No. 22-1098

In the United States Court of Appeals For the Tenth Circuit

ROBERT HARRISON, on behalf of himself, the ENVISION MANAGEMENT HOLDING INC. ESOP, and all other similarly situated individuals,

Plaintiff-Appellee,

v.

ENVISION MANAGEMENT HOLDING, INC. BOARD OF DIRECTORS; ENVISION MANAGEMENT HOLDING, INC. EMPLOYEE STOCK OWNERSHIP PLAN COMMITTEE; ARGENT TRUST COMPANY; DARREL CREPS, III; PAUL SHERWOOD; JEFF JONES; AARON RAMSAY; TANWEER KAHN,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Colorado, Case No. 1:18-cv-00304, Hon. Regina M. Rodriguez

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's members include many employers that sponsor benefits plans governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, and companies that administer those plans. These businesses frequently defend against lawsuits involving ERISA claims.

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[1] No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

Many of these same members regularly employ arbitration agreements, including in ERISA-governed benefits plans and in the employment context. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the principles embodied in the Federal Arbitration Act (FAA) and the Supreme Court's consistent affirmation of the FAA's legal protections for arbitration agreements, the Chamber's members have structured millions of contractual relationships around arbitration agreements.

The Chamber has a strong interest in this case and in reversal of the judgment below. The district court's refusal to enforce the arbitration agreement according to its terms runs afoul of the FAA and binding Supreme Court precedent, and it threatens to subject businesses to unnecessary class-action litigation and deprive businesses and claimants alike of the benefits of faster, simpler, and cheaper alternatives to resolving claims for breach of fiduciary duties under ERISA.

INTRODUCTION

The district court unnecessarily placed ERISA on a collision course with the Federal Arbitration Act. The court refused to enforce the arbitration agreement in a defined-contribution plan according to the arbitration agreement's terms. In the district court's view, the agreement's requirement of individualized arbitration and individualized relief for breach-of-fiduciary-duty claims meant that the plaintiff—a plan participant—could not vindicate his rights under ERISA. That approach, and result, runs headlong into binding Supreme Court precedent.

The Supreme Court has emphasized repeatedly that the FAA protects parties' agreements to utilize "individualized," "one-on-one" arbitration, and, in rejecting a claimed conflict between the FAA and a federal labor law, explained that courts have a "duty to interpret Congress's statutes as a harmonious whole rather than at war with one another." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018). The district court failed to discharge that duty here, even though it could have readily done so.

The FAA and ERISA deal with entirely different matters. The FAA commands, among other things, that courts "enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Id.* ERISA is silent regarding arbitration. It is thus no surprise that every court of appeals that has addressed the issue has recognized that there is no conflict between the FAA and ERISA. *See, e.g.*, *Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000); *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107, 1111 (9th Cir. 2019); *Bird v. Shearson Lehman/Am. Express, Inc.*, 926 F.2d 116, 122 (2d Cir. 1991).

The Supreme Court has also held that ERISA claimants with the same type of plan as the plaintiff here (a *defined-contribution plan* with individual accounts) can vindicate their statutory rights under ERISA's breach-of-fiduciary duty provisions (Sections 409(a) and 502(a)(2)) by seeking individual relief on behalf of the plan. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255-56 (2008). In the context of a defined-contribution plan, individual relief—recouping the losses in the individual's own account—will make a participant whole for any plan

losses attributable to the breach of fiduciary duty by a plan fiduciary. *Id.* at 256.

Epic Systems and *LaRue* make clear that nothing about individualized arbitration is inconsistent with vindicating one's rights under ERISA, and, in fact, they require enforcing an agreement for individualized arbitration.

The district court's decision to the contrary would deprive businesses and claimants alike of the benefits of arbitration. If the decision is allowed to stand, plaintiffs and their lawyers will be emboldened to pursue wasteful and unnecessary class-action litigation. Requiring plan fiduciaries and employers to defend against this deluge of class-action litigation will ultimately inflate costs and discourage employers from offering attractive plan options—precisely the opposite of what Congress intended when enacting ERISA.

The district court's decision should be reversed.

ARGUMENT

I. The FAA Requires Enforcement Of The Arbitration Agreement In This Case.

The FAA reflects an "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,*

Inc., 473 U.S. 614, 631 (1985). It is now "beyond dispute that the FAA was designed to promote arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011).

In service of that goal, Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *accord Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1917 & n.3 (2022). "Congress directed courts to abandon their hostility and instead treat arbitration agreements as 'valid, irrevocable, and enforceable.'" *Epic Sys.*, 138 S. Ct. at 1621 (quoting 9 U.S.C. § 2).

The FAA requires courts to "enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Epic Sys.*, 138 S. Ct. at 1619. A fundamental characteristic of arbitration "as envisioned by the FAA" is its individualized nature. *Concepcion*, 563 U.S. at 351. Accordingly, the Supreme Court has repeatedly made clear that the FAA "protect[s] pretty absolutely" arbitration agreements that require "one-on-one arbitration" using "individualized . . . procedures." *Epic Sys.*, 138 S. Ct. at 1619, 1621; *see*

also Viking River, 142 S. Ct. at 1912; *Concepcion*, 563 U.S. at 344; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686-87 (2010). That protection enables parties agreeing to "individual arbitration" to "'realize the benefits of private dispute resolution,'" including "'lower costs'" and "'greater efficiency and speed.'" *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) (quoting *Stolt-Nielsen*, 559 U.S. at 685).

Because the FAA mandates that arbitration agreements be enforced according to their terms—including terms requiring individualized arbitration—the district court's refusal to compel arbitration conflicts with the FAA and must give way unless an exception to the FAA applies. None does.

A. ERISA Does Not Contain A "Contrary Congressional Command" Overriding The FAA.

A party contending that a federal statute displaces the FAA and precludes arbitration must demonstrate that the statute contains a "contrary congressional command" overriding the FAA's mandate that arbitration agreements be enforced according to their terms. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (internal quotation marks omitted). Time and time again, however, the Court has "heard and *rejected* efforts to conjure conflicts between the Arbitration

Act and other federal statutes" under this standard. *Epic Sys.*, 138 S. Ct. at 1627 (emphasis added) (collecting cases).

The Supreme Court's decisions uniformly require that Congress speak with "clarity"—that is, expressly in the text of the statute—to override the FAA. *CompuCredit*, 565 U.S. at 103. Moreover, the Court has repeatedly "made clear that even a statute's express provision for collective legal actions does not necessarily mean that it precludes 'individual attempts at conciliation' through arbitration." *Epic Sys.*, 138 S. Ct. at 1627 (quoting *Gilmer*, 500 U.S. at 32).

In *Epic Systems*, which involved collective actions under the Fair Labor Standards Act (FLSA), the Court noted that the employees seeking to invalidate the arbitration agreements did not even try to argue "that the FLSA overcomes the Arbitration Act to permit their class and collective actions" because the Court had long held "that an identical collective action scheme (in fact, one borrowed from the FLSA) does *not* displace the Arbitration Act or prohibit individualized arbitration proceedings." 138 S. Ct. at 1626 (citing *Gilmer*, 500 U.S. at 32 (addressing Age Discrimination in Employment Act)). Similarly, in *CompuCredit*, the Court "refused to find a conflict even though the Credit Repair

Organizations Act expressly provided a 'right to sue,' 'repeated[ly]' used the words 'action' and 'court' and 'class action,' and even declared '[a]ny waiver' of the rights it provided to be 'void.'" *Id.* at 1628 (quoting *CompuCredit*, 565 U.S. at 99-100).

The *Epic Systems* Court squarely rejected the argument that the employees made—that the National Labor Relations Act (NLRA), rather than the FLSA, supplied the requisite conflict. 138 S. Ct. at 1624-30. The Court reasoned that "[f]ar from conflicting," the FAA and the NLRA deal with "separate spheres of influence." *Id.* at 1619. While the FAA expressly encourages the enforcement of arbitration agreements, the NLRA "does not express approval or disapproval of arbitration." *Id.* at 1624. Indeed, the Court said, the NLRA "does not even hint at a wish to displace the [FAA]—let alone accomplish that much clearly and manifestly." *Id.* Neither the NLRA's "broader structure," nor the specific statutory terms, "speak[] to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum." *Id.* at 1625. The Court therefore enforced the agreements for individual arbitration according to their terms.

Here, plaintiff never even attempted to demonstrate that ERISA contains a "contrary congressional command" displacing the FAA, and the district court did not so hold. *See* AA0176-189. For good reason: this Court concluded decades ago that ERISA claims in general are arbitrable (and every other court of appeals to address the question agrees). *See Williams*, 203 F.3d at 767 ("Congress did not intend to prohibit arbitration of ERISA claims.").

B. The District Court's Refusal To Enforce The Arbitration Agreement Is Not Justified By The "Effective Vindication" Exception.

Although it did not find a contrary congressional command in ERISA displacing the FAA, the district court concluded that a different exception to the FAA applied based on the specific type of ERISA claims at issue in this case. AA0177, AA0184-188. That conclusion, however, is clearly wrong.

The district court invoked a line of Supreme Court cases suggesting that even in the absence of a clear congressional command overriding the FAA, there may be circumstances in which arbitration agreements are not enforceable because they would "prevent the 'effective vindication' of

a federal statutory right." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013).

This "effective vindication" exception, like the "contrary congressional command" standard, is difficult to satisfy. It "originated as dictum in *Mitsubishi Motors*," in which the Court said that "'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.'" *Am. Express*, 570 U.S. at 235 (quoting *Mitsubishi Motors*, 473 U.S. at 637). The Supreme Court has never refused to enforce an agreement to arbitrate federal statutory claims on effective-vindication grounds. *Id.* (collecting cases).

The district court here concluded that the "effective vindication" exception applies because, in the court's view, (1) the sections of ERISA at issue create an unwaivable right to seek plan-wide remedies; and (2) the FAA has nothing to say about enforcement of arbitration agreements where parties agreed to seek only individualized relief. Both rationales misread the relevant statutes and contradict Supreme Court precedent.

1. The provisions of ERISA at issue do not require plan-wide relief.

a. The district court was mistaken in thinking that ERISA mandates the availability of plan-wide relief for the claims asserted here. Some background on ERISA and the type of benefits plan and claims at issue in this case demonstrates the district court's error.

Congress passed ERISA in 1974 to "promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). ERISA sets various standards, "including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans." *Id.* at 91. It also includes various forms of criminal and civil actions to enforce those rules. *See, e.g.*, *id.*

As relevant here, § 502(a)(2) states 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]." 29 U.S.C. § 1132(a)(2). Section 409, in turn, provides that plan fiduciaries who "breach[] any of the responsibilities, obligations, or duties imposed upon"

them must rectify those breaches, including by "mak[ing] good to such plan any losses to the plan resulting" from the breach. *Id.* at § 1109(a).[2]

In *Massachusetts Mutual Life Insurance Co. v. Russell*, the Supreme Court held that § 502(a)(2) "authorizes a beneficiary to bring an action against a fiduciary who has violated § 409," but indicated that this section did not permit the beneficiary to seek individualized relief. 473 U.S. 134, 140 (1985). Instead, the *Russell* Court concluded, any "recovery for a violation of § 409 inures to the benefit of the plan as a whole." *Id.* Under *Russell*, then, all § 502(a)(2) claims were representative of the plan itself, including for relief. *See id.*

Russell, however, involved *defined-benefit* plans, which were once "the norm of American pension practice," but have largely given way to *defined-contribution* plans, the type at issue in this case. *LaRue*, 552 U.S. at 255 (quoting J. Langbein, S. Stabile, & B. Wolk, Pension and Employee

[2] Section 409(a) provides in full that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. § 1109(a).

Benefit Law 58 (4th ed. 2006)).[3] In a defined-benefit plan, participants are entitled to fixed benefit payments from a single plan trust. *Id.* at 255. By contrast, in a defined-contribution plan, the participant is entitled to the proceeds in his or her own individual account. *Id.* at 256; *see also* 29 U.S.C. § 1002(34) (discussing how a defined-contribution plan participant has "an individual account . . . for benefits").

In *LaRue*, the Court held that *Russell*'s emphasis on seeking relief for "the plan" did not preclude participants and beneficiaries of defined-contribution plans from maintaining actions under § 502(a) for what amounts to *individual* relief. 552 U.S. at 256. Under the individualized approach called for by *LaRue*, a participant in a defined-contribution plan may use § 502(a)(2) to recover for injuries caused by a breach of fiduciary duty that "impair the value of plan assets in [that] participant's individual account." *Id.*

b. Like the NLRA (and FLSA) at issue in *Epic Systems*, ERISA can easily be harmonized with the FAA's strong preference for enforcing

[3] In 2019, of the 733,678 pension plans in the United States, over 93 percent (686,809) were defined-contribution plans; fewer than 7 percent (46,870) were defined-benefit plans. Employee Benefits Security Administration, U.S. Dep't of Labor, *Private Pension Plan Bulletin* (Sept. 2021), https://bit.ly/3urZC2m.

parties' arbitration agreements by requiring individualized arbitration of the fiduciary-breach claims. The district court's overbroad reading of §§ 409(a) and 502(a)(2) as demanding plan-wide relief in *all* cases, including cases involving defined-contribution plans (*see* AA0185-188) is contrary to *LaRue* and ignores *Epic Systems*' teachings.

To begin with, the district court's statement that there is "a clear statutory right for a participant to seek Plan-wide relief under §§ 409(a) and 502(a)(2)" (AA0186) fails to take account of the fact that the plan at issue is a defined-*contribution* plan. As just discussed, a participant in that kind of plan can be made whole for any fiduciary breach with an *individualized* remedy. *LaRue*, 552 U.S. at 255-56 (interpreting §§ 409(a) and 502(a)(2)).[4]

The district court's opinion would improperly resurrect the dictum from *Russell* that a plan participant seeking relief under §§ 409(a) and 502(a)(2) must do so in a way that would "protect the entire plan" from fiduciary misconduct regardless of the type of plan at issue. *Russell*, 473

[4] Because this case involves a defined-contribution plan rather than a defined-benefit plan, the Court has no occasion to decide whether the effective-vindication doctrine could preclude enforcement of an arbitration agreement with respect to a fiduciary breach claim in the defined-benefit context.

U.S. at 142. In fact, the Supreme Court in *LaRue* unequivocally rejected the argument that a participant in a defined-contribution plan must seek plan-wide relief in order to have a remedy under §§ 409(a) and 502(a)(2).

The Court explained 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. "[T]he Supreme Court has recognized that [defined-contribution plan] claims are *inherently individualized*." *Dorman v. Charles Schwab Corp. ("Dorman II")*, 780 F. App'x 510, 514 (9th Cir. 2019) (discussing *LaRue*) (emphasis added).

Individualized arbitration of disputes involving defined-contribution plans allows ERISA claimants to fully vindicate their federal statutory rights under §§ 409(a) and 502(a)(2) by providing individual relief. *LaRue*, 552 U.S. at 256. As the Ninth Circuit explained: "*La Rue* 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. . . . The Plan & [the participant] both agreed to arbitration on an individualized basis. This is consistent with *LaRue*."

Dorman II, 780 F. App'x 510, 514 (9th Cir. 2019) (citing *LaRue*, 552 U.S. at 256) (internal citations omitted).[5]

This case demonstrates how ERISA claimants can easily vindicate their statutory rights on an individual basis. Plaintiff seeks monetary relief for the alleged fiduciary duty breaches.[6] Although plaintiff's requests are often phrased in terms of "the Plan" or accounts of "class members," the arbitrator could easily make plaintiff whole under §§ 409(a) and 502(a)(2) by providing him the amount equal to the losses to his own defined-contribution account resulting from the breaches. *E.g.*, *LaRue*, 552 U.S. at 256; *Dorman II*, 780 F. App'x at 514; *Holmes v. Baptist Health S. Fla., Inc.*, 2022 WL 180638, at *2-3 (S.D. Fla. Jan. 20, 2022). In other words, Section 21.1(b) of the plan terms—which allow recovery for "losses to the Claimant's individual Account resulting from the alleged breach of fiduciary duty" and a "pro-rated portion of any profits allegedly made by a fiduciary through the use of Plan assets," along with any "other

[5] Enforcing the agreement for individualized arbitration in the plan document also accords with the "core functional requirement[]" of ERISA that plans be administered in accordance with the written plan terms. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (discussing 29 U.S.C. § 1102(a)(1)).

[6] *See, e.g.*, AA0014, AA0051 (Compl. ¶ 2 & Prayer for Relief (E), (F), (I)).

remedial or equitable relief" so long as it is limited to the "Claimant," AA0119—enables the plaintiff to vindicate fully his own statutory rights under §§ 409(a) and 502(a)(2).

That should have been the end of the "effective vindication" inquiry. Instead, the district court erred in relying on a recent Seventh Circuit decision concluding that the effective-vindication doctrine precluded enforcement of an arbitration agreement. AA0184-187 (citing *Smith v. Bd. of Dirs. of Triad Mfg., Inc.*, 13 F.4th 613 (7th Cir. 2021)). In *Smith*, the Seventh Circuit correctly recognized that ERISA claims in general are arbitrable and that nothing in ERISA satisfies the "contrary congressional command" inquiry. 13 F.4th at 620. But the *Smith* court nonetheless applied the "effective vindication" exception, downplaying the decision in *LaRue* and the availability of individual relief by focusing exclusively on the plaintiff's requests to remove the current plan trustee or appoint a new fiduciary. *Id.* at 622-23.[7]

[7] The district court also pointed to the district court decision in *Cedeno v. Argent Trust Co.*, which similarly relied on *Smith* and elided the fundamental differences between defined-benefit and defined-contribution plans. *See* AA0186-187 (discussing *Cedeno*, 2021 WL 5087898, at *6 (S.D.N.Y. Nov. 2, 2021)). The decision in *Cedeno* is up on a pending appeal. *See Cedeno v. Sasson*, No. 21-2891 (2d Cir.) (appeal filed Nov. 22, 2021).

Pointing to any possible form of relief that could benefit third parties is not enough to displace the FAA and invalidate an agreement for individual arbitration. It is hardly unusual for parties to contract around the availability in court of federal statutory remedies benefitting third parties—and for courts to enforce such limits in arbitration agreements. As discussed above (at 7-10), the FAA does not give way even to federal statutes explicitly authorizing class or collective actions.

The Truth in Lending Act (TILA) includes a specific statutory reference to the ability to seek relief on behalf of a class. 15 U.S.C. § 1640(a)(2)(B). Nonetheless, courts have repeatedly enforced agreements to resolve TILA claims by individualized arbitration. *See, e.g.*, *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 819 (11th Cir. 2001); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000).

Relatedly, even if §§ 409(a) and 502(a)(2) could be read to create a right to seek certain forms of relief benefiting third parties, it does not follow that individual arbitration prevents the effective vindication of claimants' ERISA rights. The Supreme Court has never construed the "effective vindication" exception to require that every twig in a bundle of rights remain impregnable. Just like employees can waive the right to

sue on behalf of "other employees similarly situated" in the FLSA by entering into an arbitration agreement, *Epic Sys.*, 138 S. Ct. at 1626, employees can waive certain rights by agreement in a benefits plan. That is especially the case when, as here, plan participants can be made whole in individual arbitration.

Finally, the Department of Labor always retains the right to bring a fiduciary-breach claim seeking plan-wide relief. 29 U.S.C. § 1132(a)(2); *cf. Gilmer*, 500 U.S. at 32 (recognizing that "arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief") (emphasis omitted).

2. The FAA's protection of individualized arbitration extends to agreements requiring individualized remedies.

Not only did the district court misconstrue ERISA, but it also failed to give effect to the FAA's protection of arbitration agreements. The court treated the FAA as affording no protection to a plan provision that provides for individualized relief in an arbitration proceeding, despite the parties' express agreement to those terms. AA0184-189.

That reading of the FAA is impossible to square with *Epic Systems* and the Supreme Court's other FAA precedents. The Court held in *Epic*

Systems that the FAA requires courts to "enforce arbitration agreements *according to their terms*—including terms providing for individualized proceedings." *Epic Sys.*, 138 S. Ct. at 1619 (emphasis added). And the FAA "protect[s] pretty absolutely" arbitration agreements requiring "one-on-one arbitration." *Id.* at 1619, 1621; *see also Lamps Plus*, 139 S. Ct. at 1416 (reaffirming that the FAA protects an "individualized form of arbitration"). Just this Term, the Court reaffirmed these precedents, observing that "individualized arbitration" is "arbitration's traditional form" and explaining that the FAA empowers contracting parties to "control which claims are subject to arbitration." *Viking River*, 142 S. Ct. at 1912, 1918 (internal quotation marks omitted).

An arbitration proceeding focused on the harm (if any) to other plan participants' separate accounts within a defined-contribution plan would depart markedly from the "traditional individualized," "one-on-one" arbitration contemplated in the FAA. *Epic Sys.*, 138 S. Ct. at 1619, 1623. In place of the relatively straightforward assessment of an individual's injury and entitlement to relief, the arbitrator would have to adopt class-like procedures "incompatible with arbitration." *Concepcion*, 563 U.S. at 351. This would include things like "whether the named class

representatives are sufficiently representative and typical of the [plan participants]; what kind of notice, opportunity to be heard, and right to opt out absent [participants] should enjoy; and how discovery should be altered in light of the classwide nature of the proceedings." *Epic Sys.*, 138 S. Ct. at 1623 (citing *Concepcion*, 563 U.S. at 347-48). These sort of "class procedures" are "at odds with arbitration's traditional form." *Viking River Cruises*, 142 S. Ct. at 1918.

The district court's rule would effectively mandate that any proceeding under § 502(a)(2) allow class-wide relief, regardless of any arbitration agreement to the contrary. It is difficult to see how a plan participant could seek plan-wide remedies without turning an arbitration proceeding into something resembling a class action. Unsurprisingly, the plaintiff here expressly seeks to represent a class. *See* AA0036-39 (Compl. ¶¶ 109-13).

The *Epic Systems* Court warned against just such whittling away of the FAA's strong enforcement of agreements for traditional individualized arbitration. As the Court put it: "Just as judicial antagonism toward arbitration before the Arbitration Act's enactment 'manifested itself in a great variety of devices and formulas declaring

arbitration against public policy,' *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today." 138 S. Ct. at 1623 (quoting *Concepcion*, 563 U.S. at 342). As one district court recently explained in rejecting the Seventh Circuit's decision in *Smith*, the Supreme Court's recognition that "a waiver of the right to bring a class action in arbitration is permissible" means that "the concomitant waiver of remedies associated with class actions is also permissible." *Holmes*, 2022 WL 180638, at *3.

II. The Decision Below Threatens To Harm Businesses And Employees Alike.

If the district court's circumvention of arbitration is upheld, businesses and claimants alike will be deprived of the benefits of arbitration. And the resulting increase in class-action litigation, along with its associated costs and burdens, will deter employers from offering the range of benefits options that ERISA is meant to encourage.

A. Individual Arbitration Provides Significant Benefits To Claimants And To Businesses.

Arbitration offers a "quicker, more informal, and often cheaper resolution[] for everyone involved." *Epic Sys.*, 138 S. Ct. at 1621. The "benefits of private dispute resolution" are myriad—including "lower costs" and "greater efficiency and speed." *Stolt-Nielsen*, 559 U.S. at 685.

The Supreme Court has repeatedly recognized these "real benefits to the enforcement of arbitration provisions" calling for traditional, bilateral arbitration, including "allow[ing] parties to avoid the costs of litigation." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001); *see also, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (recognizing that one of the "advantages" of arbitration is that it is "cheaper and faster than litigation") (internal quotation marks omitted).

Empirical analyses bear out the Supreme Court's assessment. In the employment context, for example, claimants obtain outcomes in arbitration equal to—if not better than—the outcomes in litigation. A study released by the Chamber's Institute for Legal Reform surveyed more than 25,000 employment arbitration cases and 260,000 employment litigation cases resolved between 2014 to 2021 and found that employees were nearly four times more likely to win in arbitration than in court. Nam D. Pham, Ph.D. & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment*

Arbitration, NDP Analytics 4-5, 12, 17 (March 2022), https://bit.ly/3yiU23A (37.7% win rate in arbitration versus 10.8% in litigation). And the median monetary award for employees who prevailed in arbitration was over double the award that employees received in cases won in court. *Id.* at 4-5, 14 ($142,332 in arbitration versus $68,956 in litigation); *see also, e.g.*, Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004) (reporting that employees in the securities industry were 12% more likely to win their disputes in arbitration than in litigation in the Southern District of New York and obtained awards in arbitration that typically were the same as, or larger than, court awards).[8]

Not only do claimants fare better or just as well in arbitration, but their claims are also resolved more efficiently. One study determined that arbitrators awarded relief in less than half the time of courts—taking an average of 11 months to decision, versus over 26 months to verdict in

[8] There were similar results in the consumer context. Pham, *supra*, at 4-5, 11, 14; *see also*, *e.g.*, Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896-904 (2010) (finding that consumers win relief 53.3% of the time in arbitration and approximately 50% of the time in litigation).

state court jury trial cases. Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Cal. L. Rev. 1, 51 (2019); *see also, e.g.*, Pham, *supra*, at 5-6, 15 (reporting that average resolution for employment arbitration was approximately two months faster than litigation); Delikat & Kleiner, *supra*, at 58 (reporting findings that arbitration was 33% faster than litigation); David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stanford L. Rev. 1557, 1573 (2005) (collecting studies reaching similar conclusions). That speed derives in large measure from the decreased procedural complexity and costs of arbitral proceedings. *E.g.*, Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 791-92 (2008).

In sum, "there is no evidence that plaintiffs fare significantly better in litigation. In fact, the opposite may be true." Sherwyn, *supra*, at 1578; *see also*, *e.g.*, Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017) (endorsing this conclusion).

B. The Decision Below Threatens To Invite Abusive Class-Action Litigation.

The district court's approach, if upheld, would encourage needless class-action litigation. It is no secret that employee benefit plans are a target for the plaintiffs' bar. As of 2019, those plans held over $10 *trillion* in assets. Employee Benefits Security Administration, U.S. Dep't of Labor, *Private Pension Plan Bulletin* 13 (Sept. 2021), https://bit.ly/3urZC2m. Given that sum, it is unsurprising that "401(k) litigation . . . has surged" in recent years. George S. Mellman & Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What Are the Causes and Consequences?* 1-2 (Center for Retirement Research May 2018).

As discussed above, both the plaintiff in this case and other participants in defined-contribution plans can be made whole in individual arbitration. But plaintiffs' lawyers have strong incentives to bring lawyer-driven class action lawsuits to exert maximum settlement pressure, and they will undoubtedly seize on the opening to do so afforded them by the decision below.

Defendants in class actions already face tremendous pressure to capitulate to what Judge Friendly termed "blackmail settlements." Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973). The

Supreme Court has long recognized the power of class-action lawsuits to induce settlement. As the Court explained over 40 years ago, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("[A] class action can result in 'potentially ruinous liability.'") (quoting Advisory Committee's Notes on Fed. R. Civ. P. 23).

These pressures are especially acute in ERISA class actions, given the high costs of litigating them. As the Second Circuit has recognized, the prospect of discovery in ERISA actions is "ominous," entailing "probing and costly inquiries" and the need to retain expensive fiduciary and financial experts. *PBGC ex rel. St. Vincent Catholic Med. Ctr. Ret. Plan v. Morgan Stanley Inv. Mgmt., Inc.*, 712 F.3d 705, 719 (2d Cir. 2013).

Defending and settling unnecessary class-action lawsuits designed to extract lucrative settlements would require businesses to expend enormous resources. But the harmful consequences of this increase in

costs would not be limited to businesses. Rather, the harms would ultimately fall on the very people that ERISA is designed to protect. For one thing, inflated employer costs to defend against (and settle) unjustified class action lawsuits mean fewer funds available to plan participants. *See, e.g.*, *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 907 (8th Cir. 2002) (observing that plan participants would "be adversely affected by subjecting the Plan and its fiduciaries to costly litigation brought by parties who have suffered no injury from a relatively modest but allegedly imprudent investment").

Perhaps even more fundamental, a deluge of class-action § 502(a)(2) litigation that circumvents agreements for individual arbitration would discourage employers from offering attractive plan options in the first instance. That would run directly counter to Congress's purposes in ERISA, which embodies both the "public interest in encouraging the formation of employee benefit plans," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987), and Congress's desire for "a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place," *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996);

accord Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 425 (2014); *Conkright v. Frommert*, 559 U.S. 506, 517 (2010).

In particular, discouraging the formation and retention of employee stock ownership plans (ESOPs)—the type of plan at issue here—would be exactly the opposite of what Congress intended. *See Dudenhoeffer*, 573 U.S. at 424 (recognizing that "Congress sought to encourage the creation of ESOPs"). When ERISA was under development by Congress, such plans were viewed as a win-win proposition: "provid[ing] low-cost capital for the employer" and "the most important form of job enrichment known to man: Enrichment for each employee in the form of a reasonable capital holding," which was believed to "generate labor-management harmony" and to curtail "the structurally inevitable inflation" that results from employees whose interests fall out of alignment with their employers. 119 Cong. Rec. 40,754 (Dec. 11, 1973) (statement of Sen. Russell B. Long, Chairman, S. Comm. on Fin.). In practice, those objectives are frequently met. When businesses take steps to encourage employee ownership, they tend to see increased productivity and better employee relations. *See* Corey M. Rosen, *Employee Ownership and Corporate Performance*, *in* 1

Employee Stock Ownership Plans 2-1 to 2-3 (Robert W. Smiley, Jr. et al. eds., 2006).[9]

Instead of adopting a legally flawed rule that discourages employers from offering attractive plan options, the Court should conclude that the FAA requires enforcement of the arbitration agreement in this case.

[9] Congress continues to promote ESOPs today. Congress has proposed legislation seeking to expand the availability of ESOPs in S corporations. *See* Promotion and Expansion of Private Employee Ownership Act of 2021, H.R. 4141, https://bit.ly/34xrWqg. And in the National Defense Authorization Act for Fiscal Year 2022, Congress created a pilot program that would give corporations wholly owned through an ESOP preferential status in bidding on certain defense contracts. *See* David Solomon, *New Legislation Benefitting 100% ESOP-Owned Defense Contractors* (Jan. 13, 2022), https://bit.ly/3aphTGC.

CONCLUSION

The Court should reverse the district court's order denying the motion to compel arbitration.

Dated: July 7, 2022

Respectfully submitted,

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 5,975 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in Century Schoolbook 14-point type for text and footnotes.

Dated: July 7, 2022

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CERTIFICATE OF DIGITAL SUBMISSION

This brief complies with Circuit Rule 25.5. No privacy redactions were required in this brief and thus no redactions were made. The electronic version of this brief has been scanned for viruses by the most recent version of a commercial virus scanning program, Windows Defender (version 1.331.554.0, updated continuously), and is, according to that program, free of viruses. The electronically filed version of the brief is an exact copy of the paper version that will be filed with the clerk.

Dated: July 7, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2022, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

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