No. 23-30

IN THE

Supreme Court of the United States

ARGENT TRUST COMPANY, *et al.*,

Petitioners,

v.

ROBERT HARRISON,

Respondent.

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

REPLY BRIEF

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REPLY BRIEF

The decision below invalidates an arbitration provision for a reason this Court has never adopted: the "effective vindication" exception to the enforceability of arbitration provisions. The basis for that holding is that, the Tenth Circuit claims, ERISA *requires* that plan-wide remedies be available in individual arbitration. That holding creates a split with the Ninth Circuit's decision in *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510 (9th Cir. 2019), which allowed a provision requiring individual arbitration of ERISA claims for individual remedies only. Worse still, the Tenth Circuit's reasoning would preclude *any* requirement for individual arbitration of ERISA claims because *all* such claims must be able to be arbitrated plan-wide. That places ERISA claims separate from all other federal statutory claims, which can be arbitrated individually rather than class-wide, and evinces a hostility to arbitration that this Court has never countenanced. It also undercuts this Court's recent decisions. The split is real and the question is important. This Court should grant the petition.

Respondent denies the existence of a circuit split. But *Dorman* permitted what the Tenth Circuit forbids: a single plan participant seeking individual monetary relief in arbitration for his individual alleged harm. In Respondent's view, the Tenth Circuit did not expressly prohibit the Envision Management Holding, Inc. Employee Stock Ownership Plan (the "Plan") from requiring *any* individual arbitration of ERISA claims, but merely provided that participants must remain free to seek plan-wide monetary and equitable ERISA remedies in individual arbitration proceedings.

That is a distinction without a difference. An arbitration proceeding in which a participant must be allowed to seek all alleged plan losses or fiduciary profits (*i.e.*, monetary recovery that would inure to the benefit of all plan participants), or plan-wide equitable relief (such as removal of a fiduciary, injunctive relief, or rescission of a challenged stock purchase transaction), is not "individual" in any sense of the word. As a practical matter, the Tenth Circuit effectively outlawed provisions requiring individual arbitration for ERISA claims, in direct conflict with *Dorman* and the holdings of this Court on analogous statutory claims.

The Tenth Circuit's holding also misapplies the effective vindication exception by creating a purported ERISA right that does not exist. According to the decision below, a single ERISA plan participant has an inherent right—outside of a Rule 23 class or collective action—to bring a representative action seeking plan-wide monetary and equitable remedies. There is no support for this purported right anywhere in ERISA or this Court's decisions.

Indeed, that rationale conflicts with this Court's decisions in *Viking River Cruises*, *Inc. v. Moriana*, 142 S.Ct. 1906 (2022), *reh'g denied*, 143 S.Ct. 60 (2022), *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), and *Thole v. U.S. Bank N.A.*, 140 S.Ct. 1615 (2020). Respondent misreads *Viking River Cruises* and fails to show how, in light of this Court's other relevant precedents, a participant's representative ERISA claim can be an "agent or proxy" claim in the parlance of *Viking River Cruises*, rather than a form of "claim joinder" that must be arbitrated on an individual basis when required by an

arbitration provision. The petition presented a coherent synthesis of *all* these precedents that leads to the conclusion that the Tenth Circuit should have enforced the Plan's provision requiring individual arbitration of ERISA claims.

The petition also merits review because the question is important. If allowed to stand, the decision below will create a host of practical and legal difficulties around procedural protections for absent plan participants other circuits have recognized. For example, in *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006), the Second Circuit held that ERISA does *not* guarantee an automatic right to seek plan-wide relief, but rather requires an ERISA litigant to take adequate steps to notify and allow for participation by absent participants whose interests could be affected by a representative lawsuit. If the Tenth Circuit's articulation of an individual participant's ERISA rights were allowed to stand uncorrected, then absent participants would lack procedural protections and be exposed to the very risks the Second Circuit identified: for instance, that a single participant could enter into a self-interested settlement to the detriment of other participants, or that a decision in a lawsuit brought by one participant could have preclusive effect on absent participants without their knowledge.

The decision below has spawned erroneous decisions in other courts,[1] causing parties to "irretrievably" lose the

1. The other decisions are *Smith v. Board of Directors of Triad Manufacturing, Inc.*, 13 F.4th 613 (7th Cir. 2021), by the Seventh Circuit and *Henry v. Wilmington Trust, N.A.*, 72 F.4th 499 (3d Cir. 2023), by the Third Circuit. As for the latter decision, a petition for a writ of certiorari was filed on August 4, 2023 in

benefits of individual arbitration of ERISA claims (such as "efficiency, less expense, less intrusive discovery, and the like"). *See Coinbase, Inc. v. Bielski*, 143 S.Ct. 1915, 1921 (2023). This Court should grant the petition to resolve the circuit split in favor of the Ninth Circuit's interpretation, allowing individual arbitration of ERISA claims, and ensuring all courts are applying this Court's precedents correctly and consistently.

A. The Decision Below Creates A Circuit Split

Although Respondent denies it, this Court's intervention is needed to resolve a split of authority that the Tenth Circuit's decision creates with the Ninth Circuit, which enforces provisions requiring individual arbitration of ERISA claims.

1. The Ninth Circuit in *Dorman* enforced an arbitration provision requiring individual arbitration of an ERISA claim. The Tenth Circuit below invalidated a similar provision requiring individual arbitration of an ERISA claim. That is a conflict.

Seeking to avoid it, Respondent argues that there is no split because "[n]o circuit" (*i.e.*, not the Tenth, Seventh, or Third Circuits) has "held that ERISA claims cannot be arbitrated on an individual basis." *See* Br. for Resp't in Opp'n ("BIO") 11-14. Rather, according to Respondent, "[t]he problem in every one of these cases was not the elimination of class procedures or the requirement to

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Wilmington Trust, N.A. v. Henry, Case No. 23-122 (U.S. Aug. 4, 2023), raising a similar question whether plans can require individual arbitration of ERISA claims.

arbitrate individually, but the elimination of remedies provided by the statute." *See id.* at 12. And the ERISA remedies that the courts required be preserved in individual arbitration were "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." *See id.* at 10.

Respondent asserts incorrectly that the arbitration provision in *Dorman* is distinguishable from the provision here because it "did not eliminate remedies offered by [ERISA]." *See id.* at 14-15 (emphasis removed). The arbitration provision in *Dorman* provided in relevant part that "[a]ny claims or disputes . . . shall be brought solely on an individual basis." *Dorman v. Charles Schwab & Co. Inc.*, No. 17-CV-00285, 2018 WL 467357, at *2 (N.D. Cal. Jan. 18, 2018), *rev'd and remanded sub nom. Dorman v. Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. 2019), and *rev'd and remanded sub nom. Dorman v. Charles Schwab Corp.*, 780 F. App'x 510 (9th Cir. 2019). The *Dorman* provision also included an express waiver of "the right to commence, be a party to, or be an actual or putative class member of any class, collective, or representative action." *Id.* The Plan provides, similarly, that ERISA 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." D. Ct. Dkt. 34-1, § 21.1(b).

Although the provision in *Dorman* did not *expressly* foreclose plan-wide remedies in the same way as this Plan's provision, the Ninth Circuit clearly understood that

result to follow from the prohibition on representative actions. *Dorman* stated that "[t]he Provision . . . requires the arbitration to be conducted on an individual rather than collective basis," *Dorman*, 780 F. App'x at 513, and then explained that what ERISA protects is a "claim for the plan losses *in [the participant's] own individual account*," *id.* at 514 (emphasis added). In other words, the arbitration provisions at issue in *Dorman* and here are substantively the same, because both would prohibit a single participant from representing an entire plan in arbitration and seeking relief that would benefit the entire plan. *Dorman*'s reading is consistent with this Court's embrace in *LaRue v. DeWolff, Boberg, & Assoc., Inc.*, 552 U.S. 248 (2008) of individual ERISA claims (and individual ERISA relief). *See Dorman*, 780 F. App'x at 514 (noting that in *LaRue* "the Supreme Court has recognized that [ERISA] claims are inherently individualized when brought in the context of a defined contribution plan").

Respondent's contrary reading of *Dorman* overlooks that an arbitration proceeding in which one participant remains free to seek plan-wide remedies—whether monetary relief for absent plan participants, or equitable relief that would affect the entire plan—has ceased to be "individual." The Tenth, Seventh, and Third Circuits may have been careful to state that they had no qualms with individual arbitration of ERISA claims *per se*, *see* BIO 11-14, but their mandate to preserve plan-wide remedies operates as a *sub silentio* ban on individual arbitration provisions. These courts' decisions to prohibit provisions requiring individual arbitration of ERISA claims stand in direct conflict with the Ninth Circuit's decision in *Dorman* to enforce them.

2. The split alone merits review, but review is also warranted because the question presented is important. The Tenth Circuit's holding will create serious due process difficulties for courts seeking to protect the rights of absent plan participants in any ERISA claim seeking plan-wide remedies—whether in arbitration or federal court.

The Tenth Circuit concluded that the Plan's arbitration provision runs afoul of the effective vindication exception because the provision forbids remedies in arbitration that purportedly would otherwise be available in federal court. Specifically, Respondent claims he "*individually* has a statutory right under ERISA to pursue remedies that benefit both him and the plan as a whole," and such plan-wide remedies are those "an individual plaintiff – without joining any other plaintiff or joining a class action – would be entitled to pursue in court." *See* BIO 19, 23.

In *Coan*, the Second Circuit defined a participant's ERISA rights differently, observing that "we do not see how an action can 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." 457 F.3d at 259. The Second Circuit did not "delineate minimum procedural safeguards that [ERISA] requires in all cases," but rather observed that "although plan participants need not always comply with Rule 23 to act as a representative of other plan participants or beneficiaries, those who do will likely be proceeding in a 'representative capacity' properly for purposes of [ERISA]." *Id.* at 261. The Second Circuit thus concluded that one plan participant does *not* have an automatic right to seek relief on behalf of an entire plan, but rather must first demonstrate adequacy as a representative.

The Second Circuit recognized that allowing a participant to bring a representative ERISA action "without notifying or otherwise involving other plan participants would . . . create significant practical difficulties and opportunities for abuse," *id.*, and such risks are triggered by the Tenth Circuit's approach to ERISA rights under which no procedural protections are necessary. For instance, the Second Circuit saw "nothing to prevent [a participant] from reaching a settlement with the defendants that would disproportionately, or even exclusively, benefit her." *Id.* at 261. Further, if an individual participant prevailed on a plan-wide representative claim "the district court would face a difficult task in ensuring that recovery 'inures to the benefit of the plan as a whole,'" and in any subsequent claim by an absent participant "the issue of collateral estoppel (issue preclusion) would likely arise." *Id.* at 261-62.

Respondent highlights the Tenth Circuit's conclusion that a single participant has an inherent right to seek plan-wide relief in federal court. This conclusion contradicts the Second Circuit's holding that a participant can represent an ERISA plan and its absent participants in federal court only after satisfying adequacy requirements similar to those under Rule 23 for class action certification. If the Tenth Circuit's interpretation were allowed to stand, a single participant could seek remedies that would upset an entire ERISA plan (for instance, by seeking to rescind an entire ESOP stock transaction or remove a fiduciary who is preferred by the plan's participants) with no procedural safeguards to protect absent participants' interests.

B. The Decision Below Misapplies Numerous Decisions Of This Court On The Effective Vindication Exception To Arbitration And *Thole*'s Articulation Of ERISA Rights

Respondent argues that the Tenth Circuit's decision is consistent with this Court's precedents, based on his unfounded contention that every plan participant has an inviolable right to every remedy listed in a statute,[2] *see* BIO 20, regardless whether such remedies would have plan-wide effect and thus destroy the individual nature of arbitration required by a binding arbitration provision. At Respondent's urging, the Tenth Circuit also focused on the availability of statutory remedies, striking down the Plan's arbitration provision "because it purports to foreclose a number of remedies that were specifically authorized by Congress in the ERISA provisions cited by [Respondent]." *See* Pet. App. 33a.

The effective vindication exception is not concerned with the mere availability of statutory remedies, but rather "the assertion of certain statutory rights." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013). Read together, this Court's decisions in *Viking River Cruises*, *Thole*, *LaRue*, and *Epic Systems* lead to the conclusion that the nature of Respondent's right as an ERISA plan participant is to make *himself* whole when ERISA violations have harmed him, not to remedy harm

2. Respondent's argument is undermined by ERISA's text, which empowers a participant to file a civil action "for *appropriate* relief under [29 U.S.C. § 1109]," *see* 29 U.S.C. § 1132(a)(2) (emphasis added). ERISA itself contemplates that a participant is not automatically entitled to seek all remedies under § 1109, but only those that are "appropriate" in the given circumstances.

to the plan as a whole—exactly the type of right that can be vindicated through individual arbitration. *See* Pet. 16-22.

1. In *Viking River Cruises*, this Court described the right to bring two forms of "representative" actions. The first is a "claim joinder" form of action, 142 S.Ct. at 1922-24, which in the context of ERISA could mean one plan participant bringing together fiduciary breach claims by multiple participants alleging harm to all of their respective individual plan accounts, similar to a Rule 23 class action. It is undisputed that this first form of action is a "procedural device[]" that can be modified by an arbitration provision. *See* BIO 23.

The second form of "representative" action is one in which the plaintiff serves as an "agent or proxy" standing in the shoes of another entity, similar to a *qui tam* action. *See Viking River Cruises*, 142 S.Ct. at 1916. In the ERISA context, this could mean a participant standing in the shoes of the plan litigating on the plan's behalf. This latter form of claim cannot be subject to an individual arbitration provision because the plaintiff is actually litigating another's interest. *See id.* at 1922.

Respondent contends that he has such a statutory right under ERISA to bring an "agent or proxy" form of representative claim in which he stands in the shoes of the Plan. That contention flies in the face of this Court's reasoning in *Thole*, which recognizes that ERISA claims are individual and for individual ERISA remedies, and are not inherently on behalf of a plan.

2. Respondent ignores *Thole* by dismissing the decision as "a standing case." *See* BIO 21. But in analyzing Article III constitutional standing, 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. *See Thole*, 140 S.Ct. at 1620. This holding cannot coexist with Respondent's position that he has a right to stand in the shoes of the Plan and bring ERISA claims on its behalf. Were that the case, *Thole* should have come out the opposite way, meaning an ERISA plaintiff could piggyback off a plan's alleged injury for purposes of Article III standing. *See id.* (noting that in an ERISA claim, unlike a *qui tam* action, "the plan's claims have not been legally or contractually assigned" to participants).

3. If ERISA does not grant a participant lacking individual standing the right to stand in the shoes of their plan as an agent or proxy, then any other form of representative action that may be allowed under ERISA falls within the "claim joinder" analysis in *Viking River Cruises*. *See Viking River Cruises*, 142 S.Ct. at 1922-24. As Respondent admits, claim joinder actions "are procedural devices that may be waived" by an arbitration provision. *See* BIO 23. Because an ERISA claim is properly construed as a procedural form of claim joinder, *Epic Systems* squarely applies to the question whether the Tenth Circuit should have enforced the Plan's arbitration provision. There is no "clearly expressed congressional intention" in ERISA to create disharmony with the FAA by prohibiting provisions requiring individual arbitration of ERISA claims, *see Epic Systems*, 138 S.Ct. at 1624; Pet. App. 41a, so the Plan's arbitration provision is enforceable. In direct contravention of *Epic Systems*, the Tenth

Circuit's decision fails to harmonize the FAA and ERISA because it displaces the FAA's mandate to enforce a valid arbitration provision in favor of the court's mistaken view of ERISA rights. The Tenth Circuit erred in finding *Epic Systems* "inapposite" to its analysis, *see* Pet. App. 39a-40a, which merits this Court's review and correction.

CONCLUSION

This Court should grant the petition.

Dated: September 8, 2023

Respectfully submitted,

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