No. 23-122

IN THE

Supreme Court of the United States

WILMINGTON TRUST, N.A., *et al.*,

Petitioners,

v.

MARLOW HENRY, ON BEHALF OF THE BSC VENTURES HOLDING, INC. EMPLOYEE STOCK OWNERSHIP PLAN,

Respondent.

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

PETITIONERS' REPLY BRIEF

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REPLY BRIEF

Respondent attempts to circumvent this Court's "class-action waiver" decisions by drawing an artificial line between proceeding individually and seeking individual relief. He blames Petitioners for drafting a non-severable arbitration provision, suggesting the Third Circuit would have enforced the arbitration provision had the court been able to sever the requirement that he pursue only individual relief because the Third Circuit merely forbid arbitration provisions that limit claims to individual relief. (BIO at 1, 10–11.) Put another way, Respondent has no issue with proceeding in arbitration alone provided he can arbitrate for the entire plan and every participant, even if they are not involved or do not agree with the remedies sought. "That is a distinction without a difference." Reply Brief of Petitioners at 1, *Argent Trust Co., et al. v. Harrison*, No. 23-30 (U.S. Sept. 8, 2023).[1]

The right to proceed collectively under ERISA and the right to obtain plan-wide relief are one and the same. If a single participant can arbitrate and obtain monetary relief that inures to the supposed benefit of all plan participants or secure equitable remedies that apply plan-wide, that is not an "individual" proceeding. Respondent does not offer any example of an ERISA claim he agrees should be sent to individual arbitration because, in his view, none exists. In effect, the Third Circuit (and Seventh and Tenth Circuits) created a *per se* prohibition on individual arbitration of ERISA claims.

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1. The certiorari petition pending in *Argent Trust Company* raises a similar question.

The Third Circuit declined to enforce the arbitration provision under the "effective vindication" exception. That exception, which this Court has never applied, purports to override the FAA's mandate to enforce arbitration provisions as written. In applying the exception, the Third Circuit found that ERISA creates a non-waivable right for each plan participant to bring a representative action (outside of a Rule 23 class action) to obtain plan-wide relief. (Pet. App. at 13a–14a.) In doing so, the Third Circuit split from the Ninth Circuit and ignored this Court's long-standing decisions upholding individual arbitration of statutes expressly permitting the pursuit of collective relief (i.e., class actions) in court. (*See* Pet. at 11–17.) The Court should grant this Petition to make clear to the lower courts (again) that the effective vindication exception—to the extent it remains viable—only protects "the assertion of certain statutory rights," not all available remedies (such as plan-wide relief) in a statute. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013).

There is nothing unique about ERISA that warrants exempting the statute from the FAA's reach. ERISA permits a plan participant to obtain "appropriate relief," but nothing in the statute establishes that "appropriate relief" must include plan-wide relief, particularly when an ERISA plan requires individual proceedings. At most, ERISA can be read to *permit* plan-wide relief, but that does "'not mean that individual attempts at conciliation were intended to be barred.'" *See id.* at 237 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)).

In finding an unfettered right to pursue plan-wide relief, the Third Circuit's decision also conflicts with

this Court's decisions in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020), and *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). Respondent misreads *Viking River Cruises* and fails to show how, given *Thole*, a participant's representative ERISA claim can be an "agent or proxy" claim, rather than a form of "claim joinder" requiring individual arbitration. Respondent also attempts to sidestep *LaRue v. DeWolff, Boberg, & Assocs.*, 552 U.S. 248 (2008), which holds that the core of the ERISA participant's right in the defined contribution context is to remedy an injury to his own account. The Petition explains how these decisions establish that the Third Circuit should have enforced the Plan's arbitration provision because it allows a participant to make *himself* whole—the only necessary relief for a plan participant under ERISA.

To be sure, courts have interpreted ERISA as contemplating the *possibility* of a participant seeking collective relief for the plan. But this Court consistently rejects lower courts' efforts to invoke the effective vindication exception to avoid individual arbitration of statutes expressly providing for collective relief in court. *See Am. Express Co.*, 570 U.S. at 237 ("[S]tatutory permission" does "'not mean that individual attempts at conciliation were intended to be barred'" (quoting *Gilmer*, 500 U.S. at 32)).

Further, the "individual" arbitration rubric contemplated by the Third, Seventh, and Tenth Circuits creates more problems than it purports to fix. Respondent could proceed in arbitration with no procedural safeguards to protect absent plan participants, creating the risk

that a single participant could enter a settlement to the detriment of the absent participants, preclude their future claims for their own relief, or obtain plan-wide relief that these members do not want.

The Court should grant the Petition to harmonize the lower courts' decisions and the FAA and ERISA.

A. ERISA Does Not Provide a Non-Waivable Right to Seek Plan-Wide Relief.

The Third Circuit misapplied the effective vindication exception because the court read into ERISA a fundamental, non-waivable right that does not exist. Respondent claims that he "has a statutory right under ERISA to pursue a representative claim and remedies that benefit both him and the plan as a whole." (BIO at 15.) But he offers no explanation for how ERISA's text is different from the statutes this Court has found can be individually arbitrated despite the statute's express language permitting collective relief.[2] (Pet. at 13–14.) In fact, ERISA is *weaker than* these other statutes because nowhere does ERISA explicitly provide that a participant can pursue plan-wide (i.e., collective) relief. ERISA does not justify the exemption to the FAA that the Third Circuit's decision creates. *See Epic Sys.*, 138 S. Ct. at 1619 ("It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another.").

2. Respondent's silence is particularly puzzling because he claims Petitioners "fail[] to acknowledge the actual holding of the court below" and "make no effort to attack the Third Circuit's actual holding." (BIO at Question Presented, 16.) Petitioners squarely address why the effective vindication exception does not apply. (*See, e.g.*, Pet. at 17–24.)

The parties agree that the operative ERISA provisions are Section 409 (29 U.S.C. § 1109) and Section 502 (29 U.S.C. § 1132). Respondent fails to explain how either section indicates a congressional intent to create a non-waivable right for a participant to seek collective relief. Of the two, only Section 502 addresses a plan participant's rights to bring an action "for *appropriate* relief under Section 409." 29 U.S.C. § 1132(a)(2) (emphasis added). Section 502 is silent on *what* relief is considered "appropriate" or what the *scope* of that relief may be. What is clear is that Section 502 does not say that individual participants always can bring claims for plan-wide relief.

Section 409 likewise does not move the needle for Respondent. That section says nothing about individual participants' rights. Rather, Section 409 addresses the potential consequences for a fiduciary that breaches its duties and makes the fiduciary liable to the *plan* for the full losses and ill-gotten gains caused by the breach. *See* 29 U.S.C. § 1109(a). That a fiduciary is liable to the entire plan, however, does not address whether an *individual* participant has an immutable right to obtain the full recovery on behalf of the plan.

At most, Sections 502 and 409 can be read together to permit individual plan participants to seek collective relief on behalf of the entire plan absent any restrictions on that permissive ability. But this Court consistently has upheld arbitration provisions mandating individual arbitration (i.e., individual relief) of claims under statutes that also contemplate class proceedings (i.e., collective relief) using more explicit statutory language than ERISA. *See, e.g.*, *Gilmer*, 500 U.S. at 32 (enforcing individual arbitration under statute expressly allowing employees to recover

on behalf of "themselves and other employees similarly situated"); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 99–100 (2012) (enforcing individual arbitration under Credit Repair Organization Act, which provides a "right to sue," references "class action," and declares "[a]ny waiver" of rights under the statute are "void"). That individuals *can* pursue collective or representative relief under a statute in court does not mean they *must* be permitted to do so in arbitration. (*See* Pet. at 13–15.) This conclusion applies especially to ERISA, where there is no express "right" to proceed collectively, let alone statutory text establishing such a right cannot be waived in an arbitration provision.

B. This Court and the Ninth Circuit Interpret ERISA to Protect Individual Relief Only.

Upholding the Third Circuit's decision also creates tension with this Court's precedents that speak to individualized arbitration of claims that could proceed collectively. Permitting the Third Circuit's use of the effective vindication exception would end-run *LaRue*, *Viking River Cruises*, and *Thole.* In *LaRue,* this Court held that a participant in a defined contribution plan may bring Section 502(a)(2) and 409(a) claims as a remedy for harm to the participant's individual plan account, even if such harm did not affect the larger plan. The *LaRue* plaintiff was a participant in a 401(k) plan, which, like the Plan here, is a defined contribution plan. 552 U.S. at 250–51. Thus, despite Respondent's assertion to the contrary (BIO at 17), *LaRue* holds that in the context of a defined contribution plan, a participant can be made whole on an individualized basis, and that the emphasis on protecting the "entire plan" from fiduciary misconduct present in the defined benefits plan context is not present

in the defined contribution plan context. *LaRue,* 552 U.S. at 255–56. Put differently, pursuing relief on behalf of the entire plan is not imperative in the context of a defined contribution plan, as the participants each can be made whole individually. That is precisely the relief available to Respondent under the Plan's arbitration provision. Nothing in the Plan Document waives Respondent's right to seek his full panoply of individual remedies.

Respondent further ignores this Court's prior rulings that a plan participant does not have an inherent right to seek plan-wide relief. For example, Respondent's treatment of *Viking River Cruises* disregards the important distinction between an "agent or proxy" representative action and a "claim joinder" representative action. (*See* BIO at 13–14.) In *Viking River Cruises*, this Court enforced individual arbitration of claims under the California Private Attorneys General Act ("PAGA") even though PAGA expressly permits "representative claims" that were "predicated on code violations sustained by other employees." 142 S. Ct. at 1915–16, 1922–24. It did so because the type of representative action allowed by PAGA was of the "claim joinder" variety—one person suing on behalf of absent persons—which could be curtailed by an arbitration provision. *See id.* at 1923–24.

This Court determined that PAGA's "built-in mechanism of claim joinder" conflicted with and was preempted by the FAA because it unduly circumscribed the freedom of parties to determine "'the issues subject to arbitration' and 'the rules by which they will arbitrate.'" *Id.* at 1923 (citation omitted). This, in turn, "would permit a party to expand the scope of the arbitration by introducing claims that the parties did not jointly agree

to arbitrate," *id.*, and "effectively coerces parties to opt for a judicial forum rather than 'forgo[ing] the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution.'" *Id.* at 1924 (citation omitted). This Court therefore held that the FAA preempts the "claim joinder" variety of representative action.

Conversely, this Court recognized that an "agent or proxy" representative action, in which the plaintiff stands in the shoes of another entity, is wholly distinct from a claim joinder representative action. *See id.* at 1916. This is because an agent or proxy representative action "does not produce a shift from a situation in which the arbitrator must 'resolv[e] a single dispute between the parties to a single agreement' to one in which he or she must 'resolv[e] many disputes between hundreds or perhaps even thousands of parties.'" *Id.* at 1922 (citation omitted). This form of claim, akin to an ERISA plan participant standing in the shoes of the *plan* and litigating on the *plan*'s behalf, cannot be subject to individual arbitration because the plaintiff is litigating another's interest. *See id.*

That *Thole* was a "standing case" (BIO at 16) provides even greater support to Petitioners' position. In *Thole*, this Court addressed the fundamental question of what it means for a plan participant to suffer an injury under ERISA, speaking to the core of what rights must be protected under the effective vindication exception. This Court held that a participant must have an individualized injury to bring an ERISA claim, separate from any alleged injury to the participant's plan. *Thole*, 140 S. Ct. at 1620. This holding cannot coexist with Respondent's purported right to stand in the shoes of the Plan and bring ERISA

claims on its behalf. Were that so, *Thole* should have come out the opposite way, meaning an ERISA plaintiff could piggyback off a plan's alleged injury to establish standing.[3] *See id.* (noting in an ERISA claim, unlike a *qui tam* action, "the plan's claims have not been legally or contractually assigned" to participants).

Thole forecloses Respondent's argument that he stands as proxy for the plan, so Respondent is left with a "claim joinder" representative claim that *Viking River Cruises* makes clear can be waived by an arbitration provision. Because an ERISA claim is properly construed as a procedural form of claim joinder, *Epic Systems* squarely applies to the question that was before the Third Circuit. As the Petition explained (Pet. at 11–17), there is no clearly expressed congressional intention in ERISA to create disharmony with the FAA, *see Epic Systems*, 138 S. Ct. at 1624, so the Plan's arbitration provision is enforceable. *LaRue* confirms that the arbitration provision's waiver of Respondent's ability to seek plan-wide relief does not harm Respondent because he can be made whole on an individualized basis. The Third Circuit's decision fails to harmonize the FAA and ERISA because it displaces the FAA's mandate to enforce valid arbitration provisions under a mistaken reading of ERISA.

Dorman v. Charles Schwab Corp., 780 F. App'x 510, 514 (9th Cir. 2019) is the only case that applied *LaRue* consistently with *Thole*, *Viking River Cruises*, and *Epic*

3. As *Thole* recognized, multiple layers of monitoring—including the Department of Labor's enforcement abilities—exist to protect plan participants even if individual participants cannot seek plan-wide relief. 140 S. Ct. at 1621.

Systems by holding that ERISA claims can be arbitrated individually. Respondent's insinuation that *Dorman* would have come out differently had the Ninth Circuit been faced with a different arbitration provision is wholly unsupported. (*See* BIO at 11.) The Ninth Circuit explicitly stated that claims brought under 29 U.S.C. § 1132(a)(2) "are inherently individualized when brought in the context of a defined contribution plan," regardless of whether the claims "seek relief on behalf of a plan[.]" *Dorman*, 780 F. App'x at 514 (citing *LaRue*, 552 U.S. at 256).

By arguing that an ERISA plan's arbitration provision must allow participants to pursue plan-wide remedies, Respondent asks this Court to sap the arbitration provision and subject Petitioner to the exact type of coercion into a judicial forum that this Court rejected in *Viking River Cruises*. Further, Respondent asks this Court to elevate the effective vindication exception over *LaRue*, *Viking River Cruises*, and *Thole*, which demonstrate that Respondent does not assert an "agent or proxy" representative claim, does not have an immutable right to pursue plan-wide relief individually, and can be made whole on an individual basis—all of which dictate that the arbitration provision should be enforced.

C. Individual Arbitration for Plan-Wide Relief Is Not "Individual."

Respondent argues this Court's line of decisions upholding individual arbitration under various statutes does not apply here because "this case has nothing to do with . . . class-action waivers." (BIO at 15.) Respondent does not dispute he can arbitrate individually under ERISA, but rather claims that he must be able to obtain relief on

behalf of the entire plan and absent plan members. (*Id.*) This is a hollow distinction that ignores the practical realities of arbitrating ERISA claims on an "individual basis." An arbitration is not "individual" if the outcome affects the plan and all plan participants.

Practically, the "individual" arbitration scenario endorsed by the Third Circuit raises due process concerns because an individual would be permitted to arbitrate on behalf of absent members with no procedural safeguards for those members in the proceeding or outcome. This result is inconsistent with how lower courts define a participant's rights under ERISA. For example, the Second Circuit observed that individual ERISA actions cannot be "'brought in a representative capacity on behalf of the plan' if the plaintiff does not take any steps to become a bona fide representative of other interested parties." *Coan v. Kaufman*, 457 F.3d 250, 257 (2d Cir. 2006) (citation omitted).

Further, the decisions by the Third, Seventh, and Tenth Circuits "create significant practical difficulties and opportunities for abuse." *Id.* at 261. Respondent could, for example, obtain plan-wide relief that other plan participants do not want, such as removing a fiduciary. Respondent also may reach "a settlement with the defendants that would disproportionately, or even exclusively, benefit [him]." *Id.* "Without the benefit of a procedural mechanism for the protection of interested parties, it is unclear how the court could satisfy itself that their interests were in fact being taken into consideration without a great deal of improvisation, effort, and expense." *Id.* at 261–62.

The result of Respondent's "individual" arbitration is not individual at all. Absent class members would be bound or impacted without any meaningful opportunity to participate, leading to the very outcome the Third Circuit claims to avoid—a waiver of individual rights under ERISA.

CONCLUSION

This Court should grant the Petition.

DATED this 25th day of September, 2023.

Respectfully submitted,

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