No. 24-_____

In the Supreme Court of the United States

TENNECO INC., et al.,

Petitioners,

v.

TANIKA PARKER, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The court below applied the judge-made "effective vindication" exception to the Federal Arbitration Act ("FAA") to invalidate an individual arbitration procedure contained in a defined contribution plan governed by the Employee Retirement Income Security Act ("ERISA"). The Court has never applied this judge-made exception to invalidate any arbitration agreement, much less one in an ERISA plan. Moreover, several Justices have questioned the viability of the "effective vindication" exception.

The first question presented is whether the judge-made "effective vindication" exception to the FAA, which the Court has consistently refused to apply, may be used to circumvent the statutory mandates of the FAA and invalidate an individual arbitration procedure contained in an ERISA-governed plan.

2. To the extent the "effective vindication" exception to the FAA is viable, the lower courts are split about its effect on individual arbitration provisions contained in ERISA-governed plans. The split is based on (a) varying interpretations of the Court's decision in *LaRue v. DeWolff, Boberg, & Assocs.*, 552 U.S. 248 (2008), (b) the scope of the cause of action authorized by ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), and (c) the impact of *Thole v. U.S Bank N.A.*, 590 U.S. 538 (2020), and *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022). The court below misconstrued *LaRue* and ignored the import of *Thole* and *Viking River* to find that ERISA guarantees a single plan participant an unwaivable statutory right to seek monetary relief, in a representative capacity, on behalf of all absent

plan participants and their individual plan accounts. In so holding, the lower court ignored the express limitation on the relief available set forth in ERISA § 502(a)(2) and the due process rights of absent plan participants and plan fiduciaries. The Second, Third, and Tenth Circuit have made similar errors. Other courts, however, have interpreted the Court's precedent and ERISA § 502(a)(2) to avoid a conflict between ERISA and the FAA and to preserve the due process rights of absent plan participants and plan fiduciaries.

Given the divergence among the lower courts as to the impact of the Court's decisions on ERISA, the second question presented is whether a participant in an ERISA-governed plan has an unwaivable statutory right (or stated differently, a mandatory obligation) under ERISA § 502(a)(2) to represent the plan as a whole and seek monetary relief on behalf of all absent plan participants' individual plan accounts, such that enforcement of a plan's individual arbitration procedure would preclude the participant's "effective vindication" of his ERISA statutory rights.

PARTIES TO THE PROCEEDING

Petitioners are Tenneco Inc., DRiV Automotive, Inc., Tenneco Automotive Operating Company, Inc., Tenneco Benefits Committee, Federal-Mogul Corporation, Federal-Mogul, LLC, Federal-Mogul Powertrain, LLC, and the Tenneco Benefits and Pension Investment Committee.

Respondents are Tanika Parker and Andrew Farrier, who purport to bring claims on behalf of themselves, the DRiV 401(k) Retirement Savings Plan, and all other similarly situated individuals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Tenneco Inc. states that it is indirectly owned by investment funds managed by an affiliate of Apollo Global Management, Inc. ("Apollo"). Apollo's common stock is publicly traded on the New York Stock Exchange.

DRiV Automotive, Inc., Tenneco Automotive Operating Company, Inc., Federal-Mogul Corporation, Federal-Mogul, LLC, and Federal-Mogul Powertrain, LLC are all subsidiaries of Tenneco Inc.

RELATED PROCEEDINGS

Parker, et al. v. Tenneco Inc., et al., Case No. 23-10816, United States District Court, Eastern District of Michigan, Southern Division, Order entered August 21, 2023.

Parker, et al. v. Tenneco Inc., et al., Case No. 23-1857, United States Court of Appeals for the Sixth Circuit, Order and Judgment entered August 20, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully file this petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's decision affirming the district court's order (Pet. App. 1a–36a) is available at 114 F.4th 786 (6th Cir. 2024). The district court's order denying Defendants' motion to compel individual arbitration (Pet. App. 37a–52a) is available at 2023 WL 5350565 (E.D. Mich. Aug. 20, 2023).

JURISDICTION

The Sixth Circuit entered its decision on August 20, 2024 (Pet. App. 2a). The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions are 9 U.S.C. §§ 2, 4 (reproduced at Pet. App. 54a–56a) and 29 U.S.C. §§ 1132(a)(2),(a)(3), and 1109(a) (reproduced at Pet. App. 53a–54a).

INTRODUCTION

The FAA requires that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Notwithstanding the limited grounds for avoiding enforce-

ment of an arbitration agreement set forth in Section 2 of the FAA, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court expressed a willingness to create an additional exception to the FAA's requirement that written arbitration agreements be enforced. 473 U.S. 614, 637, n.19 (1985). The Court stated, in dicta, that it would consider invalidating, on "public policy" grounds, arbitration agreements that "operat[e] ... as a prospective waiver of a party's right to pursue statutory remedies." *Id.*; *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013) (describing the discussion of the "effective vindication" exception to the FAA in *Mitsubishi Motors* as dicta and acknowledging it was based on "public policy" grounds).

The "Court's dicta, even if repeated, does not constitute precedent and does not alter the plain text of the [statute], which was the law passed by Congress and signed by the President." *Oklahoma v. Castro-Huerta,* 597 U.S. 629, 645 (2022) (citation omitted). Furthermore, the Court's consistent refusal to apply the "effective vindication" exception to the FAA indicates that it may not be applicable in any case. *DirecTV Inc. v. Imburgia*, 577 U.S. 47, 68 n.3 (2015) (Ginsberg, J., dissenting) (citing *Italian Colors*, 570 U.S. at 251–52 (Kagan, J., dissenting) ("Although the Court in *Italian Colors* did not expressly reject this "effective vindication" principle, the Court's refusal to apply the principle in that case suggests that the principle will no longer apply in any case."). Justice Thomas has also repeatedly opined that neither "public policy" nor the "effective vindication" exception may be used to invalidate an arbitration agreement.

See, e.g., Italian Colors, 570 U.S. at 239 (Thomas, J., concurring) (rejecting the public policy and effective vindication arguments being offered to avoid enforcement of an arbitration agreement because "[n]either argument 'concern[s] whether the contract was properly made'" and, thus, the respondents did not provide the legal basis necessary "for the revocation of any contract" as required by 9 U.S.C. § 2); *see also infra* at pp. 14–16.

Five Circuit Courts of Appeal, including the court below, have now used the dubious judge-made exception to invalidate a plan's individual arbitration procedure. Given that the Court has repeatedly refused to apply this exception to invalidate an arbitration agreement and appears to be scaling back judge-made doctrines, certiorari is needed so that the Court can clarify whether the judge-made "effective vindication" exception to the FAA may be used to invalidate a plan's individual arbitration procedure.

If the Court determines that there is an "effective vindication" exception to the FAA, it should hold that it can be used to invalidate a plan's individual arbitration procedure only if ERISA conflicts with the FAA. When evaluating whether a statute conflicts with the FAA, the Court has "stressed that the absence of any specific statutory discussion of arbitration or class actions [in the statute] is an important and telling clue that Congress has not displaced the [FAA]." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 516–17 (2018).

ERISA does not discuss arbitration or class actions. This is "an important and telling clue" that Congress did not intend for ERISA to displace the FAA. *Id.* Another clue is provided in the text of ERISA itself. ERISA, which was enacted after the FAA, states that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States … or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d). Had Congress intended for ERISA to displace the FAA, it would have said so. But it did not.

"It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another." *Epic Systems*, 584 U.S. at 502. The court below ignored the Court's direction and the clear wording of ERISA and implicitly found that there ERISA conflicts with the FAA. The court then used the judge-created "effective vindication" exception to invalidate the Plan's individual arbitration procedure. The court found that it was necessary to invalidate the Plan's individual arbitration procedure because it precluded a participant from effectively vindicating his alleged guaranteed, statutory right to serve as a representative of all absent plan participants to seek monetary relief for each of their individual plan accounts under ERISA § 502(a)(2). Based on similar reasoning, the Second, Third, and Tenth Circuits have also refused to enforce individual arbitration provisions in ERISA plans pursuant to the "effective vindication" exception.

In so holding, the court below (and the Second, Third, and Tenth Circuits) ignored the limitation on

the relief available to plan participants under ERISA § 502(a)(2), which expressly limits the relief available to "appropriate" relief. The court also ignored and/or misinterpreted this Court's rulings in *LaRue*, *Thole* and *Viking River*. Considered together and as implicitly recognized by the minority of courts that have enforced ERISA plan individual arbitration procedures, *LaRue*, *Thole* and *Viking River* confirm that ERISA does not grant participants in a defined contribution plan an unfettered, statutory right to represent the plan to seek monetary relief on behalf of all absent plan participants and their individual plan accounts. *See, e.g., Dorman v. Charles Schwab Corp.*, 780 F.App'x 510, 514 (9th Cir. 2019) ("Because arbitration is a matter of contract, the Provision's waiver of class-wide and collective arbitration must be enforced according to its terms, and the arbitration must be conducted on an individualized basis."); *Merrow v. Horizon Bank,* 699 F. Supp. 3d 605, 615 (E.D. Ky. 2023) (holding that the plaintiffs' claims must be brought in individual arbitration pursuant to the plan's arbitration provision and class action waiver); *Robertson v. Argent Tr. Co.,* 21-cv-01711, 2022 WL 2967710, *10 (D. Ariz. July 27, 2022) (compelling plaintiff's ERISA § 502(a)(2) claims into individual arbitration pursuant to the plan's arbitration procedure and class action waiver); *Holmes v. Baptist Health S. Fla., Inc.*, No. 21-22986, 2022 WL 180638, *4 (S.D. Fla. Jan. 20, 2022) (same); *Ducharme v. DST Sys., Inc.*, No. 4:17-CV-00022, 2017 WL 7795123, *1 (W.D. Mo. June 23, 2017) (dismissing ERISA § 502(a)(2) claims and enforcing individual arbitration where plaintiff "waived his right to act in a representative capacity on behalf of a class or collective action"); *see*

also Smith v. Bd. of Dir. of Triad Mfg., Inc., 13 F.4th 613, 622 (7th Cir. 2021) (noting that individual arbitration of ERISA § 502(a)(2) claims is not "inherently incompatible with ERISA").

Consistent with the Court's precedent and the plain text of ERISA § 502(a)(2), the statutory right granted to a participant in a defined contribution plan is limited to serving as a representative of his individual plan account and seeking "appropriate relief" on behalf of his plan account. Interpreting the phrase "appropriate relief" to provide a participant with a statutory right to pursue monetary relief on behalf of his individual plan account and any necessary injunctive or equitable relief harmonizes the FAA and ERISA, acknowledges relevant Supreme Court precedent, and preserves the due process rights of absent plan participants and plan fiduciaries. The Court's intervention is necessary to harmonize the law and provide the uniformity ERISA needs to incentivize companies to continue offering voluntary benefits to their employees.

STATEMENT OF THE CASE

I. THE ERISA PLAN CONTAINS AN INDIVIDUAL ARBITRATION PROCEDURE THAT COVERS THE ERISA § 502(a)(2) CLAIMS ASSERTED IN THIS CASE.

Plaintiffs are participants in the Tenneco 401(k) Investment Plan ("Plan"). The Plan is a defined contribution plan regulated by ERISA. As with other types of defined contribution plans, Plan participants, including Plaintiffs, have individual accounts within

the Plan, and the value of the assets within those individual Plan accounts determines each participant's individual Plan benefit. The Plan is "maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). The Plan's individual arbitration procedure provides that the ERISA § 502(a)(2) claims brought by Plaintiffs must be settled by binding arbitration on an individual basis and identifies the specific relief available to each Plaintiff-Claimant:

> [W]ith respect to any claim brought under ERISA § 502(a)(2) to seek appropriate relief under ERISA § 409, the Claimant's remedy, if any, shall be limited to (i) the alleged losses to the Claimant's individual Plan account resulting from the alleged breach of fiduciary duty, (ii) a prorated portion of any profits allegedly made by a fiduciary through the use of Plan assets where such pro-rated amount is intended to provide a remedy solely to Claimant's individual Plan account, and/or (iii) such other remedial or equitable relief as the arbitrator deems proper so long as such remedial or equitable relief does not include or result in the provision of additional benefits or monetary relief to any Employee, Participant or Designated Beneficiary other than the Claimant…

Pet. App. 5a–6a. The Plan also provides that "nothing in this provision shall be construed to preclude a Claimant from seeking injunctive relief, including, for

example, seeking an injunction to remove or replace a Plan fiduciary." Pet. App. 6a.

The relief available to a Plan participant is consistent with the rights afforded to participants under ERISA § 502(a)(2), *i.e.*, it allows a participant to seek "appropriate" monetary relief on behalf of the participant's individual plan account and to obtain any necessary injunctive or other non-monetary equitable relief (including, for example, an injunction to remove or replace a Plan fiduciary).

II. THE COURTS BELOW REFUSED TO COMPEL INDIVIDUAL ARBITRATION BASED ON THE DUBIOUS JUDGE-MADE "EFFECTIVE VINDICATION" EXCEPTION TO THE FAA.

Rather than file their ERISA § 502(a)(2) claims with the AAA as required by the Plan, Plaintiffs filed suit in federal district court and purport to assert their claims on behalf of the Plan and all absent Plan participants. Defendants moved to compel individual arbitration based on the Plan's individual arbitration procedure. Pet. App. 37a. The United States District Court for the Eastern District of Michigan, Southern Division, denied Defendants' motion. Pet. App. 38a. The district court found that the Plan's individual arbitration procedure prohibited the participants from seeking the plan-wide remedies expressly provided by ERISA § 502(a)(2) because it (1) limited relief to losses attributable to individual participant accounts, as opposed to allowing a participant to seek plan-wide remedies; and (2) prohibited participants from

bringing suit in a representative capacity on behalf of the Plan as a whole. Pet. App. 51a.

The Sixth Circuit affirmed on similar grounds. Relying on the "effective vindication" exception to the FAA, the court held that the Plan's individual arbitration procedure was invalid because it was a "prospective waiver" of a Plan participant's statutory right to bring an ERISA § 502(a)(2) claim "in a representative capacity on behalf of the plan as a whole" and to sue "for all losses resulting from a fiduciary breach." Pet. App. 3a, 24a.

The Sixth Circuit was bound by its prior decisions applying the "effective vindication" exception to invalidate an arbitration agreement and (mis)construing the import of the Court's decision in *LaRue*.[1] Pet. App. 18a; *see also id.* at 32a (McKeague, J.) (concurring) (stating that "[w]riting on a blank slate, this case would be difficult. It raises hard questions of statutory interpretation, requires us to consider the

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[1] In particular, the Sixth Circuit found in *Hawkins v. Cintas Corp.,* 32 F.4th 625, 627, 633, 635 (6th Cir. 2022), that *LaRue* did not overrule *Mass. Mutl. Life Ins. Co. v. Russell* or abrogate its fundamental precept that "[s]ection 502(a)(2) suits are "brought in a representative capacity on behalf of the plan as a whole." Pet App. 19a–20a. *LaRue*, however, states exactly the opposite: "our reference to the 'entire plan' in *Russell*, which accurately reflect[s] the operation of § 409 in the defined benefit context, are beside the point in the defined contribution context." *LaRue*, 552 U.S. at 256. As discussed below, *LaRue* ultimately held that a participant in a defined contribution plan (like the one at issue here) can bring an ERISA § 502(a)(2) claim on an individual basis to remedy any alleged harm to that participant's individual plan account. *Id.* at 256.

interplay between ERISA and the FAA, and tasks us with applying a judge-made doctrine. Fortunately for us, much ink has been spilled on these topics … [and] those [prior Sixth Circuit] rulings are enough for us to affirm.") (citing *Morrison v. Cir. City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) and *Hawkins*, 32 F.4th at 627, 633, 635)). The court below made no effort to reconcile its prior decisions with subsequent decisions issued by the Court, including *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), and *Loper Bright Enterprises v. Raimondo,* 144 S. Ct. 2244 (2024).

In addition to its blind adherence to Sixth Circuit precedent, the Sixth Circuit failed to consider the express limitation in the scope of the cause of action created by ERISA § 502(a)(2), which limits the relief available to participants to "appropriate" relief. It also misunderstood ERISA § 409(a) as creating a "remedy" for plan participants rather than creating the universe of potential liability for plan fiduciaries. Pet. App. at 9a–10a, 23a (describing ERISA § 409(a) as a "remedy" for participants despite the fact that § 409(a) discusses the personal liability for "[a]ny person who is a fiduciary with respect to a plan…." and is not located in ERISA's enforcement section). Together, these statutory construction errors caused the Sixth Circuit to find that a participant has a statutory right to represent other participants' financial interests that Congress did not provide for when it enacted ERISA.

REASONS FOR GRANTING THE PETITION

The decision below widened the split among the lower courts regarding the proper application of the

judge-made "effective vindication" exception to the FAA to ERISA-governed plans and whether a plan participant has an unwaivable, statutory right (or stated differently, a mandatory obligation) to act as a representative of the plan as a whole and to seek monetary relief on behalf of all absent plan participants and their individual plan accounts. The split hinges, in large part, on a misunderstanding of the Court's precedent and the scope of a participant's guaranteed cause of action under ERISA § 502(a)(2).

Certiorari is needed to resolve the split among the lower courts and to confirm that, consistent the Court's precedent and the plain language of ERISA § 502(a)(2), a participant in the defined contribution context does not have an unwaivable statutory right to represent a plan as a whole or to seek monetary relief on behalf of absent plan participants and their individual plan accounts. Instead, a participant has a statutory right to seek only "appropriate" relief under ERISA § 502(a)(2), *i.e.*, monetary relief on behalf of his individual plan account and any appropriate non-monetary relief. This reading harmonizes ERI and the FAA, recognizes important Court precedent, and protects the due process rights of absent plan participants and plan fiduciaries.

I. THE COURT BELOW ERRED BY RELYING ON THE JUDGE-MADE "EFFECTIVE VINDICATION" EXCEPTION TO OVERRIDE THE FAA'S AND ERISA'S REQUIREMENTS THAT A PLAN'S INDIVIDUAL ARBITRATION PROVISION BE ENFORCED ACCORDING TO ITS TERMS.

The FAA mandates that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As the Court has repeatedly recognized, the FAA reflects Congress's intent to establish a "liberal federal policy favoring arbitration agreements." *Epic Sys. Corp.*, 584 U.S. at 505; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) ("The principal purpose of the FAA is to ensur[e] that private arbitration agreements are enforced according to their terms.") (citations omitted). This strong policy favoring arbitration "holds true for claims that allege a violation of a federal statute," including ERISA. *See Italian Colors,* 570 U.S. at 233.

Despite the clear mandate of the FAA and the national policy favoring arbitration, the Court has expressed, in *dicta*, a willingness to invalidate on "public policy" grounds arbitration agreements that "operat[e] ... as a prospective waiver of a party's right to pursue statutory remedies." *Mitsubishi Motors*, 473 U.S. at 637, n. 19. This hypothetical, judge-made exception to the FAA has never been applied by the Court to invalidate any arbitration agreement, much less an arbitration agreement contained in an ERISA-

governed plan. The court below erred by applying this exception for at least three reasons.

First, the exception is inconsistent with the FAA. Section 2 of the FAA provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the ***revocation*** of any contract." 9 U.S.C. § 2 (emphasis added). As explained by Justice Thomas, the omission of the terms "invalidation" or "nonenforcement'" as a grounds to void arbitration agreements is significant, and the Court properly presumes that "Congress intended a difference in meaning." *Concepcion*, 563 U.S. at 354 (Thomas, J., concurring); *see also Loughrin v. United States*, 573 U.S. 351, 358 (2014) ("We have often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court presume[s] that Congress intended a difference in meaning") (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Nken v. Holder*, 556 U.S. 418, 430 (2009) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). By using the sole term "revocation" to describe the circumstances when an arbitration agreement does not need to be enforced, Congress intentionally limited the defenses available to enforcement of an arbitration agreement to those that involve "revocation" of a contract.

The scope of Congress's limitation is clarified in Section 4 of the FAA. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme."). Section 4 provides, in relevant part, that a court must order arbitration in accordance with the terms of an arbitration agreement absent a successful challenge to the "making" of the arbitration agreement. *See* 9 U.S.C. § 4; *see also Concepcion*, 563 U.S. at 355 (Thomas, J., concurring) ("Reading [9 U.S.C.] §§ 2 and 4 harmoniously, the 'grounds ... for the revocation' preserved in § 2 would mean grounds related to the making of the agreement…"); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–404 (1967) (interpreting FAA § 4 to permit federal courts to adjudicate claims of "fraud in the inducement of the arbitration clause itself" because such claims "g[o] to the 'making' of the agreement to arbitrate").

Defenses unrelated to the making of the agreement, including the judge-made, public policy based "effective vindication" exception, are not a proper basis for declining to enforce an arbitration clause under the FAA. *Concepcion*, 563 U.S. at 355 (Thomas, J., concurring) ("Contract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause."); *Italian Colors*, 570 U.S. at 239 (Thomas, J., concurring) (rejecting the public policy and effective vindication arguments because "[n]either argument 'concern[s] whether the contract was properly made'" and, thus, the respondents did not furnish "grounds

... for the revocation of any contract" as required by 9 U.S.C. § 2); *Epic Sys.*, 584 U.S. at 525–526 (Thomas, J., concurring) (similar).

Second, application of the judge-made "effective vindication" exception to invalidate an ERISA-governed plan's individual arbitration procedure violates the Court's requirement that an ERISA plan be enforced as written. *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 101 (2013); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (recognizing that ERISA's statutory scheme is "built around reliance on the face of written plan documents"); 29 U.S.C. § 1132(a) (permitting claims only "under the terms of the plan"); *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 108 (2013) (the "focus on the written terms of the plan is the linchpin of 'a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'").

Third, application of the "effective vindication" exception to invalidate an ERISA plan's individual arbitration procedure fails to harmonize ERISA and the FAA. Instead, it creates an unnecessary conflict between the two statutes.

It is undisputed that ERISA does not mention arbitration or class-wide actions. *Dorman II*, 780 F. App'x at 513–14 (("As every circuit to consider the question has held, ERISA contains no congressional command against arbitration") (citing circuit court cases). The absence of such language in ERISA "is an important and telling clue that Congress has not

displaced the Arbitration Act." *Epic Sys*., 584 U.S. at 517. Equally telling is the fact that ERISA expressly affirms Congress's intention not to interfere with the normal operation of other federal statutes, including the FAA. ERISA, *which was enacted after the FAA*, confirms that it shall not "be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States … or any rule or regulation issued under any such law." *See* 29 U.S.C. § 1144(d).

Notwithstanding Congress's statutory statement that ERISA does not "alter, amend, modify, invalidate, impair, or supersede any law of the United States," including the FAA, the Sixth Circuit's decision (as well as the decisions by the Second, Third, and Tenth Circuits) improperly finds that ERISA trumps the FAA. Such rulings ignore the express language of ERISA and the Court's pronouncement that a party claiming that a statute cannot be harmonized with the FAA (and, as such, should displace the FAA) "bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow." *Epic Sys.*, 584 U.S. at 510 (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)). Given this high bar, it is no surprise that the Court "has rejected *every* such effort [to displace the FAA with another federal statute] to date … with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act." *Id.* at 516 (emphasis in original). The Court's repeated refusal to displace the FAA is

consistent with the national policy respecting Congress's role as drafter of the law and with the separation of powers.

The theorical "effective vindication" exception is being used to eviscerate the FAA's requirement that arbitration provisions be enforced according to their terms and ERISA's requirement that a plan be enforced as written. But the exception lacks a Congressional basis or a legal justification. *See Loper Bright*, 144 S. Ct. at 2270 (overturning the judge-made *Chevron* deference rule and noting that, "[f]or its entire existence, *Chevron* has been a 'rule in search of a justification,' if it was ever coherent enough to be called a rule at all.") (internal citation omitted). Certiorari is needed to clarify whether the judge-made "effective vindication" exception can be used in invalidate an ERISA plan's individual arbitration procedure.

II. THE DECISION BELOW MISCONSTRUED ERISA AND THE COURT'S PRECEDENT IN FINDING THAT PLAN PARTICIPANTS HAVE A STATUTORY RIGHT TO SEEK MONETARY RELIEF ON BEHALF OF ABSENT PARTICIPANTS.

The court below erred in finding that ERISA § 502(a)(2) guarantees a plan participant a statutory right (or stated differently, a mandatory obligation) to seek monetary relief on behalf of absent plan participants and their individual plan accounts. The Second, Third, and Tenth Circuits have made similarly erroneous rulings.

In doing so, those courts ignored the plain language of ERISA § 502(a)(2) which makes clear that the relief available to a plan participant is limited to "appropriate" relief:

> A civil action may be brought … by the Secretary, or by a participant, beneficiary or fiduciary for ***appropriate relief*** under section 1109 of this title."[2]

29 U.S.C. § 1132(a)(2) (emphasis added). By ignoring Congress's use of the term "appropriate" in ERISA § 502(a)(2), these lower courts failed to consider the limitation Congress placed on the scope of potential relief available to a single plan participant. This violates the Court's mandate that courts "give effect to every word that Congress used in the statute." *Lowe v. S.E.C.,* 472 U.S. 181, 207 n.53 (1985); *see also Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 70 (2011) (holding that each word in a statute should carry meaning and interpreting the bankruptcy code in such a manner as to ensure that the term "applicable" carries meaning); *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) ("we must give effect to every word of a statute wherever possible").

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[2] Unlike ERISA § 502(a)(2), ERISA § 409, 29 U.S.C. § 1109, does not authorize enforcement or create any cause of action. Instead, ERISA § 409, which is located in the "fiduciary responsibility" section of ERISA, establishes the ceiling of liability for fiduciaries who breach their obligations to an ERISA plan. 29 U.S.C. Subtitle B, Part 4. It says nothing as to what "appropriate" relief may be pursued by a plan participant under ERISA § 502(a)(2).

Had Congress intended for ERISA § 502(a)(2) to guarantee a participant's right to sue a fiduciary for the full amount of potential liability identified in ERISA § 409, it could have done so. It did not. Instead, Congress chose to add the limitation of "appropriate" to describe the scope of a participant's cause of action under ERISA § 502(a)(2). That language cannot be ignored. *See Oklahoma*, 597 U.S. at 642 ("the text of a law controls over purported legislative intentions unmoored from any statutory text. The Court may not 'replace the actual text with speculation as to Congress' intent.' Rather, the Court 'will presume more modestly' that 'the legislature says what it means and means what it says.'") (citing *Magwood v. Patterson*, 561 U.S. 320, 334 (2010)).

Moreover, any doubt that the term "appropriate" in ERISA § 502(a)(2) is intended to be a limitation on the relief available was resolved by the Court's construction of the term "appropriate" in ERISA § 502(a)(3). There is "a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *See Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). On at least two occasions, the Court has interpreted the term "appropriate" to be a limitation on the relief available under ERISA § 502(a)(3). *See, e.g., Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996) (interpreting the term "appropriate" in the phrase "appropriate equitable relief" as limiting the scope of available relief under § 502(a)(3), separate from additional constraints imposed by the term "equitable"); *US Airways,* 569 U.S. at 98 (finding that

"appropriate" equitable relief for purposes of § 502(a)(3) was not "all" equitable relief, but only the relief made available under the terms of the plan). And as recognized by Justice Roberts, "[a]pplying the same rationale to an interpretation of 'appropriate' in § 502(a)(2) would accord with [the Court's] usual preference for construing the same terms [to] have the same meaning in different sections of the same statute...and with the view that ERISA in particular is a 'comprehensive and reticulated statute with carefully integrated civil enforcement provisions." *LaRue*, 552 U.S. at 258 (Roberts, C.J., concurring) (internal quotations and citations omitted).

Consistent with this precedent, the Court's construction of the term "appropriate" in the § 502(a)(3) context, *i.e.*, that the term "appropriate" limits the relief that may be awarded and that a plan's terms may inform what relief is "appropriate," should apply equally to the term "appropriate" in § 502(a)(2). *See id.* Such a construction gives meaning to ERISA § 502(a)(2)'s limitation of relief to "appropriate" relief, respects a plan's terms, and harmonizes ERISA and the FAA.

The construction of the term "appropriate" as a limitation on the relief available to a participant in a defined contribution plan is also consistent with this Court's decision in *LaRue* in which the Court rejected the idea that a participant in a defined contribution plan must seek plan-wide relief in order to seek a remedy under ERISA §§ 409(a) and 502(a)(2). *LaRue,* 552 U.S. at 255–56 (holding that individual plan participants in defined contribution plans may pursue

individual claims under ERISA § 502(a)(2) to obtain ***individual*** relief for alleged violations of ERISA). It is also consistent with the rulings issued by the Ninth and Seventh Circuits. *See Dorman II*, 780 F. App'x at 514 (discussing *LaRue* and stating that "the Supreme Court has recognized that [ERISA § 502(a)(2) defined contribution plan] claims are inherently individualized."); *Smith*, 13 F.4th at 622 (recognizing that individual arbitration of ERISA § 502(a)(2) claims is not "inherently incompatible with ERISA").

In line with the foregoing, the Plan here provides that, if an individual Plan participant prevails on the merits of an ERISA § 502(a)(2) claim, the participant is entitled to all the individual relief that ERISA makes available, including monetary relief for the participant's individual plan account and any equitable or injunctive relief deemed necessary to prevent harm to the participant's account. *See* Pet. App. at 5a–6a (citing the Plan).

The court below (and others) erred in finding that a participant has a statutory right to seek monetary relief on behalf of all absent plan participants and their individual plan accounts. The Court should grant this petition to review the decision and clarify that the scope of relief guaranteed to a single plan participant is limited to "appropriate" relief, which in the context of a defined contribution plan, means monetary relief for the participant's individual plan account and any equitable or injunctive relief deemed necessary to prevent harm to the participant's

account (such as removal or replacement of the plan's trustee).[3]

III. THE COURT BELOW IGNORED THIS COURT'S PRECEDENT AND DUE PROCESS CONCERNS WHEN IT FOUND THAT A PARTICIPANT IS GUARANTEED A STATUTORY RIGHT TO REPRESENT THE PLAN AS A WHOLE.

The court below ignored the Court's precedent in *Thole* and *Viking River* when it determined that a participant in a defined contribution plan has a guaranteed statutory right to represent the plan as a whole and all of the plan's absent plan participants.

In *Thole*, the Court held that ERISA plan participants cannot "assert standing as representatives of the plan." 590 U.S. at 543–44. Instead, to bring a

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[3] It is worth noting that the Plan's individual arbitration procedure does not protect plan fiduciaries from facing claims for plan-wide monetary relief. In addition to authorizing participants to pursue claims for "appropriate" relief, ERISA § 502(a)(2) authorizes the Secretary of Labor to bring actions on behalf of a plan to seek relief under ERISA § 409(a). An agency's ability to pursue broader relief than an individual has been recognized as a factor favoring the enforcement of individual arbitration provisions requiring arbitration of federal statutory claims. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (rejecting plaintiff's argument that the enforcement of an arbitration agreement requiring individual arbitration of ADEA claims would not "adequately further the purposes of the ADEA claims because they do not provide for broad equitable relief and class actions," because, among other reasons, the arbitration agreements at issue "will not preclude the EEOC from bringing actions seeking class-wide and equitable relief.").

claim under ERISA § 502(a)(2), a participant must establish his or her individual Article III standing, including that the participant's individual plan account suffered an injury. *See id.* The court below failed to reconcile its (erroneous) holding with the Court's decision in *Thole*.

The court below also ignored the Court's recognition in *Viking River* that there are two types of "representational" claims: (1) claims that "are predicated on [statutory] violations sustained by other[s]", which the Court described as a form of "claim joinder"; and (2) claims where the plaintiff sues as an "agent or proxy" of a singular entity. 596 U.S. at 645–50 (requiring individual arbitration of statutory claims even where the statute allowed a plaintiff to bring a representative claim in court).

Claims that are predicated on statutory violations sustained by others (*i.e.*, a claim joinder type of representational claim) may be arbitrated on a individual basis. *See id.* at 656–58 (holding that an individual arbitration provision precluding the plaintiff from pursing "representative" claims in arbitration was enforceable with respect to the "claim joinder" form of a representative claim under the California Private Attorneys General Act. Here, the only ERISA § 502(a)(2) "representational" claims barred by the Plan's individual arbitration procedure are claims seeking "to unite multiple claims against an opposing party in a single action," meaning "claim joinder." *Id.* at 639. Consistent with *Viking River*, requiring these types of "representational" claims to be

arbitrated on an individual basis is permitted. *See id.* at 656–58.

Any argument that a participant sues as an "agent or proxy" of the plan, such that any ERISA § 502(a)(2) claim asserted by a participant should not be subject to individual arbitration, is dispelled by *Thole*. ERISA § 502(a)(2) claimants—even when proceeding in a representative capacity—must have individual Article III standing. *See Thole*, 590 U.S. 533–34. If participants asserting claims under ERISA § 502(a)(2) truly came to court as agents of the plan, then requiring an individual injury would not be necessary. Moreover, if a participant really was a "proxy" or "agent" of the plan, the participant would be able to settle or release claims on behalf of the plan. It is well-settled, however, that participants cannot bind the plan. *See In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 594 (3d Cir. 2009) ("a number of courts have held that, as a matter of law, an individual [participant] cannot release the plan's [ERISA § 502(a)(2)] claims"); *Bowles v. Reade*, 198 F.3d 752, 760 (9th Cir. 1999) (holding that a participant seeking relief under ERISA § 502(a)(2) could not settle the claim on behalf of the plan without the plan's consent).[4]

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[4] Unlike a plan participant, a plan fiduciary bringing an ERISA § 502(a)(2) claim is functionally acting as the plan's "agent." It is well-recognized that a plan can only act through its fiduciaries, and that in pursuing a ERISA § 502(a)(2) claim on the plan's behalf, the fiduciary has a duty under ERISA § 404(a) to act solely in the plan's interest in pursuing the claim. Because the fiduciary is functionally acting as the plan's agent, it is deemed to be in "privity" with the plan. *See v. Tecumseh Products*

Construing the ERISA § 502(a)(2) "representational claims" at issue here as a type of claim joinder representational claim, which "unite[s] multiple claims against an opposing party in a single action" as described in *Viking River*, also preserves the due process rights of absent plan participants and plan fiduciaries.

Neither the court below (nor any of the other Circuit Courts invalidating a plan's individual arbitration procedure) have grappled with the due process consequences associated with their decisions. Due process, however, cannot be ignored forever and, at some point, important issues such as who will be bound by any settlement or findings on the merits will have to be addressed. Without the safeguards of Federal Rule of Civil Procedure 23, absent plan participants may be bound by a judgment or settlement without adequate representation, without their knowledge or consent, and without the opportunity to present their own claims or defenses. Such a scenario, which will occur here without the Court's intervention (and which is likely occurring in those courts which have determined that a participant has a statutory right to represent absent plan participants) undermines the fundamental due process rights to notice, participation, and representation in legal proceedings.

Co., 123 F.3d at 877, 880 (6th Cir. 1997) ("A person is represented by a party who is … [t]rustee of an estate or interest of which the person is a beneficiary … ."). For this reason, and unlike plan participants, a plan fiduciary may pursue a fiduciary breach claim on the plan's behalf under ERISA § 502(a)(2) without first establishing that the fiduciary has suffered a concrete and particularized injury as a result of the alleged breach.

It is not difficult to imagine other due process concerns for plan participants arising from the Sixth Circuit's decision. Assume, for example, that Participant A has been a participant in her 401(k) plan for three years. Participant A believes that the plan should not be offering certain mutual funds because there are allegedly less expensive funds that have similar returns. Participant A files an ERISA § 502(a)(2) claim based on these allegations on behalf of herself and all other similarly situated plan participants. Participants B and C learn of Participant A's lawsuit. Participant B decides that he is in a better position to assert the ERISA claims because he has been invested in the plan for six years (whereas Participant A has only been invested in the plan for three years) and, thus, can assert claims over a longer period of time. Participant B also believes that there are better investment comparators that Participant A failed to consider, which could materially impact the success of the claims asserted. Participant C disagrees with both Participants A and B. Participant C believes that if Participant A's claim is successful it would actually harm his own individual account because the challenged investment option has performed very well during the eight year period that he participated in the investment option and the investment's strategy aligns with his long term investment goals.

Under the lower court's decision, Participants B and C would arguably have no right to intervene into the Participant A's litigation because Participant A got to the courthouse first and has a guaranteed statutory right to represent all the participants in the

plan, including Participants B and C. Moreover, there would be no analysis of the possibility of inter-class conflicts or protection afforded to participants in the event inter-class conflicts exist. Additionally, there would be an open question as to whether Participants B or C would have the ability to bring their own subsequent litigation should Participant A lose on the merits of her case.

Rule 23 was enacted to protect fundamental due process rights and eliminate the uncertainties set forth above. As explained by one lower court, "to permit the [ERISA § 502(a)(2)] action to go forward without the type of protections provided by [Rule 23] or their equivalent would be overly myopic." *Fish v. Greatbanc Tr. Co.*, 667 F. Supp. 2d 949, 951 (N.D. Ill. 2009); *see also Coan v. Kaufman*, 457 F.3d 250, 259 (2d Cir. 2006) (an ERISA § 502(a)(2) claim cannot "be brought in a 'representative capacity on behalf of the plan' if the plaintiff does not take any steps to become a bona fide representative of other interested parties"); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 318 (5th Cir. 2007) (vacating class certification order of ERISA § 502(a)(2) claims on behalf of the plan due to the participant's inability to satisfy the requirements of Rule 23; in doing so, the court explained that "we are confident that the subtlety of the fiduciary claims alleged, the intraclass conflicts and the individualized nature of potential defenses mandated that the case proceed as a class action and equally mandated, on the facts before us, against the propriety of a Rule 23(b)(2) class"); *Wagner v. Stiefel Labs., Inc.*, No. 1:12-CV-3234, 2015 WL 4557686, at *13 (N.D. Ga. June 18, 2015) (concluding that individual

plaintiffs could not pursue ERISA § 502(a)(2) claims on behalf of absent plan participants and their plan accounts because plaintiffs "have done nothing to notify or otherwise involve other [p]lan participants").

Should the Sixth Circuit's decision be allowed to stand, the due process protections guaranteed to absent plan participants and plan fiduciaries would be obliterated. Review is warranted to prevent that unfair result in this case.

CONCLUSION

Defendants respectfully request that petition for a writ of certiorari be granted.

November 15, 2024

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