No. 22-226

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.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

MARK K. GYANDOH
CAPOZZI ADLER, P.C.
312 Old Lancaster Road
Merion Station, PA 19066
(610) 890-0200

BRIDGET C. ASAY
STRIS & MAHER LLP
15 E. State Street
Suite 2
Montpelier, VT 05602
(213) 995-6800

PETER K. STRIS
JOHN STOKES
Counsel of Record
STRIS & MAHER LLP
777 S. Figueroa Street
Suite 3850
Los Angeles, CA 90017
(213) 995-6800
jstokes@stris.com

COLLEEN R. SMITH
STRIS & MAHER LLP
1717 K Street NW, Ste. 900
Washington, D.C. 20006
(213) 995-6800

Counsel for Respondents

QUESTION PRESENTED

Claims under ERISA § 502(a)(2) may be brought "by the Secretary [of Labor], or by a participant, beneficiary, or fiduciary." 29 U.S.C. § 1132(a)(2). Such claims, however, belong to the plan—they seek to remedy "plan injuries" and are "brought in a representative capacity on behalf of the plan as a whole." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985) ("*Russell*"); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008) ("§ 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries"). In ERISA's 50-year history, only two cases have addressed whether the plan (a distinct legal entity, 29 U.S.C. § 1132(d)(1)) must itself consent to arbitrate claims brought on its behalf under § 502(a)(2). Both cases, including the decision below, have answered in the affirmative.

The question presented is whether an ERISA plan must consent to arbitrate claims brought on its behalf under § 502(a)(2).

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INTRODUCTION

Petitioners ask this Court to grant review on an ERISA question that comes up rarely, is easily avoided by plan sponsors, and has been decided the same way in the only two cases that have addressed it. To put it charitably, there is nothing remotely certworthy about this case.

According to petitioners, 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." To state the question is enough to show why it rarely arises: typically, arbitration clauses are included in the text of an ERISA plan document, leaving no question that the plan consents.

That is why petitioners can identify only *two* cases in ERISA's 50-year history that have addressed the question presented. This case is one. The other is *Munro v. University of Southern California*, 896 F.3d 1088 (9th Cir. 2018). And both reached the same holding—*i.e.*, both rejected the position articulated by petitioners.

To manufacture a circuit split, petitioners conjure sub silentio holdings from cases that did not address the question presented at all. Not one of the cases relied on by petitioners addressed whether an ERISA plan must consent to arbitration of § 502(a)(2) claims. In fact, it's not even clear the question presented *could* have been raised in those cases. *See infra* 9-11. And tellingly, petitioners never suggested to the Sixth Circuit that a circuit split existed. Given the parties' extensive briefing on *Munro*, surely petitioners would have advised the Sixth Circuit if the courts of appeals were already divided on this issue. They didn't, because there is no split.

What's more, the Sixth and Ninth Circuits are right: because ERISA § 502(a)(2) claims are brought on behalf of the plan to recover losses to the plan caused by a breach of fiduciary duty (29 U.S.C. §§ 1132(a)(2), 1109), the plan must consent to arbitration. The consent of the individual plan participants alone is not sufficient because § 502(a)(2) "does not provide a remedy for individual injuries distinct from *plan* injuries." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008) (emphasis added). The plan is a real party in interest and its consent is required to satisfy that "foundational" requirement under the Federal Arbitration Act. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019).

There is no need for the Court to reach out and decide an issue that the lower courts agree on and comes up rarely. The petition should be denied.

STATEMENT

A. Statutory Background

ERISA. 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 Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). In crafting those safeguards, Congress recognized that "jurisdictional and procedural obstacles" had "hampered effective enforcement of fiduciary responsibilities." H.R. Rep. No. 533, 93d Cong., 2d Sess. 17, 1974 U.S.C.C.A.N. 4639, 4655.

ERISA carefully delineates plan administration and enforcement. The plan is a distinct legal entity (*see* 29 U.S.C. § 1132(d)(1)), and "all assets" of the plan must "be held in trust by one or more trustees." *Id.* § 1103(a). The plan is governed by a written plan document. *See id.* §§ 1102(a)(1), 1104(a)(1)(D). Plan fiduciaries must satisfy duties of prudence and loyalty and may not engage in certain prohibited transactions. *Id.* §§ 1104(a), 1106. The fiduciary duties of prudence and loyalty "impose a fiduciary standard that is considered 'the highest known to the law.'" *Sweda v. Univ. of Penn.*, 923 F.3d 320, 333 (3d Cir. 2019) (citation omitted).

To enforce those duties, Congress designed with "evident care" an "interlocking, interrelated, and interdependent remedial scheme." *Russell*, 473 U.S. at 146-47; *see* 29 U.S.C. § 1132(a). Of particular relevance here, § 502(a)(2) authorizes participants to sue on behalf of their ERISA plan for the relief provided in § 409. *See* 29 U.S.C. § 1132(a)(2) (providing "[a] civil action" "for appropriate relief under section 1109 [ERISA § 409]").

Section 409, in turn, provides for multiple remedies that vindicate participants' interest in "the financial integrity of the plan" as a whole. *Russell*, 473 U.S. at 142 n.9. A

breaching fiduciary must "make good *to such plan* any losses *to the plan* resulting from" the breach and must "restore *to such plan* any profits of such fiduciary which have been made through use of assets *of the plan*." 29 U.S.C. § 1109(a) (emphases added).

Those aspects of §§ 502(a)(2) and 409 show that suits under those sections are "brought in a representative capacity on behalf of the plan as a whole." *Russell*, 473 U.S. at 142 n.9; *LaRue*, 552 U.S. at 256 ("§ 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries").

As this Court has indeed "stressed," ERISA's fiduciary duties are owed *to the plan itself*, not to individual participants, and the plan is likewise the recipient of any relief recovered under § 502(a)(2). *Id.* at 254 (The Court has "stressed that the text of § 409(a) characterizes the relevant fiduciary relationship as one 'with respect to a plan,' and repeatedly identifies the 'plan' as the victim of any fiduciary breach and the recipient of any relief.").

The FAA. The FAA provides that "[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, . . . shall be valid, irrevocable, and enforceable," except "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. If a party to an arbitration agreement is "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under" that agreement, it can ask a court "for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. It is a "'foundational FAA principle,'" however, that arbitration "'is strictly a matter of consent.'" *Lamps Plus*, 139 S. Ct. at 1415 (citations omitted). Accordingly, one party may not

force another to arbitrate where he or she has not agreed to do so. *Ibid.*

B. Facts And Procedural History

1. Plaintiffs Raymond Hawkins and Robin Lung worked at Cintas Corporation, a uniform and business supply company. Pet. App. 2a. They participate in Cintas's ERISA-governed retirement plan. Pet. App. 3a. The plan is a "defined contribution" plan—a 401k plan—in which the sponsor selects a "menu" of investment options for participants to choose from. Pet. App. 2a. The value of a participant's account, in turn, depends on "the amount contributed, market performance, and associated fees." Pet. App. 2a-3a; *see LaRue*, 552 U.S. at 248, 250 n.1 (explaining defined contribution plans).

Hawkins and Lung sued on behalf of the plan under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), alleging that the plan's fiduciaries had violated their duties to the plan by (1) offering only actively managed funds for participants to invest in (rather than, e.g., passively managed index funds), and (2) allowing the plan to be charged imprudently expensive recordkeeping fees. Pet. App. 3a.

Petitioners moved to compel arbitration based on arbitration clauses contained in plaintiffs' employment agreements. Pet. App. 4a. The relevant language is:

> . . . 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 (emphasis omitted).

It is undisputed that the plan document does not itself contain an arbitration clause.

2. Because the claims at issue here "belong to the Plan itself"—and the plan did not consent to arbitration—the Sixth Circuit affirmed the district court's denial of petitioners' motion to compel arbitration. Pet. App. 8a. The court of appeals started with this Court's repeated confirmation that "Section 502(a)(2) suits are 'brought in a representative capacity on behalf of the plan as a whole.'" *Ibid.* (quoting *Russell*, 473 U.S. at 142 n.9); *see* Pet. App. 10a ("*LaRue* therefore means that while any claims properly brought under § 502(a)(2) must be for injuries to the plan itself, § 502(a)(2) authorizes suits on behalf of a defined-contribution plan even if the harm is inherently individualized.").

Given that § 502(a)(2) plaintiffs sue "on behalf of the plan," the Sixth Circuit had little trouble concluding that such claims "belong to the Plan," and thus cannot be compelled to arbitration without the plan's consent. Pet. App. 10a. In reaching this conclusion, the court followed the Ninth Circuit's reasoning in *Munro*. There, the Ninth Circuit reasoned that "ERISA § 502(a)(2) plaintiffs are not

seeking relief for themselves." Pet. App. 11a (citation omitted). Rather, "a plaintiff bringing a suit for breach of fiduciary duty . . . seeks recovery only for injury done to the plan." Pet. App. 11a-12a (citations omitted). In short, the court recognized that claims under § 502(a)(2) are the plan's claims, so they cannot be compelled to arbitration without the plan's consent. Pet. App. 12a.

The Sixth Circuit found this "reasoning . . . persuasive and supported by the history of § 502(a)(2) suits." *Ibid.* Thus, because the plan had not consented to arbitration here (e.g., through the sponsor's inclusion of an arbitration clause in the plan itself), the district court properly denied petitioners' motion.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CIRCUIT SPLIT.

Petitioners have fabricated a circuit split from whole cloth. No circuit besides the Ninth (and now the Sixth) has even addressed the question presented, let alone agreed with petitioners. The cases on which petitioners rely—from the Second, Fifth, and Tenth Circuits—held only that ERISA claims are generally arbitrable. In none of those cases did the parties raise or the court address the question whether plan consent is necessary to arbitrate claims under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). The question presented, accordingly, is not settled in any of the circuits that petitioners say are on their side of the split. This is not a close thing: as petitioners essentially admitted in their briefs and at argument before the Sixth Circuit, there is no circuit split on the question presented.

We address in turn the three cases that petitioners now say are on their side of the split:

1.a. The Second Circuit's decision in *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116 (2d Cir. 1991), did not address the question whether plan consent

is necessary to arbitrate claims under § 502(a)(2). In *Bird*, the Second Circuit had initially held that ERISA statutory claims are not arbitrable at all. *Id.* at 118. The defendant petitioned for certiorari, and this Court granted, vacated, and remanded in light of an intervening decision regarding the arbitrability of claims under a different federal statute. *Ibid.* On remand, the Second Circuit held that "the FAA requires that [the] agreement to arbitrate be enforced notwithstanding the fact that appellees' claim is for a breach of fiduciary duties under ERISA." *Ibid.*

While it is true, so far as it goes, that the court compelled arbitration without regard to whether the plan consented, the question of plan consent played no role in any part of the proceedings. It was not raised by either party or by the court; it is not mentioned anywhere in any of the briefs; it is nowhere to be found in the certiorari proceedings; and it is entirely absent from both of the Second Circuit's decisions. The only issue that *Bird* decided (and the only issue for which petitioners cited *Bird* below) is that ERISA statutory claims are generally arbitrable.

At very most, then, petitioners can say the Second Circuit reached a sub silentio holding about the need for plan consent. But as the Second Circuit itself has repeatedly recognized, "a sub silentio holding is not binding precedent." *Green v. Dep't of Educ. of City of New York*, 16 F.4th 1070, 1076 n.1 (2d Cir. 2021) (citation omitted); *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 153 (2d Cir. 2016) ("a sub silentio holding [on a preemption and statutory interpretation question] is not binding precedent"); *Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 113 (2d Cir. 1988) ("A sub silentio holding is not binding precedent. Thus, inasmuch as the punitive damages issue was not briefed, argued or addressed by the [prior] panel, we are not constrained by it to affirm.") (formatting cleaned

up). It is accordingly frivolous for petitioners to contend that the question presented here was settled by *Bird*.

Nor is it even clear that *Bird* involved claims asserted under § 502(a)(2). Respondents were unable to locate the complaint from *Bird*, which was filed thirty-five years ago, but the plaintiff's Second Circuit brief stated that the claims were brought under 29 U.S.C. § 1132(a)(3)—*i.e.*, not on behalf of the plan. *See* Br. of Appellee, *Bird*, No. 90-7688, 1990 WL 10029975, at *10 (2d Cir. Oct. 12, 1990) ("29 U.S.C. § 1132(a)(3) specifically empowers any participant or beneficiary of a plan covered by ERISA to bring a civil action to obtain redress for any violations of "any provision of this subchapter", including breaches by a fiduciary of the duties imposed upon him or it by 29 U.S.C. §1104 . . . . In this case, the defendants are alleged to be fiduciaries of a covered plan and to have breached the duties and obligations imposed upon them by 29 U.S.C. §1104 in various ways specified."); *accord Bird v. Shearson Lehman/Am. Exp., Inc.*, 871 F.2d 292, 297 (2d Cir. 1989) ("Section 1132(a)(3) specifically empowers any participant or beneficiary of a plan to bring a civil action for any violation of the statute, including breach of fiduciary duties imposed by 29 U.S.C. § 1104."); *see Varity Corp. v. Howe*, 516 U.S. 489, 509-10, 515 (1996) (explaining that, in contrast to § 502(a)(2)'s claims on behalf of the plan, § 502(a)(3) allows plaintiffs to seek relief in an individual capacity).

Perhaps understandably, then, petitioners never told the Sixth Circuit that *Bird* stood for the proposition that plan consent is unnecessary to arbitrate claims under § 502(a)(2). Despite devoting an entire section of their brief to the issue (and discussing the Ninth Circuit's decision in *Munro* at length) petitioners did not mention *Bird*—now the lead case in their petition for certiorari—a single time on this issue. *See* Br. of Appellants, *Hawkins*

v. Cintas Corp., No. 21-3156, 2021 WL 2556749, at *21-30 (6th Cir. June 14, 2021) ("C.A. Br."). *Bird* simply does not address the question presented here; it cannot form the basis of a circuit split with *Munro* and the decision below.

b. The same is true of the Fifth Circuit's decision in *Kramer v. Smith Barney*, 80 F.3d 1080 (5th Cir. 1996). Like *Bird*, the only question that *Kramer* addressed was whether ERISA statutory claims are arbitrable at all. *See, e.g.*, *id.* at 1084 ("We must determine whether ERISA's enforcement provision preempts the Arbitration Act."). The parties never argued that plan consent was relevant, and the Fifth Circuit did not address the issue. The issue of plan consent was entirely absent from the case.

Petitioners again attempt to read between the lines and extract a holding on an issue the parties didn't raise and the court didn't pass on. But like the Second Circuit, the Fifth Circuit holds that sub silentio "holdings" on issues the parties did not raise and the panel did not address are not binding. *E.g.*, *USPPS, Ltd. v. Avery Dennison Corp.*, 647 F.3d 274, 283 (5th Cir. 2011) ("Our Court . . . held that our exercise of jurisdiction in a prior case did not constitute a binding precedent, because the issue was neither raised by the parties nor addressed by the Court. Following this logic, we see no reason to accord a prior panel's ruling the discretionary status of law of the case where the Court's resolution of that issue would not even constitute binding precedent had it been decided in a separate appeal.") (formatting cleaned up); *In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 794 (5th Cir. 2021) ("The *Brown* panel made no mention of *Kwai Fun Wong* in its unpublished decision, which severely undermines the appellees' position, as an opinion restating a prior panel's ruling does not sub silentio hold that the prior ruling survived an uncited Supreme Court decision.") (formatting cleaned up). Accordingly, *Kramer* does not establish a

rule in the Fifth Circuit that plan consent to arbitration is unnecessary. It says nothing at all about the question presented.

In any event, petitioners told the Sixth Circuit that the plan *did* consent to arbitration in *Kramer*. C.A. Reply Br., 2021 WL 4126447, at *13 n.1 (arguing that the plan in *Kramer* consented because the plaintiffs "were plan fiduciaries who were responsible for plan administration, and the agreements that they entered—to which their plans were not a party—therefore were enforceable as to their plans"). If the plan consented in *Kramer*, then of course there would have been no reason for the Fifth Circuit to address whether such consent was necessary—which the court indeed did not do. *Kramer* accordingly does not help petitioners establish a circuit split.

c. The Tenth Circuit's decision in *Williams v. Imhoff*, 203 F.3d 758 (10th Cir. 2000), fits the same mold. There again, nobody raised and the court did not address whether plan consent was required. The court did not even mention § 502(a)(2), nor state that the claims were brought on behalf of the plan. Not a single breath in the entire case, as far as respondents can tell, was spent on the question presented here. Like *Kramer* and *Bird*, *Williams* merely held that "Congress did not intend to prohibit arbitration of ERISA claims." 203 F.3d at 767. And notably, *Williams* cited both *Kramer* and *Bird* as among the "four circuits [to] have held that Congress did not intend to prohibit arbitration of statutory ERISA claims." *Id.* No mention of plan consent anywhere.

Petitioners again try to leverage what is at most a sub silentio holding to create a circuit split. Again, their attempt fails. *E.g.*, *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1248 n.3 (10th Cir. 2018) (prior panel's sub silentio resolution of an arbitration question was not binding because the panel "never addressed whether incorporation

of the Commercial Arbitration Rules of the AAA added clear and unmistakable evidence of delegation, and there is no indication that either party raised this as an issue").

2. There is simply no circuit split on the question presented. And petitioners effectively admitted as much before the Sixth Circuit.

Petitioners argued that the plan in *Kramer did* consent to arbitration. *Supra* 11. And petitioners cited neither *Bird* nor *Williams* for the proposition that plan consent is unnecessary to arbitrate claims under § 502(a)(2). Instead, petitioners cited those cases only for the proposition they actually stand for—that ERISA claims are generally arbitrable. C.A. Br. at *18 ("Indeed, this Court and other circuits have long held that 'disputes arising under ERISA . . . are subject to arbitration under the FAA.'") (citing *Bird*, *Williams*, and *Kramer*). Given petitioners' extensive discussion of *Munro* (a whole section of their brief), their silence about the existence of any cases to the contrary speaks volumes.

Indeed, when asked at argument about whether disagreeing with *Munro* would "create a circuit split," petitioners' counsel did not mention *Bird*, *Williams*, or *Kramer*, or suggest that *any* decision was on the other side of this issue. *Hawkins v. Cintas Corp.*, No. 21-3156, Oral Argument Audio at 1:44-2:28 (6th Cir. Dec. 9, 2021) (https://bit.ly/3UijaQE). One might expect that when *specifically asked* about a circuit split on this issue, counsel would at least have mentioned the existence of supposed longstanding precedent on its side of a deeply entrenched split. He did not, because no split exists.

II. THE QUESTION PRESENTED IS UNIMPORTANT, HAS FEW PRACTICAL IMPLICATIONS, AND VIRTUALLY NEVER ARISES.

Petitioners greatly overstate the importance of the holding below. The court of appeals has not "prevent[ed]"

enforcement of arbitration agreements or "refus[ed] to follow" the FAA. Pet. 26. The Sixth Circuit merely recognized that, as a real party in interest to ERISA § 502(a)(2) claims, an ERISA plan must consent to arbitrate. That is both correct, *see infra* 14-21, and easily done. The holding below thus poses no obstacle—much less a significant one—to arbitration of ERISA disputes.

For plan sponsors and administrators who prefer arbitration, the "fix" is straightforward: include an arbitration provision in the plan document. Although the court below stopped short of holding that an arbitration clause in the plan document is sufficient, it strongly hinted that such a provision would suffice as "manifestation of the plan's consent." Pet. App. 21a, 23a.

Putting an arbitration clause in an ERISA plan is not burdensome and does not undermine nationwide plan administration. Long before the Sixth Circuit's decision in this case, arbitration clauses had become common in ERISA retirement plans. One industry source suggests that "many—if not most—retirement plans include provisions requiring employees and plan participants to arbitrate any disagreements they may have with the employer or plan fiduciaries." Ted Godbout, *House Approves Bill Banning Arbitration Clauses in ERISA Plans*, Amer. Soc. Pension Prof. & Actuaries (Oct. 6, 2022).

The notion that "countless" plans will be impacted by this decision is unsupported hyperbole. Pet. 26. After nearly 50 years of ERISA litigation, petitioners have identified only *two* cases in which a plan's consent to arbitration was disputed. As a practical matter, the Sixth Circuit's holding will have minimal, if any, impact on ERISA disputes. There is no need, much less an urgent one, for this Court's review.

III. THE DECISION BELOW WAS CORRECT.

Finally, the Sixth Circuit properly applied this Court's precedent in refusing to compel arbitration of ERISA fiduciary-breach claims absent any evidence that the plan consented to arbitration. The holding below rests on two indisputable legal principles: (1) that consent to arbitrate is the "foundational" requirement under the Federal Arbitration Act, *Lamps Plus*, 139 S. Ct. at 1415, and (2) that fiduciary-breach claims under ERISA § 502(a)(2) are necessarily brought "in a representative capacity on behalf of the plan as a whole." *Russell*, 473 U.S. at 142 n.9. It is the plan that takes "legal claim to the recovery" in a suit under § 502(a)(2). Pet. App. 13a; *see* 29 U.S.C. § 1109(a) (breaching fiduciary must "make good *to such plan any losses to the plan* resulting from each such breach") (emphasis added). The court below correctly held that, because § 502(a)(2) claims belong at least in part to the plan, "an arbitration agreement that binds only individual participants cannot bring such claims into arbitration." Pet. App. 13a. Petitioners offer no persuasive basis to conclude otherwise.

A. Petitioners do not dispute that consent is the starting point for any analysis under the FAA. "The first principle that underscores all of [this Court's] arbitration decisions is that arbitration is strictly a matter of consent." *Lamps Plus*, 139 S. Ct. at 1415 (formatting cleaned up). As this Court recently explained, a court cannot compel a party to arbitrate a dispute "absent an affirmative contractual basis for concluding that the party *agreed* to do so." *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1923 (2022) (formatting cleaned up) (emphasis in original). The only contracts that petitioners point to here are employment contracts between respondents and their employer. Pet. 6; Pet. App. 4a-5a. The plan is not a party to those contracts; there is no other relevant agreement

to which the plan is a party; and nothing in the plan document signals consent to arbitration.

B. Lacking any evidence that the plan made a contractual agreement to arbitrate, Petitioners instead contend that the plan participants' employment contracts with Cintas are sufficient to bind the plan to arbitration. That argument rests on a fundamental misunderstanding of the plan-based claims and relief available under ERISA §§ 502(a)(2) and 409.

The plan itself—a separate and distinct "entity" with legal capacity, 29 U.S.C. § 1132(d)—is central to any litigation under § 502(a)(2). An action under § 502(a)(2) is brought on behalf of the plan to recover losses to the plan caused by a breach of fiduciary duty. 29 U.S.C. §§ 1132(a)(2), 1109. As this Court explained in *Russell* and reiterated in *Larue*, §§ 409 and 502(a)(2) collectively "emphasi[ze] . . . the relationship between the fiduciary and the plan *as an entity*." *Russell*, 473 U.S. at 140 (emphasis added); *LaRue*, 552 U.S. at 254 ("§ 409 characterizes the relevant fiduciary relationship as one 'with respect to a plan,' and repeatedly identifies the 'plan' as the victim of any fiduciary breach and the recipient of any relief"). Consistent with this Court's precedent, the Sixth Circuit recognized that any recovery under § 502(a)(2) inures directly to the plan, not to individual participants. Pet. App. 13a; *see LaRue*, 552 U.S. at 256 ("§ 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries"); *Russell*, 473 U.S. at 140 ("recovery under § 409 inures to the benefit of the plan as a whole"). Indeed, § 409 establishes "remedies benefiting, in the first instance, *solely* the plan." *Id.* at 141-42.

Against this undisputed legal backdrop, the Sixth Circuit's holding that not just participants, but the plan itself, must agree to arbitrate § 502(a)(2) claims is both correct

and unremarkable. As the Sixth Circuit noted, it is consistent with numerous decisions holding that individual releases by plan participants do not release claims on behalf of a plan under § 502(a)(2). Pet. App. 20a. For example, in *Bowles v. Reade*, 198 F.3d 752, 760 (9th Cir. 1999), the Ninth Circuit held the plan participant's § 502(a)(2) claims were not "truly individual" and could not be settled without the plan's consent. Thus, although the participant had previously released her claims against the plan fiduciary, that release did not require dismissal of claims for fiduciary breach under § 502(a)(2). *Id.* The Third Circuit later reached the same result, noting that "[t]he vast majority of courts have concluded that an individual release has no effect on an individual's ability to bring a claim on behalf of an ERISA plan under § 502(a)(2)." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 594 (3d Cir. 2009). Just as participants cannot unilaterally settle claims that inure to the plan, they likewise cannot prospectively consent to arbitrate on behalf of the plan.

Petitioners rely on three cases from this Court to argue that the plan's consent is irrelevant even though the plan is a real party in interest to the litigation. None of those cases supports their position.

First, petitioners misread *LaRue*. *LaRue* did not alter *Russell's* holding that claims under § 502(a)(2) are brought in a representative capacity on behalf of the plan. And it most certainly did not hold, as petitioners suggest, that a participant in a defined-contribution plan who sues under § 502(a)(2) "is asserting her own claim, as opposed to a claim of the plan" and "pursuing her own personal interests." Pet. 21-22. *LaRue* addressed a claim that the fiduciaries for a defined-contribution plan did not follow the plaintiff's directions about how to invest his account. Although that fiduciary breach affected only the plaintiff's account, this Court held that the plaintiff could recover

under §§ 502(a)(2) and 409. "Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409." *LaRue*, 552 U.S. at 256. Either way, the loss is an injury *to the plan*. *Id.* ("[A]lthough § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account.").

Petitioners wrongly suggest that *LaRue* limits any monetary relief under § 502(a)(2) to "recovery of 'the value [that] plan assets in the participant's individual account' would have had but for the alleged misconduct." Pet. 21 (citing *LaRue*, 552 U.S. at 250). *LaRue* says nothing of the kind; petitioners' misleading quotation is to the Court's description of what the plaintiff sought in that case. Because the alleged fiduciary breach was the failure to follow the plaintiff's investment directions, the breach only affected plan assets in his account. *LaRue* does not say that a participant in a defined-contribution plan is barred from suing on behalf of the plan or seeking plan-wide remedies under § 502(a)(2). *See LaRue*, 552 U.S. at 261 (Thomas, J., concurring) ("§§ 409(a) and 502(a)(2) permit recovery of *all* plan losses caused by a fiduciary breach"). The Sixth Circuit thus rightly rejected Cintas's argument that because this is a defined contribution plan respondents necessarily assert "claims on their own behalf, not on behalf of the Plan." Pet. App. 16a.

Second, *Epic Systems Corp. v. Lewis,* 138 S. Ct. 1612 (2018), has no relevance here because the Sixth Circuit did not hold that ERISA claims are not arbitrable. The plaintiffs in *Epic Systems* argued that the National Labor Relations Act overrode class-action waivers in the employment context and rendered those arbitration agreements

illegal and unenforceable. *Id.* at 1622-24. In rejecting that argument, the Court looked for, and did not find, "a clear and manifest congressional command to displace the Arbitration Act." *Id.* at 1624.

Contrary to petitioners' suggestion, *Epic Systems* is not the "roadmap" for this case. Pet. 19. The Sixth Circuit's holding does not create any conflict, much less an "irreconcilable" one, between ERISA and the FAA. *Epic Systems,* 138 S. Ct. at 1624. The court merely applied the FAA's consent requirement to the specific circumstances of a claim brought on behalf of an ERISA plan under § 502(a)(2). Because *Epic Systems* does not speak to that question, it is unsurprising that the Sixth Circuit did not cite it.

Last, petitioners say (wrongly) that the holding below conflicts with this Court's subsequent decision in *Viking River Cruises, Inc. v. Moriana,* 142 S. Ct. 1906 (2022). In *Viking River*, the Court addressed arbitrability of claims under California's Labor Code Private Attorneys General Act, or PAGA. PAGA claims are brought by private plaintiffs against their employers for labor code violations, but the state is a real party in interest and receives part of any monetary recovery. 142 S. Ct. at 1914. The Court held that an arbitration clause in an employment contract was invalid to the extent it purported to waive any PAGA claim, because the FAA does not "render all forms of representative standing waivable by contract" and "single-agent, single-principal representative suits" are not "inconsistent" with norms of arbitration. *Id.* at 1922, 1924-25. But the FAA does preempt the state-law rule that employees could not waive their right to pursue penalties for violations that affected *other* employees. *Id.* at 1924-25.

Just as petitioners perceive a circuit split based on sub silentio holdings in the lower courts, they also perceive a sub silentio holding by this Court in *Viking River* that in

representative actions, only the representative or agent must consent to arbitration. In fact, petitioners go further, and outright mis-cite the decision, claiming it says "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." Pet. 23 (citing *Viking* River, 142 S. Ct. at 1922). *Viking River*, however, says nothing at all about whether, or in what circumstances, a principal or real party in interest must manifest consent to arbitration. And this Court "has never considered itself bound" where an issue was passed on in a prior decision only sub silentio. *See, e.g., Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145 (2011) ("The Court would risk error if it relied on assumptions that have gone unstated and unexamined."); *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) ("But since we have never squarely addressed the issue, and have at most assumed the applicability of the *Chapman* standard on habeas, we are free to address the issue on the merits.").

Because § 502(a)(2) claims are brought on behalf of the plan, to recover losses for the plan, a plan participant's agreement to arbitrate does not suffice. The plan must also consent. Absent an arbitration provision in the plan document or any other evidence that the plan consented to arbitration, the Sixth Circuit correctly refused to compel arbitration here.

C. Petitioners cite a handful of lower-court cases that they claim show that a principal or real party in interest need not consent to arbitration. Pet. 24. Those cases do not help their cause. In the derivative actions cited by petitioners, the corporation agreed to arbitration or the

court did not consider the corporation's consent.[1] Other courts recognize a corporation must, in fact, consent to arbitration.[2]

The wrongful death cases cited by petitioners likewise do not support their position. In *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 532 (2012), this Court held preempted a state law that categorically barred arbitration agreements covering certain wrongful death claims against nursing homes. The decision says nothing about who is the real party in interest in such cases or who must consent to arbitration. And *United Health Services of Georgia, Inc. v. Norton*, 797 S.E.2d 825, 826-27 (Ga. 2017), holds that, under Georgia law, wrongful death

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[1] *See Long v. Silver*, 248 F.3d 309, 313, 319-20 (4th Cir. 2001) (court did not address whether the corporation would need to consent to arbitration before the derivative claims could be subject to the arbitration clause, but regardless, corporation was a party to an arbitration agreement); *Maresca v. La Certosa*, 172 A.D.2d 725, 725-26 (N.Y. App. Div. 1991) (court did not address whether corporation needed to consent to the arbitration of derivative claims or whether derivative claims belong to corporation under state law); *Burns v. Olde Disc. Corp.*, 538 N.W.2d 686, 688 (Mich. Ct. App. 1995) (same); *In re Carl v. Weissman*, 263 A.D. 887, 887 (N.Y. App. Div. 1942) (arbitration clause was in "a written agreement for the organization of the corporation," meaning the corporation agreed to the arbitration clause); *Lumsden v. Lumsden Bros. & Taylor Inc.*, 242 A.D. 852, 852 (N.Y. App. Div. 1934) (declining to compel arbitration of derivative action where defendant failed to provide "a copy of the alleged arbitration agreement or state its contents").

[2] *Trover v. 419 OCR, Inc.*, 397 Ill. App. 3d 403, 408-09 (2010) (derivative claims brought on behalf of LLC were not subject to arbitration because claims belonged to LLC and LLC was not a party to the agreement); *Mission Residential, LLC v. Triple Net Properties, LLC*, 275 Va. 157, 161 (2008) (declining to compel arbitration of derivative claim because entity was not party to operating agreement); *Frederick v. First Union Secs., Inc.*, 100 Cal. App. 4th 694, 697 (2002) (for derivative action, court looks to whether corporate entity consented to arbitration).

claims are "wholly derivative of a decedent's right of action." Because the decedent there had agreed to arbitration, the beneficiaries bringing derivative wrongful death claims were bound by that agreement. *Id.* at 828. Equally unhelpful is *Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.*, 316 P.3d 607, 614 (Ariz. Ct. App. 2014), which held that under Arizona law, "a wrongful death claim is independently held by the decedent's statutory beneficiaries" and thus not covered by an arbitration clause signed by the decedent.

In short, cases from other contexts are of a piece with the decision below: because claims under § 502(a)(2) belong to the plan, the plan must consent to arbitration. That did not happen here, so the Sixth Circuit properly affirmed the district court's denial of the motion to compel.

CONCLUSION

The petition should be denied.

Respectfully submitted.

MARK K. GYANDOH
CAPOZZI ADLER, P.C.
312 Old Lancaster Road
Merion Station, PA 19066
(610) 890-0200

BRIDGET C. ASAY
STRIS & MAHER LLP
15 E. State Street
Suite 2
Montpelier, VT 05602
(213) 995-6800

PETER K. STRIS
JOHN STOKES
Counsel of Record
STRIS & MAHER LLP
777 S. Figueroa Street
Suite 3850
Los Angeles, CA 90017
(213) 995-6800
jstokes@stris.com

COLLEEN R. SMITH
STRIS & MAHER LLP
1717 K Street NW, Ste. 900
Washington, D.C. 20006
(213) 995-6800

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