No. ____

In the Supreme Court of the United States

CONNIE J. EDMONSON,
on behalf of herself and all others similarly situated,
Petitioner,

v.

LINCOLN NATIONAL LIFE INSURANCE COMPANY,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When an ERISA plan permits the use of retained asset accounts to settle life-insurance claims but leaves discretion to the insurer to determine the interest rates and other features of those accounts, does the insurer cease to act as a fiduciary when it creates the account (as the Second and Third Circuits have held) or do its subsequent discretionary acts remain subject to ERISA's protections (as the First Circuit has held)?

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INTRODUCTION

Over the past decade, the life-insurance industry has increasingly embraced the use of "retained asset accounts"—arrangements where the insurer does not pay death benefits in a lump sum but instead retains the funds and sends the beneficiary a book of blank drafts resembling a checkbook. Until the beneficiary writes a draft for a specific amount, the insurer may invest all the funds for its own profit, enjoying the spread between the investment earnings and the often much lower interest rate credited to the beneficiary. Absent legal safeguards, the risk of abuse and self-dealing is evident.

Despite the ubiquity of this practice, the courts remain hopelessly divided over the legal ground rules—including whether insurers have any fiduciary obligations at all. Even before the decision below, the circuits parted ways over the question presented here: Is an insurer that uses a retained asset account bound by fiduciary obligations under ERISA when the ERISA plan gives the insurer discretion to set the interest rate and other key terms? The First Circuit held yes; the Second Circuit held no. Tens of billions of dollars, the benefits of millions of Americans, and the policies of some of the nation's largest insurers hang on the answer.

In this case, the Third Circuit acknowledged the split, sided with the Second Circuit, and compounded the confusion. The resulting legal uncertainty is intolerable for insurers (who must structure national policies), plan sponsors (who face the risk that liability will be shifted onto them), and beneficiaries (who face the risk of undisclosed self-dealing). Only this Court can resolve that uncertainty. Because a chief goal of ERISA is to establish uniformity in the disbursement of benefits, the issue cries out for this Court's intervention.

OPINIONS BELOW

The Third Circuit's opinion in this case is reproduced at Pet. App. 1 and reported at 725 F.3d 406. The Third Circuit's unreported order denying rehearing and rehearing en banc is reproduced at Pet. App. 136. The district court's summary-judgment decision is reproduced at Pet. App. 55 and can be found at 899 F. Supp. 2d 310. The district court's motion-to-dismiss decision is reproduced at Pet. App. 93 and can be found at 777 F. Supp. 2d 869.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2013. Pet. App. 1. The order of the court of appeals denying a timely petition for rehearing or rehearing en banc was entered on September 4, 2013. *Id.* at 134. On December 19, 2013, Justice Alito granted an extension of the time within which to file this petition until February 3, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and implementing regulations are reproduced in the appendix at 136.

STATEMENT OF THE CASE

A. Retained Asset Accounts

For many years, insurers paid death benefits to life-insurance beneficiaries the way one might expect: by providing a check for the amount owed, which the beneficiary could then invest or deposit into a personal bank account. That has now changed. "Over the past decade," it has become increasingly common—"in an industry that touches virtually every American"—for

insurers to settle life-insurance claims using "retained asset accounts." Bloomberg, *Death Benefit Accounts Seem to Slight Survivors*, N.Y. Times (July 29, 2010), *available at* http://www.nytimes.com/2010/07/29/business/29insure.html; David Evans, *Duping the Families of Fallen Soldiers*, Bloomberg (July 28, 2010), *available at* http://www.bloomberg.com/news/2010-07-28/duping-the-families-of-fallen-soldiers.html.[1]

These accounts work like this: When a policyholder dies and the survivor submits a claim, the insurance company does not provide a check for the amount owed. It does not provide any money at all. Instead, the company sets up an empty account in the survivor's name and mails a "checkbook" linked to that account to the survivor's address. The insurer informs the survivor that an account has been created and that it will be credited up to the full amount payable with interest at a rate chosen by the company ("typically 0.8 to 1.5%"). Maria O'Brien Hylton, *Disclosure to the Rescue: A Conceptual Framework for Retained Asset Accounts*, 80 Tenn. L. Rev. 69, 71 (2012). Under this arrangement, the insurer retains the proceeds in its general corporate treasury, where they generate investment returns, until the survivor writes a draft, at which point the insurer will deposit just enough money into the survivor's account to cover that draft. Survivors who want out of this arrangement must take the affirmative step of withdrawing all of their money at once, which they often fail to do—even when they would prefer to—because of what behavioral economists call "status quo bias" and the

[1] *See id.* (noting that "[t]here are more than 300 million active life insurance policies in the U.S.," and that "the industry holds $4.6 trillion in assets").

"immense power of default options." Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* 85 (2008).

The retained-asset arrangement was first devised in the 1980s by a MetLife executive who wanted to "c[o]me up with a way for MetLife to hold onto death benefits" rather than pay them to survivors, so it could make more money. Evans, *Duping the Families of Fallen Soldiers*. His plan worked. By giving beneficiaries low interest rates while earning higher returns investing their money, insurers have been able to pocket millions of dollars in extra profits using these accounts. Even in the downturn of 2008, for example, Prudential Financial "paid survivors . . . 1 percent interest" on their accounts as "it earned a 4.8 percent return on its corporate funds." Bloomberg, *Death Benefit Accounts Seem to Slight Survivors*. A spread like that, multiplied over many thousands of accounts, translates to real money: The executive who created the device "says MetLife makes $100 million to $300 million a year from investment returns on the death benefits it holds." *Id.* And that is just one insurer. As early as 1997, retained asset accounts held more than $50 billion and were used by 175 life insurers. Joseph Lauria, *Many Default to the Retained Asset Account*, Nat'l Underwriter Life & Health, Sept. 22, 1997, 1997 WLNR 4682274.

If used responsibly, retained asset accounts can be mutually advantageous for insurers and the beneficiaries of the policies they issue. When insurers are left unchecked, however, the profits generated by the use of these accounts can come at the expense of the survivors. Because insurance companies maximize profits by finding the sweet spot between (1) paying the lowest interest rate possible and (2) setting such a low rate that

it triggers withdrawals, they have a strong economic incentive to obscure important details about the arrangement. For example, insurers often fail to mention that retained asset accounts are not insured by the Federal Deposit Insurance Corporation (FDIC). Nor do insurers typically tell survivors that the money owed is not in fact deposited into the accounts—and so their "checks" are "actually drafts, or IOUs, issued by" the insurer, which are often misleadingly "set up" to "impl[y] that [the bank] stands behind the accounts and that they are thus backed by the FDIC." Evans, *Duping the Families of Fallen Soldiers*.

By giving survivors the mistaken impression that they are receiving a "bank account," these practices subject survivors to far greater risk than they are led to believe. This is no academic concern: As the landmark collapse of MF Global illustrates, even the largest financial institutions can become insolvent when they risk consumers' money to chase spreads. *See, e.g.*, Julie Steinberg, *MF Global Customers Seek Closure with Final Payments*, Wall Street Journal (Oct. 4, 2013), *available at* http://on.wsj.com/1aPVlte ("In the week leading up to the firm's bankruptcy on Oct. 31, 2011, an estimated $1.6 billion in customer money flew out the door as the firm frantically tried to fill margin calls."); Tim Worstall, *Jon Corzine's Disgrace at MF Global: Worth Reminding Ourselves Why It All Happened*, Forbes (June 28, 2013), *available at* http://onforb.es/1fwvFk2 ("[F]irms like MF global make and made their money by investing the float. With interest rates at near zero they went looking for higher yield. Other things being equal, higher yield means

higher risk and this one was sufficiently risky that it blew up.").[2]

With these drawbacks, and with interest rates that are sometimes "less than half of the rate available at some banks with accounts insured by the FDIC up to $250,000," retained asset accounts are not for everyone—making the need for basic safeguards all the more important. Evans, *Duping the Families of Fallen Soldiers*. Indeed, "[w]hen consumers have the option to choose between [these accounts] and lump-sum check payments, the overwhelming majority choose lump-sum check payments." Gov't Accountability Office, *Federal Employees' Group Life Insurance: Retirement Benefit and Retained Asset Account Disclosures Could Be Improved*, at 24 (Nov. 2011), *available at* http://www.gao.gov/assets/590/586835.pdf ("GAO Report").

For these reasons, retained asset accounts "have been the subject of considerable recent controversy."

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[2] Retained asset accounts can pose other risks to beneficiaries. Retailers sometimes reject drafts when used to make purchases because they cannot confirm that the account has sufficient funds. Evans, *Duping the Families of Fallen Soldiers*. And if a forged check is used to withdraw money, or there is other fraud on the account, then both the bank and the insurer could deny responsibility, with the beneficiary caught in the middle. *See* David Glovin, *Forged MetLife "Checks" Show Retained-Asset Account Risks*, Bloomberg (August 24, 2010), *available at* http://www.bloomberg.com/news/2010-08-24/forged-metlife-check-lawsuit-costs-show-risks-of-retained-asset-account.html (describing case in which MetLife refused to cover losses a beneficiary sustained when a third party forged her signature on checks drawn on her account, thus forcing her to sue MetLife and the bank that processed the drafts to recover her losses); *Williams v. Metro. Life Ins. Co.*, 367 F. Supp. 2d 844 (E.D.N.C. 2005).

Hylton, *Conceptual Framework for Retained Asset Accounts*, 80 Tenn. L. Rev. at 70. Some critics have gone so far as to call their use "a scheme to defraud by inducing the policyholder's beneficiary to let the life insurance company retain assets they're not entitled to," thereby "turning death claims into a profit center." Evans, *Duping the Families of Fallen Soldiers*. These concerns have prompted recent investigations into the practice by the FDIC, state insurance commissioners and attorneys general, federal and state legislators, and others. Glovin, *Forged MetLife "Checks" Show Retained-Asset Account Risks*.

They have also spawned litigation, which has created "uncertainty" and "inconsistencies in the courts" as they struggle "to figure out what rights survivors have" and "what responsibilities insurance companies have to the holders of retained-asset accounts." *Id.* Before the decision below, the First and Second Circuits were "the only federal appellate courts" to rule on the legality of retained asset accounts, and they "split on the question of the scope of ERISA fiduciary duty." Hylton, *Conceptual Framework for Retained Asset Accounts*, 80 Tenn. L. Rev. at 78. As commentators have recognized, that is a "crucial question." *Id.* at 74-75.

B. Statutory Background

The Employee Retirement Income Security Act of 1974 (ERISA) imposes basic standards for employee benefit plans, including the core requirements that plan fiduciaries (1) discharge their duties "solely in the interest of the participants and beneficiaries" of the plan, and "for the exclusive purpose . . . of providing benefits to participants and their beneficiaries," 29 U.S.C. § 1104(a)(1); and (2) may not "deal with the assets of the plan in his own interest or for his own account," *id.*

§ 1106(b)(1). In general, a person is a fiduciary "to the extent" that "he exercises . . . any authority or control" over plan "assets," or has "discretionary authority or discretionary responsibility" in the plan's "management" or "administration." *Id.* § 1002(21)(A).

Fiduciary "administration" means "to perform the duties imposed, or exercise the powers conferred, by the trust documents." *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996). But that is not all it means. As this Court has explained: "There is more to plan (or trust) administration than simply complying with the specific duties imposed by the plan documents or statutory regime; it also includes the activities that are ordinary and natural means of achieving the objective of the plan. Indeed, the primary function of the fiduciary duty is to constrain the exercise of *discretionary* powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime." *Id.* at 504 (citation and internal quotation marks omitted) (emphasis in original).

C. Factual Background

Connie Edmonson is the beneficiary of an ERISA-governed employee benefit plan that provides death benefits through a group life-insurance policy issued by Lincoln. The plan states that "[u]pon receipt of satisfactory proof of a Dependent's death while insured under this Policy, the Company will pay the amount of the Dependents['] Life Insurance in effect on the date of such death," and that "[a]ny benefits payable under this Policy will be paid immediately after the Company receives complete proof of claim." Pet. App. 3-4. But the plan does not provide any specifics about how the benefits will "immediately" be paid. It makes no mention of the possibility of using a retained asset account, nor

does it say what the interest rate and other terms of such an account would be if one were used. *Id.* at 4.

When Ms. Edmonson's husband died, she submitted a claim for $10,000 in benefits. The claim form explained that Lincoln's "usual method of payment" for claims of $5,000 or more "is to open" a "personal, interest-bearing account" in the survivor's name. *Id.* 62. The form also explained that, "instead of receiving a lump sum of money through the mail," Ms. Edmonson would "receive a checkbook" allowing her to "write checks for any amount over $250 and up to [the] full balance at any time." *Id.* at 62-63. The form did not give any further details about the terms of the "account," such as the amount of interest it would earn (or that it would not be backed by the FDIC nor have any funds immediately deposited into it). *Id.*

Lincoln approved the claim. It mailed Ms. Edmonson a letter informing her that it had established an account in her name that would be credited in the amount of $10,000. Lincoln also provided a "checkbook" from which Ms. Edmonson could access her life-insurance proceeds, as well as a packet of the account's terms and conditions. *Id.* at 63. The packet finally provided the minimum interest rate determined by Lincoln: It would be set "equal to the national average for interest bearing checking accounts as published by Bloomberg, plus 1%." *Id.* The packet also stated that the only way Ms. Edmonson could receive "the entire proceeds immediately" was "to write one check for the entire account balance." *Id.* And it explained that Lincoln expressly reserved the right to change the terms and conditions governing the accounts—terms and conditions that are nowhere to be found in the plan itself. *Id.*

After setting up the account, Lincoln did not immediately transfer any money to fund it. Rather, the company retained the full $10,000—investing the proceeds and keeping for itself the difference between what it earned and what it chose to credit as interest—until the company was called upon to transfer funds to cover drafts drawn on the account. That happened three months after the account was established, when Ms. Edmonson withdrew the entire amount of the proceeds owed to her. Her account was later closed and a check was issued to her for the $52.33 of interest that had accumulated on the account since it was opened. *Id.* at 3.

D. Proceedings Below

Ms. Edmonson brought suit against Lincoln on behalf of herself and all others similarly situated, alleging that the company had breached its ERISA fiduciary duties by creating a retained asset account, investing the retained assets in its own account, and keeping most of the resulting profits. *Id.* at 5.

1. Lincoln moved to dismiss on the ground that it was not acting as a fiduciary and therefore had no fiduciary obligations to Ms. Edmonson. *Id.* at 99. The district court denied the motion. *Id.* at 124. The court concluded that "[w]here the benefits are held, and the level of control [Lincoln] exercises over benefits," are "key factual inquiries in determining [Lincoln's] fiduciary status." *Id.* at 117. The court noted the "substantial Supreme Court . . . precedent" supporting its position, along with the First Circuit's decision in *Mogel v. UNUM Life Insurance Co.*, 547 F.3d 23 (1st Cir. 2008), which "determined that the insurer, UNUM, 'had possession of [the funds] and enjoyed their use' while the funds were in the [retained asset accounts], and therefore UNUM

was acting as a fiduciary." Pet. App. 94, 122 (quoting *Mogel*, 547 F.3d at 26).

2. "[R]evisit[ing]" this "difficult issue" at summary judgment, however, the district court reversed course. *Id.* at 55. The court observed that "both the First Circuit and the Second Circuit addressed the issue in similar circumstances to the case at bar." *Id.* at 69. But this time the district court "follow[ed] the rationale" of the Second Circuit's decision in *Faber v. Metro. Life Insurance Co.*, 648 F.3d 98 (2d Cir. 2011), rather than the First Circuit's decision in *Mogel*. *Id.* at 59. In *Faber*, "[u]nlike in *Mogel*, the court held that [the insurer] was not acting in a fiduciary capacity when it invested the funds backing plaintiffs' [retained asset accounts] because it 'discharged its fiduciary obligations as a claims administrator and ceased to be an ERISA fiduciary'" when it established the accounts. *Id.* at 74. Finding *Faber*'s holding "more persuasive" than *Mogel*'s, the district court held that "Lincoln was not acting as an ERISA fiduciary when it retained the funds backing [Ms. Edmonson's retained asset] account and invested them for its own profit." *Id.* at 77, 85.

3. The Third Circuit affirmed. Acknowledging the split between *Mogel* and *Faber*, the panel explained that "[t]wo of our sister circuits have considered [the] question" whether an insurer acts as an ERISA fiduciary when it uses a retained asset account to settle death benefits, "but have come to different conclusions." *Id.* at 21. In contrast to those cases, however, the decision below adopted its own approach for addressing the question. It treated the use of retained asset accounts as *two independent acts*: first, the insurer decides whether to use a retained asset account; then, the insurer decides

whether to invest the proceeds for its own benefit. *Id.* at 21-39.

The panel analyzed these acts separately. It held that the first act "was an act of plan administration or management" that involved discretion because "Lincoln had the choice whether to pay Edmonson with the [retained asset account] or with some other form of payment." *Id.* at 25-26. The panel further held that this act "involved exercising authority and control over plan assets." *Id.* at 26. Thus, "Lincoln was subject to ERISA's fiduciary duties when it performed this act." *Id.* But the panel concluded that "Lincoln did not breach its fiduciary duties when it exercised its discretion to pay Edmonson with a retained asset account" because "[t]he retained-asset account method of payment is not in itself necessarily inconsistent with ERISA, and it is inconsistent with ERISA's goals to prohibit this type of arrangement." *Id.* at 28 (internal quotations omitted).

As for what the panel perceived to be the second act—investing the proceeds for Lincoln's own profit—the panel found "*Faber*'s rationale persuasive" and held that this act was not a fiduciary act because "Lincoln fulfilled its obligation to pay Edmonson when it established the [retained asset account]." *Id.* at 31, 33. In reaching this conclusion, the panel brushed off a lengthy quotation from this Court's decision in *Varity*, believing it to be taken "out of context." *Id.* at 33. This Court in *Varity* explained that "[t]here is more to plan (or trust) administration than simply complying with the specific duties imposed by the plan documents," and that "the primary function of the fiduciary duty is to constrain the exercise of *discretionary* powers which are controlled by no other specific duty imposed by the trust instrument

or the legal regime." 516 U.S. at 504 (emphasis in original).[3]

Ms. Edmonson timely filed a petition for rehearing en banc, which was denied on September 4, 2013. *Id.* at 134. This petition followed.

REASONS FOR GRANTING THE PETITION

I. The Question Presented Has Confused and Divided the Circuits.

Three circuits, including the court below, have now confronted the question presented in this case: whether an insurance company acts as an ERISA fiduciary by settling benefit claims using a retained asset account when the ERISA plan gives the company discretion to set the account's material terms. Their answers to that question cannot be reconciled with one another.

Even before the decision below, commentators recognized that the circuits "have split on the question of the scope of ERISA fiduciary duty" concerning retained asset accounts and that the First and Second Circuits, "presented with similar facts," "came to very different conclusions about the reach of ERISA's fiduciary provisions." Hylton, *Conceptual Framework for Retained Asset Accounts*, 80 Tenn. L. Rev. at 78. The court below acknowledged that disagreement and compounded it: "Two of our sister circuits have considered this question, but have come to different conclusions." Pet. App. 21. This important and recognized split warrants this Court's immediate intervention.

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[3] Judge Jordan dissented on standing grounds. Pet. App. 54.

On one side of the split is the First Circuit's 2008 decision in *Mogel v. Unum Life Insurance Co. of America*, 547 F.3d 23 (1st Cir. 2008). The question there was the same as the one the presented here: whether the insurance company "acted as an ERISA fiduciary when, by establishing [retained asset accounts]" to pay benefits under plans that neither mentioned nor categorically prohibited their use, "the company retained and invested death benefits presently due beneficiaries." 547 F.3d at 26. The First Circuit answered yes. It reasoned that an insurance company "cannot be said to have completed its fiduciary functions under the plan when it set up [the accounts] and mailed the checkbooks, retaining for its use the funds due until they were withdrawn." *Id.* A "euphemistically named" account "accompanied with a checkbook," the First Circuit held, is "no more than an IOU." *Id.* at 27.

On the other side of the divide is the Second Circuit's 2011 decision in *Faber v. Metropolitan Life Insurance Co.*, 648 F.3d 98 (2d Cir. 2011). That case also involved ERISA plans that did not provide specifics regarding retained asset accounts (like their interest rates), although the plans there expressly permitted their use. The Second Circuit—in a fundamental disagreement with the First Circuit—held that an insurance company "discharge[s] its fiduciary obligations under ERISA when it establishe[s] the [accounts]," even when the company *retained discretion* under the plans in determining how to structure them. 648 F.3d at 100. On the Second Circuit's view, once an account is "set up and credited" (no matter *how* it is set up and credited), the insurer has "provided all of the benefits promised" under the plan. *Id.* at 105. The Second Circuit's decision to "carve[] out a different path in *Faber* … has become the basis for a distinct line of cases that rejects the who-

holds-the-money approach adopted in *Mogel*." Hylton, *Conceptual Framework for Retained Asset Accounts*, 80 Tenn. L. Rev. at 82.

These "different conclusions" are bad enough, but the confusion they have wrought is exacerbated by the Third Circuit's decision in this case. Drawing an artificial temporal distinction at odds with the other courts' approaches, the Third Circuit sliced up the question into two: First, was the insurance company acting as a fiduciary when it chose to settle claims using a retained asset account? And second, was it acting as a fiduciary when it later invested the retained assets for its own benefit?

Having created two separate questions, the court then gave two separate answers: The first act, according to the Third Circuit, is a fiduciary act because there is discretion. But "Lincoln did not breach its fiduciary duties when it exercised [that] discretion" because "[t]he retained-asset account method of payment is not in itself necessarily inconsistent with ERISA." Pet. App. 28. The second act, however, is *not* a fiduciary act, according to the Third Circuit, because "Lincoln had completed its obligations with respect to managing or administering the plan once it established the [account]." *Id.* at 33-34; *see id.* at 34 ("Lincoln was not managing or administering the plan when it invested the retained assets"). That holding cannot be reconciled with the First Circuit's holding in *Mogel* that an insurance company "cannot be said to have completed its fiduciary functions under the plan when it set up [the accounts] and mailed the checkbooks." 547 F.3d at 26.

The Third Circuit's two-step approach is not only at odds with that of other circuits but also lacks any basis in ERISA. As even the Second Circuit recognized in *Faber*,

there is only *one act* at issue in these cases: the creation of a retained asset account to settle plan benefits. And the question under ERISA is whether the insurer retains any discretion in performing that act (whether in deciding to use a retained asset account in the first place, choosing its terms, or both). At bottom, each of these three cases grapples with that question. Yet they come to very "different conclusions," and for very different reasons.

To be sure, the ERISA plans in *Mogel* were slightly different than the one at issue here. They provided that benefits would ordinarily be paid "in one lump sum" upon "proof of claim," while allowing that default setting to be overridden if "otherwise elected." 547 F.3d at 25. The plan here provides that "[a]ny benefits payable under this Policy will be paid immediately after the Company received complete proof of claim." Pet. App. 4

But, as far as the question presented is concerned, there is no meaningful difference in that semantic distinction, and certainly nothing in *Mogel* turned on it. *See Merrimon v. Unum Life Ins. Co. of America*, 845 F. Supp. 2d 310, 319 (D. Me. 2012) (rejecting an attempt "to distinguish *Mogel* because the plaintiffs in *Mogel* had policies that called for payment to the beneficiaries by a lump sum payment," instead explaining that a "[c]ourt is obliged to look at whether [insurers] retained any discretion … and, if so, whether it exercised that discretion solely in their interests").

To the contrary, the First Circuit relied on this Court's case law and held that the company's "disposition to the beneficiaries of benefits under the plan falls comfortably within the scope of ERISA's definition of fiduciary duties with respect to plan

administration." *Mogel*, 547 F.3d at 27 (citing *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996)).

That holding—and its interpretation of this Court's precedent in *Varity*—cannot be reconciled with the decision below, which embarks on an extended effort to distinguish *Varity*, claiming that a large quotation from that opinion was taken "out of context." Pet. App. 33. Such disagreement concerning the scope of this Court's holdings is untenable, and this Court should step in to resolve the disagreement and bring clarity to what is fast becoming a hopelessly confusing issue.[4]

II. The Question Presented Is Exceptionally Important and Cries Out for This Court's Intervention.

The extent to which insurers who employ retained asset accounts have ERISA fiduciary obligations to beneficiaries is an issue of enormous practical significance. Life insurance is "an industry that touches virtually every American," and these accounts have

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[4] This disarray has been exacerbated by several courts' confusion concerning the Department of Labor's position. In *Faber*, the Secretary of Labor filed a letter brief in response to an invitation from the Second Circuit to offer the agency's views on three factbound questions. Dep't of Labor amicus letter brief (Feb. 17, 2011), available at http://www.dol.gov/sol/media/briefs/faber(A)-02-17-2011.pdf ("DOL Br.") (listing questions). The DOL's brief concluded that "the Secretary has no reason to believe that [the insurer in *Faber*] has mismanaged plan assets, or indeed is acting as a plan fiduciary, in its conduct following its creation of the [retained asset accounts]." DOL Br. 15. But the DOL made clear that its conclusion was limited to "the facts and circumstances of [that] case." *Id.* The DOL's brief, properly understood, does not express a position on the question presented. Accordingly, this Court may wish to call for the views of the Solicitor General.

quickly become the predominant way of settling claims. Evans, *Duping the Families of Fallen Soldiers*. The question presented is a "crucial question" for the future use of these accounts. Hylton, *Conceptual Framework for Retained Asset Accounts*, 80 Tenn. L. Rev. at 74-75.

As the use of retained asset accounts has increased, so have concerns about their misuse. In late 2010, the National Association of Insurance Commissioners and the National Conference of Insurance Legislators issued guidance intended to improve disclosures to consumers regarding this subject.[5] Shortly thereafter, the National Association of Insurance Commissioners issued a model bulletin for use by state regulators.[6] And in 2012, the GAO issued a report explaining its decision to stop using retained asset accounts as the default option under the life-insurance program for federal employees. *See generally* GAO Report, *supra*. The report noted that the "overwhelming majority" of consumers prefer "lump-sum check payments" to these accounts, and described "concern about the kinds of protections that apply to [these accounts] and how well beneficiaries understand them" given the lack of "disclosures." *Id.* at 24, 26.

Because of these concerns, it is unsurprising that retained-asset-account practices have generated significant litigation. And because of the ubiquity of employer-sponsored benefit plans, it is also unsurprising

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[5] *See, e.g.*, *NCOIL President Unveils Beneficiaries' Bill of Rights*, Letter of National Conference of Insurance Legislators (Aug. 12, 2010), *available at* http://www.ncoil.org/Docs/2010/PRreBillofRights.pdf.

[6] *Retained Asset Account Sample Bulletin*, National Association of Insurance Commissioners (2010), *available at* http://www.naic.org/documents/legal_bulletin_raa.pdf.

that much of this litigation has been brought under ERISA. *See* Brendan S. Maher & Peter K. Stris, *ERISA & Uncertainty*, 88 Wash U. L. Rev. 433, 449-451 (2010) (explaining the extent to which private insurance is provided through ERISA welfare benefit plans). To date, class-action lawsuits have been brought against numerous life-insurance companies—including MetLife, Prudential, and Aetna—asserting that various retained-asset-account practices violate ERISA. These lawsuits have been brought in federal courts in Massachusetts, Maine, New York, Pennsylvania, Nevada, Rhode Island, and Mississippi.[7]

As explained above, these courts—and the circuits in which they reside—have divided on the question presented, creating a hopeless state of disarray regarding whether, and to what extent, an insurer's retained-asset--account practices must comply with ERISA fiduciary duties. The importance of a definitive answer to that question is hard to overstate.[8] One of the

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[7] *See, e.g.*, *Baptista v. Mutual of Omaha Ins. Co.*, No. 1:10-cv-00467-ML-LDA (D.R.I., filed Nov. 17, 2010); *Merrimon v. Unum Life Ins. Co. of Am.*, No. 2:10-cv-00447-JAW (D. Me., filed Oct. 29, 2010); *Huffman v. Prudential Ins. Co. of Am.*, No. 2:10-cv-05135-JF (E.D. Pa., filed Sept. 30, 2010); *Edmonson v. Lincoln Nat. Life Ins. Co.*, No. 2:10-cv-04919-MMB (E.D. Pa., filed Sept. 21, 2010); *Otte v. Life Ins. Co. of N. Am.*, No. 1:09-cv-11537-RGS (D. Mass., filed Sept. 15, 2009); *Vander Luitgaren v. Sun Life Assurance Co. of Canada*, No. 1:09-cv-11410 (D. Mass., filed Aug. 24, 2009); *McCreary v. Aetna Life Ins. Co.*, No. 3:08-cv-00654-LRH-RAM (D. Nev., filed Dec. 15, 2008); *Faber v. Metro. Life Ins. Co.*, No. 1:08-cv-10588-HB (S.D.N.Y., filed Dec. 5, 2008); *Moore v. Reliance Standard Life Ins. Co.*, No. 2:08-cv-00161-WAP-SAA (N.D. Miss., filed July 3, 2008); *Mogel v. Unum Life Ins. Co. of Am.*, No. 1:07-cv-10955-NMG (D. Mass., filed May 18, 2007).

[8] To be sure, retained-asset-account practices may be challenged

(continued …)

principal goals of ERISA is "to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). Regardless of one's views about the merits of the underlying substantive dispute, continuing uncertainty about ERISA's *applicability* is unacceptable. And that is true for all three constituencies involved in life-insurance arrangements: insurers, plan sponsors, and beneficiaries.

Life insurers. The status quo is intolerable for insurers. How can they structure their policies and practices if they do not know the body of laws to which they are subject? To be sure, national insurers must comply with the laws of each state in which they operate. But they know *ex ante* what these laws require. The problem with the courts' disagreement on the question presented is that no insurance company can say for sure whether, and to what extent, it will be subjected to the more stringent requirements of federal law. And because the ERISA-covered life-insurance policies at issue in these cases are offered throughout the country, insurance companies risk defending a lawsuit seeking to certify a nationwide class action in any one of many different circuits. This means that—unless and until this Court intervenes—the plaintiffs' bar will understandably choose to bring such lawsuits in favorable jurisdictions

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under state law. But the law of most states provides significantly fewer protections than ERISA—effectively making the question presented by this petition outcome determinative. *See, e.g.*, *Phillips v. Prudential Ins. Co. of Am.*, 714 F.3d 1017, 1024 (7th Cir. 2013) (noting that "it is well-settled that no fiduciary relationship exists between an insurer and an insured as a matter of [state] law").

(like the First Circuit) rather than unfavorable ones (like the Second and Third Circuits). *See, e.g.*, *Spataro v. Lincoln Nat'l Corp.*, No. 1:11-cv-02035-HB (S.D.N.Y., filed Mar. 23, 2011) (voluntarily dismissed by plaintiff with prejudice 10 days after the Second Circuit affirmed dismissal in *Faber*).

Plan sponsors. The answer to the question presented also affects whether fiduciary liability will be shifted onto plan sponsors. If third-party insurers are immunized from ERISA liability for the discretionary decisions they make—as the decision below holds—the plaintiffs' bar will inevitably begin to bring class-action litigation against plan sponsors for their selection and monitoring of those insurers. This phenomenon is currently playing out in the pension context regarding the revenue-sharing practices of third-party service providers to ERISA plans. *See, e.g.*, *Tussey v. ABB, Inc.*, 2:06-CV-04305-NKL, 2012 WL 1113291 at *40 (W.D. Mo. Mar. 31, 2012) (finding ABB liable for more than $35 million). Absent this Court's intervention, plan sponsors will operate under a cloud of uncertainty that will prevent informed decision-making about their group-life-insurance purchases. That uncertainty, as this Court has repeatedly recognized, is squarely at odds with one of ERISA's fundamental purposes: encouraging "the continuation and maintenance of voluntary private plans." *PBGC v. LTV Corp.,* 496 U.S. 633, 651 (1990) (quoting 29 U.S.C. § 1302(a)(1)).

Insurance-policy beneficiaries. The status quo is also intolerable for life-insurance beneficiaries. As this Court has noted, "one of ERISA's central goals [is] to enable plan beneficiaries to learn their rights and obligations at any time." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995). Because of

persisting uncertainty regarding the question presented, beneficiaries of ERISA-governed policies cannot possibly know their rights and obligations. Indeed, those rights and obligations now turn on the circuit in which the individual's insurer has been (or is) facing litigation. Immediate intervention by this Court is needed.

III. The Decision Below Conflicts With This Court's Precedent and Is Wrong on the Merits.

The decision below erroneously concluded that insurers in Lincoln's position do not act as fiduciaries when they exercise discretion to set the key terms of a beneficiary's retained asset account. That holding not only implicates an entrenched circuit split but also runs afoul of the plain text of ERISA and this Court's precedent. This Court should grant certiorari to set the law straight.

1. "In every case charging breach of ERISA fiduciary duty," the "threshold question" is whether the defendant "was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). ERISA defines the term "fiduciary" in "*functional* terms of control and authority over the plan." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). Under the statute's plain terms, a person performs a fiduciary function whenever he exercises discretion or control over the "management" or "administration" of an ERISA plan or its assets. 29 U.S.C. § 1002(21)(A).

Although ERISA does not define the terms "management" or "administration," this Court has determined their meanings with reference to trust law. *See, e.g.*, *Varity*, 516 U.S. at 502. Fiduciary "administration" means "to perform the duties imposed,

or exercise the powers conferred, by the trust documents[,]" or to exercise "'such powers as are necessary or appropriate for the carrying out of the purposes' of the trust." *Id.* As this Court has emphasized, "the common law trustee's most defining concern historically has been the payment of money in the interest of the beneficiary." *Pegram*, 530 U.S. at 231; *see also id.* ("At common law, fiduciary duties characteristically attach to decisions about managing assets and distributing property to beneficiaries.").

The actions at issue in this case, and others like it, unquestionably involve the exercise of discretion regarding the distribution of property to beneficiaries. And here, as is often the case, that discretion was expressly conferred on the insurer by the operative trust document. *See* CA3 R. 86, 142. As such, the actions taken by Lincoln are paradigmatic examples of fiduciary conduct covered by ERISA. Those actions include not only the decision to establish a retained asset account but also the following:

- The decision to encourage beneficiaries to delay in claiming the retained assets. *See* Edmonson CA3 Br. at 56 (quoting communications from Lincoln to beneficiaries (citing R. 299 ¶ 31)); Edmonson CA3 Reply Br. at 10 (citing R. 69).
- The decision to not inform beneficiaries that Lincoln would "invest [the retained assets] for its own account and keep most of the profit." Edmonson CA3 Reply at 9 (citing R. 68-84).
- The decision to "manage[] and invest [Policy proceeds] along with other assets in its general account." Edmonson CA3 Br. at 54 (citing R. 426-427 (McKinnon Dep. 22:8-27:4); R. 478-479 (Rsp. 11)).

- The decision regarding "how much of the resulting profits to keep for itself by deciding what percentage of those profits to credit as interest to Plaintiff." Edmonson CA3 Br. at 54 (citing R. 75, 79, 83; R. 303 ¶ 40; R. 479 (Rsp. 12)); *see also id.* at 47-48 (citing summary-judgment evidence that Lincoln exercised discretion in choosing what portion beneficiaries would be paid from "the total earning from the investment of their benefits").
- The failure to "disclose that the [retained asset account] would not be FDIC-insured" coupled with the misleading suggestion "that the funds had been deposited into an account at Northern Trust Company, where they would have been FDIC-insured and inaccessible to Lincoln." Edmonson CA3 Reply at 9 (citing R. 71).

By holding that—once Lincoln established a retained asset account *of any kind*—none of the choices it made pertaining to that account was a fiduciary act, the decision below misconstrues 29 U.S.C. § 1002(21)(A), which confers fiduciary status on any discretionary act of plan management or administration.

The panel's failure to recognize that each of Lincoln's discretionary acts conferred fiduciary status was based on its mistaken belief that none of Lincoln's acts (other than the initial decision to establish a retained asset account) involved the management or administration of the ERISA plan. *See, e.g.*, Pet. App. 33-34 ("Lincoln had completed its obligations with respect to managing or administering the plan once it established the [retained asset account]. Accordingly, Lincoln was not managing or administering the plan when it invested the retained assets."). That holding cannot be reconciled with the

plain meaning of 29 U.S.C. § 1002(21)(A), and warrants this Court's intervention.

2. The Third Circuit's interpretation of 29 U.S.C. § 1002(21)(A) also cannot be reconciled with this Court's decision in *Varity,* which makes clear that when an insurer retains discretion in choosing the material terms of a retained asset account, every discretionary choice regarding that account is undertaken "in the administration of such plan."[9] As this Court explained:

> There is more to plan (or trust) administration than simply complying with the specific duties imposed by the plan documents or statutory regime; it also includes the activities that are "ordinary and natural means" of achieving the "objective" of the plan. Indeed, the primary function of the fiduciary duty is to constrain the exercise of *discretionary* powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime. If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose.

Varity, 516 U.S. at 504 (citation omitted) (emphasis in original).

The First Circuit recognized as much in *Mogel* when it concluded that the life insurer's "ret[ention] and invest[ment of] death benefits presently due

[9] Such choices may include: how to describe the retained asset account to the beneficiary, whether to make the retained asset account the default option, what interest rate to pay the account holder, whether to tie the interest rate to an index, and how to invest the retained assets.

beneficiaries" "falls comfortably within the scope of ERISA's definition of fiduciary duties with respect to plan administration." 547 F.3d at 26, 27 (citing *Varity*, 516 U.S. at 502).

In stark contrast, the decision below asserts that "Edmonson takes the Supreme Court's quotation from *Varity Corp.* out of context." Pet. App. 33. But neither of its two explanations for that assertion withstands scrutiny.

First, the decision below maintains that "*Varity Corp.* does not suggest that Lincoln's fiduciary duty to administer the plan continued after it satisfied its contractual duty to pay Edmonson her benefits." Pet. App. 33. But the panel's use of the phrase "after it satisfied its contractual duty to pay Ms. Edmonson her benefits" begs the only relevant question. Ms. Edmonson has always argued that, because Lincoln retained discretion under the plan in establishing the material terms of her retained asset account, ERISA continued to impose duties upon Lincoln as it exercised that discretion in satisfying the contract. As the First Circuit understood, that is precisely what this Court meant when it made clear that ERISA's fiduciary duties extend to all discretionary "activities that are 'ordinary and natural means' of achieving the 'objective' of the plan." *Varity*, 516 U.S. at 504.

Second, the decision below claims that *Varity* did not "implicate a fiduciary's obligation to manage or administer a plan." *Id.* But that was exactly this Court's holding. *See Varity*, 516 U.S. at 498 ("We believe that . . . Varity was exercising 'discretionary authority' respecting the plan's 'management' or 'administration' when it made these misrepresentations."). Accordingly, this Court's intervention is needed not only to resolve

the division in the circuits but also to ensure that the lower courts adhere to ERISA's plain language and the Court's own precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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