various ERISA cases.[108] The Supreme Court explained that the "outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III."[109] Plaintiffs with statutory standing who lack an injury-in-fact will not have Article III standing.[110]

102. 29 U.S.C. § 1132(a)(1)–(11).
103. 29 U.S.C. § 1132(a)(1)(A), (B).
104. 29 U.S.C. § 1132(a)(3)(A), (B).
105. Graden v. Conexant Sys. Inc., 496 F.3d 291, 295 (3d Cir. 2007).
106. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021) (stating that the "[Supreme] Court has rejected the proposition that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'" (quoting Spokeo, Inc. v. Robbins, 578 U.S. 330, 341 (2016))); *see also TransUnion*, 141 S. Ct. at 2205 (explaining that "[f]or standing purposes . . . an important difference exists between (i) a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law."); *id*. at 2220-21 (noting "under Article III, an injury in law is not an injury in fact.").
107. *Ramirez*, 141 S. Ct. at 2205; *see also* Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 178 (2012) (recognizing that "just because a legal harm has been committed does not mean that the plaintiff asserting it as a cause of action was the party actually injured." (internal quotation omitted)).
108. *See* Flanigan v. Gen. Elec. Co., 242 F.3d 78, 85–86 (2d Cir. 2001); *see also* Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1620–21 (noting that "Article III standing requires a concrete injury even in the context of a statutory violation." (quoting *Spokeo*, 136 S. Ct. at 1549)).
109. Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring).
110. *Ramirez*, 141 S. Ct. at 2205.

2. ARTICLE III STANDING

a. Judicial Inquiry, Injury-in-Fact, and Precedential Requirements

The Supreme Court has stated that the requirement that plaintiffs show standing "to invoke the power of a federal court is perhaps the most important of [the multiple Article III] doctrines."[111] The standing inquiry determines whether a litigant has made sufficient allegations such that a court may "decide the merits of the dispute or of particular issues."[112]

Article III provides that federal jurisdiction extends *only* to cases and controversies.[113] Whether a plaintiff's allegations constitute a case or controversy is the essence of standing analysis.[114] Without an injury-in-fact, a plaintiff's allegations will *not* form a case or controversy[115] under Article III.[116] A plaintiff must show that they have "a personal stake in the outcome"[117] of the suit for their allegation to be a case or controversy under Article III.[118] Specifically, plaintiffs "must maintain a personal interest in the dispute at *every* stage of litigation . . . and [] do so 'separately for each form of relief sought[.]'"[119]

111. Allen v. Wright, 468 U.S. 737, 750 (1984).
112. Warth v. Seldin, 422 U.S. 490, 498 (1975).
113. U.S. CONST. art. III, § 2.
114. *See Ramirez*, 141 S. Ct. at 2203 (noting that "Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'"); *see also* Toll Bros., Inc. v. Twp. Readington, 555 F.3d 131, 137 (3d Cir. 2009) (explaining that "[c]ourts enforce the case-or-controversy requirement through the several justiciability doctrines [including standing] that cluster about Article III." (internal quotations omitted)).
115. *See generally* U.S. CONST. art. III, § 2.
116. *Ramirez*, 141 S. Ct. at 2203 (recognizing that "[i]f the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve." (internal quotations omitted)).
117. Lujan v. Defs. of Wildlife, 504 U.S. 555, 583 (1992) (Stevens, J. concurring) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).
118. *Ramirez*, 141 S. Ct. at 2203 (quoting Raines v. Byrd, 521 U.S. 811, 820 (1997)).
119. Uzuegbunam v. Preczewski, 141 S. Ct. 792, 801 (2021) (emphasis added) (quoting Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 185 (2000) (citing *Lujan*, 504 U.S. at 561)); *see e.g.*, Transcript of Oral Argument at 9–11, Thole v. U.S. Bank, N.A., 140 S. Ct. 1615 (2020) (Justice Alito reminding petitioner's counsel that "compliance with Article III has to be reassessed at different stages of the [] proceeding."). Relatedly, under Supreme Court precedent, courts must analyze Article III standing—DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 340 (2006) (quoting *Friends of Earth, Inc.*, 528 U.S. at 180)—but may raise it sua sponte. *See* Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medaco Managed

The personal stake requirement functions as an enforcement mechanism, ensuring that claims brought in Article III courts necessarily demonstrate an adversarial nature.[120] Reiterations of standing doctrine in case-law rendered it axiomatic that resolutions by the judicial process of federal courts are proper for *only* those disputes which demonstrate this adversarial nature.[121]

Whether the "judicial power"[122] conferred to federal courts by Article III of the U.S. Constitution may be invoked to adjudicate a dispute depends on whether the allegations asserted traditionally formed the basis for a lawsuit in the English and American courts.[123] Courts also consider the justiciability of particular claims in constitutional standing

Care, 433 F.3d 181, 198 (2d Cir. 2005); *see also* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 230–31 (1990) (noting that courts examine Article III standing "even if the parties fail to raise the issue before [the court]."). For a definition of sua sponte, *see* Legal Information Institute, *Sua Sponte*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/sua_sponte (last visited Apr. 17, 2023).

120. *Cf. Lujan*, 504 U.S. at 583 (Stevens, J. concurring) (recognizing that "[t]he plaintiff must have a 'personal stake in the outcome' sufficient to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.'" (quoting *Baker*, 369 U.S. at 204)).

121. *See* Flast v. Cohen, 392 U.S. 83, 94–95 (1968) (noting that "[e]mbodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversar[ial] context and in a form historically viewed as capable of resolution through the judicial process."). This has been reiterated in recent Article III jurisprudence from the Supreme Court, *see, e.g.*, Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (citations omitted). For a discussion of additional points raised by the *Flast* Court, *see* Elizabeth Earle Beske, *Charting A Course Past Spokeo and TransUnion*, 29 GEO. MASON L. REV. 729, 745 (2022) (explaining that "[t]he concrete-adversity function is a Warren Court-era construct in which standing operates to ensure that federal courts decide cases presented in an adversarial posture. [] It thus promotes better decision making." (endnote omitted)).

122. U.S. CONST. art. III, § 1.

123. *See Spokeo*, 136 S. Ct. at 1550–51 (Thomas, J., concurring) (citation omitted); *see also* Vt. Agency of Nat. Res. v. United States *ex rel*. Stevens, 529 U.S. 765, 774 (2000); *Ramirez*, 141 S. Ct. at 2200. For two judicial applications of this consideration, one which was accepted as concrete under Article III and the other which was not, *compare Ramirez*, 141 S. Ct. at 2208–09, *with id.* at 2209–10.

analysis.[124] If plaintiffs' claims do not demonstrate Article III standing, they will be dismissed for a lack of subject matter jurisdiction.[125]

In *Lujan v. Defenders of Wildlife*,[126] the Supreme Court set forth a detailed description for judicial assessments of Article III standing,[127] which has since been utilized extensively in ERISA litigation.[128] The first requirement is that "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical[.]"[129]

Additionally, a plaintiff needs to demonstrate "a causal connection between the injury and the conduct complained of —the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court."[130] Also, Article III requires that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[131] Plaintiffs in federal court, as the party attempting to invoke the jurisdiction of Article III, are burdened to demonstrate these elements to prove standing.[132]

As the first *Lujan* factor[133] suggests, courts examine particularization in their Article III standing analysis. To show particularity, the injury complained of "must affect the plaintiff in a personal and individual way."[134]

124. *See* Warth v. Seldin, 422 U.S. 490, 498 (1975) (explaining that "[i]n its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Article III."); *see also* Whitmore v. Arkansas, 495 U.S. 149, 154–55 (1990) (noting that federal courts are granted jurisdiction over "those disputes which are appropriately resolved through the judicial process.").

125. *See, e.g.*, Shain v. Ellison, 356 F.3d 211, 215 (2d Cir. 2004).

126. Lujan v. Defs. of Wildlife, 504 U.S. 555, 555–606 (1992).

127. *Id.* at 560–61.

128. For various ERISA breach of fiduciary duty decisions involving Article III standing determinations, *see* Thole v. U.S. Bank, N.A., 140 S. Ct. 1615, 1618 (2020); Wilcox v. Georgetown Univ., No. 18-422, 2019 WL 132281, at *9 (D.D.C. Jan. 8, 2019); Marshall v. Northrop Grumman Corp., No. CV 16–06794, 2017 WL 2930839, at *7 (C.D. Cal. Jan. 30, 2017); Paulsen v. CNF Inc., 559 F.3d 1061, 1072 (9th Cir. 2009).

129. *Lujan*, 504 U.S. at 560–61.

130. *Id.*

131. *Id.* at 561.

132. *Id.*

133. *Id.* at 560–61.

134. Spokeo, Inc. v. Robbins, 578 U.S. 330, 339 (2016) (citation omitted).

A plaintiff's showing of particularity alone does not necessarily establish that they suffered an injury-in-fact.[135] The injury's concreteness is also analyzed,[136] which is separate *and* distinct from particularization.[137] A concrete injury, according to the Supreme Court, is real and not abstract.[138] This often necessitates tangibility, but some intangible injuries are concrete if they historically acted as the basis for a lawsuit.[139]

A general example may be illustrative to contextualize concreteness and particularization given their importance in Part III of this Note.[140] A defined-contribution plaintiff participant alleges a concrete injury under Article III if they demonstrate that a fiduciary breach's associated misconduct led to investment losses which reduced their benefits under the plan.[141] Assume that fiduciary misconduct affected three options in an ERISA plan's menu, and that a participant experienced losses in two of those options (having not invested in the third). If suing as the only named plaintiff, the participant could establish particularization for Section 1132(a)(2) claims that correspond to each of the two options with realized losses to their *personal* account.

Further, when multiple claims are asserted, each needs its own Article III standing justification,[142] and may *not* derive standing from another's satisfaction of this constitutional requirement.[143] This independent standing requirement is important because it is common for breach of fiduciary duty to be alleged alongside other ERISA-based claims[144] and this requirement *has* been applied in the context of ERISA

135. *Id.* at 340.
136. *Id.*
137. *Id.*
138. *Id.* (explaining that a concreteness requires a "*de facto* [injury] that . . . actually exist[s].")
139. *Id.* at 341 (citing Pleasant Grove City v. Summum, 555 U.S. 460 (2009)). *But see* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021) (citing *Spokeo*, 578 U.S. at 340–41).
140. *See* discussion *infra* Part III (b)–(c).
141. Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1622 (2020); *Spokeo*, 578 U.S. at 340; for another hypothetical example of concreteness outside of the ERISA context, *see Ramirez*, 141 S. Ct. at 2205–06.
142. *Ramirez*, 141 S. Ct. at 2208 (explaining that "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek . . . ." (citing Davis v. Fed. Election Comm'n, 554 U.S. 724, 734 (2008); Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 185 (2000))).
143. *Id.*
144. *See, e.g.*, Larson v. Allina Health Sys., 350 F. Supp. 3d 780, 806 (D. Minn. 2018).

defined-contribution litigation.[145] Article III thus requires injury-in-fact to be assessed on a claim by claim basis corresponding to the plan's individual investment options.[146]

Some of the cases mentioned in Part III are class actions. In class actions, class representatives are required to demonstrate standing as to themselves individually if they wish to establish standing for purposes to bring causes of action on behalf of the class.[147] Additionally, class certification cannot occur if any individual member of the class lacks standing.[148] At least one court has considered how *Thole* may affect the issue of injury-in-fact for standing in ERISA class actions.[149] Importantly, invocation of the class action procedural device cannot create federal jurisdiction over claims which courts otherwise would not have due to a lack of Article III standing.[150] In other words, constitutional standing determinations supersede those with respect to class certification, including questions of typicality.[151]

b. Recent Article III Litigation at the U.S. Supreme Court

Spokeo, Inc. v. Robins[152] and *TransUnion LLC v. Ramirez*[153] have been important developments to standing doctrine. As mandatory authority, both *Spokeo* and *Ramirez* are directly applicable to cases discussed in

145. *See, e.g.*, Hoeffner v. D'Amato, 09-CV-3160, 2022 WL 1912942, at *12 (E.D.N.Y. June 2, 2022) (citing Davis v. FEC, 554 U.S. 724, 734 (2008)).

146. Peters v. Aetna Inc., 2 F.4th 199, 218 (4th Cir. 2021) (stating that the court's conclusion with respect to Article III standing "turns on the determination that the financial loss analysis *must be* conducted at the individual claims level rather than at the aggregate claims level." (emphasis added)).

147. *See* Wilcox v. Georgetown Univ., 2019 WL 132281, at *9 (citing O'Shea v. Littleton, 414 U.S. 488, 494 (1974)); *see also Larson*, 350 F. Supp. 3d at 791 (explaining that a class representative must establish individualized standing before they may do so as a representative.).

148. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021) (quoting Tyson Foods, Inc. v. Bouaphakeo, 557 U.S. 442, 466 (2016)); *accord Larson*, 350 F. Supp. 3d at 791 (quoting Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1034 (8th Cir. 2010)); *see* Sabers v. Delano, 100 F.3d 82, 84 (8th Cir. 1996).

149. *See, e.g.*, Mattson v. Milliman, Inc., C22-37 TSZ, 2022 WL 2357052, at *1 n.1 (W.D. Wash. June 30, 2022) (citation omitted).

150. Theane Evangelis, *Article III Standing and Absent Class Members*, 64 EMORY L. J. 383, 385 (2014) (citing FED. R. CIV. P. 82).

151. See *id.* at 385 (citing 28 U.S.C. § 2072(b) (2022)).

152. Spokeo, Inc. v. Robins, 578 U.S. 330 (2016).

153. *Ramirez*, 141 S. Ct. at 2190–2225.

Part III(c). *Spokeo* was directly invoked during the *Thole* majority's Article III analysis,[154] and the *Ramirez* majority utilized *Spokeo* within its Article III inquiry.[155]

In *Spokeo*, the Court considered whether the plaintiff Robins had Article III standing to support his claims under the Fair Credit Reporting Act ("FCRA").[156] The defendant Spokeo used the internet search engine it operated to perform a search on Robins.[157] Some of the information contained in the search results, which Spokeo disseminated, was incorrect.[158] Robins' complaint was filed "on his own behalf and on behalf of a class of similarly situated individuals."[159]

Initially, the district court dismissed Robins' claims for lack of standing.[160] The Ninth Circuit reversed, first because in alleging violation of his personal statutory rights under the FCRA, Robins maintained compliance with the requirements of representational standing.[161] Second, since Robins' personal credit information was at issue, his alleged injury could be characterized as "individualized rather than collective."[162]

The Supreme Court held that the Ninth Circuit's Article III analysis was incomplete since it examined only the particularization of Robins' allegations and failed to consider whether the claims were concrete.[163] The Court remanded the case to the Ninth Circuit for consideration of concreteness.[164] The *Spokeo* majority opinion explained that "Robins [could not] satisfy the demands of Article III by alleging a bare procedural violation."[165] The Court also noted that in this context,

154. Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1620 (2020).
155. *Ramirez*, 141 S. Ct. at 2210–11.
156. *Spokeo*, 578 U.S. at 333 (citing 15 U.S.C. § 1681 *et seq*.).
157. *Id.*
158. *Id.*
159. *Id.*
160. Robins v. Spokeo, Inc., No. CV10–05306, 2011 WL 597867, at *2 (C.D. Cal. Jan. 27, 2011).
161. Robins v. Spokeo, Inc., 742 F.3d 409, 413 (9th Cir. 2014) (noting that Robins alleged a violation of his own "statutory rights, not just the statutory rights of other people . . . .").
162. *Id.* (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992)).
163. *Spokeo*, 578 U.S. at 342 (explaining that "[b]ecause the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete.").
164. *Id.* at 341.
165. *Id.*

statutory authorization to sue under the FCRA alone provided no guarantee that the plaintiff had sustained any harm.[166]

In *Ramirez*, like *Spokeo*, the Court again considered a class action brought under the FCRA.[167] The class was composed of over 8000 individuals, and "[t]he plaintiffs claimed that TransUnion failed to use reasonable procedures to ensure the accuracy of their credit files, as maintained internally by TransUnion."[168] For over 1800 of those class members, TransUnion[169] had "provided misleading credit reports to third-party businesses."[170] The Court held that those class members satisfied the concreteness requirement of standing such that their FCRA reasonable-procedures claims could be adjudicated.[171] However, as to the other class members the internal credit files of which "were *not* provided to third-party businesses[,]" the Court held that those members did not satisfy the concreteness requirement and had no standing.[172]

The class asserted two additional claims covering all class members regarding complaints "about formatting defects in certain mailings sent to them by TransUnion."[173] However, the named plaintiff Ramirez was the *only* class member that made a showing of concreteness.[174] Therefore, the Court held, he was the *only* class member with Article III standing as to those two additional claims.[175] The Court reasoned that "[e]very class member must have Article III standing in order to recover individual damages."[176]

According to one law firm, the Court's decision in *Ramirez* was an expansion of *Spokeo* such that it provides additional hurdles to establishing Article III standing in the class action context.[177] Specifically,

166. *Id.*
167. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021).
168. *Id.*
169. *See id.* at 2201 (providing background information on the defendant).
170. *Id.* at 2200.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*; for factual underpinnings that formed the basis of the named plaintiff Ramirez's injuries-in-fact, see *id.* at 2201–02.
175. *Id.* at 2200.
176. *Id.* at 2208.
177. *See U.S. Supreme Court Confirms that Every Class Member Must Have Article III Standing to Recover Damages, Creating Additional Obstacles to Class Certification*, COVINGTON (June 29, 2021), https://www.cov.com/en/news-and-insights/insights/2021/06/us-supreme-court-confirms-that-every-class-member-must-have-article-iii-standing-to-recover-damages-creating-additional-obstacles-to-class-certification.

Ramirez may exclude class representatives with mere statutory authorization that lack concrete injuries under Article III, while also possibly prolonging or inhibiting class certifications due to its mandatory authority with respect to properly establishing injuries in fact and concreteness.[178]

The Sixth Circuit has stated that "once a potential ERISA class representative establishes his individual standing to sue his own ERISA-governed plan, there is no additional constitutional standing requirement related to his suitability to represent the putative class of members of other plans to which he does not belong."[179] After *Ramirez*, this judicial proposition may be untenable and unavailing for considerations of Article III compliance in ERISA litigation.[180]

c. Representational Standing Doctrine

Similar to the class action context is the common-law rule referred to as representational standing.[181] Plaintiffs may seek to establish representational standing to obtain relief on behalf of others who are similarly situated to themselves, such as other ERISA plan participants.[182] To meet the requirements of representational standing, the Supreme Court requires that a plaintiff seeking "to claim 'the interests of others . . . still must have suffered an injury in fact . . .' [such that they possess] 'a sufficiently concrete interest in the outcome of the issue in dispute.'"[183]

(contending that *Ramirez* "expands the scope of the Court's earlier Article III standing decision in [*Spokeo*] confirming that, to recover damages in a class action, *every* class member must satisfy the standing requirement of Article III. The Court's decision will inevitably make it more difficult for plaintiffs to certify a class asserting claims based on 'bare violations' of statutes that do not cause concrete harm to putative class members." (emphasis added)).

178. *See generally id.*

179. Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 424 (6th Cir. 1998).

180. *See Ramirez*, 141 S. Ct. at 2214.

181. *See generally Representational Standing: Overview*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/representational-standing-overview (last visited Apr. 17, 2022).

182. *See, e.g.*, Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 592 (8th Cir. 2009) (depicting an example where the court implicitly disregarded Article III compliance under the unavailing justification of the plaintiff's statutory authorization.).

183. Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1620 (2020) (quoting Hollingsworth v. Perry, 570 U.S. 693, 708 (2013)).

Judicially imposed limitations on representational standing are pertinent for purposes of Part III and IV(a) of this Note.[184] An otherwise effective assertion of representational standing which alleges the named plaintiff as "among the injured"[185] will not possess a legally sufficient basis to subordinate or erase the other applicable Article III standing requirements,[186] which collectively determine the matter's justiciability. This necessitates compliance with Article III jurisprudence, such as *Spokeo* and *Ramirez*, because the case and controversy requirement is enforced by federal courts by analyzing adherence to the standing doctrine that has formed around Article III.[187]

d. Potential Concreteness of Alleging Future Harms[188]

The Supreme Court has recently considered the potential satisfaction of concreteness under Article III with respect to alleging a risk of future harm.[189] The Court's majority approaches have been similar in *Thole* and *Ramirez*.[190] To cover what Chief Justice Roberts has described

184. *See infra* Part III (b)–(c); *see also infra* Part IV(a) which is structured to necessarily provide a description of a constitutionally sufficient assertion of representational standing.

185. Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972).

186. Warth v. Seldin, 422 U.S. 490, 511 (1975) (noting that a plaintiff proceeding under representational standing will not circumvent, by elimination or attenuation, "the constitutional requirement of a case or controversy." (citing *Morton*, 405 U.S. at 727)).

187. Plains All Am. Pipeline L.P. v. Cook, 866 F.3d 534, 538–39 (3d Cir. 2017) (citation omitted); *see* McKinney v. U.S. Dep't of Treasury, 799 F.2d 1544, 1549 (Fed. Cir. 1986) (citation omitted); *see also* Canatella v. State of Cal., 304 F.3d 843, 852 (9th Cir. 2002) (citation omitted); Nat'l Treasury Emp. Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (citation omitted).

188. This will be important background information for consideration in conjunction with the second of Part IV's recommended resolutions, *see infra* Part IV (B).

189. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2210 (2021) (recognizing that "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently *imminent and substantial*." (emphasis added) (internal citations omitted)); City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983); Gubala v. Time Warner Cable, Inc., 846 F.3d 909, 912 (7th Cir. 2017).

190. *Compare Ramirez*, 141 S. Ct. at 2213 (noting that "the risk of future harm *on its own* does not support Article III standing for the plaintiffs' damages claim." (emphasis added)), *with* Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1621–22 (2020) (in dicta, responding to one of the amici Solicitor General's arguments not asserted by the petitioner, that "a bare allegation of plan underfunding *does not itself* demonstrate a substantially increased risk that the plan and the employer would both fail.").

as a "forward looking theory of injury,"[191] the Court's majority opinions in *Thole* and *Ramirez* have relevant dicta and precedent, respectively, providing that simply alleging risk with respect to a future injury will not serve as an adequate demonstration of concreteness for purposes of Article III.[192]

Possible materialization of a future risk being sufficient for alleging an injury-in-fact poses some difficulties. Deciding whether risks are concrete, even assuming some substantiation, may present difficult line drawing issues for courts. This was suggested by questions posed during *Thole* oral arguments.[193]

Ramirez may support the proposition that claims alleging future risk of injury should be rejected if the risk sought to be redressed by the plaintiff is "too speculative to support Article III standing."[194] Many *Ramirez* class members lacked Article III standing for their claims based on risk of future harm for not substantiating their claims with evidence.[195] The Court noted that the plaintiffs' contentions "did not demonstrate a sufficient likelihood . . . ." that TransUnion would have released the personal information at issue with respect to these FCRA claims.[196] The Court concluded that there was no "material risk of concrete harm."[197]

III. Analysis

This Part is focused on the injury-in-fact component of Article III standing, which itself encompasses close considerations of concreteness and particularization. While *Thole* likely governs the issue of standing in defined-contribution litigation, other Article III doctrine pertaining to representational standing and independent claim analysis is separately adequate to determine the constitutional deficiency of denying motions to dismiss and deciding certain claims on the merits.

191. Transcript of Oral Argument at 5–6, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712).
192. *Thole*, 140 S. Ct. at 1621–22; *Ramirez*, 141 S. Ct. at 2213–14.
193. Transcript of Oral Argument at 38–40, 50–54, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712).
194. *Ramirez*, 141 S. Ct. at 2212 (citation omitted).
195. *Id.* at 2211.
196. *Id.* at 2212.
197. *Id.* (quoting Ramirez v. TransUnion LLC, 951 F.3d 1008, 1040 (9th Cir. 2020) (McKeown, J. dissenting)).

a. *Thole v. U.S. Bank* and its Applicability

Thole may affect outcomes of fiduciary investment claims in the defined-contribution context. One law firm noted that participants seeking to challenge investment options in which they did not invest "may lack a concrete stake in the litigation because their own benefit levels will not change whether they win or lose."[198] This reasoning is derived from the *Thole* majority's conclusion that those plaintiffs "ha[d] no concrete stake in [the] lawsuit."[199] The attorney-authors further note that if *Thole* governs these cases, such a development in ERISA litigation would be substantial "given the prevalence of defined-contribution plans and the proliferation of litigation challenging fees and expenses connected to specific investment options in those plans."[200]

i. Case Background

In *Thole*, the plaintiff-participants filed a class action lawsuit under ERISA against U.S. Bank, among other named defendants, for breaching their fiduciary duties of loyalty and prudence.[201] The claims stemmed from allegations that U.S. Bank mismanaged the defined-benefit plan's assets, including allegations of poor investment decisions.[202] Specifically, the plaintiffs alleged that the plan sponsor maintained an inappropriately high investment allocation solely to equities[203] that was responsible for the plan's nearly 750 million-dollar loss. The plaintiffs also contended that the sponsor was engaged in conflicts of interest due to a disproportionate percentage of the plan being invested in their own mutual fund products.[204]

At the district court level, U.S. Bank's monetary contribution to the plan following the filing of the associated complaint formed the basis for the court to dismiss the plaintiffs' case for a lack of Article III

198. Paul Weiss, *supra* note 18, at 5.
199. Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1619 (2020) (finding no establishment of Article III standing.).
200. Paul Weiss, *supra* note 18, at 5.
201. *Thole*, 140 S. Ct. at 1618.
202. *Id*.
203. Brief for Petitioner at 10, Thole v. U.S. Bank, N.A., 140 S. Ct. at 1615 (2020) (No. 17-1712) (citing Pet. App. 2a.); *see also* Brief for Petitioner at 10, Thole v. U.S. Bank, N.A., 140 S. Ct. 1615 (No. 17-1712) (2020) (contending that the U.S. Bank plan's "all-equities strategy flouted basis investment-diversification guidelines . . . ." (citation omitted)).
204. *Id.* (citing Pet. App. 7a–8a).

standing.[205] This contribution rendered the plan to no longer have a status of being underfunded, despite the contribution's amount being less than that of the realized investment loss.[206]

The Eighth Circuit Court of Appeals affirmed the decision,[207] but did not address the constitutional question implicated by Article III.[208] The court held that when their plan is not underfunded, a defined-benefit participant cannot maintain an ERISA claim for breach of fiduciary duty because such a plaintiff has not suffered an actual injury, placing them outside of ERISA's statutory authorization.[209] This court previously considered a similar question in *Harley v. Minn. Mining*,[210] which was also resolved on statutory grounds.[211]

The Supreme Court, however, resolved *Thole* based on Article III standing.[212] The majority noted that the plaintiffs had "received all of their monthly benefit payments thus far, and the outcome of th[e] lawsuit would *not* affect their future benefit payments."[213] The majority held that the plaintiffs did *not* have standing and added that "[t]here is no ERISA exception to Article III."[214]

While trust law principles have made numerous appearances in ERISA case-law,[215] the *Thole* majority rejected the plaintiffs' argument that standing could be established from the plaintiffs' equitable interest

205. Adedipe v. U.S. Bank, Nat'l Ass'n, 62 F. Supp. 3d 879, 889 (D. Minn. Dec. 29, 2015).

206. *Id.*; *see also* Brief for Petitioner at 13, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712).

207. Thole v. U.S. Bank, Nat'l Ass'n, 873 F.3d 617, 632 (8th Cir. 2017).

208. *Id*. at 628, 632.

209. *Id.* at 629–30.

210. Harley v. Minn. Min. & Mfg. Co., 284 F.3d 901 (8th Cir. 2002). The Eighth Circuit also considered McCullough v. Aegon USA Inc., 585 F.3d 1082 (8th Cir. 2009) as controlling precedent on this issue, *see Thole*, 873 F.3d at 626–29 for a discussion of these two rulings which bound the disposition of the appeal.

211. *See id.* at 906–09.

212. Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1622 (2020).

213. *Id.* at 1619 (emphasis added).

214. *Id.*

215. *See* Varity Corp. v. Howe, 516 U.S. 489, 497 (1996) (arguing in dicta that ERISA analysis has a "starting point" in the common law of trusts.); *see, e.g.*, Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828 (2015); Cent. States Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985); *see also* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) (contending that "ERISA abounds with the language and terminology of trust law.").

in the defined-benefit plan.[216] The *Thole* majority also found unavailing the argument based upon the doctrine of representational standing, since the plaintiffs asserting it lacked an injury-in-fact themselves.[217] The Court, noting binding precedent such as *Spokeo*,[218] rejected the assertion that alleged violations of ERISA alone could constitute an injury-in-fact under Article III.[219] Finally, the plaintiffs argued that if the Court held that there was no standing, this would nullify ERISA's Civil Enforcement provisions.[220] The Court rejected this argument and noted the plethora of ERISA plaintiffs authorized to allege fiduciary misconduct.[221]

ii. Post-Thole Implications on Defined-Contribution Plan Litigation

While the Court did not address the question of Article III standing for defined-contribution plan participants that lack a personal stake[222] in the investment option(s) they challenge, this Note argues that *Thole* together with other standing precedent governs the outcome of these cases. The ERISA defense bar has made similar assertions in online publications.[223]

216. *Thole*, 140 S. Ct. at 1620. For a description of the equitable interest argument, *see* Brief for Petitioner at 23–25, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712); *see also* Charles E. Rounds Jr., *The U.S. Supreme Court has determined that ERISA negated in its sphere of pre-emption a traditional protection afforded property rights incident to the trust relationship*, JD SUPRA (Mar. 1, 2021), https://www.jdsupra.com/legalnews/the-us-supreme-court-has-determined-th-93276/.

217. *Thole*, 140 S. Ct. at 1620.

218. *Id.* at 1620–21 (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016)).

219. *Id.*

220. *Id.*

221. *Id.* at 1621.

222. *Id.* at 1622.

223. *See U.S. Supreme Court's Thole Decision Limits Plaintiffs' Ability to Sue Plan Fiduciaries*, SIDLEY AUSTIN (June 2, 2020), https://www.sidley.com/en/insights/newsupdates/2020/06/us-supreme-courts-thole-decision-limits-plaintiffs-ability-to-sue-plan-fiduciaries (asserting that "*Thole strongly* supports the conclusion that plaintiffs lack standing to challenge options in which they *never* invested.") (emphasis added); *see also 2020 Year-End ERISA Disputes Update*, GIBSON DUNN (Feb. 11, 2021), https://www.gibsondunn.com/2020-year-end-erisa-disputes-update/ (noting that "*Thole* may support the argument that plaintiffs lack standing to bring suit when they did not personally invest in a challenged plan investment option."); *see generally* Lukas D. Hakkenberg et al., *Supreme Court Limits Standing For Private ERISA Plaintiffs—Implications For ERISA And Beyond*, CLEARY GOTTLIEB (June 11, 2020), https://www.clearygottlieb.com/-/media/files/alert-memos-2020/supreme-court-sharply-limits-

Contrarily, some lawyers and courts have argued that *Thole* does not extend to govern these cases due to its holding allegedly being circumscribed to that of defined-benefit plan litigation.[224] The purported support for this proposition from *Thole* is background information on the differences between defined-benefit and defined-contribution plans provided early in the majority opinion.[225]

This information merely foreshadowed how U.S. Bank's defined-benefit plan's funding status relationship to participant benefit levels would impact the Article III standing analysis.[226] No other language throughout the opinion suggests *Thole* is limited to governing only in defined-benefit plan litigation.[227] Specifically, the majority opinion's holding was not explicitly limited by any further mention of defined-contribution plans to exclude them from being bound by this decision.[228] Therefore, courts adjudicating participant initiated Section 1132(a)(2) claims against defined-contribution plans should follow *Thole*. Multiple courts have cited *Thole* within their ERISA Article III

standing-for-erisa.pdf (predicting that *Thole* "will likely have an impact on standing in a variety of ERISA contexts, including in particular defined-contribution plans." (footnote omitted)).

224. Alas v. AT&T Servs., Inc., No. 2:17-cv-8106-VAP-RAOx, 2021 WL 4893372, at *13 (C.D. Cal. Sept. 28, 2021) (stating that *Thole* contained "explicit language" with respect to "the inapplicability of its holding to defined-contribution plans . . . ."). *But see* Lange v. Infinity Healthcare Physicians, S.C., No. 20-cv-737-jdp, 2021 WL 3022117, at *3–4 (W.D. Wis. July 16, 2021) (stating that defendant's invocation of *Thole* for a basic principle on standing was proper given its applicability to "both defined-benefit *and* defined-contribution plans.").

225. *See Thole*, 140 S. Ct. at 1618 (noting that "[o]f decisive importance to this case, the plaintiffs' retirement plan is a defined-benefit plan, not a defined-contribution plan."); *see also id.* at 1619 (explaining that "[t]he basic flaw in the plaintiffs' trust-based theory of standing is that the participants in a defined-benefit plan are not similarly situated to the beneficiaries of a private trust or to the participants in a defined-contribution plan." (citation omitted)).

226. *See id.* at 1618–19; *see also* Brief for Appellant, Boley v. Univ. Health Servs., 36 F.4th 124 (3d Cir. 2022), 2021 WL 4520389, at *23 (noting that "[w]hat was of 'decisive importance' in *Thole*, then, was not the plan's 'defined benefit' label, but the fact that plaintiffs would receive 'not a penny more' in benefits had they prevailed." (citing *Thole*, 140 S. Ct. at 1618–19)).

227. *Id.* at 1618–22.

228. *Id.* at 1621–22.

standing analysis in cases not involving a defined-benefit plan, but rather a different ERISA plan type, including a defined-contribution plan.[229]

The distinction of *Thole* involving a defined-benefit plan versus other litigation in Part III involving defined-contribution plans need not preclude *Thole*'s extension to govern the disposition of these standing inquiries. However, given certain dicta from federal courts that weighs toward distinguishing case-law between these two types of plans,[230] together with the previously mentioned dicta,[231] *Thole*'s precedential effects have continued to be litigated.

iii. Thole's Trust Law Argument is Issue Precluded for Reassertion in the Defined-Contribution Context

An ERISA practitioner has contended that *Thole* lacks applicability for purposes of defined-contribution litigation, asserting that "[p]articipants in defined contribution plans should retain standing to challenge plan investments after *Thole*, since they clearly have a beneficial interest in the trust and there is a direct relationship between plan investment returns and fees and their account balances."[232] Notably, ERISA plan assets are held in trust,[233] where the trustee holds legal title to those assets and the trust beneficiaries are the plan's participants.[234] However, it seems likely that if the Supreme Court considered Article III standing for defined-contribution participants situated similarly to

229. *See, e.g.*, Gleason v. Orth, No. 2:22-cv-00305-JHC, 2022 WL 4534405, at *3 (W.D. Wash. Sept. 28, 2022) (responding to the plaintiffs challenging *Thole*'s applicability outside defined-benefit litigation, the court noted that "[t]his Court does *not* interpret *Thole* as applying exclusively to defined-benefit plans." (emphasis added)); O'Driscoll v. Plexus Corp., No. 20-C-1065, 2022 WL 3600824, at *1–3 (E.D. Wis. Aug. 23, 2022); *see also* Nohara v. Prevea Clinic Inc., No. 20-C-1079, 2022 WL 1504925, at *1–2 (E.D. Wis. May 12, 2022) (denying defendants' motion to dismiss, citing *Thole* in opinion on this 401(k) plan dispute); Ortiz v. Am. Airlines, Inc., 5 F.4th 622 (5th Cir. 2021).

230. *See* Vaughn v. Bay Env't Mgmt., Inc., 567 F.3d 1021, 1028 n.9 (9th Cir. 2009) (noting that "precedent from cases involving defined benefit plans is not automatically applicable in cases involving defined contribution plans." (citing LaRue v. DeWolff, Boberg & Assocs., 128 S. Ct. 1020, 1025 (2008))).

231. *Thole*, 140 S. Ct. at 1618.

232. Carol Buckmann, *Standing of Defined Benefit Plan Participants to Sue for Fiduciary Breach*, 2020 NYU REV. EMP. BENEFITS & EXEC. COMP. (2020).

233. 29 U.S.C § 1103(a).

234. 29 U.S.C § 1103(c)(1).

those in the Part III cases, it would probably reject a trust law argument as it did in *Thole*.[235]

Thole's counsel[236] and the U.S. Solicitor General[237] both argued that the participants should have had Article III standing based upon a purportedly qualifying historical exception[238] which would render the alleged invasion of the participants' legally protected interest to automatically constitute an injury-in-fact.

The *Thole* petitioner and the Solicitor General's trust law argument was supported by case-law originated from the English courts of chancery in the 15th century.[239] At common law, a breach of fiduciary duty by a trustee, regardless of any showing of a factual injury or harm sustained by the beneficiary, would provide the beneficiary with a valid cause of action against the trustee to cure the breach.[240] The breach itself, under the "no further inquiry" rule, was enough to establish a de-facto injury. Both Thole's counsel and the Solicitor General contended that the extensive associated case-law supported this intangible injury to qualify for a historical exception to the rule that otherwise prevents

235. *Thole*, 140 S. Ct. at 1619–20. *But see* Woznicki v. Aurora Health Care, Inc., 20-cv-1245-bhl, 2022 WL 1720093, at *4 (May 27, 2022 E.D. Wis.) (contending "the trust-based theory of standing the Supreme Court rejected in *Thole*" to be applicable in defined-contribution cases.).

236. Brief for Petitioner at 2, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712) (asserting that "for centuries, trust law has allowed beneficiaries to sue without showing personal financial loss. A trust beneficiary may sue to restore losses to the trust's property caused by a breach of trust, whether or not the losses reduced her benefits. And under the 'no further inquiry' rule, a beneficiary may sue for a breach of loyalty not only when she has not suffered financial harm but even when the trust corpus was not affected. The breach itself is injury enough to permit suit.").

237. Brief for United States as Amicus Curiae at 10, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712).

238. *See* Brief for Petitioner at 7, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712) (asserting that "in many cases, the Court has also found that various intangible injuries supply the concrete personal stake needed to confer standing." (citations omitted)); *see also* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021) (noting that "[v]arious *intangible* harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." (citing Spokeo v. Robins, 578 U.S. at 340–41 (2016))).

239. *See* Brief for Petitioner at 24, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712) (citing Scott & Ascher on Trusts § 13.1 (5th ed. 2007)).

240. *See id.* at 31–34.

statutory standing from establishing an injury-in-fact under Article III.[241]

Thole's holding that "there is no ERISA exception to Article III"[242] should preclude further consideration of the historically based trust law argument that participants asserted to seek an exception to the concreteness requirement for an injury-in-fact.[243] When courts consider Article III standing, *Thole* should have an issue preclusive effect on a defined-contribution participant's attempt to relitigate this purported exception in an ERISA action asserted under Section 1132.[244] Specifically, a decision on the historical trust law argument was "necessary"[245] to the judgment reached in *Thole* and the plaintiff's opportunity to litigate that issue in the U.S. Supreme Court was "full and fair."[246] Therefore, with *Thole*'s lack of limitation to the defined benefit context,[247] it is highly unlikely that the no-further-inquiry rule has the capacity to assist ERISA defined-contribution plaintiffs with circumventing Article III.

Neither petitioners nor their amici's briefs cited any federal caselaw containing judicial adaptations of the no-further-inquiry rule to ERISA Section 1132 claims.[248] Despite the voluminous nature and alleg-

241. *Id.* at 35–38; Brief for United States as Amicus Curiae at 10–12, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712).

242. *Thole*, 140 S. Ct. at 1622.

243. *See* Brief for Petitioner at 28–41, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712); *see also* Brief for United States as Amicus Curiae at 10, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (noting that "[h]istorical trust law reinforces the conclusion that a breach of fiduciary duty, standing alone, permits a beneficiary to sue *irrespective* of any monetary loss.").

244. *See* Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008) (citations omitted); *see also* Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 376 n.1 (1985) (citation omitted); *see generally* 13C EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4425 (3d ed. 2022).

245. United States v. Mendoza, 464 U.S. 154, 158 (1984) (citing Montana v. United States, 440 U.S. 147, 153 (1979)).

246. Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 328, 329 (1971).

247. *Thole*, 140 S. Ct. at 1621–22; *see, e.g.*, Fritton v. Taylor Corp., 22-cv-00415, 2022 WL 17584416, at *1, 9 (D. Minn. Dec. 12, 2022) (applying *Thole* to dismiss claims against defined-contribution plan sponsor for lack of standing.).

248. *See generally* Brief for Petitioner, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712); Brief for United States as Amicus Curiae, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712).

edly unbroken line of case law that underpinned the trust law argument,[249] at common law, the presumption of de facto injury only applied to particular beneficiaries.[250] Additionally, ERISA's enactment departed from the common law of trusts with an associated expansion of protections accorded to its covered beneficiaries.[251] One general example of this was the established regulatory regime that operationalized the enforcement of ERISA statutory protections.[252]

Importantly, the Supreme Court has noted that while trust law is helpful for interpreting ERISA, it doesn't necessarily control judicial fiduciary duty analysis in ERISA lawsuits.[253] Therefore, for purposes of constitutional standing in ERISA defined-contribution cases, trust law should be accorded persuasive authority at most.[254]

The trust law argument should fail if asserted to justify Article III standing for otherwise constitutionally defective claims by defined-contribution plan participants. Regardless of demonstrable analogies between the common law of trusts and ERISA, the no-further-inquiry rule is inapplicable to modern Section 1132 litigation. One key judicial proposition that directly relates is the Supreme Court's finding that under Article III, Congress does not have the ability to classify conduct that is not factually harmful into an injury-in-fact.[255] However, at least

249. Brief for Petitioner at 35–38, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712).

250. *See* Response Brief for Respondent at 2, 28–30, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712).

251. *Cf.* Donovan v. Mazzola, 716 F.2d 1226, 1231–32 (9th Cir. 1983) (noting that "[c]ourts have also recognized that in enacting ERISA Congress made more exacting the requirements of the common law of trusts relating to employee benefit trust funds." (citation omitted)).

252. *See* 29 C.F.R. Chapter XXV ("Employee Benefits Security Administration, Department of Labor").

253. Varity Corp. v. Howe, 516 U.S. 489, 497 (1996) (explaining that the Court "believe[s] that the law of trusts often will inform, but will not necessarily *determine* the outcome of, an effort to interpret ERISA's fiduciary duties." (emphasis added)).

254. *Id.* (recognizing that "[i]n some instances, trust law will offer *only a starting point*, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements." (emphasis added)).

255. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021) (cautioning that "even though Congress may elevate harms that exist in the real world before Congress recognized them to actionable legal status, it may not simply *enact an injury into existence*, using its lawmaking power to transform something that is not remotely harmful into something that is." (citations omitted, internal quotations omitted) (emphasis added)); *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring).

one district court opinion posited that the trust law argument is applicable and valid within the context of ERISA defined-contribution litigation.[256]

Finally, other Article III jurisprudence also has preclusive effects on the reconsideration of the argument discussed above. While *Spokeo* noted that courts should give these types of assertions consideration, by "ask[ing] whether plaintiffs have identified a close historical or common-law analogue for their asserted injury[,]"[257] *Thole* was decided after *Spokeo*. Additionally, in *Ramirez*, decided post-*Thole*, the majority noted that such arguments deserve scrutiny[258] to prevent unwarranted judicially imposed expansions of federal jurisdiction.[259]

iv. Thole Has Precedential Effect on ERISA Defined-Contribution Plan Litigation

After *Thole*, Article III requires individualized financial injury for ERISA plaintiffs seeking relief under Section 1132(a)(2) with respect to relief sought both individually and on behalf of their plan.[260]

Most importantly, *Thole* involved an ERISA action brought under Section 1132(a)(2),[261] just like the defined-contribution cases examined below. Further, neither Section 1132's statutory text nor its corresponding regulations contemplates a distinction between defined-benefit and defined-contribution plans for purposes of seeking relief in federal court.[262] Relatedly, as the Solicitor General noted in its *Thole* amicus

256. Woznicki v. Aurora Health Care Inc., No. 20-cv-1246-bhl, 2022 WL 1720093, at *4 (E.D. Wis. May 27, 2022) (claiming that "the trust-based theory of standing the Supreme Court rejected in *Thole* is applicable in this case because, as with trusts, the ultimate value the beneficiaries of a defined contribution plan receive depends on how well the plan is managed." (citing Kurtz v. Vail Corp., 511 F. Supp. 3d 1185, 1194 (D. Colo. 2021))). *But see, e.g.*, Peters v. Aetna Inc., 2 F.4th 199, 217–21, 225 (4th Cir. 2021) (noting an express demarcation of the court's Article III standing discussion and that of an invocation of trust law principles once "adjudicating the full claim on the merits.").

257. *Ramirez*, 141 S. Ct. at 2204 (citing Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)).

258. *Id.* (articulating that "*Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary evolving beliefs about what kinds of suits should be heard in federal courts.").

259. *See id.*

260. Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1620–21 (2020).

261. *Id.* at 1619.

262. *See* Buckmann, *supra* note 232 (explaining that *Thole* may "be criticized because ERISA's remedies section . . . does not distinguish as the Court did between

brief, "[n]othing in the text of ERISA conditions a fiduciary's duties to beneficiaries on whether the plan is a defined-benefit or defined-contribution plan . . . ."[263] *Thole* should thus govern future dispositions of these ERISA cases.

v. Other ERISA Fiduciary Litigation Claim Types that Maintain Article III Standing Under Thole

Different circumstances underpin ERISA plaintiffs' prospective litigation against their defined-contribution plan sponsors. There are some types of ERISA cases where participants who seek relief under Section 1132(a)(2) and (3) have standing under *Thole*. In such cases, there may be a uniform injury among the plan participants that affects everyone, possibly identically.[264] The factual underpinnings to these claims may provide opportunities for constitutionally permissive assertions of representational standing, or perhaps a class action.

One example of this are claims that the plan record-keeper was paid excessive fees that caused financial injury to the participants. This injury could be quantified by the differential of fees paid versus those of an adequate alternative.

Another claim without standing issues under *Thole* could be an assertion that the defined-contribution menu failed to comply with ERISA Section 404(c) by not properly diversifying, i.e., offering enough choice of investment options.[265]

These examples are not the subject of the analysis which follows. Instead, this Note will discuss very specific ERISA claims which pose standing doctrine compliance issues.

the rights of participants in defined benefit plans and the rights of participants in other types of employee benefit plans."); 29 U.S.C. § 1132; 29 CFR §§ 2560.502-1–2578.1.

263. Brief for United States as Amicus Curiae at 9, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712).

264. *See, e.g.*, Boley v. Univ. Health Servs., Inc., 36 F.4th 124, 129–33 (3d Cir. 2022).

265. *See, e.g.*, Ortiz v. Am. Airlines, Inc., 5 F.4th 622, 629 n.9 (5th Cir. 2021) (considering claims that a defined-contribution plan menu did not comply with ERISA Section 404(c) in connection with the question of participants' standing.).

b. Pre-*Thole* Case-Law

In various cases, courts held there was Article III standing, but if these cases were reexamined after *Thole* the outcomes may be different. This is important as some courts have cited pre-*Thole* case-law in finding standing.

The scenario of participants seeking relief through Section 1132(a)(2) and (3) claims involving menu options that they lacked investment in has been present in multiple cases litigated at the district court level and some Circuit Courts of Appeals both before and after *Thole*. Interestingly, one Supreme Court Justice inquired about this exact set of factual underpinnings during the *Thole* oral arguments, and *Thole*'s counsel conceded that a participant who lacked a personal stake in a challenged investment option(s) would *lack* Article III standing as to that particular ERISA claim.[266] The cases analyzed below, first those decided before *Thole* and then those decided after, involved decisions regarding federal jurisdiction.

In *McDonald v. Edward D. Jones*,[267] the plaintiff sued for breach of fiduciary duty, alleging that Edward Jones "engaged in prohibited transactions related to the Plan in violation of [ERISA]."[268] The court considered the defendants' argument that the plaintiff did "not have standing to challenge the [fiduciary defendants'] duties regarding the Plan funds in which she did not personally invest."[269] Importantly, however, the court recognized that the plaintiff was asserting these claims on behalf of herself *and* on behalf of the Plan.[270]

The *McDonald* court relied on 8th Circuit authority *Braden*,[271] in deciding that the plaintiff had standing, which it found stood for the judicial proposition that in ERISA breach of fiduciary duty actions, "a plan participant may seek recovery for the plan even where the participant did not personally invest in every one of the funds that caused an injury to the plan."[272] However, *Braden* did not specifically involve a

266. Transcript of Oral Argument at 9–10, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712) (posing a hypothetical to Thole's counsel with factual underpinnings generally parallel to the district court litigation discussed in Part III.).
267. McDonald v. Edward D. Jones & Co., L.P., No. 4:16 CV 1346, 2017 WL 372101 (E.D. Mo. Jan. 26, 2017).
268. *Id.* at *1.
269. *Id.* at *2.
270. *Id.*
271. Braden v. Wal-Mart Stores, Inc., 588 F.3d 585 (8th Cir. 2009).
272. *McDonald*, 2017 WL 372101, at *2 (citing *Braden*, 588 F.3d at 593).

standing inquiry related to a plaintiff's lack of personal stakes in investment options.[273] According to the *Braden* court, the issue was whether the plaintiff could establish standing by demonstrating injury-in-fact despite the alleged breaches having occurred prior to the date of this plaintiff-participant's first plan contribution.[274] The judicial inquiry involved general standing doctrine dealing with individualization of injury and seeking relief on behalf of the plan.[275]

The *McDonald* court's reliance on *Braden*[276] is unavailing as to the plaintiff's lack of Article III standing. Specifically, statutory authorization to seek judicially granted relief on behalf of an ERISA plan does *not* enable a plaintiff to circumvent constitutional restraints on the jurisdiction of federal courts.[277] Certain district courts parenthetically mentioned in the collection of illustrative cases at the conclusion of Part III(c) have continued to invoke *Braden* as authoritative on the standing inquiry while ignoring or denying *Thole*'s governance, to the detriment of constitutional compliance.

This extension of *Braden* by the *McDonald* court was too narrow and likely superseded by *Thole*. If a participant with circumstances analogous to that of *McDonald* chose to bring a lawsuit today, they would be unlikely to establish standing with respect to the fiduciary investment claims pertaining to options in which they did not invest. Under *Thole*, such a plaintiff would be unaffected by the outcome of the lawsuit with respect to those specific claims, as they lacked financial injuries being an unaffected participant.[278]

In *Marshall v. Northrop Grumman Corp.*,[279] the plaintiffs were unable to establish Article III standing with respect to the fiduciary investment claims brought after losses were suffered by the Plan's Emerging Markets Equity Fund ("the fund").[280] While the plaintiffs lacked a personal stake in this specific investment option, they nevertheless argued that in the alternative scenario of a passively managed option replacing the fund, the Plan as a whole would have avoided millions in fees.[281]

273. *Braden*, 588 F.3d at 589–90.
274. *Id.* at 589–91.
275. *Id.* at 593.
276. *McDonald*, 2017 WL 372101, at *2.
277. TransUnion, LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021).
278. Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1619 (2020).
279. Marshall v. Northrop Grumman Corp., No. CV 16–06794, 2017 WL 2930839 (C.D. Cal. Jan. 30, 2017).
280. *Id.* at *8.
281. *Id.*

The court rejected this argument and further rejected any standing altogether, as the plaintiffs did not allege "they individually invested in [the fund] such that they have suffered a concrete injury."[282]

Before *Thole*, the Northern District of California decided *Cryer v. Franklin Templeton*.[283] The defendants sought to oppose class certification by arguing in multiple ways that Cryer lacked standing as to his fiduciary investment claims.[284] The court noted that such "arguments are more suited to a motion to dismiss but may overlap with arguments about typicality and adequacy" regarding Rule 23.[285] The defendants asserted that Cryer, the class representative, did not have standing "to bring claims regarding funds in which he did not invest . . . ."[286] The defendants also contended that Cryer lacked standing on his claims asserted with respect to outperforming menu options that he did invest in due to a lack of financial injury.[287] The defendants argued that Cryer lacked standing "because he [did] not fully understand what a stable value fund is and whether he would have allocated money to such a fund had it been available, and had he done so he would have lost money."[288]

The court rejected all the defendants' arguments, holding that the plaintiff Cryer had standing because Cryer's "lawsuit [sought] to restore value to and [was] therefore brought on behalf of the Plan."[289] The court explained its reliance on the Supreme Court's directive that prevailing Section 1109 claims'[290] recoveries are rewarded to the plan rather than an individual beneficiary plan-participant.[291] Further, the court relied on recent Ninth Circuit precedent which stated that Article III standing in the ERISA context does not involve analyzing individual

282. *Id.*
283. Cryer v. Franklin Templeton Res., Inc., No. C 16-4265 CW, 2017 WL 4023149 (N.D. Cal. July 26, 2017).
284. *Id.* at *1, 4.
285. *Id.* at *4.
286. *Id.* (noting that the defendants' argument contended that Cryer's "single claim for breach of fiduciary duty "in reality . . . comprises 40 separate claims challenging the propriety of each and every [Franklin Templeton] Fund offered in the Plan [investment menu.]'" (citing Docket No. 57, Opp'n 8)).
287. *Id.*
288. *Id.*
289. *Id.* (holding also that the plaintiff had standing for claims seeking injunctive relief despite having withdrawn his personal financial stake from the Plan, rejecting that additional argument by defendants.).
290. 29 U.S.C. § 1109.
291. *Cryer*, 2017 WL 4023149, at *4 (quoting Paulsen v. CNF Inc., 559 F.3d 1061, 1073 (9th Cir. 2009)).

financial stakes but instead considers "the nature of the claims and allegations to determine whether the pleaded injury relates to the defendants' management of the Plan as a whole."[292]

It is likely, that if reexamined, these factual underpinnings would yield a lack of Article III standing for Cryer under either *Thole*'s coverage or plainly by Cryer's failure to demonstrate injury-in-fact, which was not contemplated by the Northern District's Order granting class certification.[293] Under *Thole*, Cryer did not allege a personal financial injury and would lack Article III standing.[294] Cryer failed to effectively plead injury-in-fact because his allegations lacked particularization. His ERISA claims regarding investment funds which he had not invested in can hardly be said to have affected him "in a personal and individual way."[295]

Also, the *Cryer* decision purports to rely upon *Mass. Mut. Life Ins. Co. v. Russell* as authority, but in effect, that case was cited only as to its recognition of specific ERISA remedial procedure rather than Article III standing.[296] The 401(k) involved in *Cryer* was a defined-*contribution* plan, not a defined-benefit plan.[297] Importantly, the Supreme Court noted in *LaRue* that *Russell*'s "entire plan" language does not appear in Section 1132(a)(2) and "does *not* apply to defined contribution plans."[298] Therefore, the question of standing in *Cryer* was determined entirely lacking Supreme Court injury-in-fact authority.[299]

In *Larson v. Allina Health*,[300] the Eighth Circuit considered the question of Article III standing with respect to more than one fiduciary investment claim by the three plaintiffs, who brought their causes of action as class representatives against their defined-contribution plan.[301]

The defendants argued against the plaintiffs' ability to show standing because of the fact that the plaintiffs, at the time of the alleged breaches, had stakes only in the plan's core options and no investment

292. *Id.* (internal quotation omitted).
293. *Id.* at *7.
294. *Id.*; *see also* Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1618 (2020).
295. Spokeo, Inc. v. Robins, 578 U.S. 330, 339 (2016) (citation omitted).
296. *Cryer*, 2017 WL 4023149, at *4 (quoting Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985)).
297. *Id.* at *1.
298. LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 256 (2008); 29 U.S.C. § 1132(a)(2).
299. *See generally Cryer*, 2017 WL 4023149.
300. Larson v. Allina Health Sys., 350 F. Supp. 3d 780, 788 (D. Minn. 2018).
301. *Id.* at 788–89, 791.

in the plan's mutual fund window.[302] To support their argument, the defendants cited an Eighth Circuit ERISA stock-drop case that involved a plaintiff without Article III standing due to lacking an injury-in-fact, who liquidated their investment prior to a disclosure that negatively affected the market price of the asset they invested in.[303] The court rejected this argument, noting that, contrary to the defendants' cited authority, the plaintiffs in *Larson* were alleging financial injury relating to the core options program that they invested in.[304]

The court noted some of the plaintiffs' explicitly asserted financial injuries that helped them establish injury-in-fact included the defendants' failures to "remove high-cost investment options from the Plan," "to monitor recordkeeping costs," and not negotiating "lower fees for the Plan."[305] Notably, the plaintiffs lacked personal investments "in the ProManage option or the mutual fund window . . . ."[306] The court decided that as to those circumstances, the plaintiffs were permitted to still seek relief "on behalf of the whole plan."[307] This result was purportedly justified under *Braden*, similar to the *McDonald* court's inappropriate reliance on that authority in reaching their holding.[308] However, this decision did *not* comport with Article III standing case-law.[309]

Additionally, the *Larson* court noted a district court holding which was excerpted as "plaintiffs were allowed to bring an action on behalf of the entire plan [despite lacking investments in options pertinent to breach allegations] because 'defendants' decisions . . . to invest in or retain certain funds for the plan was the same for each putative class member.'"[310] This violates the standing rules for class representatives per *Ramirez*. Also, under *Thole*, such claims would not likely be permitted to proceed for lack of injury-in-fact. The lines have been blurred in

302. *Id.* at 792.
303. *Id.* at 792 (citing Brown v. Medtronic, 628 F.3d 451 (8th Cir. 2010)).
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*
308. *Compare Larson*, 350 F. Supp. 3d at 792, *with* McDonald v. Edward D. Jones & Co., L.P., No. 4:16 CV 1346 RWS, 2017 WL 372101, at *3 (E.D. Mo. Jan. 26, 2017).
309. *Larson*, 350 F. Supp. 3d at 792; *see* TransUnion, LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021) (citing Davis v. Fed. Election Comm'n, 554 U.S. 724, 733 (2008), Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 185 (2000)).
310. *Larson*, 350 F. Supp. at 792 (quoting Krueger v. Ameriprise Fin., Inc., 304 F.R.D. 559, 572 (D. Minn. 2014) (brackets omitted)).

this particular judicial inquiry when it comes to separately analyzing injury-in-fact to mere ERISA statutory authorization.

Other district courts have considered similar standing inquiries in ERISA defined-contribution litigation before the Supreme Court's *Thole* decision in 2020.[311]

c. Post-*Thole* Case-Law

In certain district court cases, *Thole*, *Spokeo*, and *Ramirez* have been circumvented despite the litigation of issues arising under Article III. In *McGowan v. Barnabas Health*,[312] the district court asserted *Thole* suggested that plaintiffs could maintain Article III standing despite not having investments in all investment options.[313] However, this *immediately* followed the *McGowan* court's noting that since defined-contribution "participants stand to gain or lose from the manner in which the funds are invested and managed, they have standing—at least as to the *particular* investment funds in which their money *was* invested."[314]

The *McGowan* court's reading of *Thole* cited to page 1620 of that majority opinion—possibly to the discussion of why the plaintiffs in *Thole* lacked representational standing.[315] Those sentences in *Thole* only explained generally that because the plaintiffs lacked an injury-in-fact themselves, they had no ability to seek relief in federal court on behalf of others.[316]

The *McGowan* court made no mention of how fiduciary investment claims against defined-contribution plans involve separately sought relief under Sections 1132(a)(2) and (3) for each option in the menu being challenged in the lawsuit arising under ERISA.[317] Therefore, that court decided this case without proper regard to standing

311. *See In re* UBS ERISA Litig., No. 08–cv–6696, 2014 WL 4812387, at *4–8 (S.D.N.Y. Sept. 29, 2014); Taveras v. UBS AG, 612 F. App'x 27, 28–30 (2d Cir. 2015); Wilcox v. Georgetown Univ., No. 18-422, 2019 WL 132281, at *6, 8–10 (D.D.C. Jan. 8, 2019); Hay v. Gucci Am., Inc., No. 2:17-cv-07148, 2018 WL 4815558, at *4–5 (D. N.J. Oct. 3, 2018); Leber v. Citigroup 401(k) Plan Inv. Comm., 323 F.R.D. 145, 154–55 (S.D.N.Y. 2017).

312. McGowan v. Barnabas Health, Inc., No. 20-13119, 2021 WL 1399870 (D. N.J. Apr. 13, 2021).

313. *Id.* at *4.

314. *Id.* at *3 (emphasis added).

315. *Id.* at *4.

316. Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1620 (2020).

317. *McGowan*, 2021 WL 1399870, at *3–5. *But see* Boley v. Univ. Health Servs., Inc., 36 F.4th 124 (3d Cir. 2022).

doctrine and misconstrued the judicial propositions that *Thole* provides, leading to an erroneous decision that was constitutionally improper.[318] At least one district court has followed the *McGowan* court's interpretation of standing under *Thole* in reaching its decision in a similar ERISA lawsuit.[319]

In *Brown v. Daikin America*,[320] two participants in a defined-contribution plan brought claims under Section 1132(a)(2) individually and on behalf of a class alleging that their sponsor Daikin breached its fiduciary duties under ERISA by imprudent selection and inadequate monitoring of the menu during the class period.[321] This was one of two counts contained in the plaintiffs' first amended complaint filed in the Southern District of New York, in which the breach of fiduciary duty claims contained five separate options that were managed by the trustee Daikin selected.[322] The court noted that during the class period, the two named plaintiffs invested in only two of these five funds which formed the basis for the *individual* claims of breaching the duty of prudence under ERISA.[323]

The defendant requested that those claims be dismissed for the named plaintiffs' lack of Article III standing which they attributed to the plaintiffs not having invested "in each of the funds complained of in the First Amended Complaint."[324] Specifically, the defendant argued that the named plaintiffs had not suffered an injury-in-fact with respect to those three funds[325] and that the plaintiffs' purported injuries lacked concreteness and particularization.[326]

The court rejected the defendant's argument on the grounds that it "misconceive[d] the nature of" the suit, which it claimed was "derivative, not personal . . . ."[327] According to the court, this was evident

318. *McGowan*, 2021 WL 1399870, at *3–5.
319. *McGowan*'s reasoning persists in the District of New Jersey, *see* Cho v. Prudential Ins. Co. of Am., No. 19-19886, 2021 WL 4438186, at *5 (D. N.J. Sept. 27, 2021) (citing *Thole*, 140 S. Ct. at 1620–21, 1618) (quoting *McGowan*, 2021 WL 1399870, at *4))).
320. Brown v. Daikin Am., Inc., No. 18-CV-11091, 2021 WL 1758898 (S.D.N.Y. May 4, 2021).
321. *Id.* at *3.
322. *Id.* at *2.
323. *Id.*
324. *Id.*
325. *Id.* at *3 (linking to three ERISA claims separate from the two which the named plaintiffs had personal stakes in.).
326. *Id.*
327. *Id.*

from the plaintiffs asserting claims under ERISA Sections 1109(a) and 1132(a)(2) "in a representative capacity on behalf of the plan."[328] The court noted that the plaintiffs were suing for individual relief in addition to that which would redress injuries sustained to their plan and the other participants.[329] However, analogizing to derivative actions from the ERISA context has been rejected by the Third Circuit,[330] and this authority was cited by the First Circuit when making a decision on the issue of Article III standing similar to that discussed throughout this Note.[331] The First Circuit stated that "recovery made on behalf of a defined contribution plan must be allocated to the individual accounts injured by the breach."[332]

In *Brown*, the Southern District of New York additionally relied on Second Circuit authority which it contended stands for the judicial proposition that ERISA permits the two named plaintiffs to bring these claims in a representative capacity provided that the plaintiffs "can demonstrate that they are 'within the zone of interests ERISA was intended to protect.'"[333] The court decided that the named plaintiffs were in this zone of interests, and claimed that "[d]erviative standing to sue on behalf of the Plan [] unlocked the door to federal court."[334] This analysis conflates the framework of statutory standing with what is separately required under Article III, as the Supreme Court explained in *Thole*.[335]

Finally, the court concluded with a claim that "under *Thole*, [the named plaintiffs] demonstrated Article III standing" because they "personally invested in several of the Plan's investment funds that they now

328. *Id.* (internal quotation omitted) (citing LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 251–52 (2008)).
329. *Id.* (citation omitted).
330. Graden v. Conexant Sys. Inc., 496 F.3d 291, 296 n.6 (3d Cir. 2007) (declining to analogize 1132(a)(2) actions to those of derivative suits, noting that participant losses, contrary to those of shareholders, are direct and "any recovery made 'on behalf of the plan' must be paid out to the injured participant in the form of augmented benefit payments.").
331. Evans v. Akers, 534 F.3d 65, 74 (1st Cir. 2008) (citing *Graden*, 496 F.3d at 296 n.6).
332. *Id.*
333. *Brown*, 2021 WL 1758898, at *3 (quoting Mullins v. Pfizer Inc., 23 F.3d 663, 668 (2d Cir. 1994)).
334. *Id.* at *4 (citations omitted).
335. Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1620–21 (2020).

claim were imprudently selected."[336] The court did not consider, however, what *Thole* contemplated about lawsuit outcomes and standing.[337] With respect to the named plaintiffs' claims asserted regarding the options that they lacked injury and investment in, whether the court dismissed those claims or awarded relief would *not* affect those plaintiffs. Therefore, without a "concrete stake" in the lawsuit with respect to *those* claims, the court should have dismissed them[338] to cure the constitutional defect under Article III, per *Thole*.[339]

Although *Brown* was decided before *Ramirez*, the standing analysis could have been resolved through the requirement that each claim must provide independent satisfaction of Article III.[340] *Ramirez* reiterated fundamental doctrine—that "plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek . . . ."[341] At least one district court case has invoked the *Brown* court's reasoning with respect to analogizing derivative claims to ERISA as a basis to find standing,[342] although that process necessarily rejected *Thole*'s governance and relied upon nonprecedential authority.

In addition to the above cases, many other courts have considered the Article III standing inquiry in ERISA defined-contribution litigation following the Supreme Court's *Thole* decision.[343]

336. *Brown*, 2021 WL 1758898, at *4.

337. *Thole*, 140 S. Ct. at 1619.

338. *See* FED. R. CIV. P. 12(b)(6); *see also* FED. R. CIV. P. 12(h)(3).

339. *Thole*, 140 S. Ct. at 1619.

340. TransUnion, LLC v. Ramirez, 141 S. Ct. 2190 (2021).

341. *Id.* at 2208 (citing Davis v. Fed. Election Comm'n, 554 U.S. 724, 734 (2008), Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 185 (2000)).

342. Vellali v. Yale Univ., Civ. No. 3:16-cv-1345, 2022 WL 13684612, at *15–16 (D. Conn. Oct. 21, 2022).

343. McCaffree Fin. Corp. v. ADP, Inc., No. 20-5492, 2023 WL 2728787, at *4–8 (D. N.J. Mar. 31, 2023) (dismissing claims alleging inclusion of imprudent investment options for lack of Article III standing where named plaintiff did not invest in the challenged funds.); Jones v. Dish Network Corp., No. 22-cv-00167, 2023 WL 2644081, at *2, 3–5 (D. Colo. Mar. 27, 2023) (overruling the plaintiffs' objection and affirming judge's "conclusion that [the] [p]laintiffs lack[ed] constitutional standing to challenge the Royce Fund" which none of the plaintiffs pleaded to have either invested in or suffered a "concrete injury traceable to [the fiduciary's] retention and monitoring of the Royce Fund." (citation omitted)); Ruilova v. Yale-New Haven Hosp., Inc., No. 3:22-cv-00111, 2023 WL 2301962, at *10–12 (D. Conn. Mar. 1, 2023) (ruling that the "[p]laintiffs ha[d] class standing to advance claims related to the funds in which they did *not* invest." (emphasis added)); *In re* Sutter Health ERISA

Litig., No. 1:20-cv-01007-JLT, 2023 WL 1868865, at *5–7 (E.D. Cal. Feb. 9, 2023) (denying the defendants' motion to dismiss, concluding that "whether the named Plaintiffs may ultimately bring ERISA claims in a representative capacity on behalf of all Plan participants, is a question of class certification" and not a question of standing even though the named plaintiffs failed to plead that they invested in all of the challenged funds.); Beldock v. Microsoft Corp., C22-1082JLR, 2023 WL 1798171, at *3–4 (W.D. Wash. Feb. 7, 2023) (granting the defendants' motion to dismiss claims for lack of standing, applying *Thole* in a defined-contribution dispute and noting that "*Braden* does not obviate the requirement that [plaintiffs] prove that [they] suffered the type of concrete and particularized injury necessary for Article III standing."); Schave v. CentraCare Health Sys., 22-cv-1555, 2023 WL 1071606, at *2–3 (D. Minn. Jan. 27, 2023) (concluding that even though the plaintiff challenged "investment options in which she was not enrolled[,]" *Thole* does not apply to defined-contribution litigation and "[c]onsistent with *Braden*, [the plaintiff] ha[d] Article III standing" with respect to *all* challenged options . . . .); Locascio v. Fluor Corp., No. 3:22-CV-0154, 2023 WL 320000, at *2–3 (N.D. Tex. Jan. 18, 2023) (granting, in part, motion to dismiss for lack of Article III standing where participant challenged twelve defined-contribution plan investment options despite having only invested in three of them.); Singh v. Deloitte LLP, 21-cv-8458, 2023 WL 186679, at *2–4 (S.D.N.Y. Jan. 13, 2023) (granting motion to dismiss for lack of Article III standing, noting that "none of the plaintiffs have shown that the four challeneged funds in which they did not invest caused them any particularized injury . . . ."); Iannone v. Autozone, Inc., No. 2:19-02779, 2022 WL 17485953, at *3–5 (W.D. Tenn. Dec. 7, 2022) (denying motion to dismiss for lack of Article III standing where the plaintiffs challenged five investment options that they did not elect into as participants.); *Vellali*, 2022 WL 13684612, at *15–16; Jonathan Z. v. Oxford Health Plans, No. 2:18-cv-00383-NJP-JCB, 2022 WL 3227909, at *1 (D. Utah Aug. 9, 2022); Hoeffner v. D'Amato, 605 F. Supp. 3d 467, 476–81 (E.D.N.Y. 2022); Woznicki v. Aurora Health Care Inc., No. 20-cv-1246-bhl, 2022 WL 1720093, at *4 (E.D. Wis. May 27, 2022); Nohara v. Prevea Clinic Inc., No. 20-C-1079, 2022 WL 1504925, at *1–2 (E.D. Wis. May 12, 2022); Perkins v. United Surgical Partners Int'l, Inc., No. 3:21-CV-00973-X, 2022 WL 824839, at *2–4 (N.D. Tex. Mar. 18, 2022) (granting the defendants' motion to dismiss, noting that the plaintiffs failed to allege an individual injury where the plaintiffs challenged funds that they lacked investments in); Alas v. AT&T Servs., Inc., No. 2:17-cv-8106-VAP-RAOx, 2021 WL 4893372, at *12–13 (C.D. Cal. Sept. 28, 2021); Smith v. CommonSpirit Health, No. 20-95-DLB-EBA, 2021 WL 4097052, at *3–5 (E.D. Ky. Sept. 8, 2021) (concluding that because the plaintiff "alleged that she suffered injury by investing in *one* of the challenged funds . . . this provide[d] [the p]laintiff standing to challenge *not only* the fund she invested in, *but other* similar funds alleged to have underperformed." (emphasis added)); Dover v. Yanfeng US Auto Interior Sys. I LLC, 563 F. Supp. 3d 678, 683 (E.D. Mich. 2021) (rejecting motion to dismiss, explaining that "as long as the Complaint contains broad allegations that the fiduciaries violated ERISA, claims regarding *specific* funds are allowed to move forward at the motion to dismiss stage *even if* not all of the named plaintiffs participated in every one of the individual funds." (citation omitted) (emphasis added)); *In re* Omnicom ERISA Litig., No. 20-cv-4141, 2021 WL 3292487, at *5–10 (S.D.N.Y. Aug. 2, 2021); Lange v. Infinity Healthcare Physicians, S.C., 20-cv-737-jdp, 2021 WL 3022117, at *3 (W.D. Wis. July, 16, 2021) (rejecting the plaintiff's argument that "*Thole* [was] inapposite because the [defendant fiduciary's] plan was a defined-contribution plan" and agreeing with the defendant's citation of "*Thole* for the basic principle that a plaintiff lacks standing if

d. Post-*Thole* U.S. Circuit Court of Appeals Decisions

In *Boley v. Universal Health Services,*[344] the Third Circuit ruled that the injury-in-fact analysis should be analyzed at the level of the breach,

[they] challenge[] investment decisions that did not personally affect [them], a principle that would apply to *both* defined-benefit *and* defined-contribution plans." (emphasis added)); Walter v. Kerry Inc., No. 21-cv-0539-bhl, 2022 WL 1720095, at *3 (E.D. Wis. May 27, 2022) (holding that the plaintiff had standing without a financial injury to challenge a single investment option that he lacked an investment in.); Garthwait v. Eversource Energy Co., No. 3:20-CV-00902, 2022 WL 1657469, at *6–9 (D. Conn. May 25, 2022); Anderson v. Coca-Cola Bottlers' Ass'n, No. 21-2054-JWL, 2022 WL 951218, at *2–6 (D. Kan. Mar. 30, 2022); Falberg v. Goldman Sachs Grp., Inc., No. 19 Civ. 9910, 2022 WL 538146, at *5–6 (S.D.N.Y. Feb. 14, 2022); Rosenkranz v. Altru Health Sys., No. 3:20-cv-168, 2021 WL 5868960, at *5–6 (D. N.D. Dec. 10, 2021); Mator v. Wesco Distrib., Inc., No. 2:21-CV-00403-MJH, 2021 WL 4523491, at *3–4 (W.D. Pa. Oct. 4, 2021); Cutrone v. Allstate Corp., No. 20 CV 6463, 2021 WL 4439415, at *5–6 (N.D. Ill. Sept. 28, 2021); Cho v. Prudential Ins. Co. of Am., No. 19-19886, 2021 WL 4438186, at *4–5 (D. N.J. Sept., 27, 2021); Allison v. L Brands, Inc., No. 2:20-cv-6018, 2021 WL 4224729, at *2–4 (S.D. Ohio Sept. 16, 2021); Enos v. Adidas Am., Inc., No. 3:19-cv-01073-YY, 2021 WL 5622121, at *1–4 (D. Or. Aug. 26, 2021); *In re* Biogen, Inc. ERISA Litig., No. 20-cv-11325, 2021 WL 3116331, at *3–5 (D. Mass. July 22, 2021); Luense v. Konica Minolta Bus. Sol. U.S.A., Inc., 541 F. Supp. 3d 496, 505–507 (D. N.J. 2021); Becker v. Wells Fargo & Co., No. 20-2016, 2021 WL 1909632, at *3 (D. Minn. May 12, 2021); *In re* Quest Diagnostics Inc. ERISA Litig., No. 20-07936-SDW-LDW, 2021 WL 1783274, at *2 (D. N.J. May 4, 2021); Brown v. Daikin Am., Inc., 2021 WL 1758898 (S.D.N.Y. May 4, 2021); Khan v. PTC, Inc., No. 20-11710-WGY, 2021 WL 1550929, at *2–4 (D. Mass. Apr. 20, 2021); Jones v. Coca-Cola Consol., Inc., No. 3:20-cv-00654-FDW-DSC, 2021 WL 1226551, at *2–4 (W.D. N.C. Mar. 31, 2021); Davis v. Magna Int'l of Am., Inc., No. 20-11060, 2021 WL 1212579, at *3–5 (E.D. Mich. Mar. 31, 2021); Cates v. Trs. Columbia Univ., No. 16 Civ. 6524, 2021 WL 964417, at *2 (S.D.N.Y. Mar. 15, 2021) (concluding that plaintiff had standing because "requiring a defined-contribution plan participant to establish an injury with respect to each fund being challenged . . . is unduly restrictive and *is not in accordance with the law*." (emphasis added)); McCool v. AHS Mgmt. Co., No. 3:19-cv-01158, 2021 WL 826756, at *2–3 (M.D. Tenn. Mar. 4, 2021); Santiago v. Univ. of Miami, No. 1:20-cv-21784, 2021 WL 1173164, at *7–8 (S.D. Fla. Mar. 1, 2021) (finding that plaintiffs lacked standing as to claims related to two options neither had invested in, but completely without citation or recognition of *Thole*.); Parmer v. Land O'Lakes, Inc., 518 F. Supp. 3d 1293, 1300–1302 (D. Minn. 2021) (citing *Braden* as authority that plaintiffs had standing to bring claims with respect to options they had no stake in while rejecting that *Thole* governs defined-contribution litigation.); Kurtz v. Vail Corp., 511 F. Supp. 3d 1185, 1194–95 (D. Colo. 2021); Boley v. Univ. Health Servs., Inc., 498 F. Supp. 3d 715, 719–21 (E.D. Pa. 2020) (holding there was no standing); Silva v. Evonik Corp., Civ. No. 20-2202, 2020 WL 12574912, at *3 (D. N.J. Dec. 30, 2020) (rejecting plaintiffs' argument based on *Braden* "that ERISA permits a plaintiff suing on behalf of a plan to seek 'relief . . . that sweeps beyond his own injury'–once Article III standing is established." Citing to *Thole*, the court noted that "ERISA may *not* be used to establish *constitutional* standing in the first instance." (citations omitted) (emphasis added)); Jacobs v. Verizon Commc'n, Inc., 16 Civ. 1082, 2020 WL 5796165, at *4–7 (S.D.N.Y. Sept. 29, 2020); Falberg v. Goldman Sachs Grp. Inc., 19 Civ. 9910, 2020 WL 3893285, at *7–8 (S.D.N.Y. July 9, 2020).

344. Boley v. Univ. Health Servs., Inc., 36 F.4th 124 (3d Cir. 2022).

or fiduciary misconduct, and therefore, if imprudence or disloyalty affected a participant with investments in two funds, that participant has standing to challenge *all* investment options affected by that particular breach on behalf of the plan, which enables that plaintiff to challenge options they never invested in.[345] However, under Article III jurisprudence, this should only be possible with a uniform injury that has the same affect against those claimants that are not named plaintiffs.[346] This was present in *Boley* because of an excessive fee that was charged to the entire plan which was decided to be fiduciary misconduct under ERISA.[347] Yet, other claims asserted by plaintiffs which were decided to be sufficient for standing purposes were investment option specific injuries in fact.[348] Defense counsel argued in brief that the plaintiffs should not have been permitted to "invoke representational standing under these circumstances."[349]

Boley's holding contradicts Article III jurisprudence with respect to the *Ramirez* Court's reiteration of the prohibition on claims without standing deriving it from other constitutionally sufficient claims.[350]

345. *See generally id* at 133. The ultimate legal theory that this Note endorses for purposes of resolving these interpretational issues follows. Breaches may correspond to each "count" set forth in the participants' complaint where each count contains potentially multiple claims with respect to each breach. These similar but distinct legal claims may be demarcated by the corresponding investment options from the menu. *Cf.* Brief for Appellant, Boley v. Univ. Health Servs., 36 F.4th 124 (3d Cir. 2022), 2021 WL 3406505, at *39 (arguing that every challenge to a specific investment option "is a distinct claim, seeking different relief, from each challenge to every other option."). At the individual claim level, there can often be distinct financial losses to underpin demonstrable injuries in fact. Specifically, as defense counsel argued in *Boley*, it can be shown that a plan sponsor's particular imprudent fiduciary process could lead to substantially different Article III injuries to participants invested in distinct investment options that are in completely opposite asset classes, *see e.g.*, Oral Argument at 6:18–6:37, 11:25–11:50, Boley v. Univ. Health Servs., 36 F.4th 124 (3d Cir. 2022) (No. 21-2014), https://www2.ca3.uscourts.gov/oralargument/audio/21-2014Boleyv.UniversalHealth.mp3. Put simply, each investment option challenged in these lawsuits is done so through individual claims, which requires application of the independent claim rule as reaffirmed by TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021) (citations omitted). In the ERISA context, this theory is supported by the Fourth Circuit opinion in Peters, in which the court noted that injuries-in-fact are assessed at the investment option level, which contradicts the breach-by-breach standing ruling from the Third Circuit's *Boley* decision.

346. *See Ramirez*, 141 S. Ct. at 2208 (citations omitted).

347. *Boley*, 36 F.4th at 131.

348. *Id.*

349. Brief for Appellant, Boley v. Univ. Health Servs., 36 F.4th 124 (3d Cir. 2022), 2021 WL 6495067, at *10 (citing Lewis v. Casey, 518 U.S. 343, 357 (1996) (endnote omitted)).

350. *See generally, Ramirez*, 141 S. Ct. at 2208 (citations omitted).

However, the Third Circuit left open the possibility for future defendants to prevail on similar motions to dismiss but on the grounds of opposing class certification, specifically with respect to arguing the issue of typicality of claims in which class representatives had no investment stake in the challenged options.[351]

In *Albert v. Oshkosh Corp.*,[352] the Seventh Circuit briefly addressed the issue discussed by this Note within a footnote,[353] but left open the question of standing for purposes of possible reconsideration in subsequent proceedings.[354]

IV. Recommendation

A. ERISA Fiduciary Investment Claims Alleging Imprudence with respect to Multiple Options in the Menu Under § 1132(a)(2)–(3)

This first recommendation addresses the circumstances discussed throughout Part III—participants do not have a stake in some of the investments with respect to which they are claiming a breach of fiduciary duty, resulting in potential partial dismissal due to a lack of Article III standing.[355] There is a simple litigation strategy that would cure the constitutional defect that results from the claims pertaining to the options in which the named plaintiffs did not invest.

Adding additional named plaintiff participants could provide compliance with standing doctrine that requires each legal claim to possess its own Article III standing, with separate de facto injuries to justify them.[356] If participants pursuing such litigation name at least one plaintiff from their plan with a financial injury from the associated option related to each fiduciary investment claim, they could conceivably

351. *Boley*, 36 F.4th at 134–36. *See also Third Circuit Becomes First Court of Appeals to Consider Thole v. U.S. Bank N.A.'s Application to Defined Contribution Plans*, SIDLEY AUSTIN LLP (June 6, 2022) https://www.sidley.com/en/insights/newsupdates/2022/06/third-circuit-becomes-first-court-of-appeals-to-consider-thole-v-us-bank-nas.

352. *See generally* Albert v. Oshkosh Corp., 47 F.4th 570 (7th Cir. 2022).

353. *Id.* at 578 n.4.

354. *Id.* at 578.

355. *See* FED. R. CIV. P. 12(b)(1); *see also* FED. R. CIV. P. 12(h)(3) (providing the rule that lack of subject matter jurisdiction warrants dismissal.); *see, e.g.*, Shain v. Ellison, 356 F.3d 211, 215 (2d Cir. 2004) (noting if a plaintiff lacks Article III standing, courts "lack subject matter jurisdiction . . . ."); *see also* Berkelhammer v. Automatic Data Processing Inc., Civ. Action No. 20-5696, 2022 WL 3593975, at *3 (D. N.J. Aug. 23, 2022) ("II. Legal Standard").

356. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021).

avoid dismissal since they would have maintained a justiciable case or controversy under Article III.[357] Without that, certain claims would be dismissed before they could be decided on the merits.[358]

B. Standing Considerations for ERISA Section 1132(a)(3) Claims

Fiduciary misconduct that poses a risk to a defined-contribution plan but has not yet reduced participant benefits to provide statutory authorization under 1132(a)(1)(B) could form the basis for Article III standing in future cases. The *Thole* majority discussed this in dicta at the end of its opinion, solely with respect to defined-benefit litigation.[359] The U.S. Solicitor General as plaintiffs' amici,[360] but not the plaintiffs themselves, asserted this argument, thus the Court lacked the ability to consider it beyond the realm of dicta.[361]

First, courts lack contextualization of what to require of a defined-contribution plaintiff who seeks equitable relief to redress a future risk of harm, because that was unaddressed by the pertinent *Thole* dicta, and has not since arisen in district court litigation to much extent.[362] Second, while the leading Supreme Court authority on this subject has been

357. *See* Toll Bros., Inc. v. Twp. Readington, 555 F.3d 131, 137 (3d Cir. 2009) (explaining that "[c]ourts enforce the case-or-controversy requirement through the several justiciability doctrines [(including standing)] that cluster about Article III." (internal citation and quotations omitted)).

358. FED. R. CIV. P. 12(b)(1), 12(h)(3).

359. Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1622 (2020).

360. *See generally*, Brief for the United States as Amicus Curiae at 17–19, Thole v. U.S. Bank, N.A., 140 S. Ct. 1615 (2020) (No. 17-1712).

361. *Thole*, 140 S. Ct. at 1622.

362. *See* Brief for the United States as Amicus Curiae at 17–18, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712), 2019 WL 2209252, at *17–19 (discussing the pre-*Thole* tendency of some courts to consider similar standing inquiries irrespective of plan type, with a brief summary of some of these holdings). *But see, e.g.* Anderson v. Intel Corp, No. 19-CV-04618-LHK, 2021 WL 229235, at *13–14 (N.D. Cal. Jan 21, 2021); Silva v. Evonik Corp., Civ. Action No. 20-2202, 2020 WL 12574912, at *3 (D. N.J. Dec. 30, 2020); Berkelhammer v. Automatic Data Processing Inc., Civ. Action No. No. 20-5696, 2022 WL 3593975, at *15–16 (D. N.J. Aug. 23, 2022) (holding plaintiffs had standing for equitable monetary and injunctive relief claims); Jonathan Z. v. Oxford Health Plans, 2:18-cv-00383, 2022 WL 3227909, at *1–4 (D. Utah Aug. 9, 2022) (granting defendant's motion to dismiss plaintiffs' claims seeking equitable relief.).

Clapper v. Amnesty Int'l,[363] the *Thole* dicta merely acknowledged the Solicitor General's reliance on this case[364] without indicating whether it is appropriate to apply in ERISA litigation cases involving equitable relief.[365]

There is a difference in the *Thole* dicta pertaining solely to defined-benefit plans and the general rule of *Clapper*, which leaves open multiple questions on how the judicial determinations regarding purely equitable relief may be structured in a fiduciary investment claims case involving a defined-contribution plan. This Note recommends monitoring federal dockets for unwarranted dismissals of defined-contribution participant claims for equitable relief, which if present could indicate the appropriate consideration of a new administrative remedy.[366] However, the post-*Thole* treatment of Article III standing by district courts[367] could indicate that this will not be an issue in ERISA litigation.

1. PARTICIPANTS LACKING FINANCIAL INJURIES SEEKING EQUITABLE RELIEF

There may be ERISA fiduciary misconduct which constitutes a breach that does not inflict a financial injury on participants because their benefits under the plan were not reduced. After *Thole*, participants may have issues seeking relief via Section 1132(a)(2) given a lack of Article III standing. Specifically, plaintiffs seeking "purely equitable relief" under 1132(a)(2) and or (a)(3) may find a roadblock in pursuing their claims if they lack an injury-in-fact as to those specific claims,

363. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414, n.5 (2013) (providing a basis for a defined-contribution participant obtaining equitable relief under § 1132(a)(2) and (3) provided that they allege a "risk of harm [that] is sufficiently imminent and substantial.").

364. Brief for the United States as Amicus Curiae at 12, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712).

365. *Thole*, 140 S. Ct. at 1622.

366. Brief for Petitioner at 5–6, Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020) (No. 17-1712) (providing excerpt from DOL that evidences such intent in pertinent part: "The Secretary [of Labor] depends on participant suits to enforce ERISA, because she lacks the resources to do so singlehandedly, and plan fiduciaries are commonly defendants in such cases." (internal quotations omitted) (citations omitted)); *see also* Brief for the United States as Amicus Curiae, at 14, *Thole*, 140 S. Ct. 1615 (2020) (No. 17-1712) (noting that "Congress thus reasonably determined that the *best* means of protecting individual pension rights was to authorize beneficiaries to sue fiduciaries that breach their duties . . . .").

367. *See* Part III(c).

which could inhibit the redressability of statutorily prohibited fiduciary misconduct.[368]

However, the *Thole* majority's dicta on this subject pertained to substantiating such claims with more than a mere allegation of inadequate funding status,[369] which circumscribes its applicability solely to ERISA defined-*benefit* plaintiffs. While this dicta provided that mere allegations of future harm with only proof of underfunded status of the plan would not be sufficiently concrete for purposes of Article III,[370] it is less helpful with identifying what might be sufficient for a participant seeking to allege future risk in the defined-contribution context.[371] The law is far from settled with respect to future risk constituting injury-in-fact for Article III, even less so in the specific context of ERISA litigation.[372]

ERISA plans are already heavily regulated[373] and the creation of this administrative remedy may not necessarily be warranted. If pursued, defining the scope of a new remedy should be approached carefully.

V. Conclusion

Standing doctrine has an immense impact on participants because complying with Article III will affect whether their claims can be decided on the merits. Specifically, standing doctrine directly controls whether participants may invoke the federal jurisdiction of Article III courts. As this Note demonstrates, ERISA plan participants currently face uncertainty regarding their abilities to pursue statutorily provided enforcement actions, given recent developments in federal case-law.

368. *See, e.g.*, Anderson v. Intel Corp., No. 19-CV-04618-LHK, 2021 WL 229235, at *13–14 (N.D. Cal. Jan. 21, 2021) (applying the injury-in-fact requirement of *Thole* to a claim for solely equitable relief under Section 1132.).

369. *Thole*, 140 S. Ct. at 1622.

370. *Id.* at 1621–22.

371. *Id.* While the majority opinion in *Thole* recognized that the Solicitor General's position rested on Supreme Court case-law such as *Clapper*, it only cited to *LaRue* in dicta, which dealt with a defined-*benefit* lawsuit.

372. *See, e.g.*, David v. Alphin, 704 F.3d 327, 338 (4th Cir. 2013) (finding that "risk-based theories of standing [are] unpersuasive, not least because they rest on a highly speculative foundation lacking any discernible limiting principle.").

373. *See generally Thole*, 140 S. Ct. at 1621; *see also* Employee Benefits Security Administration, *Form 5500 Series*, U.S. DEP'T LAB., https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500 (last visited Apr. 18, 2023).

Standing doctrine sourced from mandatory authority and its implications on benefit plan litigation warrants careful consideration. This may necessitate additional efforts, pursuant to Part IV above, for potential legislative or administrative attention.