No. 12-526

IN THE
Supreme Court of the United States

FIRST UNUM LIFE INSURANCE CO.,
Petitioner,

v.

LEAH BILYEU, ET AL.,
Respondents.

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

**BRIEF FOR
THE AMERICAN COUNCIL OF LIFE INSURERS,
AMERICA'S HEALTH INSURANCE PLANS,
AND THE AMERICAN BENEFITS COUNCIL
AS AMICI CURIAE SUPPORTING PETITIONER**

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QUESTION PRESENTED

Whether the court of appeals erred in holding that when an ERISA plan seeks to recover overpaid benefits from a plan participant, "equitable relief" is available and "appropriate" under ERISA's remedial provision, 29 U.S.C. § 1132(a)(3), only if the participant still possesses the specific funds in question, or their specifically identifiable proceeds.

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BRIEF FOR THE AMERICAN COUNCIL OF LIFE INSURERS, AMERICA'S HEALTH INSURANCE PLANS, AND THE AMERICAN BENEFITS COUNCIL AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICI CURIAE[1]

The **American Council of Life Insurers** (ACLI) is the largest life insurance trade association in the United States, representing the interests of more than 300 legal reserve life insurers and fraternal benefit member companies operating in the United States. ACLI member companies are the leading providers of financial and retirement security products covering individual and group markets. They provide life, disability income and long-term care insurance, annuities, pension products and reinsurance. In the United States, these member companies represent more than 90% of the assets, premiums, and considerations of the life insurance and annuity industry. ACLI member companies provide the majority of private disability income insurance coverage in the United States. Most products sold by ACLI members in the group employee benefits mar-

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[1] All parties participating in this Court have consented to the filing of this brief. Documents reflecting the parties' consent are being lodged with the Clerk. Counsel for the parties participating in this Court received timely notice of the *amici*'s intention to file this brief. The Morgan Stanley Long Term Disability Plan and its Plan Administrator are not participating in this Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to find the preparation or submission this brief. No person other than the *amici*, their members, and their counsel made any such monetary contribution.

ket are purchased to fund benefits under plans subject to the requirements of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq*.

America's Health Insurance Plans (AHIP) is the national association representing health insurance plans that provide health and supplemental benefits to more than 200 million Americans through employer-sponsored coverage, the individual insurance market, and public programs such as Medicare and Medicaid. AHIP's members offer a broad range of products in the insurance marketplace, including health, disability, long-term care, dental, vision, and supplemental coverage. AHIP's membership includes approximately fifty-five insurance carriers providing disability income protection. AHIP seeks to facilitate, preserve, and increase the availability of affordable benefit coverage related to health care and disability.

The **American Benefits Council** (ABC) is a broad-based nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans under ERISA. ABC's more than 250 members include both small and large employer sponsors of employee benefit plans, as well as organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, ABC's members either directly sponsor or provide services to ERISA plans covering more than 100 million Americans.

Each organization regularly participates as *amicus curiae* in this Court and in other courts on issues that affect employee benefit plan design or administration. In particular, they have often filed briefs

in significant cases involving the scope of "appropriate equitable relief" under ERISA's remedial provision, including *Sereboff v. Mid Atlantic Medical Services, Inc.*, No. 05-260; *Great-West Life & Annuity Insurance Co. v. Knudson*, No. 99-1786; and *LaRue v. DeWolff, Boberg & Associates*, No. 06-856.

Amici and their members have a substantial interest in this case, which presents the question whether ERISA's remedial provision should be construed in a way that undermines a key aspect of plan design: the ability to pay disability benefits up-front without reduction, based on the plan participant's agreement to return any overpayment to the plan. *Amici* submit that the agreement is enforceable under a proper construction of ERISA even when the funds at issue are no longer in the participant's possession.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent, a participant in an ERISA plan, made an agreement. She asked her plan to pay her the full amount of benefits she could receive under her policy, even though she was eligible to receive Social Security Disability Insurance (SSDI) benefits for the same disability. Those SSDI benefits would offset some of her eligibility for benefits under her ERISA plan. In return for up-front payment without the offset, respondent agreed that if and when she collected her SSDI benefits, she would reimburse the plan for any resulting overpayment. That overpayment turned out to be more than half the benefits she had collected from the plan. But instead she spent the money.

This Court has held that an agreement to repay, such as the one respondent signed, creates an "equitable lien by agreement" that may be enforced under ERISA. *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 363–65 (2006). Four circuits have agreed that defendants may not defeat that equitable lien merely by alleging that they have already spent the money. But the Ninth Circuit in this case, subsequently joined by the Eighth Circuit, held that spending the money defeats the plan's ability to seek equitable relief under ERISA (unless the plan can trace specific proceeds).

That circuit split casts doubt on ERISA plans' ability to continue offering an up-front payment benefit like the one respondent chose. That benefit rests on a bargain: the participant's agreement that she will pay back any overpaid benefits. The decisions of the Eighth and Ninth Circuits hold that the participant's agreement is unenforceable once the money is spent. That leaves plans' ability to rely on such agreements in serious doubt.

This result harms ERISA plans, which have relied to their detriment on agreements that the Eighth and Ninth Circuits have now declined to enforce. It does not benefit employers or employees, who now may face higher premiums. And it does not help disabled workers, who benefit greatly from the ability to get their disability-insurance benefits up-front without waiting for SSDI benefits. In short, the circuit conflict negatively affects everyone who touches an ERISA disability plan—except those individuals who obtain a double recovery and spend the money quickly and untraceably.

The question presented is one of pressing, nationwide importance. This Court should resolve it.

ARGUMENT

The circuit conflict on the question presented is well developed. The panel majority acknowledged it. Pet. App. 23a, 27a ("We are unpersuaded by the view of those [four] other circuits."); *see also id.* at 34a (Rawlinson, J., dissenting) (explaining that "the majority opinion creates an unwarranted circuit split"). And the Eighth Circuit has since deepened the split. *See Treasurer, Trs. of Drury Indus., Inc. Health Care Plan & Trust v. Goding*, 692 F.3d 888, 897 (8th Cir. 2012) (*Goding*). *See generally* Pet. 11–20.

That conflict calls for this Court's prompt review, because as explained below, the decision below threatens immediate, significant consequences for employee benefit plans nationwide, particularly those providing employees with disability income insurance. Under the view taken by the Eighth and Ninth Circuits, ERISA provides no judicial remedy when a plan pays benefits subject to a participant's contractual commitment to repay duplicative benefits, but the participant then breaches that commitment and spends the money. This is a frequently recurring and important issue with major consequences for disability plans, the employers and participants who pay premiums to those plans, and the disabled employees who wish to receive benefits from those plans as soon as possible. If the conflict goes unreviewed, and ERISA plans remain unable to obtain judicial relief in cases like this in a significant part of the country, those plans will be forced to reconsider (on a nationwide basis) whether they can

continue to offer up-front benefits based on a repayment agreement that may be held unenforceable. That consequence would benefit no one. This Court should take this opportunity to resolve the circuit conflict and head off that negative consequence.

I. The Ninth Circuit's Decision Renders Unenforceable A Plan Participant's Contractual Commitment To Reimburse Her Plan For Overpaid Benefits

The decision below, and the related Eighth Circuit decision, are important because of what they portend: in those circuits, ERISA will offer no remedy when a plan participant agrees to repay duplicative benefits, but breaches that agreement and instead spends the benefits. That is a tremendously significant issue for ERISA plans, particularly those that offer disability income insurance, and for employers and participants. The decision below would severely handicap, if not eliminate, plans' ability to adopt the features here—features that control costs while paying benefits up-front in a way that benefits participants.

A. The Importance Of Offsets And Up-Front Payment To Disability Insurance Plans

Approximately 40 million Americans participate in employer-sponsored long-term disability (LTD) plans. That figure encompasses approximately 32% of private-sector employees. U.S. Dep't of Labor, Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States* 233 tbl.16 (Mar. 2012) (*National Compensation Survey*), http://www.bls.gov/ncs/ebs/benefits/2012/ebbl0050.pdf. Last year the beneficiaries of LTD policies re-

ceived more than $9.3 billion in payments to replace income lost to their disability. Council for Disability Awareness, *2012 Long Term Disability Claims Review* 1-2 (2012) (*LTD Claims Review*), http://www.disabilitycanhappen.org/research/CDA_LTD_Claims_Survey_2012.pdf. Those payments went to at least 662,000 individuals, of whom at least 155,000 were claiming LTD benefits for the first time last year. *Id.* at 2.[2]

Of those billions of dollars of payments, a substantial proportion comes from ERISA plans that contain plan terms like the ones at issue here: an offset provision and a provision for up-front payment despite the offset. Both are common practice in today's marketplace.

1. Premiums Are Set Based On Offsets

Disability insurance is a backstop. In virtually all cases, it guarantees not a fixed sum of money, but the replacement of a preset percentage of the insured's base salary. *See National Compensation Survey* 285 tbl.29. The benefit is usually 60% of earnings. *See id.* at 289 tbl.30.

Thus, disability insurance guarantees an insured that, if he is no longer able to work, he can count on continuing to receive at least a certain percentage of his former income. But he does not necessarily receive that replacement income only from the disability insurance policy: rather, portions of the replacement income may come from certain other sources,

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[2] These figures are understated, because they are based on a survey of companies representing only about 75% of the commercial disability-insurance market. *LTD Claims Review* 1.

specified in the disability-insurance policy, such as government disability benefits, which also replace a portion of lost income. *See* AHIP, *Guide to Disability Income Insurance* 11 (Oct. 9, 2009), http://www.ahip.org/Issues/Documents/2009/Guide-to-Disability-Income-Insurance.aspx.

Long-term disability insurance policies thus have long included an offset that applies *if* the insured qualifies for any payments from specified other sources, such as government disability benefits. *See, e.g.*, Pet. App. 42a. SSDI is the most significant form of government benefits subject to offset. Others may include worker's compensation payments; benefits under federal programs for miners, veterans, civil servants, or railroad workers; or other sources of income. If a policy guarantees the insured 60% of his base salary, then a portion of that 60% may come from government benefits, and the remainder from the disability policy.

An offset provision thus can significantly affect the benefits that an insurer must pay and, as a result, the premiums that it must charge. Premiums are set using actuarial projections of the insurer's net responsibility for benefits: not only the likely amount of disability income that participants will receive, but also the amount likely to be offset by other benefits. For example, in 2010, the median wage for Americans working full time was $3500 per month. A standard long-term disability policy would replace 60% of that sum, or $2100 per month. In the same year, the average SSDI payment was $1050 per month—exactly half the amount of the private disability benefit. Thus, an individual whose salary was $3500 per month and qualified as disabled under

both SSDI and his own disability policy could expect to receive $1050 per month from SSDI and $1050 from his policy. Without an offset provision in the insurance policy, by contrast, the policy would pay out twice as much (the full 60%) and the insured would receive 90% of his salary (private insurance plus SSDI benefits). ACLI, *Social Security Disability Income Integration in Group Disability Income Insurance* 2-3 (2012).[3]

With offsets, the insurer can charge lower premiums to guarantee a particular level of income replacement. And the participants remain secure in the guarantee that, if they become disabled, they will receive the contracted-for percentage of their income, whether or not they qualify for government benefits.

2. Up-front Payments Are Based On Agreements To Repay Offsets

The key provision in this case is the ERISA plan term that allowed respondent to receive up-front payment of disability benefits *even when* she was eligible for SSDI benefits that would offset her plan's responsibility. Pet. App. 42a. That plan term is particularly important to participants who become disabled, because private disability plans generally begin making payments much faster than the Social Security Administration begins making SSDI payments.

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[3] Circumstances in which income from disability benefits approximates income from working also raise the risk of overinsurance, which can create adverse incentives. *E.g.*, Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 Va. L. Rev. 845, 903 (1987) (overinsured individuals are "more likely to suffer a loss and more likely to stay disabled").

See p. 20, *infra*. But SSDI benefits are paid retroactively to the date of disability (minus a five-month waiting period), up to a year before the SSDI application was filed. *See* 42 U.S.C. § 423(c)(2). The question is what happens to the portion of the insured's income that SSDI will eventually cover, but is not yet covering.

Respondent's ERISA plan, like many disability plans, gave participants the option of receiving the full contracted-for percentage of their income up-front—even though nothing in ERISA requires it to offer that option. Respondent had the opportunity to choose to receive payments under her ERISA plan, totaling 60% of her income, while she waited for the Social Security Administration to process her SSDI claim. Pet. App. 42a. In return, she signed a contract agreeing to repay any overpayment, if and when she actually received a retroactive award of SSDI benefits. *Id.* at 13a-14a. In the language of equity doctrine, she gave her plan an "equitable lien by agreement" on the overpaid funds. If she did not want to make that bargain, she could have opted to receive a reduced benefit under the ERISA plan, reflecting the offset of the amount she could anticipate receiving from SSDI. *Id.* at 42a.

Up-front payments provide quick access to funds that could otherwise take a long time to recover. That is an important benefit to plan participants: as noted above, SSDI can account for a significant percentage of replacement income. Indeed, in this case, Respondent began receiving benefits under her insurance policy in October 2004, a few months after the date when she says her disability began. *See* Pet. App. 42a, 52a. Only thereafter did she apply for

SSDI, and she did not receive SSDI benefits until June 2008, when she received a retroactive award of nearly *four years* of benefits. Over the period retroactively covered by SSDI, she received more than $36,000 from her disability plan that, if she had not agreed to make repayment, would not have been paid to her. That is more than half of the total benefits she received from her plan. *See id.* at 43a.

B. The Eighth and Ninth Circuit's Decisions Leave Plans With No Judicial Remedy When An Insured Breaches Her Agreement To Reimburse Overpayments

An ERISA plan's ability to offer up-front payments depends on the participant's signing an agreement to return any overpayment. The holding below—that the agreement could not be enforced under ERISA because the participant spent the funds—threatens the viability of that plan term.

The only way that an ERISA plan or its fiduciary may enforce a participant's agreement in court is under ERISA's remedial provision, 29 U.S.C. § 1132(a). Congress gave particular attention to ERISA's "carefully crafted and detailed enforcement scheme," *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (citations omitted), and it made that federal remedial scheme the exclusive means of enforcing obligations that arise under an ERISA plan. *E.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208-09 (2004) (alternative state remedies preempted); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-48 (1985). If a plan fiduciary wants to enforce a repayment obligation that

arises under the terms of the ERISA plan, it must sue under ERISA or not at all.

The relevant provision of ERISA's remedial section is 29 U.S.C. § 1132(a)(3), which authorizes a plan fiduciary to seek "appropriate equitable relief . . . to enforce . . . the terms of the plan." This Court has confirmed that one "appropriate" form of equitable relief is an action to enforce an "equitable lien by agreement" like the one created here. *Sereboff*, 547 U.S. at 363–65. The plan and the participant may agree in advance that whenever particular funds come into the participant's possession, the participant will become "a trustee [of those funds] as soon as he gets a title to [them]." *Id.* at 366–67 (quoting *Barnes v. Alexander*, 232 U.S. 117, 121 (1914)). And such an agreement is enforceable by "appropriate equitable relief" under ERISA, without the need to apply "strict tracing rules" to identify precisely what property the participant holds that was once the property of the plan. *Id.* at 364–65. By contrast, a suit seeking to hold the participant liable for funds *that never came into his possession* seeks damages, not "equitable relief." *Id.* at 362–63 (explaining the holding of *Great-West*, 534 U.S. at 207, 212–14).

Like the plan in *Sereboff*, petitioner here is seeking to enforce its lien on funds (the overpaid benefits) that indisputably were in respondent's possession. But the Ninth Circuit held that in order to enforce that lien under ERISA, petitioner was required to show that the overpaid benefits *themselves*, or funds that can be traced directly to them, were still in respondent's possession. Pet. App. 21a. The Eighth Circuit has now reached the same holding: that because the defendant "no longer ha[d] any money to

which [the plan fiduciaries] claim[ed] an interest," the fiduciaries' suit to enforce the equitable lien was not within the class of "appropriate equitable relief"—or, indeed, "equitable relief" at all. *Goding*, 692 F.3d at 897.

Those decisions effectively nullify ERISA plans' ability to secure judicial enforcement of a plainly valid equitable claim. The panel majority recognized that if respondent had saved the disability benefits that she received under her plan, then petitioner would have prevailed in this action. Once the Social Security Administration paid respondent her SSDI benefits, petitioner could have enforced its equitable lien and recovered the duplicative disability benefits through an action for "appropriate equitable relief" under ERISA. The only reason why petitioner did not prevail under ERISA is because respondent had already spent the particular dollars that petitioner sought to recover.

That reasoning makes repayment obligations essentially unenforceable under ERISA, and particularly in disability cases. There is no reasonable prospect that participants who receive their full disability benefits up-front while waiting for their SSDI benefits will set aside and refrain from spending the portion of the benefits that might overlap with the future SSDI award. Indeed, the entire point of up-front payment of benefits is to allow a disabled individual who can no longer work to replace the specified percentage of her income as soon as possible. And if the court of appeals were correct that a participant can render her agreement unenforceable simply by spending the money she has agreed to return, she would have even fewer incentives to segregate

and preserve that money such that the plan can recover it.

Furthermore, when the repayment obligation is triggered by the participant's receipt of SSDI benefits (as opposed to other sources of income), plans have even fewer options, because SSDI benefits cannot themselves be attached. 42 U.S.C. § 407(a). Thus, disability plans or fiduciaries cannot seek to place a lien on the incoming SSDI payments, as the health insurance plan successfully did with a different kind of incoming payment in *Sereboff*.[4]

II. The Eighth and Ninth Circuits' Incorrect Rule Will Soon Have Nationwide Effect If This Court Does Not Resolve The Circuit Conflict

ERISA plans, particularly those offering disability insurance benefits, now face just the sort of conflicting rules that ERISA was adopted to prevent. ERISA provides employers with a guarantee that their benefit plans will be governed by a single, federal set of rules that guarantees "efficiency, predictability, and uniformity." *Conkright v. Frommert*, 130 S. Ct. 1640, 1649 (2010). That guarantee helps both employers and employees, because it "'induc[es] employers to offer benefits by assuring a predictable set of liabilities, under . . . a uniform [remedial] regime.'" *Id.* (quoting *Rush Prudential HMO, Inc. v. Moran*,

[4] In that case, the Sereboffs received damages from a tort judgment that, *inter alia*, compensated them for the same medical expenses for which their health insurance plan had paid. The plan obtained temporary injunctive relief requiring the Sereboffs to set aside the portion of the tort judgment that overlapped with the medical expenses. *See* 547 U.S. at 360.

536 U.S. 355, 379 (2002)) (first brackets in original). The circuit conflict over the question presented threatens to disrupt that uniformity.

Indeed, the decision below threatens to place many ERISA plans in what this Court has described as "an impossible situation." *Id.* at 1650. A plan "that covers employees in different jurisdictions" is supposed to be able to treat those employees alike. *Id.* at 1649. Yet it cannot do so if different employees become "entitled to different benefits depending on where they live, or perhaps where they bring a legal action." *Id.* at 1650. That is precisely the situation now facing nationwide plans—indeed, any plans that cover employees in the Eighth or Ninth Circuit or have minimum contacts there.

This Court's decision in *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), dealt with the factually and economically identical problem, albeit in the context of a different ERISA provision. FMC Corporation sponsored an ERISA plan that required participants to reimburse the plan if they received benefits to treat an injury and then recovered a tort judgment for the same injury. *Id.* at 54. Pennsylvania adopted an "antisubrogation" law to prohibit any such reimbursement requirements. *Id.* at 60. This Court recognized that if Pennsylvania could enforce such a law, plans would need "to calculate benefit levels in Pennsylvania based on expected liability conditions that differ from those in [other] States," which would "frustrate plan administrators' continuing obligation to calculate uniform benefit levels nationwide." *Id.* The Court accordingly held that ERISA preempted Pennsylvania's law. *Id.* at 61–65.

Just as Pennsylvania's antisubrogation law would have affected and disrupted ERISA plans well beyond the borders of the Keystone State, the decision below and the similar decision of the Eighth Circuit will have far-reaching consequences if they are not reviewed and reversed. It is not good enough for a reimbursement obligation to be judicially enforceable in *part* of the country. With the Eighth and Ninth Circuit decisions in this case and in *Goding* on the books, an ERISA plan must recognize that a participant's reimbursement obligation may not be judicially enforceable in most of the States west of the Mississippi River.

That, in turn, affects how the plan must calculate its potential liability to its participants—based not only on the circuits "where they live," but also on all circuits "where they [may] bring a legal action." *Conkright*, 130 S. Ct. at 1650. As this Court has noted, *id.*, ERISA's venue provision is permissive. Not only does it authorize nationwide service of process, it allows suit to be brought in any jurisdiction "where a defendant . . . may be found." 29 U.S.C. § 1132(e)(2). That language imposes few limitations: minimum contacts will suffice, *see* Pet. 29 (citing cases), and some courts might require even less. *Cf. Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 369 (3d Cir. 2002) (stating, in a non-ERISA context, that "[w]here Congress has spoken by authorizing nationwide service of process, . . . the jurisdiction of a federal court need not be confined by the defendant's contacts with the state in which the federal court sits").

In this litigation, for instance, the participant rather than the plan chose the venue. Respondent

sued the plan for benefits in her home district, and petitioner counterclaimed in that same district to enforce respondent's reimbursement obligation. Pet. App. 6a–7a.

Plans therefore can hardly be expected to calculate the actuarial likelihood of reimbursement by reference to every circuit where an individual participant might conceivably sue. If the law in the Eighth and Ninth Circuits remains unchanged, therefore, the likely consequence will be that plans must treat those obligations as judicially unenforceable *in every case*.

III. The Eighth And Ninth Circuits' Decisions Threaten To Leave Plans Unable To Offer Up-Front Payment Of Benefits

For any ERISA plan that "may be found" in the Eighth or Ninth Circuits, therefore, the decisions in this case and in *Goding* seriously undermine the ability to enforce participants' contractual agreements to repay benefits that are subject to an offset. If those agreements are unenforceable, plans may no longer be able to offer participants the choice that respondent enjoyed: to receive full up-front payment of benefits, rather than have a portion of benefits held back to offset anticipated SSDI benefits or other income. *Cf. Conkright*, 130 S. Ct. at 1649 (legal regime forcing plans to offer different benefits in different jurisdictions "might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them") (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987)). That outcome is not only undesirable to

plans, employers, and participants alike, but contrary to ERISA's very purpose.

Up-front payment in full, followed by reimbursement of any offset, is an arrangement that benefits everyone: the participants who become disabled, who are able to replace the full 60% of their income sooner; and the employers and participants who pay premiums, who benefit from the lower premiums that an enforceable offset provision brings. But to offer up-front payment in full, plans must be able to enforce their offset provisions later, by recovering overpayments from any participants who seek to keep and spend them. By undermining that ability, the Eighth and Ninth Circuits have undermined the up-front payment benefit itself. This Court should correct their error.

A. Offset Provisions Are Essential To Keeping Disability Insurance Affordable

Virtually every disability-insurance company offsets not only SSDI, but several other sources of income as well. *E.g.*, Robert W. Beal, *Group Long-Term Disability Benefit Offset Reserving Practices Survey* 4 (June 2010), http://www.soa.org/Files/Research/Projects/research-2010-group-ltd-ben-survey.pdf. Without those offset provisions, costs would increase significantly, and companies would be forced to either increase premiums or decrease benefits significantly. Offset provisions play an important role in keeping the cost of disability insurance affordable and the benefits appropriate.

Indeed, SSDI alone can offset a substantial percentage of the otherwise-applicable disability insurance payments. Studies have estimated that nearly

70% of individuals receiving payments from their long-term disability plans also qualified for SSDI payments, *LTD Claims Review* 3, and that those SSDI payments replaced an average of 33% of the beneficiaries' pre-disability income. Robert W. Beal, *Group Long-Term Disability Benefit Offset Study* 10 (July 2009), http://www.soa.org/Research/Research-Projects/Disability/research-offset.aspx. In that sample, therefore, if disability insurance guarantees 60% of pre-disability income, then payments to beneficiaries who receive SSDI would nearly double without the SSDI offset. Doubling payments to 70% of payment recipients would have a dramatic impact on premiums. "Estimates range from [a] 40% up to 100% increase in premiums if the SSDI offset provisions were excluded," depending on the demographics of the insured population. *Testimony from the American Council of Life Insurers Before the 2012 ERISA Advisory Council: Managing Disability Risks in an Environment of Individual Responsibility* 3 (Aug. 28, 2012), http://www.dol.gov/ebsa/pdf/AC-Clayburn.pdf. The alternative to such rate hikes would be equally substantial benefit reductions.

B. Without Some Enforceable Means Of Securing Reimbursement, Benefits Will Be Reduced To Anticipate Future Offsets

For offset provisions to play this important role in holding down premiums, the offsets must actually be recoverable. The plan can enforce the offset from the beginning, by reducing benefit payments by the projected amount of the offset. But because the wait for SSDI approval is so long, that can leave the disabled participant receiving significantly less income for a substantial period of time. That is why the up-front

payment option that respondent used is so popular and makes disability insurance a more useful safety net.

But a plan cannot use offsets *and* offer up-front payment in full, unless there is some judicially enforceable way to enforce the offset provision later, through reimbursement. Otherwise the plan, and the employer and participants who pay the premiums, lose the benefit of the offset provision. That is exactly what will likely happen under the decision below: offsets and up-front payments will no longer be able to coexist.

If the decision below does force plans to abandon up-front payment, then disabled participants will have to receive reduced benefits while their SSDI applications are pending. That is a significant consequence: for those who qualify, it can take months or even years for the Social Security Administration to approve an SSDI claim. It can take even longer if the applicant must face a hearing, as is increasingly common. In 2009, resolving an SSDI case at the lowest administrative level took an average of 119 days. Cases involving hearings—of which there were more than 600,000—took an average of 812 days, well over two years. And cases litigated all the way to federal court took more than five years. Office of Inspector General, Social Security Admin., *Audit Report: Overall Disability Claim Times for 2009*, at 3 (May 2011).

In contrast, ERISA plans offering disability benefits must decide disability claims within 45 days, with extensions permitted only as specified. 29 C.F.R. § 2560.503-1(f)(3). And disability insurance generally uses a somewhat less stringent definition

of disability than SSDI, meaning that some of the same claimants who struggle for years to obtain SSDI benefits receive benefits promptly under their disability insurance policies. Respondent's case is not atypical: she waited more than four years for a retroactive award of SSDI benefits, while receiving more than $30,000 in benefits from her plan that were subject to offset. *See* pp. 10–11, *supra*.

The often-lengthy delay in receiving SSDI benefits is a further reason why an offset provision, to be meaningful, must be *judicially* enforceable. By the time respondent received her SSDI benefits, she was no longer receiving disability benefits under the ERISA plan; the plan therefore was no longer able to collect her past liability by reducing her future payments. And even if respondent were still receiving benefits, petitioner could not easily recover the offset of more than $36,000 merely by reducing her future payment: her *entire* disability payment was less than $30,000 per year. *See* Pet. App. 42a–43a (petitioner was disabled for 753 days and received about $61,000 in benefits).

Thus, if agreements like the one respondent signed are unenforceable under ERISA—or if enforcement can be defeated by merely spending the overpayment before the plan can recover it—then ERISA plans will have to reconsider the viability of the up-front payment option. That is already a significant possibility for any plan that "may be found" in the Eighth or Ninth Circuit. This Court should step in to resolve the circuit conflict before those plans are compelled to re-evaluate the continued viability of this important benefit nationwide.

IV. The Impact Of The Decision Below Extends Beyond Disability Benefits

Although the consequences of the decision below are particularly pernicious in the context of disability benefits, its remedial holding will spill over into other employee-benefits contexts as well. ERISA's remedial provision applies to *all* employee benefit plans, no matter what benefit they offer, and various types of benefit plans depend on the availability of reimbursement to lower costs and make benefits more widely available.

This Court and the courts of appeals have considered numerous cases in which plans sought reimbursement of health benefits once the participants recovered damages for their injuries in tort. *See, e.g.*, *Sereboff*, 547 U.S. at 360; *Great-West*, 534 U.S. at 207; *Holliday*, 498 U.S. at 54–55; *Goding*, 692 F.3d at 891-92; *Longaberger Co. v. Kolt*, 586 F.3d 459, 462-65 (6th Cir. 2009). Tort judgments, unlike SSDI benefits, are not protected from attachment by a statutory anti-alienation rule. *See* pp. 13–14, *supra*. But on the reasoning of the court below, once a tort judgment is spent, it likely cannot be recovered through "appropriate equitable relief" under ERISA, unless the ERISA plan can somehow identify some particular property still in the participant's possession as the proceeds of the already-spent tort judgment. The same is true of the numerous other sources of income that may trigger an offset, from worker's compensation awards to black-lung benefits.

The circuit split in the specific context of disability benefits would warrant this Court's review even standing alone. *Compare, e.g.*, *Cusson v. Liberty Life*

Assurance Co. of Boston, 592 F.3d 215, 231 (1st Cir. 2010), *and Gutta v. Standard Select Trust Ins. Plans*, 530 F.3d 614, 621 (7th Cir. 2008), *with* Pet. App. 22a–23a. As shown above, the issue is of particular and pressing nationwide importance in the disability context. But if this Court does not step in, the impact will not be limited to disability benefits alone.

V. This Court Should Grant Review Now Rather Than Hold The Case

The Court currently has pending another case that involves equitable relief under Section 1132(a)(3). In *U.S. Airways, Inc. v. McCutchen*, No. 11-1285 (argued Nov. 27, 2012), the question presented is whether a plan participant may raise certain equitable *defenses* to a plan's claim seeking to enforce an equitable lien by agreement under Section 1132(a)(3). Answering that question will not resolve the circuit conflict at issue in this case; no matter which side prevails in *McCutchen*, the question presented here still needs review and resolution by this Court.

McCutchen involves a health insurance plan fiduciary's action to enforce its equitable lien on payments from a tort settlement and underinsured-motorist coverage. It is undisputed that McCutchen possesses the funds the plan seeks. The only question is whether various equitable doctrines limit the plan's ability to recover the full amount of those funds. The resolution of that question will not affect this case, except potentially to heighten the need to resolve the question presented here. In this case, respondent has no similar claim that her circumstances make it inappropriate to enforce an equitable lien

against her property. *See* Pet. App. 26a (acknowledging that "the district court's decision may have produced an equitable result"). Therefore, she can prevail only if, by spending the funds in question, she has precluded petitioner from seeking that equitable result. *Id.* While *McCutchen* turns on what equitable relief is "appropriate" in particular circumstances, this case turns on what is within the category of "equitable relief" in the first place.

For that reason, resolving *McCutchen* will not clear up the circuit split that this case implicates—even if this Court were to hold this petition and then grant, vacate, and remand following *McCutchen*. The Ninth Circuit will not likely change its position irrespective of *McCutchen*'s outcome, and even if it did, the circuit conflict would persist, because of the Eighth Circuit's decision in *Goding*.

* * * * *

ERISA was enacted to give employers a predictable, uniform legal framework that would encourage them to offer benefits to their employees. The circuit split that the decision below has created disrupts that uniformity, upsets settled expectations, and threatens to frustrate a key element of plan design that helps employers and participants alike. The Court should take this opportunity to make clear that holding respondent to her agreement, which she made in exchange for up-front payment of her full benefits, is squarely within the scope of "appropriate equitable relief" under ERISA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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