MENASHI, *Circuit Judge*, dissenting:

The Federal Arbitration Act ("FAA") provides 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. Through the FAA, Congress established "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Nonetheless, parties who have agreed to arbitrate sometimes try to avoid arbitration later by "conjur[ing] conflicts between the Arbitration Act and other federal statutes." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 516 (2018). The Supreme Court "has rejected *every* such effort to date." *Id.*; *see id.* at 502 (National Labor Relations Act); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013) (Sherman Antitrust Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991) (Age Discrimination in Employment Act).

And here we are again. This time, the purported conflict is with the Employee Retirement Income Security Act ("ERISA"). Petitioner Ramon DeJesus Cedeno argues that the arbitration clause in the documents governing his ERISA plan prevents him from effectively vindicating his statutory rights under Section 409(a) of ERISA, which makes plan fiduciaries liable for the mismanagement of plan assets. The arbitration clause prohibits Cedeno from bringing a claim in arbitration "in a representative capacity or on a class, collective, or group basis," and it limits his relief under Section 409(a) to remedies that neither "result in the provision of additional benefits or monetary relief" to other plan participants nor bind the plan fiduciaries with respect to other participants. J. App'x 105-06. The court concludes that, because Cedeno's only "avenue for relief under ERISA is to seek a plan-wide remedy, and the specific terms of the arbitration

agreement seek to prevent Cedeno from doing so, the agreement is unenforceable." *Ante* at 15.

I disagree. Enforcing the arbitration agreement would not diminish Cedeno's ability to vindicate his statutory rights. The court's holding depends on its acceptance of Cedeno's tendentious reading of ERISA. The Supreme Court has warned that "we must be alert to new devices and formulas" by which litigants seek to revive the old "judicial antagonism toward arbitration." *Epic Sys.*, 584 U.S. at 509 (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011)). The manufactured conflict between ERISA and the arbitration clause here is just such a device. I would reject it, and therefore I dissent.

I

This is a straightforward case. The documents governing Cedeno's ERISA plan provide that any claim for a breach of fiduciary duty is to be resolved through binding arbitration. The arbitration clause requires Cedeno to bring any claims "solely in [his] individual capacity and not in a representative capacity or on a class, collective or group basis," and it limits him to the remedies that are necessary to redress his individual injuries. J. App'x 105-06. Cedeno nevertheless brought a lawsuit in federal court—a class-action lawsuit, no less—asserting a breach of fiduciary duty by Argent, the trustee of the plan. The district court should have granted the motion to compel arbitration.

When it enacted the FAA, Congress directed the courts to "respect and enforce" not only "agreements to arbitrate" but also "the parties' chosen arbitration procedures." *Epic Sys.*, 584 U.S. at 506. We must respect the parties' choice "to use individualized [arbitration] rather than class or collective action procedures." *Id.*; *see also*

Concepcion, 563 U.S. at 348 ("[C]lass arbitration, to the extent it is [imposed] rather than consensual, is inconsistent with the FAA.").

Had the district court respected and enforced the arbitration clause, Cedeno would have been able to seek whatever legal or equitable relief was necessary to make him whole; he simply would have been required to seek that relief in an individualized arbitration proceeding. The arbitration clause would have prohibited Cedeno from pursuing money damages on behalf of other plan participants, but the Supreme Court has repeatedly held that, pursuant to the FAA, parties may waive the right to pursue relief on behalf of others through class arbitration. *See Epic Sys.*, 584 U.S. at 506; *Concepcion*, 563 U.S. at 348. Under those precedents, the arbitration clause in this case is enforceable.

Cedeno, however, insists that there is a conflict with ERISA, and the court agrees. Section 502(a)(2) of ERISA provides that "[a] civil action may be brought … by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under" Section 409(a). 29 U.S.C. § 1132(a)(2). The court understands Sections 502(a)(2) and 409(a) to require Cedeno to act in a "representative capacity" on behalf of the plan itself and to seek a "plan-wide remedy" on its behalf, effectively making Cedeno a guardian *ad litem* for the plan (much as a shareholder would represent a corporation in a derivative suit). *Ante* at 24.[1] Because the arbitration clause prohibits Cedeno from asserting claims in a representative capacity, the court

[1] *See Miller v. Brightstar Asia, Ltd.*, 43 F.4th 112, 122 (2d Cir. 2022) (explaining that, in a derivative suit, "the plaintiff-shareholder does not sue for his own direct benefit or in his own direct right but rather as a guardian *ad litem* for the corporation") (quoting Harry G. Henn, Handbook of the Law of Corporations and Other Business Enterprises 560 (1961)).

concludes that, in this case, the FAA's mandate to enforce arbitration agreements conflicts with ERISA, which purportedly does not allow Cedeno to make claims on his own behalf.[2] The court also interprets the arbitration clause to prohibit Cedeno from seeking relief that affects other plan participants *in any way*, including equitable relief contemplated by ERISA. The court therefore holds that the arbitration agreement is "not enforceable" because it "ha[s] the effect of prospectively waiving [Cedeno's] statutory remedies." *Ante* at 18.

In reaching this conclusion, the court relies on "the 'effective vindication' exception," a "judge-made exception to the FAA" that "originated as dictum in *Mitsubishi Motors*." *Italian Colors*, 570 U.S. at 235.[3] As today's decision describes it, the effective vindication exception to the FAA means that "terms in an arbitration agreement

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[2] The court insists that the relevant conflict is "not between the FAA and ERISA" but "between ERISA and the plan's arbitration provision." *Ante* at 46 (quoting *Smith v. Bd. of Dirs. of Triad Mfg.*, 13 F.4th 613, 622-23 (7th Cir. 2021)). But the FAA requires a court to "'rigorously enforce' arbitration agreements according to their terms." *Italian Colors*, 570 U.S. at 232 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). So if ERISA somehow prevents the enforcement of the arbitration clause, it conflicts with the FAA. Indeed, the court seeks to avoid applying the FAA by relying on "the 'effective vindication' exception," a "judge-made *exception* to the FAA." *Id.* at 235 (emphasis added).

[3] The Supreme Court in *Mitsubishi Motors* remarked that if an arbitration agreement "operated … as a prospective waiver of a party's right to pursue statutory remedies, we would have little hesitation in condemning the agreement as against public policy." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). However, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function," and public policy would not prevent the enforcement of the arbitration agreement. *Id.* at 637.

that have the effect of prospectively waiving a party's statutory remedies are not enforceable." *Ante* at 18. The court concludes that the arbitration clause prevents Cedeno from vindicating his statutory rights because it prohibits him from acting in a representative capacity on behalf of the plan, and it operates as a waiver of statutory remedies because it prohibits him from seeking equitable relief that would incidentally benefit other participants.

That is incorrect. Even assuming that there is an "effective vindication" exception to the FAA—notwithstanding that the Supreme Court has never applied it—the exception is not implicated here. A participant in a defined-contribution pension plan, such as Cedeno, may proceed under Sections 502(a)(2) and 409(a) to seek relief that benefits only his or her individual account within the plan. Requiring Cedeno to pursue relief in an arbitral forum does not alter that substantive right. The court ruminates over the abstract question of whether Sections 502(a)(2) and 409(a) of ERISA transform an individual claimant into a representative of the plan. ERISA does no such thing. But even if it did, nothing would prevent the claimant from waiving the right to bring a claim as the plan representative and agreeing to individualized arbitration. In the individualized procedure contemplated by the arbitration clause, Cedeno could obtain any legal or equitable remedy that is necessary to make him whole. Accordingly, I would reverse the district court's denial of the motion to compel arbitration.

II

There are three problems with the court's analysis. First, the effective vindication exception is a questionable principle of uncertain legal status. Second, neither Section 502(a)(2) nor Section 409(a) of ERISA requires Cedeno to act in a representative capacity on behalf

of the plan. To the contrary, an ERISA plaintiff represents his own individual interest. Third, the arbitration clause allows Cedeno to obtain any legal or equitable relief that is necessary to make him whole. There is no reason to interpret the clause to prohibit such relief, even if an equitable remedy would incidentally benefit other plan participants. Ultimately, there is no conflict between ERISA and the mandate of the FAA to enforce arbitration agreements.

A

While the Supreme Court has acknowledged the theoretical possibility of an effective vindication exception to the FAA, it has always declined to apply the exception whenever litigants have asked it to do so. *See Italian Colors*, 570 U.S. at 235-36; *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-74 (2009); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90-91 (2000); *Gilmer*, 500 U.S. at 28; *Mitsubishi Motors*, 473 U.S. at 636-37. In his concurrence in *Italian Colors*, Justice Thomas observed that the purported exception conflicts with "the plain meaning of the Federal Arbitration Act." 570 U.S. at 229 (Thomas, J., concurring). It does so because "the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress." *Id.* (quoting *Concepcion*, 563 U.S. at 353 (Thomas, J., concurring)); *see* 9 U.S.C. § 2 (providing 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"). And Justice Ginsburg concluded that the Court's decision in *Italian Colors* meant that the effective vindication exception was no longer relevant. "Although the Court in *Italian Colors* did not expressly reject this 'effective vindication' principle," she wrote, "the Court's refusal to apply the principle in that case suggests that the

principle will no longer apply in any case." *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 68 n.3 (2015) (Ginsburg, J., dissenting).

To be sure, the Supreme Court appears to have referenced the exception in a recent case. The Court stated that "the FAA does not require courts to enforce contractual waivers of substantive rights and remedies." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 653 (2022). But the Court emphasized that "[a]n arbitration agreement … does *not* alter or abridge substantive rights; it merely changes how those rights will be processed." *Id.* (emphasis added). Thus, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral forum." *Id.* (alterations omitted) (quoting *Preston v. Ferrer*, 552 U.S. 346, 359 (2008)). In this way, the Court clarified that an agreement to arbitrate, by itself, *never* involves an impermissible waiver of substantive rights. Rather, what had previously been described as the effective vindication "exception" really refers to the principle that "the FAA requires only the enforcement of provisions to settle a controversy by arbitration, and not any [substantive] provision that happens to appear in a contract that features an arbitration clause." *Id.* at 653 n.5 (internal quotation marks, alteration, and citation omitted). In other words, a court must always enforce agreements to arbitrate; it may decline to enforce agreements that go beyond arbitration to alter substantive rights.

Given this latest authoritative statement from the Supreme Court, we should pause before embracing the argument the court adopts today: that the agreement to proceed by individualized arbitration would *itself* so distort the statutory claim as to implicate the effective vindication exception. *Cf. Estle v. IBM Corp.*, 23 F.4th 210, 214 (2d Cir. 2022) ("[C]ollective action, like arbitration, is a

'procedural mechanism,' not a substantive right.") (quoting *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.6 (2d Cir. 2013)).

B

In this case, the effective vindication exception is a solution in search of a problem. Both the arbitration clause and ERISA afford Cedeno the right to seek remedies for harm to himself. Section 502(a)(2) authorizes Cedeno to seek "appropriate relief" for a breach of fiduciary duty. 29 U.S.C. § 1132(a)(2). Section 409(a) makes the fiduciary liable "to make good to such plan" any losses resulting from its breach and for any "other equitable or remedial relief" that a court "may deem appropriate." 29 U.S.C. § 1109(a). While Section 409(a) establishes a fiduciary duty owed to the plan, it does not follow that the specific parties authorized to sue for breach of that duty—the Secretary of Labor or "a participant, beneficiary or fiduciary," *id.* § 1132(a)(2)—must seek relief for the plan as a whole rather than to remedy their own distinct harms.

In fact, the Supreme Court has specifically held that a participant in a defined-contribution plan—such as Cedeno—may sue under Sections 502(a)(2) and 409(a) to recover losses to his own individual account, without any recovery for other accounts. *See LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 256 (2008).[4] Even in

[4] *See also Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 514 (9th Cir. 2019) (explaining that "the Supreme Court has recognized that [Section 502(a)(2)] claims are inherently individualized when brought in the context of a defined contribution plan" and that "*LaRue* stands for the proposition that a defined contribution plan participant can bring a 502(a)(2) claim for the plan losses in her own individual account"); *Robertson v. Argent Tr. Co.*, No. CV-21-01711, 2022 WL 2967710, at *10 (D. Ariz. July 27, 2022) ("*LaRue*

the defined-benefit context, the Court has held that a plan participant who sues under Section 502(a)(2) must establish his own concrete "injury in fact." *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 543 (2020). Plan participants do not have "standing as representatives of the plan." *Id.*[5] They must seek recovery for their own injuries. If ERISA prohibited a participant from seeking to remedy his own distinct injuries, this requirement would make little sense.

As the court notes, there are established forms of "[n]on-class representative actions in which a single agent litigates on behalf of a single principal," such as a shareholder derivative suit, a trustee's suit on behalf of a trust, or an action by a guardian *ad litem*. *Ante* at 35 (quoting *Viking River Cruises*, 596 U.S. at 657). Many representative actions are recognized by statutes or procedural rules.[6] Others, such as trustee actions against third parties for injuries to the trust or trust property, are recognized by the common law.[7] But an ERISA suit is not a representative action. ERISA does not authorize, much less require, an action in a representative capacity on behalf of the plan.

… authorizes defined contribution plan participants to recover losses from their individual accounts using § 502(a)(2) of ERISA. That is exactly what Plaintiff is allowed to do under the Plan.").

[5] The dissenters in *Thole* argued that plan participants should be able to maintain a "representational suit" to "sue on their plan's behalf." *Thole*, 590 U.S. at 564-65 (Sotomayor, J., dissenting). But that view did not prevail.

[6] *See, e.g.*, Fed. R. Civ. P. 23.1 (shareholder derivative suit); N.Y. C.P.L.R. § 1202 (guardian *ad litem*); Cal. Lab. Code § 2698 *et seq.* (California Labor Code Private Attorneys General Act of 2004).

[7] *See* Restatement (Third) of Trusts § 107 cmt. b (Am. L. Inst. 2012) ("As holder of the title to trust property … [and] representative of the trust and its beneficiaries, the trustee is normally the appropriate person to bring … an action against a third party on behalf of the trust.").

See Thole, 590 U.S. at 543-44 (explaining that participants have not "been legally or contractually appointed to represent the plan" and cannot "assert standing as representatives of the plan itself" but must seek recovery for individual injuries in fact). To the contrary, *LaRue* and *Thole* make clear that an ERISA plaintiff sues in his own individual capacity to recover for his own injuries. Courts should be "'reluctant to tamper with the enforcement scheme' embodied in the statute by extending remedies not specifically authorized by its text," *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985)), and the notion that Cedeno must recover only plan-wide remedies is such an extension.

This lawsuit does not resemble any of the traditional types of representative actions that the court references. A trustee, for example, may sue on behalf of a trust. But here, Cedeno is *not* the trustee of the plan; at the time of the alleged misconduct, Argent was the trustee, and Cedeno is suing Argent. Cedeno is effectively a trust beneficiary, not a trustee, and a trust beneficiary sues a trustee for breach of trust in his individual capacity as a beneficiary; he does not do so on behalf of the trust.[8] That is true even when the beneficiary seeks equitable remedies that affect the administration of the trust.[9]

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[8] *See* Restatement (Third) of Trusts § 94 ("A suit against a trustee … to enjoin or redress a breach of trust … may be maintained *only by a beneficiary* or by a co-trustee, successor trustee, or other person acting *on behalf of one or more beneficiaries*.") (emphasis added); *id.* § 94 cmt. b ("A suit to enforce a private trust ordinarily … may be maintained by any beneficiary whose rights are or may be adversely affected by the matter(s) at issue.").

[9] *See* Restatement (Third) of Trusts § 95 cmt. c (explaining that equitable remedies available in a suit by the beneficiary include "ordering the trustee

The shareholder derivative suit is not an apt analogy either. The Supreme Court has explained that "the term 'derivative action' … has long been understood to apply only to those actions in which the right claimed by the shareholder is one the corporation could itself have enforced in court." *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 529 (1984). Therefore, "[b]ecause ERISA plans cannot bring suit against fiduciaries on the plans' own behalf under section 502, the lawsuits of individual participants are not derivative." *Coan v. Kaufman*, 457 F.3d 250, 258 (2d Cir. 2006).[10] The derivative suit originated as an equitable remedy that allowed individual shareholders, who lacked standing to bring an action at law, to assert a cause of action that properly belonged to the corporation. *See Ross v. Bernhard*, 396 U.S. 531, 534 (1970). Unlike a shareholder, a participant in an ERISA plan has individual rights as a plan participant. In a defined contribution plan, for example, a participant has the right to direct the management of the assets in his individual account.[11] A participant in an ERISA plan does not resemble a shareholder.

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to account," "directing the trustee to administer the trust" in accordance with "the terms of the trust or the powers and duties of the trusteeship," "enjoining the trustee to take or refrain from taking certain action(s) or otherwise to avoid committing a breach of trust," and "removing the trustee").

[10] *See also Pressroom Unions-Printers League Income Sec. Fund v. Cont'l Assurance Co.*, 700 F.2d 889, 893 (2d Cir. 1983) ("In light of the frequent references in the Act and its legislative history to 'participants, beneficiaries and fiduciaries,' th[e] conclusion [that the plan itself may sue] is untenable.") (citations omitted).

[11] The plan in this case is an Employee Stock Ownership Plan ("ESOP"), not a traditional 401(k) plan. As an ESOP, the plan "was designed to invest primarily in the employer securities of Strategic Family," and its principal

I recognize that the Supreme Court stated in dicta about forty years ago that the "[i]nclusion of the Secretary of Labor [in Section 502(a)(2)] is indicative of Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole." *Russell*, 473 U.S. at 142 n.9. But the Court clarified in *LaRue* that its "references to the 'entire plan' in *Russell*, which accurately reflect the operation of § 409 in the defined benefit context, are beside the point in the defined contribution context." *LaRue*, 552 U.S. at 256. The "entire plan" language in *Russell* described the "kind of harms that concerned the draftsmen of § 409"—namely, "[m]isconduct by the administrators of a defined benefit plan … [that] creates or enhances the risk of default by the entire plan." *Id.* at 255-56. "For defined contribution plans, however, fiduciary misconduct need not threaten the solvency of the entire plan" to create the kind of injury that Section 409(a) was intended to remedy. *Id.* at 255.

The lesson of *Russell*, which the Court clarified and reaffirmed in *LaRue*, is that Section 502(a)(2) "does not provide a remedy for individual injuries *distinct from plan injuries*." *Id.* at 256 (emphasis

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asset was Strategic Family's stock. J. App'x 20-21. In general, the beneficiaries could not choose how the plan would invest its assets. *Id.* at 17 ("As Trustee, Argent had exclusive authority to manage and control the assets of the Plan."). However, the participants in the plan had some discretionary rights. For example, participants who were still employed, were over 55 years old, and had participated in the plan for at least ten years could "elect to diversify a portion of [their] ESOP Stock Accounts" by receiving a cash distribution equal to a portion of the value of the stock in their accounts and investing the cash in other assets. *Id.* at 225. By contrast, a shareholder cannot compel the corporation to make a distribution to him. *See* 11 Fletcher Cyclopedia of the Law of Corporations § 5321 (September 2023 update) ("The shareholders have no legal right to share in the corporation's profits unless the directors declare a dividend … [and] cannot compel the declaration of dividends by agreement.").

added). In *Russell*, the plaintiff sought damages resulting from the plan's improper delay in processing her claim and paying her the benefits to which she was entitled. 473 U.S. at 136. She alleged that the delay "forced [her] disabled husband to cash out her retirement savings which, in turn, aggravated the psychological condition that caused [her] back ailment." *Id.* at 137. The Court decided that Section 502(a)(2) does not provide a cause of action to remedy injuries unrelated to the administration of the plan. *See id.* at 142-43 ("[T]he principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest.").

But Section 502(a)(2) "*does* authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account" because such an individual injury is not "distinct" from an injury to the plan. *LaRue*, 552 U.S. at 256 (emphasis added); *see also id.* at 262-63 (Thomas, J., concurring in the judgment) ("Because a defined contribution plan is essentially the sum of its parts, losses attributable to the account of an individual participant are necessarily 'losses to the plan' for purposes of § 409(a)."). If a participant can seek relief for his own individual injuries, ERISA does not prevent him from agreeing to arbitrate his claims on an individualized basis.

Russell's "representative capacity" language, like its references to the "entire plan," similarly reflected the distinction between injuries unrelated to plan administration, on the one hand, and injuries resulting from such administration, on the other. The very next sentence of footnote 9 in *Russell* explains that "the common interest shared by all four classes [of plaintiffs named in Section 502(a)(2)] is in the financial integrity of the plan." 473 U.S. at 142 n.9.

The Court's point was that Section 502(a)(2) authorizes a remedy only for financial mismanagement by a plan fiduciary. There is no reason to believe that the footnote established a new rule requiring a participant to become a guardian *ad litem* of the plan itself to proceed under Section 502(a)(2).

Even Cedeno does not really believe that. Cedeno brought this lawsuit as a class action under Rule 23, not as a representative suit on behalf of the plan as an entity.[12] A class action involves the aggregation of individual claims, not a single claim brought by a representative on behalf of a single principal. *See* Fed. R. Civ. P. 23(b) (providing that "[a] class action may be maintained" if, *inter alia*, "prosecuting *separate actions* by … *individual* class members" risks inconsistent adjudications or unfair prejudice to nonparty class members) (emphasis added).[13] No one disputes that the FAA

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[12] The court asserts that this lawsuit "is not actually a class action." *Ante* at 38. That would appear to be news to Cedeno, who stated in his complaint that he "brings this action as a class action pursuant to Fed. R. Civ. P. 23(a) and (b), on behalf of the following class: All participants in the Strategic ESOP (the 'Plan') and the beneficiaries of such participants as of the date of the December 28, 2017 ESOP Transaction or anytime thereafter." J. App'x 38.

[13] By contrast, an established representative-capacity action on behalf of a single principal, such as a shareholder derivative action, cannot be brought as a class action. *See F5 Capital v. Pappas*, 856 F.3d 61, 76 (2d Cir. 2017) (holding that the shareholder plaintiffs' equity-dilution claim "*may not proceed as a class action* because the claim belongs to [the corporation], not its shareholders") (emphasis added); *see also Anwar v. Fairfield Greenwich Ltd.*, 676 F. Supp. 2d 285, 297 (S.D.N.Y. 2009) (holding that shareholder derivative suits are not "mass actions" under the Class Action Fairness Act because "[a] derivative suit is neither a claim by multiple plaintiffs consolidated by State court rules, nor a class action in disguise") (internal quotation marks omitted).

requires a court to enforce a class-action waiver in an arbitration agreement. *See Concepcion*, 563 U.S. at 344. Cedeno's recharacterization of his attempted class action as a single-principal representative-capacity suit allows him to evade this rule. And the court, by excusing Cedeno from his arbitration agreement and allowing him to proceed in a "representative capacity," has authorized an *ersatz* class action that lacks the "procedural safeguards" we would require if Cedeno were proceeding under Rule 23. *Coan*, 457 F.3d at 261.[14]

In fact, Cedeno was right the first time. Because a plan participant proceeds under Section 502(a)(2) in an individual capacity, his claim can be aggregated with similar actions by other individual plan participants under Rule 23. Cedeno's arbitration agreement preserves his right to pursue his individual claim, but he must pursue it in the arbitral forum. ERISA does not authorize a "representative capacity" action that allows Cedeno to avoid both the requirements of Rule 23 and his own agreement to arbitrate his claim.

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[14] In *Coan v. Kaufman*, we held that summary judgment was appropriate when an ERISA plaintiff had failed to take procedural steps to ensure that she "represent[ed] adequately the interests of other plan participants" and thus "properly proceeded in a representative capacity as required by section 502(a)(2)." 457 F.3d at 262. *Coan* predated the Supreme Court's decisions in *LaRue* and *Thole*, and to the extent that it holds a defined contribution plan participant *must* proceed in a representative capacity and seek plan-wide relief, it is no longer good law. However, to the extent that an ERISA plaintiff *chooses* to seek class-wide relief, he should proceed under Rule 23 or join necessary parties under Rule 19, as *Coan* suggested. *See id.* at 261.

C

Beyond its representative-capacity theory, the court worries that "there is no legal way to provide many of the equitable remedies allowed by statute and sought by Cedeno without impacting the accounts of other plan participants and beneficiaries or binding the Plan Administrator and Trustee vis-à-vis other participants." *Ante* at 42. The court assumes that the arbitration clause prohibits the award to Cedeno of any relief with a "plan-wide" effect, "including a surcharge, accounting for profits, the imposition of a constructive trust on any funds wrongfully held by Defendants, and disgorgement of fees, earnings, or profits." *Id.*

But Cedeno has not shown—*and the defendants deny*—that any equitable relief available under ERISA would be unavailable to Cedeno in an individualized arbitration. The defendants maintain that the arbitration clause "does not limit Plaintiff's ability to seek any equitable remedies to which he may be entitled on his own behalf." Reply Br. 17. And the defendants agreed at oral argument that "if removal of the fiduciary [or other equitable relief] is necessary to make Mr. Cedeno whole, to provide him a remedy for his own harm, … [it is] available in arbitration." Oral Argument Transcript at 4-5. In the defendants' view, the arbitration agreement "only prohibits providing money to other people." *Id.* at 5. It does not prevent Cedeno from seeking any equitable relief that may be necessary to make him whole and thereby to vindicate his statutory rights—even if that equitable relief has an impact on other plan participants.[15] This is the

[15] *See Robertson*, 2022 WL 2967710, at *10 (explaining that "invocation of the effective vindication doctrine is misplaced" when an arbitration clause requiring individualized arbitration of fiduciary duty claims under ERISA does not "preclude[] an individual participant from pursuing equitable

most sensible reading of the contractual language. There is no reason to conclude that any form of relief ERISA envisions would be categorically denied to Cedeno in arbitration.

The court insists that it is "incoherent" to say that Cedeno could obtain equitable relief that affects the plan and yet that the order providing such relief would not bind the plan administrator or trustee in proceedings with other plan participants. *Ante* at 44. But that is how equitable remedies work. If a litigant obtains an injunction requiring her employer to discontinue a discriminatory employment practice, for example, the injunction will affect other employees. But the employer may still argue, in a separate lawsuit by a different employee, that the second employee is not entitled to the same remedy.[16] The individualized arbitration process required in this

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remedies, such as removal of a fiduciary, that would benefit other participants").

[16] *See, e.g.*, *Martin v. Wilks*, 490 U.S. 755, 762 (1989) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."); 18A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 4464.1 (3d ed.) ("[N]onmutual claim preclusion continues to be denied in decisions that probably reflect a general assumption that it is not ordinarily available."). The employer is not even necessarily precluded from arguing in the second lawsuit that the employment practice is not discriminatory. *See* 18A Wright, Miller & Kane, *supra*, § 4465 ("Nonmutual issue preclusion is not available as a matter of right."); *see also Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331 (1979) (explaining that "a trial judge should not allow the use of offensive collateral estoppel" when the "plaintiff could easily have joined in the earlier action" or when "the application of offensive estoppel would be unfair to a defendant").

case parallels this familiar process of case-by-case adjudication. The court's idiosyncratic view of equitable relief, by contrast, is novel.[17]

Even if it were uncertain that Cedeno could obtain equitable relief in arbitration that affects other plan participants, that would not be enough to affirm the judgment in this case. The Supreme Court has told us that "the proper course is to compel arbitration" when it is possible that the arbitration agreement might impermissibly limit a plaintiff's remedies but "we do not know how the arbitrator will construe the remedial limitations." *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 (2003). "[W]e should not, on the basis of 'mere speculation' that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved." *Id.* at 406-07 (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995)). That approach is consistent with the longstanding "federal policy to construe liberally arbitration clauses … and to resolve doubts in favor of arbitration." *Metro Indus. Painting Corp. v. Terminal Constr. Co.*,

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[17] *See United States v. Texas*, 599 U.S. 670, 693 (2023) (Gorsuch, J., concurring in the judgment) ("Traditionally, when a federal court finds a remedy merited, it provides party-specific relief, directing the defendant to take or not take some action relative to the plaintiff. If the court's remedial order affects nonparties, it does so only incidentally."); *Trump v. Hawaii*, 585 U.S. 667, 717 (2018) (Thomas, J., concurring) ("[A]s a general rule, American courts of equity did not provide relief beyond the parties to the case. If their injunctions advantaged nonparties, that benefit was merely incidental. … While [some] injunctions benefited third parties, that benefit was merely a consequence of providing relief to the plaintiff."); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 420 (2017) (noting that the "American practice was that an injunction would restrain the defendant's conduct vis-à-vis the plaintiff, not vis-à-vis the world").

287 F.2d 382, 385 (2d Cir. 1961); *see also PacifiCare*, 538 U.S. at 407 n.2 ("Given our presumption in favor of arbitration, we think the preliminary question whether the remedial limitations at issue here prohibit an award of [remedies available under the statute] is not a question of arbitrability.").

Because it is ambiguous—at the very least—whether the arbitration agreement prevents Cedeno from seeking equitable relief with plan-wide consequences, the "proper course" would be to compel arbitration despite Cedeno's speculation that the arbitrator might construe the agreement in a way that would call its enforceability into question. *PacifiCare*, 538 U.S. at 407.

The case that originated the effective vindication exception, *Mitsubishi Motors*, involved a similar situation. In that case, the parties' contract provided for arbitration in Japan and specified that Swiss law would govern the contract. The United States, as amicus curiae, suggested that if the court compelled arbitration, the Japanese arbitrator might read the choice-of-law clause "not simply to govern interpretation of the contract terms, but wholly to displace American law"—in particular, the Sherman Antitrust Act—"even where it would otherwise apply." 473 U.S. at 637 n.19. As the Supreme Court noted, however, Mitsubishi's counsel conceded at oral argument that American antitrust law would apply in arbitration. So the Court enforced the arbitration agreement and declined to "speculate" as to whether the arbitrator would apply the Sherman Act "at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to

arbitrate, not to enforce an award." *Id.* The same reasoning should apply here.[18]

III

Even if the court were correct that a plaintiff proceeding under Section 502(a)(2) is a representative of the plan—and that the arbitration clause prohibits Cedeno from acting in that capacity—the district court still erred in refusing to compel arbitration. Pursuant to the purported effective vindication exception, "the FAA does not require courts to enforce contractual waivers of substantive rights and remedies." *Viking River Cruises*, 596 U.S. at 653. Thus, for example, a party cannot waive the right to bring a claim if his civil rights have been violated. *See 14 Penn Plaza*, 556 U.S. at 273 ("[A] substantive waiver of federally protected civil rights will not be upheld."). In this case, however, Cedeno does not argue that he has waived any of *his* substantive rights. Rather, he argues—and the court agrees—that because he agreed to arbitrate on an individual basis, he has waived the right to bring a claim on behalf of the plan to vindicate *its* substantive rights. But the effective vindication exception does not prevent such a waiver.

To the extent that the court relies on *Viking River Cruises* for the proposition that the FAA does not allow parties to waive the right to bring a representative-capacity claim on behalf of another individual or entity, that reliance is misplaced. In *Viking River Cruises*, the Court

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[18] For these reasons, the decisions of other courts that arbitration agreements should be invalidated because similarly ambiguous language "prohibits relief that ERISA expressly permits" are not persuasive. *Smith*, 13 F.4th at 615; *see also Henry ex rel. BSC Ventures Hldgs., Inc. Emp. Stock Ownership Plan v. Wilmington Tr. NA*, 72 F.4th 499, 508 (3d Cir. 2023); *Harrison v. Envision Mgmt. Hldg., Inc.*, 59 F.4th 1090, 1109 (10th Cir. 2023).

considered whether the FAA conflicted with a California statute that gave individual citizens a non-waivable right to bring civil actions as private attorneys general on behalf of the state. In holding that the California law and the FAA did not conflict, the Court noted that "[n]on-class representative actions in which a single agent litigates on behalf of a single principal"—such as "shareholder-derivative suits, wrongful-death actions, trustee actions, and suits on behalf of infants or incompetent persons"—form "part of the basic architecture of much of substantive law." 596 U.S. at 657. The Court held that such actions are not "inconsistent [with] the norm of bilateral arbitration" in the same way that class actions are. *Id.* For that reason, California could prohibit contractual waivers of "representative standing" in this context without impermissibly interfering with contracting parties' ability to choose the comparatively informal and efficient procedure of bilateral arbitration. *Id.*

But the fact that states have the authority to ban waivers of representative standing does not mean that a federal court—on its own initiative and in the absence of any statutory ban—may itself decide to prohibit such waivers by refusing to enforce arbitration agreements.

* * *

The district court should have compelled arbitration because the effective vindication exception—assuming it exists—is inapplicable. The court's opinion cannot be reconciled with our obligation to enforce an arbitration agreement according to its terms and to avoid finding conflicts between the FAA and other federal statutes when possible. I dissent.