No. _______

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent Great-West Life & Annuity Insurance Company offers an investment fund to retirement plans governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Through their ERISA plans, individuals like petitioner John Teets can invest their retirement savings in Great-West's fund.

Great-West holds ongoing and unilateral authority to set the interest rate it pays to participants in the fund. And Great-West keeps the spread between that interest and the returns it generates by investing participant contributions to the fund. Thus, the lower it sets the interest rate for participants, the more money Great-West makes for itself. Over the class period, Great-West made hundreds of millions in profits from this arrangement.

Great-West's conduct violates ERISA's clear rules barring parties in interest from using plan assets (here, the fund contract) to benefit themselves. See 29 U.S.C. 1106(a). This Court has held that where a party in interest violates those rules, plan participants can force them to disgorge their ill-gotten gains. See *Harris Trust & Sav. Bank* v. *Salomon Smith Barney*, 530 U.S. 238, 250 (2000). Multiple courts of appeals have held the same.

In the decision below, the Tenth Circuit flouted that rule, holding that disgorgement was unavailable because the plan asset at issue was the fund contract—not specific property over which petitioner could himself assert title. The question presented is:

May an ERISA plan participant or beneficiary seek disgorgement of unreasonable profits derived from a plan contract from a nonfiduciary party in interest?

STATEMENT OF RELATED PROCEEDINGS

United States District Court for the District of Colorado:

Teets v. *Great-West Life & Annuity Ins. Co.,* No. 14-cv-2330-WJM-NYW (Dec. 14, 2017)

United States Court of Appeals for the Tenth Circuit:

Teets v. *Great-West Life & Annuity Ins. Co.*, No. 18-1035 (Mar. 9, 2018), dismissal upon stipulation of the parties entered as mandate.

Teets v. *Great-West Life & Annuity Ins. Co.*, No. 18-1019 (Mar. 27, 2019), judgment entered.

Teets v. *Great-West Life & Annuity Ins. Co.*, No. 18-1019 (Apr. 22, 2019), petition for reh'g denied, judgment entered as amended.

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Employee Retirement Income Security Act
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Other Authorities

4 A. Scott & W. Fratcher, *Law of Trusts* § 284, § 291.1, § 294.2, § 297 (4th ed. 1989) 10, 11

1 D. Dobbs, *Law of Remedies* § 4.7(1) (2d ed. 1993) 10

G. Bogert, *Law of Trusts and Trustees* § 886
(rev.2d ed. 1995) 10

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PETITION FOR A WRIT OF CERTIORARI

John Teets respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

INTRODUCTION

This case involves clear-cut ERISA violations. Under its contracts with ERISA plans, Great-West retains complete and ongoing discretion to decide *its own profits* at the expense of participants who invest in its fund. Exercising its discretion, Great-West has paid itself hundreds of millions of dollars over the class period.[1] ERISA prohibits this scheme in two ways. First, it categorically bars

[1] The exact amount is unknown because Great-West keeps it secret. App., *infra*, 13a.

those with discretion over a plan (like Great-West) from using it to profit themselves. Second, ERISA bars those who provide services to a plan (also like Great-West) from receiving unreasonable compensation.

In finding no ERISA violation here, the Tenth Circuit misunderstood the record on appeal, which makes Great-West's fiduciary status clear. Mr. Teets does not challenge that fact-bound ruling here. In holding that Mr. Teets also has no *nonfiduciary* claim, however, the Tenth Circuit made a mistake that warrants this Court's attention. The sole question was whether equitable relief was available in the form of disgorgement of Great-West's unreasonable profits derived from its contracts with ERISA plans.[2] In answering "no," the court erroneously distinguished plan contracts from any *other* type of plan asset, the use of which could support disgorgement.

There is no basis in law or logic for the Tenth Circuit's new "plan contract" exception. It strays from an on-point decision of this Court, splits from the decisions of other courts of appeals, and frustrates congressional intent. In *Harris Trust & Savings Bank* v. *Salomon Smith Barney*, 530 U.S. 238, 250 (2000), this Court held that ERISA authorizes disgorgement from nonfiduciaries of profits they derive from wrongfully transferred trust property. As the Tenth Circuit recognized in the decision below, plan contracts are trust property. But instead of treating these contracts like any other plan asset, as other Circuits have in analogous cases, the Tenth Circuit mistakenly believed it could not rely on such contracts to award disgorgement.

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[2] Great-West did not dispute that it is a party in interest (App., *infra*, 97a), nor that whether it overcharged the plan is a fact issue for trial (*ibid.*).

This defied not only judicial precedent, but also legislative intent. There is no reason to believe that Congress wanted to let those who engage in prohibited transactions keep their ill-gotten gains.

At a basic level, the Tenth Circuit's distinction makes no sense. Most prohibited transactions occur via contract. Those who profit from those prohibited transactions must return that profit.[3] Unless profit derived from a contract suffices, there will be hair-splitting and uncertainty in the Tenth Circuit over whether the profit was derived from a contract as opposed to some other type of plan asset. That will happen even where, as here, a prohibited transaction involving plan assets clearly took place. Litigants with viable prohibited transaction claims against nonfiduciaries will not know how to frame their requests for relief. Lower courts will not know how to adjudicate them. And the remedial scheme that Congress crafted will suffer.

The question presented thus satisfies the Court's traditional criteria for plenary review. Review is warranted to restore uniformity to ERISA's remedial scheme.

OPINIONS BELOW

The order denying panel rehearing and rehearing en banc (App., *infra*, 107a-108a) is unreported. The opinion of the court of appeals (App., *infra*, 2a-68a), as clarified *nunc pro tunc*, is reported at 921 F.3d 1200. The original opinion of the court of appeals, superseded on denial of rehearing en banc, is reported at 919 F.3d 1232. The district court's order (App., *infra*, 69a-104a) is reported at 286 F. Supp. 3d 1192.

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[3] Numerous courts of appeals use precisely that "profit from a prohibited transaction" construction. See *infra* at 13.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2019. The court of appeals denied a petition for panel rehearing and rehearing en banc on April 22, 2019. App., *infra*, 107a-108a. On July 12, 2019, Justice Sotomayor extended the time to file a petition for certiorari to and including September 19, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, are reproduced in the appendix to this petition. App., *infra*, 109a-124a.

STATEMENT

A. Statutory Background

ERISA is a landmark federal statute enacted "to protect * * * the interests of participants in employee benefit plans * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries * * * and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b).

ERISA furthers this goal by policing interactions between plans and those best positioned to take advantage of participants. "Congress enacted [Section 1106], which supplements the fiduciary's general duty of loyalty to the plan's beneficiaries * * * by categorically barring certain transactions deemed 'likely to injure the pension plan.'" *Harris Trust*, 530 U.S. at 241-242. While Congress categorically banned fiduciaries from self-dealing, it allowed service providers to deal with plans for their own benefit,

so long as their compensation is "reasonable." 29 U.S.C. 1106(a), 1108(b)(2).

Sections 1106 and 1108 work in tandem to impose this reasonableness limit. Section 1106(a) prohibits plans from engaging in transactions with service providers that carry the potential for self-dealing. To that end, it bars parties in interest from "furnishing * * * services" to a plan or dealing with plan assets for their own benefit. 29 U.S.C. 1106(a)(1). But Section 1108(b) exempts contracts between plans and service providers under conditions that protect participants. 29 U.S.C. 1108(b). As relevant here, it allows parties in interest to provide "services necessary for the establishment or operation of the plan," which Section 1106(a) would otherwise prohibit, so long as "no more than reasonable compensation is paid therefor." 29 U.S.C. 1106(a)(1)(C), 1108(b)(2). Congress thus effectively prohibited service contracts for "more than reasonable compensation." 29 U.S.C. 1108(b)(2).

Congress gave teeth to the ban on excessive compensation by holding service providers liable for violating it. ERISA authorizes participants and beneficiaries to sue parties in interest for "appropriate equitable relief." 29 U.S.C. 1132(a)(3); see *Harris Trust*, 530 U.S. at 241. Consistent with the common law of trusts, "appropriate equitable relief" includes disgorgement of profits. *Id.* at 250. See also *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 262 (1993) (nonfiduciary service providers "must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406 * * *").

B. Facts and Procedural History

1. Respondent Great-West Life & Annuity Insurance Company offers an investment product called the Great-

West Key Guaranteed Portfolio Fund. App., *infra*, 12a. Individuals like Mr. Teets invest in the Fund through their ERISA-governed retirement plans. *Id.* at 12a, 71a. Plan sponsors enter into a contract with Great-West (the "Contract"), which guarantees that Great-West will preserve all principal that individuals invest in the Fund, along with all interest once it has been earned. *Id.* at 72a.

Participants earn interest in the Fund at the "Credited Rate." App., *infra*, 12a. The Contract does not set the Credited Rate. *Ibid.* Instead, it gives Great-West discretion to set the Rate every quarter; the only constraint is that the Rate may not be lower than zero. *Id.* at 13a. If plans object to the Credited Rate, their only recourse is to terminate the Contract and withdraw from the Fund after a one-year waiting period. *Id.* at 14a.

The Credited Rate determines not just how much participants make, but also how much *Great-West* makes. Great-West keeps the difference between the Rate and the actual market returns earned on money invested in the Fund (the "margin"). App., *infra*, 13a. Thus, the lower Great-West sets the Credited Rate, the more money it makes. Great-West discloses a portion of the margin as a management fee (of 0.89%), but it does not disclose the rest. *Ibid.* Nor does it disclose the Fund's actual market returns, so plans cannot readily deduce the margin. *Ibid.*

Discovery has shown that over the class period, Great-West consistently set the Credited Rate to achieve its desired margin. App., *infra*, 13a. That margin increased over time, from 1.77% in 2008 to 2.97% in 2014. Petitioner's Opening Brief, Case No. 18-1019 (10th Cir. July 31, 2018) ("Br.") at 8. At the same time, Great-West steadily cut the Credited Rate from 3.5% in 2008 to just over 1% in 2016. App., *infra*, 13a. Thus, for providing the same services and

incurring the same costs, Great-West earned ever-increasing profits at the expense of plan participants. By Mr. Teet's estimate, Great-West made about $500 million from the undisclosed portion of the margin alone during the class period. Br. at 1.

2a. Petitioner filed suit on behalf of all ERISA plan participants who had invested in the Fund. His first two claims alleged that Great-West's discretion over the Credited Rate made it a fiduciary, and that Great-West breached its fiduciary duties by engaging in self-dealing. App., *infra*, 15a. His third claim alleged that the Contract was a prohibited, non-exempt transaction and sought disgorgement of Great-West's unreasonable profits. *Id.* at 16a. After discovery (*ibid.*) and class certification (*id.* at 69a), the parties cross-moved for summary judgment (*id.* at 76a). Despite acknowledging Great-West's discretionary authority to set the Credited Rate, the district court mistakenly concluded that Great-West was not a fiduciary because plans could terminate the Contract. *Id.* at 28a. On the nonfiduciary claim, the district court erroneously held that Great-West could not be held liable for receiving more than reasonable compensation unless it knew that its conduct violated the law. *Id.* at 17a.

2b. The Tenth Circuit affirmed on different grounds. Mistaking the facts, the court first held that Great-West was not a fiduciary because it did not impose obstacles to plans terminating the Contract. App., *infra*, 34a. (Great-West has admitted that plans are locked in for a year after they seek to withdraw. *Id.* at 73a.) Mr. Teets does not seek further review of the fiduciary holding here.

With respect to Mr. Teets' nonfiduciary claim, the court held that disgorgement of Great-West's unreasona-

ble profits under the Contract was not "appropriate equitable relief" under ERISA. App., *infra*, 42a.[4] The court began by acknowledging that disgorgement from parties in interest is available under ERISA. *Id.* at 50a-53a (discussing *Harris Trust* and trust law). It also acknowledged that the Contract is a plan asset (*id.* at 20a) from which Great-West enriched itself. *Id.* at 13a. But believing that this Court had sharply "limited the remedies available under § 502(a)(3)," the court applied another layer of analysis. *Id.* at 61a (citing a different line of cases). It required Mr. Teets to identify "particular property that rightfully belong[ed] to" him, and from which Great-West derived its profits. *Id.* at 59a. Without explanation, the court rejected the Contract as such property. *Id.* at 59a-60a.

3. Mr. Teets timely sought panel rehearing and rehearing en banc. In his petition for rehearing, Mr. Teets urged the court to reconsider its holding that he could not seek disgorgement of profits derived from the Contract. Petitioner's Request for Panel Rehearing and Rehearing En Banc, Case No. 18-1019 (10th Cir. Apr. 10, 2019). The panel members denied the request for panel rehearing. App., *infra*, 108a. However, they "made small *sua sponte* clarifications to the original opinion" and directed the clerk to file the clarified decision *nunc pro tunc* to the date of the original opinion. *Ibid.* None of the changes affected the court's analysis of the disgorgement issue. The Tenth Circuit denied the request for reconsideration en banc. *Ibid.*

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[4] The Tenth Circuit did not adjudicate the "knowledge" issue that was dispositive in the district court. It stated the correct knowledge standard from *Harris Trust*, but did not decide whether it was met. App., *infra*, 17a.

REASONS FOR GRANTING THE PETITION

According to the Tenth Circuit, a party in interest cannot be compelled to disgorge unreasonable compensation derived from a plan contract. That holding directly conflicts with this Court's decision in *Harris Trust* and with every appellate decision on the subject. It eviscerates ERISA's bar on excessive compensation and severely undermines protections for plan participants in the Tenth Circuit. Further review is warranted.

I. The Tenth Circuit's Decision Directly Conflicts With This Court's Decision In Harris Trust

A. It has never been controversial that appropriate equitable relief under ERISA includes disgorgement of profits wrongly earned by nonfiduciaries on plan assets. This Court first considered such relief in *Mertens*, 508 U.S. at 248. Holding that money damages were not "equitable relief" available against nonfiduciaries, the Court observed that disgorgement *would* be available (if a cause of action existed): "For even in its more limited sense, the 'equitable relief' awardable under § 502(a)(5) includes restitution of ill-gotten plan assets or profits * * *." *Mertens*, 508 U.S. at 260.

A decade later in *Harris Trust*, the Court clarified that ERISA does authorize suit for disgorgement against a nonfiduciary party in interest who knowingly participates in a prohibited transaction. 530 U.S. at 241. Citing trust law authorities, the Court explained:

> [I]t has long been settled that when a trustee in breach of his fiduciary duty to the beneficiaries transfers trust property to a third person, the third person takes the property subject to the trust, unless he has purchased the property for value and without notice of the fiduciary's

> breach of duty. 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.*

Id. at 250 (emphasis added) (citing Restatement (Second) of Trusts §§ 284, 291, 294, 295, 297 (1957); 4 A. Scott & W. Fratcher, *Law of Trusts* § 284, § 291.1, pp. 77-78, § 294.2, p. 101, § 297 (4th ed. 1989) (hereinafter *Law of Trusts*); 5 *id.*, § 470, at 363; 1 D. Dobbs, *Law of Remedies* § 4.7(1), pp. 660-661 (2d ed. 1993); G. Bogert, *Law of Trusts and Trustees* § 886, pp. 95-96 (rev.2d ed. 1995)).

Rejecting the argument that disgorgement would be inequitable, the *Harris Trust* Court pointed out that "the common law of trusts sets limits on restitutionary actions against defendants other than the principal 'wrongdoer.'" 530 U.S. at 251. It identified those limits: "the transferee must be demonstrated to have had actual or constructive knowledge of the circumstances that rendered the transaction unlawful." *Ibid.* The Court then concluded that an action against a "transferee of tainted plan assets" satisfied both the "'appropriate[ness]'" and "'equitable'" criteria in Section 502(a)(3). *Id.* at 253. It set no other limits on the availability of disgorgement from parties in interest.

B. The decision below is irreconcilable with *Harris Trust*, which holds unequivocally that "when a trustee in breach of his fiduciary duty to the beneficiaries transfers trust property to a third person, the third person takes the property subject to the trust * * *." 530 U.S. at 250. That happened here. Plans gave Great-West rights under the Contract, which (as the Tenth Circuit recognized) is a plan asset. App., *infra*, 20a; accord *Chicago Bd. Options*

Exch., Inc. v. *Conn. Gen. Life Ins. Co.*, 713 F.2d 254, 260 (7th Cir. 1983) ("[T]he policy itself is a Plan asset * * *."). Great-West then pocketed profits that it made investing participant dollars it received pursuant to the Contract. App., *infra*, 13a. Under *Harris Trust*, Mr. Teets may therefore "maintain an action for * * * disgorgement of the third person's profits derived therefrom." Yet the Tenth Circuit held this relief unavailable. *Id.* at 62a-63a.

Two related missteps led the Tenth Circuit astray. First, the court layered a superfluous inquiry on top of the *Harris Trust* test. The only question before the court here was whether an ERISA participant or beneficiary could sue a party in interest for disgorgement of profits derived from an unlawful transfer of trust property. According to *Harris* Trust, the answer depends on whether there was a transfer of "tainted plan assets," 530 U.S. at 253, with knowledge of the circumstances that render the transfer unlawful, *id.* at 251.[5] That should have ended the inquiry.[6]

But the court of appeals did not stop there. Believing that this Court had *further* "limited the remedies available under § 502(a)(3)" (App., *infra*, 61a), the court *also* required that the profits be "generated from particular

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[5] The treatise sources on equity agree with the limited *Harris Trust* test. For example, *Law of Trusts* explains simply that when a third-party transferee takes with knowledge of the breach (as Great-West did here), "the seller takes the purchase money subject to the trust and can be compelled to restore it." Scott & Fratcher, *supra*, § 291.1 (cited in *Harris Trust*, 530 U.S. at 250).

[6] To be clear, although Great-West disputes that its use of the plan contract was "tainted" here, that is a fact question that would need to be resolved on remand from this Court. And it in no way creates an obstacle to plenary review: The Tenth Circuit rested its holding entirely on the remedy question—a legal error that warrants this Court's attention.

property over which Mr. Teets can 'assert title or right to possession,'" (*id.* at 62a (citing *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213) (2002))). This language comes from *Knudson*, where an insurance company sought money owed by plan participants. 534 U.S. at 208-209. The Court easily found that no "equitable" relief was available; the insurer had no claim to *own* the money, rather only to be *owed* it. *Id.* at 213.

Neither *Knudson* nor any other decision of this Court authorizes an addendum to *Harris Trust*. ERISA participants have exactly the kind of ownership interest in the "plan assets" (or "trust property") discussed in *Harris Trust* that the Court contemplated in *Knudson*. There is no requirement that participants have an additional, *personal* ownership interest in the assets. Indeed, the *Knudson* Court readily reconciled the two cases: "[t]he nature of the relief we described in *Harris Trust*—a claim to specific property (or its proceeds) held by the defendant—accords with the restitution we describe as equitable today." 534 U.S. at 215.

Second, the Tenth Circuit's choice to import language from *Knudson* into the *Harris Trust* standard caused the court to violate *Harris Trust*'s simple command. The court barred recovery of profits generated from the very plan asset that is most likely to be wrongfully transferred to a party in interest: rights under a plan contract. On its face, the court's test does not countenance claims based on plan contracts (over which Mr. Teets could not plausibly "assert title or right to possession"). Yet *Harris Trust* allows for disgorgement of profits from any "tainted plan assets" without limitation. 530 U.S. at 253. Because plan contracts are plan assets, the profits they generate can be disgorged under *Harris Trust*, contrary to the decision below.

In short, *Harris Trust* makes disgorgement of profits earned on plan assets available from parties in interest to prohibited transactions. The decision below turns that standard on its head by making disgorgement *unavailable* in ordinary cases. In so holding, the Tenth Circuit departed not only from this Court's precedent, but also from the decisions of numerous sister courts of appeals.

II. The Tenth Circuit's Resolution Of The Question Presented Created A Circuit Conflict

The Tenth Circuit's departure from *Harris Trust* also marks a split with decisions of the Third, Fourth, Sixth, Ninth, and Eleventh Circuits.

Even before *Harris Trust*, multiple courts of appeals had expressly held that nonfiduciaries could be required to disgorge profits derived from prohibited transactions. See, *e.g.*, *LeBlanc* v. *Cahill*, 153 F.3d 134, 153 (4th Cir. 1998) (endorsing relief sought, that the party in interest "disgorge the profits and gains * * * realized as a result of their wrongful conduct," as "squarely within the Court's definition of 'appropriate equitable relief'"); *Landwehr* v. *DuPree*, 72 F.3d 726, 734 (9th Cir. 1995) ("nonfiduciary service providers 'must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by [29 U.S.C. § 1106.]'") (quoting *Mertens*, 508 U.S. at 262); *Herman* v. *South Carolina Nat. Bank*, 140 F.3d 1413, 1422 (11th Cir. 1998) ("[T]hey may be liable as 'parties in interest' for equitable disgorgement of their profits received from engaging in a prohibited transaction in violation of § 406.").

After *Harris Trust*, more courts of appeals joined the chorus. See, *e.g.*, *National Security Systems, Inc.* v. *Iola*, 700 F.3d 65, 101-02 (3d Cir. 2012) (approving disgorge-

ment of half of commissions paid to party in interest pursuant to prohibited transaction); *McDannold* v. *Star Bank, N.A.*, 261 F.3d 478, 488 (6th Cir. 2001) (interpreting *Harris Trust* to hold that "[a]s a form of equitable relief * * * disgorgement is allowed").

Brock v. *Hendershott*, 840 F.2d 339 (6th Cir. 1988), presents an especially sharp conflict with the decision below. In *Brock*, the court held that a nonfiduciary could be held liable for aiding fiduciary self-dealing with respect to a union's choice of dental provider. 840 F.2d at 342. The nonfiduciary also profited from each local that contracted with a dental cartel. *Id.* at 341. The court agreed with the Department of Labor that "the money received by [nonficuiary] Platel was also subject to disgorgement, despite his nonfiduciary status, because he participated with [fiduciary] Hendershott in the breach." *Ibid.*

Brock is instructive because the only conceivable "plan asset" that changed hands was the *group contract* that the union locals signed with the dental cartel. 840 F.2d at 341. The locals did not pay the defendants the money that the court disgorged; those sums were kickbacks from the dentists. *Ibid.* In other words, there was no other "res" or "particular property" in *Brock* from which profits were derived, except the asset that the Tenth Circuit rejected. *Brock* remains good law. *McDannold*, 261 F.3d at 486.

III. The Question Presented Is Exceptionally Important And Frequently Recurring

Whether a party in interest can keep profits under an illegal plan contract is obviously important and recurring. The decision below flouts Congress's intent and jeopardizes basic protections for plan assets in the Tenth Circuit.

In enacting ERISA, Congress focused particularly on protecting the interests of participants and beneficiaries

in plan assets. See S. Rep. No. 93-127 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4866–71; H. Rep. No. 93-533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647–51. To that end, it provided robust remedies against anyone who exploited plan assets. As the Department of Labor has observed, "it is clear that Congress intended that parties in interest that engage in prohibited transactions would 'correct' those transactions and thus would not be entitled to remain unjustly enriched as a result of such transactions." Amicus Brief of U.S. at 17-18, *Harris Tr. & Sav. Bank* v. *Salomon Bros., Inc.*, No. 99-579, 2000 WL 228599 (U.S. Feb. 22, 2000).

The decision below eviscerates these protections in the Tenth Circuit for assets that happen to be contracts. It creates what the Tenth Circuit itself has called a "zone of immunity, protecting the illegitimate gains of parties in interest who have completed prohibited transactions that the Secretary could have enjoined while they were occurring." *Reich* v. *Stangl*, 73 F.3d 1027, 1031 (10th Cir. 1996). In other words, the contract exception is a huge loophole. It would immunize those who enrich themselves from plan contracts in any way, whether by taking bribes for negotiating them, using them as collateral, or any other abuse. And it does so despite the express policy of ERISA to protect plan assets above all else.

Even more dangerously, the plan contract exception threatens to swallow the rule permitting disgorgement in prohibited transaction cases in the Tenth Circuit. This case illustrates the danger. No one disputes that the Contract effects a transaction that Section 1106(a) prohibits on its face. App., *infra*, 97a. Nor does anyone dispute that pursuant to that Contract, participant dollars flowed to

Great-West (*id.* at 12a), and Great-West profited as a result (*id.* at 13a). Yet the court held that Mr. Teets had not adequately identified the plan asset from which Great-West enriched itself. *Id.* at 54a. If that is how the "plan contract" exception applies, then litigating nonfiduciary prohibited transaction cases in the Tenth Circuit is a minefield. What facts must litigants allege to survive the pleadings on disgorgement claims? What facts do they have to establish to avoid summary judgment? To prevail?

This is not a problem that will go away any time soon. Along with the Department of Labor, participants, beneficiaries, and fiduciaries routinely seek disgorgement of profits from nonfiduciaries. The history of the past few months proves as much. See, *e.g.*, *Del Castillo* v. *Community Child Care Council of Santa Clara County, Inc.*, Case No. 17-cv-07243-BLF, 2019 WL 2644234 (N.D. Cal. June 27, 2019); *Haley* v. *Teachers Ins. & Annuity Assoc. of Am.*, 377 F. Supp. 3d 250 (S.D.N.Y. 2019). What is more, with such lawsuits occurring nationwide, uniformity is particularly important. See *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002). Yet the Tenth Circuit alone now has a "plan contract" loophole that makes uniformity impossible.

IV. This Case Is An Ideal Vehicle To Address The Question Presented

This case provides a perfect vehicle to address the question presented. The question was dispositive of petitioner's nonfiduciary prohibited transaction claim. There are no unresolved factual issues that could hamper this Court's ability to resolve those legal issues. There is very little likelihood of further percolation of this issue, as the

courts of appeals are in accord except for the Tenth Circuit. This significant question is accordingly ripe for the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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