No. 19-382

In the Supreme Court of the United States

JOHN TEETS, PETITIONER

v.

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

PETER K. STRIS
Counsel of Record
DANA BERKOWITZ
RACHANA A. PATHAK
DOUGLAS D. GEYSER
JOHN STOKES
STRIS & MAHER LLP
777 S. Figueroa Street
Suite 3850
Los Angeles, CA 90017
(213) 995-6800
peter.stris@strismaher.com

Counsel for Petitioner

(Additional counsel listed on inside cover)

NINA WASOW
TODD F. JACKSON
FEINBERG, JACKSON,
WORTHMAN & WASOW LLP
383 4th Street, Suite 201
Oakland, CA 94607
(510) 269-7998

SCOT BERNSTEIN
LAW OFFICES OF
SCOT D. BERNSTEIN, P.C.
101 Parkshore Drive,
Suite 100
Folsom, CA 95630
(916) 447-0100

ERIN RILEY
MATTHEW GEREND
KELLER ROHRBACK LLP
1201 Third Avenue,
Suite 3200
Seattle, WA 98101
(206) 623-1900

TODD SCHNEIDER
MARK JOHNSON
JAMES BLOOM
SCHNEIDER WALLACE
COTTRELL KONECKY
WOTKYNS LLP
2000 Powell Street, Suite 1400
Emeryville, CA 94608
(415) 421-7100

GARRET W. WOTKYNS
SCHNEIDER WALLACE
COTTRELL KONECKY
WOTKYNS LLP
8501 N. Scottsdale Road,
Suite 270
Scottsdale, AZ 85253
(480) 428-0145

JEFFREY LEWIS
KELLER ROHRBACK LLP
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 463-3900

Counsel for Petitioner

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INTRODUCTION

Great-West does not dispute the critical importance of the question presented, which implicates ERISA's protections for trillions of dollars of retirement savings. Cf. Opp. at 4. Nor does Great-West dispute that the decision below conflicts with Sixth Circuit law disgorging profits derived from plan contracts. Cf. Opp. at 18. (discussing *Brock* v. *Hendershott*, 840 F.2d 339, 341 (6th Cir. 1988)).

Great-West's chief argument is that this case is a poor vehicle to decide the critical question presented because Mr. Teets "did not preserve the argument below." Opp. at 10. But Mr. Teets pressed his plan contract theory vigorously, raising it in the district court, in his Tenth Circuit briefing, at oral argument, and *yet again* in a petition for rehearing. See *infra* at 2-3.

Great-West also argues that the Tenth Circuit correctly applied this Court's precedent in holding that a participant cannot disgorge profits without a claim to title or possession of the profit-generating res. Opp. at 10.[1] But that is the standard for equitable restitution, not disgorgement. See *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213 (2002). This Court's decision in *Harris Trust & Savings Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000) set the standard for disgorgement. The remedies are distinct. See *infra* at 4-6.

Great-West's mix-up illustrates yet another reason for this Court to intervene. Practitioners and courts are hopelessly confused about how to get various kinds of equitable

[1] Great-West broadens the question presented accordingly. Opp. at (i). Its version encompasses Mr. Teets' version because participants cannot "assert title or right to possession" over plan contracts. See Pet. at (I). Nor can they do so over many other plan assets.

relief under ERISA. See *infra* at 8-9. As Great-West itself points out, three other circuits have (wrongly) applied *Knudson* to disgorgement claims. Opp. at 16. Until this Court steps in, participants will lack the remedies that Congress authorized to protect plan assets.

ARGUMENT

I. Great-West's Waiver Argument Is Frivolous

The record thoroughly belies Great-West's principal argument that Mr. Teets failed to preserve the question presented. Cf. Opp. at 10-12.[2] Mr. Teets argued in the district court for disgorgement of the profits derived from Great-West's use of the Contract, as the court recognized:

> Plaintiff argues "[t]here can be no dispute that [Defendant] used the Contract (which is a plan asset) to set the Credited Rate, collect contributions and pay interest to plan participants at the Credited Rate, and retain the margin. . . . Even if [Defendant] [is] not a fiduciary, it is liable for its participation in this prohibited transaction."

Pet. App. at 95a.

In his Tenth Circuit briefing, Mr. Teets again argued that the Contract was the relevant plan asset. See, *e.g.*, App. Br. at 34 n.9 ("[T]he contract *itself* is indisputably a

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[2] Great-West concedes that the Tenth Circuit decided its broader version of the question presented. Opp. at 10 (citing Pet. at 60a-63a). Even if the court only reached the holding that Great-West attributes to it, this case would be cert-worthy for all the reasons described in *infra* parts III and IV. In fact, the broader question posed by Great-West is even more consequential because it affects more assets.

plan asset. And each of Mr. Teets's claims is based *entirely* on Great-West's control over the contract, not its handling of the plans' money.").[3] He then reiterated and explained his position at length at oral argument. See, *e.g.*, Oral Argument at 01:27, *Teets* v. *Great-West*, 921 F.3d 1200 (10th Cir. Mar. 27, 2019) (No. 18-1019) ("Oral Argument"), https://www.ca10.uscourts.gov/oralarguments/18/18-1019.MP3 ("So, in a nutshell, you can't use plan assets for your benefit, unless you fall within an exemption. So, the contract is the plan asset."); *id.* at 02:07 ("The contract is being used by Great-West for its benefit. It makes profit. . . . So I think we clearly trigger 406(a)(1)(b), because Great-West admits the contract is a plan asset and it's being used so that Great-West presumably can generate a profit—that's the business that they're in.").

If that were not enough, Mr. Teets then reiterated his position *yet again* in seeking panel reconsideration and rehearing *en banc*. See Appellant's Pet. for Panel Reh'g & Reh'g *En Banc* at 2, 5, 10-13, *Teets* v. *Great-West*, 921 F.3d 1200 (10th Cir. Mar. 27, 2019) (No. 18-1019). Even Great-West concedes as much. Opp. at 11 n.2 (admitting that Mr. Teets argued in seeking rehearing "that the profit-producing property was the plan contract"). Great-West's first response to the Petition is thus that Mr. Teets waived an argument that he raised in the district court, in his appellate briefs, at oral argument, and yet once more in seeking rehearing.

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[3] Notably, Mr. Teets made this argument below even though Great-West, in seeking summary judgment, *did not argue* that Mr. Teets had failed to adequately identify the profit-generating res. See Defs.' Mot. for Summary Judgment, ECF No. 175, at 37-39.

The Tenth Circuit considered (and rejected) his argument. Cf. Opp. at 11. The court expressly acknowledged at oral argument that Mr. Teets had identified the ERISA plan contracts as the res giving rise to equitable disgorgement. After Mr. Teets' counsel stated, "the contract is the plan asset," Judge Bacharach responded, "No, I understand all that." Oral Argument at 01:39. The panel's written opinion again acknowledged that the contract is "an asset of the plan," Pet. App. at 20a, from which Great-West enriched itself, *id.* at 13a. Great-West's claim that the Tenth Circuit nevertheless did *not* pass on this issue would make the court's ruling unintelligible.[4]

II. The Decision Below Conflicts With This Court's 2000 *Harris Trust* Opinion

Great-West hardly disputes that the decision below flouts *Harris Trust*. It dedicates just one paragraph to that case, arguing that *Harris Trust* did not expressly hold that plan contracts can support disgorgement. Opp. at 12-13. True, but of course legal principles apply across fact patterns. *Harris Trust* announces the principle that an action for disgorgement is available against a third person who derives profits from wrongfully transferred trust property. 530 U.S. at 250. Here, Mr. Teets seeks disgorgement from Great-West, who derived profits from the Contracts. The facts fit.

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[4] True, the court asserted that Mr. Teets had not identified a res. Opp. at 11 (quoting Pet. App. at 60a). But that claim is inconsistent with the district court's written analysis, Mr. Teets' appellate briefing and oral argument, the court's own written analysis, and Judge Bacharach's colloquy with counsel. See *supra* at 2-4.

Great-West's only real response to this conflict is to argue that *Knudson* changed the *Harris Trust* ballgame. See Opp. at 13-15 (arguing that *Harris Trust* was before *Knudson* and that post-*Knudson* Supreme Court cases apply the *Knudson* test). The Tenth Circuit reasoned similarly below, layering the *Knudson* "title or right to possession" criteria atop the *Harris Trust* test. See Pet. at 12.

Like countless practitioners and courts, Great-West and the Tenth Circuit are confused because they are mixing and matching remedies. Here, they have conflated the equitable remedy of disgorgement, at issue in this case and in the relevant portion of *Harris Trust*, with the sometimes legal, sometimes equitable remedy of restitution, at issue in *Knudson*. These remedies are distinct:

> Disgorgement wrests ill-gotten gains from the hands of a wrongdoer. It is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs. Disgorgement does not aim to compensate the victims of the wrongful acts, as restitution does.

S.E.C. v. *Huffman*, 996 F.2d 800, 802 (5th Cir. 1993). See also, *e.g.*, *Edmonson* v. *Lincoln Nat'l Life Ins. Co.* 725 F.3d 406, 415-416 (3d Cir. 2016) (citing *Huffman* and distinguishing disgorgement and restitution in ERISA context); *Beaumont Hosp.* v. *Fed. Ins. Co.*, 552 Fed. Appx. 494, 498 (6th Cir. 2014) (distinguishing disgorgement and restitution in insurance dispute).

Knudson did not cause the sea change in the *Harris Trust* regime that Great-West posits *because it is about a different remedy.* This case and the relevant part of *Harris Trust* are about disgorgement. See *Harris Trust*, 530

U.S. at 250. Mr. Teets wants to disgorge from Great-West the profits that it unjustly made from the Contracts, not because he is personally entitled to those profits, but because Great-West should not be allowed to keep them. *Knudson*, on the other hand, is about restitution and when it is equitable relief (as opposed to legal relief). *Knudson*, 534 U.S. at 205. The plaintiff in *Knudson* claimed a contractual entitlement to settlement money that defendants received in a tort action. *Id.* at 204. To get that kind of "compensation," *Knudson* required the plaintiff to show "'title or right to possession'" of the funds. *Id.* at 213. That logic does not apply to disgorgement cases.

With this context, Great-West's arguments fall apart. Its first point that *Knudson* distinguished between "restitution at law and restitution in equity" fails—there is no "disgorgement at law;" disgorgement is only equitable.[5] Cf. Opp. at 13. This Court in *Knudson* thus did not refine *Harris Trust* to weed out "legal" disgorgement cases. Great-West's next point that *Knudson* reconciled *Harris Trust* in a way that supports Great-West is wrong. Cf.

[5] See, *e.g.*, *Fifty-Six Hope Rd. Music, Ltd.* v. *A.V.E.L.A., Inc.*, 778 F.3d 1059, 1065 (9th Cir. 2015) ("[A] claim for profit disgorgement is equitable in nature."); *U.S.* v. *Rx Depot, Inc.*, 438 F.3d 1052, 1058 (10th Cir. 2006) ("Disgorgement is a traditional equitable remedy."). In fact, the search term "disgorgement at law" yields no results in the Westlaw database. "Legal disgorgement" brings up one hit, a case holding it unavailable. The only contrary authority that Great-West cites is a recent edition of Dobbs' *Law of Remedies*, Opp. at 15, but that just shows how the widely the confusion has spread.

Opp. at 14. *Knudson* observed that its holding did *not affect Harris Trust* at all. 534 U.S. at 215.[6]

Great-West next argues that this Court's post-*Knudson* cases have "continued to observe the distinction between legal and equitable restitution." Opp. at 14-15. But none of these cases is about disgorgement. See *id.* at 15 (citing *Montanile* v. *Bd. of Trustees of Nat'l Elevator Industry Health Benefit Plan*, 136 S. Ct. 651, 660-661 (2016) (equitable lien by agreement); *CIGNA Corp.* v. *Amara*, 563 U.S. 421, 439 (2011) (lien and constructive trust)). So too with Great-West's final argument based on treatises, citing Palmer's *Law of Restitution* for the proposition that tracing is required, see Opp. at 15-16, when it is well-settled that tracing is not required for disgorgement.[7]

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[6] The Court specified that the remedy of disgorgement was not at issue. *Knudson*, 534 U.S. at 214 n.2 ("There is a limited exception for an accounting for profits, a form of equitable restitution that is not at issue in this case."). In describing disgorgement as a form of equitable restitution, the Court merely acknowledged that there are numerous so-called restitutionary remedies. As the Ninth Circuit has explained, these include "the 'constructive trust,' the 'equitable lien,' 'subrogation,' 'accounting for profits,' 'rescission in equity,' and 'reformation of instruments.'" *F.T.C.* v. *AMG Capital Mgmt., LLC*, 910 F.3d 417, 434 (9th Cir. 2018), cert. docketed, 19-508. The *Knudson* standard evidently does not apply to many of these remedies.

[7] To be sure, the courts are confused about tracing requirements in the context of ERISA, too. For example, the Ninth Circuit requires plaintiffs to meet equitable tracing requirements for disgorgement, even though disgorgement (unlike restitution) is not a tracing remedy. Compare *Depot, Inc.* v. *Caring for Montanans, Inc.*, 915 F.3d 643, 664 (9th Cir. 2019) (requiring tracing) and *F.T.C.* v. *Bronson Partners, LLC*, 654 F.3d 359, 374 (2d Cir. 2011) ("Indeed, it is by now so uncontroversial that tracing is not required in disgorgement cases

This case illustrates why the Court must intervene to clarify that the distinctions between remedies matter. The answer to the question presented here would differ in the restitution context. It makes sense that a plaintiff who seeks compensation for her loss must have a personal stake (like "title or right to possession") in the property. Not so where, as here, the goal is to "prevent the wrongdoer from enriching himself by his wrongs." *Huffman*, 996 F.2d at 802. If plan participants cannot disgorge unreasonable profits from service providers unless they meet the onerous requirements of restitution, then ERISA's ban on service contracts for "more than reasonable compensation" is toothless. See Pet. at 9.

III. The Decision Below Creates A Clear Circuit Split

The Tenth Circuit's decision squarely conflicts with *Brock*, 840 F.2d at 340, which affirmed an award of disgorgement of profits derived from plan contracts. Great-West does not deny that the Sixth Circuit reached that holding. Instead, Great-West wrongly claims that *Brock* is no longer good law. Opp. at 18. But the Sixth Circuit strongly reaffirmed both the status and the applicability of *Brock* after *Harris Trust. McDannold* v. *Star Bank, N.A.*, 261 F.3d 478, 486 (6th Cir. 2001) (*Harris Trust* "confirms earlier authority within this Circuit that permitted an action for disgorgement of profits against an ERISA nonfiduciary."). Great-West asserts that another Sixth Circuit case, *Central States, Se. & Sw. Areas Health & Welfare Fund* v. *First Agency, Inc.*, 756 F.3d 954 (6th Cir.

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that we recently rejected an argument to the contrary via summary order.").

2014), undermines *Brock* (Opp. at 18), but Great-West ignores that *Central States* is a *restitution* case, not a *disgorgement* case. See 756 F.3d at 960-961. See also *supra* part II. The conflict with *Brock* is plain.

Moreover, Great-West's position highlights the confusion in this area by bringing additional circuits into the mix. Great-West views the issue as whether the *Knudson* "title or right to possession" standard applies in disgorgement cases writ large. See *supra* at 5. And as Great-West observes, the Third, Fourth, and Ninth Circuits have each (wrongly) applied *Knudson* to disgorgement cases. See Opp. at 16-17 (citing *Depot*, 915 F.3d at 661; *Pender* v. *Bank of Am. Corp.*, 788 F.3d 354, 368-369 (4th Cir. 2015); *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 579 F.3d 220, 238 (3d Cir. 2009)).[8] In other words, based on Great-West's own framing, there are now four circuits on the wrong side of the question presented. The Court's review is thus urgently needed.[9]

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[8] Great-West cites three additional cases that are about restitution, not disgorgement. See Opp. at 16-17 (citing *Cent. States, Se. & Sw. Areas Health & Welfare Fund* v. *Gerber Life Ins. Co.*, 771 F.3d 150 (2d Cir. 2014); *Cent. States*, 756 F.3d; *Moore* v. *CapitalCare, Inc.*, 461 F.3d 1 (D.C. Cir. 2006)).

[9] Indeed, Great-West's opposition only underscores the tension surrounding *Knudson* in the disgorgement context. Contrary to the Third, Fourth, and Ninth Circuits, for example, the Sixth Circuit held that disgorgement *was* available in a non-ERISA case even though plaintiffs did not seek "particular funds or property in the defendant's possession." *Osborn* v. *Griffin*, 865 F.3d 417, 461-462 (6th Cir. 2017). *Knudson* was "inapposite" because "disgorgement and restitution are distinct remedies that serve different purposes." *Id.* at 461. The

IV. The Question Presented Is Manifestly Important

Great-West does not and cannot dispute the critical importance of the question presented, nor that it arises often. Compare Pet. at 14-15 and Opp. at 19 (arguing only that Mr. Teets failed to meet his evidentiary burden).

Major industry groups and consumer advocates alike have vouched for the stakes. See, *e.g.*, Brief of Am. Council of Life Ins. as Amici Curiae at 2, *Teets* v. *Great-West*, 921 F.3d 1200 (10th Cir. Mar. 27, 2019) (No. 18-1019) ("ACLI Br."); Brief of U.S. Chamber of Commerce as Amici Curiae at 22, *Teets* v. *Great-West*; Brief of AARP as Amici Curiae at 2, *Teets* v. *Great-West*. For example, ACLI argued below that if Great-West were held liable as a nonfiduciary, then "many service providers would likely be discouraged from offering essential products and services to ERISA-governed plans." ACLI Br. at 26.

The stakes are high because ERISA's ban on service contracts for "more than reasonable compensation" hangs in the balance. 29 U.S.C. 1106(a)(1); 29 U.S.C. 1108(b)(2). If participants cannot disgorge excessive profits illegally derived from plan contracts, then the ban is pointless, and Congress' will thwarted. Pet. at 14-15.[10] The situation is even worse if participants cannot disgorge unreasonable

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Second Circuit has been even more explicit in the context of disgorgement under the securities laws. As Great-West concedes, *Knudson* imposes a constructive trust inquiry. Opp. at 19 (quoting Pet. App. at 52a). The Second Circuit has held that disgorgement does *not* require entitlement to a constructive trust. *F.T.C.* v. *Bronson Partners, LLC*, 654 F.3d at 373. There is no reason to think that the law views disgorgement differently inside and outside the ERISA contexts.

[10] Great-West's claim that ERISA's text more specifically forbids plan contracts to support disgorgement is nonsensical. Cf. Opp. at 20.

profits derived from *any* plan assets in which they lack a personal stake, as Great-West argues. See Opp. at (i). Great-West's rule turns ERISA on its head.

If the Court remains uncertain about whether the question presented merits review, Mr. Teets respectfully urges the Court to call for the views of the Solicitor General. In *Harris Trust*, the United States made clear that requiring parties to disgorge ill-gotten gains would "not only protect participants and beneficiaries but deter violations of the law as well." Brief of U.S. as Amici Curiae at 30, *Harris Tr. & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000) (No. 99-579). So too here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PETER K. STRIS
Counsel of Record
DANA BERKOWITZ
RACHANA A. PATHAK
DOUGLAS D. GEYSER
JOHN STOKES
STRIS & MAHER LLP
777 S. Figueroa Street
Suite 3850
Los Angeles, CA 90017
(213) 995-6800
peter.stris@strismaher.com

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