No. 22-

IN THE

Supreme Court of the United States

CINTAS CORPORATION, ET AL.,
Petitioners,

v.

RAYMOND HAWKINS AND ROBIN LUNG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Cintas Corporation sponsors a defined contribution retirement plan governed by the Employee Retirement Income Security Act of 1974 (ERISA). Respondents are former Cintas employees who participated in the Cintas retirement plan. In their employment contracts with Cintas, respondents agreed that "all of [their] rights or claims arising out of or in any way related to [their] employment with" Cintas, "such as rights or claims arising under … the Employee Retirement Income Security Act," shall be resolved through arbitration. Respondents later filed a complaint in federal court asserting claims under Section 502(a)(2) of ERISA, which authorizes any "participant, beneficiary or fiduciary" of a retirement plan to sue the plan's fiduciaries for breach of their fiduciary duties. The question presented is:

Whether an agreement to arbitrate claims against an ERISA plan's fiduciaries under Section 502(a)(2) of ERISA is enforceable without regard to whether the plan is a party to the agreement.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Cintas Corporation ("Cintas"), the Board of Directors of Cintas Corporation, the Investment Policy Committee, and Scott D. Farmer were defendants-appellants in the proceeding below. None of the petitioners has a parent corporation, and no publicly held corporation has 10 percent or greater ownership in any of the petitioners.

Respondents Raymond Hawkins and Robin Lung were plaintiffs-appellees in the proceeding below.

RELATED PROCEEDINGS

United States of Court of Appeals (6th Cir.):

Hawkins v. *Cintas Corp.*, No. 21-3156 (Apr. 27, 2022)

United States District Court (S.D. Ohio):

Hawkins v. *Cintas Corp.*, No. 1:19-cv-1062 (Jan. 27, 2021)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion (Pet. App. 1a–23a) is reported at 32 F.4th 625. The district court's opinion (Pet. App. 24a–38a) is unreported and available at 2021 WL 274341.

JURISDICTION

The Sixth Circuit entered its judgment on April 27, 2022. Pet. App. 1a. On July 19, 2022, this Court granted an application to extend the time to file a petition for a writ of certiorari to September 9, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act (FAA) provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

9 U.S.C. § 2.

Section 502(a)(2) of ERISA provides:

> (a) A civil action may be brought—
>
> …
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409[.]

See 29 U.S.C. § 1132(a)(2). In turn, Section 409(a) of ERISA provides in relevant part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

See 29 U.S.C. § 1109(a).

INTRODUCTION

The Sixth Circuit in this case deepened what is now a 3–2 split of authority on an important issue impacting the retirement plan industry. The sponsors of retirement plans (typically the employers who established the plans, who are also plan fiduciaries) have been a major target of litigation under ERISA in recent years, especially with respect to questions concerning the fees associated with the various investment options made available to participants in a plan. ERISA provides for such lawsuits to be brought by, among others, the participants themselves. That

is, Congress has empowered retirement plan participants to seek relief for harm done by fiduciaries of the plan to the participants' assets in a plan. 29 U.S.C. § 1132(a)(2). Facing the waste and burdens of lengthy litigation, retirement plan sponsors have sought to avail themselves of the potential cost savings and convenience provided by arbitration.

In this case, the sponsor of the Cintas retirement plan included in its contracts with its employees an agreement to arbitrate any disputes related to their employment. That agreement expressly covered claims arising under ERISA. When the respondents, participants in the Cintas plan, filed suit asserting claims under ERISA for breach of fiduciary duty, Cintas moved to enforce the agreement and compel arbitration. After the district court refused to order arbitration, the Sixth Circuit affirmed. It did so because, according to the Sixth Circuit, a claim brought under Section 502(a)(2) of ERISA is not the participant's claim, but rather belongs to the retirement plan (a legally distinct entity). According to the Sixth Circuit, participants who agree to arbitrate ERISA claims do not, because they cannot, agree with their employer to arbitrate claims they bring under Section 502(a)(2).

The Sixth Circuit joined the Ninth Circuit in reaching this result. See *Munro* v. *Univ. of S. Cal.*, 896 F.3d 1088 (9th Cir. 2018). The Second, Fifth, and Tenth Circuits have allowed claims arising under Section 502(a)(2) to be the subject of enforceable arbitration agreements, just like any other federal statutory claim, without regard to whether the plan is a party to the agreement; the participant's agreement to arbitrate ERISA claims is sufficient. See *Bird* v. *Shearson Lehman/Am. Express, Inc.*, 926 F.2d 116, 118–22 (2d Cir. 1991); *Kramer* v. *Smith Barney*, 80

F.3d 1080, 1084–85 (5th Cir. 1996); *Williams* v. *Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000). This Court should accept review here to resolve the conflict.

National uniformity is crucial in this area because many employers have employees based in jurisdictions throughout the country, and the uniform treatment of claims brought by ERISA plan beneficiaries is a matter of Congressional policy. The issue could not be more cleanly presented because the language of the arbitration agreement here is unambiguous and comprehensive, leaving no room for doubt that the parties intended *all* ERISA claims that employees might bring to be subject to arbitration.

Importantly, the Sixth Circuit decision is wrong. It ignores the strong federal policy favoring enforcement of arbitration agreements. And its reasoning directly conflicts with this Court's recent ruling, decided less than two months after the Sixth Circuit ruled, in *Viking River Cruises, Inc.* v. *Moriana*, 142 S. Ct. 1906 (2022). The rationale for refusing to enforce agreements to arbitrate Section 502(a)(2) claims, first articulated by the Ninth Circuit in *Munro*, is that when a participant sues pursuant to Section 502(a)(2), the participant is like a relator in a *qui tam* action, or a plaintiff in a derivative action; the participant is entitled to sue, but only on behalf of some distinct legal entity. And because the lawsuit "belongs" in some technical legal sense to the other legal entity (the plan), the participant's agreement to arbitrate all ERISA "rights or claims" is beside the point. That rationale has always been dubious because it is based on a misreading of this Court's decisions in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985), and *LaRue* v. *DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008). But whatever might have been said for that reasoning before *Vi-*

king, it is now unsustainable after *Viking*. In *Viking*, this Court expressly stated that "single-principal, single-agent representative actions," to the extent they deviate from bilateral litigation norms, are "not alien to traditional arbitral practice." 142 S. Ct. at 1922. When one party is authorized to sue as the "agent" of some other party, and the "agent" has an arbitration agreement with the defendant that encompasses the lawsuit, the arbitration agreement controls. See *id.* at 1922–23.

This Court should accept review to clarify the enforceability of arbitration agreements in the common situation where an agent (here, a plan participant) is empowered by statute to sue on behalf of some other entity (the plan).

STATEMENT OF THE CASE

A. ERISA and Defined Contribution Plans

ERISA is a comprehensive federal statute designed to "protect … the interests of participants" in employer-sponsored benefit plans. 29 U.S.C. § 1001(b). Plan fiduciaries must administer the plan "solely in the interest of the participants and beneficiaries" of the plan, and must act with the "care, skill, prudence, and diligence under the circumstances then prevailing" in carrying out their plan-related duties. *Id.* § 1104(a)(1). The plan sponsor and others are plan fiduciaries if they are named as fiduciaries in the plan documents, or if they otherwise meet ERISA's definition of "fiduciary." See *id.* §§ 1002(21)(A), 1102(a).

One type of benefit plan that employers can sponsor for their employees is a defined contribution plan, also known as an "individual account plan." See Pet. App. 2a–3a & n.1. In a defined contribution plan, the

plan sponsor assembles a menu of investment options, and each participant chooses from that menu and decides how to allocate the money in her individual account. The value of each participant's individual account thus depends on "the amount contributed" to the account, and "any income, expenses, gains and losses" resulting from the investment options that the participant selects. 29 U.S.C. § 1002(34); see also Pet. App. 2a–3a & n.1.

If a plan sponsor breaches its fiduciary duties—for example, by acting disloyally in selecting the investment options, or by imprudently administering a participant's account—the affected participants can sue under Section 502(a)(2) of ERISA. That provision authorizes a civil action to be brought "by the Secretary [of Labor], or by a participant, beneficiary or fiduciary" against the plan sponsor for breach of fiduciary duties. 29 U.S.C. § 1132(a)(2). If a participant prevails on a Section 502(a)(2) claim, she may recover the losses to her plan assets resulting from the breach. *Id.* § 1109(a).

B. The Parties' Agreements to Arbitrate

Respondents are former Cintas employees who participated in the Cintas Partners' Plan (the "Plan"), a defined contribution retirement plan sponsored by Cintas. Respondents entered into employment contracts with Cintas, each of which contains arbitration provisions. See Pet. App. 3a–4a.

The arbitration provisions are broad and explicit. They cover "all" of respondents' "rights or claims arising out of or in any way related to [their] employment with" Cintas. Pet. App. 4a. And they expressly include ERISA claims within their scope. See *id.* They provide as follows:

> … The rights and claims of Employee covered by this Section 8, including the arbitration provisions below, specifically include but are not limited to ***all of Employee's rights or claims*** arising out of or in any way related to Employee's employment with Employer, ***such as rights or claims arising under … the Employee Retirement Income Security Act*** ….
>
> Either party desiring to pursue a claim against the other party will submit to the other party a written request to have such claim, dispute or difference resolved through impartial and confidential arbitration. …
>
> Except for workers' compensation claims, unemployment benefits claims, claims for a declaratory judgment or injunctive relief concerning any provision of Section 4 and claims not lawfully subject to arbitration, the impartial arbitration proceeding, as provided above in this Section 8, will be the exclusive, final and binding method of resolving any and all disputes between Employer and Employee. …

Pet. App. 4a–5a (emphases altered).

C. Proceedings Below

1. Respondents filed a putative class action complaint in federal court against petitioners. The complaint expressly states that "the Plan is not a party" to this case. Compl. (ECF No. 1) at 2 n.1.

The complaint asserts claims under Section 502(a)(2) of ERISA. First, it claims that Cintas and its Investment Policy Committee breached their fiduciary duties by selecting actively managed mutual funds, instead of passively managed funds or other alternatives, for the Plan's menu of investment op-

tions, and by allowing the Plan to pay allegedly excessive recordkeeping fees. It also claims that Cintas and its Board of Directors breached their fiduciary duties by failing to adequately monitor the Investment Policy Committee. Respondents seek to bring these claims "on behalf of themselves and [a] proposed class" of certain "participants in or beneficiaries of the Plan." *Id.* ¶ 47. The relief they seek includes "[a]ctual damages in the amount of any losses the Plan suffered, to be allocated among the participants' individual accounts in proportion to the accounts' losses." *Id.* ¶ 136.

Cintas moved to compel arbitration of the claims in accordance with its agreements with respondents to arbitrate "all" of their "rights or claims arising under" ERISA. See Pet. App. 4a. The district court denied the motion. Pet. App. 38a.

2. The Sixth Circuit affirmed. The Sixth Circuit acknowledged that the FAA reflects "an emphatic federal policy in favor of arbitral dispute resolution." Pet. App. 6a (citation omitted). And the Sixth Circuit acknowledged that no other circuit has ruled that ERISA's policies outweigh the policies embodied in the FAA. Rather, "'every other circuit to consider the issue' has held that 'ERISA claims are generally arbitrable.'" *Id.* at 7a (citation omitted). Nonetheless, it found the policy favoring arbitration to be outweighed here by "ERISA's policy … to provide 'ready access to the Federal courts,'" *id.* (quoting 29 U.S.C. § 1001(b)), in light of what it deemed to be the "derivative" nature of Section 502(a)(2) suits.

As the Sixth Circuit viewed matters, suits under Section 502(a)(2) claims are "derivative" in nature in light of "common-law trust principles." Pet. App. 13a. According to the Sixth Circuit, the plan holds legal title to any recovery for a Section 502(a)(2) claim, so

the claim "really 'belongs' to the Plan," not to the participant who brings it. *Id.* And because the claim does not "belong" to the participant, the court concluded, the participant's agreement to arbitrate the claim is unenforceable. *Id.*

The Sixth Circuit relied extensively on *Munro* v. *University of Southern California*, 896 F.3d 1088 (9th Cir. 2018), which likewise had viewed claims brought by participants under Section 502(a)(2) as actually belonging to the plan. The Ninth Circuit analogized Section 502(a)(2) claims to *qui tam* claims brought by relators on behalf of the United States under the False Claims Act. In the Ninth Circuit, such claims "belong to the government and not to the relator," and the claims therefore are "not within the scope of the arbitration agreements" that the relator can validly enter into, absent the government's consent. Pet. App. 11a (quoting *Munro*, 896 F.3d at 1092) (internal quotation marks omitted). The Sixth Circuit found that analogy persuasive and adopted it. See *id.* at 11a–13a. It said Section 502(a)(2) of ERISA is akin to the False Claims Act because both "require a plaintiff to bring suit in the plaintiff's own name on behalf of a non-party entity, and the remedy is paid out to that non-party entity." *Id.* at 13a n.7. In the Sixth and Ninth Circuits' view, it does not matter that recovery to the plan is allocated into each affected participant's individual account, and thus directly and solely benefits the affected participants. Having divorced each participant's personal interest in recovery from Section 502(a)(2) suits, the Sixth Circuit, following the Ninth Circuit, concluded that, absent consent of the plan, plan participants' agreements to arbitrate Section 502(a)(2) claims are unenforceable. *Id.* at 11a–13a.

The Sixth Circuit rejected petitioners' argument that arbitration agreements are merely a specialized type of forum-selection clause and are thus enforceable. See Pet. App. 20a–21a. ERISA provides that Section 502(a)(2) claims can be brought in any of several judicial fora: "in the district 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). Petitioners had argued that, just as participants have the power—without consent of the plan—to choose among available venues for Section 502(a)(2) claims, participants have the power to enter into enforceable agreements to resolve those claims in an arbitral forum. See Pet. App. 20a–21a. The Sixth Circuit did not disagree that participants may choose among judicial fora without the plan's consent, but deemed the choice of an arbitral forum to be different in kind. *Id.*

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision deepens a split among the federal courts of appeals on the issue of whether an agreement to arbitrate Section 502(a)(2) claims is enforceable, even when the plan is not a party to the agreement. In the Second, Fifth, and Tenth Circuits, such agreements are enforceable. *Bird* v. *Shearson Lehman/Am. Express, Inc.*, 926 F.2d 116, 118–22 (2d Cir. 1991); *Kramer* v. *Smith Barney*, 80 F.3d 1080, 1084–85 (5th Cir. 1996); *Williams* v. *Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000). But in the Sixth and Ninth Circuits, they are not. See Pet. App. 10a–19a; *Munro* v. *Univ. of S. Cal.*, 896 F.3d 1088 (9th Cir. 2018).

The uniform treatment across jurisdictions of each ERISA plan and disputes relating to it is unquestionably an important matter of federal policy. And this case presents an excellent vehicle to resolve this split.

The terms of the arbitration agreements between respondents and Cintas, the plan sponsor, are straightforward and clear. The scope of the agreements, in light of their language, is not in dispute. There is no doubt that respondents agreed to arbitrate "all" of their "rights or claims arising out of or in any way related to [their] employment with" Cintas, expressly including "rights or claims arising under … the Employee Retirement Income Security Act." Pet. App. 4a–5a (emphases omitted). The only dispute is whether such an express agreement is effective as to plan participants' claims under Section 502(a)(2) of ERISA.

The Court should review the decision below also because it is wrong. It is irreconcilable with *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612 (2018), and with this Court's many other arbitration precedents, which direct lower courts to interpret federal statutes so as to resolve ambiguities in favor of arbitration. Rather than applying that principle, the Sixth Circuit, like the Ninth Circuit before it, ignored *Epic Systems* and interpreted Section 502(a)(2) as conferring a right on plan participants to assert claims that belong not to the participants themselves, but to the plan. That ruling was not moored to any statutory text. Instead, it was based on the notion, supposedly rooted in common-law trust principles, that Section 502(a)(2) claims are "derivative" in nature, and that participants who assert those claims on the plan's behalf are therefore powerless to agree to arbitrate them. But Section 502(a)(2) claims are not "derivative" in any sense that could matter here. The statute expressly authorizes participants to bring this lawsuit, and any recovery would flow not into some undifferentiated planwide account, but would be credited to each affected participant's individual account. That is, the

statute expressly grants participants the right to bring the claims in this suit (and the arbitration agreement encompasses all of respondents' "rights and claims"). Especially in the context of defined contribution plans, the claims belong to the participants who the statute authorizes to assert them. The Sixth Circuit's contrary conclusion was based on a misreading of *LaRue* v. *DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008), which nowhere denies that Section 502(a)(2) claims belong to participants or that participants may enter binding agreements to arbitrate them.

Even if Section 502(a)(2) claims were "derivative" in some relevant sense, the Sixth Circuit's conclusion still does not follow. Courts have widely recognized that an agent who asserts claims in a representative capacity for a principal is bound by agreements to arbitrate such claims, even if the principal is not a party to the agreements. Indeed, less than two months after the Sixth Circuit ruled in this case, this Court made clear that nothing in such a principal-agent arrangement interferes with the enforceability of an arbitration agreement. See *Viking River Cruises, Inc.* v. *Moriana*, 142 S. Ct. 1906 (2022).

I. THE DECISION BELOW DEEPENS A SPLIT AMONG THE CIRCUITS.

1. The Second, Fifth, and Tenth Circuits have held that an arbitration agreement is enforceable with respect to claims against a plan fiduciary arising under Section 502(a)(2) of ERISA whenever a participant agrees to arbitrate such a claim, without regard to whether the plan is a party to the agreement.

The Second Circuit was the first court of appeals to address the issue. In *Bird* v. *Shearson Lehman/American Express, Inc.*, two plaintiffs—a partic-

ipant of an employee benefits plan, and the trustee of the plan, who was also a participant—sued an investment firm for breach of fiduciary duties under Section 502(a)(2) of ERISA. 926 F.2d at 117. The trustee/participant had entered into a standard customer's agreement with the firm, in which he agreed that disputes relating to the agreement would be "settled by arbitration." *Id.* at 117–18. In the parties' first appeal, the Second Circuit held that the agreement was unenforceable as to the plaintiffs' Section 502(a)(2) claims. This Court granted certiorari, vacated the Second Circuit's judgment, and remanded the case for further consideration in light of *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989), which held that agreements to arbitrate claims arising under the Securities Act of 1933 were enforceable. See *Bird*, 926 F.2d at 118. On reconsideration following remand, the Second Circuit concluded that ERISA's policy of providing "ready access to the Federal courts" did not reflect any Congressional intent to prevent ERISA claims from being subject to arbitration. *Id.* at 119–20 (quoting 29 U.S.C. § 1001(b)).

The Second Circuit recognized that the participant who was not a trustee had not entered into any agreement to arbitrate with the defendant. But it found no reason not to enforce the arbitration agreement as to her, in addition to the trustee/participant who had signed the arbitration agreement, because both plaintiffs' interests were aligned. *Id.* at 121. The court held that the arbitration agreement was enforceable without considering whether the plan was a party to it. *Id.* at 122.

The Fifth Circuit reached the same result in *Kramer* v. *Smith Barney*, 80 F.3d 1080. There, the plaintiff was both the trustee and a beneficiary of two pen-

sion plans he had set up for the benefit of himself and his employees. *Id.* at 1082. He sued a brokerage firm under Section 502(a)(2) of ERISA, claiming the firm had breached its fiduciary duties by selling unsuitable investments to the plans. *Id.* at 1082–83. Before the suit, the plaintiff had signed a standard customer agreement with the brokerage firm, in which he agreed that disputes relating to the plans would be resolved by arbitration. *Id.* at 1082. The Fifth Circuit enforced the agreement, without regard to whether the plans were parties to the agreement. *Id.* at 1084.

The Tenth Circuit joined the Second and Fifth Circuits in *Williams* v. *Imhoff*, 203 F.3d 758. The plaintiffs in *Williams* were employees who claimed that the trustees and committee members of their employer-sponsored benefit plan had breached their ERISA fiduciary duties by undervaluing investments in the plan. *Id.* at 760, 762. Each plaintiff had signed agreements in which they agreed to arbitrate "any dispute, claim or controversy" with their employer. *Id.* at 760. The Tenth Circuit held that those agreements were enforceable with respect to the Section 502(a)(2) claims the plaintiffs asserted, even though the plan was not a party to those agreements. *Id.* at 767. Like the Second and Fifth Circuits, the court did not even discuss whether the plan was a party to the arbitration agreement. The participants' agreement to arbitrate their ERISA claims was sufficient.

These decisions all reflect the general principle that "the FAA applies with full force to claims under ERISA," and thus that "ERISA claims are generally arbitrable." *Smith* v. *Bd. of Dirs. of Triad Mfg., Inc.*, 13 F.4th 613, 620 (7th Cir. 2021) (citing, *inter alia*, *Pritzker* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993), and *Arnulfo P. Sulit, Inc.* v. *Dean Witter Reynolds, Inc.*, 847 F.2d

475, 478–79 (8th Cir. 1988)). The rule appeared settled: participants could agree to arbitrate ERISA claims asserted under Section 502(a)(2) without regard to whether the plan was a party to the arbitration agreement.

2. That all changed in 2018. The Ninth Circuit created a split of authority in *Munro* v. *University of Southern California*, 896 F.3d 1088. The plaintiffs in *Munro* were plan participants who sued their plan sponsor for breach of fiduciary duties under Section 502(a)(2). See *id.* at 1090. In their employment contracts, each plaintiff had agreed to "the resolution by arbitration of all claims … that [plaintiff] may have against the University or any of its related entities," including "claims for violation of any federal, state or other governmental law, statute, regulation, or ordinance." *Munro* v. *Univ. of S. Cal.*, No. CV-16-6191, 2017 WL 1654075, at *1 (C.D. Cal. Mar. 23, 2017), *aff'd*, 896 F.3d 1088. The Ninth Circuit held that the Section 502(a)(2) claims the plaintiffs asserted could not validly be within the scope of their arbitration agreements because such claims "are brought on behalf of the Plans" and the plaintiffs "consented only to arbitrate claims brought on their own behalf." *Munro*, 896 F.3d at 1092.

In reaching that conclusion, the Ninth Circuit imported reasoning from *United States ex rel. Welch* v. *My Left Foot Children's Therapy, LLC*, 871 F.3d 791 (9th Cir. 2017)—a case arising not under ERISA, but under the False Claims Act. In *Welch*, the plaintiff-relator had entered into an employment contract in which he agreed to arbitrate claims against his employer. *Id.* at 794. The court held that the agreement was unenforceable with respect to *qui tam* claims that the plaintiff asserted as a relator under the False Claims Act (FCA), because "the underlying

fraud claims asserted in a FCA case belong to the government and not to the relator." *Id.* at 800. *Munro* extended *Welch*'s reasoning to ERISA. It concluded that plaintiffs who assert Section 502(a)(2) claims are similar to *qui tam* relators because both seek recovery "only for injury done to" a separate legal entity—that is, the United States (in FCA cases) or the plan (in Section 502(a)(2) suits). *Munro*, 896 F.3d at 1092–93. Given the purported similarities between suits brought under the FCA and ERISA, and despite the numerous differences between the two statutory schemes, the Ninth Circuit held that "claims for breach of fiduciary duty brought under ERISA must be treated the same as *qui tam* claims brought under the FCA." *Id.* at 1092.

The Sixth Circuit has now deepened the split by joining the Ninth Circuit. Its opinion nowhere mentioned the decisions of the Second, Fifth, and Tenth Circuits on the other side of the split, much less tried to reconcile its reasoning with those cases. And, in similar fashion, it simply said nothing about this Court's decision in *Epic Systems Corp.* v. *Lewis*. Instead, it followed the Ninth Circuit. See Pet. App. 10a–13a.

3. There are no vehicle issues that would prevent this Court from authoritatively resolving this issue nationwide. The issue is squarely presented by the clearest possible language in a broad arbitration agreement. Further percolation of the issue would provide no benefit to this Court. The positions and arguments on both sides of the split are clear and fully developed. The Court should grant the petition to resolve this split now.

II. THE DECISION BELOW IS IRRECONCILABLE WITH THIS COURT'S PRECEDENTS, INCLUDING *VIKING RIVER CRUISES, INC.* V. *MORIANA*

The Sixth Circuit's judgment also merits review because it is wrong, for several reasons. It departs from *Epic Systems* and numerous other decisions of this Court, which instruct courts to interpret federal statutes in harmony with the FAA. It claims to justify that departure by pointing to this Court's decision in *LaRue*, but only by misreading that decision. And rather than follow this Court's precedents and apply the plain terms of the FAA and ERISA, it invokes unsupported notions about the common law of trusts and other representative action suits that need not and do not frustrate the FAA's policy favoring arbitration.

All of that is especially true in light of this Court's recent ruling in *Viking River Cruises, Inc.* v. *Moriana*, 142 S. Ct. 1906. *Viking* held that an individual's arbitration agreement, which included a waiver provision stating that the parties could not bring any dispute as a representative action under California's Labor Code Private Attorneys General Act (PAGA), was enforceable even though the State was not a party to the agreement. *Id.* at 1922–24. In so holding, this Court rejected the premise that "single-agent, single-principal representative suits are inconsistent [with] the norm of bilateral arbitration." *Id.* at 1922. That premise formed the foundation of the Sixth Circuit's reasoning below. Without it, the decision does not stand.

1. The FAA mandates that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As

this Court has long recognized, the FAA reflects Congress's intent to establish "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (citing *Prima Paint Corp.* v. *Flood & Conklin Mfg. Corp.*, 388 U.S. 395 (1967)). It was enacted in response to "widespread judicial hostility to arbitration agreements," *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011), and its "principal purpose" is to "ensur[e] that private arbitration agreements are enforced according to their terms," *id.* at 344 (quoting *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

In light of the strong federal policy reflected in the FAA, arbitration agreements are presumed enforceable. The party resisting arbitration "bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue." *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79, 91–92 (2000). And any "ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration." *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1418–19 (2019) (citing *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985), and *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25).

Epic Systems Inc. v. *Lewis* applied these well-settled principles in a case that, like this one, called upon the Court to reconcile the FAA with another federal statute. In *Epic Systems*, employees argued that agreements to subject certain claims to individualized arbitration are an unlawful bar on "concerted activities" under the National Labor Relations Act (NLRA), and that the NLRA therefore overrides the FAA and makes those agreements unenforceable. 138 S. Ct. at 1620–21. This Court rejected that argument.

The Court aimed for "harmony over conflict" in interpreting the statutes, "stri[ving] to give effect to both" the NLRA and the FAA. *Id.* at 1624 (internal quotation marks omitted). And it achieved that harmony by interpreting the NLRA's guarantee of "the right … to engage in other concerted activities" not to include a right to bring class or collective actions. *Id.*

Epic Systems is the roadmap for this case. The employees in *Epic Systems* sought to avoid arbitration by claiming a federal statute was at odds with the FAA's clear mandate. Respondents here have done the same, merely with another federal statute (ERISA instead of the NLRA). Yet the Sixth Circuit's decision—like the Ninth Circuit's decision in *Munro*—did not cite, much less address, *Epic Systems*. The Sixth Circuit should have instead aimed to "harmon[ize]" ERISA with the FAA, as *Epic Systems* mandates. *Id.* And there was a way to "easily" do so. *Id.* at 1632.

Section 502(a)(2) of ERISA authorizes a civil action to be brought by "a participant, beneficiary or fiduciary"—not by retirement plans. 29 U.S.C. § 1132(a)(2). That text makes plain that Section 502(a)(2) claims belong to the "participant, beneficiary or fiduciary" who brings them—not to the plan. *Id.* That reading, guided by the principles applied in *Epic Systems*, should have resolved this case and required arbitration of the Section 502(a)(2) claims that respondents agreed to arbitrate yet asserted in court.

The Sixth Circuit pointed to nothing in the text of ERISA to support its contrary interpretation. Instead, its ruling relied on general "common-law trust principles." Pet. App. 13a. But there are crucial differences between ERISA and the common law of trusts. "[T]rust law does not tell the entire story." *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996). Even

when trust law may be used as a "starting point," courts must "go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements," while also "tak[ing] account of competing congressional purposes." *Id.*; see also *Thole* v. *U.S. Bank N.A.*, 140 S. Ct. 1615, 1623 (2020) (Thomas, J., concurring). The Sixth Circuit should have taken account of the plain text of Section 502(a)(2) and the Congressional policies reflected in the FAA, as *Epic Systems* instructs. Its ruling disregarded, and conflicts, with both.

The Sixth Circuit resisted the conclusion that Section 502(a)(2) claims belong to the individual participant, rather than to the plan, because, it thought, that conclusion would "conflict with" this Court's decision in *LaRue* v. *DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248. But *LaRue* is no barrier to reconciling the FAA and ERISA in favor of allowing arbitration here.

LaRue clarified the narrow scope of this Court's prior decision in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985). *Russell* addressed claims brought against the fiduciary of a defined benefit plan. Participants in a defined benefit plan do not have individual accounts. Rather, each participant is promised a fixed level of retirement income, typically based on a formula that uses the participant's years of employment and compensation as inputs, and the participant is paid that income out of plan assets upon retirement. Pet. App. 3a n.1. *Russell* had held that Section 502(a)(2) of ERISA allows recovery only for losses to plan benefits, and that a participant in a defined benefit plan thus cannot use ERISA to seek consequential or punitive damages beyond those losses. 473 U.S. at 139–42. In prohibiting

the plaintiff in *Russell* from suing for such consequential or punitive damages, the Court said that Section 502(a)(2) authorizes recovery of benefits for "the plan as a whole." *Id.* at 140.

Before *LaRue*, some courts had read *Russell* to mean that plaintiffs suing under ERISA could never bring claims for relief that would benefit them only individually, even if the individual benefit they received came from an increase in plan assets. See, e.g., *Milofsky* v. *Am. Airlines, Inc.*, 404 F.3d 338, 344 (5th Cir. 2005); *Coyne & Delany Co.* v. *Blue Cross & Blue Shield of Va., Inc.*, 102 F.3d 712, 714–15 (4th Cir. 1996). *LaRue* corrected that misreading.

The plaintiff in *LaRue* was a participant in a defined contribution plan who sued his former employer under Section 502(a)(2). 552 U.S. at 250–51. The Court held that the plaintiff could pursue his claim, even though he sought only individualized relief, because Section 502(a)(2) "authorize[s] recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account." *Id.* at 256. It remains true that Section 502(a)(2) "does not provide a remedy for individual injuries distinct from plan injuries." *Id.* But in the context of defined contribution plans, all that means is the participant cannot recover consequential or punitive damages; any monetary relief is limited to recovery of "the value [that] plan assets in the participant's individual account" would have had but for the alleged misconduct. *Id.* at 250.

So, contrary to the Sixth Circuit's suggestion (Pet. App. 16a), *LaRue* nowhere denies that a participant suing under Section 502(a)(2) is asserting her own claim, as opposed to a claim of the plan. Before *LaRue*, it might have been possible to read *Russell* to suggest that Section 502(a)(2) claims belong to the

plan. But *LaRue* made clear that such a reading is wrong, especially in the context of defined contribution plans where there is no ambiguity that the participant is pursuing her own personal interests and seeking to benefit her own individual account.

Indeed, that is the point of *LaRue*: an individual participant can bring an individual claim under Section 502(a)(2) to advance her own personal interest. To be sure, only certain of her injuries can be addressed in such a suit, namely injuries to her interest in plan assets. But the injury remains the individual's, and so the claim remains the individual's to assert, as Congress has directed. Nothing in *LaRue* compels the conclusion the Sixth Circuit reached.

Nor does it make sense to ask, as the Sixth Circuit did, whether the plan consented to arbitration of these types of ERISA claims. Once the participant has consented, whether the plan also consented is irrelevant. As discussed below, and as *Viking* makes clear, either the principal or agent can consent in a principal-agent relationship. And it makes particularly little sense to ask whether the plan has consented in the context of claims under Section 502(a)(2), which involve participants suing to vindicate their own interests in plan assets. Once a participant commences a Section 502(a)(2) claim, the plan has no control over the litigation. The statute gives participants full control over Section 502(a)(2) claims; participants decide where and when the suits are brought, and they decide whether to settle or litigate the suits to judgment. The plan acting through its fiduciaries has no right to interfere with those decisions. So it makes sense that participants also decide whether to arbitrate the claims.

2. The Sixth Circuit's decision is also irreconcilable with this Court's subsequent decision in *Viking River Cruises, Inc.* v. *Moriana*, 142 S. Ct. 1906.

Viking considered California's Labor Code Private Attorneys General Act (PAGA), which allows certain individuals to bring a "representative action" as an "'agent or proxy' of the State." *Id.* at 1914. In PAGA suits, under California law, the State is the "real party in interest," and employees have no private rights or claims but instead have only the "right to assert the State's claims" on a "representative" or "derivative basis." *Id.* at 1914–15. The respondent had agreed to arbitrate any dispute arising out of her employment, and the agreement included a waiver provision stating that she could not bring any dispute as a representative action under PAGA. *Id.* at 1916. The California Supreme Court had held that agreements to arbitrate individual PAGA claims for Labor Code violations were unenforceable, on the theory that "resolving victim-specific claims in separate arbitrations does not serve the deterrent purpose of PAGA." *Id.* at 1916–17.

This Court reversed. In doing so, it rejected the notion that "single-agent, single principal representative suits are inconsistent [with] the norm of bilateral arbitration." *Id.* at 1922. Such "representative suits" include, for example, shareholder derivative suits and wrongful death actions. In such suits, the plaintiff is an agent and representative for an absent party and asserts the absent party's claim. See *id.* And *Viking* observed that an agent-plaintiff and the defendant can agree between themselves to resolve such disputes through arbitration, even when the principal has not so agreed. *Id.* Though committing such disputes to arbitration without the principal's consent is some "degree of deviation from bilateral norms," that

deviation is "not alien to traditional arbitral practice." *Id.*

The Court's observation in *Viking* is borne out by the case law. Federal and state courts have long held that shareholder-derivative suits—in which a shareholder-plaintiff stands in the shoes of an absent company to assert claims on the company's behalf—can be subjected to valid arbitration agreements, even though the company is not a party to the agreement. See, e.g., *Long* v. *Silver*, 248 F.3d 309, 319 (4th Cir. 2001); *Maresca* v. *La Certosa*, 172 A.D.2d 725, 725–26 (N.Y. App. Div. 1991); *Burns* v. *Olde Disc. Corp.*, 538 N.W.2d 686, 688 (Mich. Ct. App. 1995); see also *Viking*, 142 S. Ct. at 1922 n.7 (citing *In re Carl*, 263 A.D. 887 (N.Y. App. Div. 1942); *Lumsden* v. *Lumsden Bros. & Taylor Inc.*, 242 A.D. 852 (N.Y. App. Div. 1934)). Courts in wrongful-death actions have applied a similar rule, holding that an agreement to arbitrate the decedent's claims are enforceable even though the claims "belong" to the decedent and the decedent's beneficiaries. See, e.g., *United Health Servs. of Ga., Inc.* v. *Norton*, 797 S.E.2d 825, 826–27 (Ga. 2017) (arbitration agreement signed by the plaintiff-agent as power of attorney for the decedent was enforceable as to wrongful-death claims, even though the claims belonged to the decedent and her beneficiaries, who were not parties to the agreement); *Est. of Decamacho ex rel. Guthrie* v. *La Solana Care & Rehab, Inc.*, 316 P.3d 607, 613 (Ariz. Ct. App. 2014) ("[S]tates that consider wrongful death actions as derivative of the decedent's claims conclude that the decedent's heirs are bound."); see also *Viking*, 142 S. Ct. at 1922 (describing *Marmet Health Care Center, Inc.* v. *Brown*, 565 U.S. 530 (2012) (per curiam), as "invalidating rule categorically barring arbitration of wrongful-death actions").

Here, the Sixth Circuit's characterization of Section 502(a)(2) claims as "derivative" is wrong. Pet. App. 13a. Neither the statute nor *LaRue* requires that label. But even if the claims could be deemed "derivative" in some relevant sense, it does not follow that plan participants lack the power to enter into binding agreements to arbitrate those claims. As *Viking* observed, enforcing an arbitration agreement between a plaintiff-agent and a defendant with respect to a claim brought on behalf of the absent principal comports with "traditional arbitral practice," and this Court's precedents "have never suggested otherwise." 142 S. Ct. at 1922.

* * *

The Sixth Circuit's decision is fundamentally flawed. The False Claims Act analogy it borrowed from the Ninth Circuit and the common-law principles to which it alluded are no substitute for the interpretive tools it should have used: the text of ERISA itself, and this Court's long line of arbitration precedents. *Viking* adds to those precedents and further confirms the decision below is wrong.

This Court could grant, vacate, and remand to the Sixth Circuit for further consideration in light of *Viking*, as it has already done in several PAGA cases since *Viking* was decided. See *Coverall N. Am. Inc.* v. *Rivas*, No. 21-268 (U.S. June 27, 2022); *Uber Techs., Inc.* v. *Gregg*, No. 21-453 (U.S. June 27, 2022); *Uber Techs., Inc.* v. *Rosales*, No. 21-526 (U.S. June 27, 2022); *Lyft Inc.* v. *Seifu*, No. 21-742 (U.S. June 27, 2022); *Shipt, Inc.* v. *Green*, No. 21-1079 (U.S. June 27, 2022); *Handy Techs. Inc.* v. *Pote*, No. 21-1121 (U.S. June 27, 2022). But to comprehensively resolve the split, the Court should grant the petition and resolve nationwide the question presented to provide

clarity on the enforceability of agreements to arbitrate ERISA claims.

III. THE QUESTION PRESENTED IS IMPORTANT.

If allowed to stand, the split that the Sixth Circuit's decision deepened will have substantial detrimental effects on retirement plan disputes and business operations nationwide.

Approximately 60 million Americans—more than half of all non-union private-sector U.S. employees—are subject to employment-related arbitration provisions.[1] Many of these arbitration agreements cover claims relating to ERISA-governed defined contribution plans. Defined contribution plans "dominate the retirement plan scene today," *LaRue*, 552 U.S. at 255, and approximately 44% of all private-sector employees participated in defined contribution plans as of 2016.[2]

The Sixth and Ninth Circuits' refusal to follow the FAA and this Court's decisions applying it are preventing—and, if uncorrected, will continue to prevent—enforcement of countless of these agreements to arbitrate. Their rulings substantially disrupt employees' and employers' reliance interests in the contracts they have formed, many of which long predate those rulings. Respondents' own arbitration agree-

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[1] See Alexander J.S. Colvin, Econ. Pol'y Inst., *The Growing Use Of Mandatory Arbitration*, at 2, 5 (Apr. 6, 2018), https://files.epi.org/pdf/144131.pdf.

[2] Eli R. Stoltzfus, U.S. Bureau of Labor Statistics, *Beyond The Numbers; Defined Contribution Retirement Plans: Who Has Them And What Do They Cost?* (Dec. 7, 2016), https://www.bls.gov/opub/btn/volume-5/defined-contribution-retirement-plans-who-has-them-and-what-do-they-cost.htm.

ments are an example. Respondents entered each of their employment agreements between 2011 and 2017, all before the Ninth Circuit in *Munro* departed from its sister circuits. See Pet. App. 4a n.4.

Moreover, if allowed to stand, the approach taken below will prevent the enforcement of Section 502(a)(2) claims in two of the largest federal circuits in the country, depriving employees and employers in those jurisdictions of an efficient means of resolving these disputes. This Court has consistently recognized the benefits of private arbitration: "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). And those features benefit not only the parties to the dispute, but also the federal courts. Complaints asserting ERISA fiduciary-breach claims, like respondents' complaint here, have already been increasing at a rapid pace in recent years. In 2020, for example, plan participants filed approximately 100 such complaints—a 500% increase from the previous year. See Amicus Br. of Euclid Fiduciary, *Hughes* v. *Northwestern Univ.*, No. 19-1401 at 6–7 & n.2 (U.S. Oct. 27, 2021). If litigants may no longer rely on agreements to resolve these claims through arbitration, they will be forced to instead resolve them in court, adding to the wave of recent ERISA complaints and congesting the federal dockets.

Finally, however this Court views the Sixth and Ninth Circuits' approach, it should resolve the split to restore a nationally uniform rule. Congress enacted the FAA to establish a "*national* policy favoring arbitration." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006) (emphasis added). And likewise, it enacted ERISA to establish "*uniform* standards" with regard to employee benefit plans. *Rush*

Prudential HMO, Inc. v. *Moran*, 536 U.S. 355, 379 (2002) (emphasis added). Employers who have employees based across the country now face disparate rules for resolving ERISA fiduciary duty suits that they have agreed to arbitrate. Allowing this split to remain unresolved frustrates Congress's objectives, and the efficient and fair administration of ERISA plans. This Court's intervention is urgently needed.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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