No. 23-30

In the Supreme Court of the United States

ARGENT TRUST COMPANY, ET AL., PETITIONERS,

v.

ROBERT HARRISON.

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

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioners say that their question presented is whether ERISA participants can be compelled, through a valid arbitration provision, to "submit [their] claims to individual arbitration." Pet. i. The Tenth Circuit below answered that question "yes." Pet. App. 40a (plan's provision for "individualized" rather than "class or collective action" procedures is "protected by the FAA"); *id.* at 41a ("It is not the Plan Document's requirement that a claimant engage in the procedural mechanism of individual arbitration that is the problem here."). Indeed, every court of appeals to consider the issue has *already* reached the holding that petitioners ask of this Court: "Nothing in ERISA precludes individual arbitration." Pet. i; *see infra* 11-15.

Petitioners lost this case for a different reason. They drafted an 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 particular arbitration clause has invalidated it for that reason, and that reason alone. 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

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

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INTRODUCTION

Petitioners ask this Court to grant certiorari and hold that ERISA claims are subject to individual arbitration. There is no need. The circuits unanimously agree that ERISA claims are subject to individual arbitration.

There's a reason that petitioners wrote an irrelevant question presented and barely discuss the reasoning of the Tenth Circuit below or the other two circuits that have invalidated this particular arbitration clause. Petitioners chose to draft a clause that goes far beyond requiring individualized arbitration procedures. They created a non-severable provision that eliminates substantive remedies contemplated by the statute. For example, the non-severable clause prohibits any remedy in arbitration that is "binding on the Plan Administrator or Trustee" beyond the individual plaintiff. Pet. App. 29a. Yet ERISA allows

plaintiffs to pursue "removal of [a breaching] fiduciary." 29 U.S.C. § 1109(a). And a fiduciary cannot be removed only with respect to an individual plaintiff. Petitioners do not dispute that this express statutory remedy is barred by their so-called arbitration clause.

Three circuits have now confronted this exact arbitration clause, and each of them has found it invalid. The Department of Labor has likewise filed multiple amicus briefs urging courts to reach that result. *See infra* 11. But that is *not* because the clause requires individual arbitration. It is because the clause eliminates statutory remedies. In reaching this conclusion, the circuits have been careful to explain that "[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." Pet. App. 41a. "The problem with the plan's arbitration provision," the courts have held, "is its prohibition on certain plan-wide remedies, not plan-wide representation." *Smith v. Bd. of Directors of Triad Mfg., Inc.*, 13 F.4th 613, 622 (7th Cir. 2021). As the Seventh Circuit bluntly put it: nothing about "individualized arbitration [is] inherently incompatible with ERISA." *Ibid.*; *see also Henry v. Wilmington Trust NA*, 72 F.4th 499, 507 & n.9 (3d Cir. 2023) (adopting the reasoning of the decision below and *Smith*).

There is accordingly no dispute over the question presented; everyone agrees ERISA claims are subject to individual 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 Tenth 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, 236 (2013) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)). Not content to merely provide for arbitration, petitioners wrote an arbitration clause that undisputedly bars multiple remedies that are available to individual participants under ERISA. The lower courts have properly refused to enforce it.

STATEMENT

A. 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 be compelled to prospectively waive their substantive legal rights or statutory remedies in the guise of stipulating to arbitration. *E.g.*, *Am. Exp.*, 570 U.S. at 236 ("effective vindication" exception to enforcing arbitration agreements "finds its origin in the desire to prevent prospective waiver of a party's *right to pursue* statutory remedies" (cleaned up)). 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 Cruises*, 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." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). It empowered participants to sue in federal court on multiple grounds, including enforcing their rights to promised benefits and seeking a range of equitable remedies against breaching fiduciaries. 29 U.S.C. § 1132(a), (e).

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). In addition, a court may remove a breaching fiduciary and appoint an independent fiduciary. *Ibid.* ("including removal of such fiduciary"); *see e.g.*, *Delgrosso v. Spang & Co.*, 769 F.2d 928, 937 (3d Cir. 1985) ("Removal and replacement of a fund administrator under ERISA has been found appropriate where the administrator has been in substantial violation of his fiduciary duties.").

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) (§ 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, 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 makes clear 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." Another provision of that subchapter expressly bars "[i]nterference with protected rights" under "this subchapter," which includes § 1132. *Id.* § 1140.

B. Facts And Procedural History

1. Robert Harrison is a former employee of Envision Management Holding, Inc. and a vested participant in the Envision Employee Stock Ownership Plan (ESOP). Pet. App. 3a-4a. Mr. Harrison brought suit under ERISA Section 502, 29 U.S.C. § 1132, on behalf of himself and the Plan, against the former owners of Envision (the "Seller Defendants"), Envision's Board of Directors, the Plan Committee, and the ESOP Trustee (Argent). He asserts fiduciary breach and prohibited transaction claims in connection with the creation and administration of the ESOP. Pet. App. 46a-47a.

As the Tenth Circuit summarized, "Harrison alleges that the Seller Defendants, with the effective assistance of Argent, were able to financially benefit by selling Envision to the ESOP for significantly more than it was worth, while at the same time leaving the ESOP with a $154.4 million debt." *Id.* at 6a. "[N]otwithstanding the sale," the Seller Defendants "were able, with the assistance of Argent, to retain control of Envision." *Ibid.*

The complaint sought relief including "a declaration that the Defendants have breached their fiduciary duties under ERISA, removal of Defendant Argent as the trustee of the ESOP, [and] appointment of a new independent fiduciary to manage the ESOP." *Id.* at 47a. The complaint further sought "an order that Defendant Argent restore losses resulting from the alleged breach, an order that Defendants provide equitable relief to the ESOP, and an order enjoining the Defendants from dissipating, transferring, or disposing of any proceeds received from the allegedly improper transaction." *Ibid.*

Even though a summary plan description, dated April 1, 2018, assured employees of their right to file suit in federal court, *id.* at 8a n.2, defendants moved to compel arbitration. They pointed to Section 21 of the plan document, which includes the following:

> 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 only 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 Eligible Employee, Participant, or Beneficiary other than the Claimant*. For instance, with respect to any claim brought under ERISA § 502(a)(2) to seek appropriate relief under ERISA § 409, the Claimant's remedy, if any, shall be limited to (i) the alleged losses to the Claimant's individual Account resulting from the alleged breach of fiduciary duty, (ii) a pro-rated portion of any profits allegedly made by a fiduciary through the use of Plan assets where such

pro-rated amount is intended to provide a remedy solely to Claimant's individual Account, and/or (iii) such other remedial or equitable relief as the arbitrator(s) deems proper so long as such remedial or equitable relief does not include or result in the provision of additional benefits or monetary relief to any Eligible Employee, Participant or Beneficiary other than the Claimant, *and is not binding on the Plan Administrator or Trustee with respect to any Eligible Employee, Participant or Beneficiary other than the Claimant*. The requirement that (x) all Covered Claims be brought solely in a Claimant's individual capacity and not in a purported group, class, collective, or representative capacity, and (y) that no Claimant shall be entitled to receive, and shall not be awarded, any relief other than individual relief, shall govern irrespective of an AAA rule or decision to the contrary and is a material and non-severable term of this Section 21. The arbitrator(s) shall consequently have no jurisdiction or authority to compel or permit a class, collective, or representative action in arbitration, to consolidate different arbitration proceedings, or to join any other party to any arbitration. Any dispute or issue as to the applicability or validity of this Section 21(b) (the 'Class Action Waiver') shall be determined by a court of competent jurisdiction. Moreover, nothing in this Arbitration Procedure shall preclude seeking interim or provisional relief or remedies in aid of arbitration from a court of competent jurisdiction. In the event a court of competent jurisdiction were to find these requirements to be unenforceable or invalid, then the entire Arbitration Procedure

> (i.e., all of this Section 14) shall be rendered null and void in all respects.

Pet. App. 29a-30a (emphasis added).

Mr. Harrison argued that this purported arbitration clause was invalid because it barred him from seeking in arbitration multiple remedies that are authorized by ERISA and would be available in court. *Id.* at 53a. Defendants (petitioners here) did not dispute that the arbitration clause would bar Mr. Harrison from pursuing remedies available under ERISA, including removal of a plan fiduciary and other equitable relief. Instead, they argued that arbitration provisions may "curtail[]" a party's claims and are only invalid "if they prohibit *any federal claim whatsoever*." *Ibid.*

The district court rejected that argument, explaining that the "arbitration provision prohibits remedies that are explicitly provided for by ERISA." *Id.* at 59a-60a. That left Mr. Harrison "unable to effectively vindicate his statutory cause of action in the arbitral forum." *Id.* at 60a. Agreeing with the Seventh Circuit's reasoning in *Smith*, the court held that the limitation on statutory remedies was unenforceable. *Id.* at 56a-61a. Because the arbitration clause provides that if any part is found "unenforceable or invalid," the entire clause is "null and void in all respects," the district court invalidated the clause and denied the motion to compel arbitration. *Id.* at 52a, 60a-61a.

2. On appeal, the Tenth Circuit affirmed. Petitioners offer a one-paragraph, largely inaccurate summary of the Tenth Circuit's decision. The Tenth Circuit did not invalidate the clause "because it prohibited [Mr. Harrison] from bringing a representative ERISA claim." Pet. 9. The court noted that the clause's prohibition on any representative claim was "potentially . . . problematic," given the nature of claims under 29 U.S.C. § 1132(a)(2), but concluded it "d[id] not need to decide that question." Pet.

App. 31a. The court instead held that the clause was invalid because it was "intended to foreclose any . . . planwide relief" and thus "purports to foreclose a number of remedies that were specifically authorized by Congress." *Id.* at 33a. The court identified multiple remedies sought by Mr. Harrison which would benefit both him and the plan as a whole, including removal and replacement of a plan fiduciary, restoration of plan losses, and declaratory relief voiding certain indemnification agreements intended to protect petitioners from liability for a breach of duty. *Id.* at 32a. As the court explained, these remedies "would clearly 'ha[ve] the purpose or effect of providing additional benefits or monetary or other relief to' all of the Plan participants and beneficiaries"—and thus the remedies are "barred by" the arbitration clause. *Ibid.*

Petitioners do not dispute that Mr. Harrison seeks these remedies, that the remedies are authorized by ERISA and could be awarded to Mr. Harrison in court, or that the arbitration clause bars them. As the Tenth Circuit noted, the clause "effectively prevents any claimant from pursuing the types of claims that" Mr. Harrison asserts, and "it is not clear what remedies Harrison would be left with" if the clause were enforced. *Id.* at 34a & n.5.

Instead, petitioners mischaracterize the decision below. Contrary to petitioners' assertion, the Tenth Circuit did not hold that *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), or any other FAA case, was "inapplicable to ERISA claims." Pet. 9. Nor did it reject individual arbitration under ERISA. Pet. i. The court agreed that, consistent with *Epic Systems*, the arbitration clause's requirement for individualized instead of class or collective action procedures was "not problematic" and was "protected by the FAA." Pet. App. 33a, 40a. *Epic Systems* does not, however, address an arbitration clause like the

one here, which bars an individual litigant from pursuing statutory remedies. *Id.* at 40a.

The U.S. Department of Labor filed an amicus brief below that made exactly this point. The Department noted that the "circuit courts that have considered the arbitrability of ERISA claims . . . are in agreement that ERISA claims are generally arbitrable." Br. of U.S. Sec'y of Labor 14, *Harrison v. Envision Mgt. Holding Co.*, No. 22-1098, Doc. No. 010110735206/181 (10th Cir. Sept. 7, 2022); *see also id.* at 16-17 (noting that class-action waivers in arbitration clauses are generally enforceable). Here, however, the defendants "attempted to re-write ERISA's *substantive* remedial scheme through an arbitration agreement." *Id.* at 21. As the Department explained, "prohibit[ing] participants from pursuing a substantive remedy in arbitration that ERISA allows them to seek in court" is "impermissible." *Id.* at 25.

The Tenth Circuit agreed. Looking to this Court's precedents and the Seventh Circuit's decision in *Smith*, the court found fault with the arbitration clause because it did not allow Mr. Harrison to effectively vindicate his statutory cause of action. Applying this Court's effective vindication doctrine, the Tenth Circuit invalidated the clause because it precludes "statutory remedies that are outlined in ERISA." Pet. App. 40a. And because that limitation on remedies was invalid, the non-severability language in the arbitration clause rendered it "null and void in all respects." *Id.* at 44a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CIRCUIT SPLIT OVER WHETHER ERISA CLAIMS ARE SUBJECT TO 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 split 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.

In the decision below, for example, 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." Pet. App. 31a. 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 41a.

The problem, rather, is that the (non-severable) arbitration clause eliminated "the statutory remedies" plaintiff sought in his complaint. *Id.* at 31a. 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, and any remedy that was "binding on the Plan Administrator or Trustee" beyond the individual plaintiff. *Id.* at 28a-29a. 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"). 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 Tenth

Circuit closed by reiterating: "It is not [the clause's] prohibition on class actions that is problematic. Rather, it is [the clause's] prohibition of any form of relief that would benefit anyone other than Harrison that directly conflicts with the statutory remedies available under 29 U.S.C. §§ 1109 and 1132(a)(2), (a)(3)." Pet. App. 36a-37a.

In other words, the decision below reached the very answer to the question presented that petitioner urges: ERISA claims are arbitrable on an individual basis. The problem was entirely based on the specific, non-severable arbitration clause that petitioners chose to write.

The Seventh Circuit, confronting the same arbitration clause, drew the same distinction. "[T]he problem with the plan's arbitration provision," the court 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 Tenth 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.

Like the Tenth Circuit, the Seventh Circuit reached the answer petitioners want on the question presented: ERISA claims are subject to individual arbitration. What the court rejected was defendants' attempt to write an arbitration clause that eliminates remedies that the statute authorizes. The Seventh Circuit's decision does not provide so much as a toe-hold for a purported circuit split.

Nor does the Third Circuit's decision in *Henry*, 72 F.4th 499. Once again facing the same arbitration clause at issue here, the Third Circuit included essentially the same caveat as the Seventh and Tenth. The court expressly noted it had previously "held that ERISA claims are arbitrable, and this opinion does not undermine that holding." *Id.* at 506 n.8 (internal citation omitted). The court, rather, "*solely* address[ed] 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." *Ibid.* (emphasis added).

And just like the Seventh and Tenth Circuits, the Third Circuit had little trouble concluding that the clause "purports to waive plan participants' rights to seek remedies expressly authorized by statute." *Id.* at 507; *see id.* at 507 & n.9 (following the reasoning of *Smith* and *Harrison*). In other words, the problem again had nothing to do with requiring individual arbitration; the problem was eliminating the remedies a plaintiff would be entitled to pursue in court.

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 Tenth, Seventh, and Third Circuits all recognized that ERISA claims can be subject to individual arbitration. The only difference is that in *Dorman*, the particular 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. To the contrary, the circuits are in lockstep on each of these issues. All they 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 Tenth, Seventh, and Third 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 Tenth Circuit correctly concluded (as did the Third and Seventh Circuits) that the clause is invalid because it prohibits remedies specifically authorized by ERISA. Pet. App.

32a-34a; *Henry*, 72 F.4th at 507; *Smith*, 13 F.4th at 621-22.

Contrary to petitioners' rhetoric, a court's invalidation of an arbitration clause does not necessarily demonstrate "hostility to arbitration." Courts *must* invalidate arbitration clauses that bar substantive statutory remedies. In attempting to show a conflict with this Court's precedents, petitioners mischaracterize both this Court's rulings and the decision below.

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

The Tenth Circuit's decision in this case was narrow. It compared the remedies sought by Mr. Harrison (remedies available under ERISA) with the restrictive terms of the arbitration clause and concluded that the clause "clearly prevent[ed]" Mr. Harrison from obtaining those remedies. Pet. App. 32a. Those remedies, sought by Mr. Harrison here, include removal and replacement of the fiduciary; 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; 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 Tenth Circuit's conclusion that "because all of these forms of relief would clearly 'hav[e] the purpose or effect of providing additional benefits or monetary or other relief to' all of the Plan participants and beneficiaries," they are "barred" by the arbitration clause. Pet. App. 32a (quoting arbitration clause).

That is, petitioners effectively concede that the arbitration clause does not allow Mr. Harrison to pursue in arbitration the substantive remedies that he seeks in his complaint and could pursue in court. *See* Pet. 8-9, 12-13 &

n.3 (acknowledging that arbitration clause bars remedies that benefit plan, such as removal of breaching fiduciary).

Once the Tenth 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 Tenth Circuit correctly recognized that the doctrine "'finds it origin in the desire to prevent prospective waiver of a party's right to pursue statutory remedies'" and thus the "key question is 'whether the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.'" Pet. App. 11a (quoting *Am. Exp.*, 570 U.S. at 235-36 (cleaned up)). Petitioners suggest that the "effective vindication" exception to enforcement of arbitration agreements is meaningless, even a "dead letter." Pet. 4. 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*, this 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.

Here, the Tenth Circuit held—and petitioners do not dispute—that the arbitration clause "purports to foreclose a number of remedies that were specifically authorized by Congress" in ERISA. Pet. App. 33a. To focus on just one: the arbitration clause would bar the arbitrator from removing a fiduciary—even though 29 U.S.C. § 1109(a) expressly calls for that remedy. 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 Tenth, Third, and Seventh 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 Tenth 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 Tenth Circuit did not question the provision in the arbitration clause that waives class or collective actions. Precisely the opposite: the court below said repeatedly that the prohibition on class actions was "not problematic" and was "protected by the FAA." Pet. App. 31a, 33a, 36a, 40a-41a. The court instead focused on the remedies that Mr. Harrison, 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. 32a, 36a-37a.

Petitioners try to spin the decision below as precluding "individual" arbitration, but it does nothing of the kind. As an initial matter, the lower courts invalidated the entire arbitration clause, including the class-action waiver, only because petitioners included broad non-severability language in the arbitration clause they drafted. *Id.* at 44a. That was their choice. Petitioners do not dispute that once a reviewing court found any limitation on remedies to be invalid, the non-severability language required striking the entire clause.

Further, because Mr. Harrison *individually* has a statutory right under ERISA to pursue 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 case petitioners primarily rely upon, 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 Tenth Circuit held no differently; it did not find any right to class or collective action procedures in ERISA. Pet. App. 31a, 33a, 36a, 40a-41a. Petitioners' supposed conflict on this issue is imaginary.

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

It is also telling that in ten pages arguing that the Tenth Circuit failed to follow this Court's precedent, petitioners cite the Tenth Circuit's decision exactly once. Pet. 13-22. Their arguments are premised on the invented narrative that the Tenth Circuit found a conflict between ERISA and the FAA, and supposedly "treat[ed] ERISA claims differently from every other federal right of action." Pet. 15. That is pure fiction. The Tenth Circuit carefully reviewed *Epic Systems* and acknowledged that, based on *Epic Systems*, the arbitration clause's "procedural provisions" that mandate "*individualized* rather than class procedures" are "protected by the FAA." Pet.

App. 40a (emphasis added). Again, it invalidated the clause not because it requires individual arbitration but because it "alters or effectively eliminates substantive forms of relief that are afforded to a claimant by statute." *Id.* at 41a. There is no conflict between that holding and any decision of this Court. *See, e.g., Viking River Cruises*, 142 S. Ct. at 1919; *Am. Exp.*, 570 U.S. at 235; *Mitsubishi Motors*, 473 U.S. at 637.

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 Mr. Harrison), §§ 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 Mr. Harrison 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 "each plan participant has an individual claim under ERISA." Pet. 18. 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 (non-monetary) remedies authorized by §§ 1132(a)(2) and 1109, such as a removal of a breaching fiduciary. 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. In other words—as petitioners argued below, Pet. App. 53a—arbitration is sufficient so long as a participant can get *some* remedy, however limited and divorced from the statutory scheme. This Court has never said that.

Petitioners' last ERISA argument, that the arbitration clause must be enforced merely because it is part of the plan, barely deserves a response. 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 remove them for breaches of fiduciary duty." *See* Pet. App. 34a. The notion that ERISA makes sacrosanct a plan provision that purports to rewrite the statute's enforcement provisions and eliminate remedies is untenable.

C. The Tenth Circuit's ruling is correct.

The Tenth Circuit got this case right.

First, there's no question that this arbitration clause tries to do what this Court's precedents forbid: eliminate substantive statutory remedies that an individual plaintiff—without joining any other plaintiff or bringing a class action—would be entitled to pursue in court. That is sufficient to invalidate the clause—and that is what the Tenth Circuit did. Pet. App. 33a-34a, 41a-42a; *see also Smith*, 13 F.4th at 621 (holding arbitration provision unenforceable because "what the statute permits, the plan precludes").

Second, to the extent petitioners argue that the plan-wide remedies authorized by §§ 1132(a)(2) and 1109 should be viewed as a procedural class-action device, that argument is squarely foreclosed by *Viking River Cruises*. *Viking River Cruises* carefully distinguished "representative" actions like claims by a trustee on behalf of the trust (or a shareholder's derivative suit) from claim-joinder procedures that, like class actions, allow for multiple separate claims of separate individuals to be litigated together. The former "are part of the basic architecture of much of substantive law" and are consistent with "bilateral arbitration." *Viking River Cruises*, 142 S. Ct. at 1922. The latter are procedural devices that may be waived by contract. *Id.* at 1923-24. Mr. Harrison's right as a plan

participant to seek statutory remedies, including those that happen to benefit the plan as a whole, is precisely the kind of substantive right that cannot be waived in an arbitration clause. *See ibid.*[1]

Because the arbitration clause expressly bars remedies that Mr. Harrison is entitled to pursue, the Tenth Circuit correctly refused to enforce it.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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[1] *See also, e.g.*, *Am. Exp.*, 570 U.S. at 236 ("The exception finds its origin in the desire to prevent prospective waiver of a party's right to pursue statutory remedies." (cleaned up)); *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 79 (D.C. Cir. 2005) (Roberts, C.J.) ("The arbitration clause was unenforceable as written because it precluded an award of punitive damages, which are available under the D.C. statute."); *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 241-42 (3d Cir. 2020) ("The Supreme Court, however, has framed the prospective waiver question as whether the contract effects an 'elimination of the right to pursue a remedy.'" (cleaned up)); *Kristian v. Comcast Corp.*, 446 F.3d 25, 48 (1st Cir. 2006) ("We conclude that the award of treble damages under the federal antitrust statutes cannot be waived" in an arbitration clause.); *Ingle v. Cir. City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir. 2003) ("Because the remedies limitation improperly proscribes available statutory remedies, we again conclude that it is substantively unconscionable."); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 216 (3d Cir. 2003) (impermissible waiver of attorney's fees); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 & n.14 (5th Cir. 2003) (arbitration clause that eliminated punitive damages provided for under Title VII was unenforceable); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (holding that an arbitration clause's prohibition on damages and equitable relief under Title VII was unenforceable); *Kramer v. Smith Barney*, 80 F.3d 1080, 1085 (5th Cir. 1996) (invalidating arbitration clause's shortened limitations period for ERISA fiduciary breach claims).

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