No. 22-1098

In the U.S. Court of Appeals
For the Tenth Circuit

ROBERT HARRISON, on behalf of himself, the Envision Management Holding, Inc. ESOP, and all other similarly situated individuals,
Plaintiff-Appellee,

v.

ENVISION MANAGEMENT HOLDING, INC. BOARD OF DIRECTORS; ENVISION MANAGEMENT HOLDING, INC. EMPLOYEE STOCK OWNERSHIP PLAN COMMITTEE; ARGENT TRUST COMPANY; DARREL CREPS, III; PAUL SHERWOOD; JEFF JONES; AARON RAMSAY; TANWEER KAHN,
Defendants-Appellants

On Appeal from the U.S. District Court
for the District of Colorado
Case No. 1:21-cv-00304

Brief for the U.S. Secretary of Labor as Amicus Curiae Supporting Plaintiff-Appellee

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QUESTION PRESENTED

Whether a provision in an arbitration agreement limiting ERISA plan participants to obtaining only individualized relief is an unenforceable prospective waiver of the right to obtain plan-wide relief under section 502(a)(2) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq*.

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Secretary of Labor ("Secretary") has the primary authority to interpret and enforce Title I of ERISA and is responsible for "assur[ing] the . . . uniformity of enforcement of the law under the ERISA statutes." *See Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 691–93 (7th Cir. 1986) (en banc). To that end, the Secretary has an interest in effectuating ERISA's express purpose of "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans" and "providing for appropriate remedies . . . and ready access to the Federal courts." *See* 29 U.S.C. § 1001(b).

In this case, the district court correctly held that arbitration agreements cannot prospectively waive participants' statutory right to pursue plan-wide relief for claims under section 502(a)(2), 29 U.S.C. §

1132(a)(2). The Secretary has a substantial interest in ensuring that participants are not forced to arbitrate under agreements that prohibit the plan-wide remedies that ERISA provides.

The Secretary files this brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE CASE

A. Factual Background

Plaintiff Robert Harrison is a former employee of Envision Management Holding, Inc. ("Envision"). *Harrison v. Envision Management Holding, Inc. Board of Directors, et al.,* No. 21-cv-0304-RMR-NYW, 2022 WL 909394 at *1 (D. Colo. Mar. 24, 2022). He is a vested participant in the Envision Management Holding Inc. Employee Stock Ownership Plan, a defined contribution plan covered by ERISA and administered by Envision. *Id.* In December 2017, the Plan became the 100% owner of Envision by purchasing shares of the company from its founders and top executives ("Transaction"). *Id.*; A14. Argent Trust Company was the trustee for the Plan at the time of the Transaction. 2022 WL 909394 at *1.

The Plan is administered pursuant to a Plan Document, which provides that Plan participants are bound by an "Arbitration Provision"

to resolve all "Covered Claims." *Id.* at *3. The Arbitration Provision limits participants to obtaining individualized relief and precludes relief that inures to the benefit of any other Plan participant or beneficiary ("Remedy Limitation"):

> All Covered Claims must be brought solely in the Claimant's individual capacity and not in a representative capacity or on a class, collective, or group basis. Each arbitration shall be limited solely to only Claimant's Covered Claims, and **that Claimant may not seek or receive any remedy which has the purpose or effect of providing additional benefits or monetary or other relief to any Eligible Employee, Participant, or Beneficiary other than the Claimant**. For instance, with respect to any claim brought under ERISA § 502(a)(2) to seek appropriate relief under ERISA § 409, the Claimant's remedy, if any, shall be limited to (i) the alleged losses to the Claimant's individual Account resulting from the alleged breach of fiduciary duty, (ii) a pro-rated portion of any profits allegedly made by a fiduciary through the use of Plan assets where such pro-rated amount is intended to provide a remedy solely to Claimant's individual Account, and/or (iii) such other remedial or equitable relief as the arbitrator(s) deems proper so long as such remedial or equitable relief does not include or result in the provision of additional benefits or monetary relief to any Eligible Employee, Participant or Beneficiary other than the Claimant.

Id. (emphasis added).

Additionally, the Arbitration Provision provides that the Remedy Limitation is a non-severable term of the Arbitration Provision and that "[if] a court of competent jurisdiction were to find these requirements to

be unenforceable or invalid," then the entire Arbitration Provision "shall be rendered null and void in all respects." *Id.*

B. Proceedings Below

Plaintiff filed a class action complaint in the United States District Court for the for the District of Colorado alleging that Defendants violated ERISA's fiduciary standards and prohibited transaction rules by causing the Plan to buy Envision shares for more than their fair market value. 2022 WL 909394 at *3; A40–49. The complaint alleges that these violations caused losses to the Plan, and seeks in relevant part: (1) a declaration that Defendants breached their fiduciary duties; (2) removal of the Plan trustee; (3) appointment of a new independent fiduciary to manage the Plan; (4) an order that the Plan trustee restore to the Plan all losses, and disgorge to the Plan all profits, resulting from the alleged breaches; and (5) an order that the other Defendants restore Plan losses and disgorge profits resulting from the alleged breaches. *Id.* at *1; A50–51.

Defendants moved to compel Plaintiff to pursue his claims through individual arbitration or, in the alternative, to dismiss the complaint for lack of jurisdiction. A55–69. Plaintiff opposed the motion,

arguing that the Arbitration Provision is unenforceable because (1) it includes a non-severable provision that prospectively eliminates his statutory remedies under ERISA and (2) he was not given notice of and did not agree to the Arbitration Provision. 2022 WL 909394 at *2; *see also* A136–50.

Defendants argued in reply that Plaintiff does not have a right to seek damages on behalf of the Plan because the Plan is not a defined benefit plan, but rather a defined contribution plan, and that participants in such plans may only obtain relief inuring to their individual accounts. A171–73. Defendants also argued that arbitration provisions may permissibly curtail certain statutory remedies, as long as they do not "cut off all federal claims" entirely. A173; *see also* 2022 WL 909394 at *4.

The district court denied the Defendants' motion to compel arbitration. The court found that "the arbitration provision acts as a prospective waiver because it disallows plan-wide relief, which is expressly contemplated by ERISA." 2022 WL 909394 at *2. Because the court held that the Arbitration Provision was invalid on this basis, it did not reach the notice and consent issue. Defendants appealed.

SUMMARY OF THE ARGUMENT

The district court correctly refused to compel arbitration because the agreement's Remedy Limitation precludes Plaintiff from obtaining the very relief that ERISA expressly allows him to seek.

ERISA sections 502(a)(2) and 409(a) authorize participants to bring an action to recover, among other things, "any losses to the plan" resulting from a fiduciary breach, and to seek "removal of such fiduciary." 29 U.S.C. §§ 1132(a)(2), 1109(a). As the Supreme Court and this Court have recognized, claims under these sections are "brought in a representative capacity on behalf of the plan as a whole." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985); *Walter v. Int'l Ass'n of Machinists Pension Fund*, 949 F.2d 310, 317 (10th Cir. 1991). This is true even in the context of defined contribution plans comprising individual participant accounts. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008). In short, a participant bringing a claim under section 502(a)(2) does so on the plan's behalf and thus may recover, for the plan's benefit, all losses sustained by the plan (among other forms of redress) stemming from the fiduciary breach.

Plaintiff here sought precisely the remedies authorized by section 502(a)(2) to redress the overpayment he alleges Defendants caused the Plan, including all Plan losses and removal of Argent as Plan trustee. Yet, Defendants sought to force Plaintiff to abandon these statutory remedies by moving to compel arbitration under an agreement that restricts him to obtaining only individualized relief. The Supreme Court and this Court have made clear, though, that arbitration agreements are unenforceable when they include non-severable provisions that prospectively waive a party's right to pursue statutory remedies. Because the Remedy Limitation in the Arbitration Provision here precludes participants from seeking the very plan-wide relief that ERISA explicitly authorizes in sections 502(a)(2) and 409(a), the district court correctly determined that this provision was invalid and denied the motion to compel arbitration.

ARGUMENT

An Arbitration Agreement That Includes a Non-Severable Provision Prospectively Waiving a Participant's Right to Pursue Plan-wide Relief Is Not Enforceable

A. ERISA Sections 502(a)(2) and 409(a) Authorize Participants in Defined Contribution Plans to Seek Plan-wide Relief for Fiduciary Breach Claims

The district court correctly recognized that ERISA authorizes participants in a defined contribution plan to seek plan-wide relief for fiduciary breach claims brought on behalf of the plan. 2022 WL 909394 at *6. ERISA section 502(a)(2) provides that a participant, such as Plaintiff, just like the Secretary of Labor or a plan fiduciary, can bring an action "for appropriate relief" under section 409. 29 U.S.C. § 1132(a)(2). ERISA section 409(a), in turn, provides that a fiduciary who breaches their duties "shall be personally liable to make good to such *plan* any losses to *the plan* resulting from each such breach . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. § 1109(a) (emphasis added).

Because of its focus on redressing plan losses, the Supreme Court has explained that section 409(a) "provid[es] relief singularly to the plan." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142

(1985). Thus, the recovery obtained under section 502(a)(2) for fiduciary breaches, whether brought by a participant, the Secretary, or a fiduciary, "inures to the benefit of the plan as a whole." *Id.* at 140. And given their plan-based character, claims under section 502(a)(2) are "brought in a representative capacity on behalf of the plan as a whole." *Id.* at 142 n.9

In *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008), the Supreme Court held that although defined contribution plans, unlike defined benefit plans, comprise individual participant accounts, losses to those accounts still qualify as plan losses. The plaintiff there alleged that his employer failed to implement the changes he requested to his individual account, and in so doing caused his account to decline in value; the breach, and the resulting harm, was thus localized to the plaintiff's account and did not affect any other participant accounts. *LaRue*, 552 U.S. at 251. As the Court explained, "fiduciary misconduct need not threaten the solvency of the entire plan" to cause plan losses implicating section 409(a). *Id.* at 255. Indeed, a plan may experience losses redressable under section 409(a) "[w]hether a fiduciary breach

diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts." *Id*. at 256.

In Defendants' telling, *LaRue* means that "Plaintiff can fully vindicate his statutory rights in an individualized proceeding" that limits his recovery to his individual account and precludes recovery for the Plan more broadly. *See* Appellants' Br. at 3, 39. The Court suggested no such thing. In *LaRue*, the Court simply clarified that the participant may maintain a claim under section 502(a)(2) even though the fiduciary breach diminished only his account and not those of other participants. It nowhere said or suggested that every participant in a defined contribution plan is forever limited to recovering losses only to their individual accounts, even where a breach affects the entire plan.

Nor does that proposition logically follow from the Court's holding. Indeed, the Court reiterated in *LaRue* that *all claims* under section 502(a)(2)—including those pertaining to a breach that harms a single participant's account—are not individual actions, but instead are "actions *on behalf of a plan* to recover for violations of the obligations defined in § 409(a)." *LaRue*, 552 U.S. at 253 (emphasis added). Because participants pressing section 502(a)(2) claims act on the plan's behalf

even in the context of defined contribution plans, it follows that they should be permitted to recover (for the plan's benefit) *all* plan losses, not just those that pertain or may be passed through to their particular individual account (unless, as in *LaRue*, the *only* plan loss was to that participant's account). *See e.g.*, *Ramos v. Banner Health*, 1 F.4th 769, 778 (10th Cir. 2021) ("ERISA directs courts to award damages to compensate for *losses a plan sustains* due to a breach") (emphasis added). Defendants' argument that these representative actions may be fully vindicated by recovering a fraction of the plan's losses is thus antithetical to *LaRue*.[1]

Not surprisingly then, circuit courts post-*LaRue* have allowed participants in defined contribution plans to recover all losses to the plan resulting from the fiduciary breach. *Cf., e.g., L.I. Head Start Child*

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[1] In an unpublished decision, the Ninth Circuit enforced an arbitration provision requiring arbitration on an individual rather than collective basis. Similarly misconstruing *LaRue*, the court reasoned that individualized arbitration of a section 502(a)(2) claim was appropriate because participants in a defined contribution plan can only bring a claim for the losses in their own individual account. *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 514 (9th Cir. 2019). However, the arbitration provision at issue apparently precluded only collective arbitration and did not prohibit plan-wide relief, so *Dorman* is inapposite to the issue on appeal here.

Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cty., Inc., 710 F.3d 57, 65 (2d Cir. 2013) (in claims involving a defined contribution plan, "recoupment of losses to the Plan" was an appropriate remedy "for the benefit of the Plan as a whole"); *Brundle on behalf of Constellis Emp. Stock Ownership Plan v. Wilmington Tr., N.A.*, 919 F.3d 763, 782 (4th Cir. 2019), *as amended* (Mar. 22, 2019) (ESOP participants entitled "to compensation for the loss from the overpayment" for ESOP assets); *Munro v. Univ. of S. California*, 896 F.3d 1088, 1094 (9th Cir. 2018) (participants in defined contribution plans entitled to "seek financial and equitable remedies to benefit the Plans and all affected participants and beneficiaries"); *Spano v. The Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011) (recognizing the possibility of "plan losses in a defined-contribution setting" resulting from alleged fiduciary breaches involving excessive fees and selection of investment options).

Defendants' citation to one out-of-circuit decision fails to support their misreading of *LaRue*. In the first place, the Ninth Circuit's unpublished decision in *Dorman v. Charles Schwab Corp.* ("*Dorman II*") concerned whether the participant was bound by the arbitration agreement and whether it violated the NLRA, not whether it contained

a provision that impermissibly waived plan-wide remedies. *See generally* 780 F. App'x 510 (9th Cir. 2019). To the extent the court suggested that participants in a defined contribution plan can *only* bring a claim for the losses in their own individual account, *see id. at* 514 as set forth above, the Ninth Circuit's own published precedent makes clear that plaintiffs bringing fiduciary duty claims under section 502(a)(2) do not "seek[] relief for themselves" but instead "seek[] recovery only for injury done to the plan." *Munro v. Univ. of S. Cal.*, 896 F.3d 1088, 1092 (9th Cir. 2018) (citing *LaRue*, 552 U.S. at 256).

Accordingly, the district court correctly determined that sections 502(a)(2) and 409(a) authorize Plaintiff to seek plan-wide relief to redress Defendants' alleged breaches.

B. A Provision in an Arbitration Agreement That Waives a Party's Right to Pursue a Statutory Remedy May Not Be Enforced

The Federal Arbitration Act ("FAA") expresses the general policy 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. Although the Supreme Court has not addressed the arbitrability of ERISA claims, it has upheld arbitration

agreements involving claims under other federal remedial statutes. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (enforcing arbitration agreement for claims under the Sherman Act); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (enforcing arbitration agreement for claims under the Securities Exchange Act of 1934 and RICO Act). The circuit courts that have considered the arbitrability of ERISA claims, including this Court, are in agreement that ERISA claims are generally arbitrable. *See Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000) ("Having carefully examined the opinions, we agree with those circuits and likewise conclude that Congress did not intend to prohibit arbitration of ERISA claims."); *Smith v. Bd. of Directors of Triad Mfg., Inc.*, 13 F.4th 613, 620 (7th Cir. 2021) (collecting cases holding that ERISA claims are generally arbitrable).

But a unanimous Supreme Court recently clarified that the effect of the FAA's "policy favoring arbitration" should not be overstated: this "federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713–14 (May 23, 2022). In that regard, the Supreme Court has

recognized an "effective vindication" doctrine, which serves to prevent the "prospective waiver of a party's *right to pursue* statutory remedies" in an arbitration agreement. *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) (quoting *Mitsubishi*, 473 U.S. at 637 n.19). As the Court explained in *Mitsubishi,* a party that agrees to arbitration "does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628. Although the Supreme Court did not apply this doctrine in *Italian Colors Rest.* or *Mitsubishi*, the Court wrote that the doctrine "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Id.*[2]

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[2] The Supreme Court recently clarified that the effective-vindication doctrine is consistent with the text of the FAA itself. As the Court explained, the FAA "requires only the enforcement of 'provision[s]' to settle a controversy 'by arbitration,' and not any provision that happens to appear in a contract that features an arbitration clause." *Viking River Cruises, Inc. v. Morian*, 142 S. Ct. 1906, 1919 n.5 (2022) (quoting 9 U.S.C. § 2). In other words, while the FAA requires enforcing an agreement to submit a dispute to arbitration, it does not require enforcing every provision in such an agreement, such as the Remedy Limitation in this case. Here, though, because the Plan provides that the Remedy Limitation is inseverable from the broader arbitration agreement, invalidating the Remedy Limitation renders the entire agreement void (by operation of the Plan's severability clause).

This Court in particular has declined to enforce provisions in arbitration agreements that would preclude a party from effectively vindicating their substantive statutory rights. For example, in *Nesbitt v. FCNH, Inc.*, this Court applied the "effective vindication" doctrine to invalidate an arbitration provision because it included a non-severable provision that would have required the plaintiff to give up a substantive statutory right to attorneys' fees. 811 F.3d 371, 376-81 (10th Cir. 2016); *see also Shankle v. B–G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1233–35 (10th Cir. 1999).

In contrast, provisions that do not limit a statutory remedy but merely affect the *manner* of arbitration will generally stand. For example, courts will typically enforce arbitration agreements containing waivers of class or collective actions, even if the statute giving rise to the claim expressly permits such actions. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Italian Colors Rest.*, 570 U.S. 228; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Class-arbitration waivers that leave the party with the right to pursue their statutory remedies through an individual action generally do not provide a basis

for courts to invalidate these provisions. *See Italian Colors Rest.*, 570 U.S. at 236.

C. The District Court Correctly Found the Arbitration Agreement Unenforceable

Because ERISA sections 502(a)(2) and 409(a) provide participants (as well as the Secretary and plan fiduciaries) a cause of action on the plan's behalf for plan-wide relief, and because the Arbitration Provision here contains a non-severable provision prohibiting Plaintiff from pursuing just that, the district court correctly denied the motion to compel individual arbitration.

This conclusion mirrors the Seventh Circuit's recent holding in *Smith v. Bd. of Directors of Triad Mfg., Inc.*, 13 F.4th 613, 620–21 (7th Cir. 2021), that an ERISA plan's arbitration agreement was unenforceable because it contained a non-severable provision that precluded relief extending to other participants or beneficiaries (namely, removal of the plan's fiduciary). That court held that the provision could not be reconciled with "the plain text of § 1109(a)," which provides for relief that would extend to the entire plan. *Id.* at 621. Because the provision would act as a prospective waiver of the right to pursue a statutory remedy, the provision was unenforceable. *Id.*

Following *Smith*, at least one other district court in addition to the court below has refused to compel arbitration of fiduciary breach claims pursuant to an arbitration agreement that similarly included a non-severable provision purporting to bar participants from seeking plan-wide relief. *See Cedeno v. Argent Tr. Co.*, No. 20-CV-9987 (JGK), 2021 WL 5087898 (S.D.N.Y. Nov. 2, 2021), *appeal docketed*, No. 21-2891 (2d Cir. Nov 22, 2021) ("Despite the ERISA-conferred right to a plan-wide remedy, section 17.10(g) provides that the plaintiff cannot recover losses to the entire Plan. . . . This provision is invalid and unenforceable because it purports to limit the available remedies that ERISA explicitly provides.").[3]

Like in *Smith*, by prohibiting Plaintiff from seeking plan-wide relief, the Remedy Limitation in this case directly bars Plaintiff from asserting his statutory right to recover, on the Plan's behalf, "any losses to the plan" resulting from a fiduciary breach, and "equitable or

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[3] Prior to the Seventh Circuit's decision in *Smith*, two other district courts refused to enforce arbitration agreements that included non-severable provisions purporting to bar participants from seeking plan-wide relief. *See Henry v. Wilmington Tr., N.A.*, No. CV 19-1925 (MN), 2021 WL 4133622 (D. Del. Sept. 10, 2021); *Hensiek v. Bd. of Dirs. of Casino Queen Holding Co., Inc.*, 514 F. Supp. 3d 1045 (S.D. Ill. 2021).

remedial relief . . . , including removal of such fiduciary." 29 U.S.C. § 1109(a). Plaintiff alleges that Defendants breached their fiduciary duties by allowing the Plan to overpay for its Envision shares and seeks to recover the resulting monetary losses to the Plan, as well as a variety of forms of equitable relief that inure to the Plan's benefit, including disgorgement of Defendants' profits and removal of Argent as the Plan trustee. A50–51. Defendants concede that the Remedy Limitation precludes Plaintiff from obtaining these remedies. *See e.g.,* Appellants' Br. at 20 (arguing that enforcement of the arbitration provision at issue would "leave [plan-wide] relief to other forums and other plaintiffs"). This Court should not enforce an agreement containing a non-severable provision that plainly constitutes a "prospective waiver of a party's right to pursue statutory remedies." *Italian Colors Rest.*, 570 U.S. at 236 (quoting *Mitsubishi*, 473 U.S. at 637 n.19).[4]

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[4] Enforcing the Arbitration Provision here would not only run counter to the text of ERISA section 409(a), but would also undermine its intended deterrent effect. The only way an arbitrator could award monetary relief consistent with the Remedy Limitation would be to calculate the full losses to the Plan and profits to be disgorged, and then award to Plaintiff a small sliver of that amount, while allowing Defendants to keep the rest of the gains from their breaches. *See Sec'y U.S. Dep't of*

Defendants curiously argue that "[i]n finding that the individualized arbitration provision violates the 'effective vindication' exception, the Order essentially concluded that an ERISA plan participant can never arbitrate an individual claim, because he can never waive the ERISA provision allowing for plan-wide remedies." Appellants' Br. at 28. To the contrary, both the district court and the Supreme Court have stated that the "effective vindication" doctrine is meant to prevent the "*prospective* waiver of a party's right to pursue statutory remedies" prior to a conflict arising. *Italian Colors Rest.*, 570 U.S. at 236 (quoting *Mitsubishi*, 473 U.S. at 637 n.19) (emphasis added). But nothing prevents participants from opting to seek only individualized relief through arbitration after a conflict arises.

The district court also properly rejected Defendants' attempt—which Defendants repeat in their brief on appeal—to conflate the Remedy Limitation with the type of class-arbitration waiver that the Supreme Court has determined to be enforceable. *See* Appellants' Br. at

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Labor v. Koresko, 646 F. App'x 230, 245 (3d Cir. 2016) ("The purpose of disgorgement of profits is deterrence, which is undermined if the fiduciary is able to retain proceeds from his own wrongdoing").

29–30. As Defendants acknowledge, *Epic Systems* involved an agreement "to use individualized rather than class or collective action procedures"—not one that prohibited statutory remedies—and held that courts should generally "enforce the parties' chosen arbitration procedures." 138 S. Ct. at 1621. But the district court here rested its decision not on the arbitration agreement's failure to allow collective or class arbitration *procedures*, but on its preclusion of a statutory remedy guaranteed under ERISA. 2022 WL 909394 at *6. Thus, the district court correctly found that the Remedy Limitation restricts the *remedies* available to participants rather than simply the *manner* of arbitration, as in *Epic Systems*. 2022 WL 909394 at *6. The Remedy Provision itself could not be clearer on this point: "[W]ith respect to any claim brought under ERISA § 502(a)(2) to seek appropriate relief under ERISA § 409, the Claimant's remedy, if any, shall be limited . . ." 2022 WL 909394 at *3. Thus, far from a *procedural* class action waiver, Defendants have attempted to re-write ERISA's *substantive* remedial scheme through an arbitration agreement.

Defendants and their supporting amici now argue that the ability to seek a plan-wide remedy is not a "substantive" right under ERISA.

Appellants' Br. at 37–40; Br. of ESOP Association in Supp. of Appellants at 16–17; Br. of Chamber of Commerce in Supp. of Appellants at 20–23. Specifically, Defendants contend that courts construe plan-wide rights as "procedural, in that one participant's claim affects the interests of absent plan participants and such interests must be protected by taking steps similar to those required for a class or collective action to proceed in federal court." Appellants' Br. at 37; *see also id.* at 38 (citing *Coan v. Kaufman*, 457 F.3d 250, 259 (2d Cir. 2006)) ("plan participants must employ procedures to protect effectively the interests they purport to represent").

But representative actions and class actions are hardly one and the same. As the Supreme Court recently noted in *Viking River Cruises, Inc. v. Morian*, in contrast to the procedural device of a class action, "[n]on-class representative actions in which a single agent litigates on behalf of a single principal are part of the basic architecture of much of *substantive law*." 142 S. Ct. 1906, 1922 (2022) (emphasis added). Here, a plan participant bringing an action on behalf of a plan for plan-wide relief is akin to the non-class representative actions that the Supreme Court stated were part of the substantive law. *See Viking River*, 142 S.

Ct. at 1922 ("Familiar examples [of non-class representative actions] include shareholder-derivative suits, wrongful-death actions, *trustee actions*, and suits on behalf of infants or incompetent persons.") (emphasis added); *Russell*, 473 U.S. at 142 n.9 (502(a)(2) claims are "brought in a representative capacity on behalf of the plan as a whole."). Indeed, a section 502(a)(2) action brought on behalf of a plan is on all fours with a "trustee action" brought on behalf of a trust, which the *Viking River* court specifically distinguished from a class action. *See Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156, 1160–62 (10th Cir. 1998) ("[C]ourts consistently have characterized ERISA actions . . . akin to common law trust actions and thus governed by common law trust principles.") (citations omitted).

The ESOP Association also contends that because section 502(a)(2) allows only "appropriate" relief under section 409, this somehow demonstrates that plan-wide relief may be prospectively waived, presumably because such relief can never be "appropriate" in the context of a defined contribution plan. *See* Br. of ESOP Association at 11–13. In the first place, this argument has no basis in the text of sections 502(a)(2) and 409(a), and as explained above, is contrary to the

Supreme Court's decision in *LaRue*. And it is belied by the facts of this case: taking Plaintiff's complaint allegations as true—*i.e.*, that Defendants breached their fiduciary duties and caused the Plan to massively overpay for Envision stock—it is hard to imagine why the plan-wide relief he seeks, such as removal of Argent as the Plan's trustee and restoration of losses to the Plan as a whole, could never be "appropriate." In any event, even if the relief sought here may not ultimately *prove* "appropriate," the effective-vindication doctrine precludes prospectively waiving the right to "pursue" statutory remedies. *Mitsubishi*, 473 U.S. at 637 n.19. Yet the Remedy Limitation here categorically precludes participants from even *attempting* to seek recovery for the Plan beyond that which would inure to their individual accounts. *See Parisi v. Goldman Sachs & Co.*, 710 F.3d 483, 487 (2d Cir. 2013) (recognizing that "a number of Circuits have altered or invalidated arbitration agreements where they interfered with the recovery of statutorily authorized damages.").

Defendants and their amici argue for the first time on appeal that Plaintiff's right to plan-wide remedies has not been waived because the Department of Labor can recover plan-wide losses and equitable relief,

such as removal of the Plan trustee. *See* Appellants' Br. at 35, 46–50; Br. of the ESOP Association at 5, Br. of the Chamber of Commerce at 20. This misstates the effective vindication doctrine, which asks whether "the *prospective litigant*"—not some stranger to the case—"effectively may vindicate its statutory cause of action in the arbitral forum." *Italian Colors Rest.,* 570 U.S. at 236 (emphasis added). Applying the correct test, the Remedy Limitation is impermissible for the simple reason that it prohibits participants from pursuing a substantive remedy in arbitration that ERISA allows them to seek in court. *See Mitsubishi Motors,* 473 U.S. at 628 (a party that agrees to arbitrate "does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."). But even if the Secretary of Labor's right to seek plan-wide remedies could conceivably be relevant, it is not a sufficient replacement for a participant's separate right to do so, especially because there could be a host of reasons preventing the Secretary from bringing even the most meritorious of claims. *See* Br. of the United States as Amicus Curiae, *Thole v. U.S. Bank*, 2019 WL 4879635 (U.S.), 26 (2019) ("But given limited resources, the Secretary of Labor cannot

monitor every plan in the country. Congress thus reasonably determined that the best means of protecting individual pension rights was to authorize beneficiaries to sue fiduciaries who breach their duties, notwithstanding resulting litigation costs.").[5]

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[5] The cases Defendants cite do not say that prospective waivers of statutory remedies are permissible where there is a potential for Government enforcement. Appellants' Br. at 48–49. The question in *Gilmer*, for example, was whether compulsory arbitration was *ever* permissible for claims under the Age Discrimination in Employment Act (ADEA), not whether a particular provision effected a substantive waiver of a statutory remedy. 500 U.S. at 23. The Court referred to the EEOC's ability to obtain class-wide relief to rebut the argument that arbitration does not "adequately further the purposes of the ADEA," *Gilmer*, 500 U.S. at 32, not that the arbitration agreement prevented plaintiff from vindicating a statutory right. Also distinguishable is the Sixth Circuit's unpublished decision in *Williams v. Dearborn Motors 1, LLC,* which concerned the enforceability of a *class-action waiver* in an arbitration agreement, which plaintiffs said prevented pattern-or-practice discrimination claims under the civil rights laws. No. 20-1351, 2021 WL 3854805, at *6 (6th Cir. Aug. 30, 2021). The Sixth Circuit pointed out that "[t]here is no statutory guarantee in the Civil Rights Acts providing pattern-or-practice claims as private rights of action," noting that Title VII instead confers such a right on the Government. *Id.* at *6. In contrast, ERISA gives both private plaintiffs and the Secretary of Labor the same statutory right to bring an action for plan-wide relief. *See* 29 U.S.C. § 1132(a)(2) ("A civil action may be brought. . . by the Secretary, or by a participant . . . for appropriate relief under section 1109 of this title.").

Finally, Defendants argue that the district court's holding was inconsistent with ERISA in two respects. First, Defendants argue that ERISA section 404(a)(1)(D), which requires fiduciaries to abide by a plan's written terms, 29 U.S.C. § 1104(a)(1)(D), requires enforcing the Remedy Limitation because it is a term of the Plan. Appellants' Br. at 24. But ERISA section 404(a)(1)(D) requires fiduciaries to discharge their duties "in accordance with the documents and instruments governing the plan" only "*insofar as such documents and instruments are consistent with the provisions of [Title I of ERISA].*" 29 U.S.C. § 1104(a)(1)(D) (emphasis added); *see also Esden v. Bank of Boston,* 229 F.3d 154, 173 (2d Cir. 2000) ("The Plan cannot contract around the statute."). Enforcing a plan provision that waives a participant's right to seek plan-wide relief from a breaching fiduciary is inconsistent with the right to such relief conferred by sections 502(a)(2) and 409(a). Accordingly, ERISA section 404(a)(1)(D) undermines Defendants' position and militates in favor of finding the Plan's Remedy Limitation invalid.

Second Defendants argue that the district court's refusal to compel arbitration under the FAA is contrary to ERISA's federal-law

savings clause, which says that ERISA shall "[not] alter, amend, modify, invalidate, impair, or supersede" another federal law, 29 U.S.C. § 1144(d). Appellants' Br. at 31. But as the district court put it, "there is no conflict with the FAA because there is no provision of the FAA that prevents a participant from seeking such remedies." 2022 WL 909394 at *6. Rather, the conflict here is between ERISA's remedy of plan-wide relief and the plan provision that eviscerates it. Indeed, the FAA is fully intact and enforceable; it is simply the Remedy Limitation—and the arbitration agreement itself by dint of its non-severability provision—that is not.

The Remedy Limitation prohibits participants from seeking or receiving any relief that provides "benefits or monetary relief to any Eligible Employee, Participant or Beneficiary other than the Claimant." *Id.* at *3. This restriction plainly contradicts ERISA's remedial provisions authorizing participants to recover, on the plan's behalf, *any losses* to the plan resulting from a fiduciary breach and other equitable or remedial relief, including removal of a fiduciary. Plaintiff's right to pursue plan-wide relief may not be prospectively waived. Accordingly,

the court properly denied the motion to compel arbitration under the effective vindication doctrine.

CONCLUSION

The Secretary respectfully requests that this Court affirm the district court's denial of Defendants' motion to compel arbitration.

Respectfully submitted,

Date: September 7, 2022

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Date: September 7, 2022

/s/ Brendan Ballard
Brendan Ballard

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I hereby certify that on this day, September 7, 2022, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Brendan Ballard

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