No._____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN J. KORESKO, V,
PETITIONER
v.

R. ALEXANDER ACOSTA,
SECRETARY, UNITED STATES DEPARTMENT OF LABOR

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit CA3 No. 16-3806

PETITION FOR A WRIT OF CERTIORARI

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Pro se

QUESTIONS PRESENTED

ERISA, 29 U.S.C. § 1132(a)(2) allows a participant, beneficiary or the Secretary of Labor to sue for appropriate relief under § 1109; or each can seek injunction or "appropriate equitable relief" under § 1132(a)(3) or §1132(a)(5). Under § 1109, a fiduciary who breaches his duty is "personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits * * *." Nevertheless, participants and beneficiaries have no standing to sue for any monetary relief attributable to "plan injury" when reduction of surplus assets does not reduce their defined benefits. Because plans, like trusts, cannot sue under § 1132(a), and Congress did not give plans any property rights, the questions address the appropriate analytical framework for determining the Secretary's standing to maintain an action seeking monetary recovery under ERISA:

1. Does the Secretary of Labor have standing to sue for "losses" to the surplus of an ERISA defined benefit welfare plan – i.e., a theoretical injury to a legal abstraction -- under 29 U.S.C. § 1132(a)(2) or (a)(5), without also showing concrete harm to the present property interests of participants or beneficiaries?

2. Whether the Third Circuit correctly held—in conflict with this Court — that 29 U.S.C. § 1132(a)(2) and (a)(5) authorized the courts to ignore contractual language, supersede the interpretation by the person with settlor/sponsor/administrator and trustee powers, and refuse to recognize his right to amend welfare benefit plans and deprive the Secretary of standing?

3. Did the District Court's order to permanently bar Petitioner from providing services to any employee benefit plan exceed the limited "appropriate relief" permitted by 29 U.S.C. §1132(a)(2) and (5), especially when Congress only barred felons from positions in ERISA plans in 29 U.S.C. § 1111, and the court otherwise granted a complete and adequate remedy at law?

PARTIES TO THE PROCEEDING BELOW

Petitioner is John J. Koresko, V, one of the defendants and appellant below, and the principal, director, officer or controlling shareholder of the other corporate party defendants listed below (which are not public companies):

- **PennMont Benefit Services, Inc.**, a Pennsylvania corporation;
- **Koresko & Associates, P.C.** , a Pennsylvania corporation;
- **Koresko Law Firm, P.C.,** is a Pennsylvania corporation;
- **Penn Public Trust,** a Pennsylvania non-profit corporation.

- Co-defendants **Regional Employers Assurance Leagues Voluntary Employees Beneficiary Association Trust** and **Single Employer Welfare Benefit Plan Trust** were Pennsylvania trusts named as defendant parties by the Secretary. Petitioner was the controlling fiduciary of each before their property was seized and Petitioner was removed by order of the district court. They did not participate in the trial of this case or the appeal.
- **Co-defendant Jeanne Bonney is a party but did not appeal.**

Respondent, A. Alexander Acosta, is the Secretary, United States Department of Labor, the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

John J. Koresko, V respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The order denying panel rehearing and rehearing en banc (App., *infra,* 1a) is unreported. The opinion of the court of appeals dated March 23, 2018 (3a) is unreported but available at *Sec'y U.S. Dept. of Labor v. Koresko*, 726 Fed. Appx. 127 (3d Cir. 2018). The opinion of the court of appeals dated April 2016 (36a) is unreported, but available at *Sec'y U.S. Dept. of Labor v. Koresko,* 646 F. Appx. 230 (3d Cir. 2016).

The district court's order of August 31, 2016 (20a) is unreported but available at 2016 U.S. Dist. LEXIS 117384. The prior orders of the district court are reported at *Perez v. Koresko*, 86 F.Supp.3d 293 (E.D. Pa. 2015) (151a) (*"Perez")* and *Solis v. Koresko*, 884 F.Supp.2d 261 (E.D. Pa. 2012) (236a) (*"Solis"*).

JURISDICTION

The judgment of the court of appeals was entered March 26, 2018. The court of appeals denied a petition for panel rehearing and rehearing *en banc* on June 12, 2018. (1a.) On August 30, 2018, Justice Alito extended the time to file a petition for certiorari to and including November 9, 2018. No. 18A225. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 et seq., and the United States Constitution are reproduced in the appendix to this petition (132a).

INTRODUCTION

In February 2004, the United States Department of Labor (DOL) initiated an investigation into unspecified fiduciary duty violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA") involving the Regional Employers' Assurance Leagues' Voluntary Employees' Beneficiary Association ("REAL VEBA") (156a). REAL VEBA was a multiple-employer welfare benefit trust, a vehicle of private enterprise. Petitioner created REAL VEBA. (171a).

The Secretary has never alleged that REAL VEBA was ever an ERISA plan. (159a, 299a).

Instead, this case concerns REAL VEBA trust property, owned by a trustee, that was mysteriously transmuted by the Secretary into the "property" of theoretical ERISA plans. The Secretary was able to convince the courts below that those theoretical plans (not people) had rights and property interests "under typical notions of property law," (309a) despite nothing in the common law, the documents, or ERISA that ever gave trusts, quasi-trusts, or "plans" any rights or property interests.[1] Eventually, Petitioner and his affiliates were sued and put out of business when the district court seized the REAL VEBA non-ERISA trust, and found strict liability for millions of dollars of "transfers" (assumed to be damages) among the Petitioner's affiliates, even though there was never any allegation or

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[1] The Circuit and District Courts agreed: "[T]he documents do not confer legal title on the plans, *they manifest an intent* to confer a beneficial interest..." (312a) (emphasis added). "The nature of any particular beneficiary's interest in the assets of the REAL VEBA Trust is irrelevant . . .." (313a).

proof that anything they did ever resulted in diminution of the benefits owed to the real people entitled to any benefit. (313a).

The first issue - the Secretary's representational standing to seek monetary damages on behalf of theoretical plans, in the absence of any concrete injury to any real person – is one of first impression in this Court and obvious national importance. The issue of concrete injury in ERISA cases has already divided the circuits. It seems commonly sensible that before the government dismantles people with its unlimited resources, it should at least have to demonstrate more than theoretical harm – especially when the object is money. Congress, after all, did not bestow on any "plan" any rights or a juridical body.

The second issue faces this Court for the first time because the courts below ignored Petitioner's right, as the one person with settlor, sponsor, administrator, and even trustee powers, to choose state trust law to govern the arrangement, and make sure ERISA could not apply, rather than suffer the fluid theories and endless resources of a federal regulator. Petitioner's act of executing a critical amendment document is uncontested, and that should have been enough to end this case in 2009, considering that Petitioner controlled the arrangement and wrote all the governing documents. This Court should decide whether ERISA standing of the Secretary ultimately depends on a settlor's intent and whether the settlor's reasonable construction of all governing documents, even amendments, deserves deference in the federal courts -- just like the common law of trusts.

Without review of the third question, Petitioner is wrongfully barred for life

from his profession under a permanent injunction that federal courts never had authority to grant. Congress only barred certain felons from certain positions involving ERISA plans 29 U.S.C. § 1111 -- not all plans, and not all trusts with a possible ERISA connection. The rulings below have no historical precedent in any treatise or case of this court involving ERISA or the general law of trusts. Lower courts are not empowered to invent novel ERISA remedies. *Massachusetts. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

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STATEMENT OF THE CASE

A. PETITIONER AND THE TRUST STRUCTURE

Petitioner John J. Koresko, V was at all relevant times the president of both Koresko Law Firm, P.C. and PennMont Benefit Services, Inc ("PennMont").[2] In 2002, Petitioner, through the firms he controlled, created an unincorporated association of unrelated employers called the Regional Employers Assurance Leagues" ("REAL," "League"). He offered unrelated employers the opportunity to create and adopt welfare benefit arrangements, particularly death benefit plans, through the REAL Voluntary Employees' Beneficiary Association ("REAL VEBA") Trust. PennMont was named Plan Administrator in all governing documents. It possessed the authority of a trustee (78a, 80a, 91a: §2.04,6.03), and it spoke for the League. (87a §11.3). Petitioner was also sole director of Penn Public Trust, a non-profit corporation ("PPT"), which served as trustee at various times. Petitioner wrote all of the plan and trust documents, and under a Custodial Agreement (114a) had authority as agent of the custodial trustee, Community Trust Co., to "effectuate the terms of REAL VEBA trust, including, but not limited to, surrender of . . . withdrawal of cash value from, and/or borrowing from an Insurance Policy." He ran the League, or he was the League. (*Perez, supra,* at 315 (171a)).

More than 400 employers (called "participating employers") adopted arrangements under REAL VEBA, all offering death benefits. Each executed an

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[2] The Circuit Court relied on the facts stated by the District Court in its memorandum supporting partial summary judgment (*Solis,* 236a) and its subsequent opinion (*Perez,* 151a). See 36a – 39a.

Adoption Agreement to join the League and subscribe to the trusts. (124a, 172a) The employers paid League set up fees and ongoing administration fees when billed by PennMont. In joining the League, employers agreed to be bound by the governing documents including the Master Trust Agreement (78a), REAL VEBA master Plan Document (91a), and their individual Adoption Agreement. (124a). Participating employers selected the type and amount of benefits offered and set certain eligibility requirements for their employees. (124a, 173a). Only eligible employees could participate. (124a, 131a). The trust property consisted of employer contributions, which the adoption agreements required, and life insurance policies taken out on the lives of participating employees to fund the benefits. (91a). Benefits were then paid according to each adoption agreement, subject to the governing documents for the trust. (174a).

Death benefits were defined as a multiple of a participant's compensation (131a), but no benefits were payable unless they were insured. (91a, §7.05(g)). The only amounts in the trust fund absolutely committed to benefit payments were amounts received from insurance carriers. (*Id.*, 307a) PennMont had broad discretion to determine all elements of participation, eligibility for benefits, calculation and method of payment, accounting, every other relevant matter relating to operation of the trust and any underlying arrangement. *(Id.,* see e.g. §6.03,174a). PennMont had discretion to classify any amounts in the trust as experience-gains and surplus, which amounts also were not committed to payment of any benefit. *(Id.* § 9.02(c)).

REAL VEBA's trustee and administrator paid the insurance policy premiums. The trustee was the owner and beneficiary of each policy. (*Id.* § 7.05). Each Adoption Agreement defined the interest of any participant as "year to year" coverage, having "no economic benefit" or cash surrender value. (124a, par. 8). No interest in any trust property existed in anyone beyond that created by the governing documents. REAL VEBA did not ever maintain separate accounts in any participant's name or define benefits by any account balance. (91a, § 8.01, 8.04).

Each prospective participant in REAL VEBA was required to execute a Participation Agreement acknowledging his consent to the arrangement along with a limited power of attorney for Petitioner, his firm, the administrator and trustee of REAL VEBA to act on his or her behalf. (131a). The Master Plan, §10.21, gave PennMont, the Trustee or its delegate (including Petitioner) power of attorney to act on behalf of each participating employer with respect to all "questions, controversies and issues relating to the Plan * * * involving the Department of Labor." In the event of failure of the Plan Administrator, each Adoption Agreement named Petitioner as Secretary of a "Plan Committee" with authority to exercise the Administrator's powers. (124a, par. 9).

The trust, or any employer arrangement, could be terminated or amended in whole or part at any time, for any reason, with or without the consent of any employer. Petitioner could amend under any of four provisions: as designated representative of any employer (Plan § 9.03(a)), the League (Plan § 9.03(b)), Administrator (Plan § 6.03), and under the League's 2002 revised power. (Trust §§

9.1, 11.3). In the event of any conflict in the documents, the Trust document controlled (Plan §10.22)(113a); and it contained no anti-discrimination provision.

B. THE SECRETARY'S SUIT AND THE 2009 AMENDMENT

In March 2009, the Secretary [illegible] sued Petitioner, his law firm, PennMont and other affiliates in the Eastern District of Pennsylvania. N0, 09-cv-00988. The Secretary alleged a breach of fiduciary duties with respect to several individual welfare benefit plans. (38a).

Petitioner contested the authority of the Secretary to proceed under ERISA, citing the Secretary's published opinions that multiple employer arrangements like REAL VEBA are not ERISA plans. (299a-300a). Petitioner expected that typical laws of property should apply: (1) plans and trusts do not own anything; (2) if a trust is not an ERISA plan, a plan does not "own" the trust's assets; and (3) unvested contract rights are executory, not equitable remainder interests. (254a.)[3]

In July 2009, Petitioner believed he had discretion to amend the governing documents. He amended them to provide that no future benefits would be payable to any person not an owner-employee ("OE") or the spouse of an OE. (44a,116a, 304a). Petitioner and his brother signed as President and Vice-President of PennMont, respectively; and Petitioner signed "as Attorney-in-Fact for all participating employers" and "participating employees." (*Id.*). DOL litigation was

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[3] The District Court noted the simplicity of the arguments, based on property and contract law, and that participants in a defined benefit plan have no interests in trust assets; but said that defined benefit plan analysis only applies to pension plans and "overlooks the dispositive context in which the plans operate." (254a).

still in the starting blocks. Thereafter, Petitioner, PennMont, PPT, and his affiliates treated the trusts and arrangements as amended and terminated with respect to any benefits involving non-owner employees ("NOEs"), and accordingly, not within the scope of ERISA.

Petitioner and the other defendants filed a motion to dismiss the Secretary's complaint, alleging the district court lacked subject-matter jurisdiction because ERISA did not apply, and the Secretary lacked Article III standing. The district court, Jones, J., denied the motion in a memorandum dated August 31, 2009. [Doc. 107.] The court denied the Secretary's first request for preliminary injunction on January 11, 2010.

In the two years following the amendment, the trustee PPT obtained loans from various insurance companies and Petitioner acted, pursuant to his authority, to apply other surplus funds to other investments. Surplus was used to pay expenses of operations. The Secretary filed a "supplemental complaint" in 2012 [Doc. 349] alleging that all these actions were ERISA prohibited transactions. (161a).

C. THE DISTRICT COURT JUDGMENTS – 2012 to 2015

On August 3, 2012, the United States District Court for the Eastern District of Pennsylvania (McLaughlin, J.) entered an order granting in part and denying in part the Secretary's motion for partial summary judgment. (236a, *Solis, supra*). Judge McLaughlin said that Petitioner did not in 2009 follow the amendment procedure of the documents he wrote. Even though the court wrote that he signed

"as attorney in fact for each of the adopting employers," the court said there was no "argument" that Petitioner signed in that settlor/sponsor capacity. Further, such an amendment was allegedly contrary to public policy. *Solis*, at 280.

On September 16, 2013, the District Court granted the Secretary's application for a temporary restraining order and preliminary injunction [61a, Doc. 496], removing Petitioner and other defendants from "any position they may currently hold with regard to the [Trusts]." That Order also appointed an Independent Fiduciary for the Trusts (defined below) and barred the Trusts from advancing defense costs to Petitioner or his affiliates. [61a, at ¶ 12]. The Court also imposed a prejudgment seizure of the bank accounts of Petitioner's law firms and affiliates, and effectively put them out of business. Petitioner appealed the injunction, again contesting the Secretary's standing and statutory authority, but the Third Circuit never considered the merits. No. 13-3827 (C.A. 3 June 2015). Two weeks after the injunction, the Secretary filed a motion for contempt, which the court denied a year later. (Doc. 990).

After having allowed Petitioner and his affiliates the money necessary to hire counsel to defend the contempt proceedings, the District Court scheduled a trial and terminated all indemnification and legal fees. (161a). The District Court conducted a bench trial on June 9, 10 and 11, 2014, receiving only the Secretary's evidence. Petitioner was unrepresented. (168a). Shortly afterward, on June 27, 2014, the Court allowed counsel to reappear for Petitioner to assert his post-trial rights and certain "limited tasks." (Doc. 898; & 168a).

In February 2015, the district court issued a memorandum opinion that tracked the Secretary's version of Petitioner's alleged violations of ERISA. (*Perez,* 151a–235a). ERISA applied because Petitioner's amendment was ineffective with respect to over 400 welfare benefit plans. Nowhere did the Court say that any benefit payable to anyone was reduced or put at risk by the contested "payments" and "investments." The Court ruled that Petitioner's affiliates had never been permitted to pay themselves fees, or to place money into multiple accounts, or invest, despite their undisputed control of the entire arrangement, the expansive powers granted them by employers, employees, and other fiduciaries, and the settlor/sponsor/administrator/and trustee powers they drafted into the governing documents.

The Court entered a judgment in March 2015 (55a, 68a) consisting of three elements, including a monetary award it called "restitution and disgorgement."[4] First was a money judgment for over $38 million, immediately reduced by over $19 million previously seized from Petitioner's affiliates. The court then ordered Petitioner to turn over any plan assets -- if they were in his possession. Finally, going beyond the Secretary's prayer in any filed complaint and the statute, the court barred Petitioner, *forever*, from ever serving in any capacity in connection with any ERISA arrangements (268a) but the judgment extends the bar to any "employee benefit plan." (55a).

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[4] The Court specified that the monetary relief flowed from 29 U.S.C. § 1132(a)(2) (267a), while the injunction and permanent bar flowed from § 1132(a)(5) (268a).

Nothing in the district court's opinion or in the separate final judgment order gave any relief or monetary award in favor of the Secretary. (*Id.,* 17a). The relief was specifically entered in favor of the "Plans" and "Trusts." (*Id.)*

The Court denied Petitioner's motion for a new trial. (38a). After Petitioner appealed the Court's March 2015 judgment, the Court issued an order on August 4, 2015 appointing a permanent independent fiduciary over the non-ERISA trusts and the "plans." (61a).

D. THE THIRD CIRCUIT'S DECISIONS 2016 to 2018 AND CIVIL INCARCERATION

The Third Circuit rejected Petitioner's assertion that ERISA never applied to this case because the 2009 Amendment validly eliminated any possible participation of non-owner employees. *Sec'y U.S. Dept. of Labor v. Koresko,* 646 F. Appx. 230, 241-43 (3d Cir. 2016). Although aware that all the adopting employers had expressly vested settlor, sponsor and administrator powers in Petitioner,[5] *id.,* the Circuit Court affirmed the district court's determination that even though REAL VEBA was not an ERISA plan, individual theoretical "plans" held property rights in trust assets that could be enforced by the Secretary under a strict liability

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5 Petitioner's brief spoke of his settlor powers:

"Mr. Koresko executed the Master Trust Agreement on behalf of REAL as its attorney in fact. [GX-48]. Although he signed the 2009 Amendment "as Attorney in Fact for all Participating Employers," since the participating employers are REAL, it is a distinction without a difference and should not affect the validity of the 2009 Amendment. Mr. Koresko was authorized to approve the 2009 Amendment and he did so. Any other conclusion elevates form over substance."

Brief of Appellant, available at 2015 WL 5697497 (C.A.3), at *22 – 23.

statute, 29 U.S.C. § 1106. There is not one word about the rights of real people by any of the courts below, *id.* at 236 - 245, because the Secretary sued "on behalf of the Plans," not on behalf of beneficiaries. [Doc. 107, p. 17.] The courts thus adopted the position of the Secretary that (i) a plan is an entity with its own "beneficial ownership interests" in property under ERISA; (ii) the Secretary can assert representational standing for a legal fiction; and (iii) a court is free to ignore the procedures of trust amendment implemented by the person who possessed every conceivable power to control the trust and any underlying benefit plan.

The Third Circuit's nonprecedential opinion appeared in April 2016 but did not dispose of the entire case.[6] Simultaneously, the Secretary attacked Petitioner for alleged failure to turn over "plan assets," including $1.68 million that was already included and double-counted in the original money judgment of March 2015. [A320, Doc. 1134-1, Lines 1, 2, 3]. Petitioner surrendered after a new judge, Beetlestone, J., refused him indemnification for counsel and declared him in contempt of the 2013 preliminary injunction. (Doc. 1307, 1311). He was put in solitary confinement on May 5, 2016, deprived of counsel, and rendered unable to seek rehearing or review in this Court of the Third Circuit's April 2016 decision. He was not able to appeal the contempt matter until September 29, 2016. (3a).

This case arises now on appeal from decisions of the Third Circuit which affirmed the validity of the incarceration and its use by the Secretary to collect

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[6] Petitioner appealed the District Court ruling that he bear the future costs of the fiduciary's appointment. That appeal was dismissed for lack of a final order, and there is not yet a final order relating to the total due. (49a-52a).

parts of a money judgment that never granted one penny of relief contemplated by ERISA to the Secretary or any other real person or juridical entity. (1a, 3a).*

In footnote 4 of its May 2018 opinion, the Third Circuit rejected Petitioner's reassertion that the district court never had jurisdiction because the Secretary never had statutory authority or Article III standing to continue the suit as of the retroactive date of amendment, April 2009. (16a). Observing that Petitioner cited "two recent Supreme Court decisions, *Ziglar v. Abbasi*, . . . 137 S.Ct. 1843 . . . (2017), and *Spokeo, Inc. v. Robins*, . . . 136 S.Ct. 1540 . . . (2016) for the proposition that the DOL lacked standing to seek relief against him because . . . the Plans did not sustain a pecuniary loss," the Circuit Court found those cases only "instructive in the areas of immigration . . . and the Fair Credit Reporting Act (*Spokeo, Inc.*)." The Court said that *Ziglar* and *Spokeo* "have nothing to do with standing to obtain redress for an ERISA fiduciary's breach of duties." Instead, it followed *Edmonson v. Lincoln National Life Insurance Co.*, 725 F.3d 406, 417 (3d Cir. 2013), saying: "a financial loss is not a prerequisite for standing to bring a disgorgement claim under ERISA," *id.*, at 428, assuming that "plans" have rights the Secretary can enforce in equity, in the presence of a clearly adequate and crippling monetary judgment. The district court continues to this day its actions to liquidate REAL VEBA trust and infringe Petitioner's interests therein.

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* District Judge Beetlestone held Petitioner in federal prison twenty-four months after he was deposed and swore he had no plan assets. Judge McLaughlin never said he possessed any, as of the 2015 judgment or thereafter. (55a)

REASONS FOR GRANTING THE PETITION

I. The First Question – The Secretary's Standing in Cases of Reduced Plan Surplus, Without Concrete Harm to Real People or Their Benefits – Warrants Further Review.

A. The Third Circuit's Decision Contradicts The Uniform View of This Court And The Other Circuits In Cases Involving Defined-Benefit Arrangements.

This Court held in 1995, in *Hughes Aircraft v. Jacobson,* 525 U.S. 432 (1995), that a fiduciary could amend a defined benefit pension arrangement, freeze any accrued benefits due to participants, and then, if there were any surplus, refund it to the sponsor of the arrangement. This Court agreed that a plan sponsor could remove millions out of an ERISA plan after amendment, without triggering liability (see 29 U.S.C. § 1106), once that sponsor determined that accrued benefits were fully-funded.

To arrive at that holding this Court agreed that in the case of defined benefit pension plans, the participants and beneficiaries have no interests in "plan assets." *See Malia v. General Elec. Co.,* 23 F.3d 828 (3d Cir. 1994), at 830 n.2, 831-832. When the benefit is defined by plan terms, not by an account balance, a participant's only interest is in the plan's contractual promise of that benefit. *Id.* And so long as the plan pays promised and vested benefits, or has enough assets to pay them, any excess money is not locked in forever, and not within the realm of ERISA's concern. *Id.*

That result is consistent with the historic law of trusts, when a settlor expressly reserves a reversionary interest to himself, or implicitly does so by retaining the ability to revoke or amend a trust in its favor. Moreover, that holding respects the

fundamentally contractual nature of benefits in the employment context, especially non-pension benefits like those at issue in this case.

In *Hughes Aircraft*, this Court thus established the circumstances under which people articulate a harm sufficient to trigger an ERISA remedy in a case of reduced corpus. ERISA remedies depend on how each arrangement is constructed and what it promises. Participants in a defined-benefit plan have no "claim to any particular asset that composes a part of the plan's general asset pool." 525 U.S. at 440. Instead, participants have only "a right to a certain defined level of benefits." *Ibid.* In other words, defined-contribution-plan participants have rights in certain specific assets in the plan; but defined-benefit-plan participants do not. The ability to sue tracks the contract right.

This Court reaffirmed that distinction in *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008), clearly spelling out when an ERISA plan participant can demonstrate a personal harm for purposes of an ERISA cause of action. 552 U.S. at 253. A plaintiff's cause of action for fiduciary misconduct depends on the status of his benefits under the plan and the directness of his interest in assets. An actionable "loss" resulting from breach of fiduciary duties, 29 U.S.C. § 1109(a), requires loss of money or profits that people have an expectation of enjoying. If the participant belongs to a "defined-contribution plan," where he owns certain assets held by the plan on his behalf, he can sue if he shows a real harm -- when fiduciary misconduct "diminishes plan assets payable to all participants * * * or only to persons tied to particular individual accounts" that include his. *LaRue*,

552 U.S. at 256. But if he belongs to a "defined-benefit plan," where people are *not* entitled to certain assets in the plan, misconduct by the fiduciary does not suffice "unless it creates or enhances the risk of default by the entire plan." *Id.* at 255.

Hughes Aircraft cemented the view that a defined benefit plan consists of two "pots." ERISA protects the pot of assets necessary for payment of benefits. *LaRue, supra, at* 255. The remainder (if any) of a fund, consisting of "surplus" does not demand a razor-edged application of ERISA for at least two very practical and important reasons. ERISA is not a vehicle for employee windfall; and an employee benefit arrangement is not charitable.

Accordingly, the Circuit Courts have unanimously agreed, in a variety of factual settings, that even if there is an act by a fiduciary that may appear actionable as a breach of fiduciary duty (29 U.S.C. 1109) or prohibited transaction (29 U.S.C. § 1106), participants and beneficiaries suffer no injury-in-fact necessary for suit under ERISA § 502(a) (29 U.S.C. § 1132(a)) when there is an alleged reduction of surplus, so long as there are sufficient amounts remaining in a fund to pay vested benefits. *See Duncan v. Muzyn,* 885 F.3d 422, 427 (6th Cir. 2018); *Thole v. U.S. Bank, Nat'l Ass'n,* 873 F.3d 617, 630 (8th Cir. 2017); *pet. for cert pending* No. 17-1712; *Lee v. Verizon Commc'ns, Inc.,* 837 F.3d 523, 546-47 (5th Cir. 2016), *cert. denied sub nom. Pundt v. Verizon Commc'ns, Inc.*, 137 S. Ct. 1374, 197 L. Ed. 2d 568 (2017) (finding participants did not have standing when a plan was only 66% actuarially funded); *Soehnlen v. Fleet Owners Ins. Fund,* 844 F.3d 576, 583 (6th Cir. 2016); *Perelman v.*

Perelman, 793 F.3d 368 (3d Cir. 2015); *David v. Alphin,* 704 F.3d 327, 338 (4th Cir. 2013); *McCullough v. AEGON USA Inc.,* 585 F.3d 1082, 1084 (8th Cir. 2009); *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.,* 433 F.3d 181, 199 (2d Cir. 2005); *Kendall v. Emps. Ret. Plan of Avon Prods.,* 561 F.3d 112, 121 (2d Cir. 2009).

The foregoing cases repeat the reasoning of *Harley v. Minn. Mining & Mfg. Co.,* 284 F.3d 901, 906 (8th Cir. 2002), which relied directly on the dichotomy established in *Hughes Aircraft.* Since surplus only relieves sponsors from future contributions necessary to fund benefit obligations, the sponsors have the predominant property interest; and therefore, a "loss" involving erosion of surplus does not implicate any concern in ERISA. *Ibid.* There may be a loss, but not a legal damage.

The foregoing cases all involved pension plans, which require that some or all of a benefit promise become vested (i.e., nonforfeitable) at a time dictated by statute. In contrast to pensions, welfare benefits (like those at issue in this case) are not vested. *M&G Polymers USA, LLC v. Tackett,* 524 U.S. ___, 135 S. Ct. 926, 944 (2015). A plan sponsor can amend, change, or eliminate benefits at any time, for any reason. *Id.; Curtis-Wright Corp. v. Schoonejongen,* 514 U.S. 73, 78 (1995) ("[e]mployers or other plan sponsors are generally free under ERISA, for any reason and at any time, to adopt, modify or terminate welfare plans."). Welfare benefits arrangements have the least amount of ERISA regulation, especially when the benefits are fully-insured and do not depend on investment acumen. The fully-insured welfare arrangements in this case, of the defined benefit variety, were the least regulated of anything

touched by ERISA.

Despite the foregoing, the courts below allowed the Secretary to sue Petitioner and proceed under ERISA to seize assets -- allegedly "beneficially owned" by welfare benefit plans (non-trusts) -- that were never promised to participants and which participants could not obtain in any suit on their own. Under *Hughes Aircraft* and its progeny, no real person had statutory or Article III standing to complain about the particular assets at issue in this case – those not necessary to discharge any vested obligations set forth in the documents governing any alleged ERISA plan. The foregoing cases that evolved from *Hughes Aircraft* all confirm that a participant's suit "on behalf of a plan" is not permitted without concrete, individualized harm to a real person, whether viewed in terms of Article III standing or the statutory zone of interests shared by ERISA plaintiffs. *See Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1384 - 86 (2014).* It does not matter whether the erosion of plan surplus (allegedly caused by a fiduciary's act) is $25.00 or $25 million. In short, loss to surplus does not translate into an actionable loss to "the plan" (within the meaning of ERISA), especially when (as here) the party with authority retains the power to amend and thereafter remove surplus from any arrangement.

There is nothing in the statutory design to indicate that the Secretary of Labor obtained from Congress any broader statutory zone of interests than participants. *Ibid. Participants* are the people who have whatever rights Congress intended to protect, 29 U.S.C. § 1001(b), and only their rights (not regulatory desires) define the boundaries of ERISA enforcement, especially when the object is monetary award

under 29 U.S.C. § 1109.

Accordingly, given the uniform message of *Hughes Aircraft* and the cases relying upon it, prior to this case, an actual or functional fiduciary of any welfare plan (like Petitioner) could not reasonably discern that his duty was greater, and more subject to strict liability, than if this were a matter involving a pension plan. Given *Curtis-Wright,* a fiduciary could not know that his right to amend could be abolished, and his intention to secure the same outcome of *Hughes Aircraft* could be supplanted in favor of previously unknown "rights" and "beneficial interests" of a "plan."

Certainly, the breadth of the Secretary's power is an issue of national importance that warrants this Court's attention. This is especially urgent in the light of this case where the courts below allowed the Secretary virtually every remedy imaginable, when there was not a dollar of proven harm to the promises made to anyone. This Court should review whether the Secretary can sue, take over non-ERISA trusts, obtain crippling money judgments, and then jail people, to satisfy only the Secretary's regulatory appetite.

B. The Decision Below Conflicts With This Court's Well-Established Doctrines Involving Standing and The Law of Trusts.

1. Conflict with *Spokeo v. Robins.*

This Court has never treated an ERISA "plan" as an entity which could, because of its personal injury, be the focus of representational standing by the Secretary. The premise of a remedy based on entity injury disregards that Congress intended that the duties of plan fiduciaries be informed by the law of

trusts; and it ignores centuries of law rejecting any notion that a trust—as an entity – could sue for breach of fiduciary duty. It ignores that equity courts only acted to protect the rights of people.

This Court's Article III precedents require injury-in-fact. The individual plaintiff must allege some *personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 - 48 (2016) (citations omitted). Even in cases of private suits involving public rights, a plaintiff must allege a personal concrete harm. *Ibid* An actual injury must exist for *the plaintiff,* or *some real person he can represent,* because the mere allegation of procedural violation, "divorced from any concrete harm" cannot "satisfy the injury-in-fact requirement of Article III." *Ibid.* (citing *Summers v. Earth Island Institute,* 555 U.S. 488, 496 (2009)).

The standing of the Secretary of Labor to assert a claim for money (under a legal or equitable theory) for breach of fiduciary duty under ERISA, 29 U.S.C. § 1132(a)(2), must, therefore, depend on whether a vested interest of a citizen has been harmed by an alleged violation of ERISA. The Secretary has no typical basis to assert representational standing, like contractual assignment, *see Sprint Communications Co. v. APCC Services, Inc.,* 554 U.S. 269, 274 (2008), or statutory sharing of any pecuniary interest. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 775–777 (2000)(qui tam).

The Third Circuit's decision conflicts with this Court's precedents,

particularly *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 (2016). In *Spokeo,* this Court vacated the Ninth Circuit's decision for failure to consider that an injury in fact under a statute must be both "particularized" and "concrete." *Id.* at 1544, 1550. This Court elaborated that "[t]o establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (citation omitted). Injury is not concrete simply because a plaintiff alleges violation of his statutory rights. *Id.* A plaintiff's "personal interests" in the statutory goal "[a]re individualized rather than collective." *Id.* Those reasons "concern particularization, not concreteness." *Id.*

Under the plain language of *Spokeo* the Secretary of Labor does not satisfy "the injury-in-fact requirement" simply because ERISA "grants [him] a statutory right and * * * authorize[s] him to sue to vindicate that right." *Ibid.* He must show that the alleged statutory injury has resulted in actual harm to the ability of "the plan" to satisfy in full its obligations to pay real people their vested levels of nondiscretionary benefits.

If the Secretary had sought the penalties he can assess under 29 U.S.C. 1132(a)(6), (i) or (l) for violations of the prohibited transactions provisions of ERISA, at least he would have asserted some "concrete injury" to the United States "in the context of statutory violation." *Id.* He did not.

2. Trust law confirms the purely theoretical injury here.

In *Spokeo,* this Court stated that a "concrete injury" must be "real" and not

"abstract." *Ibid.* at 1548-49. While "intangible injuries can nevertheless be concrete" for constitutional standing purposes, *ibid.* at 1549, an intangible injury also assumes the existence of an intangible right possessed by a natural or legal person. This Court elaborated that "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Ibid.* First, "it is instructive . . . whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Ibid.* Second, "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." *Ibid.* In this case, there is no traditional basis for assuming that Congress identified an intangible harm as catalyst for the Secretary's suit.

As a matter of the common law in England and America, trusts have no rights that can be harmed, they cannot sue, and nobody sues for a trust as "its" representative. A trust is "an abstraction" at law. *Greenough v. Tax Assessors Of City Of Newport* 331 U.S. 486, 494 (1944). Sometimes Congress deals with a trust as though it has a separate existence, but "the economic pinch is felt by men of flesh and blood." *Id.; citing Anderson v. Wilson*, 289 U.S. 20, 27 (1933). A trust is simply the division of simultaneous interests in property: the equitable interest in the res of the beneficiary and the legal interest of the trustee. *Greenough, supra.* The trust estate cannot make a promise. *Greenough,* 331 U.S. at 495. Neither a trust estate nor trust property are recognized as separate legal or

equitable entities. George Gleason Bogert, The Law of Trusts and Trustees §§ 718, 731.

A trust case always involves a duty relating to a right of a real person. At common law, only a "beneficiary whose rights are or may be *adversely affected* by the matter(s) at issue" may bring "suit to enforce a private trust." Restatement (Third) of Trusts § 94 cmt. b. (2007) (emphasis added). While beneficiaries of common-law trusts may have "an equitable interest in the trust corpus," participants in ERISA defined-benefit plans "have an interest solely in their defined benefits, not in the 'general pool' of Plan assets." *Duncan*, 885 F.3d at 429; *see Hughes*, 525 U.S. at 440 ("Given the employer's obligation to make up any shortfall, no plan member has a claim to any particular asset that composes a part of the plan's general asset pool."). Unless the challenged conduct puts their individual benefits at risk, participants' rights are not "adversely affected." Restatement (Third) of Trusts § 94 cmt. b. There is no precedent recognizing that a quasi-trust (like the plans here) can have property interests in another trust.

As a matter of legal history, harm to a trust is at best only "abstract" and intangible, not concrete. All Congress had to do was make a plan an entity for purposes of 29 U.S.C. § 1132(a)(2) to take plan injury out of the abstractions resulting from application of the law of trusts. Alternatively, it could have expressly compelled recognition of intangible harm to secure standing for the Secretary. But Congress did neither.

Congress did not make the ERISA "plan" a new entity with property rights

in need of protection by the Secretary. Plans are not among the limited classes of ERISA plaintiffs set forth in § 1132(a). Any notion of injury to the "rights" of a legal abstraction – an amorphous "plan" -- is about as theoretical and not concrete as could be imagined. Nothing could be farther from ERISA's purpose or the reason for the injury-in-fact component of Article III.

C. The Third Circuit's Decision, Expressly Rejecting *Spokeo v. Robins* in ERISA Cases, Creates An Exception For The Secretary In Conflict With The Other Circuits

A defined-benefit-plan participant has no stake in his plan's assets, but merely an interest in the defined benefit he is to receive at some future date. *Hughes Aircraft*, 525 U.S. at 439. It does not matter what type of benefit, pension or welfare, is involved. The participant only has standing if he can show a fiduciary's actions created an imminent risk that promised benefits will not be paid – i.e., so-called "plan default." *See LaRue*, 552 U.S. at 255; *Hughes Aircraft*, 525 U.S. at 439-40. Such reasoning reflects the requirement of concrete harm, other than mere statutory violation in an ERISA case. *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1549 (2016).

In this case, the Secretary could not make that showing as the representative of any participant and did not even try. The Secretary confined its suit to the hyper-technical issue of whether certain uses of assets created strict liability in the absence of harm to any person. That position was questionable prior to *Spokeo,* but now there is a clear conflict as to whether *Spokeo* applies in an ERISA case.

The Fifth Circuit's decisions in *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 547-48 (5th Cir. 2016) illustrate the present conflict with the Third Circuit. In 2015, the court held that participants in an ERISA defined-benefit plan lacked Article III standing to assert fiduciary breach claims where the plan, but not the individual, had been injured. *Lee* v. *Verizon Commc'ns, Inc.*, 623 F. App'x 132, 150 (5th Cir. 2015) (rejecting "quasi-representative" standing). After deciding *Spokeo*, this Court remanded *Lee* to the Fifth Circuit to consider *Spokeo's* clarifications.

On remand, the Fifth Circuit confirmed that its previous decision "remain[ed] valid in light of *Spokeo*." *Lee*, 837 F.3d at 529. The "bare allegation of improper defined-benefit-plan management under ERISA, without concomitant allegations that any defined benefits are even potentially at risk does not meet the dictates of Article III," * * * "'even in the context of a statutory violation.'" *Id.* at 530 (quoting *Spokeo*, 136 S. Ct. at 1549). In doing so, the Fifth Circuit reaffirmed its holding that "representational standing" requires a personal harm to the plaintiff or his privy. "[C]oncluding otherwise would vitiate the Supreme Court's explicit pronouncement that 'Article III standing requires a concrete injury even in the context of a statutory violation.'" *Id.* at 546-47 (5th Cir. 2016), *(quoting Spokeo, supra* at 1549). The *Lee* court also relied on *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 120 (2d Cir. 2009). The *Kendall* court dismissed ERISA claims based on alleged "general" breaches of fiduciary duty without any violation of "specific" rights impaired by the breach. *Kendall*, 561 F.3d at 119.

After this Court decided *Spokeo*, the Sixth Circuit revisited the issue of

representational standing. In *Soehnlen v. Fleet Owners Ins. Fund*, 844 F.3d 576, 584 (6th Cir. 2016) the court confirmed the holding of *Spokeo* that Article III requires plaintiffs to "show that the deprivation of a right created by statute is accompanied by 'some concrete interest that is affected by the deprivation.' " *Soehnlen*, 844 F.3d at 582 (quoting *Spokeo*,136 S. Ct. at 1548). *Soehnlen* thus concluded that plaintiffs cannot establish Article III standing merely by showing "[d]efendants' violations of their ERISA rights"; they must also demonstrate "what concrete harm they suffer as a result." *Ibid.*; *see id.* at 583 (recognizing *Kendall* reached the same conclusion).

Soehnlen applied this post-*Spokeo* reasoning in rejecting the plaintiffs' breach of fiduciary duty claim (§ 1132(a)(2)) and the plaintiffs' § 1132(a)(3) claim (for "appropriate equitable relief") premised on the allegation that the defendants "breached their fiduciary obligations" to the ERISA plan in question by "subjecting it to over $15,000,000 in taxes and penalties." *Id.* at 584. The allegation was "plan injury." Citing the Second Circuit's *Kendall* decision, the court explained that ERISA plaintiffs cannot merely allege a plan is "deficient," but must instead show that a "specific right owed to them"—*e.g.*, the right to the disclosure of particular information, or to the payment of particular benefits—"was infringed." *Ibid.* Otherwise, a plaintiff 's claim would suffer from a "lack of concreteness." *Ibid.* And although the court recognized that more general fiduciary misconduct might "create an injury if 'it creates or enhances a risk of default by the entire plan,'" (an allusion to *Hughes Aircraft* and *LaRue, supra*)

the court held the plaintiffs before it had made "no showing of actual or imminent injury to the Plan itself." *Ibid.* Plaintiffs therefore lacked standing. *Ibid.*

In a pre-*Spokeo* decision, the Fourth Circuit likewise held that Article III prevents federal courts from entertaining claims by ERISA plan participants for injuries not suffered by any individual. *David v. Alphin*, 704 F.3d at 334-35. "Where there is no actual injury, we see little to be gained from an abstract challenge to alleged fiduciary misconduct at the cost of the plan * * * *" *Id.* at 336. The court said that a risk to possible future benefits "as a result of the present alleged ERISA violations is too speculative to give rise to Article III standing." *Id.* at 338. The court also rejected the plaintiffs' contention that a violation of their statutory right alone conferred standing. *Ibid.*

Similarly, the Eighth Circuit has held that the statutory provision at issue here—29 U.S.C. § 1132(a)(2) – does not give a plan participant standing to bring a claim on behalf of the plan for losses to the plan. *Harley* v. *Minn. Mining & Mfg. Co.*, 284 F.3d 901, 906-07 (8th Cir. 2002). The alleged "plan loss" of over $20 million was not a personal harm. That court was clear that mere statutory entitlement to sue was not be enough to satisfy Article III. *Ibid. Accord Thole v. U.S. Bank, Nat'l Ass'n,* 873 F.3d 617, 630 (8th Cir. 2017); *pet. for cert pending* No. 17-1712.

The decision of the Third Circuit in this case conflicts with its own contemporaneous interpretation of standing for purposes of ERISA. In *Perelman* v. *Perelman*, 793 F.3d 368, 373 (3d Cir. 2015), the court addressed participants'

standing to bring a claim under Section 1132(a)(3) "in the form of restitution or surcharge." Following the other circuit courts, the court rejected the argument that a plaintiff "need not prove an individualized injury insofar as he seeks *monetary* equitable remedies in a 'derivative' or 'representational' capacity on behalf of the Plan." *Perelman*, 793 F.3d at 375-76. The Third Circuit noted that its "own case law provide[d] no support for this theory, and other federal appellate courts have unanimously rejected it." *Id.* at 376.

In *Perlman,* the Third Circuit concluded that standing, for purposes of suit with respect to a defined benefit plan, depended on individual monetary loss. *Id.* at 373-76. But in reaching that conclusion, the court confirmed that plaintiffs seeking *injunctive* relief need not show individual monetary loss to establish an Article III injury: "With respect to claims for injunctive relief, such injury may exist simply by virtue of the defendant's violation of an ERISA statutory duty." *Id.* at 373. That conflicts with the reading of *Spokeo* announced in *Lee, supra, and Soehnlen, supra.* In this case, however, the Secretary sought and secured millions of dollars of strict liability damages for breach of statutory duty. *See* Judgment, par. 1 (55a).

By expressly rejecting application of *Spokeo* in ERISA cases (16a), in direct conflict with *Lee, supra, and Soehnlen, supra,* the Third Circuit stands alone in its view that *Spokeo* has no application to cases of legal or equitable relief under ERISA (and the notion that a multi-million-dollar judgment enforced by

garnishment[7] is equitable relief). In the Third Circuit, the Secretary can allege only theoretical "plan injury" (even if it demands damages under an equitable label) to get into court. There is no logic for the distinction, especially when Congress did not protect welfare benefits like pension benefits.

The requirement of concrete injury should apply uniformly among all ERISA plaintiffs described in 29 U.S.C. § 1132(a) with respect to pension and welfare plans, alike. The issue merits review.

II. The Second Question Should Be Reviewed Because ERISA Does Not Prohibit Any Amendment By A Person Who Has Settlor/Sponsor/Administrator and Trustee Powers, Even If It Operates to Deprive The Secretary Of Standing.

The second issue is a matter of public importance concerning an important issue of federal law. It addresses the standing of the Secretary of Labor in an ERISA action and thus affects over 150 million Americans. It is an issue of first impression.

ERISA does not bar an amendment, simply because it takes any plan out of the statute's scope and coverage, and thereby, deprives the Secretary of standing.[8]

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[7] The garnishment of an account, not traced to any plan, was affirmed in the consolidated case, No. 17-1140 (3d. Cir.)

[8] The courts below correctly discerned that the Secretary's standing to sue is irrevocably intertwined with the fundamental issue of ERISA jurisdiction since the Secretary cannot act in the absence of an ERISA plan. (45a). *See Yates v. Hendon,* 541 U.S. 1, 21 (2004) (ERISA only applies when plans cover non-owner employees). Plainly, ERISA jurisdiction must exist at all stages of a suit, even now. *See Kontrick v. Ryan,* 540 U.S. 443, 455 (2004) ("A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially

The district court below said the 2009 amendment was against public policy.[9] (305a). The Circuit Court's position was plainly colored by Petitioner's defensive motivation, as demonstrated by its footnote 15 (54a) agreeing with the district court and calling it "troubling" that Petitioner could amend a plan out of ERISA. While it spoke directly to disregard plain words of REAL VEBA, the Circuit Court did not overrule the district court's holding and left a gaping exception. If a plan draftsman can create ERISA standing with his words, then, consistent with this court's jurisprudence, his words and the powers they allocate should receive deference, even if an amendment ends ERISA jurisdiction.

The decision of the Third Circuit Court fails to respect the clearest holdings of this Court to regularly reverse other decisions based on judicial deviation from the terms of governing plan documents. *See U.S. Airways v. McCutchen,* 133 S.Ct. 1537 (2013); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). The Circuit Court looked at the amendment process as if it were some static event frozen in time in 2009. Virtually every time he addressed the district court after the Secretary's suit, Petitioner said that the arrangement was amended, and he acted as if it were. The only way to disregard the plain demonstration of intention to amend was to find that Petitioner never had actual or apparent authority despite

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at the highest appellate instance." The issue cannot be waived, despite parts of opinions below that suggested Petitioner waived argument of the plain and dispositive language in the governing documents. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704(1982) (no waiver of subject matter jurisdiction). *See* also 28a (Petitioner challenged subject-matter jurisdiction).

[9] The true policy issue is Congress' decision to not subject all employee benefit arrangements to federal law and thus limit the jurisdiction of the federal courts.

his many roles. Though he had sufficient authority over REAL VEBA and its assets to paint him as a fiduciary – indeed, like a settlor he could fire the Trustee and name a trustee (which he did in 2009, naming his affiliate PPT) – and he was held liable for $39 million of "transfers" as if he were a trustee – the courts rejected his most fundamental settlor powers. *Sec of Labor v. Koresko,* 616 Fed. Appx. 241 – 243. That was a mistake of law because there is no factual dispute as to what the documents said and how the decisions below changed the words in favor of some notion of equitable relief. "It is still hornbook law that the pole star in every trust (and in every will) is the settlor's (or testator's) intent and that intent must prevail." *In re Trust Estate of Pew,* 411 Pa. 96, 106, 191 A.2d 399, ___ (1963) (citations omitted).

The mistake below is fundamental because courts and the Secretary only have limited authority in ERISA cases. *Mertens v. Hewitt Associates,* 508 U. S. 248, 256 (1993). The section under which this suit is brought "does not, after all, authorize 'appropriate equitable relief' at large," *Mertens* , 508 U. S. at 253 1993 (quoting §1132(a)(3)); rather, it countenances only such relief as will enforce "the terms of the plan" or the statute, §1132(a)(3) [,(2), or (5)]. *McCutchen, supra.* That limitation reflects ERISA's principal function: to "protect contractually defined benefits." *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U. S. 134, 148 (1985). The statutory scheme, "is built around reliance on the face of written plan documents." *Curtiss-Wright Corp. v. Schoonejongen,* 514 U. S. 73, 83 (1995). "Every employee benefit plan shall be established and maintained pursuant to a written instrument,"

§1102(a)(1), and an administrator must act "in accordance with the documents and instruments governing the plan" insofar as they accord with the statute, §1104(a)(1)(D). Nevertheless, amendment is a settlor act divorced from any requirement of fiduciary loyalty. *Curtiss-Wright, supra.*

Petitioner wrote the documents; and whether as creator, settlor, sponsor, officer, administrator, principal, agent, or attorney (at law or in fact), he amended the arrangement for the League, every plan committee, and all employers. The courts disregarded the legal import of his words, the "terms of the plan" and the "other manifestations of the parties' intent." *Firestone Tire & Rubber Co. v. Bruch*, 489 U. S. 101, 113 (1989). Not one word of the amendment or the amendment procedure contradicted any part of ERISA. Petitioner's interpretation was reasonable and should not have been disturbed, even without his extra settlor powers. *Firestone, supra* at 111 (citations omitted.).

There were four separate amendment provisions -- three in the Plan, one in the Trust. The courts below failed to apprehend that the Master Plan document was also incorporated into the Master Trust, via Plan § 10.22; and in cases of conflict between documents, the Master Trust prevailed:

> In the event of any conflict between the Provisions of this Plan Document and the Trust document . . . the terms of the Trust document shall control; and the terms of the Trust shall be incorporated by reference into this Plan.

Id. (113a).

Petitioner said the Trust overruled the Plan, since he wrote it that way. That should have been enough, especially because the discretionary power of amendment

was a settlor power. The Circuit Court concluded that its interpretation of the Plan overruled the Trust; and that is an error of law. *Schreibner v. Kellogg*, 50 F.3d 264, 266 (3d Cir. 1995) (applying Pennsylvania law).

Trust § 9.01(a) (86a), created in 2002, empowered "the League" to amend the Trust, and logically, all Plan documents included in the Trust. *There was no additional requirement that any amendment be nondiscriminatory.* Petitioner was the League, or he ran it as "a fictitious entity" consisting of Petitioner and his brother. *Koresko,* 647 Fed. Appx. at 241. Employers joined it, and they gave Petitioner power of attorney to act "with respect to all questions, controversies, and issues relating to the Plan before . . . the Department of Labor." Plan § 10.21.

Plan § 9.03(a) (110a) allowed *employers* to amend, *without any condition of nondiscrimination.* Since Petitioner had powers of attorney from all employers, he could exercise employer power under this provision, or the superior provision, Trust § 9.01(a), via *League power,* to eliminate participation of non-owner employees. The Circuit Court called this argument "convoluted." *Koresko*, at 240-41.

Third, **Plan § 6.03** (107a) allowed each Plan Committee to determine all questions *of eligibility* [§6.03(a)] and *to amend without any nondiscrimination condition* [§6.03(g)] (304a). The Administrator exercised any Committee power. *Id.* Thus, PennMont could amend. The Third Circuit rejected PennMont's authority to amend, because "the role of administrator ... does not automatically entail the authority to amend the plan." 246 Fed. Appx. at 242. But, in this Plan, the named administrator could amend, and do so without any nondiscrimination limitation.

Finally, **Plan § 9.03(b) and (c)** gave the League power to create amendments that did not discriminate in favor of highly compensated employees. (305a). The Court rejected Petitioner's contentions that this clause had a limited tax purpose and was subordinate to the unrestricted and conflicting Trust power.

Just as in *Hughes Aircraft, supra,* and *Curtis-Wright*, the lower courts interfered with a settlor act executed by people who had plenary powers beyond those of simple administration. Further, the Third Circuit misconstrued the rule of law stated in *Firestone,* because the applicable rule of deference to a fiduciary's interpretation depends on actual powers stated in documents, not whether an entity with trustee powers happens to be called "administrator." This Court should clarify that there is no public policy exception to the holdings of *Curtiss-Wright* and *Firestone*, even if an amendment impacts federal court jurisdiction and the standing of the Secretary of Labor.

III. The Third Question Should Be Reviewed Because Congress Did Not Give Federal Courts Authority To Permanently Bar Any Non-Felon From Providing Services To Any Employee Benefit Plans, Whether Or Not Covered By ERISA, Or To Issue Punitive Sanctions In Favor Of The Secretary Of Labor

This Court has held that ERISA's list of plaintiffs, and the limited remedies available for each, are sufficiently indicative of Congressional intention not to include others. *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U. S. 134, 148 (1985). "Congress does not hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

In 29 USC § 1111, Congress barred only certain felons from serving in a fiduciary capacity with respect to an ERISA plan. After conviction, the bar expires, *inter alia*, in 13 years or upon court order. That penalty is statutory, not equitable, and it does not apply to a non-felon like Petitioner. The penalty in this case finds no historical precedent in any trust case or authoritative treatise.

In *Great West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 209 (2002) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258 n.8 (1993)) this Court explained that "'[e]quitable' relief must mean something less than all relief," implying that there must exist at least some remedies which do not follow on the coattails of injunctive authority. The Court provided an example of a non-equitable remedy in *Tull v. United States,* 481 U.S. 412, 422 (1987), holding that civil penalties are not available as a remedy to courts sitting in equity. A permanent bar is plainly a punitive remedy with no less a monetary effect as any other penalty. It is worse.

Under the doctrine of *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), a person has a fundamental liberty interest in pursuing "any of the common occupations of life." "[T]his liberty interest may not be interfered with under the guise of protecting the public interest * * *" by arbitrary legislative action." *Id.* at 400. In ERISA, Congress exercised that power with a limited bar. 29 USC § 1111. Petitioner is not a felon; consequently, the rulings that imposed a bar, penal award, and punishments on him must be assumed as arbitrary usurpations of legislative perogative. *Massachusetts Mut. Life Ins. Co. v. Russell, supra.*

The courts below misconstrued the rules of law applicable to ERISA remedies and the authority of the federal courts. This Court should review the question of whether the Secretary has any authority to ever seek a bar beyond the limited settings of § 1111. Since ERISA remedies do not include punitive sanctions, there is also a valid and related question as to whether the courts had any authority (i) to grant monetary sanctions to the Secretary; or (ii) to allow punitive incarceration as "equitable relief" to aid satisfaction of the money judgment in this case. *See Kokesh v. SEC,* 137 S. Ct. 1635, 1642 (2017) (*citing Huntington v. Attrill,* 146 U.S. 657, 667 (1892)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully,

John J. Koresko, V
Petitioner, Pro Se

October 24, 2018