21-2891

In the United States Court of Appeals
FOR THE SECOND CIRCUIT

RAMON DEJESUS CEDENO,
Plaintiff – Appellee
v.
ARGENT TRUST COMPANY, RYAN SASSON, DANIEL BLUMKIN, IAN BEHAR, STRATEGIC FINANCIAL SOLUTIONS, LLC, DUKE ENTERPRISES LLC, TWIST FINANCIAL LLC, BLAISE INVESTMENTS LLC,
Defendants – Appellants

On Appeal from the United States District Court for the Southern District of New York
Case No. 20-cv-9987 (JGK), Hon. John G. Koeltl

BRIEF OF *AMICI CURIAE* THE ESOP ASSOCIATION AND AMERICAN BENEFITS COUNCIL IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, *Amici Curiae* state as follows:

- The ESOP Association has no parent corporation, and no publicly held company has 10 percent or greater ownership in the Association; and
- The American Benefits Council has no parent corporation, and no publicly held company has 10 percent or greater ownership in the Council.

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INTEREST OF *AMICI CURIAE*[1]

The ESOP Association is a national nonprofit organization that supports the creation and maintenance of employee stock ownership plans ("ESOPs"). Since its inception in 1978, the Association has served the interests of companies with ESOPs, professionals with a commitment to ESOPs, and companies considering implementing an ESOP. The Association works to promote and enhance laws and governmental regulations that govern ESOPs and to provide its membership with expert educational ESOP programming and information.

The American Benefits Council (the "Council") is a national nonprofit organization dedicated to protecting and fostering employer-sponsored benefit plans. The Council's members are primarily large, multistate U.S. employers that sponsor benefit plans for active and retired workers and their families. The Council's membership also includes organizations that offer services to benefit plans. Collectively, the Council's approximately 430 members directly sponsor or provide services to plans covering virtually every American who participates in an employer-sponsored benefit program. The Council and its members have participated as *amicus curiae* in cases affecting the management and administration of employee

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[1] All parties consented to *Amici* filing this brief. No party's counsel authored this brief either in whole or in part. No one other than *Amici*, *Amici*'s members, *Amici*'s counsel, and Certain Underwriters at Lloyd's, London, made a financial contribution intended to fund the preparation of this brief.

benefit plans under the Employee Retirement Income Security Act of 1974 ("ERISA").

Many of *Amici*'s members offer their employees ESOP plans like the one at issue in this case, and many others offer or provide services to non-ESOP benefit plans—such as 401(k) retirement plans and employer-sponsored health plans—that likewise would be impacted by the District Court's decision. The companies that design such plans, the fiduciaries who administer them, and companies that provide services to them, have a significant interest in the ability to arbitrate ERISA fiduciary-breach claims. The District Court's ruling, if adopted by this Court, would effectively ban individualized arbitration of such causes of action, which would frustrate one of the central goals of ERISA: ensuring the prompt provision of benefits to participants and beneficiaries. Accordingly, *Amici* submit this brief to aid the Court in its understanding of the issues presented and the adverse impact that affirming the decision below would have on all stakeholders in ERISA plans.

INTRODUCTION/SUMMARY OF THE ARGUMENT

The District Court erroneously determined that the parties' arbitration agreement was unenforceable. The error stemmed from the District Court's misapplication of the "effective vindication" exception[2] to the Federal Arbitration Act ("FAA") and mistaken conclusion that ERISA creates a nonwaivable statutory "right" for a participant to pursue "all" loss to an ERISA plan, including amounts that, if recovered, would be paid to plan accounts other than the participant's own plan account. At most, however, the effective-vindication exception applies only where an arbitration provision requires a party to waive a nonwaivable "guarantee" provided by another federal statute; the exception is not implicated by another federal statute's mere contemplation, allowance, or opportunity to pursue certain relief. *See CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

ERISA does not guarantee an individual participant a right to pursue all loss to an ERISA plan. Instead, the ERISA cause-of-action that is at issue in this case, § 502(a)(2), guarantees only the right to pursue "appropriate" relief from among certain remedies authorized by § 409(a). *See* 29 U.S.C. §§ 1132(a)(2), 1109. ERISA's statutory text, its legislative history, principles of trust law, and relevant

[2] Although the District Court did not refer to the exception by name, its reasoning and precedents it cited confirm that was the basis for its decision. A281-83.

precedent confirm that an individual participant's ability to pursue additional loss to a plan is not guaranteed, but depends on that participant meeting certain procedural requirements—and a participant's ability to pursue that relief is waivable. Simply put, there is no ERISA statutory "guarantee" that each participant may pursue recovery of all plan loss, and the effective-vindication exception is not implicated by an arbitration provision that requires individualized arbitration.

The District Court's ruling, if adopted by this Court, would be deeply problematic, not least because it would effectively ban individualized arbitration of ERISA fiduciary-breach claims. ERISA was designed to protect benefits due to participants and beneficiaries, and Congress also "was concerned lest the cost of federal standards discourage the growth of private pension plans." 29 U.S.C. § 1001(a), (b); *Conkright v. Frommert*, 559 U.S. 506, 517 n.2 (2010). Individualized arbitration affords participants and employers a faster and less-expensive means of resolving disputes over benefits that may be due; prohibiting individualized arbitration would threaten to impose the high costs and substantial risk of litigation that Congress feared would discourage employers from offering voluntary benefit programs, like ESOPs or 401(k)s.

This Court should reverse the District Court and uphold individualized arbitration of § 502(a)(2) claims.

ARGUMENT

I. The District Court Misapplied the Effective-Vindication Exception.

A. Relevant History

Plaintiff is a participant in the Strategic Financial Employee Stock Ownership Plan (the "Plan"), which is a defined-contribution plan with individual participant accounts. Plaintiff sued Defendants for allegedly violating their ERISA fiduciary duties by causing the Plan to purchase employer stock for more than "adequate consideration," which would (if true) be a non-exempt "prohibited transaction" under ERISA.[3] A13-15; *see also* 29 U.S.C. §§ 1106(a), 1108(e). Plaintiff sought to represent a class of other Plan participants, and he requested that Defendants pay all supposed losses to the Plan and disgorge alleged profits.

As discussed at greater length in Defendants' brief, Dkt. No. 54 at 9-11, the Plan's arbitration agreement required individualized arbitration, limited to loss to a claimant's individual Plan account and a pro-rated share of any ill-gotten profits, and prohibited "remedial or equitable relief" that results "in the provision of additional benefits or monetary relief to any Employee, Participant or Beneficiary other than the Claimant." A275. The District Court held that the arbitration agreement was

[3] ERISA's prohibited-transactions provisions impose duties on fiduciaries, only, and are enforceable through a cause of action in § 502(a). *See Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 (2000).

unenforceable because it required Plaintiff to waive nonwaivable rights under §§ 502(a)(2) and 409.

Section 502(a)(2) provides:

> **(A) PERSONS EMPOWERED TO BRING A CIVIL ACTION**
>
> A civil action may be brought—
>
> * * *
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section [409] of this title;

29 U.S.C. § 1132(a)(2). Section 409 in turn provides:

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

Id. § 1109(a). The District Court determined that these sections reflect Congress's intention to provide "plan-wide" relief to a participant, and the District Court interpreted "plan-wide" as conferring on each participant a nonwaivable statutory right to recover "all" loss to an ERISA plan. A280-81. On this basis, the District Court held that individualized arbitration would impermissibly require Plaintiff to waive his statutory right to pursue losses beyond those Plaintiff may have suffered in his Plan account. A285.

B. The District Court Conflated a Mere Statutory Contemplation, Allowance, or Opportunity with the Type of Statutory Guarantee Required for the Effective-Vindication Exception to Apply.

The District Court misapplied the effective-vindication exception to the FAA. The FAA requires courts to "rigorously enforce" agreements to arbitrate, including those that specify "with whom" parties will arbitrate. *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). There are two potential exceptions: where claims allege violations of a federal statute that contains a "contrary congressional command" to displace the FAA and outlaw certain arbitration agreements,[4] and if an arbitration provision would not permit the "effective vindication" of a party's "right" to pursue its federal statutory claims.[5] *Italian Colors*, 570 U.S. at 233, 236 (discussing both).

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[4] This Court already has concluded that ERISA contains no contrary congressional command and, accordingly, that ERISA claims are arbitrable. *Bird v. Shearson Lehman/Am. Exp., Inc.*, 926 F.2d 116, 122 (2d Cir. 1991). Absent such a command, courts must do everything in their power to give effect to both the FAA and ERISA. *See Epic Sys.*, 138 S. Ct. at 1624.

[5] In *Italian Colors*, the Supreme Court cast doubt on whether the effective vindication exception is still—or ever was—a viable exception. 570 U.S. at 235 n.2 (observing that prior decision discussed effective vindication in dicta). As Defendants note, there is strong reason to believe that the effective-vindication exception has been subsumed within the "contrary congressional command" exception. Dkt. No. 54 at 28 (discussing *Epic Sys.*, 138 S. Ct. at 1621). For present purposes, this brief assumes that the effective-vindication exception remains viable.

The effective-vindication exception[6]—which the Supreme Court has never actually applied to invalidate an arbitration agreement[7]—originated with dicta in *Mitsubishi Motors*. 473 U.S. at 617, 637 n.19. There, the arbitration agreement required arbitration in Japan and under Swiss law, and the party opposing arbitration (and one of its *amici*) argued that the Japanese tribunal might apply (presumably less favorable) Swiss law instead of the Sherman Act to antitrust claims. *Id.* at 637 n.19. Although events had mooted the concern in that case, the Court nevertheless posited that if the arbitration agreement amounted to a *de facto* bar on asserting a Sherman Act claim, that might warrant invalidating the arbitration agreement; such a bar, the Court explained, would preclude the claimant from "effectively…vindicat[ing] its statutory cause of action." *Id.*

In subsequent cases, the Court refined its articulation of the exception, making clear that a nonwaivable statutory "right" means a nonwaivable "guarantee" of the ability to pursue some statutory claim or remedy—the exception is not implicated by a waiver of a mere statutory "contemplation," "allowance," or "opportunity." In *CompuCredit Corp v. Greenwood*, for example, the Credit Repair Organizations Act ("CROA") required disclosure to consumers that they "have a right to sue," and the

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6 The party contesting arbitration bears the burden of establishing the effective-vindication exception. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000).

7 *See Italian Colors*, 570 U.S. at 235.

CROA expressly voided purported waivers of any "right" provided by the CROA. 565 U.S. at 98. Nevertheless, the Court held that an arbitration agreement that waived the purported "right to sue" was not invalid, because the "right to sue" referred to in a disclosure was not a "*guarantee*" provided by the plain text of the CROA. *Id.* at 102 (emphasis original).

To determine what guarantee the CROA provided, the Court examined the text and structure of the CROA's enforcement provision, placing significant weight on the fact that the only actionable "right" conferred by the enforcement provision was the right to "enforce" a credit repair company's "liability." *Id.* at 98-99. By contrast, Congress placed the disclosure requirement in the statute's *disclosure* provision, not the enforcement provision. Because the "right to sue" was not located in the enforcement provision, it was not an enforcement "right" guaranteed by the statute. *See id.* at 102 (describing the "right to sue" language as a "mere 'contemplation'").

Other Supreme Court cases further developed the distinction between statutory guarantees and statutory contemplations or opportunities. In *Gilmer v. Interstate/Johnson Lane Corp.*, Gilmer challenged individualized arbitration of his ADEA claims. 500 U.S. 20, 32 (1991). ADEA Section 216(b) stated, in relevant part:

> An action to recover the liability . . . may be maintained against any employer (including a public agency)…by any one or more employees for and on behalf of himself or themselves and other employees similarly situated….

29 U.S.C. § 216(b). This language clearly contemplated a class or collective action, yet it still did not rise to the level of a "guarantee" of the right to pursue a class or collective action. *Gilmer*, 500 U.S. at 32. The Court favorably cited the dissent in *Nicholson v. CPC Int'l Inc.*, which characterized the ADEA provision as an "opportunity," not "an invitation to plaintiffs that they could not refuse." *Nicholson*, 877 F.2d 221, 241 (3d Cir. 1989), abrogated by *Gilmer*, 500 U.S. at 32.

The Court reached a similar conclusion in *Epic Systems*, which involved an arbitration provision with a class-waiver. The plaintiffs argued that the National Labor Relations Act ("NLRA") created a statutory right to bring class or collective actions, because the NLRA expressly allowed employees to sue on behalf of "themselves and other employees similarly situated." 138 S. Ct. at 1626. That statutory language did not implicate the effective-vindication exception, because it did not "guarantee[]" the ability to bring a class action. *Id.* at 1628 ("[n]othing in our cases indicates that the NLRA guarantees class and collective action procedures"); *id.* at 1629 ("not a single one of the lower court or Board decisions…went so far as to hold that Section 7 guarantees a right to class or collective action procedures"); *see also Italian Colors*, 570 U.S. at 234 (reiterating rejection of argument that "opportunity" to pursue class action is a nonwaivable right). Even the statute's "express provision for collective legal actions does not *necessarily* mean that it precludes 'individual attempts at conciliation' through arbitration." *Epic Sys.*, 138 S. Ct. at 1627.

The Supreme Court in *Epic Systems* also made clear that courts are obligated to give effect to two potentially conflicting federal statutes, and because the NLRA could be interpreted as not guaranteeing a right to proceed collectively, it did not override the FAA's mandate that courts enforce arbitration agreements as written. *Id.* at 1627-28. These cases demonstrate that the effective-vindication exception can apply only if a federal statute provides an express, statutory enforcement guarantee that necessarily precludes individual attempts at conciliation.

II. The District Court Mistakenly Concluded That ERISA § 502(a)(2) Creates a Nonwaivable Statutory Right for an Individual Participant to Recover All Loss to an ERISA Plan.

In keeping with the above, the sole question before the District Court was whether ERISA "guarantees" each individual Plan participant the nonwaivable statutory right to pursue "all" loss to the Plan from any fiduciary breach, including loss to other Plan accounts that the individual participant would not personally receive. It does not, as the statutory text, legislative history, principles of trust law, and relevant precedent all confirm.

A. ERISA's Text and Structure Demonstrate That Section 502(a)(2) Does Not Create a Nonwaivable Statutory Right for an Individual Participant to Recover All Loss to an ERISA Plan.

As with all statutes, the analysis begins with ERISA's text[8]—and, specifically, ERISA's exclusive enforcement provision that creates "guarantees" (if any) of a right to pursue relief. That starting point is dictated by the Supreme Court's decision in *CompuCredit*, where the Court identified the enforcement rights guaranteed by the CROA by interpreting the statute's enforcement provision and eschewing reliance on a disclosure provision. 565 U.S. at 100 n.2; *see also Gilmer*, 500 U.S. at 32; *Epic Sys.*, 138 S. Ct. at 1628-29. Here, that methodology points exclusively at § 502(a)(2), which is one of the "six carefully integrated civil enforcement provisions" found in ERISA's "exclusive" enforcement scheme: § 502(a). *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (Section 502(a) is comprehensive and exclusive).

Section 502(a)(2) lists four classes of plan stakeholders—participants, beneficiaries, fiduciaries, and the Secretary of Labor—and authorizes each to sue for "appropriate" relief under § 409. 28 U.S.C. § 1132(a)(2). Following the Supreme Court's analysis in *CompuCredit*, if ERISA "guarantees" a plan participant any particular right to pursue a form of relief, it is for only what the statute expressly

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8 *See Limtiaco v. Camacho*, 549 U.S. 483, 488 (2007).

says in its enforcement provision—and § 502(a)(2) only guarantees the right to bring an action for "appropriate" relief under § 409.

Section 409, for its part, is not found in ERISA's enforcement section, but a separate subpart of ERISA entitled "fiduciary responsibility." 29 U.S.C. Subtitle B, Part 4. In keeping with that structure, § 409 does not authorize enforcement or create a cause of action, but instead establishes liability for fiduciaries who breach their obligations to an ERISA plan. Specifically, § 409(a) makes a fiduciary "personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. § 1109(a). Section 409 does not, however, guarantee any relief for any category of claimant in any particular case.

The District Court nevertheless seized on § 502(a)(2)'s cross-reference to § 409 as guaranteeing that the full scope of potential liability in § 409 categorically qualifies as "appropriate" under § 409. A277-78. That is wrong for several reasons.

First, that's not what § 502(a)(2) actually says. It authorizes participants (and other stakeholders) to obtain "appropriate"—not *all*—relief under § 409. Put another way, § 409 is not, as the District Court thought, a floor, but a ceiling; it specifies the universe of potential liability for fiduciary breach, subject to the qualification in §

502(a)(2) that only "appropriate" relief may be pursued. If Congress intended to make the full range of potential relief under § 409 *nonwaivable* for every claimant in every case, it surely would have said so. *See Loughrin v. United States*, 573 U.S. 351, 360 (2014) ("We thus see no reason to doubt that in enacting § 1344, Congress said what it meant and meant what it said…."); *cf. Whitman v. American Trucking Assn's, Inc.*, 531 U.S. 457, 468 (2001) (explaining that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes"). This point is all the more forceful here, given that Congress did, in fact, use the word "all" in several other provisions in § 502. *See* 29 U.S.C. § 1132(a)(9), (10)(e), (10)(j), (10)(l)(3)(B).

Second, and relatedly, the District Court's analysis effectively writes the term "appropriate" out of § 502(a)(2) and eliminates any narrowing effect it might have on the universe of potential relief that a plan participant can recover. But that construction ignores the Supreme Court's repeated exhortation that courts "must give effect to every word that Congress used in the statute." *Lowe v. S.E.C.*, 472 U.S. 181, 207 n.53 (1985).

Third, any effort to construe the term "appropriate relief" in § 502(a)(2) must give due consideration to the Supreme Court's construction of the term "appropriate" in a neighboring ERISA provision: § 502(a)(3). *See Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) ("[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.”). Specifically, the Court has construed term “appropriate” in § 502(a)(3) as substantively limiting the relief that may be awarded to a claimant, and the Court also has looked to the ERISA plan’s express terms when determining what relief qualifies as “appropriate.”

The Court first addressed the term’s meaning in *Varity Corp. v. Howe*, interpreting the term “appropriate” in the phrase “appropriate equitable relief” as imposing a limitation on the scope of available relief under § 502(a)(3), separate from additional constraints imposed by the term “equitable.” 516 U.S. 489, 515 (1996) (emphasizing that “the statute authorizes ‘*appropriate*’ equitable relief” (emphasis in original)).

More recently, the Court in *U.S. Airways v. McCutchen* explained that the determination of “appropriate” for purposes of § 502(a)(3) depends on the parties’ express agreement as embodied in the ERISA plan document. 569 U.S. 88, 98 (2013) (holding that what relief was “appropriate” under § 502(a)(3) depended on, among other things, the plan’s express language). In *McCutchen*, a plan fiduciary sued a participant for “appropriate equitable relief” under § 502(a)(3)—namely, recoupment from the participant of medical expenses paid by the plan. *Id.* at 93. The fiduciary claimed that reimbursement was “appropriate” because the plan’s terms required “full reimbursement” of funds advanced by the plan if the participant recovered from a third party (*e.g.*, as damages in a lawsuit). *Id.* The Court agreed, emphasizing that the plan required full reimbursement, and enforcing an ERISA plan "means holding the parties to their mutual promises" embodied in that plan. *Id.* at 98. The Court implicitly acknowledged that "appropriate" equitable relief for purposes of § 502(a)(3) was not "all" equitable relief, but relief the parties agreed would be available per the express terms of the plan. *Id.* (noting that "hewing to the parties' exchange yield 'appropriate' as well as 'equitable' relief").

The Supreme Court's construction of "appropriate" in the § 502(a)(3) context—namely, that "appropriate" substantively limits the relief that may be awarded, and that the plan's terms may inform what relief is "appropriate"—should apply with equal force to the term "appropriate" in § 502(a)(2). *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 258 (2008) (Roberts, C.J., concurring) ("[a]pplying the same rationale to an interpretation of 'appropriate' in § 502(a)(2) would accord with [the Court's] usual preference for construing the "same terms [to] have the same meaning in different sections of the same statute'…and with the view that ERISA in particular is a 'comprehensive and reticulated statute' with 'carefully integrated civil enforcement provisions.'"); *accord Atl. Cleaners*, 286 U.S. at 433.

From the foregoing, it follows that "appropriate" relief authorized by the neighboring provision in § 502(a)(2) does not mean "all" relief, as the District Court incorrectly concluded. What's more, the principle that terms of a plan may inform what constitutes "appropriate" relief accords with the Supreme Court's command that courts must harmonize potentially conflicting federal statutes whenever possible. *See Epic Sys.*, 138 S. Ct. at 1614; *see also Italian Colors*, 570 U.S. at 235-36. Such a construction honors § 502(a)(2)'s provision of "appropriate" relief, honors the parties' express agreement as reflected in the Plan, and upholds the FAA's directive that courts enforce arbitration agreements as written.[9]

[9] The Seventh Circuit's contrary decision in *Smith v. Bd. of Dirs. of Triad Mfg., Inc.*, 13 F.4th 613 (7th Cir. 2021), rests on a misinterpretation of § 502(a)(2). Invoking the effective-vindication exception, the Seventh Circuit held that ERISA creates an automatic statutory right for an individual to recover equitable relief on behalf of others. *Id.* at 621. As at least one other federal court has concluded, however, that conclusion is not supported by the language in § 502(a)(2). *See Holmes v. Baptist Health S. Fla, Inc.*, No. 21-22986, 2022 WL 180638, at *3 (S.D. Fla. Jan. 20, 2022). As the *Holmes* court explained—and as this Court itself has held—plan-wide relief "is only available to those who bring a representative or class action." *Id.*; *accord Coan v. Kaufman*, 457 F.3d 250, 261 (2d Cir. 2006). Because the availability of relief for others turns on the claimant's ability to satisfy procedural hurdles, the ability to seek plan-wide relief is not a statutory "guarantee" but, as discussed above, a potential remedy "contemplate[ed]" by § 502(a)(2). *CompuCredit*, 565 U.S. at 102.

B. ERISA's Legislative History and Traditional Trust Law Principles Confirm That Section 502(a)(2) Does Not Create a Nonwaivable Statutory Right for an Individual Participant to Recover All Loss to an ERISA Plan.

ERISA's legislative history[10] and underlying trust law principles[11] support that § 502(a)(2) does not create a nonwaivable statutory right to pursue all loss to an ERISA plan beyond losses to the individual claimant's own plan account. The first indication comes from early draft versions of ERISA that included either mandatory class-action requirements or permissive class-action provisions for fiduciary-breach actions.[12] These provisions reflect Congress's recognition that an individual

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[10] The Supreme Court reviews ERISA's legislative history to assist with statutory construction. *See, e.g., Russell*, 473 U.S. at 146 (1985) (reviewing the "voluminous legislative history of" ERISA).

[11] Trust law is a "starting point" to interpreting ERISA, after which courts must ask whether, and to what extent, "the language of the statute, its structure, or its purposes require departing from common-law trust requirements." *Varity*, 516 U.S. at 497.

[12] *See* Employee Benefits Protection Act, S. 1557, ERISA-LH 99, 1974 WL 186669 (A.&P.L.H.), 174-75 (action "shall be brought as a class action" if the law of the jurisdiction provides for class actions and if "the court is satisfied that the requirements for a class action reasonably can be met."); *see also* H.R. 12906, ERISA-LH 95, 1973 WL 173013 (A.&P.L.H.), 77 (same); Employee Benefits Protection Act of 1973, S. 75, ERISA-LH 24, 1973 WL 173122 (A.&P.L.H.), 64-65 (civil action may be brought "by a participant or beneficiary (as a representative party on behalf of all participants or beneficiaries similarly situation where the requirements for maintaining a class action are met)"); Summary of Differences Between House and Senate Versions of H.R. 2, ERISA-LH 85-C, 1974 WL 186735 (A.&P.L.H.), 20 (recommending that conferees adopt House bill that required class actions); *see also* ERISA-LH 2, 1973 WL 172968 (A.&P.L.H.), 6 (explaining that draft bill would permit "pension fund participants and beneficiaries to seek remedies for breach of fiduciary duty through class action suits"); ERISA-LH 40, 1973 WL

participant must satisfy some procedural requirements in order to recover loss beyond her own; otherwise, there would be no need for class actions at all. Congress heard criticisms of the potential costs and abuses of class actions,[13] and the final bill left the precise procedural requirements for courts to address in their discretion. *See Coan*, 457 F.3d at 259 (discussing ERISA legislative history regarding class actions). The fact that Congress did not include mandatory class-action provisions in the final version of ERISA demonstrates that Congress did not intend to "guarantee" an individual participant the right to pursue procedural requirements that are necessary to recover "all" loss to a plan beyond her own plan account—class-based enforcement might be available in some circumstances, but it certainly is not guaranteed by statute.

172991 (A.&P.L.H.), 114-15, 116-17 (actions for fiduciary breach "may also be brought by a participant or beneficiary as a representative party on behalf of all participants or beneficiaries similarly situated.").

[13] *See* Statement of F.E. Seibert, ERISA-LH 25-A, 1972 WL 136888 (A.&P.L.H.), 194 (class actions place "pressure on defendants as to induce settlements in large amounts as the alternative to complete ruin and disaster, irrespective of the merits of the claim."); *see also* Roberta A. Albright from U.S. Steel and Carnegie Pension Fund, on behalf of the National Association of Manufacturers (criticizing class-action requirements); Statement of John S. Nolan, ERISA-LH 73, 1974 WL 186656 (A.&P.L.H.), 32, 39-40 (urging prohibition or limitation on class actions); *see also* Statement of John S. Nolan, ERISA-LH 25-B, 1972 WL 136889 (A.&P.L.H.), 49 ("Provisions in S.4 contemplating enforcement by class actions on behalf of employees should in all events be abandoned as highly inefficient and an unnecessary burden on our judicial system.").

Trust law, from which ERISA was derived—including § 409[14]—likewise requires individual beneficiaries to satisfy procedural requirements before they can recover on behalf of others. *See, e.g.*, *Bogert's The Law of Trusts and Trustees* § 706 (June 2021 Update). A trust beneficiary must obtain class certification, join necessary parties, or meet other procedural requirements to represent others in a fiduciary-breach action against a trustee. *See, e.g.*, *id.*, § 871 ("in suits involving trust property, generally both the trustee and all beneficiaries are deemed necessary parties"); *see also Restatement (Third) of Trusts* § 71 TD No 4, Comment (b) (2005) (discussing methods beneficiary may use to represent other beneficiaries, including class actions). These principles further demonstrate that an individual trust beneficiary, and an individual participant in an ERISA plan, has no guarantee of a right to pursue relief beyond her own losses.[15]

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14 Several passages in ERISA's legislative history explain that fiduciary-liability provisions were modeled after trust law principles. *See* ERISA-LH 18, 1968 WL 98951 (A.&P.L.H.), 8 (provision holding a fiduciary personally liable "to the fund for any losses" "basically follows the elementary trust law doctrine"); ERISA-LH 14, 1972 WL 136883 (A.&P.L.H.), 39 (provision rendering fiduciary liable "to the fund" was "intended to codify with respect to employee benefit fund fiduciaries, rules developed under the law of trusts").

15 Having intended ERISA to adopt principles of trust law, and being fully aware of arbitration as a mechanism for resolving ERISA disputes, Congress could have expressly barred individualized arbitration, but it clearly did not do so. In fact, some of the draft forerunners to ERISA would have required ERISA plans to offer arbitration. ERISA-LH 75-A, 1973 WL 173124 (A.&P.L.H.), 57 ("A second enforcement procedure under the amendment requires an arbitration procedure to be provided in each employee benefit plan"); *see also* ERISA-LH 157, 1974 WL 186687 (A.&P.L.H.), 36 ("The Senate bill provided that each plan was to incorporate

C. Courts Routinely Require Individual Participants to Satisfy Representational-Adequacy Requirements Before Recovering Losses Beyond Those to Their Own Plan Account.

Importantly, the District Court agreed that § 502(a)(2) does not prohibit arbitration agreements with class-action waivers. A284-85. This was the Ninth Circuit's holding in *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510 (9th Cir. 2019), where the Ninth Circuit enforced an individualized-arbitration provision. In the District Court's words, "[s]imply because a participant in a defined contribution plan may only be able to recover the losses to that participant's individual account does not mean that the participant cannot seek recovery for the total losses to be reimbursed to the plan as a whole."[16] A282 n.5.

a procedure for arbitration of benefit claim disputes between the plan and participants and beneficiaries"); Statement of Ribicoff on S. 4, ERISA-LH 136, 1973 WL 173046 (A.&P.L.H.), 37. Some bills provided an opportunity for arbitration, but allowed participants and beneficiaries to bring civil actions "in lieu of submitting the dispute to arbitration." *See* Proposed Amendment No. 496, ERISA-LH 136, 1973 WL 173046 (A.&P.L.H.), 126; H.R. 10470, ERISA-LH 47, 1974 WL 186653 (A.&P.L.H.), 107. An alternative suggested by the staff of a Committee of Conferees suggested that arbitration should be limited to situations where "10 percent of the plan participants or 10 participants, whichever is less," requested an arbitration "on a uniform issue or issues." ERISA-LH 85-C, 1974 WL 186735 (A.&P.L.H.), 19. Ultimately, however, an ERISA-specific arbitration provision was not included, leaving in place the already-extant, universally applicable arbitration framework established by the FAA.

[16] The District Court's conclusion suggests that it may have assumed there is a distinction between plan losses, which the District Court held an individual participant has a nonwaivable statutory right to pursue, and other participants' losses, which the District Court suggested an individual participant may waive the ability to pursue. For purposes of § 502(a)(2), losses to other participants' individual accounts are a type of 'plan' loss. *See, e.g.*, *LaRue*, 552 U.S. at 255. It follows that

The District Court's determination that an individual participant has a nonwaivable statutory right to recover all loss to a plan as a whole, *even where that participant is bound by a class-action waiver*, is inconsistent with decades of case law. As many courts have held, an individual participant's ability to recover other plan losses in § 502(a)(2) actions turns on the ability to obtain class certification (or other representative status).[17] *See Coan*, 457 F.3d at 261; *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1998) (in ERISA case, stating "whether a plaintiff will be able to represent the putative class…depends solely on whether he is able to meet the additional criteria encompassed in Rule 23"); *see also, e.g.*, *Mendenhall v. Out of Site Infrastructure, Inc.*, No. CV 14-4996, 2017 WL 3394735, at *7 (E.D. Pa. Aug. 7, 2017) (plaintiff who failed to take adequate steps to represent others, and named the plan as a defendant, could not represent others or the plan itself, but was limited to individual relief under § 502(a)(2)); *Abbott v. Lockheed Martin Cor*p., No. 06-cv-0701-MJR, 2010 WL 547172, at *4 (S.D. Ill. Feb. 10, 2010) (refusing to permit § 502(a)(2) case to proceed absent procedural safeguards

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if a participant may lawfully be precluded from pursuing recovery of *other participants'* losses, then that participant has necessarily been precluded from seeking recovery of *plan losses*.

[17] This Court's dicta in *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173 (2d Cir. 2021) does not apply here. The *Cooper* decision assumed that all § 502(a)(2) actions must involve some type of class, collective, or representative procedure. An individual participant who seeks to recover only losses to her plan account does not have to pursue class, collective, or representative procedures.

because of "antagonistic and irreconcilable" interests and a concern for redundant suits).

An individual participant also can affirmatively release the ability to serve as a class representative in a § 502(a)(2) claim, which further supports that ERISA does not guarantee the ability to pursue other plan losses. *Halldorson v. Wilmington Tr. Ret. and Institutional Servs. Co.*, 182 F. Supp. 3d 531, 539 (E.D. Va. 2016); *Innis v. Bankers Tr. Co. of S. Dakota*, No. 416CV00650RGESBJ, 2019 WL 2714509, at *9 (S.D. Iowa Apr. 30, 2019) (release barred participant from seeking losses on behalf of the plan); *see also Wagner v. Stiefel Laboratories, Inc.*, No. 1:12-CV-3234-MHC, 2015 WL 4557686, at *11 (N.D. Ga. June 18, 2015) (release bars plaintiff from serving as lead plaintiff in § 502(a)(2) action).

These cases recognize that a participant's ability to pursue additional losses to a plan is not a guarantee, but the same type of contemplation subject to Rule 23 or other procedural requirements that clearly is waivable per Supreme Court precedent. *Italian Colors*, 570 U.S. at 234-35 (the "opportunity" to satisfy Rule 23 is not a nonwaivable guarantee for purposes of the effective-vindication exception).

III. Prohibiting Individualized Arbitration Would Undermine ERISA's Purposes.

At its core, ERISA is concerned with benefits due to "employees and their beneficiaries." 29 U.S.C. § 1002(a). Congress also was concerned with "litigation expenses" that might "discourage employers from offering ERISA plans in the first place." *Varity*, 516 U.S. at 497. Congress thus sought to strike a balance between "ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Conkright*, 559 U.S. at 517; *id.* at n.2 (Congress "was concerned lest the cost of federal standards discourage the growth of private pension plans") (citing H.R. Rep. No. 93-533, 1, 9 (1973), 2 Leg. Hist. 2348, 2356 and 120 Cong. Rec. 29949 (1974), 3 Leg. Hist. 4791)).

Individualized arbitration of ERISA fiduciary-breach claims furthers Congress' goal of striking a balance between a participant's rights to benefits and protecting plans against excessive litigation. In individualized arbitration, a participant may pursue the same relief for herself, individually, that the participant could pursue in court—including attorneys' fees and costs pursuant to ERISA's fee-shifting provision. 29 U.S.C. § 1132(g)(1). Arbitration also offers a "means of dispute resolution that is faster, easier, and cheaper for parties to utilize," which avoids protracted and costly litigation that confers no additional benefit on the individual claimant. *Rowland v. Sandy Morris Fin. & Est. Plan. Services, LLC*, 993 F.3d 253, 257 (4th Cir. 2021).

Individualized arbitration also encourages growth of ERISA plans. Lawsuits against ESOP trustees, and fiduciaries of 401(k) and 403(b) plans, continue to increase annually,[18] which is negatively affecting fiduciary-liability insurance premiums and terms.[19] *See also Fifth Third Bancorp v. Dudenhoeffer,* 573 U.S. 409, 424 (2014) (acknowledging potentially "meritless, economically burdensome lawsuits" that can discourage creation of ERISA plans). Nearly all these cases are settled before trial, and the handful that have been tried have largely resulted in total or near-total verdicts in favor of defendants. *Ramos v. Banner Health*, 1 F.4th 769 (10th Cir. 2021); *Sacerdote v. New York U.*, 9 F.4th 95 (2d Cir. 2021), *cert. denied* 21-724, 2022 WL 515894 (U.S. Feb. 22, 2022); *Rozo v. Principal Life Ins. Co*., 4:14-CV-00463-JAJ, 2021 WL 1837539 (S.D. Iowa Apr. 8, 2021); *see also Walsh v. Bowers*, No. CV 18-00155 SOM-WRP, 2021 WL 4240365 (D. Haw. Sept. 17, 2021). *But see Brundle on behalf of Constellis Employ. Stock Ownership Plan v. Wilmington Tr., N.A.*, 919 F.3d 763 (4th Cir. 2019), as amended (Mar. 22, 2019).

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[18] Jacklyn Wille, *401(k) Fee Suits Flood Courts, Set for Fivefold Jump in 2020*, Bloomberg Law (Aug. 31, 2020), https://news.bloomberglaw.com/employee-benefits/401k-fee-suits-flood-courts-on-pace-for-fivefold-jump-in-2020

[19] Judy Greenwald, *Litigation Leads to Hardening Fiduciary Liability Market*, Business Insurance (Apr. 30, 2021), https://www.businessinsurance.com/article/20210430/NEWS06/912341566/Litigation-leads-to-hardening-fiduciary-liability-market; Rebecca Dauparas, *Fiduciary Liability Litigation Trends*, Gallaher News & Insights, (2021), https://www.ajg.com/us/news-and-insights/2021/apr/2021-fiduciary-liability-market-report/.

Individual arbitration is particularly important in the ESOP space. An ESOP is a unique type of optional benefit plan[20] that is designed to give employees "the chance to acquire a stock ownership in their company." *ESOPs, An Explanation for Employees*, Committee on Finance, United States Senate, March 1978, p. 1, https://www.finance.senate.gov/imo/media/doc/sprt95-23.pdf. Unlike a 401(k) or 403(b) plan, employees typically do not contribute money; the ESOP acquires stock of an employer, typically by borrowing money from a lender or the employer and buying stock from former shareholders or the company itself. *Id.* The employer pays back the loan by contributing cash to the ESOP annually. *Id.*

The type of ESOP involved in this case is a successful form of benefit plan. The total assets per participating employee in an ESOP are higher than participating employees in other types of defined-contribution plans, and base pay is higher in ESOP-owned companies. *See* Nancy Wiefek & Nathan Nicholson, *S Corporation ESOPs and Retirement Security*, National Center for Employee Ownership (Dec. 2018, https://www.nceo.org/assets/pdf/articles/NCEO-S-ESOPs-Retirement-Dec-2018.pdf; *Employee Ownership & Economic Well-Being*, National Center for Employee Ownership (May 15, 2017), https://www.ownershipeconomy.org/wp-

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[20] As used here, the term "ESOP" refers specifically to benefit plans that invest in stock of a non-public employer and allocate that stock to eligible employees. There also are ESOP portions of 401(k) plans offered by public companies, in which participants can choose to purchase employer stock.

content/uploads/2017/05/employee_ownership_and_economic_wellbeing_2017.pdf. Yet after a successful ESOP transaction, the trend has been for plaintiffs' class-action attorneys to actively advertise on webpages and social-media sites a supposed "employee class action" after an employer establishes an ESOP.[21] These advertisements often refer to a class action before any such action has been filed, and often do not know the identity of the trustee who acted on behalf of the ESOP in the transaction and instead refer generically to the "Bank Trustee." These advertisements invite plan participants to "join the case as a plaintiff Class Representative" by completing a form on the webpage.

Plaintiffs' class-action firms sue the ESOP trustee (and others), and the complaints, like the complaint filed in this case, preface its core (and boilerplate) allegations of misconduct with the phrase "Plaintiff further alleges that the factual allegations in this paragraph will likely have evidentiary support after a reasonable

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[21] *See, e.g.*, *Employee Class Action Against Bank Trustee regarding the Path Medical Center Holdings, Inc. Employee Stock Ownership Plan*, MKLLC Law https://www.mk-llc.com/cases/employee-class-action-against-bank-trustee-regarding-the-path-medical-center-holdings-inc-employee-stock-ownership-plan (last accessed: Mar. 11, 2022); *Employee Class Action Against Bank Trustee regarding the Advanced Diagnostic Group Employee Stock Ownership Plan*, MKLLC Law, https://www.mk-llc.com/cases/employee-class-action-against-bank-trustee-regarding-the-advanced-diagnostic-group-employee-stock-ownership-plan (last accessed: Mar. 11, 2022); *Employee Class Action against Bank Trustee regarding the Extreme Engineering Solutions, Inc. Employee Stock Ownership Plan*, MKLLC Law, https://www.mk-llc.com/cases/employee-class-action-against-bank-trustee-regarding-the-extreme-engineering-solutions-inc-employee-stock-ownership-plan (last accessed: Mar. 11, 2022).

opportunity for further investigation or discovery." A12-44 (Compl., ¶¶ 67, 69, 72, 77, 81); *see also Ahrendsen v. Prudent Fiduciary Services, LLC*, No. 2:21-cv-02157-HB, E.D. Pa., Compl. ¶¶ 60, 61, 63; *Alvarez v. Wilmington Trust. N.A.*, No. 1:20-cv-01115-UNA, D. Del., Compl. ¶¶ 43, 48, 49, 72, 84, 89; *Brown v. Wilmington Trust, N.A.*, No. 3:17-cv-00250-WHR, S.D. Ohio, Compl. ¶¶ 67, 68, 70, 71, 90, 91; *Casey v. Reliance Trust Co.*, No. 4:18-cv-00424-ALM, E.D. Tex., Compl. ¶¶ 54, 66, 73, 78; *Guidry v. Wilmington Trust, N.A.*, No. 1:17-cv-00250-RGA, D. Del., Compl. ¶¶ 53, 64; *Clare v. GreatBanc Trust Co.*, No. 1:21-cv-00368, N.D. Ill., Compl. ¶¶ 56, 59, 70; *Coleman v. Brozen*, No. 4:19-cv-00705-ALM, E.D. Tex., Compl. ¶¶ 16, 17, 19.

In response to motions to dismiss, plaintiffs will argue that they have no burden to plead or prove causation or damages, and that defendants bear nearly all of the burdens.[22] Courts have permitted claims against ESOP trustees relating to ESOP stock transactions to proceed with the barest of facts.[23] Once in discovery, Plaintiffs rarely produce relevant documents, yet seek broad information from defendants, the employer, and their respective advisors, including all business and financial information about the employer for years prior to, and after, the ESOP stock

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22 *See, e.g.*, *Gamino v. SPCP Group, LLC*, No. 5:21-CV-01466-SB-SHK, 2022 WL 336469, at *4 (C.D. Cal. Feb. 2, 2022) (holding plaintiff has no burden of pleading around prohibited-transactions exemptions).

23 *Id.*

transaction. The burden on ERISA plan sponsors, and ESOP trustees, in these cases is immense.

That burden would only worsen if this Court adopts the District Court's reasoning. The District Court's decision would create a nonwaivable right to recover all loss to a plan, which is inconsistent with the class or collective-action requirements in § 502(a)(2) cases, making it even easier for one individual to pressure settlements of millions of dollars.

Individualized arbitration strikes an appropriate balance between protecting benefits and encouraging growth of employer-sponsored benefit plans. This Court should reverse the District Court and uphold the arbitration provision.

CONCLUSION

The District Court's denial of Defendants' motion to compel arbitration should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 2d Cir. R. 29.1(c) because it contains 6,944 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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