No. 18-1341

IN THE

Supreme Court of the United States

JEFFREY A. ROBERTSON,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* SCHOLARS IN SUPPORT OF PETITION FOR CERTIORARI

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INTEREST OF THE *AMICI CURIAE*[1]

Amici law professors, who specialize in civil procedure, statutory interpretation, or the Employee Retirement Income Security Act of 1974 (ERISA), have all previously published on, or have an interest in forum selection clauses and/or ERISA. Amici have no personal stake in the outcome of the case, but have an interest in seeing that procedural and ERISA law develops in a way that protects workers, retirees, and their families.

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[1] Pursuant to Supreme Court Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in apart, and that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici or their counsel made a monetary contribution to its preparation or submission. Moreover, both Petitioner and Respondent were given 10 days notice and consented to the filing of this brief. Institutional affiliations are provided for identification only. This brief represents the positions of the amici law professors, and not necessarily their institutions.

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SUMMARY OF ARGUMENT

This case is an opportunity for the Court to correct the fundamental error of lower courts upholding ERISA forum selection clauses against participants and beneficiaries. Such clauses contravene Congress's express policy in enacting ERISA, codified at 29 U.S.C. section 1001(b), as well as the enacted text of Section 502(e)(2) of ERISA, codified at 29 U.S.C. section 1132(e)(2).

INTRODUCTION

Benefit plans governed by ERISA cover more than 141 million participants and beneficiaries. *See* Fact Sheet: What is ERISA?, UNITED STATES DEPARTMENT OF LABOR, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/what-is-erisa (providing figures from fiscal

year 2013). During the last two decades, more and more of these plans have come to incorporate unilateral forum selection clauses that allow employers to handpick where employees may enforce their rights. *It's Never Too Late for a Forum Selection Clause—Court Enforces Clause Added After the Plaintiff Retired*, LITTLER (Feb. 19, 2013) https://perma.cc/T8WQ-CQ2F (discussing the increased use of such clauses in pension plans). Judicial enforcement of such clauses conflicts with Congress's clearly expressed purpose to remove procedural obstacles that thwart employees' capacity to enforce their benefit rights. These forum selection clauses "contravene an important public policy of the forum," and accordingly, are invalid. *See The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972).

Under the Court's existing jurisprudence, a forum selection clause that violates public policy, including policy embodied in a federal venue statute, is invalid. *Id.* at 15. The validity inquiry is the first analytical step courts must undertake when faced with a motion to transfer based on such a clause.

ERISA's public policy is expressly codified. Congress intended to provide benefit plan participants "ready access to the Federal courts." 29 U.S.C. § 1001(b) (2012). Congress sought to ensure this "ready access" by affording employees and beneficiaries section 1132's choice of venue options upon filing.

To date, district and appellate courts have glossed over this primary validity inquiry, thus acting

under a flawed presumption of validity merely because ERISA does not expressly prohibit forum selection clauses. *See, e.g.*, *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 931 (6th Cir. 2014); *Klotz v. Xerox Corp.*, 519 F. Supp. 2d 430, 436 (S.D.N.Y. 2007).

These decisions fail to fully address the text, legislative history, and historical context in which ERISA was enacted. This context is essential to evaluating the public policy underlying ERISA's statutory venue provision. *Cf. Abramski v. United States*, 573 U.S. 169, 179 (2014) ("[W]e must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'"). This context shows Congress's clear decision to rebalance the interests of potential parties and remove procedural barriers to filing ERISA claims. Christine P. Bartholomew & James A. Wooten, *The Venue Shuffle: Forum Selection Clauses and ERISA*, 66 UCLA L. REV. --, § II, III (forthcoming May 2019; journal pagination not yet available) (hereinafter "Bartholomew & Wooten"). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3394587## (For the convenience of the Court, amici will seek leave to lodge a copy of the article with the Clerk pursuant to Rule 32.3).

By enforcing forum selection clauses, decisions—like the Third Circuit decision at issue here—impose a new procedural barrier to ERISA suits. These clauses may force plan participants to sue in a district far from where they live or were

employed. As a result, individuals may forego potentially meritorious claims, a result plan advisors candidly acknowledge. Stacey Cerrone, *Avoiding Liability Through ERISA Plan Design: Statute-of-Limitations Periods, Venue Provisions and Anti-Assignment Clauses*, Proskauer ERISA Litigation Newsletter (March 2015), https://www.proskauer.com/newsletter/erisa-litigation-newsletter-march-2015 (encouraging plans to adopt such clauses as one of the "tools" to "reduce the risk of being sued, or being liable if a suit is brought."); *see also* Brief of the Pension Rights Center As Amicus Curiae In Support of Petitioner, *Clause v. U.S. District Court of Missouri et al.*, No. 16-641 (filed Dec. 2, 2016).

If allowed to stand, the Third Circuit opinion will undermine Congressional intent and the reasonable expectations of workers, retirees, and their families. Review is therefore necessary to examine and correct the trend of analytical error that has emerged in the lower courts.

ARGUMENT

I. Forum Selection Clauses that Contravene Public Policy Are Not Valid.

To set aside a forum selection clause, a plaintiff must make "a strong showing." *The Bremen,* 407 U.S. at 15. Pursuant to this Court's decisions, a plaintiff can make such a showing three ways. First, the plaintiff can show a forum selection clause is invalid. *Id.* This requires an analysis of whether the clause

contravenes public policy, including policy embodied in a federal venue statute. Second, a plaintiff can contest enforceability by showing the clause was a product of fraud, overreaching, or lack of notice. *Id.* Third, a plaintiff can argue a court should override a valid, enforceable forum selection clause when transfer would contravene "public factors." It is only in the "extraordinary" case, however, that these factors will overcome enforcement. *See Atlantic Marine Const. Co. v. U.S. Dist. Ct.*, 571 U.S. 49, 62 (2013).

At the time ERISA was enacted in 1974, courts were generally hostile to, or at least skeptical of, forum selection clauses. It was not until the early 1990s, with its decision in *Carnival Cruise Lines v. Shute*—seventeen years after ERISA's enactment—that the Court upheld such clauses in contracts of adhesion. *See* 499 U.S. 585, 593-94 (1991).

Since then, the Court has clarified various procedural aspects of enforcing such clauses, most recently in *Atlantic Marine Const. Co.* In these cases, though, one precept has remained constant: a forum selection clause cannot "contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *The Bremen*, 407 U.S. at 15. Hence, the starting point for evaluating a forum selection clause is its validity as a matter of public policy.

The Third Circuit's decision ignores this threshold requirement. By not addressing the public

policy considerations relevant to ERISA venue, the appellate court assumed, *sub silentio*, the validity of forum selection clauses under ERISA.

A. This Court's Jurisprudence Invalidates Forum Selection Clauses that Contravene Public Policy.

For almost seventy years, this Court has acknowledged that a forum selection clause that conflicts with public policy is void. None of the Court's more recent decisions have altered this basic concept.

This principle was well established when Congress enacted ERISA. In the 1949 decision *Boyd v. Grand Trunk Western Railroad Co.*, the Court refused to enforce a forum selection clause that "thwart[ed] the express purpose of the Federal Employers' Liability Act." 338 U.S. 263, 266 (1949). In a concise decision, the Court held a contractual forum selection clause could not override statutory policy. *Id.* Even though the statute at issue did not expressly forbid forum selection clauses, the Court justified its holding as necessary to ensure the Act would "have the full effect that its comprehensive phraseology implies." *Id.* at 265.

In the years leading up to ERISA's passage, federal courts faithfully applied *Boyd*. *See, e.g.*, *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F. 2d 437, 439 (1st Cir. 1966) (declaring a statutory venue provision "cannot so easily be thwarted" by a contractual forum selection clause); *U.S. ex. rel. Vt.*

Marble Co. v. Roscoe-Ajax Constr. Co., 246 F. Supp. 439, 443 (N.D. Cal. 1965) ("[T]he only district in which the action may properly be brought under the Miller Act is the Northern District of California…the parties cannot by their contract prescribe a different jurisdiction….").

The Court's next significant forum selection clause decision again acknowledged that a clause must not contravene public policy. In *The Bremen*, the Court upheld a forum selection clause in a drilling rig towage contract between two sophisticated parties. 407 U.S. at 12. Invoking "present-day commercial realities and expanding international trade," the Court held the clause controlling "absent a strong showing that it should be set aside." *Id.* at 15. One way to make such a showing is by pointing to contravening public policy, including statutory-based public policy. *See id.*

The Court's subsequent decisions do not alter this key limitation on forum selection clauses. In *Carnival Cruise*, for example, the Court retained *The Bremen*'s proviso that conflicting public policy could invalidate a forum selection clause. 499 U.S. at 595-97 (analyzing policy of Limitation of Vessel Owner's Liability Act). The Court's most recent forum selection clause decision, *Atlantic Marine*, focused primarily on the procedural mechanics for enforcing a forum selection clause. *Atl. Marine Const. Co.,* 571 U.S. at 56-59. Specifically, the decision held that when the lawsuit involves a valid forum selection clause, a court affords "the plaintiff's choice of

forum…no weight." *Id.* at 63 (emphasis added). Thus, once again, the initial inquiry is whether the clause is valid.

B. Lower Court Decisions Slight the Validity Inquiry.

While lower courts are generating a growing body of jurisprudence on ERISA forum selection clauses, decisions on both sides focus more on the enforceability of such clauses than on their validity as a matter of public policy. *See, e.g.*, *In re Mathia*s, 867 F.3d 727, 731 (7th Cir. 2017) (finding "contractual forum-selection clauses are presumptively valid even in the absence of arm's-length bargaining") (citation omitted); *Loeffelholz v. Ascension Health, Inc.*, 34 F. Supp. 3d 1187, 1191 (M.D. Fla. 2014) (upholding forum selection clause even though "employees do not participate in the negotiation process by design"); *Angel Jet Serv., LLC v. Red Dot Bldg. Sys.' Emp. Benefit Plan, No. CV-09-2123*, 2010 WL 481420, at *2 (D. Ariz. Feb. 8, 2010) (upholding forum selection clause so long as the employer, not the participant, had notice of the clause); *Laasko v. Xerox Corp.*, 566 F. Supp. 2d 1018, 1024 (C.D. Cal. 2008). Others analyze whether a court should override a valid, enforceable forum selection based on public factors. *See Mathias*, 867 F.3d at 732; *see also Clause v. Sedgwick Claims Mgmt. Servs., Inc.*, No. CIV 15-388-TUC-CKJ, 2016 WL 213008, at *2 (D. Ariz. Jan. 19, 2016); *Klotz v. Xerox Corp.*, 519 F. Supp. 2d 430, 436 (S.D.N.Y. 2007).

The key, preliminary analytical question of validity as a matter of public policy has been ignored or given short shrift. Most courts slight this inquiry, failing to give adequate consideration, let alone significant weight, to ERISA's expressly declared policy to protect the interests of plan participants. *See, e.g.*, *Shah v. Wellmark Blue Cross Blue Shield, No. CV 16–2397*, 2017 WL 1186341, at *2 (D.N.J. Mar. 30, 2017), *appeal dismissed sub nom. Shah v. Wellmark Blue Cross & Blue Shield*, No. 17–1982, 2017 WL 5157741 (3d Cir. Aug. 23, 2017) (upholding clause without analysis of ERISA's goals); *Clause*, 2016 WL 213008, at *4. Statutory interpretation in these cases is often limited to noting that ERISA lacks an express prohibition against forum selection clauses, or acknowledging only in passing that ERISA is a "special kind of contract" subject to a unique statutory scheme. *See, e.g.*, *In re Mathias*, 867 F.3d at 731; *Rodriguez v. PepsiCo Long Term Disability Plan*, 716 F. Supp. 2d 855, 861 (N.D. Cal. 2010) ("Congress could have—but has not—expressly barred parties from agreeing to restrict ERISA's venue provisions." (citation omitted)).

As this Court has stated, "analysis of special venue provisions must be specific to the statute." *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193, 204 (2000). This requires considering the text, legislative history, and historical context of ERISA. As discussed next, each of these interpretative markers points in the same direction: namely, that enforcement of such a clause conflicts with ERISA's declared policy of providing benefit plan

participants "ready access to the Federal courts." 29 U.S.C. § 1001(b).

II. Forum Selection Clauses Thwart ERISA's Express Policy to Provide Participants "Ready Access to the Federal Courts."

Forum selection clauses conflict with Congress's declared policy of giving plan participants and beneficiaries "ready access to the Federal courts." *Id.* Legislative history, the prevailing understanding of the enforceability of forum selection clauses at the time of ERISA's enactment, and the express language of the ERISA statute confirm this policy.

A. Enforcing Forum Selection Clauses Contravenes Legislative Intent.

ERISA's legislative history demonstrates that Congress meant for employees to have the broad choice of venue options codified in section 1132(e)(2). Drafters and sponsors of leading bills viewed the choice of venue at filing as necessary to effectively enforce benefit rights. Enforcement of forum selection clauses conflicts with clear congressional intent because it deprives participants of the choice Congress intended them to have.

Congress passed ERISA because employees and their beneficiaries were not getting benefits – especially pension benefits – they ought to receive. Sometimes, the problem stemmed from the terms of a benefit plan – for example, stringent vesting

requirements – or the plan's administration – for example, misconduct by plan officials. Lawmakers also recognized that "jurisdictional and procedural obstacles" impeded enforcement of benefit rights. S. REP. NO. 93-127, at 35; H.R. REP. NO. 93-533, at 17. ERISA's civil enforcement provision, 29 U.S.C. section 1132, was structured to "remove" these obstacles. S. REP. NO. 93-127, at 35; H.R. REP. NO. 93-533, at 17.

ERISA's drafters included a statutory venue clause, section 1132(e)(2), because venue restrictions impeded employees' enforcement of their benefit rights. In March 1970, Senator Jacob Javits introduced the Nixon Administration's Employee Benefits Protection Act, the first bill to include the liberal venue language of section 1132(e)(2). 116 CONG. REC. 7279 (1970). In remarks to his Senate colleagues, Javits highlighted venue requirements as a factor that "compound[ed] . . . the difficulty facing individual employees who might want to institute a suit to protect their rights under present law." *Id.* Other leading pension reformers appear to have agreed because they added this liberal venue language to their own bills. Bartholomew & Wooten, at § II.B.

B. ERISA's Drafters Presumed Forum Selection Clauses Were Unenforceable.

At the time of ERISA's enactment, lawmakers and legal experts presumed the federal courts would not allow a forum selection clause to override a special statutory venue provision like section 1132(e)(2). As

previously discussed, the Court's controlling precedents, *Boyd* and *The Bremen*, clarified how "a strong public policy… whether declared by statute or by judicial decision" would override a contractual forum selection clause. *The Bremen*, 407 U.S. at 15 (internal citation omitted); *Boyd*, 338 U.S. at 265. In light of this authority, Congress had reason to understand that ERISA's expressly declared policy in 29 U.S.C. section 1001(b) would control, making it unnecessary for lawmakers to explicitly prohibit forum selection clauses.

Moreover, experts in the field of employee benefits appear to have presumed courts would not enforce forum selection clauses. The litigation practices of the United Mine Workers Welfare and Retirement Fund in the leadup to ERISA's enactment illustrate this point. Beginning in the early 1950s, the Fund spent two decades attempting to force retired miners to sue for pension benefits in the District of Columbia. *See, e.g.*, *George v. Lewis*, 228 F. Supp. 725 (D. Colo. 1964); *Pavlovscak v. Lewis*, 168 F. Supp. 839 (W.D. Pa. 1958); *Hobbs v. Lewis*, 270 S.W.2d 352 (Tenn. 1954); *Kane v. Lewis*, 125 N.Y.S.2d 544 (N.Y. App. Div. 1953). The basis for the Fund's position was the trust-of-movables doctrine, which held that litigation about the administration of a trust must take place where the trust was administered. Although the Fund had some initial success, the courts eventually rejected this line of reasoning. *See Miller v. Davis*, 507 F.2d 308, 315-18 (6th Cir. 1974).

The puzzle is why the Fund's trustees would spend two decades litigating on the basis of the trust-of-movables doctrine if they could get the same result simply by adding a forum selection clause to the Fund's governing documents. The most reasonable explanation is that the Fund's lawyers did not consider this approach because they presumed no court would enforce the clause.

ERISA's legislative history provides further evidence of such a presumption. In hearings on pension reform, some witnesses urged Congress to give participants even broader venue options than ERISA provides. Bartholomew & Wooten, at § II.C.2. If these witnesses suspected forum selection clauses could negate the participant choices their proposals were trying to protect, it seems strange they did not warn lawmakers of this danger. Likewise, if drafters and sponsors of leading pension reform bills suspected forum selection clauses could resurrect the very "obstacles" their bills sought to "remove," they certainly would have taken steps to prevent this. These are cases of "the dog that didn't bark." Sir Arthur Conan Doyle, *Silver Blaze*, THE MEMOIRS OF SHERLOCK HOLMES (1892).

Courts that enforce these clauses, including the district court in this case, commonly claim "if Congress wanted to prevent private parties from waiving ERISA's venue provision, Congress could have specifically prohibited such action." *See, e.g., Robertson v. Pfizer Ret. Comm.*, No. 18-0246, 2018 WL 3618248, at *6 (E.D. Pa. July 27, 2018) (quoting

Smith v. Aegon Co. Pension Plan, 769 F.3d 922 (6th Cir. 2014)). On the contrary, the historical record shows Congress had no reason to state that forum selection clauses were unenforceable. The most plausible reason supporters of broader venue options never mentioned forum selection clauses—and the Mineworkers Fund did not use them—is that they presumed no court would enforce them.

C. Enforcing Forum Selection Clauses Contravenes ERISA's Text.

Besides conflicting with congressional intent and prevailing understandings at the time of ERISA's enactment, enforcement of forum selection clauses also conflicts with ERISA's text. In section 1001(b), Congress "declare[s] [it] to be the policy of [ERISA] to protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b) (2012).

Courts enforcing forum selection clauses have read the final clause in section 1001(b) as though it were a decision rule that authorizes them to decide what counts as "ready access to the Federal courts." *See, e.g., In re Mathias*, 867 F.3d at 732 (*citing Smith*, 769 F.3d at 931). This reading is mistaken. The reference to "providing for appropriate remedies, sanctions, and ready access to the Federal courts" in section 1001(b) is a description of what section 1132 does by its operation. Bartholomew & Wooten at § III. For this reason, the only benchmark for assessing

what counts as "ready access to the Federal courts" is the operation of section 1132 by its terms. For example, a court applying ERISA's vesting rules must apply the vesting schedules in 29 U.S.C. § 1053, rather than substituting its own judgment about what counts as a "significant period of service[]," 29 U.S.C. § 1001(c). Likewise, a court applying section 1132(e)(2) should give participants and beneficiaries the choice of venues Congress provided there, rather than applying its own conception of what counts as "ready access to the Federal courts." 29 U.S.C. § 1001(b).

When federal courts enforce forum selection clauses against plan participants, a defendant is allowed to choose the venue where those participants may enforce their rights—without regard to whether "the preselected forum [is] inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation." *Atl. Marine Const. Co.*, 571 U.S. at 62. This cannot be what Congress had in mind when it resolved to "protect . . . the interests of *participants in employee benefit plans and their beneficiaries*, . . . by providing for . . . ready access to the Federal courts." 29 U.S.C. § 1001(b) (emphasis added). *Accord* Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 714 (2019) ("Enacted [legislative] findings and purposes are law just like any other part of the law, and there is no reason why they should not be given the full weight of law."). Rather, to have ready access to the federal courts, participants must have a choice of venue at the time of filing.

CONCLUSION

Amici urge the Court to grant the writ of certiorari to examine the deepening trend of analytical error and departure from this Court's precedent. This petition provides the rare opportunity to address a key area of confusion, namely the enforceability of forum selection clauses in the face of contravening statutory policy. Given the millions of individuals subject to these clauses, granting review will provide proper instruction to the courts, counsel, and litigants.

Respectfully submitted,

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