No. ______

In the Supreme Court of the United States

GEORGE W. MATHIAS, PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, "to protect * * * the interests of participants in employee benefit plans," safeguarding their rights with "appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). Congress sought to secure that "ready access" with a liberal venue provision. This provision guarantees plan beneficiaries a specific choice to bring suit in *any* of three venues: "where the plan is administered, where the breach took place, or where a defendant resides or may be found." 29 U.S.C. 1132(e)(2).

Petitioner (who is 72, severely disabled, and has 10 years of formal education) filed suit in Pennsylvania as expressly authorized by that provision. But respondents moved to transfer his suit under the plan's forum-selection clause; unlike ERISA's broad venue rights, this clause restricts all suits to "the Central District of Illinois," a location over 700 miles away.

The Pennsylvania district court granted the transfer, and both the Illinois district court and a divided Seventh Circuit (over the vigorous objection of the United States Department of Labor) refused to retransfer the case to its initial location.

The question presented is whether a contractual forum-selection clause purporting to override ERISA's venue provision is invalid and unenforceable.

PARTIES TO THE PROCEEDING BELOW

Petitioner Gregory Mathias was the mandamus petitioner in the court of appeals and the plaintiff in the district court.

Respondents Caterpillar Inc.; Caterpillar, Inc., Group Insurance Plan A; Caterpillar, Inc., Group Insurance Plan B; and Caterpillar, Inc. Retiree Group Insurance Plan were the real parties-in-interest in the court of appeals and the defendants in the district court. Respondent the United States District Court for the Central District of Illinois was the mandamus respondent in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases—continued :

Page

Cases—continued :

Page

Miscellaneous—continued:

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PETITION FOR A WRIT OF CERTIORARI

George W. Mathias respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The order of the court of appeals denying the petition for a writ of mandamus (App., *infra*, 1a) is reported at 867 F.3d 727 (7th Cir. 2017). The order of the Illinois district court denying retransfer (App., *infra*, 19a) is unreported (C.D. Ill. Oct. 27, 2016). The order of the Pennsylvania district court granting the original transfer (App., *infra*, 27a) is reported at 203 F. Supp. 3d 570 (E.D. Pa. 2016).

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2017. A petition for rehearing and rehearing en banc was denied on September 28, 2017 (App., *infra*, 44a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1132(e)(2) of Title 29 of the United States Code grants ERISA beneficiaries the right to bring suit in any of three places, and provides as follows:

> Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

29 U.S.C. 1132(e)(2).

Section 1104(a)(1) of Title 29 of the United States Code prohibits ERISA fiduciaries from enforcing any plan terms inconsistent with the Act's terms, and provides in relevant part:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and * * * (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III [which includes 29 U.S.C. 1132(e)(2)].

29 U.S.C. 1104(a)(1).

INTRODUCTION

This case presents an exceptionally important question of federal law: whether a contractual forum-selection clause can override ERISA's statutory venue provision. That frequently recurring question has now divided judges on the Sixth and Seventh Circuits as well as dozens of district courts throughout the nation. Yet, for reasons explained below, it is beyond any serious dispute that this case offers an exceedingly rare opportunity for resolution by this Court.

The first time the question presented reached this Court, it called for the views of the Solicitor General. In response to that invitation, the United States firmly declared that such clauses are prohibited by ERISA and constitute a legal violation of enormous consequence. See, *e.g.*, U.S. Amicus Br. at 7, 20, *Smith* v. *Aegon Cos. Pension Plan*, 136 S. Ct. 791 (2016) (No. 14-1168) (*Smith* U.S. Br.) (noting, with disapproval, that the use of forum selection clauses by ERISA plans has "proliferated in recent years.")

The government recommended denying review, however, so the issue could percolate. In taking that position, it assumed that ERISA beneficiaries (often individuals with limited means) could and would find opportunities to obtain appellate review of the question presented.

It is now clear that the government's core assumption was incorrect. Every year, the question presented affects thousands of individuals, and it has generated dozens of district-court decisions. But the Seventh Circuit's decision below is now only the third appellate ruling on the question in over a decade, and petitioner (represented by the same *pro bono* counsel who last sought its resolution by this Court) is aware of no pending appeal that will present another opportunity.

The reason why is quite simple: Transfer orders are interlocutory. They are effectively unreviewable on final judgment, because it is nearly impossible to prove prejudice. Multiple circuits prohibit review via 28 U.S.C. 1292(b), because the issue will not advance the "ultimate termination" of the litigation. And mandamus is extraordinarily difficult and expensive, meaning no rational plaintiff will pursue it—unless he is represented by *pro bono* counsel.[1]

It is equally clear that nothing will be achieved by further percolation. The question presented split the Sixth and Seventh Circuits, and it has been addressed by dozens of district courts. In each case, plaintiffs (as here) make precisely the same arguments advanced by the United States and embraced by the dissenting judges in the circuit courts. And, in each case, defendants (as here) make precisely the same arguments made by the circuit court majorities.

The Court should grant review now. Either it will adopt the position of the United States and restore the rights of ERISA beneficiaries, who are losing by default as a result of unlawful forum-selection clauses. Or it will reject the position of the United States—in which case unnecessary litigation can give way to Congressional lobbying by relevant stakeholders.

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[1] Even with *pro bono* representation, there are significant barriers to appellate review. ERISA defendants who seek to enforce a forum selection clause are necessarily repeat litigation players who have a strong incentive to settle with the few plaintiffs who demonstrate the willingness and ability to litigate the question presented though appellate resolution. At the same time, many district courts are unwilling to grant a stay of litigation pending the completion of the appellate process. See, *e.g.*, D. Ct. Doc. 34 (district court order denying stay pending this petition for certiorari).

At a minimum, the Court should again call for the views of the Solicitor General. In light of recent experience (revealing the futility of percolation), petitioner believes the United States will explain the Court's review is both warranted and urgently needed.

STATEMENT

1. 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); see also *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208 (2004). In crafting those safeguards, Congress specifically recognized that "jurisdictional and procedural obstacles" had "hampered effective enforcement of fiduciary responsibilities." H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973). ERISA beneficiaries are often highly vulnerable (widows, disabled workers, pensioners), and the inability to seek relief in convenient locations often meant an inability to seek relief at all.

Congress sought to overcome those obstacles with a liberal venue provision, granting beneficiaries the right to seek judicial relief in *any* of three venues:

> Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

29 U.S.C. 1132(e)(2). Congress intended this provision to "expand, rather than restrict, the range of permissible venue locations." *Varsic* v. *U.S. Dist. Court for Cent. Dist. of Cal.*, 607 F.2d 245, 248 (9th Cir. 1979).

2. George Mathias is 72 and resides in Pennsylvania. D. Ct. Doc. 35-2 at ¶ 1. He is severely disabled and has 10 years of formal education. D. Ct. Doc. 3 at 1-2; D. Ct. Doc. 7-5 at ¶ 1. He began his employment with Caterpillar in Pennsylvania in 1978. App., *infra*, 2a. After years of severe pain caused by various ailments, the Social Security Administration declared him disabled as of May 1997. *Ibid*. Mathias stopped working due to that disability, but believed the stoppage would be temporary. D. Ct. Doc. 3 at ¶ 13; D. Ct. Doc. 7-5 at ¶ 2. At the time, his annual earnings were only $17,340. D. Ct. Doc. 3 at ¶¶ 13, 20.

For a number of years, Caterpillar billed his health insurance at the long-term-disabled-employee rate. App., *infra*, 2a. In 2013, however, Caterpillar determined that Mathias should have been treated as fully retired effective October 2009. *Ibid.* Although the mistake was their own (D. Ct. Doc. 3 at ¶¶ 31, 33), Caterpillar still attempted to recoup over $9500 in "past-due" premiums from Mathias (reflecting the difference between the two rates). App., *infra*, 2a. When Mathias was unable to pay that substantial and unexpected sum, Caterpillar terminated his benefits. *Ibid.*

Mathias initiated this ERISA action to recover his benefits under the Plan. He availed himself of ERISA's venue provision, filing suit in federal court in Pennsylvania, where Caterpillar "may be found" and where Mathias lived and worked for nearly twenty years. 29 U.S.C. 1132(e)(2).

In response, respondents moved to transfer the case to Illinois. Respondents did not suggest that the initial venue was improper under ERISA's protective venue provision. But respondents maintained that Mathias's statutory rights were trumped by a forum-selection clause in his ERISA plan. Under that clause, notwithstanding ERISA's specific enumeration of Mathias's choice of venue, all suits had to be filed in "the Central District of Illinois." App., *infra*, 3a. Respondents asserted that this venue provision required Mathias to pursue his claims in a venue over 700 miles from where he lived, worked, and received benefits under the plan, despite his lack of any connection to Illinois.

3. a. The Pennsylvania district court granted Defendants' motion. See App., *infra*, 27a. Despite ERISA's overarching statutory scheme, the court treated the case like any other private contract dispute. It reasoned that forum-selection clauses are presumptively valid and enforceable, and it found no basis for overcoming that presumption here. *Id.* at 35a-43a. The court therefore ordered the case transferred to the Central District of Illinois.[2]

b. In Illinois, Mathias immediately sought to retransfer his case to Pennsylvania. App., *infra*, 21a. He again argued that the plan's forum-selection clause was unenforceable under ERISA. *Id.* at 22a-23a.[3]

The Illinois court also refused retransfer. App., *infra*, 19a. It agreed with the Pennsylvania court that such

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[2] The clerk implemented the order that same day (D. Ct. Docs. 16-17), foreclosing any opportunity for Mathias to seek review in the Third Circuit. *In re Nine Mile Ltd.*, 673 F.2d 242, 243 (8th Cir. 1982) (per curiam) ("physical transfer of the original papers in a case to a permissible transferee forum deprives the transferor circuit of jurisdiction to review the transfer" (citations omitted)); contra App., *infra*, 4a (questioning why Mathias did not seek appellate relief in the Third Circuit).

[3] A retransfer motion is the accepted means of preserving legal challenges to a transfer order. E.g., *Alexander* v. *Erie Ins. Exch.*, 982 F.2d 1153, 1156 (7th Cir. 1993) ("Our case law makes clear that we cannot review the decision of a court in another circuit to transfer a case to a district court in this circuit. We may review such a transfer only if a party moves, in the transferee court in this circuit, to retransfer the case.").

clauses "allow[] a plaintiff access to federal courts" and "promote[] other ERISA policies, including uniformity of administration and reducing costs." *Id.* at 25a.

4. Mathias subsequently sought mandamus relief in the Seventh Circuit. The court invited an amicus brief from the Secretary of Labor, who supported Mathias. Nonetheless, expressly rejecting the longstanding position of the United States, a divided panel denied the petition.

a. The majority recognized that mandamus is an appropriate vehicle for reviewing and correcting erroneous transfer rulings. App., *infra*, 4a, 6a (citing, *inter alia*, *Atl. Marine Constr. Co.* v. *U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 575 (2013)). But the majority found that the Plan's forum-selection clause was valid under ERISA. It agreed with the Sixth Circuit's decision in *Smith* v. *Aegon Cos. Pension Plan*, 769 F.3d 922 (6th Cir. 2014), which itself had divided over this issue. The majority reasoned that the forum-selection clause is consistent with ERISA because Section 1132(e)(2)'s "'may be brought' phrasing is entirely permissive," and the clause thus "simply settle[s] on one of the various statutory options." App., *infra*, 10a-11a. It also reasoned that the clause "promotes uniformity in decisions interpreting the plan" by "channeling litigation to a particular federal court." *Id.* at 10a.

b. Judge Ripple dissented. App., *infra*, 13a. He concluded that "a contractual clause that restricts the right of an ERISA plan participant to an action in a forum far away from his home and his place of employment * * * contravenes the strong public policy embodied in ERISA itself." *Id.* at 16a (endorsing *Dumont* v. *PepsiCo, Inc.*, 192 F. Supp. 3d 209 (D. Me. 2016)). He explained that the majority's decision "is hard to square with" this Court's decision in *Boyd* v. *Grand Trunk Western Railroad Co.*, 338

U.S. 263 (1949), which held that "a similarly worded special venue provision under the Federal Employers' Liability Act" invalidated an agreement "limit[ing] the worker's choice of venue." App., *infra*, 17a. He further noted the "unique," "difficult" position of an ERISA beneficiary, who "has *no* role in the negotiation or even the acceptance of the plan terms." *Id.* at 17a-18a. While not finding it dispositive, Judge Ripple also would have "give[n] some respect to" the Secretary's interpretation. *Id.* at 18a.

c. Petitioner then filed a petition for rehearing en banc, which the Seventh Circuit denied (after calling for a response). App., *infra*, 44a. This petition followed.[4]

REASONS FOR GRANTING THE PETITION

Immediate review by this Court is needed to resolve intolerable lower-court division over the question presented. It is beyond serious dispute that this question is one of extraordinary legal and practical significance. That is precisely what the Solicitor General told this Court when asked for his views in *Smith* v. *Aegon Cos. Pension Plan*. *Smith* U.S. Br. 7, 19-20. The issue has now split two circuits, and mass confusion continues among the district courts.

Put simply, there is no longer any benefit to further percolation. This issue has been thoroughly vetted. After

[4] Active litigation has recommenced in the Illinois district court and is moving at remarkable speed. Respondents have already moved to dismiss on the merits, and petitioner filed his opposition just days ago. D. Ct. Docs. 31, 37. To avoid the potential mooting of this petition, Mathias promptly applied for a stay of litigation pending resolution of this petition for certiorari; that application was denied. D. Ct. Doc. 34. Because the district court was never divested of jurisdiction over this case, Mathias filed his stay application with the district court rather than the Seventh Circuit. He will soon file a Motion for a Stay with Justice Kagan.

dozens of decisions, district courts are simply adopting the discussion of earlier courts, and each case pits the same arguments by the United States and the dissenting circuit judges against the same arguments by institutional defendants and the circuit majorities. All that is left is for additional circuits to pick one side of the split.

Review is also warranted because the decision below directly frustrates an Act of Congress. Three circuits have now fundamentally misinterpreted critical provisions and purposes of ERISA.[5]

Each circuit expressly rejected the contrary position asserted by the Department of Labor—the agency charged with administering ERISA. These decisions eliminate a statutory right that Congress considered paramount in securing individual rights.

Finally, the question presented has become all but immune from appellate review. There is a reason that this issue affects thousands of individuals and generates dozens of district-court decisions—but has generated a *total* of three appellate rulings across all the courts of appeals. This case presents an exceedingly rare opportunity and ideal vehicle to decide this question. There is no other opportunity on the horizon. The petition should be granted.

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[5] In addition to the Sixth and Seventh Circuits, the Eighth Circuit denied mandamus on this issue in an unpublished one-line order. *In re Lorna Clause*, No. 16-2607 (8th Cir. Sept. 27, 2016), cert. denied, 137 S. Ct. 825 (2017). The plaintiff in *Clause* (represented by the same *pro bono* counsel as Mathias) filed a petition for certiorari. Given the lack of any opinion from the court below, this Court denied the petition without calling for a response. This case could not be more different—a split panel wrote considered opinions on both sides—and no other opportunity to review this issue is in the pipeline.

A. There Is Intolerable Lower-Court Division Over This Important Question

Review is warranted because there is intolerable lower-court division that will not be resolved without this Court's review. Multiple courts have decided this issue, and they are all stacking up on one side or the other. See, *e.g.*, *Feather* v. *SSM Health Care*, No. 3:16-CV-00393, 2016 WL 6235772, at *4 (S.D. Ill. Oct. 25, 2016) (cataloging dozens of decisions).[6]

There is no benefit to further percolation. The Sixth and Seventh Circuits resolved the issue in a comprehensive set of opinions on both sides, and the Secretary has articulated at length the views of the United States (*e.g.*, *Smith* U.S. Br.). Indeed, the issue has been so thoroughly examined that a recent court found "no need to rewrite or rehash at length what has already been said." *Feather*, 2016 WL 6235772, at *4. Percolation is necessary where an issue is underdeveloped; this issue is past ripe.

Other courts of appeals have also examined closely related questions, rounding out the full spectrum of relevant considerations. See, *e.g.*, *Gulf Life Ins. Co.* v. *Arnold*, 809 F.2d 1520, 1525 & n.7 (11th Cir. 1987) (invoking ERISA's "unequivocal purpose" in rejecting a plan's attempt to

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[6] In all likelihood, the reported decisions vastly understate the incidence of the issue. Cf. Roger Michalski, *Transferred Justice: An Empirical Account Of Federal Transfers In The Wake Of* Atlantic Marine, 53 Hous. L. Rev. 1289, 1294 n.16 (2016) ("Roughly 5000 non-MDL, non-bankruptcy civil cases are transferred each year, compared with roughly 200 reported opinions on Westlaw."); cf. also, *e.g.*, *Martin* v. *Ascension Health Long-Term Disability Plan*, No. 1:15-CV-02633 (D. Colo. Sept. 7, 2016) (unreported decision enforcing forum-selection clause); *Harris* v. *BP Corp. N. Am. Inc.*, No. 1:15-CV-10299, 2016 WL 8193539 (N.D. Ill. July 8, 2016) (unreported decision invalidating forum-selection clause).

"defeat efforts by participants/beneficiaries to avail themselves of ERISA's broad venue provision"); see also Section D.2-3, *infra* (discussing cases from this Court and other circuits striking down forum-selection clauses in analogous contexts).[7]

While this Court does not often grant review without an unequivocal circuit conflict, this case fits comfortably within the Court's exceptions. The question is extraordinarily important but also circumscribed and narrow. The competing viewpoints are confined to a known set of arguments, all of which have been extensively vetted in lower courts. While other courts of appeals have yet to pick sides, the only work left would in fact be *picking sides.* And it is unclear when, or if, they will have that opportunity.[8]

There is nothing new to add after dozens of decisions (litigated by well-funded institutional defendants), repeated filings by the federal government (articulating the opposing position), and a thoughtful set of split opinions

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[7] In *Gulf Life*, a plan participant filed a benefits claim in Tennessee, where he lived and worked. 890 F.2d at 1522. Gulf Life responded by filing its own suit for declaratory relief, invoking ERISA's venue provision to litigate in Florida—a venue lacking any connection to the participant. *Ibid.* The Eleventh Circuit rejected the plan's lawsuit. Looking to ERISA's text and purpose, it held that only participants and beneficiaries can invoke ERISA's protective venue provision. Congress's goal was providing the protected class "ready access to the federal courts," a goal frustrated when plans (not plaintiffs) dictate the venue. *Id.* at 1524-1525 & n.7. While *Gulf Life* did not involve a forum-selection clause, its rationale is incompatible with *Smith*, *Clause*, and the decision below.

[8] Given the Sixth, Seventh, and Eighth Circuits' approval of forum-selection clauses, many plans can be expected to funnel litigation to these circuits—and it is always in the transferee circuit that a plaintiff must litigate the issue.

from two courts of appeals. Indeed, the competing viewpoints nationwide are represented perfectly by the majority and dissent in this case.

Nor is there any reason to believe that this issue will resolve itself. These unlawful clauses have "proliferated" in recent years (*Smith* U.S. Br. 20), and institutional defendants will continue to secure (often-insurmountable) advantages in light of their success in the lower courts. And notwithstanding the difficulty in obtaining appellate review, a significant number of beneficiaries will continue to press the issue in the district court, especially in light of the United States' longstanding position that such clauses are invalid—and the devastating effect such clauses have in the mine run of ERISA cases. See, *e.g.*, *Shah* v. *Wellmark Blue Cross Blue Shield*, No. 1:16-CV-2397, 2017 WL 1186341 (D.N.J. Mar. 30, 2017).

Divisions of this sort fall squarely within the circumstances warranting review without a circuit split, and given the dearth of other foreseeable opportunities to resolve this issue, the necessity of immediate review is even stronger here. See, *e.g.*, *City of Newport* v. *Fact Concerts Inc.*, 453 U.S. 247, 257 & n.14 (1981) (citing four district-court decisions on "important" and "recur[ring]" question); *Dawson Chem. Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 185 & n.4 (1981) (granting certiorari "to forestall a possible conflict in the lower courts"); *Curtis* v. *Loether*, 415 U.S. 189, 191 n.2 (1974) (granting certiorari where "[t]he Seventh Circuit here was the first court of appeals to consider this issue, but the reported decisions of the district courts are evenly divided on the question"); see also, *e.g.*, *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 5 (2006) (granting certiorari to resolve a statute's application "to an important and increasingly popular form of business organization").

B. As The United States Explains, The Decision Below Directly Frustrates An Act Of Congress On A Question Of "Substantial Practical Importance"

Review is also warranted because the decision below directly frustrates an Act of Congress. The entire point of securing a *choice* of venue was to protect beneficiaries' "ready access" to court. Forum-selection clauses eliminate that ready access and write this critical statutory protection out of existence. Congress's statutory design cannot function if plans refuse to follow the Act and courts are unavailable to enforce ERISA's mandates. For many beneficiaries, a decision ushering their suit far from home is effectively a bar to judicial relief. That has devastating effects on the rights of the protected class, and it effectively renders Congress's venue provision unenforceable in this setting. This is why the United States previously acknowledged the issue's "substantial practical importance." *Smith* U.S. Br. 7, 20.

1. For petitioner and countless other litigants, ready access to a local court is essential in protecting their rights. ERISA suits are typically brought by some of the most vulnerable members of the population: retirees on limited budgets, sick and disabled workers, widows, and dependents. These individuals rarely have the financial means or legal sophistication to navigate a lawsuit in a venue hundreds or thousands of miles away, in a district with no connection to their personal or professional lives. See *Dumont*, 192 F. Supp. 3d at 220; *Harris* v. *BP Corp. N. Am. Inc.*, No. 1:15-CV-10299, 2016 WL 8193539, at *6, 7 (N.D. Ill. July 8, 2016); Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. Rev. 423, 446-447 (1992).

When respondents elevate the difficulty of pursuing relief, they erect a serious impediment to the already-imposing challenge of litigating technical ERISA claims. See App., *infra*, 16a (Ripple, J., dissenting) ("a contractual clause that restricts the right of an ERISA plan participant to an action in a forum far away from his home and his place of employment * * * contravenes the strong public policy embodied in ERISA itself."); *Smith*, 769 F.3d at 935 (Clay, J., dissenting) ("Requiring Plaintiff to litigate in a distant venue imposes a substantial increase in expense and inconvenience that obstructs his access to federal courts.").

Congress recognized those difficulties and the disparity of resources between typical ERISA plaintiffs and plan defendants. Cf. H.R. Rep. No. 533, *supra*, at 17; Kevin M. Clermont & Theodore Eisenberg, *Exorcising The Evil Of Forum-Shopping*, 80 Cornell L. Rev. 1507 (Appendix) (1995) (finding that transfer in ERISA cases lowered plaintiffs' odds of prevailing from 82.10% to 55.56%). ERISA's broad venue provision is designed to ease the burdens on plaintiffs and to prevent institutional defendants—already buoyed by greater resources and expertise—from gaining an undue hometown advantage. Yet these forum-selection clauses routinely direct all suits to the plan's or company's headquarters—no matter how difficult that may prove for the beneficiary.

2. Enforcing these clauses has predictable consequences. Many plaintiffs simply give up. See, *e.g.*, *Keever* v. *NCR Pension Plan*, No. 1:15-CV-04397, Doc. 19 (N.D. Ga. Dec. 17, 2015) (voluntary dismissal after transfer from S.D. Ohio); *Haughton* v. *Plan Adm'r of the Xerox Corp. Ret. Income Guarantee Plan*, No. 6:14-CV-06116, Doc. 36 (W.D.N.Y. May 22, 2014) (voluntary dismissal with prejudice after transfer from W.D. La. because attorney could not "obtain admission pro hac vice" or "find substitute

counsel for plaintiff," Doc. 33); *Marin* v. *Xerox Corp.*, No. 6:13-CV-06133, Doc. 33 (W.D.N.Y. Apr. 18, 2013) (voluntary dismissal after transfer from N.D. Cal.); *Rodriguez* v. *PepsiCo Long Term Disability Plan*, No. 1:10-CV-04646, Doc. 34 (S.D.N.Y. July 12, 2010) (voluntary dismissal after transfer from N.D. Cal.).

Others face competitive disadvantages or incur much greater costs to prosecute their claims. *E.g.*, *Smith*, 769 F.3d at 935 (Clay, J., dissenting); cf. Michalski, *Transferred Justice: An Empirical Account Of Federal Transfers In The Wake Of* Atlantic Marine, 53 Hous. L. Rev. 1289, 1293-1294 (2016). The problem is obvious, but take one representative example:

In *Williams* v. *Cigna Corp.*, the beneficiary's suit was transferred from Kentucky to Iowa. No. 5:10-CV-00155, 2010 WL 5147257 (W.D. Ky. Dec. 13, 2010). His lawyer moved to withdraw because "he is unable to practice law" in Iowa, and simultaneously asked the court "for an extension of time for Plaintiff to find representation." *Williams* v. *Cigna Corp.*, No. 1:10-CV-00161, Doc. 43 at 1 (N.D. Iowa Feb. 22, 2011). The judge granted the withdrawal but rejected the extension on the inexplicable ground that it was "plaintiff's decision" whether to "retain[] new counsel or proceed pro se." *Williams*, No. 1:10-CV-00161, Doc. 45 at 2 (Feb. 23, 2011).

The *Williams* plaintiff eventually did find an attorney, but to little effect. In responding to Cigna's motion to dismiss, the new attorney explained the hardship resulting from transfer and its impact on the merits:

> Plaintiff contacted numerous Cedar Rapids attorneys [including me]. Based on my schedule [at the time], I did not want to get involved. Then I received a call from the Plaintiff himself on or about February 28, 2011. He was extremely frustrated that he had apparently went through almost every

> law firm he could find in the area and nobody would help him. He was being told that firms were not excited about taking a case with a pending dispositive motion and a shrinking time to respond. * * * I felt sorry for him * * * . I have tried to get up to speed in that time, but it has not been adequate time. That being said, the Court set a firm deadline of today to file a response, so I am doing the best I can under the circumstances.

Williams, No. 1:10-CV-00161, Doc. 47 at 2-3 (Mar. 7, 2011). Despite the plaintiff's best efforts, the transfer materially impaired his ability to assert his federal rights.

Moreover, it is difficult to assess how many other claims have been abandoned before a lawsuit is even filed. Local attorneys are understandably reluctant to accept low-value cases subject to forum-selection clauses; the additional cost and inconvenience of litigating in remote venues eliminates any realistic prospect of a fair return. And few ERISA beneficiaries are aware how to find counsel in venues hundreds or thousands of miles away. The predictable result, again, is many ERISA beneficiaries will simply forfeit their rights. See Amicus Br. of Pension Rights Ctr. at 1-3, 12, *Clause* v. *U.S. Dist. Court for the E. Dist. of Mo.*, 137 S. Ct. 825 (2017) (No. 16-641) ("The idea that such restrictions on venue will not impair ready access to federal courts is one that defies the realities of the world in which most ERISA participants must litigate, where distance and additional cost can be disabling obstacles to filing a civil action.").

The vital importance of this question is obvious, and the decision below leaves an Act of Congress effectively unenforceable. This Court frequently grants review in such situations, and review is warranted here.

C. This Issue Is All But Immune From Appellate Review, And This Case Presents The Exceedingly Rare Opportunity To Decide It

Despite its obvious importance, this issue rarely finds its way to the appellate courts. The best proof is the utter absence of decisions at the circuit level: this issue affects thousands of litigants and produces dozens of published opinions, and yet there have been *three* appellate decisions (including the one below) in the last decade. That means not that this issue is settled in three circuits, but that there have been only *three total rulings* across all the courts of appeals.

The difficulty of obtaining review is manifest. Parties cannot appeal from final judgment, because it is virtually impossible to prove prejudice. Interlocutory review under 28 U.S.C. 1292(b) is foreclosed in multiple circuits, and an unrealistic option even were it theoretically available. And mandamus is prohibitively time-consuming and too expensive for common ERISA litigants. Immediate review is warranted.

1. This petition presents a rare opportunity and an ideal vehicle to decide this important and recurring question. It is undisputed that petitioner initially filed in a proper ERISA venue, and the plan's forum-selection clause provided the exclusive basis for transfer. The venue issue was correctly preserved with a retransfer motion; it was squarely presented on mandamus (the appropriate vehicle for challenging erroneous transfer decisions); and the Seventh Circuit resolved it with thoughtful, thorough opinions on both sides. There are no relevant facts in dispute or other impediments to resolving the question presented. The entire dispute turns on a single and pure question of law: whether the forum-selection clause may trump ERISA's venue provision. This is a rare

and ideal vehicle, and the Court should take advantage of it.

2. If the Court declines review, it is unclear when it will have another opportunity to decide the issue—there is no other vehicle on the horizon. This is the rare case to percolate up to the court of appeals, and it did so by virtue of the concerted efforts of *pro bono* lawyers who cannot themselves afford to forever pursue cases like this one. The substantial impediments to appellate review are clear.

a. "[I]t has long been 'settled that an order granting a transfer or denying a transfer is interlocutory and not appealable.'" *Miller* v. *Toyota Motor Corp.*, 554 F.3d 653, 655 (6th Cir. 2009) (quoting *Lemon* v. *Druffel*, 253 F.2d 680, 683 (6th Cir. 1958)); see, *e.g.*, *Hill* v. *Potter*, 352 F.3d 1142, 1144 (7th Cir. 2003) (citing cases from the First, Second, Fourth, and D.C. Circuits). Yet it is all but futile to seek review of a transfer order after final judgment. Parties cannot obtain reversal without showing prejudice, and it is virtually impossible "to show that [the plaintiff] would have won the case had it been tried in a convenient forum." *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003); accord, *e.g.*, *In re Apple, Inc.*, 602 F.3d 909, 912 (8th Cir. 2010) ("If Apple were to appeal from an adverse final judgment rendered in Western Arkansas, it could not show that it would have prevailed in a hypothetical trial in Northern California.").

b. With ordinary appeals off the table, parties must seek interlocutory relief. But the only options for interlocutory review are expensive, unrealistic, or no option at all.

First, it is far from obvious that interlocutory review is available under 28 U.S.C. 1292(b). Multiple circuits categorically foreclose review of transfer orders under that section. See, *e.g.*, *In re Rolls Royce Corp.*, 775 F.3d 671, 676 (5th Cir. 2014) ("circuit precedent forecloses reviews of transfer orders under" 28 U.S.C. 1292(b)). Congress limited Section 1292(b) to orders that "materially advance the ultimate termination of the litigation" (28 U.S.C. 1292(b)), and venue "is not likely" to "terminate" a case. *A. Olinick & Sons* v. *Dempster Bros., Inc.*, 365 F.2d 439, 443 (2d Cir. 1966).

Second, while mandamus is a recognized vehicle for reviewing transfer decisions, few ERISA beneficiaries have the resources or expertise to pursue that remedy. These cases, again, are vital to a beneficiary's wellbeing. But without large amounts at stake, litigants cannot afford endless rounds of briefing on all issues.

This very case is illustrative of the steps any plaintiff must take to preserve the transfer issue. Petitioner (with the assistance of experienced *pro bono* appellate counsel) filed full briefing on: (1) respondents' motion to transfer, (2) a motion to retransfer, (3) a district-court stay request, (4) a mandamus petition, (5) a circuit-court stay request, (6) a petition for rehearing en banc, (7) another stay request in the district court, (8) this petition, and (9) shortly, a stay request in this Court.

Even so, the prospect of mootness looms. After the Seventh Circuit denied mandamus, the district court refused petitioner's request for a stay pending this petition for certiorari. Now, petitioner is engaged in active litigation on the merits in the transferee court 700 miles from his home. Respondents have moved to dismiss, and petitioner filed an opposition less than one week ago—even as this petition was being prepared. Little wonder that few plaintiffs have the wherewithal to preserve the issue, let alone obtain relief. No rational litigant (without significant *pro bono* assistance) is willing to expend the resources to challenge this issue on appeal.

This Kafkaesque series of steps only compounds the "jurisdictional and procedural obstacles" that ERISA sought to eliminate. H.R. Rep. No. 533, *supra*, at 17. Aside from *pro bono* assistance, few, if any, beneficiaries will find counsel willing to endure the expense of multiple filings in multiple courts, all in the hope of possibly obtaining a venue ruling before the case is over.

c. Nor is there any other adequate means of pursuing review. It is theoretically possible that courts could enforce a forum-selection clause via a Rule 12(b)(6) dismissal, which would produce an appealable final judgment. Cf. *Smith* U.S. Br. 21 (explaining *Atlantic Marine* left that issue unresolved). As a practical matter, however, this does not happen. Courts consistently prefer transfer over dismissal as a matter of fairness and efficiency.[9]

Given this Court's approval of Section 1404(a) as a mechanism to enforce forum-selection clauses, that preference is unlikely to fade. Indeed, petitioner is unaware of *any* case raising this issue post-*Atlantic Marine* that was dismissed instead of transferred.

Nor is there any reasonable prospect that an institutional defendant will seek further review. Those defendants would still face the same impediments to appealing the issue on final judgment, and would also face the same

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[9] Examples are legion. See, *e.g.*, *Valley Elec. Consol., Inc.* v. *TFG-Ohio LP*, No. 4:16-CV-00060, 2016 WL 3570813, at *3 (N.D. Ohio June 30, 2016) (finding dismissal over transfer "inexpedient" because the plaintiff "would simply commence the action anew in the preselected forum"); *Keever* v. *NCR Pension Plan*, No. 3:15-CV-00196, 2015 WL 9255342, at *6 (S.D. Ohio Dec. 17, 2015) ("[G]iven [*Atlantic Marine*'s] express holding that § 1404(a) is the appropriate mechanism for enforcing a forum selection clause, the Court finds that this is preferable, and better serves the interests of justice."); *McCusker* v. *HIBU PLC*, No. 2:14-CV-05670, 2015 WL 1600066, at *2 (E.D. Pa. Apr. 8, 2016) ("the interests of justice favor" transfer to dismissal); but cf. *Bradley* v. *D&B Trucks & Equipment, LLC*, No. 1:16-CV-00159, 2017 WL 4102483, at *4 (W.D. Ky. Sept. 15, 2017) (dismissing a manufacturing dispute based on a forum selection clause).

restrictions on seeking interlocutory review. While defendants have additional resources at their disposal—making mandamus more palatable—they have different incentives to avoid an appeal. Any loss in district court is not binding on other courts, and will have little effect on defendants' overall interests. But vindicating a single transfer denial on appeal risks invalidating the forum-selection clause in all cases—which perhaps explains why plans (like respondents) resist appellate review so strenuously. Cf., *e.g.*, *Smith* U.S. Br. 21 (noting the parties settled a Fifth Circuit case on the eve of oral argument where a district court had denied transfer and subsequently awarded benefits (citing *Nicolas* v. *MCI Health & Welfare Benefit Plan No. 501*, No. 09-40326 (5th Cir. Mar. 1, 2010))); *Dumont*, No. 1:15-CV-00369, Doc. 32 (Sept. 29, 2016) (notice of settlement after transfer denied).

Despite these formidable obstacles, this case squarely presents the issue for review. Not only did the case *make it* to the Seventh Circuit, a divided panel produced comprehensive opinions vetting both sides. The petition should be granted.

D. The Decision Below Is Incorrect

Review is also warranted because the decision below is incorrect. ERISA says beneficiaries may file suit in *any* of three places, while the forum-selection clause permits suit in only one. Because the clause is inconsistent with the Act, it is invalid.

1. A core goal of ERISA was guaranteeing "ready access to the Federal courts" (29 U.S.C. 1001(b)), and Congress accomplished that goal with an expansive venue provision. This provision specifically granted beneficiaries a broad choice of where to sue. 29 U.S.C. 1132(e)(2). By "expand[ing] * * * the range of permissible venue locations" (*Varsic*, 607 F.2d at 248), this liberal provision maximized judicial access and eliminated the "jurisdictional

and procedural obstacles" that previously "hampered effective enforcement of fiduciary duties" (H.R. Rep. No. 533, *supra*, at 17). See also, *e.g.*, *Trs. of the Plumbers & Pipefitters Nat'l Pension Fund* v. *Plumbing Servs., Inc.*, 791 F.3d 436, 444 (4th Cir. 2015); *Nicolas* v. *MCI Health & Welfare Plan No. 501*, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006).

To protect beneficiaries' statutory rights (including their choice of venue), Congress made it clear how to resolve any conflicts between ERISA and a benefit plan: it declared unenforceable any plan terms "[in]consistent with" ERISA's statutory framework. 29 U.S.C. 1104(a)(1)(D); *Gastronomical Workers Union Local 610 & Metro. Hotel Ass'n Pension Fund* v. *Dorado Beach Hotel Corp.*, 617 F.3d 54, 62 (1st Cir. 2010). It thus makes no difference that plans "are given significant leeway in the design of benefit plans." Contra App., *infra*, 10a-11a. The only *permissible* designs are those that stay within ERISA's boundaries. And ERISA itself ensures that plans "cannot contract around the statute." *Esden* v. *Bank of Bos.*, 229 F.3d 154, 173 (2d Cir. 2000) (invoking Section 1104(a)(1)(D)).

Yet that is precisely what respondents attempted here. The conflict between ERISA's venue provision and the plan's forum-selection clause is plain. ERISA grants beneficiaries the right to sue in *any* of three places, while the plan eliminates two of those choices. The plan thus prohibits suit in jurisdictions expressly authorized by ERISA. And the choice guaranteed by statute is essential to Congress's aims: beneficiaries are often vulnerable, and all three statutory venues are rarely accessible to each beneficiary. ERISA thus secured *multiple* options for pursuing a beneficiary's rights. The plan's attempt to eliminate the choices conferred by statute defies ERISA's text and frustrates its purpose (29 U.S.C. 1001(b), 1132(e)(2)). The forum-selection clause is thus unenforceable under Section 1104(a)(1)(D). *E.g.*, *Harris*, 2016 WL 8193539, at *6; *Dumont*, 192 F. Supp. 3d at 219-221; see also *Gulf Life*, 809 F.2d at 1525 & n.7 (finding incompatible with ERISA's "unequivocal purpose" analogous attempts to "defeat efforts by participants/beneficiaries to avail themselves of ERISA's broad venue provision").

Nor does it matter that the plan's forum-selection clause picked a venue available under Section 1132(e). Contra App., *infra*, 12a. The *choice itself* is an essential part of the statutory scheme: Section 1132(e)(2) "is not a neutral provision merely describing the venues in which ERISA actions can be heard, but is rather intended to grant an affirmative right to ERISA participants and beneficiaries." *Coleman* v. *Supervalu, Inc. Short Term Disability Program*, 920 F. Supp. 2d 901, 906 (N.D. Ill. 2013) (citing *Gulf Life*, 809 F.2d at 1524-1525). It thus makes no difference that the plan permits one of the *three* distinct venues guaranteed by law; the point is to facilitate judicial access by providing a *choice*, and Congress gave *beneficiaries* the right to exercise that choice and select the suit's location. See *Gulf Life*, 809 F.2d at 1523-1524. Plans cannot override that choice and impede judicial access by forcing all suits to the plan's backyard. Cf. *id.* at 1525 n.7 ("We believe that ERISA's legislative history unquestionably demonstrates that Congress did not intend to allow a fiduciary to force a plan participant/beneficiary who worked for a company for 30 years in Maine and who files a claim for benefits with that company, to be required to litigate his claim in Los Angeles.").

Contrary to the Seventh Circuit's view (App., *infra*, 9a-11a), limiting all litigation to a single district hardly provides "*ready* access" to federal court. *Dumont*, 192 F. Supp. 3d at 220 ("Congress chose the phrase 'ready access to the Federal Courts,' not just 'access to the Federal

Courts.'" (citing *McDonnell* v. *United States*, 136 S. Ct. 2355, 2359 (2016))). There is no "ready" access where vulnerable beneficiaries with small-dollar (but important) claims are required to litigate hundreds or thousands of miles from their jobs and homes. As discussed, the end result is that claims will be abandoned or deterred because claimants cannot find a lawyer willing to help, or cannot afford the increased costs of litigation.

In short, unlike the statute that Congress drafted, the plan's forum-selection clause restricts all litigation to a single location—"the Central District of Illinois." ERISA guarantees beneficiaries the right to sue in multiple districts, and respondents' forum-selection clause abrogates that statutory right. "Such a restrictive clause not only conflicts with the broad venue provision set forth in § 502(e) of ERISA, but also undermines the very purpose of ERISA and contravenes the strong public policy evinced by the statute." *Smith*, 769 F.3d at 935 (Clay, J., dissenting); see App., *infra*, 16a (Ripple, J., dissenting) ("a contractual clause that restricts the right of an ERISA plan participant to an action in a forum far away from his home and his place of employment * * * contravenes the strong public policy embodied in ERISA itself"). It is accordingly unenforceable.

2. As Judge Ripple recognized in dissent below, the Seventh Circuit's contrary conclusion is incompatible with this Court's refusal to enforce forum-selection clauses that "contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." App., *infra*, 15a (quoting *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)). *The Bremen* confirmed that this "strong public policy" is often reflected in statutory venue provisions. And *The Bremen* itself relied specifically on *Boyd*, which invalidated a forum-selection clause for improperly restricting a statutory

choice of venue under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*

The same logic applies here: enforcing a forum-selection clause "would thwart" the rights secured by a statutory venue provision (*Boyd*, 338 U.S. at 265-266), undermining Congress's goal of securing easy access to federal court. Just as in *Boyd*, the plan's "preclusive venue selection clause" is "inconsistent with the purpose, policy, and text of ERISA," and is therefore "unenforceable." *Smith*, 769 F.3d at 934 (Clay, J., dissenting) (citing *The Bremen*, 407 U.S. at 15).

The Seventh Circuit may believe that *Boyd* is a "relic" (App., *infra*, 11a), but it is this Court's prerogative to decide the binding force of its own decisions. *Boyd* was not a product of hostility to forum-selection clauses, but a recognition that "[t]he right to select the forum" was a "substantial right" that "could not be abrogated" by private agreement. App., *infra*, 17a (Ripple, J., dissenting). That holding "remains intact" and cannot be "square[d]" with the Seventh Circuit's decision. *Ibid.*

3. The decision below also stands at odds with the way courts consistently analyze comparable venue provisions in other federal statutes. For instance, the Ninth Circuit invalidated a forum-selection clause like the one here as inconsistent with the venue provisions of the Carmack Amendment, which governs interstate-shipping contracts. *Smallwood* v. *Allied Van Lines, Inc.*, 660 F.3d 1115 (9th Cir. 2011). Similar to ERISA, the Carmack Amendment provided that a lawsuit "may be brought" in one of two "judicial district[s]," "assur[ing] the shipper a choice of forums as plaintiff." *Id.* at 1121-1122. Because the forum-selection clause would have "limit[ed] shippers' choice of venues enumerated in the statute," it was "unenforceable under Carmack." *Id.* at 1123; see also *Kawasaki Kisen Kaisha Ltd.* v. *Regal-Beloit Corp.*, 561 U.S. 89, 98

(2010) ("[I]f Carmack's terms apply to the bills of lading here, the cargo owners would have a substantial argument that the Tokyo forum-selection clause in the bills is preempted by Carmack's venue provisions."); *Boyd*, 338 U.S. at 265-266. The Seventh Circuit's ruling is incompatible with this reasoning.

4. The remainder of the Seventh Circuit's reasoning is demonstrably wrong. First and foremost, *Atlantic Marine* is irrelevant to this dispute. Contra App., *infra*, 6a-9a, 11a. *Atlantic Marine* did not involve any overriding statutory scheme, and its entire analysis "*presuppose*[*d*]" that the forum-selection clause at issue was "valid." 134 S. Ct. at 581 & n.5 (emphasis added). The entire question here is whether the plan's clause is *unenforceable* under ERISA's controlling framework, a question antecedent to the normal Section 1404(a) analysis. See, *e.g.*, *Harris*, 2016 WL 8193539, at *3.[10]

Nor does it matter that ERISA's venue provision uses permissive language (describing where suits "may" be brought). Contra App., *infra*, 9a-10a. That language is permissive only in the sense that it *permits* beneficiaries to *choose* one of three options; it is *mandatory* in the sense that beneficiaries have the absolute right to make that choice. Forbidding the protected class from selecting any of the three options still creates a clear conflict. Cf. *Pet*

[10] Nor is it appropriate to rely on generic rules tailored for ordinary contracts. This is no ordinary contract, but a highly regulated plan under a comprehensive statutory scheme. *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 253-254 (1993). Parties cannot simply contract however they wish. Congress crafted careful protections to prevent sophisticated counterparties from subverting beneficiaries' access to judicial relief.

Quarters, Inc. v. *Depository Tr. & Clearing Corp.*, 559 F.3d 772, 780 (8th Cir. 2009).[11]

The Seventh Circuit also said that limiting all suits to a single district promotes ERISA's interest in "uniformity." App., *infra*, 10a, 12a. But Congress was concerned about a *different* uniformity: the problem of subjecting ERISA plans to *multiple legal regimes with different requirements*. *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 148 (2001). That is why Congress preempted conflicting state laws in this area. See 29 U.S.C. 1144(a); *Davila*, 542 U.S. at 208. No matter where this action is brought, all federal courts will be applying the same law and the same plan, construed the same way by the same plan administrator, and these courts can take the decisions of their sister courts into account when issuing decisions. If Congress felt that "uniformity" required vesting a single court with jurisdiction over all claims, it would not have granted beneficiaries an affirmative right to select among *multiple* venues. *E.g.*, *Dumont*, 192 F. Supp. 3d at 221 & n.16.

Finally, the Seventh Circuit argues that forum-selection clauses are consistent with "ERISA's policy goals more generally." App., *infra*, 12a. Suffice it to say that the

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[11] Take another apparently "permissive" ERISA provision: Section 1132(a)(3) provides that "[a] civil action *may* be brought" by a "participant, beneficiary *or* fiduciary [] to enjoin any act or practice which violates [the Act]." 29 U.S.C. 1132(a)(3) (emphasis added). Any plan that purported to permit suit *only* by fiduciaries would plainly be invalid under Section 1104(a)(1)(D), notwithstanding that ordinary contract principles would permit a participant or beneficiary to release liability, see Samuel Williston, *Williston on Contracts* § 19:25 (4th ed. 2017) ("A promise not to sue or an agreement exempting one from liability for future damage caused by the latter's simple negligence will generally be upheld."). The same is true here.

expert agency tasked with ERISA's administration disagrees. Whether or not the agency is entitled to formal deference, the courts should hesitate before reaching policy determinations squarely at odds with those responsible for implementing the statute. The Seventh Circuit's decision is incorrect, and this Court should grant further review.

E. At A Minimum, The Court Should Call For The Views Of The Solicitor General

The United States has confirmed that these forum-selection clauses violate ERISA and the question is of "substantial practical importance." *Smith* U.S. Br. 7, 19-20. Despite recognizing the Sixth Circuit's error and the "significance" of the issue, the government recommended denying review to permit further percolation. *Id.* at 20.

Since the Court last called for the views of the Solicitor General, two additional circuits have now expressly rejected the government's position. Many district courts have lined up on both sides of the debate. And it has become painfully clear that the barriers to appellate review of the question presented are far greater than the government had initially anticipated.

In light of those facts (and given the Secretary's participation below), there is every reason to believe that the government now believes that review of the question presented by this Court is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, the Court should call for the views of the Solicitor General.

Respectfully submitted.

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