No. 13-934

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The courts are hopelessly divided over the basic ground rules for the use of retained asset accounts to settle claims for billions of dollars in life-insurance benefits every year. As our petition demonstrated, three circuits have divided over the important and recurring question presented here: Is an insurer that uses a retained asset account bound by fiduciary obligations under ERISA when the plan gives the insurer discretion to set material terms? The circuit split over that question is well recognized. And this case affords the Court an ideal opportunity to resolve it.

Lincoln's brief in opposition makes no serious effort to deny that the question presented is frequently recurring and exceptionally important for life insurers (who must structure uniform national policies), plan sponsors (who face risk that liability will be shifted unexpectedly onto them), and beneficiaries (who are exposed to undisclosed self-dealing). Pet. 17-22. That is not surprising. It is undeniable that the answer to the question affects tens of billions of dollars, the benefits of millions of Americans, and the policies of some of the largest insurers.

Instead, Lincoln tries to downplay the split by limiting the cases to their facts and by relying on a mischaracterization of the federal government's position. But the split cannot be brushed aside so easily. And Lincoln's standing arguments pose no barrier to this Court's review. Certiorari is warranted.

I. Lincoln Fails to Explain Away the Split.

Three circuits have confronted the question whether an insurance company acts as an ERISA fiduciary by settling benefits 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, and Lincoln's efforts to do so only highlight the enduring nature of that recognized split.[1]

Lincoln attempts to deny the existence of this recognized split by limiting the circuits' decisions to the specific plan language at issue. "There is no circuit split," argues Lincoln, because "the decision below is . . . limited to the language of the particular employee benefit plan at issue here." BIO 1. Indeed, not content to deny the split, Lincoln also asserts that "the Third Circuit below, the Second Circuit in *Faber*, and the Department of Labor have all concluded that there is no such split." *Id.* Lincoln's position cannot withstand scrutiny.

A. The First Circuit has held that the answer to the question presented is yes: Insurance companies *do* act as ERISA fiduciaries when they use retained asset accounts to settle benefits claims and retain discretion to set the material terms. *See Mogel v. Unum Life Ins. Co. of Am.*, 547 F.3d 23 (1st Cir. 2008). And, in so holding, the First Circuit relied on this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), which explained that "the primary function of the fiduciary duty is to constrain the exercise of *discretionary* powers which are

[1] *See, e.g.,* Maria O'Brien Hylton, *Disclosure to the Rescue: A Conceptual Framework for Retained Asset Accounts*, 80 Tenn. L. Rev. 69, 78 (2012) (even before the decision below, "[t]he First and Second Circuits . . . split on the question"); Bridget Henwood, *Edmonson v. Lincoln National Life Ins. Co.*, Temple L. Rev. (Aug. 7, 2013), *at* http://sites.temple.edu/templelawreviewblog/third-circuit-summaries/edmonson-v-lincoln-national-life-ins-co/ ("The Supreme Court has not ruled. . . . and circuits are split on the issue.").

controlled by no other specific duty imposed by the trust instrument." *Varity*, 516 U.S. at 504; *see Mogel*, 547 F.3d at 27.

In square conflict, the Second and Third Circuits have said no: Insurance companies *do not* act as ERISA fiduciaries when they use retained asset accounts to settle benefits claims and retain discretion to set the material terms. *See Faber v. Metro. Life Ins. Co.*, 648 F.3d 98 (2d Cir. 2011); Pet. App. 21-34. Indeed, in the decision below, the Third Circuit embarked on an extended effort to distinguish *Varity*—on which *Mogel* relied in reaching the opposite conclusion—claiming that Ms. Edmonson had taken *Varity*'s language "out of context." Pet. App. 33 (rejecting *Mogel*'s position and "find[ing] *Faber's* rationale persuasive").

To be sure, there are factual differences between *Mogel*, *Faber*, and the decision below, but those differences cannot explain away the split. *Mogel* involved plan documents that provided for lump sum payment as the default option, *Faber* involved plan documents that provided for retained asset accounts as the default option, and this case involves plan documents that provide for no default option. But the petition (at 16-17) explained that these differences have no bearing on the split over the question presented. Lincoln offers no response.

Instead, Lincoln repeatedly conflates two different grounds on which fiduciary status may be predicated: the exercise of discretionary authority in plan administration, on the one hand, and the exercise of control over plan assets, on the other. The question presented here concerns only the former. But the vast majority of Lincoln's opposition concerns the latter. *See, e.g.,* BIO 14-15 (asserting that [t]his case, *Faber*, and *Mogel* are easily harmonized" and then attempting to do so in four sentences that deal only with "plan asset" arguments).

Mogel, *Faber*, and the decision below all have one critical fact in common: They each involved ERISA plan documents that left discretion to the life insurer to determine the interest rates and other features of the retained asset accounts. And the question presented in this case is whether the exercise of such discretion is a fiduciary act. Because the circuits are intractably divided over that question, this Court's immediate intervention is warranted.

B. Lincoln's opposition relies heavily on an amicus brief filed by the United States Department of Labor in *Faber v. Metropolitan Life Insurance Co*., 648 F.3d 98 (2d Cir. 2011). *See, e.g.*, BIO 11-12, 16-17. Lincoln goes so far as to assert that "the Department of Labor [has] concluded that there is no [circuit] split." *Id.* at 1. But Lincoln has misrepresented the position of the United States. As explained in the petition, "[t]he DOL's brief, properly understood, does not express a position on the question presented." Pet. 17 n.4. This is so for at least two reasons.

First, the DOL's characterization of *Mogel* was limited to the question of fiduciary status based upon the exercise of control over plan assets. DOL Br. 12-15. By contrast, the question presented in the petition has absolutely nothing to do with that issue.

Second, the DOL made clear that, even regarding the plan-asset issue, it could not conclusively determine fiduciary status because "plan documents, including significantly the . . . insurance policies, do not appear to be in the record." *Id.* at 6 n.3. Thus, "the Secretary cannot say if these policies contain any [relevant] provisions." *Id.* at 10 n.7. To be sure, the Second Circuit elected to address the fiduciary status questions broadly (and, in our view, incorrectly) when it decided *Faber*. But that does not change the limited scope of the DOL's brief in that case.

As explained in the petition, the disarray in the lower courts over the question presented "has been exacerbated by several court's confusion concerning the Department of Labor's position." Pet. 17 n.4. Lincoln's brief in opposition, and its characterization of the government's position, highlights the confusion that will persist absent further review by this Court or, at a minimum, the filing of an invitation brief by the Solicitor General.

II. Lincoln's Merits Arguments Only Underscore the Need for this Court's Immediate Review.

Lincoln's discussion of the merits further underscores the need for this Court's intervention. Like the Third Circuit, Lincoln stakes its position on the assertion that this Court's reasoning in *Varity*—that "the primary function of the fiduciary duty is to constrain the exercise of *discretionary* powers"—is taken "out of context." BIO 17. But that mistaken belief only illustrates the need for review: It squarely conflicts with the First Circuit's reliance on *Varity* to reach the opposite conclusion. *See Mogel*, 547 F.3d at 27. And because the disagreement turns on the proper interpretation of this Court's case law, the Court should step in to decide which answer to the question presented—the First Circuit's "yes" or the Second and Third Circuits' "no"—is more "consistent with *Varity*." BIO 17.

III. Lincoln's Standing Arguments Pose No Barrier to Review.

Faced with a well-recognized circuit split on a question of exceptional importance, Lincoln devotes several pages of its opposition to the baseless contention that "this is a poor vehicle for reviewing the question presented because Petitioner lacks standing." *Id.* at 18.

Lincoln first argues that Ms. Edmonson "received everything to which she was entitled," so she lacks an Article III injury. *Id.* at 19. But that is Lincoln's *merits* argument; it does not go to standing. Indeed, Lincoln's "standing" argument (taken from Judge Jordan's dissent) simply assumes success on the merits: "*Having no claim on the profits*, Petitioner cannot claim . . . that she was 'personally affected' by not receiving a share of those profits." *Id.* (emphasis added; alterations omitted). We of course disagree. Because Lincoln was acting as an ERISA fiduciary, Ms. Edmonson *does* have a claim on ill-gotten profits. And that merits disagreement "does not implicate subject-matter jurisdiction." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

Nor does it pose a "vehicle" problem. The same argument can be made in *any* case concerning the question presented. Lincoln's attempt to show otherwise—by pointing to *Faber*, where the plaintiffs sought an "injunction barring the insurer from investing the underlying assets for its own profit"—only emphasizes our point. BIO 19. Whether a plaintiff has suffered an injury, after all, cannot possibly turn on the relief sought.

Lincoln's second vehicle argument—that Ms. Edmonson lacks *statutory* standing because disgorgement of ill-gotten gains is not "equitable relief" but "is in reality a claim for damages"—is even wider of the mark. *Id.* at 20. That issue is neither jurisdictional nor part of the question presented (and Lincoln has not filed a conditional cross-petition). In any event, it is wrong and foreclosed by precedent. As this Court explained just a few terms ago: "Equity courts possessed the power to provide relief in the form of monetary 'compensation' . . . to prevent the trustee's unjust enrichment." *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1880 (2011). This age-old equitable "remedy extended to a breach of trust committed by a fiduciary encompassing *any* violation of a duty imposed upon that fiduciary." *Id.* (emphasis added). Thus, whether Lincoln was acting as an ERISA fiduciary (which is "analogous to a trustee") when it invested Ms. Edmonson's money for its own profit—and, if so, whether it breached its duties—are the "critical" questions in determining whether disgorgement "fall[s] within the scope of the term 'appropriate equitable relief.'" *Id.* They are also the merits questions in this case. Because the federal circuits are divided over the first of those two questions, this Court should grant certiorari and resolve the conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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