No. 19-382

IN THE

Supreme Court of the United States

JOHN TEETS,

Petitioner,

v.

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Tenth Circuit correctly held: (1) to obtain disgorgement of profits under ERISA § 502(a)(3), a plaintiff must show that the profits were generated from particular property over which he can assert title or right to possession, and (2) petitioner failed to meet his summary-judgment burden to identify any such profit-generating property.

RULE 29.6 STATEMENT

Respondent Great-West Life & Annuity Insurance Company is a wholly-owned subsidiary of GWL&A Financial Inc., which is not publicly traded. No publicly held corporation directly owns 10% or more of Great-West Life & Annuity Insurance Company's stock. GWL&A Financial Inc. is indirectly owned by Great-West Lifeco Inc. ("Lifeco"). Lifeco's shares are publicly traded in Canada on the Toronto Stock Exchange.

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INTRODUCTION

In the decision below, the Tenth Circuit, consistent with this Court's precedents and those of every circuit to address the issue, held that a plaintiff seeking the restitutionary remedy of disgorgement of profits under ERISA § 502(a)(3) must show that the profits derive from particular property over which the plaintiff can assert title or right to possession. See *Great-W. Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213–14 & n.2 (2002); *infra* at 16. The court further held that petitioner failed to meet his summary-judgment burden because, in opposing summary judgment, he failed to identify any such profit-producing property, and instead rested on the erroneous legal argument that equitable disgorgement does not require the recovered funds to be traceable to a *res* or particular funds.

Neither holding warrants this Court's review. Indeed, unable to show that the Tenth Circuit's actual decision warrants review, petitioner instead invents a new one, asserting that the decision below created a new "plan contract" exception to § 502(a)(3). But the court did no such thing. It did not address petitioner's "plan contract" argument because petitioner made no such argument in opposing summary judgment. Thus, the question petitioner presents in his petition, having been neither pressed nor passed upon below, is not even properly before this Court. The Tenth Circuit's legal holding concerning the scope of "appropriate equitable relief" under § 502(a)(3) is correct, and its fact-bound holding that petitioner failed to carry his summary-judgment burden—which petitioner does not even challenge in his petition—has no prospective significance and does not warrant this Court's review. The petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

Through his employer's 401(k) retirement plan, petitioner John Teets invested money in Great-West's Key Guaranteed Portfolio Fund ("Fund" or "KGPF"). Pet. App. 4a. The Fund is a low-risk insurance product that "guarantees capital preservation," meaning "participants *will never lose* the principal they invest or the interest they earn, which is credited daily to their accounts." *Id.* at 12a (emphasis added). When a participant invests in the Fund, Great-West deposits the money into its general account, to be invested in "instruments such as treasury bonds, corporate bonds, and mortgage-backed securities." *Id.* The Fund "earn[s] lower interest rates than some higher-risk instruments or funds" because of Great-West's conservative investment strategy. *Id.* Lower rates, of course, result from the risk-reward tradeoff inherent to all investments; since the Fund guarantees that participants will never lose their principal or interest, Great-West bears *all* of the risk of loss.

Participants' investments earn interest at the "Credited Rate." Great-West "sets the Credited Rate quarterly, announcing the new rate at least two business days before the start of each quarter." *Id.* at 12a. The Fund contract mandates that "[t]he effective annual interest rate will never be less than 0%." *Id.* at 13a. "Great-West retains as revenue the difference between the total yield on the [Fund's] monetary instruments and the Credited Rate." *Id.* This difference is known as the "margin" or the "spread." *Id.*[1]

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[1] Petitioner's assertion that "over the class period," Great-West's "margin increased over time, from 1.77% in 2008 to 2.97% in 2014," Pet. 6, is based on his arbitrary selection of a cutoff date in June 2014 with the highest gross margin for any single quarter

At any time—even mid-quarter—participants who are dissatisfied with the quarterly rate may withdraw their monies from the Fund, without penalty. *Id.* at 14a, 72a–73a. Petitioner could, for example, freely withdraw his money and immediately invest it instead in one of the 29 other investment options that his employer's 401(k) plan offers, each with varying risk and return characteristics. *Id.* at 12a, 71a. Plans may likewise terminate their relationship with Great-West at any time and withdraw all of the invested funds of all of its participants. *Id.* at 14a.

Although Great-West's contracts with retirement plans permit it to defer a plan's request to withdraw all of its participants' money for up to a year, "[t]here is no evidence Great-West has ever exercised the option to impose that waiting period." *Id.* Indeed, "[m]ore than 3,000 plans have terminated the KGPF as a plan offering during the class period." *Id.* at 34a. And even if Great-West were to exercise that option, "participants may still withdraw their individual balances without fees or charges" at any time, including during the plan waiting period. *Id.* at 73a. Thus, petitioner's assertion that "the lower Great-West sets the Credited Rate, the more money it makes," Pet. 6, is a simplistic and inaccurate caricature. Great-West must consider how the rate will affect plans' willingness to offer and participants' willingness to invest and remain invested in the Fund. If the rate is set too low, plans and participants will simply leave and choose other investment options.

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calculated by his expert, see Aplt. App., Vol. I at 114–15. In fact, the gross margin began at 1.77% in September 2008 and ended only slightly higher, at 2.16%, in December 2016. *Id.* And while the Credited Rate declined from 3.55% to 1.10% over the class period, the gross yield (the overall return from Great-West's investments) likewise declined from 5.32% to 3.26%. *Id.*

Great-West "has always fulfilled the Fund's guarantees"; "[i]nvestors have never suffered a loss of principal on their monies allocated to the Fund," and Great-West "has always credited Fund participants with the Credited Rate." Pet. App. 73a. Moreover, despite offering both significant investment protections and liquidity, the Fund offered a higher rate of return than CDs and other safe retirement plan options like money-market funds. Aplt. App., Vol. II at 146. In fact, during the class period, Fund investors have enjoyed returns rivaling rates paid on two-year Treasury securities. *Id.*

The Fund thus serves important purposes for many 401(k) plan participants. While some participants may be willing to accept more risk for a shot at greater returns, many participants, especially ones at or near retirement, prefer the security of knowing that their investments will be there, in full, when they need them. Even younger participants who are more willing to take risk may want a portion of their monies in a safe and secure investment. By guaranteeing participants' principal and accrued interest, and offering the certainty of a guaranteed rate of return each quarter, the Fund provides that security while also earning returns at higher rates than money-market funds and similar, low-risk options. Indeed, during the 2008 financial crisis, when seemingly stable companies failed and traditionally safe investment options lost money, the Fund still delivered substantial positive returns and made good on its guarantee. *Id.* at 146–47.

This combination of low risk, favorable returns, and immediate liquidity has led the fiduciaries of thousands of 401(k) plans to select the Fund as an investment option for their plans, and has led hundreds of thousands of those plans' participants to invest in the Fund.

B. Procedural Background

1. In 2014, petitioner sued Great-West in the United States District Court for the District of Colorado on behalf of all employee benefit plan participants who had invested in the Fund since 2008 and their beneficiaries. Pet. App. 15a. The district court certified the class under Federal Rule of Civil Procedure 23(b)(3). See *id.*

Petitioner's amended complaint asserts three claims under ERISA. The first two claims—which were the principal focus of both the summary-judgment briefing in the district court and petitioner's appeal to the Tenth Circuit—allege that Great-West breached fiduciary duties under ERISA by earning excessive profits on the Fund. Pet. App. 15a. The district court granted summary judgment to Great-West on both claims, holding that Great-West is not a fiduciary with regard to the setting of the Credited Rate or its own compensation because "the plan and/or its participants can 'vote with their feet' if they dislike the new rate." *Id.* at 83a–95a. The Tenth Circuit affirmed on substantially the same grounds, holding that Great-West is not a fiduciary because it lacks unilateral "authority or control over the Credited Rate." *Id.* at 31a–41a. Petitioner has now abandoned his claims that Great-West breached fiduciary duties. Pet. 7 ("Mr. Teets does not seek further review of the fiduciary holding here.").

2. In his third claim, petitioner alleged that Great-West was liable as a nonfiduciary party-in-interest for engaging in "prohibited transaction[s]" under ERISA § 406(a). Pet. App. 16a. The alleged "prohibited transactions" were the decisions of thousands of plan fiduciaries to include the Fund in their plan investment lineups. As relief, petitioner sought disgorgement of Great-West's supposed "ill-gotten gains," *i.e.*, the profits Great-West obtained by allowing its Fund to be included in the plans. *Id.* at 59a.

In contrast to petitioner's fiduciary claims, which were briefed extensively below, petitioner "devoted limited attention to this claim." *Id.* at 42a n.21. The parties' summary-judgment briefs "each addressed the non-fiduciary claim in less than three pages." *Id.* (citing Aplt. App., Vol. II at 181–83, 316–18, 366–68).

Specifically, in its motion for summary judgment, Great-West showed that petitioner was not seeking "appropriate equitable relief" under ERISA § 502(a)(3) because he was "not seeking recovery of specific funds in Great-West's possession that are traceable to any plan." Aplt. App., Vol. II at 182. Rather, in seeking to recover "the margin on Great-West's general account assets," *id.*, he sought "the quintessentially legal remedy of monetary damages," *id.* at 181.

In response, petitioner did not identify any particular profit-producing property or fund in Great-West's possession. See *id.* at 317–18. Nor did he contend that the plan contract was such a *res*. See *id.* Instead, he rested his opposition on his legal argument that "equitable relief includes disgorgement of ill-gotten gains," and "disgorgement of profits does not require the recovered funds to be traceable to a *res* or particular funds." *Id.*; see also *id.* at 338 (arguing, in support of his own motion for summary judgment, that "disgorgement of ill-gotten gains is a form of 'appropriate equitable relief' for which there is no tracing requirement" (citation omitted)).

In reply, Great-West explained that disgorgement of profits "is not [an] end-run around the requirements of traceability and the existence of a specifically identifiable *res*." *Id.* at 367. Rather, as this Court's precedents make clear, for profits to be subject to disgorgement under § 502(a)(3), "they must have been generated

from assets that would have been subject to a constructive trust," *i.e.*, "'particular property' traceable to a plan." *Id.* (citing *Knudson*, 534 U.S. at 213–14).

The district court granted summary judgment to Great-West without deciding whether petitioner sought "appropriate equitable relief." Pet. App. 98a–99a. It granted summary judgment on the alternative ground that Great-West could not be held liable as a party-in-interest because petitioner had not shown that it knew or should have known that the challenged transactions violated ERISA. *Id.* at 99a–103a.

3. The Tenth Circuit unanimously affirmed on the ground that petitioner had "failed to carry his burden to show that he qualified for 'appropriate equitable relief' under ERISA § 502(a)(3)." Pet. App. 42a. Carefully applying this Court's precedent on the scope of relief available under § 502(a)(3), the court explained that "'appropriate equitable relief' does not encompass all forms of 'relief a court of equity would be empowered to provide in the particular case at issue, including ancillary legal remedies.'" *Id.* at 48a (alteration omitted) (quoting *Montanile* v. *Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 660 (2016)). "Instead, it includes remedies that could be awarded only by equity courts." *Id.* "Thus, 'legal remedies—even legal remedies that a court of equity could sometimes award—are not 'equitable relief' under § 502(a)(3).'" *Id.* (quoting *Montanile*, 136 S. Ct. at 661).

The court next explained that restitution can be either equitable or legal, and that "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 49a–50a (quoting *Knudson*, 534 U.S. at 214). Likewise, to qualify for disgorgement of profits, which is a "for[m] of restitution," *id.* at 50a,

although the plaintiff need not "identify a particular *res* containing the profits sought to be recovered," he "still must show entitlement 'to a constructive trust on particular property held by the defendant' that the defendant used to generate the profits," *id.* at 51a–52a (citing *Knudson*, 534 U.S. at 214 n.2). "Accordingly, without a particular profit-generating *res*, a claim for payment out of the defendant's general assets is a request for legal relief rather than for equitable accounting or disgorgement of profits and cannot be awarded under § 502(a)(3)." *Id.* at 52a–53a. See also *id.* at 59a.

Turning to petitioner's claim, the court observed that "Great-West may possess such 'particular property,' but Mr. Teets failed to identify any such property in his response to Great-West's summary judgment motion." *Id.* "Mr. Teets did not attempt to identify the funds in Great-West's possession that rightfully belonged to him—that is, the funds that generated the unlawful profits he sought to recover." *Id.* at 60a. "As a result, the district court was left to guess what particular property Mr. Teets would assert (1) rightfully belonged to him and (2) was used to generate unlawful profits." *Id.* It might have been participants' contributions to the plans, or the margin Great-West earned on Fund contributions, or the "compensation" Great-West retained beyond what was "reasonable." *Id.* "But Mr. Teets neither identified the property or *res* nor explained why it would qualify for equitable relief." *Id.*; see *id.* at 56a (explaining that courts "are wary of becoming advocates who comb the record of previously available evidence and make a party's case for it").

Instead, petitioner rested his opposition to summary judgment on his "legal argument" that "disgorgement of profits does not require the recovered funds to be traceable to a *res* or particular funds." *Id.* at 60a (quoting Aplt. App., Vol. II at 318). And that argument

failed because it "overlook[ed]" this Court's precedents explaining that legal remedies are unavailable under § 502(a)(3), "even if a court sitting in equity would have had jurisdiction to order that remedy." *Id.* at 61a–62a. Thus, the mere fact that an equity court could have awarded disgorgement of profits for a breach of trust does not make such an award "equitable" within the meaning of § 502(a)(3). *Id.* at 62a. "[U]nless the profits Mr. Teets seeks to recover were generated from particular property over which Mr. Teets can 'assert title or right to possession,' *Knudson*, 534 U.S. at 213, an order to disgorge them is a legal remedy," which "is not allowed under § 502(a)(3)." *Id.*

Accordingly, because petitioner's legal argument was erroneous, and because he had "not specified the assets he alleges were commingled with Great-West's general account to generate the profits he seeks to disgorge," the court held that petitioner had "failed in the district court to carry his burden of showing that the relief he sought was equitable." *Id.* at 62a–63a.

Petitioner sought rehearing en banc, which was denied with no judge calling for a poll. *Id.* at 108a.

REASONS FOR DENYING THE PETITION

The petition should be denied because this case presents no question worthy of this Court's review. At the outset, the "plan contract" question petitioner presents in his petition was neither pressed nor passed upon below. And the Tenth Circuit's actual holding—that for profits to be disgorged under § 502(a)(3), they must derive from a *res* or particular fund over which the plaintiff can assert title or right to possession—is fully consistent with both this Court's precedents and the decisions of every other court of appeals to address the issue. Contrary to petitioner's contention, the decision below rests not on any sweeping conclusions about

plan contracts or profits earned from prohibited transactions, but on the narrow, factbound—and in this Court undisputed—conclusion that petitioner failed to carry his summary-judgment burden to identify the relevant profit-producing property. As a result, the decision below breaks no new ground, has no broad significance, and does not warrant this Court's attention.

I. PETITIONER'S "PLAN CONTRACT" QUESTION WAS NEITHER PRESSED NOR PASSED UPON BELOW.

The petition falters out of the gate because it rests on a mischaracterization of the decision below. In petitioner's telling, the Tenth Circuit fashioned a "new 'plan contract' exception" to principles of equitable disgorgement under ERISA § 502(a)(3). Pet. 2. But one searches the Tenth Circuit's opinion in vain for such a holding. That holding does not exist, because petitioner did not preserve the argument below.

The Tenth Circuit's holding contains two parts: (1) a legal conclusion that, in order to obtain disgorgement of profits under § 502(a)(3), a plaintiff must show that the profits he seeks to recover were generated from particular property over which he can assert title or right to possession, Pet. App. 60a–63a; and (2) a factbound conclusion that petitioner failed to carry his summary-judgment burden to identify any such profit-producing property, *id.* at 59a–60a. Contrary to petitioner's claim, the court nowhere held that "a party in interest cannot be compelled to disgorge unreasonable compensation derived from a plan contract." Pet. 9.

Indeed, the Tenth Circuit did not even hold that relief under § 502(a)(3) is categorically unavailable on these facts. To the contrary, it stated that "Great-West may possess" the sort of property that could give rise to a claim for equitable disgorgement. Pet. App. 59a.

And it recognized that any compensation retained by Great-West beyond what was "reasonable" might qualify as the sort of "particular property" needed to obtain equitable disgorgement. *Id.* at 60a. But it held that petitioner had failed to carry his summary-judgment burden because, in opposing Great-West's motion, he "neither identified the property or *res* nor explained why it would qualify for equitable relief." *Id.*

Nor did the Tenth Circuit address whether a plan contract is the sort of *res* that can give rise to equitable disgorgement. Contra Pet. 8 (asserting that, "[w]ithout explanation, the court rejected the Contract as such property"). The court did not address that issue because petitioner did not raise it in opposing Great-West's summary-judgment motion. Instead, he rested his opposition solely on the legal argument that "disgorgement of profits does not require the recovered funds to be traceable to a *res* or particular funds." Pet. App. 60a (quoting petitioner's summary-judgment opposition, Aplt. App., Vol. II at 318). Petitioner cannot transform the Tenth Circuit's silence on an issue he failed to preserve into a holding of the court.

Moreover, by resting his petition on a mischaracterization of the decision below, petitioner has waived any challenge to the Tenth Circuit's holding that he failed to carry his summary-judgment burden to identify particular profit-generating property.[2] In any event, such a challenge would plainly be meritless, since petitioner

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[2] Notably, in his petition for rehearing en banc, petitioner did raise such a challenge, arguing that the panel wrongly concluded that "Mr. Teets failed to identify the 'particular property' from which Great-West derived profits." Reh'g Pet. 12; see *id.* at 12–14 (arguing that the profit-producing property was the plan contract or, alternatively, participants' contributions). Petitioner has not renewed that argument in his petition for certiorari, and thus has waived any challenge to this part of the Tenth Circuit's holding.

did not identify any profit-producing property in the three pages he devoted to this issue in his summary-judgment opposition. And such a challenge would amount to a request for factbound error correction that does not meet this Court's standards for certiorari.

Accordingly, the only question presented by the decision below that is properly before this Court is the legal question whether a plaintiff seeking disgorgement of profits under § 502(a)(3) must show that the profits derive from particular property over which he can assert title or right to possession. And the Tenth Circuit's holding on that point is correct.

II. THE TENTH CIRCUIT FAITHFULLY APPLIED THIS COURT'S PRECEDENTS.

As described above, the Tenth Circuit carefully analyzed and correctly applied this Court's precedent concerning "appropriate equitable relief" under ERISA § 502(a)(3). See Pet. App. 47a–53a (describing precedent); *id.* at 59a–63a (applying precedent). Petitioner's contrary argument, which turns entirely on his assertion that the decision below conflicts with *Harris Trust & Savings Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238 (2000), is demonstrably incorrect.

First, *Harris Trust*, which simply held that parties-in-interest to prohibited transactions may be sued for "appropriate equitable relief" under § 502(a)(3), did not involve a claim for disgorgement of profits derived from a plan contract, and thus did not address that question. The defendant there allegedly sold worthless interests in motel properties to a pension plan for $21 million, and the plan fiduciaries sought restitution of the purchase price and disgorgement of the profits the defendant made from using the plan assets transferred to it. 530 U.S. at 242–43. In observing that the "common law of trusts … plainly countenance[d]" that

relief, *id.* at 250, the Court said nothing to suggest that a party that enters into a plan contract that violates ERISA is subject to "an action for restitution" as a "transferee of tainted plan assets," *id.* at 253. Indeed, unlike the funds out of which the plan was swindled in *Harris Trust*, it is unclear how a plan contract could be "transfer[red] … to a third person," or what it would mean to obtain "restitution" of the contract. *Id.* at 250.

Second, *Harris Trust* preceded *Knudson*, in which the Court first recognized the importance of the "distinction between restitution at law and restitution in equity." 534 U.S. at 214 ("our cases have not previously drawn this fine distinction").[3] As the Court explained, "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff *particular funds or property* in the defendant's possession." *Id.* at 214 (emphasis added). The Court noted that "there is a limited exception for an accounting for profits," and provided an example: "If, for example, a plaintiff is entitled to a constructive trust *on particular property* held by the defendant, he may also recover *profits produced*

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[3] Likewise, the dictum in *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), that service providers "must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406," *id.* at 262, preceded this Court's explication of the distinction between legal and equitable restitution in *Knudson* and later cases. *Mertens* thus does not support the conclusion that the restitutionary remedy of disgorgement is available under § 502(a)(3) without regard to that distinction. See *Knudson*, 534 U.S. at 215 (explaining that *Mertens*, which "did not involve a claim for restitution at all," "did not purport to change the well-settled principle that restitution is 'not an *exclusively* equitable remedy,' and whether it is legal or equitable in a particular case (and hence whether it is authorized by § 502(a)(3)) remains dependent on the nature of the relief sought").

by the defendant's use of that property, even if he cannot identify a particular res containing the profits sought to be recovered." *Id.* at 214 n.2 (emphases added); see also *id.* (noting that petitioners were "not entitled to the constructive trust" in settlement proceeds that would be needed to support a claim for disgorgement of the profits they generated). The Court's description of the "limited exception" for accounting of profits thus perfectly tracks the Tenth Circuit's holding that a plaintiff seeking disgorgement must show that the profits derive from particular property over which he can assert title or right to possession.[4]

Third, in observing that the nature of the relief sought in *Harris Trust* "accord[ed] with" the Court's understanding of equitable restitution, *Knudson* described that relief in terms that, again, precisely align with the Tenth Circuit's rule: "a claim to *specific property* (or *its proceeds*) held by the defendant." 534 U.S. at 215 (emphases added). Even the passage from *Harris Trust* highlighted by petitioner supports, not undermines, the conclusion that the profits sought to be disgorged must derive from a *res* or particular funds on which a constructive trust could be imposed: "The trustee or beneficiaries may then maintain an action for restitution of *the property* (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of the third person's *profits derived therefrom*." 530 U.S. at 250 (emphases added).

Fourth, the decision below accords with this Court's post-*Knudson* cases, which have continued to observe

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[4] Disgorgement is an "exception" because the plaintiff need not "identify a particular res *containing* the profits sought to be recovered." *Knudson*, 534 U.S. at 214 n.2 (emphasis added). But the profits still must be *derived from* such a *res*. See *id.*

the distinction between legal and equitable restitution, *Montanile*, 136 S. Ct. at 660–61, and have emphasized that "equitable remedies 'are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing … rather than a right to recover a sum of money generally out of the defendant's assets," *id.* at 658–59 (omission in original) (quoting 4 S. Symons, *Pomeroy's Equity Jurisprudence* § 1234, p. 694 (5th ed. 1941)). See also *CIGNA Corp.* v. *Amara*, 563 U.S. 421, 439 (2011) ("traditionally speaking, relief that sought a lien or a constructive trust was legal relief, not equitable relief, unless the funds in question were '*particular* funds or property in the defendant's possession'" (quoting *Knudson*, 534 U.S. at 213)).

Fifth, the Tenth Circuit's holding accords with the "standard equity treatises" this Court has consulted. *Montanile*, 136 S. Ct. at 658. Dobbs, for example, recognizes that "the restitution remedy of disgorgement—stripping defendant's gain or profits—may be deemed either legal or equitable," Dan B. Dobbs, *Law of Remedies* § 4.1(1) (3d ed. 2018), and explains that equitable disgorgement involves recovery of "profits produced by property that in equity and good conscience belonged to plaintiff," *id.* § 4.3(5); see also *id.* (equitable disgorgement requires the defendant "to disgorge gains received from improper use of plaintiff's property or entitlements"); *id.* § 4.3(1) (the equitable remedy of accounting for profits, like its "sister remedies" of equitable lien and subrogation, can be considered a "for[m] of the constructive trust" and "allow[s] plaintiff to trace funds or property taken from him into any new property or entitlement that is substituted for plaintiff's property; the effect can be to give plaintiff the gain defendant makes from sale of plaintiff's property and any reinvestment of the funds"); 1 George E.

Palmer, *Law of Restitution* § 2.14 (2d ed. 2019) ("One of the most important contributions of equity to restitution is the technique of tracing. Through tracing, a person who in the first instance would be entitled to the restitution of money or other property is often permitted to assert his claim against a substituted asset—an asset which is traceable to or the product of such money or other property." (footnote omitted)).

In sum, there is no merit to petitioner's contention that the decision below conflicts with *Harris Trust*. To the contrary, it is petitioner's contention—that profits generated from a prohibited transaction are always subject to disgorgement under § 502(a)(3), without regard to the distinction between legal and equitable restitution or the latter's tracing requirement—that conflicts with this Court's precedent.

III. THE DECISION BELOW DOES NOT CREATE A CIRCUIT CONFLICT.

Petitioner's assertion that the decision below created a circuit split is equally meritless. Every circuit to have addressed the question has held, consistent with *Knudson* and the decision below, that a plaintiff seeking disgorgement of profits under ERISA § 502(a)(3) must show that the profits at issue derive from a *res* or particular funds belonging in equity and good conscience to the plaintiff. See *Depot, Inc.* v. *Caring for Montanans, Inc.*, 915 F.3d 643, 663–65 (9th Cir. 2019), *cert. denied*, No. 19-77, 2019 WL 4922669 (Oct. 7, 2019); *Pender* v. *Bank of Am. Corp.*, 788 F.3d 354, 364–65 (4th Cir. 2015); *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 579 F.3d 220, 238 (3d Cir. 2009); see also *Cent. States, Se. & Sw. Areas Health & Welfare Fund* v. *Gerber Life Ins. Co.*, 771 F.3d 150, 154–58 (2d Cir. 2014); *Cent. States, Se. & Sw. Areas Health & Welfare Fund* v. *First Agency, Inc.*, 756 F.3d 954, 959–

61 (6th Cir. 2014); *Moore* v. *CapitalCare, Inc.*, 461 F.3d 1, 13 (D.C. Cir. 2006).

The cases petitioner cites are not to the contrary. First, not one of petitioner's cases addresses whether profits derived from a plan contract are subject to disgorgement under § 502(a)(3), so none of them conflicts even with petitioner's claimed version of the Tenth Circuit's holding. Second, all but one of petitioner's cases preceded *Knudson*'s clarification of the distinction between legal and equitable restitution under § 502(a)(3), and so have limited relevance to how those cases would be analyzed if they arose today. Third, none of the cases conflicts with the rule that profits targeted for disgorgement under § 502(a)(3) must derive from particular property or funds over which the plaintiff can assert title or right to possession.

For example, *LeBlanc* v. *Cahill*, 153 F.3d 134 (4th Cir. 1998), *Landwehr* v. *DuPree*, 72 F.3d 726 (9th Cir. 1995), and *Herman* v. *South Carolina National Bank*, 140 F.3d 1413 (11th Cir. 1998), were all pre-*Knudson* cases. For that reason, the opinions did not explicitly address the distinction between legal and equitable restitution. Even so, all three cases are functionally consistent with *Knudson*, because they, like *Harris Trust*, involved particular plan funds that were wrongfully transferred to the defendant. And two of these cases (*LeBlanc* and *Landwehr*) come from circuits (the Fourth and Ninth) that have since expressly adopted the same rule as the Tenth Circuit below. See *Pender*, 788 F.3d at 364–65; *Depot*, 915 F.3d at 663–65.

National Security Systems, Inc. v. *Iola*, 700 F.3d 65 (3d Cir. 2012), petitioner's only post-*Knudson* case, is based on the principle that "where a fiduciary in violation of his duty to the beneficiary receives or retains a bonus or commission or other profit, he holds what he receives upon a constructive trust for the beneficiary."

Id. at 101 (quoting *Restatement (First) of Restitution* § 197 (1937)). The court's holding is thus consistent with the conclusion that § 502(a)(3) requires identification of particular property belonging in good conscience to the plaintiff. And the opinion indicated no disagreement with the same court's earlier holding in *Unisys* that a plaintiff seeking disgorgement of profits under § 502(a)(3) must "first identif[y] the profit generating property or money wrongly held by" the defendant. 579 F.3d at 238.

Finally, petitioner's featured case—*Brock* v. *Hendershott*, 840 F.2d 339 (6th Cir. 1988)—only shows how far he must stretch to try to assert a circuit split. *Brock* predates *Knudson*, *Harris Trust*, and even *Mertens*—every important, recent decision on the scope of § 502(a)(3) relief from this Court. The court's opinion did not analyze the propriety of the disgorgement remedy ordered by the district court. And to the extent the decision could be construed to stand for the proposition that "appropriate equitable relief" does not require the identification of property belonging in equity and good conscience to the plaintiff, it is inconsistent with subsequent Sixth Circuit precedent applying *Knudson*. See *Cent. States*, 756 F.3d at 959–61 (relying on *Knudson* to hold that requested relief was equitable only if ERISA plaintiff pointed to an "identifiable fund").[5]

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[5] *McDannold* v. *Star Bank, N.A.*, 261 F.3d 478 (6th Cir. 2001), adds nothing to *Brock*. It too is pre-*Knudson*, and it did not address the circumstances in which disgorgement of profits is available under § 502(a)(3). See *id.* at 487 (noting that the record did not indicate whether the defendants "received plan assets now subject to restitution, disgorgement, or other equitable relief").

In short, there is no circuit split. To the contrary, all post-*Knudson* decisions have followed the same rule the Tenth Circuit applied below.

IV. THIS CASE DOES NOT WARRANT THE COURT'S REVIEW.

Three final points: First, the narrowness of the Tenth Circuit's holding belies any suggestion that the decision has broad significance or applicability. The court affirmed summary judgment not because of any new "plan contract" exception, but because petitioner did not carry his burden of presenting evidence for his claims. Pet. App. 56a, 59a–60a. Instead, petitioner bet the farm on his "legal argument that 'disgorgement of profits does not require the recovered funds to be traceable to a *res* or particular funds.'" *Id.* at 60a. And, having wagered everything on this point, he lost it all when the Tenth Circuit concluded that "his legal argument was wrong." *Id.*; see also *id.* at 42a n.21 ("Mr. Teet's cursory treatment of this claim prevents him from overcoming summary judgment.").

Second, petitioner's assertion that the decision below will create a "minefield" of confusion for ERISA plaintiffs is farfetched. The Tenth Circuit laid out a clear standard: "a plaintiff bringing suit against a non-fiduciary party in interest must show that equitable relief can be granted." Pet. App. 46a. If that equitable relief is disgorgement, she must "show entitlement 'to a constructive trust on particular property held by the defendant' that the defendant used to generate the profits." *Id.* at 52a (quoting *Knudson*, 534 U.S. at 214 n.2). There is no reason to believe that ERISA plaintiffs will have trouble pleading and proving their entitlement to "appropriate equitable relief" under this standard—if they have a meritorious claim for such relief.

Third, this Court has repeatedly rejected the contention that enforcing the limits inherent in § 502(a)(3)'s text "jeopardizes basic protections for plan assets" by failing to "protec[t] the interests of participants and beneficiaries in plan assets." Pet. 14–15. See *Montanile*, 136 S. Ct. at 661 ("We have rejected these arguments before, and do so again."). "[V]ague notions of a statute's 'basic purpose' are … inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Id.* (alterations and emphasis in original) (quoting *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 261 (1993)); see also *Knudson*, 534 U.S. at 220–21.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for certiorari.

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