No. 17-1543

In The Supreme Court of the United States

BRENDA OLIVAR,

Petitioner,

v.

PUBLIC SERVICE EMPLOYEE CREDIT UNION LONG TERM DISABILITY PLAN,

Respondent.

CAROLINE BURTON,

Petitioner,

v.

COLORADO ACCESS A/K/A COLORADO ACCESS LONG TERM DISABILITY PLAN,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented are:

1. ERISA provides for an award of benefits only according to the "terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Where a plan consists of nothing more than a long-term disability insurance policy purchased by the sponsoring employer, and the plan's terms provide that only the insurer will determine eligibility and pay benefits, can the plan be liable in a suit for benefits under 29 U.S.C. § 1132(a)(1)(B)?

2. ERISA permits substitute service of process on the Secretary of the Department of Labor only when the plan has not designated an "individual" for service. 29 U.S.C. § 1132(d)(1). In light of the fact that ERISA expressly permits a plan to name an entity as the plan's agent for service, that the dictionary definition of "individual" includes both natural persons and inanimate things, and that Congress has used the word "individual" to refer to other than natural persons in ERISA and other statutes, does the word "individual" in Section 1132(d)(1) refer to both natural persons and entities designated as agents for service?

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, each of the Respondents, Public Service Employee Credit Union Long Term Disability Plan and Colorado Access a/k/a Colorado Access Long Term Disability Plan, states that it has no parent corporations, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

1. When Congress enacted ERISA, it recognized that employee benefit plans subject to the statute would take various forms. ERISA requires every employee benefit plan to be established and maintained in writing and a claimant is limited to seeking benefits due under the terms of the written plan document. As a result, a claim for relief under ERISA's remedial provision, 29 U.S.C. § 1132(a)(1)(B), "stands or falls by the terms of the plan." *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 300-01 (2009). And a claim for benefits must be filed against the party that is liable for benefits under the particular plan's specific terms.

Consistent with that framework, in these cases the Colorado Supreme Court held that, because the plans consist solely of insurance policies and the plans dictate that the insurers alone decide all eligibility questions and owe all benefits, the plans themselves could not be liable in Petitioners' suits for benefits under Section 1132(a)(1)(B). That ruling has abundant support in federal decisions because the insurer alone has the obligation to pay when the plan is exclusively insurance-funded. Petitioners' conflict argument is confused and hyperbolic; only one circuit has taken a different approach and that decision is an unpersuasive outlier of dubious strength even within that circuit. On the issue of the plans' liability, the Colorado Supreme Court reached the correct conclusion and there is no legitimate conflict. The issue does not warrant this Court's review.

2. ERISA unequivocally permits a plan to designate a "person"—a defined term that includes both natural persons and entities—as the plan's agent for service of process. In Section 1132(d)(1), ERISA also permits a claimant to serve process on the Secretary where a plan has not designated an "individual" as its agent for service. Reading these provisions in context and concert, the Colorado Supreme Court held that "individual" as used in Section 1132(d)(1) includes both natural persons and entities. This construction was correct. Dictionaries and this Court have confirmed that the word "individual" can refer to entities as well as natural persons, and that the same word can have different meanings even within the same statute or statutory section. Moreover, Petitioners' construction—limiting "individual" to natural persons—would lead to an absurd result because it would negate the ERISA provisions that expressly authorize a plan to designate an entity as its agent for service of process. Petitioners have not suggested any conflict of authority on this issue because no court has accepted their construction of "individual" in Section 1132(d)(1). For all these reasons, there is no basis for this Court's review of the service-on-Secretary issue.

3. Finally, the questions presented are unlikely to arise frequently, if at all, in other ERISA cases and the instant cases are not an appropriate vehicle for review of those issues. Petitioners' issues are creatures of litigation gamesmanship, generated by a single enterprising counsel in an effort to exploit his perception of loopholes in ERISA. The questions presented have

arisen only in cases filed by Petitioners' attorney, who regularly files claims against plans that consist only of insurance policies instead of against the insurers known to have provided those policies, and who regularly serves the Secretary in lieu of serving plans' designated entity agents. This Court should not dignify Petitioners' counsel's unsuccessful ploy by granting the petition.

STATEMENT

I. Statutory Framework

ERISA requires every employee benefit plan to be established and maintained pursuant to a "written instrument." 29 U.S.C. § 1102(a)(1). That instrument must "specify the basis on which payments are to be made." *Id.* § 1102(b)(4). Those who administer the plan are required to act "in accordance with the documents and instruments governing the plan." *Id.* § 1104(a)(1)(D).

ERISA's remedial provision is based entirely on the mandated "terms of the plan":

> A civil action may be brought [] by a participant or beneficiary . . . to recover benefits due to him *under the terms of his plan*, to enforce his rights *under the terms of the plan*, or to clarify his rights to future benefits under *the terms of the plan*.

Id. § 1132(a)(1)(B) (emphasis added). The statutory scheme "is built around reliance on the face of written

plan documents," and its remedial provisions reflect "the particular importance of enforcing plan terms as written." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995). "This focus on the written terms of the plan is the linchpin" of ERISA's remedial scheme. *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 108 (2013). Thus, "the terms of the plan" necessarily determine who should pay benefits. Only that entity can be liable in a claim for benefits.

Under ERISA, a "person" may serve as agent for service of process, 29 U.S.C. § 1022(b), and a "person" includes a "corporation." *Id.* § 1002(9).

ERISA further provides that a plan, unlike a trust at common law, "may sue or be sued under this subchapter as an entity." *Id.* § 1132(d)(1).[1] "Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan." *Id.*

ERISA permits substitute service on the Secretary in a narrow circumstance, when "a plan has not designated in the summary plan description of the plan an individual as agent for service of legal process[.]" *Id.*

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[1] The Court has emphasized that ERISA's "fiduciary responsibility provisions 'codif[y] and mak[e] applicable to ERISA fiduciaries certain principles developed in the evolution of the law of trusts.' " *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (quoting legislative history) (alterations in *Firestone*). Thus, to the extent Congress intended to depart from trust law principles, it needed to do so explicitly, as it did in the statute's "sue-and-be-sued" provision.

ERISA does not define the word "individual." When a claimant undertakes substitute service, "[t]he Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service." *Id.* However, as a practical matter, the Secretary regularly does not provide the mandated notification, and did not do so in these cases. Pet. App. 5a, 7a.

II. Proceedings Below

The petition arises out of claims filed in state courts in two separate cases for benefits under the terms of long-term disability (LTD) plans regulated by ERISA. Petitioners Brenda Olivar and Caroline Burton claimed benefits under, respectively, the Public Service Employee Credit Union (PSCU) Long Term Disability Plan and the Colorado Access Long Term Disability Plan. Their employers, PSCU and Colorado Access, sponsored and served as administrators for the respective plans. Pet. App. 36a, 79a.

Each plan consisted solely of an LTD insurance policy and existed solely as a means through which employees could obtain LTD insurance under that policy; the only benefits available under each plan were through its respective insurance policy; and the insurer providing each policy had exclusive authority to pay and administer all claims. *Id.* at 36a-37a, 79a-80a. Standard Insurance Company issued the policy comprising the PSCU plan, *id.* at 36a; Unum Life Insurance Company of America issued the policy comprising

the Colorado Access plan, *id.* at 79a. The plans did not participate in making any decisions about claims, and did not pay any claims. *Id.* at 36a, 79a-80a.

The PSCU plan, in its summary plan description (SPD), designated PSCU as the plan administrator and the plan's agent for service of process, and also required claimants to notify Standard of claims for legal process. *Id.* at 36a. The Colorado Access plan designated Colorado Access as the plan administrator and the plan's agent for service of process. *Id.* at 93a-95a.

Petitioners submitted claims for benefits to Standard and Unum before filing suit. *Id.* at 4a, 6a, 37a, 63a.

A. District Court Proceedings

After Standard denied Ms. Olivar's claim for benefits, and after Unum terminated Ms. Burton's benefits, Petitioners filed separate lawsuits in Colorado state courts. The same lawyer, their attorney before this Court, represented them.

Although Petitioners had filed their *claims for benefits* with the insurers that funded their respective plans, they brought their *ERISA claims* against only the plans. Petitioners did not name the insurers as defendants or serve them with the complaints. Pet. App. 4a-7a. Although the plans' SPDs designated Unum and PSCU as agents for service of process on the plans, Petitioners disregarded those designations, and instead made substituted service on only the Secretary, ostensibly because the designated agents were not natural

persons. *Id.* The Secretary failed to notify either plan of service and the plans were unaware of the pendency of the actions against them until after the entry of default judgments. *Id.*

Petitioners' counsel sought default judgments in *ex parte* proceedings. He failed to inform the district court judges that he had disregarded each plan's designation of its agent for service of process; that each plan consisted solely of an insurance policy; that the insurers had sole control over claim determinations and sole responsibility for the payment of claims under both plans' terms; that Petitioners had presented their claims to the insurance companies funding their respective claims; and that Petitioners had not named the insurance companies as defendants, served them with the complaint, or otherwise notified them of the pendency of the actions. *See* Pet. App. 85a-89a. As a result, Petitioners obtained default judgments. *Id.* at 59a-60a, 83a-84a. Petitioners' counsel then initiated collection proceedings against the plans' sponsoring employers.

Separate district court judges granted both plans' motions to set aside the judgments based on lack of valid service. *Id.* at 52a-58a, 92a-98a. In *Burton*, the court found that Petitioners' attorney had served the Secretary "as an end run to the obligation that Plaintiff would ordinarily have to obtain service upon—proper service upon the Defendant entity[,]" and that "this approach was intentionally taken as an effort in manipulation to accomplish the goal that was obtained, which was a default judgment and subsequent

leverage and . . . bargaining position to obtain some sort of negotiated settlement[.]" *Id.* at 97a. In *Olivar*, the court was persuaded by the analysis in *Burton*, as well as by the fact that three other Denver District Court judges had set aside default judgments entered in other cases in which Petitioners' counsel took the same approach—suing only the plans and serving the Secretary instead of the plans' designated entity agents. *Id.* at 56a-57a. The judge expressed her particular chagrin at Petitioners' "counsel's failure to disclose . . . the rejection of his service method by my brethren here at the Denver District Court in cases in which Plaintiff's counsel was asserting the same position on service he asserts here." *Id.* at 56a. A different judge denied Petitioner Olivar's motion to reconsider the order setting aside the default judgment. *Id.* at 43a-51a.

The district courts also granted the plans' motions for summary judgment, holding that the plans could not be liable for benefits because the plans had no decision-making or payment responsibility for claims. *Id.* at 35a-42a, 78a-82a.

B. Colorado Court of Appeals Decisions

In unanimous decisions by separate panels, the court of appeals affirmed in both cases. *Burton v. Colorado Access*, 2015 COA 111 (Colo. App. Aug. 13, 2015), Pet. App. 62a-77a; *Olivar v. Public Serv. Employee Credit Union Long Term Disability Plan*, 2016 WL

245145 (Colo. App. Jan. 21, 2016) (unpublished), Pet. App. 22a-34a.

C. Colorado Supreme Court Decision

In a single unanimous decision applying *de novo* review, the Colorado Supreme Court rejected all of Petitioners' arguments in their separate appeals. On the question of the plans' liability, the court reviewed the federal authority and concluded that based on the following undisputed facts, in these cases the insurers are the only obligors and, thus, the claims against the plans were properly dismissed:

- The Plans were funded as insurance policies and had no assets;
- The only governing instruments were the insurance policies;
- Only Unum and Standard determined benefits eligibility;
- Only Unum and Standard were obligated to pay benefits;
- And the Plans played no role in handling petitioners' claims for benefits.

Pet. App. 19a-20a. The court recognized that a plan, including even an insurance-funded plan, could potentially be sued under different circumstances. However, "just because ERISA allows plans to be sued under § 1132(d)(1), doesn't mean they can be sued when they have *no legal obligation* to provide benefits under the plan's terms" because "the plans' terms provide that

only the insurers are obligated to pay and to determine eligibility for benefits." *Id.* at 20a-21a (emphasis in original).

The court further held that the word "individual" as used in Section 1132(d)(1) "includes a corporation and service on the Labor Secretary is proper only when a plan fails to designate either a plan administrator or some other person as agent for service of process." *Id.* at 3a. The court reached this conclusion to avoid an absurd result—the effective negation of ERISA's express provision for appointment of an entity to serve as agent for service of process—and based on the ordinary meaning of "individual," which is not limited to natural persons. *Id.* at 13a-14a.

REASONS FOR DENYING THE PETITION

I. Plan Liability Issue

A. The Colorado Supreme Court's Holding Is Correct

ERISA requires a plan to specify who is liable for benefits, and under what circumstances. Enforcement, in turn, is made expressly dependent on the "terms of the plan." 29 U.S.C. § 1132(a)(1)(B). When the Colorado Supreme Court held that the plans were improper defendants *in these cases*, it properly based its analysis on the terms of the plans *in these cases*. Because those terms impose no claim-related obligations on the plans, they have no potential liability to pay benefits

to Petitioners, again *in these cases*. Therefore, the court held that the lower state courts properly dismissed the claims against the plans.

Because enforcement under ERISA's remedial provision is dependent on the terms of the plan, "a cause of action for 'benefits due' must be brought against the party having the obligation to pay. In other words, the *obligor* is the proper defendant on an ERISA claim to recover plan benefits." *Larson v. United Healthcare Ins. Co.*, 723 F.3d 905, 913, 916-17 (7th Cir. 2013) (emphasis in original). *See also*, *e.g.*, *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202, 1207 (9th Cir. 2011) (*en banc*) (proper defendant must have "authority to resolve benefit claims" and "responsibility to pay them"); *Musmeci v. Schwegmann Giant Super Markets, Inc.*, 332 F.3d 339, 349 (5th Cir. 2003) ("the plan beneficiaries can sue the employer when it was the employer's decision to deny benefits"), *cert. denied*, 540 U.S. 1110 (2004); *Brant v. Principal Life & Disability Ins. Co.*, 6 Fed. App'x 533, 535 (8th Cir. 2001) ("Brant's employer and its insurance provider were proper defendants in such an action, because their administrative services agreement gave them discretionary authority to determine eligibility for benefits and to construe the terms of the plan."); *Hall v. Lhaco, Inc.*, 140 F.3d 1190, 1196 (8th Cir. 1998) (an order "requiring payment of plan benefits must be directed at an entity capable of providing the relief requested, . . . not the plan itself"); *Hunt v. Hawthorne Assocs., Inc.*, 119 F.3d 888, 908 (11th Cir. 1997), *cert. denied*, 523 U.S. 1120 (1998) ("the payment of benefits from an ERISA plan

must issue against a party capable of providing the relief requested"); *Richmond v. Cont'l Cas. Co.*, 246 Fed. App'x 399, 400 n.2 (8th Cir. 2007) (same); *Daniel v. Eaton Corp.*, 839 F.2d 263, 266 (6th Cir.), *cert. denied*, 488 U.S. 826 (1988) (same); *Griffin v. Lockheed Martin Corp.*, 157 F. Supp. 3d 1271, 1274 (N.D. Ga. 2015) ("An entity is a proper defendant under Section 1132(a)(1)(B) only if it has the discretion to award the benefits at issue."), *aff'd*, 647 Fed. App'x 920 (11th Cir. 2016) (*per curiam*).[2]

In Petitioners' cases, the plans have no possible obligation to pay benefits. The plans were created simply to make group insurance available to employees, and

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[2] *See also*, *e.g.*, *Echague v. Metro. Life Ins. Co.*, 43 F. Supp. 3d 994, 1006-08 (N.D. Cal. 2014) (insurer, who decided claims and was solely responsible for benefit payment, was only proper defendant); *Cox v. Allin Corp. Plan*, 2013 WL 1832647, *4 (N.D. Cal. May 1, 2013) (same); *Greenwald v. Liberty Life Assur. Co. of Boston*, 932 F. Supp. 2d 1018, 1047 (D. Neb. 2013) ("[T]he proper defendant in a claim for benefits 'is the party with authority, under the relevant plan documents, to pay benefit claims from plan assets. . . .' ") (citation omitted); *Milton v. Life Ins. Co. of N. Am.*, 2012 WL 2357800, at *1 (N.D. Ala. June 20, 2012) ("[T]he party with decisional control over the plaintiff's benefits claim . . . is the only proper defendant in an action concerning ERISA benefits."); *Portz v. Hartford Life & Accident Ins. Co.*, 2008 WL 2986272, at *3, *7 (D. Neb. July 31, 2008) (same); *Slayhi v. High-Tech Inst., Inc.*, 2007 WL 4284859, at *10 (D. Minn. Dec. 3, 2007) ("[T]he proper defendant under § 1132(a)(1)(B) is the party with authority, under the relevant plan documents, to pay benefit claims from plan assets. . . . [L]iability, if any, must be congruent with . . . authority under the plan."); *Sawyer v. Potash Corp. of Saskatchewan*, 417 F. Supp. 2d 730, 737 (E.D.N.C. 2006), *aff'd*, 223 Fed. App'x 217 (4th Cir. 2007) (same); *Williams v. Unum Life Ins. Co. of Am.*, 250 F. Supp. 2d 641, 645 (E.D. Va. 2003) (same).

they consist of nothing but insurance policies. The only benefits payable under the plans are insurance benefits, and the insurers alone are responsible for paying those benefits. Because the policies are the sole mechanism for funding plan benefits, no term in either plan would require—let alone permit—the plans themselves to pay benefits to Petitioners. In other words, the Colorado Supreme Court correctly held that the lower courts granted summary judgment in favor of the plans because they have no legal obligation to pay benefits to Petitioners.

In addition, in these circumstances, allowing suit against a plan would make no sense. When the plan itself has no assets, a claimant cannot collect a judgment against it. Because ERISA provides that a judgment against a plan "shall not be enforceable against any other person unless liability against such person is established in his individual capacity[,]" 29 U.S.C. § 1132(d)(2), an uncollectable judgment against a plan would be valueless; the claimant would still need to separately establish a substantive basis for liability against the insurer—and due process would require the claimant to name the insurer as an additional defendant and to separately prove up the insurer's liability to pay benefits. Given this reality, applying ERISA to permit plaintiffs to pursue claims against entirely insurance-funded and insurer-controlled plans would merely authorize an exercise in futility.

Petitioners may bring their claims against the insurance companies that fund the plans, received Petitioners' applications for benefits, determined their

eligibility, and would be liable to pay benefits to Petitioners in the event of reversal. That is what claimants have done since the 1974 enactment of ERISA in literally tens of thousands of cases. Why, this Court might ask, didn't Petitioners simply do that? For the simple reason, related to the separate service-on-Secretary issue addressed below, that Petitioners and their counsel were determined to sue only the plans in order to conceal the fact of their suits and to obtain default judgments, by serving their complaints only on the Secretary. For the reasons discussed below, ERISA does not permit substitute service on the Secretary in these cases, where the plans had designated agents for service of process. Regardless, under the facts of these cases, where the insurers are the only "part[ies] having the obligation to pay," *Larson*, 723 F.3d at 913, Petitioners have no valid claims for benefits against the plans.

B. The Claimed Conflict Does Not Warrant Certiorari Review

There is no conflict that would justify this Court's exercise of jurisdiction. The circuit courts have held, almost uniformly, that the proper defendant in a claim under Section 1132(a)(1)(B) is whoever is responsible for resolving and paying claims, which will not necessarily be the plan itself. When a plan is fully funded by an insurance policy and the insurer makes all claim decisions and pays all benefits, the insurer, and not the plan, is the proper defendant.

For example, in *Peters v. Hartford Life & Accident Insurance Co.*, 579 Fed. App'x 866, 867 (11th Cir. 2014), the Eleventh Circuit affirmed the district court's dismissal of the plaintiff's claim against his employer because the disability plan was insurance-funded and "'granted the Insurance Company full discretion and authority to determine eligibility for benefits and to construe and interpret all terms and provisions of the Policy.'" *Peters v. Hartford Life & Accident Ins. Co.*, 2007 WL 9697659, *2 (N.D. Ala. Nov. 2, 2007) (quoting plan). Under those circumstances, which also exist here, the insurer was "[t]he only proper party" under Section 1132(a)(1)(B). *Id.*[3]

The Eighth Circuit has reached the same conclusion, affirming dismissal of a Section 1132(a)(1)(B) claim for benefits against a plan administrator where the plan was insurance-funded and it was "undisputed the Plan requires [the insurer] and not [the employer and plan administrator] to pay LTD benefits to Brown if she is disabled." *Brown v. J.B. Hunt Transport Servs., Inc.*, 586 F.3d 1079, 1088 (8th Cir. 2009). *See also Richmond*, 246 Fed. App'x at 400 n.2 ("Because CNA was the sole administrator of the plan at all relevant times and [the plaintiff's employer and plan sponsor] had no role

[3] *See also*, *e.g.*, *Griffin*, 647 Fed. App'x at 923 (affirming dismissal of Section 1132(a)(1)(B) claim for unpaid benefits against the employer sponsor of a group health benefit plan, where the plan made clear that the employer "had no responsibility for determining whether benefits are payable under the Plan or the amount of benefits payable[,]" and "[i]nstead, [an insurer, as the claims administrator] alone had the authority to make those determinations").

in the discontinuation decision [the employer] was never a proper defendant.") (*per curiam*).

In *Sawyer*, the Fourth Circuit affirmed the dismissal of a claim for benefits against a plan and its employer sponsor "for the reasons stated by the district court," 223 Fed. App'x 217, *1, which were that the plan was wholly funded by an accidental death and dismemberment insurance policy, and the plan delegated to the insurer all responsibility for administration of the plan: "The court finds no evidence that the [plan and the employer sponsor] exerted any influence on [the insurer's] decision to deny benefits to plaintiff. Therefore the court holds that [the insurer] is the *only* proper defendant[.]" *Sawyer*, 417 F. Supp. 2d at 737 (emphasis in original).

Seventh and Ninth Circuit decisions portend a similar outcome. Because "a cause of action for 'benefits due' *must be brought against the party having the obligation to pay*," *Larson*, 723 F.3d at 913 (emphasis added), the Seventh Circuit has held: "When an employee-benefits plan is implemented by insurance and the insurance company decides contractual eligibility and benefits questions and pays the claims, an action against the insurer for benefits due 'is precisely the civil action authorized by § 1132(a)(1)(B).'" *Id.* (quoting *Cyr*, 642 F.3d at 1207). Although *Larson* decided that a claim against the insurer was proper rather than whether a claim against a plan was improper, the court's touchstone inquiry—who is obligated to pay the claim?—is a strong indicator that the Seventh Circuit

would reject a claim against a plan that has no responsibility for determining eligibility, assessing claims, or paying benefits.

The *en banc* Ninth Circuit reached the same conclusion in *Cyr*: where "the plan administrator . . . had nothing to do with denying Cyr's claim for increased benefits[,]" and the insurer instead "effectively controlled the decision whether to honor or deny a claim under the program[,]" a claim against the insurer was proper. 642 F.3d at 1203, 1207. Like *Larson*, *Cyr* did not require the Ninth Circuit to decide the inverse question—whether a claim against the plan in those circumstances would have been *improper*—but the court's functional analysis would likely lead to that conclusion.

Petitioners argue that the Colorado Supreme Court decision "directly conflicts" with only one court of appeals decision, *Chapman v. ChoiceCare Long Island Term Disability Plan*, 288 F.3d 506 (2d Cir. 2002), which allowed a Section 1132(a)(1)(B) claim to proceed against an insured plan. *See* Pet. 8.[4] This purported

[4] Petitioners also rely on *Kirby v. TAD Resources International, Inc.*, 136 N.M. 148, 95 P.3d 1063 (N.M. App. 2004), in which the New Mexico court permitted a plaintiff to proceed against a plan in an unusual circumstance that does not exist here: "when the disability insurer in control of administration of the plan has been dismissed on res judicata grounds and is not a party and Plaintiff cannot directly obtain a judgment against the insurer." *Id.*, 95 P.3d at 1064, *cited in* Pet. 8. Years later, the plaintiff was still trying to find some way to recover on her judgment against the plan. *Kirby v. Guardian Life Ins. Co. of Am.*, 148 N.M. 106, 231 P.3d 87 (2010). The *Kirby* decisions illustrate why allowing suit

conflict, however, is both illusory and falls far short of justifying review, for many reasons.

- It is not clear from *Chapman* whether the plan played a role in claim determinations (as opposed to benefit payments), which would render it a proper defendant under Section 1132(a)(1)(B).

- *Chapman* mistakenly relied on and misconstrued Section 1132(d)(1), which provides that a plan "may sue and be sued under this subchapter as an entity[.]" 288 F.3d at 509. This provision mirrors state laws establishing that a corporation may sue or be sued. It says nothing about what triggers a plan's substantive liability, which, as this Court and other circuits have concluded, must be found in the "terms of the plan." 29 U.S.C. § 1132(a)(1)(B). *See Larson*, 723 F.3d at 913-14 ("[t]he main point of § 1132(d) is to adjust certain common-law liability rules[,]" but not to make the plan a proper defendant in all circumstances); *Hunt*, 119 F.3d at 908 (Section 1132(d)(1) "sue and be sued" language does not obviate the requirement that a defendant be, under the plan's terms, "capable of providing the relief requested").

- Relatedly, *Chapman* announced a wholesale rule—"a plan is a proper defendant in an action to recover benefits under § 1132(a)(1)(B)," 288 F.3d at 509—without regard for the terms of the plan. In so doing, the decision contravened the fundamental rule that a

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against a plan that has no responsibility for determining claims or paying benefits conflicts with ERISA's objective of providing simple, inexpensive, and speedy remedies to beneficiaries.

claim for relief under Section 1132(a)(1)(B) "stands or falls by the terms of the plan." *Kennedy*, 555 U.S. at 300-01.

- *Chapman* relied on cases with critically distinct facts, including because they did not involve insurance-funded plans, *e.g.*, *Crocco v. Xerox Corp.*, 137 F.3d 105 (2d Cir. 1998); *Leonelli v. Pennwalt Corp.*, 887 F.2d 1195 (2d Cir. 1989), *cited in Chapman*, 288 F.3d at 510,[5] and because they involved claims against plan administrators rather than plans themselves, *e.g.*, *Neuma, Inc. v. AMP, Inc.*, 259 F.3d 864 (7th Cir. 2001). At least one of the cited cases directly refutes the outcome in *Chapman*. In *Layes v. Mead Corp.*, 132 F.3d 1246 (8th Cir. 1998), *cited in Chapman*, 288 F.3d at 510, the Eighth Circuit affirmed *dismissal* of claims against the claimant's employer and the plan, because the insurer that controlled the claims process and claim decisions through its policy was the only proper defendant. 132 F.3d at 1249-50.

- *Chapman* is not even followed in the Second Circuit. To undersigned counsel's knowledge, in the past sixteen years, no Second Circuit decision has cited *Chapman* for the proposition that a plan is always a proper defendant in a claim for benefits under Section

[5] In *Leonelli*, the plaintiff challenged his employer's denial of benefits under an insurance-funded LTD plan, the company's pension plan, and its salary continuation plan. 887 F.2d at 1197. The only claim that plaintiff sought leave to bring as an ERISA claim was for denial of benefits under the pension plan, which was administered by an administrative committee, not an insurer. *Id.* at 1199.

1132(a)(1)(B). Moreover, the single post-*Chapman* Second Circuit case cited in the petition does not cite *Chapman*, does not apply an absolute plan-as-defendant rule, and, instead, functionally analyzes who is a proper defendant. *See New York State Psychiatric Ass'n, Inc. v. UnitedHealth Grp.*, 798 F.3d 125, 132 (2d Cir. 2015) ("[W]here the claims administrator has 'sole and absolute discretion' to deny benefits and makes 'final and binding' decisions as to appeals of those denials, the claims administrator exercised total control over claims for benefits and is an appropriate defendant in a § 502(a)(1)(B) action for benefits[.]"); *see also id.* at 132 n.5 ("We need not and do not decide whether a claims administrator that exercises less than total control over the benefits denial process is an appropriate defendant under § 502(a)(1)(B).").

Petitioners' conflict argument disingenuously invokes *Geddes v. United Staffing Alliance Employee Medical Plan*, 469 F.3d 919, 931 (10th Cir. 2006), as a relatively recent case holding that ERISA beneficiaries may always bring Section 1132(a)(1)(B) claims against the plan. Pet. 9-10. As Petitioners' counsel knows well—because it's plainly stated in *Geddes* and was repeatedly noted by Respondents and the courts over the course of this litigation—*Geddes* involved a self-funded medical plan that "explicitly reserves to [plaintiff's employer, the plan administrator] the right to make all final decisions about benefits paid under the terms, as well as the authority to interpret disputed Plan provisions." 469 F.3d at 922; *see also* Pet. App. 20a n.4, 30a, 75a.

In the end, contrary to Petitioners' "the sky is falling" hyperbole, their conflict argument is much ado about nothing. The Colorado Supreme Court's decision builds on and is consistent with the overwhelming body of law concerning liability under Section 1132(a)(1)(B). It is merely one more decision—and a state decision that will bind no federal court—on an issue that many other courts already have decided consistently and that must be based on the terms of specific plans and the facts of specific cases. The impact on ERISA claimants will be infinitesimal because they can and will sue the correct defendant—the insurer—except in the unusual case (like these) where a creative lawyer seeks to invoke ERISA's substitute-service provision in order to hide the fact of the lawsuit from the proper defendant.

II. Service-on-Secretary Issue

A. The Colorado Supreme Court's Holding Is Correct

ERISA provides that a "person" may serve as agent for service of process, 29 U.S.C. § 1022(b), and it defines a "person" as including a "corporation." *Id.* § 1002(9). "Service . . . upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan." *Id.* § 1132(d)(1). In compliance with these provisions, the SPDs for the PSCU plan and the Colorado Access plan designated corporate entities—PSCU and

Colorado Access, respectively—as the plans' agents for service of process.

Petitioners assert no challenge to these statutory provisions and they don't dispute that the plans designated agents for service of process. Nevertheless, ignoring the plans' designations and ERISA's procedure for service on the designated agent under Section 1132(d)(1), Petitioners made substituted service on the Secretary, relying on another sentence in Section 1132(d)(1): "In a case where a plan has not designated in the summary plan description of the plan an individual as agent for service of legal process, service upon the Secretary shall constitute such service."

Every court that has considered this issue—in these cases and in others in which Petitioners' counsel has taken the same position, *see infra* at 27—has rejected Petitioners' argument, and for good reason.

As a starting point,

> the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used. . . . Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things.
>
> . . .
>
> [I]dentical language may convey varying content when used in different statutes,

> *sometimes even in different provisions of the same statute*.

Yates v. United States, __ U.S. __, 135 S. Ct. 1074, 1082 (2015) (emphasis added).

Applying these principles, this Court and other courts have confirmed that the word "individual" is not rigidly limited to natural persons, and often applies to business entities, too. For instance, in *Clinton v. City of New York*, 524 U.S. 417 (1998), the plaintiffs challenged the constitutionality of the Line Item Veto Act, which provided standing to "any individual adversely affected." *Id.* at 428. Against a challenge brought by several businesses, the Government argued that standing under the Act was limited to natural persons. The Court rejected the argument, holding that "in the context of the entire [statutory] section Congress undoubtedly intended the word 'individual' to be construed as synonymous with the word 'person,'" which included business entities. *Id.* The Court stated:

> There is no plausible reason why Congress would have intended to provide for such special treatment of actions filed by natural persons and to have precluded entirely jurisdiction over comparable cases brought by corporate persons. Acceptance of the Government's new-found reading . . . would produce an absurd and unjust result which Congress could not have intended.

Id. at 429 (internal quotation marks and citations omitted). *See also*, *e.g.*, *Consol. Edison of New York, Inc. v. Pataki*, 292 F.3d 338, 346-49 (2d Cir.) (a corporation

is an "individual" protected by the Constitution's Bill of Attainder Clause), *cert. denied*, 537 U.S. 1045 (2002); *United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000) ("individuals" as used in a prior version of 18 U.S.C. § 1030(e)(8), includes "corporations": "[The word 'individual'] does not necessarily exclude corporations. *Webster's Third New Int'l Dictionary* 1152 (unabridged ed. 1993) provides five definitions of the noun 'individual, the first being 'a single or particular being or *thing or group of* beings or *things*.'. . . [A] corporation can be referred to as an 'individual.'") (emphasis in original); *In the Matter of Parentage & Support of M.K.M.R.*, 199 P.3d 1038, 1041-43 (Wash. App. 2009) ("[t]he term 'individual' is not a term of art limited only to natural persons"); *Individual*, The Law Dictionary, *available at* http://thelawdictionary.org/individual (defining "individual" as "very commonly, a private or natural person," but "this restrictive signification is not necessarily inherent in the word, and . . . it may, in proper cases, include artificial persons").

Mohamad v. Palestinian Authority, 566 U.S. 449 (2012), the sole case cited for the petition's narrow construction of "individual," Pet. 16, actually undermines Petitioners' position. While *Mohamad* reads "individual" as used in the Torture Victim Protection Act of 1991, 106 Stat. 73, note following 28 U.S.C. § 1350, as limited to natural persons, the Court made clear that "[t]his is not to say that the word 'individual' invariably means 'natural person' when used in a statute." 566 U.S. at 455. Rather, "Congress remains free, as always, to give the word a broader or different meaning" so

long as there is "*some* indication Congress intended such a result." *Id.* (emphasis in original). And "the statutory context [may] make[ ] that intention clear, because any other reading of 'individual' would lead to an 'absurd' result Congress could not plausibly have intended." *Id.* (quoting *Clinton*, 524 U.S. at 429). *Accord Budget Serv. Co. v. Better Homes of Va., Inc.*, 804 F.2d 289, 292 (4th Cir. 1986) (construing the word "individual" as used in the Bankruptcy Code provision for recovery of damages and fees by "an individual injured by any willful violation" of an automatic stay "to include a corporate debtor": the word "must be read in conjunction with the rest of [11 U.S.C.] § 362 and . . . its sanctions are not limited to the relief of an 'individual' in the literal sense . . . [where] [s]uch a narrow construction of the term would defeat much of the purpose of the section").[6]

Here, the statutory context makes Congress's intent clear. The Colorado Supreme Court properly read the word "individual" as used in Section 1132(d)(1) in the larger context of the relevant ERISA provisions. In a rhetorical question, the court identified and then avoided the absurd result that would result under Petitioners' construction: "Why would Congress expressly allow a plan to designate a corporation as agent for service of process . . . and then, simultaneously, allow the plaintiff to ignore the designated agent for service of process because it's a corporation?" Pet. App. 13a. The

[6] In *Budget Service*, the relevant Bankruptcy Code provision appeared at 11 U.S.C. § 362(h). It now appears at 11 U.S.C. 362(k)(1).

Court correctly rejected a restrictive interpretation that would effectively negate ERISA's express authorization for a corporation to serve as agent for service.[7]

B. There Is No Conflict

Petitioners do not assert a conflict among circuits or any courts as a basis for *certiorari* review of the service-on-Secretary issue. They could not. To Respondents' knowledge, *no court* has ever adopted their assertion that Section 1132(d)(1) permits service on the Secretary where the plan has properly designated an entity as its agent for service of process.

III. These Cases Are a Poor Vehicle for Review

Petitioners' lawyer has regularly (a) sued self-insured plans that have no responsibility for determining

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[7] Petitioners state that "each and every time the ERISA statute uses the term 'individual' as a noun, it clearly refers to an actual human." Pet. 16. The "as a noun" qualification appears deliberate. In another subsection of the very same section in which the substitute-service provision appears, ERISA uses "individual" as an *adjective* to refer to a non-natural person: "Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter." 29 U.S.C. § 1132(d)(2). Congress plainly did not intend the word "individual" as used in Section 1132(d)(2) to be limited to natural persons—otherwise claimants would be unable to enforce a judgment against a corporation whose liability was established. Moreover, ERISA expressly defines a "person," described in Section 1132(d)(2) as having an "individual capacity," as including all forms of entities. 29 U.S.C. § 1002(9).

claims or paying benefits, instead of suing the insurers who bear those responsibilities under the terms of the plans, and (b) made substitute service on the Secretary instead of serving the agents designated in the plans' SPDs. *See Cave v. Group Long Term Disability of Convergys Corp.*, No. 07-CV-6981 (Denver Dist. Ct. March 12, 2009); *Hart v. CapGemini US LLC Welfare Benefit Plan*, Case No. 07-CV-6765 (Denver Dist. Ct. Oct. 2, 2009), *aff'd after removal*, 547 Fed. App'x 870 (10th Cir. 2013); *Cobler v. The Am. Gen. Long-Term Disability Plan for Employees*, Case No. 07-CV-12520 (Denver Dist. Ct. Oct. 25, 2010); *see also Bigley v. Ciber, Inc. Long Term Disability Coverage*, 570 Fed. App'x 756 (10th Cir. 2014).

In all of those cases, the Secretary did not forward the served complaints to the relevant plans, which allowed Petitioners' counsel to conceal his clients' lawsuits from both the plans and the responsible insurers, and to obtain default judgments in *ex parte* proceedings. And in all those cases, as here, the plans challenged the default judgments once they were discovered, and the defaults were vacated. Pet. App. 56a; *Bigley*, 570 Fed. App'x at 758. Aside from Petitioners' counsel's repeated efforts, Respondents know of no other similar cases.

The petition is a direct outgrowth of the Colorado courts' refusal to play along with Petitioners' counsel's scheme for avoiding the terms of ERISA-governed plans and ERISA's service of process requirements. Particularly in this dubious and unusual context, the

questions presented do not justify this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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