

In the Supreme Court of the United States

GEORGE W. MATHIAS, APPLICANT

v.

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

**REPLY IN SUPPORT OF APPLICATION TO STAY DISTRICT-COURT
PROCEEDINGS PENDING DISPOSITION OF A PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT**

To the Honorable Elena Kagan,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Seventh Circuit

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ARGUMENT

I. RESPONDENTS OFFER NO COMPELLING REASON TO DENY MATHIAS'S STAY APPLICATION

Respondents' opposition to Mathias's application only underscores that a modest stay pending resolution of the petition for certiorari is both necessary and appropriate. Notably, respondents barely contest the importance of the question presented, and they offer little more than a sentence in defense of the Seventh Circuit's decision below. Opp. 5-6. Although respondents correctly note (as did the petition) the absence of a circuit split on this question, they admit (as emphasized in the petition) it has sharply divided two of the three circuits that have addressed it. Opp. 2-3. And they cannot deny that the holding of each of those circuits expressly rejects the position of the United States.¹

Perhaps realizing this lower court division is intolerable, respondents invoke (perplexingly) three courts of appeals that have addressed a different question—the validity of arbitration clauses in ERISA plans. Opp. 2-3. As the United States explains, however, this issue is entirely distinct from whether a forum selection clause may override ERISA's venue provision. Dep't of Labor Amicus Br. 14-15, *In re Mathias*, No. 16-3808 (7th Cir. Dec. 8, 2016). To be sure: arbitration and forum selection may be related as a matter of *contract* law. But the possibility of arbitration says nothing about the *statutory interpretation* question presented here—whether a contractual forum selection clause that permits suit in only *one* venue contravenes ERISA's venue provision, which permits suit in

¹ Respondents attempt to minimize the fact that dozens of district courts have also split over the question presented. Opp. 3. But they do not—and cannot—deny that there are many district courts on both sides of the split. Stay Application 13.

any of three. Even if arbitration clauses in ERISA plans are valid, that would result only from the compelling federal policy favoring arbitration, which itself is codified in an independent federal statute (the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*). There is no analogous statute granting primacy to generic forum-selection clauses (much less at ERISA's expense). See Dep't of Labor Amicus Br., *supra*, 14-15. Given the dearth of appellate rulings on the indisputably important question presented by *this* case, the significant division among the lower courts is precisely the kind of circumstance warranting review despite the absence of a circuit conflict.

Nor do respondents offer any compelling response to Mathias's argument that the question presented evades appellate review. Respondents do not dispute that, despite its constant recurrence, there have been three total appellate rulings on this issue in a decade. Opp. 3-4. They instead point to the fact that all three cases have arisen since 2014. Opp. 3. But two of those three cases—this one and *In re Clause*, No. 16-2607 (8th Cir. Sept. 27, 2016), cert. denied, 137 S. Ct. 825 (2017)—arose only by the concerted efforts of the same *pro bono* counsel, who themselves lack unlimited resources to forever pursue such cases. That hardly shows a host of upcoming opportunities for this Court to resolve the question presented and restore this critical protection to ERISA participants. Indeed, Mathias remains aware of no such opportunities, and respondents point to none.²

² Respondents are correct that one post-*Atlantic Marine* case raising the question presented has been dismissed rather than transferred. Opp. 4; see *Shah v. Wellmark Blue Cross Blue Shield*, No. 16-CV-2397, 2017 WL 1186341, at *2 (D.N.J. Mar. 30, 2017), appeal dismissed, No. 17-1982, 2017 WL 5157741 (3d Cir. Aug. 23, 2017). Nonetheless, Mathias's broader point stands; courts consistently prefer transfer to dismissal in this context, a sole counterexample notwithstanding. See Stay Application 23-24 & n.9 (collecting cases). And even more importantly, *Shah* evaded appellate review just like virtually every other case

The availability of mandamus review under limited circumstances in the Third Circuit is no solution at all. First, the dominant rule by far is that plaintiffs must seek review in the transferee circuit. 15 Charles Alan Wright & Arther R. Miller, *Federal Practice & Procedure: Jurisdiction* § 3846 (4th ed. Apr. 2017 update) (“When a motion for transfer * * * is granted and the papers are lodged with the clerk of the transferee court, the transferor court and the appellate court for the circuit in which that court sits lose jurisdiction over the case and may not proceed further with regard to it.”); *id.* n.1 (collecting cases). And even the Third Circuit recognizes the limited scope of mandamus jurisdiction over transfer orders. *In re Howmedica Osteonics Corp.*, 867 F.3d 390, 399-400 (3d Cir. 2017) (“[W]e do not indefinitely possess mandamus jurisdiction, and, once the transferee court proceeds with the transferred case, the decision as to the propriety of transfer is to be made in the transferee court.” (internal quotation marks omitted)).³

Second, even where mandamus might be available in the transferor circuit, the plaintiff would face incredible obstacles to obtaining relief. The plaintiff in this circumstance would have to find counsel in *both* forums, to conduct litigation on two fronts simultaneously. That only exacerbates the complexity and expense of preserving the venue issue. And the problem will only become worse if respondents’ view prevails—local attorneys simply will not accept cases subject to forum-selection clauses, leaving ERISA beneficiaries alone with the often insurmountable task of finding counsel hundreds or thousands of miles away.

that has raised the question presented. *Shah*, No. 17-1982, 2017 WL 5157741 (3d Cir. Aug. 23, 2017) (appeal dismissed).

³ Thus, contrary to respondents’ contention (Opp. 4), transfer orders remain effectively unreviewable upon final judgment even in the Third Circuit, given the difficulty in establishing prejudice. See Stay Application 21-22.

To understand the reality of this problem, the Court need look no further than respondents’ proposal for Mathias to avoid mootness here—that he take an appeal to the Seventh Circuit if the district court dismisses his case while his petition for certiorari remains pending. Opp. 7. The gamesmanship in this suggestion is palpable. Rather than acquiesce in a short pause in district court proceedings (a delay that will cause them no prejudice whatsoever), respondents suggest Mathias engage in *yet another* round of briefing, in a contested forum, hundreds of miles from his home, while proceedings in this Court are simultaneously ongoing—all just to keep the venue question from becoming moot. Even for respondents, it is a mystery how this outcome would be preferable to a stay, except as a tactic to outlast Mathias with their superior resources and thus win by default.⁴ Indeed, no rational ERISA plaintiff would be willing to undertake this expense without the kind of *pro bono* assistance Mathias has here. And such assistance may not be available in future cases. This case thus presents an exceedingly rare opportunity to address the question presented, and there is a reasonable probability that this Court will both grant review and reverse the decision below.

II. AS REQUIRED BY RULE 23.3, MATHIAS SOUGHT RELIEF FROM THE “APPROPRIATE” COURTS BELOW

Contrary to respondents’ suggestion, Mathias has sought a stay from the lower courts at every turn and has thus exhausted his lower court remedies. This Court’s Rule 23.3 says that “[e]xcept in the most extraordinary circumstances, an application for a stay

⁴ Further evidence of respondents’ approach: more than two weeks have passed since Mathias filed his petition for certiorari, and respondents have yet to file a waiver—despite the virtual certainty that they will ultimately do so.

will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.” S. Ct. R. 23.3. Here, Mathias sought all appropriate relief from both the Seventh Circuit and the district court. First, Mathias sought a stay in the district court both upon transfer and pending appellate review. See D. Ct. Doc. 22; Stay Application App. D at 2, 6. Second, Mathias sought a stay in the Seventh Circuit pending resolution of his petition for a writ of mandamus. C.A. Doc. 5. That request was granted (C.A. Doc. 11), and the stay remained in place pending his petition for rehearing *en banc*. See Stay Application App. B (lifting the stay after Mathias’s petition for rehearing *en banc* was denied). Respondents’ contention to the contrary (Opp. 6-7) is simply false.

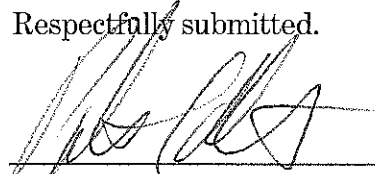
Once the Seventh Circuit denied Mathias’s petition for rehearing *en banc*, the only “appropriate” court in which to seek a further stay was the district court, and that is precisely what Mathias did. Stay Application App. C. No appeal to the Seventh Circuit was available upon the district court’s denial of that request, because no part of the case remained pending before the Seventh Circuit. See Fed. R. App. P. 8 (discussing stays “pending appeal” to the court of appeals). Nor, in the context of this case, could Mathias have sought a stay of the Seventh Circuit’s mandate under Federal Rule of Appellate Procedure 41(d). Mathias sought a writ of mandamus in the Seventh Circuit—an original proceeding (not an appeal) that never divested the district court of jurisdiction over the underlying action. See 28 U.S.C. 1651; 28 U.S.C. 1291; cf. *Cheney v. U.S. D. Ct. D.C.*, 542 U.S. 367, 378 (2004) (holding the time limits for filing an appeal under Fed. R. App. P. 4(a) do not apply to mandamus proceedings because they are not appeals, but original

proceedings). As such, no mandate ever issued to the district court upon the Seventh Circuit's resolution of Mathias's mandamus petition. C.A. Docket, *In re Mathias*, No. 16-3808. Even assuming that some appellate courts might issue a mandate in this context, it is not reasonable to expect Mathias to request a stay of the mandate in a case where none ever issued. Mathias has therefore sought "the relief requested [from this Court] * * * in the *appropriate* court or courts below." S. Ct. R. 23.3 (emphasis added).

CONCLUSION

Mathias's application for a stay pending resolution of his petition for certiorari should be granted.

Respectfully submitted.



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