No. 23-1857

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Tanika Parker, *et al.*,

Plaintiffs-Appellees,

v.

Tenneco, Inc., *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court for the
Eastern District of Michigan
Case No. 23-10816
The Honorable Judge George Caram Steeh

BRIEF FOR THE U.S. SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES

SEEMA NANDA
Solicitor of Labor

WAYNE R. BERRY
Associate Solicitor
for Plan Benefits Security

JEFFREY M. HAHN
Counsel for Appellate and
Special Litigation

Sarah M. Karchunas
Trial Attorney

U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Ave. NW, N4611
Washington, DC 20210
202.693.5411 (t) | 202.693.5610 (f)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases:

Federal Cases (continued):

Federal Cases (continued):

Federal Statutes:

Miscellaneous:

Other Authorities:

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Acting 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 ERISA 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

Plaintiffs Tanika Parker and Andrew Farrier participated in the DRiV 401(k) Retirement Savings Plan and the Tenneco 401(k) Investment Plan ("Plans"), respectively. Opinion and Order, RE 22, PageID # 480. Both employees worked for subsidiaries of Tenneco, Inc., and both Plans were maintained by Tenneco (or a subsidiary of Tenneco). Amended Compl., RE 2, PageID # 54–55, 59. After the filing of this lawsuit, the DRiV Plan was merged into the Tenneco Plan. *Id*. at PageID # 59.

In 2021 both Plan documents were amended to include the same "Arbitration Procedure" to resolve all "Covered Claims." Opinion and Order, RE 22, PageID # 480–81. The Arbitration Procedure includes a provision that limits participants to obtaining individualized relief and precludes relief that inures to the benefit of any other Plan participant or beneficiary ("Representative Action Waiver"):

> 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 one 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 relief (whether such monetary relief is described as legal damages or equitable relief) to any Employee, Participant or Designated 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 [29 U.S.C. § 1109], the Claimant's remedy, if any, shall be limited to (i) the alleged losses to the Claimant's individual Plan 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 Plan account, and/or (iii) such other remedial or equitable relief as the arbitrator 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 Employee, Participant or Designated Beneficiary other than the Claimant, and is not binding on the Committee or Trustee with respect to any Employee, Participant or Designated Beneficiary other than the Claimant.

Id. at PageID # 481–82 (emphasis added).

The Arbitration Procedure also delegates "exclusive authority to resolve any dispute or issue of arbitrability" to the arbitrators, "[e]xcept as to the applicability and enforceability of the [Representative Action Waiver]." *Id.* at PageID # 486. Additionally, the Arbitration Procedure provides that the Representative Action Waiver is not severable from the Procedure as a whole, and that "[i]n the event that the requirements [of the Representative Action Waiver] were to be found

unenforceable or invalid," then the entire Arbitration Procedure "shall be rendered null and void in all respects." *Id.* at PageID # 482.

B. Proceedings Below

Plaintiffs filed an amended class action complaint alleging that Defendants breached their fiduciary duties by failing to employ a prudent process to select, monitor, and remove investment options from the Plans' menus, resulting in the Plans and their participants being charged excessive fees for the investment options offered by the Plans. *Id.* at Page ID # 484; Amended Compl., RE 2, PageID # 53–54. The amended complaint's prayer for relief seeks an order that Defendants restore all losses resulting from the alleged breach, and other equitable relief such as the removal of plan fiduciaries and an appointment of a new independent fiduciary. Opinion and Order, RE 22, PageID # 484; Amended Compl., RE 2, PageID # 112–14. The claims, which arise under ERISA section 502(a)(2), are asserted by Plaintiffs in a representative capacity "on behalf of" the Plans. Amended Compl., RE 2, PageID # 50–51, 106, 108, 110, 114.

Defendants moved to compel individual arbitration of Plaintiffs' claims or, in the alternative, to dismiss the complaint for failure to state a claim. Mot. to Compel, RE 9, PageID # 18.

The district court denied the Defendants' motion. The court found that the Representative Action Waiver is unenforceable because it prevents the effective vindication of Plaintiffs' statutory right to seek plan-wide relief under ERISA section 502(a)(2). Opinion and Order, RE 22, PageID # 493. The district court cited the portion of the Representative Action Waiver that prevents claimants from seeking or receiving "any remedy which has the purpose or effect of providing additional benefits or monetary relief . . . to any Employee, Participant or Designated Beneficiary other than the Claimant." *Id.* at PageID # 481, 493. The district court found that this language "limits a participant's substantive right under ERISA by prohibiting plan participants from bringing suit under 1132(a)(2) and is therefore unenforceable." *Id.* at PageID # 493. And because the Arbitration Procedure, by its plain terms, renders itself "null and void" if the Representative Action Waiver is found unenforceable, the court concluded that arbitration could not be compelled. *Id.*

SUMMARY OF THE ARGUMENT

The district court correctly refused to compel arbitration because the Arbitration Procedure includes a non-severable provision precluding Plaintiffs from obtaining in arbitration the very relief that ERISA expressly allows them to seek in court.

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. 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." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985); *Hawkins v. Cintas Corp.*, 32 F.4th 625, 630 (6th Cir. 2022). This is true even in the context of defined contribution plans made up of individual participant accounts. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008); *Hawkins*, 32 F.4th at 630–31. 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.

Plaintiffs here sought precisely the remedies authorized by section 502(a)(2) to redress the harm they allege Defendants caused the Plan, including restoration of all Plan losses. Yet, Defendants sought to force Plaintiffs to abandon these statutory remedies by moving to compel arbitration under an agreement that restricts them to obtaining only individualized relief. The Supreme Court has repeatedly made clear, though, that arbitration provisions that prospectively waive a party's right to pursue statutory remedies are unenforceable. Because the Representative Action Waiver here precludes participants from seeking the very plan-wide relief that ERISA explicitly authorizes, the district court correctly determined that it was unenforceable. That determination also accords with recent decisions by multiple circuits deeming unenforceable arbitration provisions materially identical to the Representative Action Waiver. This Court should join its sister circuits by affirming the district court's ruling that the Representative Action Waiver is an unenforceable prospective waiver of statutory remedies.

Contrary to Defendants' characterization, deeming the Representative Action Waiver unenforceable does not imply any "disharmony" between ERISA and the Federal Arbitration Act ("FAA").

The district court merely applied long-standing Supreme Court doctrine making clear that arbitration agreements—while permissibly altering procedural rights—may not include provisions abridging substantive remedies conferred by *any* statute (ERISA or otherwise). This only means that the *offending provision* cannot be *enforced* in arbitration, not that arbitration cannot *proceed* at all. In fact, the reason arbitration could not ultimately proceed in this case, as the district court found, was not due to ERISA's inherent incompatibility with arbitration, but because of a non-severability clause that Tenneco itself *chose* to include in the Arbitration Procedure (voiding the entire Procedure if the Representative Action Waiver is held enforceable). That decision, too, was correct, and this Court should affirm.

ARGUMENT

I. ERISA Sections 502(a)(2) and 409(a) Authorize Plan Participants to Seek Plan-wide Relief for Fiduciary Breach Claims

The district court correctly recognized that ERISA authorizes plan participants, including participants in defined contribution plans, to bring representative actions on behalf of the plan for plan-wide relief on fiduciary breach claims. Opinion and Order, RE 22, PageID # 493.

ERISA section 502(a)(2) provides that participants, 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 the plan, the Supreme Court has explained that section 409(a) "provid[es] relief singularly to the plan" as opposed to an "individual beneficiary." *Russell*, 473 U.S. at 142. 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

These principles apply even in the context of defined contribution plans made up of individual participant accounts. In *LaRue v. DeWolff, Boberg & Associates, Inc.*, the Supreme Court held that, although defined contribution plans, unlike defined benefit plans, comprise individual accounts, losses to those accounts still qualify as plan losses.

552 U.S. at 256. 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. *LaRue*, 552 U.S. at 251. The breach, and the resulting harm, was thus localized to the plaintiff's account and did not affect any other participant accounts. *Id.* 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* set out a new rule specific to defined-contribution plans: that participants in such plans have a statutory right to pursue through a section 502(a)(2) action "*only* the plan losses attributable to his or her individual plan account." Appellants' Br. at 37. But *LaRue* suggests no such thing. The Supreme Court simply clarified that the plaintiff in that case could 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 suggested that every participant in a defined contribution plan is limited to recovering (for the plan's benefit) only those losses tied to their individual accounts under section 502(a)(2), even where a breach affects the entire plan. *LaRue* thus "broadens, rather than limits, the relief available under § 502(a)(2) in holding that a derivative fiduciary claim may be brought on behalf of a 'plan,' even if the ultimate relief may be individualized." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 595 n.9 (3d Cir. 2009).

Nor does Defendants' proposition follow from *LaRue*'s logic. Indeed, the Court reiterated in *LaRue* that *all claims* under section 502(a)(2)—including those pertaining to a breach that harms only 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).

The district court here likewise rejected Defendants' argument that section 502(a)(2) claims in the context of defined contribution plans are somehow inherently individualized, citing to this Court's decision in *Hawkins v. Cintas Corp*. Opinion and Order, RE 22, PageID # 488–92. There, the Sixth Circuit considered whether participants in a defined contribution plan could consent to arbitrate section 502(a)(2) claims via individual employment agreements, or instead whether the plan itself must consent. *Hawkins*, 32 F.4th at 627. In holding that plan consent was required, the Court reasoned that "[a]lthough § 502(a)(2) claims are brought by individual plaintiffs, it is the plan that takes legal claim to the recovery, suggesting that the claim really 'belongs' to the Plan." *Id.* at 632–33. Even Defendants concede as much. Appellants' Br. at 39 (recognizing that this Court in *Hawkins* "determined that the [502(a)(2)] claims belonged to the plan"). Indeed, the Court concluded that "interpreting the [section 502(a)(2)] claim as belonging to the individual, rather than the Plan, appears to conflict with *LaRue*." *Hawkins*, 32 F.4th at 634. The Court also recognized that the plaintiffs

possessed a statutory "right . . . to bring a representative action pursuant to § 502(a)(2)." *Id.* at 633–34. Relying on *Hawkins*, the district court thus concluded that because participants in defined contribution plans bring section 502(a)(2) claims on the plan's behalf, it follows that they have an ERISA-conferred right to pursue plan-wide remedies, not just those inuring to their individual accounts. Opinion and Order, RE 22, PageID # 488–92.[1]

Not surprisingly then, circuit courts post-*LaRue* have continued to allow participants in defined contribution plans to recover on the plan's behalf all losses to the plan resulting from a fiduciary breach no different than before the *LaRue* decision. *Cf., e.g., Brundle on behalf of Constellis Emp. Stock Ownership Plan v. Wilmington Tr., N.A.*, 919 F.3d 763, 782 (4th Cir. 2019) (ESOP participants entitled "to compensation for the loss from the overpayment" for ESOP assets); *Munro v. Univ. of S. Cal.*, 896 F.3d 1088, 1094 (9th Cir. 2018)

[1] Defendants seek to distinguish *Hawkins* on the ground that the Plan here consented to arbitration. Appellants' Br. at 38–41. But whether consent was properly obtained is irrelevant to whether the Representative Action Waiver is an unenforceable prospective waiver of statutory remedies, and Defendants do not explain why the Court's reasoning in *Hawkins* concerning the representative nature of section 502(a)(2) claims cannot apply to the resolution of that question.

(participants in defined contribution plans entitled to "seek financial and equitable remedies to benefit the Plans and all affected participants and beneficiaries"); *L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cnty., 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"); *Spano v. The Boeing Co.*, 633 F.3d 574, 585–86 (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).

Accordingly, the district court correctly determined that ERISA section 502(a)(2) authorizes Plaintiffs to seek plan-wide relief to redress Defendants' alleged breaches.

II. The Arbitration Procedure's Prohibition on Plan-wide Relief is Unenforceable Because It Prospectively Waives Remedies Authorized by ERISA

A. Arbitration agreements may not prospectively waive statutory remedies

The Federal Arbitration Act 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) (Sherman Antitrust Act of 1890); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act). The circuit courts that have considered the arbitrability of ERISA claims are in agreement that ERISA claims are generally arbitrable. *See Henry v. Wilmington Tr. NA*, 72 F.4th 499, 506 n.8 (3d Cir. 2023); *Smith v. Bd. of Dirs. of Triad Mfg., Inc.*, 13 F.4th 613, 620 (7th Cir. 2021); *Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000); *Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996); *Bird v. Shearson Lehman/Am. Express, Inc.*, 926 F.2d 116, 122 (2d Cir. 1991).[2]

But a unanimous Supreme Court recently clarified that the FAA's "policy favoring arbitration" should not be overstated: this "federal

[2] While this Court has not yet determined whether ERISA claims are subject to arbitration, it recognized that "every other circuit to consider the issue has held that ERISA claims are generally arbitrable." *Hawkins*, 32 F.4th at 629 (internal quotation marks and citations omitted).

policy is about treating arbitration contracts like all others, not about fostering arbitration." *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (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, 235–36 (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. The effective vindication doctrine, the Court made clear, "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Italian Colors Rest.*, 570 U.S. at 236. The Sixth Circuit has thus applied the "effective vindication" doctrine to invalidate an arbitration provision that stripped plaintiffs of their substantive statutory right to bring claims under federal law. *McMullen v. Meijer, Inc.*, 355 F.3d 485, 492–94 (6th Cir. 2004); *see also Morrison v. Cir. City Stores, Inc.*, 317 F.3d 646, 658 (6th Cir. 2003) ("The Supreme Court has made clear that statutory rights . . . may be

subject to mandatory arbitration only if the arbitral forum permits the effective vindication of those rights.").

In contrast, arbitration provisions that do not limit a statutory remedy but merely alter the *procedures* for pressing a claim will generally stand. For example, courts will typically enforce arbitration provisions waiving 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, 1619 (2018); *Italian Colors Rest.*, 570 U.S. at 236–39; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346–47 (2011); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27–32 (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. However, 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**," and may not be waived. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1922 (2022) (emphasis added).

B. The Representative Action Waiver prospectively waives participants' rights to seek plan-wide relief under ERISA section 502(a)(2)

The district court correctly held that the Arbitration Procedure's Representative Action Waiver was an unenforceable prospective waiver of statutory remedies. Opinion and Order, RE 22, PageID # 493. As explained above, ERISA sections 502(a)(2) and 409(a) expressly allow participants complaining of fiduciary breaches to recover for the plan "any losses to the plan resulting from" the fiduciary's breach. *See* 29 U.S.C. § 1109(a); 29 U.S.C. § 1132(a)(2) (authorizing participants to seek "appropriate relief under [section 409]"). And the Supreme Court (and this Court) have made clear that claims under section 502(a)(2) are representative actions brought "on behalf of the plan as a whole" and that the relief authorized by the statute inures to the plan. *Russell*, 473 U.S. at 142 n.9; *see also LaRue*, 552 U.S. at 253; *Hawkins*, 32 F.4th at 632–33.

Yet the Representative Action Waiver cuts off those statutory remedies by making clear that participants may not arbitrate ERISA claims "in a representative capacity" and "may not seek or receive any remedy which has the purpose or effect of providing additional benefits

or monetary relief…to any Employee, Participant or Designated Beneficiary other than the Claimant." Opinion and Order, RE 22, PageID # 481. Instead, the Representative Action Waiver provides that all claims "must be brought solely in the Claimant's individual capacity" and limits participants to recovering "the alleged losses to the Claimant's individual Plan account resulting from the alleged breach of fiduciary duty." *Id.* The district court thus correctly concluded that the Representative Action Waiver "limits a participant's substantive right under ERISA by prohibiting plan participants from bringing suit under [section 502(a)(2)] and is therefore unenforceable." *Id.* at PageID # 493.

Despite Defendants' strained analogy, the Representative Action Waiver is materially distinct from the type of class-arbitration waivers that the Supreme Court has determined to be enforceable. Appellants' Br. at 35–36 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27–32 (1991)). As Defendants acknowledge (*id.* at 36), *Gilmer* involved an agreement precluding employees from bringing a collective action—*i.e.*, from suing on behalf of themselves and other employees similarly situated—not one that prohibited statutory remedies. *See Gilmer*, 500 U.S. at 32. But the defect in the Arbitration Procedure here

is not its prohibition on class arbitration *procedures*, but on its preclusion of a *substantive* statutory remedy conferred by ERISA. Opinion and Order, RE 22, PageID # 493. The Representative Action Waiver 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 . . ." *Id.* at PageID # 481 (emphasis added).

C. The district court's holding aligns with recent decisions reached by multiple appellate courts

The district court's holding that that the Representative Action Waiver is an unenforceable prospective waiver of statutory remedies aligns with decisions reached by multiple appellate courts. For example, in *Henry v. Wilmington Tr. N.A.*, the Third Circuit recently held that an arbitration provision materially identical to the Representative Action Waiver (*i.e.*, one that also precluded plan-wide relief) was unenforceable under the effective vindication doctrine because it required the plaintiff to prospectively waive statutory remedies. 72 F.4th at 507. As the court put it, "what the statute permits, the plan precludes." *Id.* (*quoting Smith*, 13 F.4th at 621). And because, under the terms of the arbitration agreement, the provision was not severable from the

broader agreement, the Third Circuit affirmed the district court's refusal to compel arbitration. *Id.*

The Tenth Circuit likewise deemed unenforceable another near facsimile of the Representative Action Waiver because it "purports to foreclose a number of remedies that were specifically authorized by Congress." *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*, 59 F.4th 1090, 1107 (10th Cir. 2023). The court noted that the plaintiff's "claims are brought under § 1132(a)(2) and seek forms of relief," including plan-wide monetary relief, "that would benefit the Plan as a whole, rather than [plaintiff] individually," but the arbitration provision would "foreclose any such plan-wide relief." *Id.* Here too, because the unenforceable provision was not severable from the arbitration agreement, the Tenth Circuit agreed that arbitration could not be compelled. *Id.* at 1112.[3]

[3] Defendants argue that *Harrison* and *Henry* are distinguishable because the arbitration provisions there, in addition to precluding plan-wide monetary relief, also precluded injunctive relief (such as removal of the fiduciary), which they say the agreement here allows. Appellants' Br. at 50–51. But both courts explicitly found that the prohibition on plan-wide monetary relief—a prohibition shared by the Representative Action Waiver—was itself unenforceable under the effective vindication doctrine. *See Harrison*, 59 F.4th at 1106–07 (stating that Plaintiffs would be prevented from seeking relief provided for by section 502(a)(2),

Similarly, in *Smith*, the Seventh Circuit held that a provision limiting participants to individualized relief could not be reconciled with "the plain text of § 1109(a)," which provides for relief that extends to the entire plan. 13 F.4th at 621. As the court put it, "the problem with the plan's arbitration provision is its prohibition on certain plan-wide remedies." *Id.* at 622. Because the provision would thus act as a prospective waiver of the right to pursue a statutory remedy, the provision could not be enforced under the effective vindication doctrine. *Id.* at 621. While Defendants argue *Smith* "supports the conclusion that the class action waiver here is enforceable" because it "recognized that ERISA claims for fiduciary breach may be brought on an individualized basis," Appellants' Br. at 47–48, it in fact supports no such thing. Again, the Seventh Circuit applied the effective vindication doctrine to *invalidate* the provision requiring individualized arbitration in *Smith*. To the extent that *Smith* can be read as implying a different outcome if

---

including "losses suffered by the Plan generally" and "an order directing Agent to restore all the losses resulting from the fiduciary breaches"); *Henry*, 72 F.4th at 507 (finding that the provision prohibits statutorily authorized remedies because ERISA authorizes a plan member to recover "**all** plan losses caused by a fiduciary breach," which would run afoul of the provision's prohibition of monetary relief to non-party plan participants).

the provision there prohibited only plan-wide monetary relief (as opposed also to plan-wide injunctive relief), that is pure speculation, and would in any event be incorrect for the reasons discussed above.

To deflect from the growing chorus of authority aligned against them, Defendants take pains to suggest that the Ninth Circuit has staked out a contrary view in *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 514 (9th Cir. 2019), which they characterize as deeming plan-wide relief under section 502(a)(2) a "waivable, procedural right." Appellants' Br. at 25. But aside from being unpublished and non-precedential, *Dorman* did not even consider a provision prohibiting plan-wide relief or mention the effective vindication doctrine at all. Rather, the portion of *Dorman* cited by Defendants holds only that an arbitration provision may waive "class-wide or collective arbitration." *Dorman*, 780 F. App'x at 514. In reaching that unremarkable conclusion, the Ninth Circuit—in the statement Defendants seize on as supposedly reflecting the waivability of plan-wide relief—said that section 502(a)(2) claims "are inherently individualized when brought in the context of a defined contribution plan like that at issue." *Id.* (*citing LaRue*, 552 U.S. at 256).

But this language is in no way tantamount to holding that an arbitration agreement may prospectively waive a participant's right to seek plan-wide relief. Again, *Dorman* did not even consider a provision limiting plan-wide relief let alone whether it can survive the effective vindication doctrine. *Smith*, 13 F.4th at 623 ("[W]e see no conflict with *Dorman II* . . . . The arbitration provision in that case, as far as we can tell, lacked the problematic language present here."). And of course, it was a limitation on plan-wide relief that prevented the participants in *Smith*, *Henry*, and *Harrison* from effectively vindicating their rights in arbitration—not the waiver of the right to bring a class action that *Dorman* addressed. In any case, even if the stray statement in *Dorman* cited by Defendants had the far-reaching significance they ascribe to it, the notion that section 502(a)(2) claims in the context of defined contribution plans are "inherently individualized" is directly contrary to this Court's precedent. *See Hawkins*, 32 F.4th at 634. ("[I]nterpreting the [section 502(a)(2)] claim as belonging to the individual, rather than the Plan, appears to conflict with *LaRue*.").

III. The District Court Correctly Rejected Defendants' Other Arguments

A. The district court's holding does not contravene either the FAA or ERISA

Defendants criticize the district court for "implicitly determin[ing] that ERISA displaced the FAA." Appellants' Br. at 31. But as discussed, the district court deemed the Representative Action Waiver unenforceable not because of ERISA's hostility to arbitration or disharmony with the FAA, but merely by applying the Supreme Court's long-recognized effective vindication doctrine invalidating provisions "that operat[e]…as a prospective waiver of a party's right to pursue statutory remedies." *Italian Colors Rest.*, 570 U.S. at 235–36. Those two concepts (arbitrability and prospective waiver) are entirely distinct: the fact that an agreement contains provisions prospectively waiving statutory remedies—thus rendering those provisions unenforceable—does not mean the statute itself is incompatible with arbitration or the FAA. *See, e.g., McMullen*, 355 F.3d at 489–90 (explaining that "[i]t is well settled that judicial protection of pre-dispute arbitral agreements extends to agreements to arbitrate statutory employment

discrimination claims," yet still proceeding to assess whether the agreement allows for the "effective vindication of that claim").

Rather, as the district court noted, the conflict is not between ERISA and the FAA, but between ERISA and a single provision in the Arbitration Procedure—the Representative Action Waiver—that precludes the plan-wide remedies that ERISA expressly permits. Opinion and Order, RE 22, PageID # 493. But even this is not by itself fatal to arbitration. It merely means that the *Representative Action Waiver* is unenforceable, not the Arbitration Procedure more broadly. Indeed, the district court denied the motion to compel arbitration not because of ERISA, but rather because of a non-severability provision that Tenneco chose to include in the Arbitration Procedure (rendering it void if the Representative Action Waiver were invalidated). *Id*. If there is any "disharmony" with arbitration, it can be found in Defendants' own Arbitration Procedure.

Defendants also argue that the district court's refusal to compel arbitration is at odds with ERISA, which requires that the Plan (including the Arbitration Procedure and its Representative Action Waiver) be enforced as written. Appellants' Br. at 29–30. Defendants

are here referring to ERISA section 404(a)(1)(D), which requires fiduciaries to discharge their duties "in accordance with the documents and instruments governing the plan *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). But, as is plain from the text, fiduciaries need to enforce Plan terms *only* "insofar" as they comport with ERISA. Here, enforcing the Plan as written, including the Representative Action Waiver, would be inconsistent with ERISA sections 502(a)(2) and 409(a)'s right to pursue plan-wide relief. *See Esden v. Bank of Boston*, 229 F.3d 154, 173 (2d Cir. 2000) ("The Plan cannot contract around the statute.").

B. Seeking plan-wide relief under section 502(a)(2) is not akin to bringing procedural "claim joinder" actions that can be prospectively waived

Defendants argue that the ability to seek a plan-wide remedy on the plan's behalf is not a substantive right under ERISA section 502(a)(2) but rather a waivable procedural right, similar to the ability to bring "claim joinder" actions that the Supreme Court held could be prospectively waived in *Viking River*. Appellants' Br. at 41–46. But if there is any analogy to draw between section 502(a)(2) claims and those

referenced in *Viking River*, it is not with claim joinder actions, but with non-class representative actions that the Supreme Court held could *not* be prospectively waived.

Viking River concerned the FAA's effect on California precedent invalidating waivers of an employee's right to bring representative claims under the California Private Attorneys General Act of 2004 ("PAGA"), Cal. Lab. Code § 2698 *et seq*. PAGA allows California workers to bring two species of representative actions. First, an aggrieved employee, as a proxy or agent of the state, may bring a PAGA action against a former employer for civil penalties for violations of the employee's rights under California labor law. 142 S. Ct. at 1914–17. Second, aside from representing the state, employees may also represent other individuals by joining additional claims of employees "other than the PAGA litigant," which may be predicated on different facts and statutory violations. *Id*. at 1915.

The Supreme Court held that the FAA does not conflict with California precedent precluding contractual waivers of the first type of PAGA action (an individual representative action on behalf of the state). Invoking the effective vindication doctrine, the Court reiterated

that "the FAA does not require courts to enforce contractual waivers of substantive rights and remedies." *Id.* at 1919 ("[W]e have said that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral . . . forum.'" (quoting *Preston v. Ferrer*, 552 U.S. 346, 359 (2008))). And the Court distinguished this type of representative PAGA action—a single agent, single principal action—from class actions, waivers of which it has generally held to be permissible. *Id.* at 1919–22. 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*." *Id.* at 1922 (emphasis added). Thus, California's rule prohibiting waivers of this type of representative action, the Court held, does not run afoul of the FAA. *Id.* at 1923.

The right PAGA gives to employees to bring suit on behalf of California is broadly analogous to the right ERISA sections 502(a)(2) and 409(a) give to participants and beneficiaries to bring an action on behalf of a plan. They are both "representative actions . . . on behalf of a single principal." *Id.* at 1922; *see also Russell*, 473 U.S. at 142, n.9

(section 502(a)(2) claims are "brought in a representative capacity on behalf of the plan as a whole"); *Hawkins*, 32 F.4th at 630 ("Section 502(a)(2) suits are brought in a representative capacity on behalf of the plan as a whole" (internal quotation marks and citations omitted)). Accordingly, the logic underlying the first part of the Supreme Court's holding in *Viking River* supports Plaintiffs' position in this case that the FAA does not require enforcing a prospective waiver of a participant's right to seek plan-wide relief on the plan's behalf.

Defendants argue that an ERISA section 502(a)(2) claim is not analogous to *Viking River*'s "agent or proxy" type of representative PAGA action because, under *Thole v. U.S. Bank, N.A.,* 140 S. Ct. 1615 (2020), participants bringing such claims must have suffered a personal injury, which Defendants contend would not be true if participants acted as an "agent or proxy" of the plan. Appellants' Br. at 42. In fact, *Thole* states just the opposite: plaintiffs must show they suffered an injury in fact *in order* to have representative standing. *Thole,* 140 S. Ct. at 1620 ("*[I]n order to claim 'the interests of others*, the litigants themselves still must have suffered an injury in fact, thus giving' them 'a sufficiently concrete interest in the outcome of the issue in dispute.'"

(emphasis added) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013))); *see also Gollust v. Mendell*, 501 U.S. 115, 125–26 (1991) (suggesting that shareholder must "maintain some continuing financial stake in the litigation" to have Article III standing to bring an insider trading suit on behalf of the corporation). In short, "*Thole* states that, for those plaintiffs to have had representative standing, they had to show they suffered an injury in fact—not, as Defendants propose, that representative plaintiffs *either* suffer an injury in fact *or* have representative standing." *Coleman v. Brozen*, No. 3:20-CV-01358-E, 2023 WL 4498506, at *1, 16 (N.D. Tex. Jul. 12, 2023).

Defendants similarly argue that a representative action under ERISA section 502(a)(2) is a form of waivable claim joinder because "courts . . . have required a participant to satisfy procedural requirements before allowing a participant to proceed on behalf of absent plan participants or their individual plan accounts." Appellants' Br. at 44. According to Defendants, if Plaintiffs have a substantive right to pursue monetary relief on behalf of the Plan, "courts would not be concerned about ensuring procedural protections for absent plan participants." *Id.* at 46. But substantive rights often require procedural

safeguards. For instance, a shareholder-derivative action, which the Supreme Court specifically referenced as an example of a non-class representative action that is "part of the basic architecture of much of substantive law," *Viking River,* 142 S. Ct. at 1921, is also accompanied by Federal Rule of Civil Procedure 23.1's procedural safeguards. *See* Fed. R. Civ. P. 23.1(a). The possible need for procedural safeguards, in other words, in no way implies that the right in question is not substantive.

CONCLUSION

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

Respectfully submitted,

Date: December 20, 2023

SEEMA NANDA
Solicitor of Labor

WAYNE R. BERRY
Associate Solicitor
for Plan Benefits Security

JEFFREY M. HAHN
Counsel for Appellate and Special
Litigation

/s/ Sarah M. Karchunas
SARAH M. KARCHUNAS
Trial Attorney

U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Ave. NW, N4611
Washington, DC 20210
202.693.5411 (t) | 202.693.5610 (f)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(5), 32(a)(5)–(6), and 32(a)(7)(B), I certify that this amicus brief uses a 14-point proportionally spaced typeface font (Century Schoolbook) and contains 6,297 words.

/s/ Sarah M. Karchunas
Sarah M. Karchunas
Trial Attorney

Date: December 20, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this day, December 20, 2023, I electronically filed the foregoing amicus brief with the Clerk of the Court for the U.S. Court of Appeals for the Sixth 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.

/s/ Sarah M. Karchunas
Sarah M. Karchunas
Trial Attorney

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RE	Description	PageID #
2	Amended Complaint	50–114
9	Defendants' Motion to Compel Individual Arbitration	18–50
15	Plaintiffs' Response to Defendants' Motion to Compel Individual Arbitration	349–380
16	Defendants' Reply in Support of Motion to Compel Arbitration	381–390
22	Opinion and Order denying Defendants' Motion to Compel Individual Arbitration	479–494