No. 13-934

In the
Supreme Court of the United States

CONNIE J. EDMONSON,

Petitioner,

v.

LINCOLN NATIONAL LIFE INSURANCE CO.,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Respondent's use of a retained asset account to pay Petitioner's death benefit violated ERISA's fiduciary obligations, when Petitioner's plan permitted settlement with such an account, the account permitted Petitioner to obtain the entire death benefit upon the opening of the account, the account provided Petitioner with above-market interest returns with no investment risk, and creation of the account extinguished the fiduciary relationship between Petitioner and Respondent.

CORPORATE DISCLOSURE STATEMENT

The Lincoln National Life Insurance Company is a wholly-owned subsidiary of Lincoln National Corporation. Lincoln National Corporation is a publicly-held corporation and no publicly-held corporation owns 10% or more of its stock.

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INTRODUCTION

This Court should deny the petition for certiorari because there is no circuit split and the decision below is both limited to the language of the particular employee benefit plan at issue here and correct. Moreover, this is a poor vehicle as Petitioner lacks standing. Petitioner has suffered no harm whatsoever; she received every benefit to which she was entitled. Respondent paid Petitioner her benefit upon the death of her husband with a SecureLine account. This allowed her to earn above-market interest immediately with no investment risk and, at her discretion, to obtain the full balance, *i.e.*, the entire death benefit, simply by writing a check at any time. Three months later, Petitioner wrote such a check and Respondent gave her every penny she was owed. This should not be the basis for any lawsuit, much less a Supreme Court case.

Petitioner's primary argument for certiorari is that the decision below deepened a split between *Faber v. Metropolitan Life Insurance Co.*, 648 F.3d 98 (2d Cir. 2011), and *Mogel v. Unum Life Insurance Co.*, 547 F.3d 23 (1st Cir. 2008), regarding the treatment of retained asset accounts under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. But the Third Circuit below, the Second Circuit in *Faber*, and the Department of Labor have all concluded that there is no such split. Rather, the cases answer different questions about different language in different plans.

The First Circuit in *Mogel* found a breach of fiduciary duty because the insurer used a retained asset account to settle a life insurance claim when

the plan expressly required payment with a lump sum. By contrast, supported by a Department of Labor amicus brief, the Second Circuit in *Faber* found no breach of fiduciary duty when the plan expressly provided for settlement with a retained asset account. And below, the Third Circuit similarly found no breach of fiduciary duty when the plan did not specify a particular means of settlement and thus allowed (but did not require) use of a retained asset account. The Third Circuit expressly recognized that neither *Mogel* nor *Faber* squarely answered this question. But the court correctly found *Faber* to be more analogous. As in *Faber*, the insurer here did not violate ERISA when it invested the assets backing the retained asset account because those were no longer "plan assets" subject to ERISA. Rather, Respondent completed its fiduciary obligations to Petitioner when it paid her claim by establishing the SecureLine account. After that point, Petitioner and Respondent were in a creditor-debtor relationship, just like an ordinary bank account. There is thus no reason to grant the petition and every reason to deny it.

STATEMENT OF THE CASE

A. Statutory Scheme

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (quotation marks omitted). To that end, ERISA "'establish[es] standards of conduct, responsibility, and obligation for fiduciaries of employee benefit

plans.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987) (quoting 29 U.S.C. § 1001(b)).

ERISA defines "fiduciary" in functional terms. As relevant here, a person is a fiduciary with respect to an employee benefit plan "to the extent ... he exercises any ... discretionary control respecting management of such plan," "exercises any authority or control respecting management or disposition of its assets," or "has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). A person acting as a fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and ... for the exclusive purpose of ... providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1). He also may not "deal with the assets of the plan in his own interest or for his own account." 29 U.S.C. § 1106(b)(1).

ERISA "contains no comprehensive definition of 'plan assets.'" *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 89 (1993); *see* 29 U.S.C. § 1002(42). Consistent with the statutory text and guidance from the Department of Labor, courts interpret "plan assets" in light of "'ordinary notions of property rights'" to "'include any property, tangible or intangible, in which the plan has a beneficial ownership interest.'" *Sec'y of Labor v. Doyle*, 675 F.3d 187, 203 (3d Cir. 2012) (quoting Advisory Op., *Mr. John Vine*, Docket No. 93-14A, 1993 WL 188473, at *4 (Dep't of Labor May 5, 1993)); *accord In re Halpin*, 566 F.3d 286, 290 (2d Cir. 2009); *In re Luna*, 406 F.3d 1192, 1199 (10th Cir. 2005).

ERISA "leaves the question of the content of benefits to the private parties creating the plan .... The private parties, not the Government, control the level of benefits." *Lockheed Corp. v. Spink*, 517 U.S. 882, 893 (1996) (quotation and alteration marks omitted). Thus, "'employers have large leeway to design disability and other welfare plans as they see fit.'" *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 612 (2013) (quoting *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003)). In particular, "'ERISA does not mandate any specific mode of payment'" of benefits. *Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452, 1457 (10th Cir. 1991) (quoting *Oster v. Barco of Cal. Emps.' Retirement Plan*, 869 F.2d 1215, 1218 (9th Cir. 1988)). "'Any right to ... a particular method of payment must be found in the individual agreements.'" *Id.* (quoting *Fine v. Semet*, 699 F.2d 1091, 1093 (11th Cir. 1983)); *see also Pompano v. Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 916 (2d Cir. 1982) ("[n]either [ERISA] nor its legislative history comments on the mode or manner in which benefits should be paid"). Accordingly, "[n]othing in ERISA prohibits a welfare plan from defining the benefit" as payment through a retained asset account, "rather than the payment of cash benefits." Sec'y of Labor *Amicus Curiae* Letter Brief 12, *Faber*, 648 F.3d 98 (2d Cir. Feb. 17, 2011), http://1.usa.gov/PFJF2G ("DOL Br."), *reproduced in* 3d Cir. Supp. App. 1–18.

B. Factual Background

Petitioner Connie Edmonson's husband participated in an employee benefit plan sponsored by Schurz Communications, for which Respondent

Lincoln National Life Insurance Co. ("Lincoln") issued group life insurance. App. 3. The policy states: "Upon 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." App. 3–4 (quotation and alteration marks omitted). Edmonson was the beneficiary. The policy does not "specify how Lincoln was to pay Edmonson the benefits." App. 4.

"When her husband died, Edmonson was entitled to $10,000 in benefits," and she submitted a claim to Lincoln. App. 3–4. The claim form stated that "when the benefits are greater than $5,000, Lincoln's usual method of payment is to open a SecureLine Account in the beneficiary's name." App. 4. SecureLine Accounts are "retained-asset accounts." Retained-asset accounts allow beneficiaries to postpone major financial decisions—specifically, the decision of what to do with death benefits, which "are frequently the largest checks an individual may ever receive"—at a time "when grief counselors generally advise against making immediate major financial decisions." Letter from Thomas Sullivan, Conn. Ins. Comm'r, to Robert Damron, Nat'l Conf. of Ins. Legislators (Sept. 1, 2010), http://bit.ly/O2EGIg. Upon creating such an account, the insurer "credits the account with the benefits, and when a beneficiary writes a check on the account, the insurance company transfers funds into the account to cover the check." App. 4. If the account holder believes she can receive a better return elsewhere or would prefer to use the money for any other purpose, she can withdraw or transfer the funds. As with any checking account at a bank,

the company could invest the funds backing the account, with the company bearing all the investment risk. App. 4.

Edmonson's claim form stated that, "instead of receiving a lump sum of money through the mail, you will receive a checkbook" and "[y]ou may write checks for any amount over $250 and up to your full balance at any time" without any fees. App. 62–63, 96. If she "wanted the entire proceeds immediately, all she had to do was write one check for the entire balance." App. 4. The form further stated that interest would begin accruing immediately and that the interest rate would be "the Bloomberg national average rate for interest-bearing checking accounts plus 1%." *Id.*

Respondent approved Petitioner's claim. As promised, Respondent "set up a SecureLine Account in her name in the amount of $10,000, and sent her a checkbook from which she could draw checks on the account." App. 4. The booklet accompanying the checkbook again informed Petitioner that, "[i]f you decide you want the entire proceeds immediately, you just need to write one check for the entire account balance." App. 63. Her SecureLine account was insured by State Guaranty Funds for up to $300,000 in losses. Lincoln Resp. Br. 16 (3d Cir. July 19, 2012); *see also* Nat'l Org. of Life & Health Ins. Guar. Ass'ns, Guaranty Association Coverage of Retained Asset Accounts for Life Insurance Death Benefit Proceeds at 1 (2011), http://bit.ly/1dZsb6z. Three months later, Petitioner exercised her right to withdraw the full $10,000 from her account. App. 5. Respondent honored its commitments and sent her a check for the $52.33 in accrued interest. *Id.*

C. Procedural History

1. Notwithstanding that she received every benefit to which she was entitled, Petitioner brought a putative class-action lawsuit contending that "Lincoln violated its fiduciary duties under ERISA by choosing to pay her using a retained asset account and by investing the retained assets for its own profit." App. 5. Petitioner alleged that these acts involved discretionary authority or control of "plan assets." *Id.* (alteration marks omitted). And she alleged that these acts breached Respondent's fiduciary duties because they "were not taken for her exclusive benefit and because they involved self-dealing." *Id.*; *see* 29 U.S.C. §§ 1104(a)(1), 1106(b)(1). Invoking ERISA's "catchall" provision that allows "appropriate equitable relief," 29 U.S.C. § 1132(a)(3), Petitioner sought "disgorgement of the profits earned by Lincoln from the investment of the retained assets." App. 5.

The district court denied Respondent's motion to dismiss, but after discovery granted Respondent's summary judgment. App. 56. The court held that both *Faber* and *Mogel* were "factually distinguishable" because, unlike in those cases, "the terms of the Policy at issue are silent as to the method by which death benefits are to be paid." App. 77. The district court ultimately found *Faber* "more persuasive on the facts of this case," *id.*, and held that Respondent's "actions were not governed by ERISA fiduciary duties because the acts did not involve the administration or management of the plan and did not involve exercising authority or control over plan assets." App. 6.

2. The Third Circuit affirmed. First, the court held that Petitioner had constitutional standing even though she suffered no loss in the payment of the death benefit. App. 14–15. However, for standing purposes, the court held that she suffered a cognizable harm insofar as she claimed an entitlement to the difference between Respondent's earnings on her account and the interest she was paid. App. 16. The court also held that Petitioner had statutory standing because disgorgement of Respondent's profits qualifies as "appropriate equitable relief" under § 1132(a)(3), even though this was effectively a claim for money damages. App. 18.

On the merits, the Third Circuit held that Respondent fully complied with ERISA. Like the district court, the panel identified the "key factual distinction" between this case and *Mogel* and *Faber*: "[T]he plan and policy in [this] case are silent as to how Lincoln is to pay Edmonson." App. 22. Without an express plan or policy provision on point, the court divided the analysis into two steps. First, it concluded that Lincoln complied with its fiduciary duties "when it exercised its discretion to pay Edmonson with a retained asset account." App. 28. This was an act of discretion involving fiduciary duties, but "[t]he purpose of establishing the SecureLine Account was to pay Edmonson benefits" and Respondent "did not directly gain any financial benefit from this decision." App. 27. Establishing the account was not self-dealing merely because it "increased" Respondent's "potential for profit." App. 28. This potential was entirely in Petitioner's control and "wholly dependent on [Petitioner's] actions"—she could withdraw all funds

immediately—and ERISA does not prohibit payment with retained asset accounts. *Id.*

Second, the Third Circuit held that ERISA's fiduciary obligations no longer applied when Lincoln invested the assets backing the SecureLine Account because they were no longer "plan assets." As in *Faber* but unlike in *Mogel*, Lincoln had fulfilled its obligations under the plan by establishing the retained asset account. App. 32. Thereafter, the beneficiary and the company enjoyed "a straightforward creditor-debtor relationship" like that between a bank and its customers. *Id.* The funds backing the SecureLine account thus were not "plan assets," and Lincoln's investment of those funds thus did not constitute self-dealing. App. 34. In reaching this result, the Third Circuit agreed with the Department of Labor's analysis in an amicus letter brief filed in *Faber*, concluding that the funds backing the retained asset account "were not plan assets." App. 35–36; *see also* DOL Br. 12; *Faber*, 648 F.3d at 102.

Judge Jordan agreed that "Lincoln should win this case," but dissented on the grounds that the case should have been dismissed because Petitioner lacked Article III and statutory standing. App. 40. Because Petitioner "concedes that she received everything to which she was entitled under her husband's employer's plan," and "has merely hypothesized a greater benefit, had Lincoln administered the plan in a different way than it did," Judge Jordan viewed her claimed injury as "entirely speculative and hypothetical at best." App. 43 (quotation marks omitted). On statutory standing,

Judge Jordan explained that ERISA confers a cause of action to obtain "appropriate equitable relief" but not money damages. App. 48–49; *see* 29 U.S.C. § 1132(a)(3)(B); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002). "The 'disgorgement' Edmonson seeks is nothing more than compensation for an alleged loss allegedly caused by an alleged breach of Lincoln's fiduciary duty," which is "precisely the type of relief that *Great-West Life* said was legal, not equitable." App. 50.

REASONS FOR DENYING THE PETITION

This Court should deny the petition for certiorari because there is no conflict among the courts of appeals on the question presented. *See* Sup. Ct. R. 10(a). Rather, three circuits have addressed three different questions, with the outcomes turning on the different plan language at issue. The decision below is limited to the particular plan language here, which neither requires nor prohibits settlement with a retained asset account. No other circuit has addressed this "plan-bound" question, it does not warrant this Court's review, and in any event the Third Circuit's answer is correct and supported by the Department of Labor's and Second Circuit's analysis in *Faber*. Moreover, this is a poor vehicle for this Court's review, as Petitioner lacks standing to bring her suit for disgorgement in the first place.

I. There Is No Circuit Split.

1. Both lower courts below, both courts in *Faber*, and the Department of Labor have all correctly recognized that there is no circuit split here. In *Mogel*, the policy at issue provided that "'payment for loss of life will be made in one lump sum.'" 547 F.3d

at 25. Nonetheless, rather than paying with a lump sum, the insurer (Unum) created a retained asset account. *Id.* The First Circuit agreed with the district court that "delivery of the [retained asset account] checkbook did not constitute a 'lump sum payment' called for by the policies." *Id.* at 26. The First Circuit accordingly held that Unum had not "completed its fiduciary functions under the plan." *Id.* "[U]ntil the beneficiaries received the lump sum payments to which they were entitled, [the insurer] remained obligated to carry out its fiduciary duty under the plan." *Id.* Unum's investment of the retained assets for its own benefit thus constituted a breach of its ongoing fiduciary obligations under ERISA. *Id.* at 27.

In *Faber*, by contrast, a MetLife plan provided that benefits would be paid by crediting the funds to "'an interest bearing money market account'" and providing "'a checkbook to use for writing checks to withdraw funds.'" 648 F.3d at 100–01. As promised, MetLife created a retained asset account and invested the retained assets until the beneficiary withdrew them. *See id.* The district court dismissed the suit, distinguishing *Mogel* on the basis of its different plan language. *Faber v. Metro. Life Ins. Co.*, No. 08-civ-10588, 2009 WL 3415369, at *7 n.7 (S.D.N.Y. Oct. 23, 2009).

On appeal, the Second Circuit invited the Department of Labor to submit its views. In response, the Department emphasized the "significant factual differences" between *Faber* and *Mogel*. DOL Br. 13. "*Mogel* is best understood as addressing a specific factual setting not present

here": The insurer "expressly defined the plan's benefits in the form of lump sum cash payments, which defendant Unum quite literally retained for itself." *Id.* In *Faber*, by contrast, "the Plans discharge their obligation by opening a [retained asset account], which the beneficiary controls pursuant to a contractual arrangement with the insurer." *Id.* at 14.

The Department further explained why this distinction matters. "It is difficult to make these determinations in the abstract," as a plan sponsor has "wide latitude to design the plan as it sees fit, including specifying the type and level of benefits, the conditions and contingencies attached to the receipt of benefits, and the means of accomplishing the promised distribution of benefits." DOL Br. 5. In *Faber*, the plan expressly contemplated settlement with a retained asset account. MetLife thus "discharges its ERISA fiduciary duties by furnishing beneficiaries a [retained asset account] in accordance with plan terms and does not retain plan benefits by holding and managing the assets that back the [account]." 648 F.3d at 102. "[O]nce MetLife creates and credits a beneficiary's [RAA] and provides a checkbook, the beneficiary 'has effectively received a distribution of all the benefits that the Plan promised,' and 'ERISA no longer governs the relationship between MetLife and the ... account holder[].'" *Id.* That is, the account does not contain "plan assets." *Id.* at 102–03. Rather, there is an ordinary creditor and debtor relationship between MetLife and the Account Holder. *Id.*

The Second Circuit "agree[d] with the DOL and the district court" and concluded that *Mogel* addressed a different question because the plan had different language. *Id.* at 106. "*Mogel* is better understood as predicated on the fact, not present here, that the insurer failed to abide by plan terms requiring it to distribute benefits in lump sums." *Id.* at 106–07. When the plan instead provides for distribution with a retained asset account, ERISA claims fail when an insurer does just what it promised. *Id.* at 104. Once the account is established, the insurer extinguishes its fiduciary obligations and the assets backing the account are not "plan assets." *Id.* MetLife thus "was not acting in a fiduciary capacity when it invested the funds backing" the beneficiaries' accounts. *Id.* Instead, MetLife was in a "straightforward creditor-debtor relationship governed by [contract] and state law, not ERISA." *Id.* at 105.

2. The Third Circuit below recognized that this case is different from both *Mogel* and *Faber*: The "key factual distinction" between this case and *Faber* and *Mogel* is that "the plan and policy in our case are silent as to how Lincoln is to pay Edmonson." App. 22. The district court similarly stated that *Faber* and *Mogel* were "factually distinguishable" because "the terms of the Policy at issue are silent as to the method by which death benefits are to be paid." App. 77. Moreover, both courts properly recognized that this case was more analogous to *Faber*, because settlement with the retained asset account fulfilled Lincoln's fiduciary duties. After that, as in *Faber*, the fiduciary relationship ended and the account did not contain "plan assets." *See*

App. 32, 35–39. There is thus no circuit split. Rather, different cases have reached different outcomes because of the different plan language at issue.

These factual differences also explain why the Third Circuit addressed the question in two steps. In *Faber*, the plans under review specified a certain type of payment. Here, the plan did not. Unlike in *Faber*, Respondent had to exercise fiduciary discretion in choosing the method of payment. App. 26. But because "'ERISA does not mandate any specific mode of payment,'" *Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452, 1457 (10th Cir. 1991), and because Respondent's "increased potential for profit" from the retained asset account was "wholly dependent on Edmonson's actions," App. 28, the lower court held that creation of a SecureLine Account was proper. This first step was irrelevant in *Faber* because the plan provided for settlement with a retained asset account, and thus choosing that form of payment did not involve discretion—which is why the Third Circuit here did not discuss *Faber* in the first step of its analysis.

There is thus no "continuing uncertainty about ERISA's *applicability*." Pet. 20. This case, *Faber*, and *Mogel* are easily harmonized. The First Circuit held that funds remain plan assets until paid according to the terms of the plan, and payment through a retained asset account does not suffice when the plan expressly requires lump-sum payment. Consistent with the Department of Labor's views, the Second Circuit held that when a plan instead expressly provides for settlement with a

retained asset account, the assets backing such an account after its creation do not constitute "plan assets" and thus investment of those assets does not implicate ERISA. And the Third Circuit held that, given a plan that does not specify the form of payment, Lincoln permissibly exercised its fiduciary discretion in paying Edmonson with a SecureLine Account. Because establishing the account fulfilled Lincoln's fiduciary obligations, once the account was created, as in *Faber*, the account did not contain "plan assets." Quite simply, the plan did not own the assets; Edmonson did.

II. The Decision Below Is Plan-Specific And Correct.

For essentially the same reasons that there is no circuit split, the decision below is limited to the particular plan here: *Mogel* and *Faber* involved different language in different plans, with the "lump sum" requirement in *Mogel* leading to a different bottom-line result. Review of the splitless and plan-bound decision below is unwarranted.

Moreover, the Third Circuit's decision is correct. Petitioner's plan did not specify a method of payment; the method of payment was left to Respondent's discretion. Respondent properly exercised its discretion in establishing a SecureLine Account. As the Third Circuit explained, "ERISA does not mandate any specific mode of payment," and it would in fact be "inconsistent with ERISA's goals to prohibit" retained asset accounts. App. 28 (quotation marks omitted).

The Third Circuit also correctly held that Respondent's fiduciary duties ended when it

established Petitioner's account. "Nothing in the plan or policy provides that Lincoln had any duty with respect to managing or administering the plan beyond its payment of benefits to Edmonson. Nor has Edmonson argued that anything in the plan or policy required Lincoln to perform any act of plan management or administration once it paid her the benefits." App. 30. Crediting the accounts thus constituted the promised payment, ended the fiduciary relationship, and created a new, non-ERISA creditor-debtor relationship. App. 32; *Faber*, 648 F.3d at 105. That relationship is indistinguishable from "that of a customer and a bank, as the bank will invest a customer's deposited assets for its own profit, and pay interest to the customer in an amount less than the profit it earns." App. 30. Indeed, this arrangement is the entire basis of the banking system. If banks were required to pay their customers all of their profits—on top of the interest already guaranteed and without exposing the customers to any risk of investment losses—there would be no banks at all.

The Third Circuit's ruling is also supported by the Department of Labor's position in *Faber*. The Department opined that, when consistent with the plan's language an insurer "creates and credits a beneficiary's [retained asset account] and provides a checkbook, the beneficiary 'has effectively received a distribution of all the benefits that the Plan promised,' and 'ERISA no longer governs the relationship between" the insurer and the beneficiary. 648 F.3d at 102. The funds in Petitioner's SecureLine account thus were not "'plan assets' because the [plan did] not have an ownership

interest—beneficial or otherwise—in them." *Id.* at 106; App. 36–37. Instead, they belonged to Petitioner, who had complete authority to withdraw them in their entirety at any time, as she did only three months after the SecureLine account was opened.

This result is perfectly consistent with *Varity Corp. v. Howe*, 516 U.S. 489 (1996). In *Varity*, an employer made deceptive statements while acting as plan administrator in an effort to strip its employees of their vested benefits. *See id.* at 493–94. Petitioner relies on the Court's statements 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." *Id.* at 504. But the Third Circuit correctly found that Petitioner "takes the Supreme Court's quotation from *Varity Corp.* out of context." App. 33. This language addressed the *content* of fiduciary obligations. It did not address (much less support) Petitioner's novel assertion regarding the *duration* of fiduciary duties: that they persist even after satisfactory payment of a defined benefit consistent with the plan's language.

Moreover, unlike in *Varity*, Respondent fully complied with all of its fiduciary duties, express and implied. Respondent discharged those duties by settling the claim as promised and creating the SecureLine Account. Notwithstanding Petitioner's suggestions about FDIC insurance, Petitioner raised

no claim that Respondent breached its fiduciary duties by making misrepresentations. Indeed, Petitioner's claim submission form accurately disclosed that her claim would be paid with a SecureLine account, what the above-market interest rate was, and that she could withdraw all of her money immediately simply by writing a check. Petitioner's only claims are that Respondent used plan assets for its own benefit and engaged in self-dealing in violation of §§ 1104(a)(1) and 1106(b) by creating a retained asset account and investing the underlying assets. Supported by the Department of Labor's and Second Circuit's analysis in *Faber*, the Third Circuit correctly rejected this argument.

III. This Is A Poor Vehicle For This Court's Review.

As set forth above, Petitioner requests splitless and fact-bound error correction where there is no error to correct. Furthermore, this is a poor vehicle for reviewing the question presented because Petitioner lacks standing. Indeed, Petitioner has suffered no harm whatsoever.

"To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010). In settling Edmonson's claim consistent with the terms of her plan, Lincoln created an account that yielded Petitioner interest rates that were above market: The interest rate was "the Bloomberg national average rate for interest-

bearing checking accounts plus 1%." App. 4. Furthermore, Petitioner faced no investment risk and enjoyed full liquidity, as she could cash out the funds at any time. Respondent's potential for profit thus depended entirely on Petitioner's choice not to withdraw her funds immediately. Here, Petitioner opted to keep the funds in her account for approximately three months, and as promised she enjoyed the benefits that came from that choice: a guaranteed return of $52.33 in interest on a fully liquid account. That is, she ultimately received *more* than the plan itself provided.

Petitioner thus received everything to which she was entitled, including a guaranteed above-market return with no investment risk. Notably, unlike in *Faber* where the account remained open and plaintiff sought a prospective injunction barring the insurer from investing the underlying assets for its own profit, 648 F.3d at 102–03, here the account is already closed. Petitioner's only asserted claim is for retrospective disgorgement of "'the spread or difference' between the profit Lincoln earned by investing the retained assets and the interest it paid to her." App. 16 & n.7. But Lincoln's choice to invest the assets backing the SecureLine Account did not harm Petitioner any more than when a bank makes the same choice as to funds in a checking account. "Having no claim on the profits, [Petitioner] cannot claim an individual loss—or even that she was 'personally affected'—by not receiving a share of those profits." App. 46 (Jordan, J., dissenting). Moreover, Petitioner has not alleged or shown that "she would have invested her death benefit and

generated the same profit or 'spread' that she now seeks to reclaim." App. 43.

Petitioner also lacks statutory standing. ERISA's catchall remedial provision authorizes "appropriate equitable relief," which is limited to "'those categories of relief that were *typically* available in equity." *Great-West*, 534 U.S. at 210. But Petitioner does not seek equitable relief. "[W]hat Edmonson seeks under the label of 'disgorgement' is in reality a claim for damages." App. 54 (Jordan, J., dissenting). "[I]t is difficult to see how" her demand for the investment "spread" is "anything other than an attempt to 'impose personal liability on the defendant' ... for 'the defendant's breach of legal duty.'" App. 50, 52 (quoting *Great-West*, 534 U.S. at 210, 214). Indeed, Petitioner asked the lower court to certify her class action under Rule 23(b)(3), which allows class adjudication of "individualized monetary claims." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011). "Money damages are, of course, the classic form of *legal* relief." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993). "Almost invariably ... suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty.'" *Great-West*, 534 U.S. at 210.

The majority below held that this case fell within *Great-West*'s "limited exception for an [equitable] accounting for profits" because Edmonson's claim to disgorgement was "akin" to an accounting. *Great-*

West, 534 U.S. at 214 n.2; App. 19–20. But as Judge Jordan's dissent explains, this exception only applies "when 'a plaintiff is entitled to a constructive trust on particular property held by the defendant.'" App. 51 (quoting *Great-West*, 534 U.S. at 214 n.2). That in turn requires, among other things, that the defendant "acquir[e] legal title to specifically identifiable property." Restatement (Third) of Restitution and Unjust Enrichment § 55 cmt. a (2011); App. 52. Here, "legal title passed to Edmonson when Lincoln established her SecureLine Account." App. 52 (Jordan, J., dissenting). This case thus does not fit within *Great-West*'s narrow exception. Rather, Petitioner's claim for Lincoln's alleged profits is just what it appears to be: a retrospective claim for money damages.[1]

These vehicle problems are not inherent in a claim of this type but are instead particular to this case. As *Faber* demonstrates, a party who did not cash out could plausibly bring a claim for prospective injunctive relief or provide support for the assertion

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[1] These vehicle problems persist notwithstanding that Respondent did not challenge Petitioner's standing on appeal after doing so in the district court. After oral argument, the Third Circuit asked the parties to address the Article III standing issue. *See* Clerk's Letter to Counsel (Dec. 21, 2012). In response, both parties submitted extensive letter briefs on the issue. As a result, the majority and dissent below passed on both standing questions with the benefit of the parties' arguments. In all events, this Court has an independent obligation to address Article III standing, *e.g.*, *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011), and "a respondent may make any argument presented below that supports the judgment of the lower court," *Owen v. City of Independence, Mo.*, 445 U.S. 622, 661 n.3 (1980) (quotation marks omitted).

that they would have immediately received a higher return elsewhere. Petitioner did neither. She instead cashed out then sued, choosing to seek only retrospective monetary relief through "disgorgement" without providing a factual predicate for her assertion that she suffered an actual loss. There is no circuit split, the question presented is plan-specific and does not warrant this Court's review, and thus ample reason to leave further development of these issues to the lower courts. But an additional benefit of further percolation is that, if a split ever develops on the narrow question here, the Court could choose a vehicle free of these complications.

CONCLUSION

For the reasons set forth above, the Court should deny the petition for certiorari.

Respectfully submitted,

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