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 IN OPPOSITION

ASHLEY B. ABEL
JACKSON LEWIS P.C.
15 South Main Street
Suite 700
Greenville, S.C. 29601

JOHN M. NOLAN, III
JACKSON LEWIS P.C.
1601 Cherry Street
Suite 1350
Philadelphia, PA 19102

NEAL KUMAR KATYAL
Counsel of Record
SEAN MAROTTA
MATTHEW J. HIGGINS
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Respondents Pfizer Retirement Committee and Fidelity Executive Services d/b/a Fidelity Employer Services Co., LLC

QUESTION PRESENTED

The district court in this case held—consistent with every court of appeals to address the question—that the Employee Retirement Income Security Act of 1974 permits employee benefit plans and participants to enter into binding venue-selection clauses. The question presented is:

Whether the court of appeals correctly held that the district court's venue decision did not warrant the extraordinary remedy of an interlocutory writ of mandamus.

CORPORATE DISCLOSURE STATEMENT

To the extent Pfizer Retirement Committee is a non-governmental corporate entity, its parent corporation would be Pfizer Inc., which is publicly traded. Pfizer Inc. is not a party to this action, but has a financial interest in the outcome of the proceeding. No publicly traded company owns 10% or more of Pfizer Inc.

FMR LLC is the parent corporation of Fidelity Workplace Services LLC, incorrectly identified as Fidelity Executive Services Company LLC. FMR LLC is not publicly held.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 18-1341

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 IN OPPOSITION

INTRODUCTION

Petitioner asks this Court to answer a splitless question that the Court has declined to review three times in the last five years. Nothing has changed since the most-recent denial in 2018. This petition for certiorari should also be denied.

In the decision below, the Third Circuit summarily denied a mandamus petition seeking to vacate a district court order enforcing a forum-selection agreement in an ERISA plan. That nonprecedential order joins the Sixth, Seventh, and Eighth Circuits—the only courts of appeals to have considered whether ERISA venue-selection clauses are enforceable. The Sixth and Seventh Circuits have issued opinions

explaining why ERISA's text, structure, and purpose do not prohibit venue-selection clauses. *Smith* v. *Aegon Cos. Pension Plan*, 769 F.3d 922 (6th Cir. 2014); *In re Mathias*, 867 F.3d 727 (7th Cir. 2017). The Eighth Circuit, meanwhile, has denied a petition for mandamus seeking to halt a district court's transfer order that similarly held ERISA venue-selection clauses are enforceable. Judgment, *In re Clause*, No. 16-2607 (8th Cir. Sept. 27, 2016). Plaintiffs in all three cases petitioned this Court for certiorari. In all three cases, the Court denied review.

The Court should do the same here. No circuit split has emerged since this Court denied certiorari in *Mathias* less than two years ago. *See Mathias* v. *U.S. Dist. Court for Cent. Dist. of Ill.*, 138 S. Ct. 756 (2018) (mem.); Sup. Ct. R. 10(a). Moreover, procedural and factual irregularities make this case even more ill-suited for certiorari than the three cases that came before it. Unlike *Smith*, which reviewed a forum-selection clause's enforceability *de novo*, 769 F.3d at 929, the decision below denied a petition for mandamus—"a 'drastic and extraordinary' remedy 'reserved for * * * extraordinary causes.'" *Cheney* v. *U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (citation omitted). And unlike *Mathias*, which detailed its reasons for denying mandamus, *see* 867 F.3d at 730-731, the Third Circuit's one-sentence order does not specify whether it agreed with the District Court on the merits or simply believed that extraordinary relief was unwarranted. Equally troubling, the Third Circuit's order involves fact-bound questions of notice, consent, and residency (Pet. 17-19), that are unlikely to recur.

Not only that, but the decision below is also correct. ERISA's Section 502(e)(2) provides that suit "may be

brought" in one of three venues. 29 U.S.C. § 1132(e)(2). It does *not* say that suit "shall" be brought in one of those venues or may "only" be brought there. If Congress intended to prohibit ERISA plans and their participants from agreeing to a different venue, it would have used mandatory, not permissive, language. *See Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 694-697 (2003).

This case, in short, is splitless, in a poor procedural posture, and correct to boot. The petition should be denied.

STATEMENT

1. Petitioner was a Pfizer employee and a participant in the Pfizer Consolidated Pension Plan (the Plan), an employee benefit plan governed by ERISA. Pet. App. 7a. Respondent Pfizer Retirement Committee (the Committee) was the Plan administrator, and Respondent Fidelity Workplace Services (Fidelity) acted as the Committee's contracted vendor. *Id.*

In January 2016, the Plan was amended to include a forum-selection clause. Pet. App. 8a. Petitioner could have requested and received a copy of the Plan at any time after the January 2016 amendment. Crotty Decl. ¶ 16, Dist. Ct. ECF No. 18-1. In March 2017, a new summary plan description was re-issued and distributed to Petitioner and other beneficiaries to reflect the clause's addition. *Id.* ¶ 15; Pet. App. 8a.

The Plan's forum-selection clause provides that "[a]ny claimant whose claim for benefits has been denied shall have such further rights of review as are provided in sections 502 and 503 of ERISA," but that "[t]he venue for such legal action shall be the Southern District of New York for claims submitted on or after February 1, 2016." Pet. App. 9a.

The Plan selected the Southern District of New York as its forum because, among other reasons, six of the seven Committee members have offices in Pfizer's Manhattan headquarters, and all Committee meetings take place at that location. Crotty Decl. ¶ 6. Substantive decisions regarding Plan administration are also made at Pfizer's Manhattan headquarters. *Id.* ¶ 10.

2. Petitioner retired in October 2016. Pet. App. 7a. He ended his career in Pfizer's Collegeville, Pennsylvania office and relocated to Norwood, North Carolina shortly thereafter. Compl. ¶¶ 11, 23-24, Dist. Ct. ECF No. 1. Before retiring, Petitioner used Fidelity's services "to understand the Plan's benefits and create a retirement plan to fit his needs." Pet. App. 7a. In January 2017, Petitioner learned that there were IRS limits on his retirement plan that required him to immediately shift $715,507 to a non-qualified plan, subjecting that amount to state and local taxation. *Id.* Petitioner alleges that Respondents never informed him that his pension would be subject to IRS limits and contends that alleged failure was a breach of Respondents' fiduciary duties. *Id.*

Petitioner wrote the Committee's Director of Retirement Plans, detailing his complaint and seeking review. *Id.* at 8a. The director denied Petitioner's claim for additional benefits and advised Petitioner that he could appeal that decision to the Committee in writing within 60 days. *Id.* at 8a, 16a.

Petitioner did so, and the Committee denied the appeal. *Id.* at 8a. The Committee's denial letter informed Petitioner "of his right to bring a civil action under § 502 of ERISA in the United States

District Court for the Southern District of New York." *Id.*

3. Petitioner nonetheless sued in the Eastern District of Pennsylvania. *Id.* Respondents moved to transfer venue to the Southern District of New York in reliance on the Plan's venue-selection clause.

The District Court granted the motion, rejecting Petitioner's three contrary arguments. *Id.* at 6a. First, Petitioner argued that the enforcement of the forum-selection clause "would interfere with the Congressional intent for venue under § 1132(e)(2) of ERISA," which "provides that an action 'may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found.'" *Id.* at 17a-18a (quoting 29 U.S.C. § 1132(e)(2)). The District Court explained that because Section 1132(e)(2) was permissive, not mandatory, a forum-selection clause is valid "even if the venue selection clause laid venue outside of the three options provided by Section 1132." *Id.* at 18a (quoting *Smith*, 769 F.3d at 932); *see also id.* at 20a.

Second, Petitioner argued that this Court's decision in *Boyd* v. *Grand Trunk Western Railroad Co.*, 338 U.S. 263, 265 (1949) (per curiam), was controlling. *See* Pet. App. 19a n.7. But the District Court explained that *Boyd* "held that a forum-selection clause in an action arising under the Federal Employers Liability Act [(FELA)] was invalid as it was inconsistent with the legislative history of [that] Act." *Id.* The District Court ruled that because this case concerns ERISA and not FELA, *Boyd* was "inapposite." *Id.*

Last, Petitioner argued that he did not agree to the forum-selection clause and that he did not receive notice of it. *Id.* at 20a. But the District Court noted that "extensive participation in negotiating a forum-selection clause is not necessary." *Id.* at 21a (citing *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 591 (1991)). Because Petitioner sought benefits under the Plan after the addition of the forum-selection clause, the District Court reasoned, it was evident that he had accepted the Plan's complete set of provisions, including the forum-selection clause. *Id.* at 21a. And Respondents had satisfied ERISA's notice requirements by providing Petitioner with the updated summary plan description within 210 days of the end of the plan year in which the change was added, as ERISA requires. *Id.* at 25a (citing 29 U.S.C. § 1024(b)(1)(B)).

4. Petitioner petitioned for mandamus from the Third Circuit to halt transfer. *See id.* at 3a. The Third Circuit summarily denied the petition. *Id.* at 4a. Petitioner then petitioned for rehearing. *See id.* at 1a. The Third Circuit denied that, too, without any judge calling for a vote. *Id.*

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT IN THE CIRCUITS OVER THE QUESTION PRESENTED.

ERISA Section 502(e)(2) provides that an ERISA action "may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found." 29 U.S.C. § 1132(e)(2); *see* Pet. 1. The question presented is whether that clause invalidates forum-selection clauses in ERISA plans. *See id.* at 1, 12.

The Sixth, Seventh, and Eighth circuits—like the Third—have either held or declined to vacate district court orders holding that it does not. No circuit has disagreed.

1. The Sixth Circuit's 2014 opinion in *Smith* was the first appellate decision to address the enforceability of a venue-selection clause in an ERISA plan. The court held that Section 1132(e)'s venue language is "permissive," not mandatory, and therefore does not invalidate ERISA venue-selection clauses. *Smith*, 769 F.3d at 932. The court explained that "if Congress had wanted to prevent private parties from waiving ERISA's venue provision, Congress could have specifically prohibited such an action." *Id.* at 931. It concluded that even if the parties agreed on a venue outside of the three options provided by Section 1132, the venue-selection clause would still be valid. *Id.* at 932.

The Eighth Circuit came next. The court summarily denied a mandamus petition to vacate a district court's order enforcing an ERISA venue-selection clause. Judgment, *In re Clause*, No. 16-2607 (8th Cir. Sept. 27, 2016). The district court in *Clause* cast its lot with *Smith*, agreeing with the "numerous district and circuit courts" that have ruled ERISA venue-selection clauses are enforceable. *See Clause* v. *Sedgwick Claims Mgmt. Servs. Inc.*, No. 4:16-cv-00071, slip op. at 3 (E.D. Mo. May 17, 2016).

Just one year later, the Seventh Circuit joined the Sixth and Eighth Circuits. *In re Mathias*, 867 F.3d 727. The Seventh Circuit in *Mathias* rejected the argument that ERISA forum-selection clauses "deprive * * * beneficiaries of the right to select from the menu of venue options offered by § 1132(e)(2)." *Id.* at

732. The court instead adopted "the majority's reasoning" from *Smith*, holding that "the statute is not phrased in rights-granting terms." *Id.* Rather, the "phrasing is entirely permissive," setting the default venue rules for where an action "may be brought." *Id.* Section 1132(e)(2) does not "preclude" the parties from contractually channeling venue to a particular district. *Id.* at 728.

Petitioner does not even attempt to allege a circuit split. *See* Pet. 15-17. Nor could he. The District Court below followed the Sixth, Seventh, and Eighth Circuits, aligning itself with *Smith*. Pet. App. 18a, 20a. Petitioner instead asserts that certiorari is warranted because "[a]ll the arguments for and against" ERISA venue-selection clauses "have thus been aired." Pet. 17. But having arguments uniformly heard and rejected by four separate circuits does not—and has never—weigh in favor of certiorari. *See* Sup. Ct. R. 10(a). And although Petitioner cites (at 15-16) dissents filed in *Smith* and *Mathias*, "the main purpose" of this Court's "certiorari jurisdiction [is] to eliminate circuit splits," *Nunez* v. *United States*, 554 U.S. 911 (2008) (Scalia, J., dissenting), not disagreements within circuit panels. If this Court were to grant review every time there was a dissent from a panel decision, its already "overcrowded" docket would become unmanageable. *Youngblood* v. *West Virginia*, 547 U.S. 867, 873 (2006) (Scalia, J., dissenting); *see also Taylor* v. *United States*, 493 U.S. 906 (1989) (Stevens, J., respecting the denial of certiorari) ("Because the petition does not identify any *inter-Circuit* conflict concerning the question presented * * * the Court's denial of certiorari today is entirely consistent with

rules governing the management of our certiorari docket.").

Federal law has been uniformly applied by every court of appeals that has interpreted ERISA's venue provision. Not only that: The courts of appeals' decisions, or the district court's decisions they declined to vacate, *all* expressly adopted one another's holdings. *See Mathias*, 867 F.3d at 732 (adopting the "majority's reasoning" in *Smith*); *Clause*, slip op. at 3 (citing *Smith*); Pet. App. 20a ("This Court is guided and persuaded by the reasoning set forth in *Smith* and *Mathias* * * * ."). There is already "uniformity" among the circuits, and there is no need for this Court to intervene. *Magnum Imp. Co.* v. *Coty*, 262 U.S. 159, 163 (1923).

2. Petitioner next argues (at 16-17) that the Eleventh Circuit's decision in *Gulf Life Insurance Co.* v. *Arnold*, 809 F.2d 1520 (1987), is on the "other side" of a disagreement over Section 1132(e)(2)'s proper interpretation. Not so. In *Gulf Life*, the court held that a fiduciary could not "avail itself" of Section 1132(e)(2)'s venue provision when filing a declaratory judgment action. *Id.* at 1522, 1524. The court commented on ERISA's "legislative history," *id.* at 1525 n.7; but unlike the Sixth and Seventh Circuits, it never analyzed Section 1132(e)(2)'s text and structure, and certainly never ruled on whether ERISA's venue provision was mandatory or permissive. The Eleventh Circuit simply has not "addressed the enforceability of a forum-selection clause in an ERISA plan." *Turner* v. *Sedgwick Claims Mgmt. Servs., Inc.*, No. 7:14-CV-1244-LSC, 2015 WL 225495, at *6 (N.D. Ala. Jan. 16, 2015). And all three trial courts in that circuit that have interpreted Section 1132(e)(2) have sided with the majority

opinions in *Smith* and *Mathias*—not with *Gulf Life*'s footnote. *See id.*; *Loeffelholz* v. *Ascension Health, Inc.,* 34 F. Supp. 3d 1187, 1192-93 (M.D. Fla. 2014) (rejecting plaintiff's *Gulf Life* argument); *see In re Penn-Mont Benefit Servs., Inc.*, No. 3:13-bk-05986-JAF, 2013 WL 6405046, at *10-11 (Bankr. M.D. Fla. Dec. 6, 2013). It is perhaps for that reason that Petitioner does not claim that *Gulf Life* creates a circuit split.

Lastly, Petitioner argues that varying decisions from "district courts around the country" favor granting certiorari. Pet. 16-17. But this Court does not ordinarily grant review to resolve conflicts among district courts. In fact, Petitioner relies on many of the very same district court cases cited in the *Smith* petition this Court denied. *Compare* Petition for Writ of Certiorari at 20-21, *Smith* v. *Aegon Cos. Pension Plan*, No. 14-1168 (Mar. 13, 2015) (discussing *Coleman* v. *Supervalu, Inc. Short Term Disability Program*, 920 F. Supp. 2d 901 (N.D. Ill. 2013) and citing *Nicolas* v. *MCI Health & Welfare Plan No. 501*, 453 F. Supp. 2d 972 (E.D. Tex. 2006)), *with* Pet. 17 (same). Then, and now, any disagreement among the district courts should be addressed by their regional courts of appeals in the first instance.

Even before *Smith*, the District Court's opinion here would have been in the "clear majority." *Turner*, 2015 WL 225495, at *6 & nn.4-5 (exhaustively listing the relevant pre-2015 district court opinions). That trend has only continued, now that district courts have *Smith* and *Mathias*—and no contrary appellate decisions—as persuasive authority. *See, e.g.*, *Rapp* v. *Henkel of Am., Inc.*, No. 8:18-cv-01128-JLS-E, 2018 WL 6307904, at *4 (C.D. Cal. Oct.

3, 2018) ("[D]istrict courts in this circuit—along with the two circuit courts that have considered the issue—have uniformly found that forum-selection clauses in ERISA plans do not contravene ERISA's venue provision and are enforceable."); *Shah* v. *Wellmark Blue Cross Blue Shield*, No. 16-2397, 2017 WL 1186341, at *2 (D.N.J. Mar. 30, 2017) ("[T]he clear weight of authority rejects Plaintiff's argument."). There is simply no entrenched or pressing conflict for this Court to resolve.

II. THIS CASE'S UNUSUAL PROCEDURAL POSTURE AND FACTUAL HISTORY FURTHER COUNSELS AGAINST GRANTING CERTIORARI.

The petition is not just splitless. It is also procedurally and factually idiosyncratic. It is therefore all-the-more unworthy of this Court's review.

First, Petitioner seeks review not of a merits ruling on the venue issue, but rather of the Third Circuit's mandamus denial. Mandamus "is a 'drastic and extraordinary' remedy 'reserved for * * * extraordinary causes.'" *Cheney*, 542 U.S. at 380 (citation omitted). The writ is granted only if the petitioner satisfies his burden to show it is "clear and indisputable" that he is entitled to relief. *Id.* at 381 (citation omitted); *see also Atlantic Marine Constr. Co.* v. *U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 54-55 (2013) (applying that framework to Section 1404(a) transfers). Because no circuit court has ever adopted Petitioner's view of Section 1132(e), the merits—at the very least—do not clearly favor him. The Third Circuit therefore did not err in denying mandamus relief, leaving nothing for the Court to correct.

Nor will the question presented evade review if the Court does not consider it in the mandamus posture. A district court could decline to enforce a plan's forum-selection clause and eventually award benefits, allowing a plan to appeal from a final judgment. Or a district court could dismiss the case under Rule 12(b)(3), rather than transferring it, allowing a plaintiff an appeal on venue in the ordinary course. And even before final judgment, parties may also obtain review by seeking certification of a transfer order under 28 U.S.C. § 1292(b).

Moreover, given the Third Circuit's one-sentence order, the Court cannot know whether the Third Circuit denied Petitioner's request because it believed the mandamus prerequisites were not met or because it believed Petitioner was wrong on the merits. Respondents below leaned heavily on the "substantial deference" trial courts are afforded under 28 U.S.C. § 1404(a) and the limited scope of mandamus relief. Respondents' C.A. Opp. to Pet. for Writ of Mandamus 10-11, 33 ("Respondents' C.A. Opp."). As a result, all the Court knows is that in the Third Circuit's view, the District Court did not commit a clear and undisputable error. *See Mata* v. *Lynch*, 135 S. Ct. 2150, 2155 n.3 (2015) ("express[ing] no opinion" on an issue where the circuit court's single sentence did not reveal what it "th[ought] about that question"). If this Court were inclined to review the merits of the question presented, it should wait for an appellate opinion that actually decided it. *See Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to review an issue because it was "not addressed by the Court of Appeals").

Second, the petition presents idiosyncratic, fact-bound questions. Pet. 18-19. Petitioner argues that

the forum-selection clause is "unenforceable" because he never agreed to it and was not even on notice that it existed. *Id.* at 19. In addition, the parties dispute where the Committee resides, which determines whether the Southern District of New York qualifies as one of Section 1132(e)(2)'s three venue options. *Id.* at 18. Although Petitioner argues the Committee resides in Peapack, New Jersey, where certain back-office functions are performed, the Committee actually resides in Manhattan, where its members work, where it holds all Plan meetings, and where it makes all Plan decisions. *Id.*; Pet. App. 18a n.6; Crotty Decl. ¶ 6. The District Court never resolved that question, determining that it was not necessary to do so in light of the forum-selection clause. Pet. App. 18a n.6. But to the extent that the Court might conclude that there is a difference between a venue-selection provision that chooses among Section 1132(e)(2)'s three choices and one that lays venue someplace other than where Section 1132(e)(2) permits, the intensely factual issue of the Committee's residency will needlessly complicate the Court's review.[1]

In Petitioner's view, these "unique" factual questions make this case even more suitable for certiora-

[1] Petitioner's relocation to North Carolina makes this case's factual history even more unusual. Compl. ¶ 11. In the typical venue-selection-clause case, the plaintiff wishes to file suit at home and claims he is being forced to litigate in an inconvenient far-away forum. But Petitioner has selected a venue hundreds of miles away from where he resides, effectively foreclosing the argument that transfer to the Southern District of New York would be "unjust or unreasonable." *Smith*, 769 F.3d at 930 (citation omitted).

ri. Pet. 18-19. But the "uniqueness" of a factual or legal issue "weighs against," not in favor of, "review by this Court." *Martin* v. *Blessing*, 571 U.S. 1040 (2013) (Alito, J., respecting the denial of certiorari). If, as Petitioner suggests, this case requires the Court to make a "factbound determination," certiorari should be denied. *Packwood* v. *Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320-21 (1994) (Rehnquist, C.J., in chambers). Indeed, if Petitioner's notice argument were correct—and it is not, *see* Pet. App. 20a-26a—the forum-selection provision would be unenforceable and the Court would never reach the question presented.

These factual disputes and complications did not weigh down the other ERISA venue-selection-clause petitions and are unlikely to recur. If the Court finds the question presented worthy of its review, it should wait for a case without these profound vehicle problems.

III. THE DECISION BELOW IS CORRECT.

The District Court's decision is not only consistent with the view taken by every Circuit to consider the issue. It is also correct.

1. A plan participant's benefits are "bound up with the written instrument." *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 108 (2013). ERISA "authorizes a plan participant to bring suit 'to recover benefits due to him *under the terms of his plan*, to enforce his rights *under the terms of the plan*, or to clarify his rights for future benefits *under the terms of the plan*.'" *Id.* (quoting 29 U.S.C. § 1132(a)(1)(B)). Because "'reliance on the face of written plan documents'" is critical, this Court has recognized "the particular importance of enforcing plan terms as

written." *Id.* at 108-109 (citation omitted); *see also US Airways, Inc.* v. *McCutchen*, 569 U.S. 88, 102 (2013) (courts employ "[o]rdinary principles of contract interpretation" to construe ERISA plans); *CIGNA Corp.* v. *Amara*, 563 U.S. 421, 436 (2011) ("The statutory language speaks of '*enforc[ing]*' the 'terms of the plan,' not of *changing* them.").

Given the primacy of plan terms, the Court generally allows parties to contract around ERISA's default rules. *See Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115 (1989); *Heimeshoff*, 571 U.S. at 105-106 (permitting ERISA parties to contract around the "'general rule' that statute of limitations commence upon accrual of the cause of action"). In *Firestone*, for example, the Court held ERISA's default rule is that courts review a plan's denial of benefits *de novo*. 489 U.S. at 115. But plans and participants may override that rule by agreeing to give the plan administrator "authority to * * * construe the terms of the plan." *Id.* And if they do, the administrator's interpretation is then reviewed for an abuse of discretion. *Id.*; *see also Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010) (recognizing the importance of allowing for "*Firestone* deference").

Along the same lines, outside of ERISA, venue-selection clauses are presumptively valid, even in the absence of arms-length bargaining. *Carnival Cruise Lines*, 499 U.S. at 593-595. Taken together, a "forum-selection clause in [an ERISA] plan is controlling *unless* ERISA invalidates it." *Mathias*, 867 F.3d 732; *see also Smith*, 769 F.3d at 931 (to be invalid, a plan's venue-selection clause must "conflict" with an ERISA provision).

2. Petitioner posits (at 11) that Section 1132(e) invalidates forum-selection clauses by providing a "right[]" for plan participants to bring suit in any of the three locations it identifies. That ignores Section 1132(e)(2)'s text, which provides that a suit "may be brought" in any one of three potential districts. If Congress wanted to make the availability of those three venues mandatory and non-waivable, it would not have used a term as permissive as "may." *Breuer*, 538 U.S. at 694-697 (noting that "may be maintained" is permissive, while "shall be removed" is prohibitory); *see also NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 940-941 (2017) ("shall perform" is "mandatory," while "may direct" is "permissive"); *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1977 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement.").

Congress could have used mandatory language by, for example, instructing that suits "shall" be brought in one of three districts, or may "only" be brought there. *See New Mexico ex rel. Energy & Minerals Dep't* v. *U.S. Dep't of Interior*, 820 F.2d 441, 446 (D.C. Cir. 1987); *see also Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 42 (1998) (28 U.S.C. § 1391(a)'s "may . . . be brought only" language imposes a "strict limitation on venue"). Alternatively, Congress could have stated that ERISA venue-selection clauses are "void as against public policy," as it did for certain contractual agreements identified in Section 1110. *See* 29 U.S.C. § 1110(a) ("[A]ny provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility,

obligation, or duty under this part shall be void as against public policy.").

But Congress did none of these. And crucially, Section 1132, the same section of ERISA that uses the optional "may be brought" language when discussing venue, uses "shall" when issuing binding directives in other subsections. *See, e.g.*, *id.* § 1132(d)(2) ("Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person * * * ."); *id.* § 1132(e)(1) ("[T]he district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter * * * ."); *id.* § 1132(g)(2) ("[I]nterest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of title 26."). That contrast shows that Congress intended Section 1132(e)(2) to accommodate changes that the parties agree to. *See Mathias*, 867 F.3d at 732 ("may be brought" is "entirely permissive"); *Smith*, 769 F.3d at 932; *Laasko* v. *Xerox Corp.*, 566 F. Supp. 2d 1018, 1023 (C.D. Cal. 2008) ("It is significant that § 1132(e)(2) uses the word 'may,' and not 'shall' * * * ."). As this Court has recognized, when the same provision "uses both 'may' and 'shall', the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory." *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947).

Section 1132(e)(2) thus does not contain any *express* prohibitions. *See Mathias*, 867 F.3d at 731-732. That means plans and their participants are permitted to agree to their own venue. *See Heimeshoff*, 571 U.S. at 109 ("[W]e will not presume

from statutory silence that Congress intended" to void plan terms as written); *Metropolitan Life Ins. Co.* v. *Glenn*, 554 U.S. 105, 116 (2008) (if Congress wanted to restrict plans' flexibility, it "would have said more on the subject"). The District Court was therefore correct to hold that ERISA established a default venue rule, which plans and their participants may modify by agreement.

3. Petitioner minimizes Section 1132(e)(2)'s text and ignores much this Court's ERISA case law. He instead argues (at 5-9) that the decision below "cannot be reconciled" with *Boyd*. But that is simply untrue.

The Court in *Boyd* held that forum-selection agreements in contracts between railroads and their employees violated FELA's broad venue provision and were therefore void. 338 U.S. at 265-266. *Boyd* turned on the "comprehensive phraseology" in one of FELA's neighboring provisions, which prohibited "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by [FELA]." *Id*. at 265 (citations omitted). ERISA's prohibitory language, by contrast, is not so all-embracing. It bars a fiduciary from following "the documents [or] instruments governing the plan" that are not "consistent with" ERISA. 29 U.S.C. § 1104(a)(1)(D). Because *Boyd* related to a different statute, with a distinct legislative history, and more-comprehensive voiding provision, it does not control. *See Terrbonne* v. *K-Sea Transp. Corp.*, 477 F.3d 271, 280-281 (5th Cir. 2007) (declining to extend *Boyd*'s holding to the Jones Act); *Turner*, 2015 WL 225495, at *9 (explaining why "*Boyd* is not controlling").

Petitioner argues that this Court has not "*sub silientio* overruled *Boyd*" and chastises Respondents for making that alternative argument before the Third Circuit. Pet. 6, 8-9. But the Respondents' back-up argument below is irrelevant. The District Court held "[t]his case differs from *Boyd* since it pertains to [ERISA] rather than [FELA]," not that *Boyd* had been overruled. Pet. App. 19a n.7. Respondents argued that the Third Circuit should deny mandamus for the very same reason. *See* Respondents' C.A. Opp. 22 ("Robertson has asserted claims under * * * ERISA, * * * not FELA. *Boyd* is therefore inapposite * * *."). That is the only *Boyd* argument Respondents are pressing here.[2]

The *Boyd*-related cases that Petitioner and his *amici* cite therefore have no bearing on the petition. *See* Pet. 7-8 & n.2; Scholars Amicus Br. 8-9. Petitioner concedes that they have nothing to do with ERISA and are cited simply to show that "*Boyd* is still good law." Pet. 8 n.2. But Respondents do not argue otherwise. Petitioner and his *amici*'s arguments are beside the point.

Even though *Boyd* remains good law, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.* cautions against expanding it beyond FELA. 490 U.S. 477 (1989). This Court in *Rodriguez* expressly overruled

---

[2] Petitioner also asserts (at 5-6) that the Seventh Circuit's decision in *Mathias* inappropriately "discredit[s]" this Court's opinion in *Boyd*. But *Mathias* specifically held "*Boyd* * * * has not been overruled." 867 F.3d at 733. And Respondents relied on that excerpt in their Third Circuit briefing. *See* Respondents' C.A. Opp. 22. That *Boyd* remains good law in the FELA context is not disputed.

Wilko v. *Swan*, 346 U.S. 427 (1953), which discussed *Boyd* approvingly. *See* 490 U.S. at 484. *Wilko* and *Rodriguez* considered Section 14 of the Securities Act, which provides that parties may not agree to "waive compliance" with any of the act's provisions. *See Rodriguez*, 490 U.S. at 479 (quoting 15 U.S.C. § 77n). *Wilko* held that "the right to select the judicial forum is the kind of 'provision' that cannot be waived under [§] 14 of the Securities Act," and stated that *Boyd* was in "accord[]." 346 U.S. at 435, 437. But *Rodriguez* overruled *Wilko* and held "that the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that § 14 is properly construed to bar any waiver of these provisions." 490 U.S. at 481, 484. The Court held that the Securities Act's "broad venue provisions" could be waived because they were "procedural provisions," not "substantive rights." *Id.* at 481-482 (citation omitted). That holding undermines Petitioner's request (at 5) to expand *Boyd* beyond FELA.

4. Petitioner's remaining arguments nearly all turn on what he views as "Congress' intent" in passing ERISA. Pet. 9-14. Petitioner leans on Congressional "findings" and a not-yet-published law review article concerning the "reports and statements of the key actors who played a role in [ERISA's] passage." *Id.* at 10, 12-13; *see also* Scholars Amicus Br. 12-13, 15. But this Court has "repeatedly held" that Congress's "authoritative statement is the statutory text, not the legislative history." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). And here, the text and structure make plain that Section 1132(e)(2)'s venue provision is permissive, not prohibitory. *See supra* pp. 16-18.

Anyway, venue-selection clauses are consistent with ERISA's underlying purpose. Congress in ERISA created a system that would not be "so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Conkright*, 559 U.S. at 517 (quoting *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996)). Venue-selection agreements, like other clauses this Court has upheld, "help[] to avoid a patchwork of different interpretations" for the same nationwide ERISA plan—"a result that 'would introduce considerable inefficiencies in benefit program operation'" and dissuade employers from adopting a plan at all. *Id.* (quoting *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11 (1987)). For that reason, court after court has held that venue-selection clauses promote, rather than inhibit, ERISA's purposes. *See Mathias*, 867 F.3d at 733 (because "forum-selection clauses promote uniformity" and reduce costs, they "are consistent with [ERISA's] broader statutory goals" (citing *Smith*, 769 F.3d at 931-932)); *Williams* v. *Ascension Health Long-Term Disability (LTD) Plan*, No. 16-1361-JTM, 2017 WL 1540635 (D. Kan. Apr. 28, 2017); *Clause* v. *Sedgwick Claims Mgmt. Servs., Inc.*, No. CIV 15-388-TUC-CKJ, 2016 WL 213008, at *4 (D. Ariz. Jan. 19, 2016); *Scaglione* v. *Pepsi-Cola Metro. Botteling Co.*, 884 F. Supp. 2d 642, 643 (N.D. Ohio 2012); *Rodriguez* v. *PepsiCo Long Term Disability Plan*, 716 F. Supp. 2d 855, 861 (N.D. Cal. 2010); *Klotz* v. *Xerox Corp.*, 519 F. Supp. 2d 430, 436 (S.D.N.Y. 2007).

Petitioner argues (at 11) that venue-selection clauses defy ERISA's purpose of providing "ready access" to federal courts. *See* 29 U.S.C. § 1001(b). But Congress's "ready access" provision was intended

to end the historical helter-skelter adjudication of employee-benefit disputes in the state courts under varying state trust and contract laws, not to fix venue in any particular location. *See Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208 (2004) (Section 1001(b) serves Congress's purpose "to provide a uniform regulatory regime over employee benefit plans"); *cf. Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 52, 56 (1987) (explaining that "varying state causes of action * * * pose an obstacle to the purposes and objectives of Congress"). No matter where venue is laid, beneficiaries have ample access to the federal courts. The statute's private enforcement mechanism has "extraordinary pre-emptive power," such that it "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Aetna Health*, 542 U.S. at 209 (quoting *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 65-66 (1987)). Making state law claims immediately removable to federal court goes well beyond what Petitioner describes as "just 'access.'" Pet. 11; *see also Smith*, 769 F.3d at 931 (a plan's venue-selection provision does not "inhibit[] 'ready access' to federal courts when it provides for venue in a federal court").

Finally, Petitioner suggests the Court should review the decision below simply because ERISA is an important federal law whose provisions apply to over 136 million people. *See* Pet. 17 & n.5. The Court has heard—and rejected—that argument before. *See* Petition for Writ of Certiorari at 25, *University of S. Cal.* v. *Munro*, No. 18-703 (Nov. 29, 2018), 2018 WL 6259022, at *25 ("These considerations have particular salience here given the central importance of ERISA plans to workers' financial security and, in

turn, the stability of the economy more generally."), *cert. denied*, 139 S. Ct. 1239 (Feb. 19, 2019) (mem.); Petition for Writ of Certiorari at 31, *Pender* v. *Bank of Am. Corp.*, No. 18-578 (Oct. 31, 2018), 2018 WL 5786112, at *31 ("There can be no doubt" that a question about ERISA's "primary enforcement mechanism" warrants review because the statute impacts "tens of millions of people and thousands of plans"), *cert. denied*, 139 S. Ct. 1261 (Feb. 25, 2019) (mem.). Taken seriously, Petitioner's argument would compel the Court to review every ERISA petition it receives. The Court should decline review—just has it has before.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ASHLEY B. ABEL
JACKSON LEWIS P.C.
15 South Main Street
Suite 700
Greenville, S.C. 29601

JOHN M. NOLAN, III
JACKSON LEWIS P.C.
1601 Cherry Street
Suite 1350
Philadelphia, PA 19102

NEAL KUMAR KATYAL
Counsel of Record
SEAN MAROTTA
MATTHEW J. HIGGINS
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Respondents
Pfizer Retirement Committee and Fidelity Executive Services d/b/a Fidelity Employer Services Co., LLC

JUNE 2019