No. 23-122

In the Supreme Court of the United States

WILMINGTON TRUST, N.A., BRIAN C. SASS, and E. STOCKTON CROFT IV,
Petitioners,

v.

MARLOW HENRY, on behalf of the BSC Ventures Holdings, Inc. Employee Stock Ownership Plan, and on behalf of a class of all persons similarly situated.

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

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioners say that their question presented is whether ERISA prohibits "individual arbitration of claims brought under that statute pursuant to a binding arbitration provision." Pet. i. The Third Circuit below answered that question "no." App. 10a-11a n.8. No court of appeals has disagreed.

Petitioners lost their appeal for a different reason. They drafted an *expressly non-severable* arbitration clause that purports to eliminate substantive statutory remedies that an individual participant may pursue in court, including removal of a breaching fiduciary. Every court of appeals to consider this same arbitration clause has invalidated it for that reason, and that reason alone. The procedural choice of arbitration must allow all substantive claims to proceed there. Petitioners' failure to acknowledge the actual holding of the court below—much less explain why *that* holding is worthy of review—is alone sufficient basis to deny the petition.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

Petitioners ask this Court to grant certiorari and hold that ERISA claims are subject to individual arbitration. There is no need. No circuit has held ERISA claims are not subject to individual arbitration. Here, Petitioners proclaim the court left "ERISA plan providers with a Hobson's choice as to whether they must litigate plan-wide claims in front of an arbitrator or give up the benefits of arbitration." Pet. 1. Put another way, the Third Circuit's decision forces them to allow ERISA's substantive remedies to proceed in arbitration or in court, rather than using an "arbitration provision" to eliminate them altogether.

The Petition is premised on the false assertion that the Third Circuit barred individual arbitration of ERISA claims. The invalidity of Petitioners' arbitration provision is a problem of their own making because it forbade substantive remedies. And when the Third Circuit ruled those substantive remedies must be available *in arbitration*, the entire arbitration provision was invalidated solely because the Petitioners expressly made the arbitration agreement here non-severable. In short, the Third Circuit's decision was a simple application of this Court's rule that arbitration provisions are not valid to the extent they bar substantive statutory remedies.

There is no conflict among the circuits. Every circuit that has addressed the question has ruled that ERISA's substantive remedies must be presented to the arbitrator along with all other claims. It is a straightforward decision that does not warrant the Court's intervention. And the Petitioners' cynical argument ignores that the *only* reason the Third Circuit invalidated the entire arbitration provision was the Petitioners' choice to force the court to do so with its non-severability clause.

There is accordingly no dispute over the question presented; everyone agrees ERISA claims are subject to arbitration. What an arbitration clause cannot do is what this one does—prevent claimants from pursuing in arbitration the remedies afforded to them by ERISA.

That conclusion follows directly from this Court's precedents. By agreeing to arbitration, a party "does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral forum." *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1919 (2022) (cleaned up). The Third Circuit and its sister circuits correctly applied the so-called "effective vindication" doctrine, which "prevent[s] 'prospective waiver of a party's *right to pursue* statutory remedies," and "certainly cover[s] a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235-36 (2013) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)). Petitioners wrote an arbitration clause that undisputedly bars multiple remedies available to individual participants under ERISA. The lower courts have properly refused to enforce it.

STATEMENT

I. Statutory Background.

Federal Arbitration Act. The FAA provides that "[a] written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, … shall be valid, irrevocable, and enforceable," except "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. A party to an arbitration agreement may ask a court "for an order directing that

such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4.

Although parties may agree to arbitrate their future disputes, they may not prospectively waive their substantive legal rights in the guise of stipulating to arbitration. The Supreme Court recently reiterated that an arbitration agreement "does not alter or abridge substantive rights; it merely changes how those rights will be processed." *Viking River*, 142 S. Ct. at 1919. A party who agrees to arbitrate a statutory claim thus "does not forgo the substantive rights afforded by the statute" but rather "only submits to their resolution in an arbitral forum." *Ibid.* (cleaned up). An agreement to arbitrate a statutory claim will be enforced only if "the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000) (cleaned up).

Employee Retirement Income Security Act. Congress enacted ERISA "to protect … the interests of participants in employee benefit plans and their beneficiaries," safeguarding their rights with "appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. §1001(b). The statute provides that an ERISA plan is a distinct legal entity (29 U.S.C. § 1132(d)), and "all assets" of the plan must "be held in trust by one or more trustees." *Id.* § 1103(a). And ERISA mandates "strict standards of trustee conduct . . . derived from the common law of trusts—most prominently, a standard of loyalty and a standard of care." *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985); *see* 29 U.S.C. § 1104(a); *id.* § 1109 (liability for breach of fiduciary duty).

To enforce ERISA's mandates, Congress designed with "evident care" an "interlocking, interrelated, and interdependent remedial scheme." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). It empowered participants to bring a wide variety of actions and gave federal district courts "exclusive jurisdiction" over them. 29 U.S.C. § 1132(a), (e).

Congress recognized that fiduciaries cannot be expected to sue themselves when they breach fiduciary duties. Thus, section 1132(a)(2) authorizes participants to sue for the plan-wide relief provided in § 1109. *See* 29 U.S.C. § 1132(a)(2) (providing a "civil action" "for appropriate relief under section 1109"). This claim is "brought in a representative capacity on behalf of the plan as a whole." *Russell*, 473 U.S. at 142 n.9. Through §§ 1109 and 1132(a)(2), Congress protected participants' "common interest" in "the financial integrity of the plan." *Russell*, 473 U.S. at 142 n.9; *see LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008) (§ 1132(a)(2) "does not provide a remedy for individual injuries distinct from plan injuries"). A breaching fiduciary must "make good to such plan any losses to the plan resulting from" the breach and must "restore to such plan any profits of such fiduciary which have been made through use of assets of the plan." 29 U.S.C. §1109(a) (emphasis added). In addition, a court may remove a breaching fiduciary and appoint an independent fiduciary. *Id.*

In addition, §1132(a)(3), a catchall remedial provision, permits participants to seek injunctive and equitable relief to redress fiduciary and non-fiduciary misconduct. *See* 29 U.S.C. §1132(a)(3) (authorizing lawsuits "to enjoin any act or practice which violates" ERISA or "to obtain other appropriate equitable relief (i) to redress … violations of [ERISA] or (ii) to enforce [ERISA]"); *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996) (Section 1132(a)(3)

is a "catchall" provision "offering appropriate equitable relief for injuries caused by violations that [§ 1132] does not elsewhere adequately remedy").

These statutory entitlements cannot be waived by contract or overridden by the plan sponsor. The plan is governed by a written plan document, *see* 29 U.S.C. § 1102(a)(1), but only insofar as it is consistent with the provisions of ERISA, *id.* § 1104(a)(1)(D). And Congress rendered "void" any agreement that "purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty." *Id.* § 1110(a). ERISA further establishes that the remedies afforded under § 1132 are protected substantive rights. The enforcement provisions are in Subchapter I of ERISA, titled "Protection of Employee Benefit Rights."

II. Factual Background.

Marlow Henry is a former employee of BSC Ventures Holdings, Inc. who participated in its employee stock ownership plan ("ESOP"). App. 2a. Henry brought this suit under ERISA Section 502, on behalf of himself and the Plan, against the plan's trustee, Wilmington Trust, N.A., and BSC executives and selling shareholders, Brian Sass and E. Stockton Croft. App. 2a. He asserted fiduciary breach claims in connection with the creation and administration of the ESOP. App. 2a. He sought, among other things, a declaratory judgment that the indemnification agreement between Wilmington Trust and BSC violates ERISA, attorneys' fees, and other appropriate relief under ERISA "to the Plan and its participants and beneficiaries." App. 4a.

BSC created the ESOP in 2015 as a way for Sass and Croft to cash out of the business, and the ESOP bought $50 million of stock in the private company from Sass, Croft, and other shareholders in 2016. App. 3a. The ESOP

borrowed the money to buy the stock, and Henry alleges that "Wilmington Trust breached its fiduciary duty to the ESOP by incurring debt to purchase BSC stock at an inflated price." App. 3a. Among other things, Wilmington Trust relied on flawed financial projections that were prepared by the people who stood to benefit most from a high valuation, Sass and Croft. App. 3a.

When BSC created the ESOP, all BSC employees were automatically enrolled with no ability to opt out. App. 2a. The plan document gives BSC the right to amend it at BSC's sole discretion and the right to terminate the ESOP at any time. App. 3. In 2017, BSC amended the plan document to include an arbitration provision, and it amended the arbitration provision in 2019. App. 3a. It ultimately provided:

> All Covered Claims must be brought solely in the Claimant's individual capacity and not in a representative capacity or on a class, collective, or group basis. Each arbitration shall be limited solely to one Claimant's Covered Claims, and that *Claimant may not seek or receive any remedy which has the purpose or effect of providing additional benefits or monetary or other relief to any Covered Employee, Participant or Beneficiary other than the Claimant.*

App. 20a (emphasis added). And the class action waiver

> was expressly nonseverable from the rest of the arbitration provision: "[i]n the event a court of competent jurisdiction were to find [the class action waiver's] requirements to be unenforceable or invalid, then the entire [a]rbitration [p]rocedure . . . shall be rendered null and void in all respects."

App. 4a.

The defendants moved to dismiss this action based, in part, on the arbitration provision. App. 5a. Henry argued that the arbitration provision was invalid because (1) he did not consent to it and (2) it barred him from seeking in arbitration multiple remedies that are authorized by ERISA and would be available in court. App. 5a.

The district court denied the defendants' motion to dismiss based on the defendants' failure to obtain Henry's assent to the amendment adding an arbitration provision. App.5a. Having resolved the motion based on lack of mutual assent, the district court did not address Henry's argument that the "arbitration provision" would not allow him to effectively vindicate his rights in arbitration. App. 5a-6a.

The Third Circuit affirmed. It bypassed the issue of consent, "express[ing] no position on whether, and under what circumstances, an ERISA plan participant must consent to the addition of an arbitration provision to an ERISA plan document before the plan participant may be bound by it." App. 10a n.7. Instead, the court "agree[d] with Henry that the class action waiver is unenforceable because it requires him to waive statutory remedies." App. 10a. The court quickly dispatched the defendants' argument that Henry only sought individualized monetary relief by simply looking at the complaint, where Henry clearly sought the plan-wide relief Congress provided for when it recognized that fiduciaries cannot be expected to sue themselves. App. 14a. For example, Henry sought a declaratory judgment that the plan provision indemnifying fiduciaries is invalid. App. 4a.

The entire arbitration provision thus became invalid because of the defendants' non-severability clause. App. 15a. The Third Circuit added that the decision "does not

undermine" its prior holding that ERISA claims are arbitrable because the decision was limited to determining that such arbitration must address *all* ERISA statutory remedies raised by the claimant. App. 10a-11a n.8.

REASONS FOR DENYING THE WRIT

I. The Third Circuit's decision does not exempt ERISA from individual arbitration.

No circuit has held that ERISA claims cannot be arbitrated on an individual basis. In fact, the cases petitioner relies on to gin up a supposed conflict hold the exact opposite. The problem in every one of these cases was not the elimination of class procedures or the requirement to arbitrate individually, but the elimination of remedies provided by the statute. It is frivolous to argue that the circuits are divided over the question presented.

The problem, rather, is that the (non-severable) arbitration clause eliminated "the statutory remedies" plaintiff sought in his complaint. Pet. App. 10a. The clause barred "any remedy which has the purpose or effect of providing additional benefits or monetary or other relief" to anyone besides the plaintiff. Pet. App. 20a. Perhaps most obviously, this would prevent a plaintiff from obtaining removal of a breaching fiduciary—a remedy expressly provided by the statute. *See* 29 U.S.C. § 1109(a) (describing available remedies against breaching fiduciaries, "including removal of such fiduciary"). But it also prevents participants from pursuing other necessarily plan-wide remedies. Pet. App. 12a-13a. The court accordingly held the clause invalid.

Perhaps because petitioners tried the same tactic below that they do in their petition—claiming they are just trying to eliminate class procedures, when really they

are trying to rewrite ERISA's remedial scheme—the Third Circuit included a footnote plainly stating: "We have held that ERISA claims are arbitrable, *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1116 (3d Cir. 1993), and this opinion does not undermine that holding." App. 10a n.8. It added that the court would "solely address the question of whether an arbitration clause in an ERISA plan document may prevent a plan participant from pursuing the full range of statutory remedies created by ERISA." Pet. App. 10a-11a n.8.

In other words, the decision below did not find any problem whatsoever with arbitrating ERISA claims on an individual basis. The problem was entirely based on the specific, non-severable arbitration clause that petitioners chose to write.

The Seventh and Tenth Circuits, confronting the same arbitration clause, drew the same distinction. "[T]he problem with the plan's arbitration provision," the Seventh Circuit held, "is its prohibition on certain plan-wide remedies, not plan-wide representation." *Smith*, 13 F.4th at 622. The plan was free to "funnel[] its participants away from class actions," an "arbitration maneuver" that this "Court has blessed . . . many times." *Ibid.* And in light of these precedents, the court expressly held that nothing about "individualized arbitration [is] inherently incompatible with ERISA." *Ibid.*

The Seventh Circuit held, as the Third Circuit did here, that the clause impermissibly prevented the plaintiff from pursuing various remedies authorized by the statute. "Removal of a fiduciary—a remedy expressly contemplated by § 1109(a)—would go beyond just Smith and extend to the entire plan, falling exactly within the ambit of relief forbidden under the plan." *Id.* at 621. Thus, "what the statute permits, the plan precludes." *Ibid.* "In

that sense," the court explained, "the conflict in need of harmonization is not between the FAA and ERISA; it is between ERISA and the plan's arbitration provision, which precludes certain remedies that §§ 1132(a)(2) and 1109(a) expressly permit." *Id.* at 622-23. That the Seventh Circuit focused on a different plan-wide remedy, *see* Pet. 10, is of no moment. Petitioners do not explain how the distinction between replacing a fiduciary and other plan-wide remedies makes a difference. And just like the Third Circuit, the Seventh Circuit invalidated the portion of the arbitration provision that prohibited *all* plan-wide remedies, and was then forced to invalidate the entire arbitration provision because of Petitioners' non-severability clause.

For its part, the Tenth Circuit expressly held that "[t]he prohibition on class or collective actions, in our view, is not cause for invoking the effective vindication exception." *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Directors*, 59 F.4th 1090, 1106 (10th Cir. 2023). And while the Tenth Circuit noted that barring claims brought "in a representative capacity is potentially more problematic," it expressly declined to reach that question. *Ibid.* ("We ultimately do not need to decide that question[.]"). In short, "[i]t is not the Plan Document's requirement that a claimant engage in the procedural mechanism of individual arbitration that is the problem here." *Id.* at 1111. "[I]t is [the clause's] prohibition of any form of relief that would benefit anyone other than [the plaintiff] that directly conflicts with the statutory remedies available under 29 U.S.C. §§ 1109 and 1132(a)(2), (a)(3)." *Id.* at 1112.

None of these decisions is remotely inconsistent with the Ninth Circuit's unpublished memorandum disposition in *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 513-15 (9th Cir. 2019). Like *Dorman*, the Third, Seventh,

and Tenth Circuits all recognized that ERISA claims can be subject to individual arbitration. The only difference is that in Dorman, the arbitration clause at issue did not eliminate remedies offered by the statute. *Smith* 13 F.4th at 623 ("What is more, we see no conflict with *Dorman II*, either. The arbitration provision in that case, as far as we can tell, lacked the problematic language present here." (internal citation omitted)). It should be unsurprising that, faced with a different arbitration clause, the Ninth Circuit reached a different conclusion. In the Seventh Circuit's words: "[t]he plan here is different from the plan in *Dorman*, and so are the resolutions." *Ibid.*

In short, no circuit has held that ERISA claims are not arbitrable on an individual basis. No circuit has issued any decision "hostile to arbitration" in the context of ERISA § 502(a)(2) claims. Pet. 12. And no circuit has subjugated the FAA to ERISA. As the Seventh Circuit noted in *Smith*, "the conflict in need of harmonization is not between the FAA and ERISA; it is between ERISA and the plan's arbitration provision, which precludes certain remedies that §§ 1132(a)(2) and 1109(a) expressly permit." *Smith v. Bd. of Directors of Triad Mfg., Inc.*, 13 F.4th 613, 622–23 (7th Cir. 2021).

The circuits are in lockstep on each of these issues and issued decisions that *advance* arbitration. Petitioners claim that "[t]here is no dispute that, if enforced, the plain terms of the Plan's arbitration provision here require individual arbitration of Respondent's ERISA claims." Pet. 11. That is only partially true. The Plan's arbitration provision would require individual arbitration of *some* of Henry's ERISA claims and simply eliminate others. The Third Circuit, just like the Seventh and Tenth Circuits, only ruled that the provision must allow arbitration of *all* of Henry's ERISA claims. Thus, all the courts have done is faithfully apply the rule that an arbitration clause

cannot eliminate the statutory remedies that a plaintiff would be entitled to pursue in court. That is no cause for this Court's intervention.

II. The decision below does not conflict with this Court's precedents and was correct.

The Third, Seventh, and Tenth Circuits have carefully followed this Court's precedents in invalidating petitioners' overbroad arbitration clause. This Court has held that the FAA does not authorize "prospective waiver of a party's right to pursue statutory remedies" and thus arbitration clauses may not "forbid[] the assertion of certain statutory rights." *Am. Express*, 570 U.S. at 236 (cleaned up); *see also Viking River Cruises*, 142 S. Ct. at 1919 ("the FAA does not require courts to enforce contractual waivers of substantive rights and remedies"). Here, the Third Circuit correctly concluded (as did the Tenth and Seventh Circuits) that the clause is invalid because it prohibits remedies specifically authorized by ERISA. Pet. App. 15a; *Harrison*, 59 F.4th at 1112; *Smith*, 13 F. 4th at 621-22. In attempting to show a conflict with this Court's precedents, petitioners mischaracterize both this Court's rulings and the decision below.

A. The Third Circuit correctly applied this Court's precedents, which hold that arbitration clauses may not abridge statutory rights and remedies.

The Third Circuit's decision in this case was narrow. It compared the remedies sought by Mr. Henry (remedies available under ERISA) with the restrictive terms of the arbitration clause and concluded that the clause clearly prevented Henry from obtaining those remedies. Pet. App. 15a. Those remedies Henry seeks include voiding certain terms of the plan documents that purport to indemnify plan fiduciaries for their breaches of duty; a declaration that petitioners breached their fiduciary

duties; a declaration that the plan's indemnification clause is invalid; and fiduciary liability to disgorge profits and restore losses to the plan. *Ibid.*; *see, e.g.*, 29 U.S.C. §§ 1132(a)(2), (a)(3), 1109, 1110. Petitioners do not dispute the Third Circuit's conclusion that these remedies are barred by the arbitration clause.

Once the Third Circuit's narrow holding is understood, petitioners' supposed conflict disappears. This Court has "said that by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral forum." *Viking River Cruises*, 142 S. Ct. at 1919 (cleaned up); *see also, e.g.*, *Mitsubishi Motors*, 473 U.S. at 637 n.19 (noting "that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy"); *Preston v. Ferrer*, 552 U.S. 346, 359 (2008) (explaining that party "relinquishes no substantive rights . . . California law may accord him" but "cannot escape resolution of those rights in an arbitral forum"). That's because an arbitration agreement "does not alter or abridge substantive rights; it merely changes how those rights will be processed." *Viking River Cruises*, 142 S. Ct. at 1919.

In *American Express*, the Court called this principle the "effective vindication" doctrine. 570 U.S. at 235. Citing this Court, the Third Circuit correctly recognized that arbitration agreements are not enforceable when they "function[] as a 'prospective waiver of a party's right to pursue statutory remedies'" and thus the "[i]f an arbitration provision prohibits a litigant from pursuing his statutory rights in the arbitral forum, the arbitration provision operates as a forbidden prospective waiver" Pet.

App. 11a (quoting *American Express*, 570 U.S. at 236 (cleaned up)). Petitioners suggest that the "effective vindication" exception to enforcement of arbitration agreements is meaningless. Pet. 18. But *American Express* itself holds that the "effective vindication" doctrine would "certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." 570 U.S. at 236. And just last year, in *Viking River Cruises*, the Court held that an arbitration clause was invalid to the extent the clause barred a plaintiff from pursuing a "representative" state-law claim on behalf of a state agency. 142 S. Ct. at 1924-25 (holding that under state law, an arbitration agreement that "purported to waive" certain "representative" state-law claims was invalid, and the FAA did not preempt that state-law rule; FAA only preempted state-law rule that effectively mandated joinder of claims related to other individuals). In line with *American Express*, *Viking River Cruises* confirms that the FAA does not require enforcement of agreements that purport to waive substantive statutory rights and remedies. *See generally id.* at 1918-25. Petitioners do not cite a single decision of this Court holding that the FAA mandates enforcement of an arbitration clause that purports to eliminate statutory remedies that an individual plaintiff could obtain in court. That is not the law, and that is why the Third, Seventh, and Tenth Circuits have all held that this arbitration clause overreaches.

B. The supposed "conflicts" with this Court's precedents do not exist.

All of the supposed "conflicts" asserted by petitioners are based on mischaracterizations of the Third Circuit's decision and this Court's precedents.

1. Because this case has nothing to do with the validity of class-action waivers, there is no conflict between the decision below and this Court's decisions in *Epic Systems Corp. v. Lewis,* 138 S. Ct. 1612 (2018), or similar cases. The Third Circuit did not question the provision in the arbitration clause that waives class or collective actions. The court instead focused on the remedies that Henry, as an individual participant suing under 29 U.S.C. § 1132(a)(2), has the right to pursue in court and thus cannot be foreclosed in arbitration. Pet. App. 15a.

Because Henry has a statutory right under ERISA to pursue a representative claim and remedies that benefit both him and the plan as a whole, this Court's decisions addressing class-action waivers do not govern the outcome here. This Court has held that, because "parties may specify *with whom* they choose to arbitrate their disputes," a "party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683-84 (2010). The FAA thus generally requires enforcement of arbitration agreements that waive the procedural right to bring class or collective actions—that is, to aggregate the claims of multiple plaintiffs in a single proceeding. *See generally Am. Exp.*, 570 U.S. at 233-39. In *Epic Systems*, the Court rejected the argument that the National Labor Relations Act should be construed to include a "right to class actions." *Epic Sys.*, 138 S. Ct. at 1619; *see id.* at 1630 ("today's decision merely declines to read into the NLRA a novel right to class action procedures"). But the Third Circuit held no differently; it did not find any right to class or collective action procedures in ERISA. Petitioners' supposed conflict on this issue is imaginary.

While falsely insisting that the Third Circuit disallowed individual arbitration, petitioners make no effort to attack the Third Circuit's actual holding: that the clause is invalid because it purports to eliminate plan-wide remedies expressly authorized by ERISA. Petitioners never explain why Henry should not be able, in arbitration, to obtain statutory remedies that he could pursue in court on a non-class basis—such as voiding of indemnification agreements that violate ERISA.

2. Petitioners' assertion of a conflict with ERISA cases like *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020), and *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008), is baffling—and, like petitioners' other arguments, based on inaccurate descriptions of this Court's precedents.

Thole is a standing case; the Court held that a plan participant who asserts a claim under § 1132(a)(2) must show the injury-in-fact necessary to support Article III standing. 140 S. Ct. at 1619-21. *Thole*, however, does not change the fact that, for a plaintiff with standing (like Henry), §§ 1132(a)(2) and 1109 authorize multiple substantive remedies that benefit individual plan participants and the plan as a whole. Those are the remedies that Henry has a right to pursue, and that the arbitration clause impermissibly purports to foreclose.

Likewise, nothing in *LaRue* suggests that a plan sponsor, by adopting a restrictive arbitration clause, may prevent plan participants from pursuing remedies specifically authorized by ERISA. *LaRue* addressed a claim that the fiduciaries failed to obey the plaintiff participant's directions about how to invest his account. Even though that fiduciary breach affected only the plaintiff's account, the Court held that the plaintiff could recover under § 1109. The Court explained that although

the statute "does not provide a remedy for individual injuries distinct from plan injuries," it "does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account." *LaRue*, 552 U.S. at 256. Petitioners misread *LaRue*, claiming it holds that "plan participants have a right to litigate claims individually, rather than on behalf of the plan." Pet. 16. In fact, *LaRue* merely recognizes that, in the context of defined-contribution plans, it is possible for a fiduciary breach to only injure plan assets in one participant's account; the remedy under § 1109 is still for "plan injuries." 552 U.S. at 256.

But even if petitioners' reading of *LaRue* were correct, they still haven't shown a conflict with the decision below. *LaRue* does not even discuss, much less displace, a participant's right to seek other remedies authorized by §§ 1132(a)(2) and 1109, such as a declaratory judgment of breach of a fiduciary duty. What petitioners seem to be arguing is that, if a plan participant is not obligated in every case to pursue plan-wide remedies, then an arbitration clause can foreclose those remedies. But they do not explain why that would be so, and this reasoning would mean that no claim or remedy is safe from a waiver via a contract provision entitled "arbitration."

Petitioners' footnote argument that the arbitration clause must be enforced merely because it is part of the plan, barely deserves a response. Pet. 11-12 n.5. The arbitration clause on its face conflicts with ERISA's specific remedial provisions. And plan terms that are "[in]consistent with" ERISA's core statutory framework are void and unenforceable. 29 U.S.C. § 1104(a)(1)(D); *see also id.* § 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."); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424 (2014) ("§ 1104(a)(1)(D) requires fiduciaries to follow plan documents so long as they do not conflict with ERISA"). What petitioners attempted to do here is write into the plan a provision saying "no participant or beneficiary can bring the action authorized by §§ 1132(a)(2) and 1109 to hold plan fiduciaries liable" and protect the plan. *See* Pet. App. 34a. The notion that ERISA makes sacrosanct a plan provision that purports to re-write the statute's enforcement provisions and eliminate remedies is untenable.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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