No. 22-226

IN THE

Supreme Court of the United States

CINTAS CORPORATION, ET AL.,
Petitioners,

v.

RAYMOND HAWKINS AND ROBIN LUNG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

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

REPLY BRIEF

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INTRODUCTION

Respondents discourage this Court's review by wishing away a clear split of authority, pretending that plan sponsors can readily ensure arbitration of ERISA Section 502(a)(2) claims by inserting arbitration agreements in plan documents, and all but ignoring what this Court said last term in *Viking River Cruises, Inc.* v. *Moriana*, 142 S. Ct. 1906 (2022): two parties *can* agree to include within an enforceable arbitration agreement claims that one of those parties brings on behalf of a third party. But the split of authority is real. Respondents' proposal to put arbitration agreements in plan documents that participants have no role in creating is an uncertain workaround that courts have rejected. And this Court's statement in *Viking* regarding the permissible scope of arbitration agreements belies the suggestion that review here would be an unimportant matter confined to the peculiar nature of Section 502(a)(2) claims.

Correcting the misguided reasoning of the Sixth and Ninth Circuits would not only ensure uniform nationwide treatment of arbitration agreements for ERISA claims, as Congress plainly intends, but also could provide meaningful guidance regarding the enforceability of arbitration agreements governing a range of common lawsuits brought by an agent on behalf of a principal. This Court should grant the petition.

I. THE SPLIT IS REAL

Respondents seek to conceal the split of authority by reframing the question presented. As explained in the petition, this case presents the question "[w]hether an agreement to arbitrate claims against an ERISA plan's fiduciaries under Section 502(a)(2)

of ERISA is enforceable without regard to whether the plan is a party to the agreement." Pet. i. Respondents recast the question as "whether an ERISA plan must consent to arbitrate claims brought on its behalf under § 502(a)(2)." Opp. I.

Respondents' version of the question buries the critical fact: that respondents—the individuals who have brought the claims in this case—have entered into "an agreement to arbitrate claims against [the Cintas] plan's fiduciaries under Section 502(a)(2) of ERISA." Pet. i. That fact is critical because it means the issue is *not* whether the plan's consent to arbitration of Section 502(a)(2) claims is a prerequisite to arbitration of such claims in *all* circumstances. Instead, the issue is whether a court need even consider whether the plan has consented to arbitration when, as here, the participant, who ERISA empowers to assert the claim *in the participant's own name*, has entered into an express agreement with the plan sponsor to arbitrate precisely such a claim.

The Tenth Circuit addressed that exact issue in *Williams* v. *Imhoff*, 203 F.3d 758 (10th Cir. 2000). Respondents say that *Williams* is off point because "the court did not even discuss whether the plan was a party to the arbitration agreement." Pet. 14; compare Opp. 11. But that is precisely what places *Williams* directly on point. In *Williams*, there was an agreement between participants and their plan sponsor requiring arbitration of the participants' Section 502(a)(2) claims. That was the end of the inquiry. Arbitration was required. 203 F.3d at 760–62, 767. There was no need to ask whether the plan *also* consented. The Sixth Circuit below and the Ninth Circuit in *Munro* v. *University of Southern California*, 896 F.3d 1088 (9th Cir. 2018), held the opposite. The split cannot be waved away with overheated rhetoric.

It is true that in *Bird* v. *Shearson Lehman/American Express, Inc.*, 926 F.2d 116 (2d Cir. 1991), and *Kramer* v. *Smith Barney*, 80 F.3d 1080 (5th Cir. 1996), the Second and Fifth Circuits appear to have had cases where both the plan and the participant consented to arbitration. *Bird* addressed an agreement between a plan's trustee (who was also a plan participant) and a defendant investment firm, see 926 F.2d at 117, and *Kramer* addressed an agreement between a plan trustee (who was also a plan beneficiary) and a defendant brokerage firm, see 80 F.3d at 1082–83. Given the dual status as trustee and participant/beneficiary of a party in each of those cases, it is plausible that the plan was deemed to have consented to arbitration. But importantly, we can only speculate about the point precisely because in both cases, as respondents concede, "the court compelled arbitration without regard to whether the plan consented." Opp. 8; see also *id.* at 10. Once a participant agrees with the defendant to arbitrate the claim that the participant has initiated, the arbitration question has its answer: the claim must go to arbitration. Again, the Sixth Circuit has reached the contrary result.

The Second, Fifth, and Tenth Circuits' decisions do not amount to mere "sub silentio" rulings that are "not binding." *Id.* at 8–11. The result of the decisions is inarguable: enforcement of agreements to arbitrate Section 502(a)(2) claims, without regard to whether the plan consented to arbitration. And that "result … ha[s] precedential force," "independent[]" of the reasoning used to reach it. Cf. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1416 n.6 (2020) (Kavanaugh, J., concurring in part).

Respondents also try to brush aside *Williams* and *Bird* because they "did not … mention § 502(a)(2)."

Opp. 11; see also *id.* at 9. But it is clear from the nature of the claims in those cases that the plaintiffs sued under Section 502(a)(2). That is the only subsection authorizing a civil action "for appropriate relief under section 1109," 29 U.S.C. § 1132(a)(2), which in turn provides that a plan fiduciary who has breached its fiduciary duties under ERISA must "make good to such plan any losses to the plan resulting from each such breach," *id.* § 1109. The plaintiffs in *Williams* and *Bird* sought to recover such losses, so their claims necessarily arose under Section 502(a)(2). See *Williams*, 203 F.3d at 762; *Bird*, 926 F.2d at 117.

Finally, petitioners never "admitted" in the lower courts that *Bird*, *Kramer*, and *Williams* do not contribute to the split. Opp. 12. Instead, petitioners clearly staked out the view that "[a]n agreement to arbitrate these kinds of claims"—*i.e.*, ERISA Section 502(a)(2) claims—is and should be "enforceable regardless of whether the plan is a party to the agreement," citing the Fifth Circuit's decision in *Kramer*. See Br. of Appellants, *Hawkins* v. *Cintas Corp.*, No. 21-3156, 2021 WL 2556749, at *23 (6th Cir. June 14, 2021). And, contrary to what respondents say, counsel was not asked at oral argument "whether disagreeing with *Munro* would 'create a circuit split.'" Opp. 12 (quoting *Hawkins* v. *Cintas Corp.*, No. 21-3156, Oral Argument Audio ("Oral Arg.") at 1:44–2:28 (6th Cir. Dec. 9, 2021)). Instead, counsel was asked whether accepting the petitioners' arguments would require the Sixth Circuit "to disagree with the *Munro* decision." Oral Arg. at 1:44–2:28. In response, he merely explained that the Sixth Circuit could distinguish *Munro* on its facts because of the "unique breadth" of the respondents' agreements to arbitrate, which cover all of their "rights and claims under ERISA." *Id.* The breadth and clarity of those terms

make this case the ideal vehicle to resolve the split that *Munro* started and the decision below deepened.

II. THE DECISION BELOW CONFLICTS WITH *VIKING RIVER* v. *MORIANA*

Respondents offer no way to reconcile the decision below with *Viking*. They claim that petitioners "miscite the decision," and that *Viking* "says nothing at all" about the question presented. Opp. 18–19. To the contrary, *Viking* speaks powerfully to the question.

In *Viking*, this Court considered whether California's Private Attorneys General Act (PAGA) "contains any procedural mechanism at odds with arbitration's basic form." 142 S. Ct. at 1921. Viking had argued that the "prototype" of "bilateral arbitration" "involves two and only two parties and … is conducted by and on behalf of the individual named parties only." *Id.* (quotation marks omitted) As Viking saw the law, "PAGA actions necessarily deviate from this ideal because they involve litigation or arbitration on behalf of an absent principal." *Id.* at 1922.

The Court "disagree[d]" with Viking. *Id.* It observed that in many suits an agent stands in the shoes of an absent principal, and that such "representative actions" are "part of the basic architecture of much of substantive law." *Id.* "Familiar examples" of such representative actions "include shareholder-derivative suits, wrongful-death actions, trustee actions, and suits on behalf of infants or incompetent persons." *Id.* These kinds of "[s]ingle-agent, single-principal suits … necessarily deviate from the strict ideal of bilateral dispute resolution." *Id.* That is because, although these suits "involve the rights of only the absent real party in interest and the defendant," the "litigation need only be conducted by the agent-plaintiff and the defendant." *Id.* In other words, the litigation is con-

ducted only between *A* and *B*, even though it involves the rights of only *C* and *B*. See *id.* Nevertheless—and here is the key—the Court made clear that it has "never … suggested" that such suits "are inconsistent [with] the norm of bilateral arbitration." *Id.* Rather, the Court said, "[t]his degree of deviation from bilateral norms is *not* alien to traditional arbitral practice." *Id.* (emphasis added).

What this Court said in *Viking* strongly supports reversal here. Respondents are plan participants (party *A*) who have sued their plan sponsor (party *B*). Even if it were true, as respondents assert, that the claims "are brought on behalf of the plan," Opp. 19, that would make the plan absent principal *C*. Respondents persuaded the Sixth Circuit that an agreement between *A* and *B* to arbitrate the claims is unenforceable because *C* "must also consent." *Id.* *Viking* says otherwise.

III. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS REVIEW

Respondents claim that the decision below poses "no obstacle … to arbitration of ERISA disputes" because, they suggest, there is a "straightforward" "fix." Opp. 13. That "fix," they say, is that plan sponsors can require arbitration of Section 502(a)(2) claims by "includ[ing] an arbitration provision in the plan document." *Id.* That proposed workaround is of uncertain effect and is a particularly unsuitable solution given the consensual nature of arbitration.

Even respondents acknowledge the "foundational FAA principle" that "arbitration 'is strictly a matter of consent,'" and that therefore "one party may not force another to arbitrate where he or she has not agreed to do so." *Id.* at 4–5 (quoting *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1415 (2019)). Yet what

respondents propose would leave participants bound to arbitrate claims that ERISA empowers them to bring in their own name *without* ever obtaining their express consent through a signed agreement. The plan document is the written instrument through which the plan is established and maintained. 29 U.S.C. § 1102. It is written by the plan sponsor—not participants. See *id.* § 1002(16)(B). Even though participants are generally bound by the terms of the plan document, they play no role in creating and may or may not ever review the plan document, as this Court has noted. See *Intel Corp. Inv. Pol'y Comm.* v. *Sulyma*, 140 S. Ct. 768, 778 (2020). By contrast, when the arbitration provision is included in the participant's employment agreement, the process plainly respects the essentially contractual nature of arbitration. Disregarding a participant's consent to arbitration because an arbitration provision is absent from the unilaterally drafted plan document does nothing to strengthen the contractual nature of arbitration. It also contradicts the text of ERISA, which, by empowering participants to sue, acknowledges their personal interest in plan assets and their right to control adjudication of their interests. See Pet. 19.

Contrary to respondents' suggestion, it is by no means clear that inclusion of an arbitration provision in a plan document ensures enforceability of the arbitration "agreement." Lower courts have concluded that "[i]t is difficult to reconcile" respondents' approach "with the FAA's overarching principle that arbitration is a matter of contract." *Smith* v. *Greatbanc Tr. Co.*, No. 20 C 2350, 2020 WL 4926560, at *3 (N.D. Ill. Aug. 21, 2020) (quotation marks omitted), *aff'd sub nom. Smith* v. *Bd. of Dirs. of Triad Mfg., Inc.*, 13 F.4th 613 (7th Cir. 2021). For that reason, some courts have *rejected* respondents' proposed "fix" and

refused to enforce arbitration provisions in plan documents precisely because the participants are not consulted. See, *e.g.*, *id.* at *3–4 ("A plan document drafted by fiduciaries—the very people whose actions have been called into question by the lawsuit—should not prevent plan participants and beneficiaries from vindicating their rights in court."); *Henry ex rel. BSC Ventures Holdings, Inc.* v. *Wilmington Tr., N.A.*, No. 19-cv-1925, 2021 WL 4133622, at *5 (D. Del. Sept. 10, 2021) ("[T]he Court is unwilling to conclude that the traditional contract analysis that governs whether there is an arbitration agreement is displaced in the context of ERISA plans."), *appeal docketed*, No. 21-2801 (3d Cir. Oct. 1, 2021); *Brown ex rel. Henny Penny Corp. Emp. Stock Ownership Plan* v. *Wilmington Tr., N.A.*, No. 3:17-cv-250, 2018 WL 3546186, at *5 (S.D. Ohio July 24, 2018) ("Allowing the fiduciary to unilaterally require plan participants to arbitrate claims for breach of fiduciary duty would, in a sense, be allowing the fox to guard the henhouse."); *Lloyd* v. *Argent Tr. Co.*, No. 22-cv-4129, 2022 WL 17542071, at *3 (S.D.N.Y. Dec. 6, 2022) ("[T]he Plan's arbitration clause may not be enforced."), *appeal docketed*, No. 22-3116 (2d Cir. Dec. 9, 2022); *Casey* v. *Reliance Tr. Co.*, No. 4:18-cv-424, 2019 WL 7403931, at *38 (E.D. Tex. Nov. 13, 2019) (similar). Indeed, respondents cite no case in which a court has granted a motion to compel arbitration based on a plan provision or otherwise accepted respondents' proposed "fix." See Opp. 13.

This uncertain legal landscape only heightens the urgency of this Court's review. Absent review, Section 502(a)(2) claims may be non-arbitrable in some circuits because neither the participant's *nor* the plan's consent will be deemed sufficient. To resolve uncertainties in these important areas, the Court has often

granted certiorari to review questions implicating the FAA or ERISA, even in cases not involving circuit splits. See, e.g., *Viking*, 142 S. Ct. 1906 (FAA); *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421 (2017) (FAA); *Amgen Inc.* v. *Harris*, 577 U.S. 308 (2016) (per curiam) (ERISA); *Gobeille* v. *Liberty Mut. Ins. Co.*, 577 U.S. 312 (2016) (ERISA). It should do the same here—all the more so given the disagreement among the circuit courts, and the need to restore both certainty and uniformity.

The fact that the Sixth and Ninth Circuits' decisions have addressed the question presented only once each to date is hardly a reason to think their impact is "minimal." Opp. 13. Instead, it underscores how disruptive those decisions have been, and will continue to be, without this Court's review. The law was settled for decades: participants, plan sponsors, and courts, including in *Bird*, *Kramer*, and *Williams*, understood that the plan's consent to arbitration of Section 502(a)(2) claims is irrelevant when the participant and plan sponsor have agreed between themselves to arbitrate those claims. The Ninth Circuit's 2018 decision in *Munro* upended that rule. The decision below entrenches it. And there is every reason to believe that many more plaintiffs are now seeking to litigate Section 502(a)(2) claims, despite their prior agreements to arbitrate them. The volume of cases asserting Section 502(a)(2) claims for breach of fiduciary duty against plan sponsors "increased *five-fold* from 2019 to 2020"—that is, in the year after *Munro* was decided. Amicus Br. for the Chamber of Commerce et al., *Hughes* v. *Nw. Univ.*, No. 19-1401, 2021 WL 5052876, at *2 & n.2 (U.S. Oct. 28, 2021) (emphasis added). There is no reason to think that pace will slow, and meanwhile the need for enforceable arbitration agreements to facilitate swift and cost-

effective dispute resolution has only increased. If allowed to stand, the holdings of the Sixth Circuit below, and the Ninth Circuit in *Munro*, will continue to prevent enforcement of those agreements, and create a circuit-by-circuit patchwork in an area where national uniformity is key. The Court's intervention is urgently needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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