No. 20-2708

In the
United States Court Of Appeals
for the Seventh Circuit

JAMES SMITH, on behalf of himself and all others similarly situated,
and on behalf of the Triad Manufacturing, Inc. Employee Stock Ownership Plan,

Plaintiff-Appellee,

v.

BOARD OF DIRECTORS OF TRIAD MANUFACTURING, INC., et al.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division, No. 1:20-cv-02350
The Honorable Ronald A. Guzman, Judge Presiding.

BRIEF OF AMERICAN BENEFITS COUNCIL AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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FED. R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* American Benefits Council states that it has no parent corporation. It has no stock, and, therefore, no publicly held company owns 10 percent or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

The American Benefits Council (the "Council") is dedicated to protecting employer-sponsored benefit plans. The Council represents more major employers—over 220 of the world's largest corporations—than any other association that exclusively advocates on the full range of employee benefit issues. Members also include organizations supporting employers of all sizes. Collectively, Council members directly sponsor or support health and retirement plans covering virtually all Americans participating in employer-sponsored programs.

This case is significant for the Council and its members, who are at the forefront of the employer-sponsored benefit plan system, and who offer millions of U.S. workers employee benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), including defined contribution plans like the one at issue in this case. Specific to this case, the enforceability of ERISA plan arbitration provisions directly impacts a number of Council members who include, or are considering including, arbitration provisions in plan documents for the plans they sponsor.

Employers are not, and have never been, required to offer employee benefit plans. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Individuals and society as a whole benefit when employers do offer plans, and for decades Congress has acted to further policies that encourage employers to offer benefit plans. An important goal in enacting ERISA, therefore, was to provide uniform federal regulation of benefit plans. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) (noting "the goal of uniformity that Congress sought to implement" with ERISA). The drafters of ERISA had this in mind when they enacted the statute, which

[1] The parties consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the Council states that no party's counsel authored this brief either in whole or in part. Only the Council and the Council's members contributed money intended to fund preparing or submitting this brief.

seeks to incentivize employers to offer benefit plans to workers by ensuring employers do not incur exorbitant costs or other risks by offering such plans. *See id.* (recognizing that part of ERISA's goal in preempting state laws "was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government"). To encourage employers to implement plans, ERISA delegates to plan sponsors the ability to author plan terms "as they see fit." *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 108 (2013). Because "[t]he plan, in short, is at the center of ERISA," *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 101 (2013), it goes against ERISA's statutory language and policy goals to decline to enforce valid arbitration provisions in such plans.

Likewise, the Federal Arbitration Act ("FAA") provides employers with the "promise of quicker, more informal, and often cheaper resolutions for everyone involved," and, to that end, the FAA sets forth "a liberal federal policy favoring arbitration agreements." *Epic Sys. Corp v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

Enforcement of the FAA and ERISA in tandem furthers both statutory goals. It ensures the Council's members' ability to resolve plan-related claims in an efficient and cost-effective manner, thereby encouraging employers to establish and maintain benefit plans.

Summary of Argument

Before the Court of Appeals are directives from two federal statutes that can and should be harmonized. The FAA dictates that agreements to arbitrate should be enforced. ERISA dictates that the written plan document controls and governs all claims made pursuant to the plan. Read together, the FAA and ERISA dictate one obvious and sensible result: arbitration agreements contained in ERISA plan documents are valid, and courts should enforce them.

Here, where the plan at issue undisputedly contains an arbitration provision and the dispute fits squarely within its scope, the District Court should have ordered Plaintiff-Appellee's claims to individual arbitration. Instead, the District Court erroneously invalidated the arbitration provision ("Arbitration Provision") contained in the Triad Manufacturing, Inc. Employee Stock Ownership Plan (the "Plan"). In so holding, the District Court failed to harmonize and give effect to the FAA and ERISA, contrary to both statutes' language and Supreme Court precedent. The consequence of this failure is the handcuffing of plan sponsors' ability to resolve plan-related claims efficiently and cost-effectively in arbitration, creating a powerful disincentive for plan sponsors to establish and maintain plans in the first place.

In addition, the District Court erroneously based its decision on an analysis of consent under state contract law, which is not appropriate here, where all of Plaintiff-Appellee's ERISA claims are brought to enforce rights under an ERISA plan that expressly contains an arbitration provision. As such, federal law applies, and state law, which the District Court erroneously applied, should not alter the determination of whether an ERISA plan document (and its attendant arbitration provision) is binding on participants, beneficiaries, and plan sponsors. Indeed, to subject ERISA plans to state contract law, rather than to ERISA's clear statutory language and regulatory guidance regarding creation and amendment of ERISA plans, would expose ERISA fiduciaries to lawsuits predicated on whether plan participants "consented" to a plan amendment under state law. This would expose vast numbers of ERISA plans—many of which have participants in multiple states or even all 50 states—to competing legal standards depending on where the participants lived. This would be antithetical to ERISA's important goal of a uniform federal law governing the creation and maintenance of benefit plans, and the policy considerations behind that goal. Instead, the District Court should have applied only ERISA, its

regulations and interpreting case law, and the general principles of the FAA in evaluating the Plan's Arbitration Provision. This approach furthers ERISA's aim to give plan sponsors discretion in establishing and amending plan documents.

The District Court also misinterpreted controlling Supreme Court precedent in finding that the remedies offered by ERISA for breach of fiduciary duty are inconsistent with plan arbitration agreements and class action waivers under the FAA. As set forth below, plan participants may vindicate claims for breach of fiduciary duty through individual arbitration. Likewise, an arbitration provision requiring individualized proceedings does not eliminate a plan participant's right to seek individual relief under ERISA for fiduciary breach.

Not only did the District Court fail to harmonize the FAA with ERISA, as required, it did disservice to both. The District Court's interpretation of the FAA and ERISA conflicts with both statutes' text and undermines each of their key policy goals. The District Court's decision ignores ERISA's comprehensives statutory scheme, threatens plan sponsors' ability to implement and amend ERISA plans, and, by failing to compel arbitration when such was required by the FAA, will burden plan sponsors with costly litigation premised on variations in state contract law. The Council, therefore, respectfully urges the Court to reverse the ruling of the District Court.

Argument

I. The FAA and ERISA Set Forth Compatible Congressional Intents and Policies and Must Be Harmonized.

In invalidating the Arbitration Provision, the District Court erroneously reasoned that the FAA's and ERISA's directives could not "displace[]" one another. *Smith v. Greatbanc Tr. Co.*, No. 20-C-2350, 2020 WL 4926560, at *3 (N.D. Ill. Aug. 21, 2020). The District Court's holding implicitly creates a conflict between the FAA and ERISA where none exists. In fact, the two

statutes are in complete harmony, and compelling arbitration here is congruent with the goals and mandates of both statutes.

A. The FAA Encourages and Enforces Arbitration Agreements to Promote Cost-Effectiveness and Efficiency in Dispute Resolution.

In 1925, Congress enacted the FAA to "reverse longstanding judicial hostility to arbitration agreements." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 80 (2000). The virtues of arbitration are well recognized: arbitration offers "the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys. Corp.*, 138 S. Ct. at 1621; *see also Allied–Bruce Terminix Cos., v. Dobson*, 513 U.S. 265, 280 (1995) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties . . .") (quoting H.R. REP. NO. 97–542, at 13 (1982)). Thus, through the FAA, Congress sought to encourage parties to take advantage of the many benefits of arbitration.

To that end, the FAA "establishes 'a liberal federal policy favoring arbitration agreements.'" *Epic Sys. Corp.*, 138 S. Ct. at 1621 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). By enacting the FAA, "Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Id.* at 1619. Indeed, the FAA contains "a congressional command requiring [courts] to enforce, not override, the terms of the arbitration agreements before [them]." *Id.* at 1623. This ensures that arbitration agreements are "on the same footing as other contracts." *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 556 (7th Cir. 2003) (quoting *Green Tree*, 531 U.S. at 89).

B. ERISA Encourages Formation of Employee Benefit Plans and Enforcement of Plans Pursuant to Their Written Terms.

In 1974, Congress enacted ERISA to provide "minimum standards" governing employee benefit plans "assuring the equitable character of [employee benefit] plans and their financial soundness." 29 U.S.C. § 1001(a). Although "[n]othing in ERISA requires employers to establish employee benefit plans," *Lockheed Corp.*, 517 U.S. at 887, one of ERISA's primary goals was to *encourage* the voluntary formation of employee benefit plans. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). To that end, ERISA established a uniform framework that would provide certainty and a cost-effective approach to administration of ERISA benefit plans. *See FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) ("To require plan providers to design their programs in an environment of differing state regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits.").

ERISA also includes detailed directives regarding the formation of plans: Section 402 requires that plans "be established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a), and provides a list of features to be contained in that written instrument. *Id.* §§ 1102(b), (c). The written plan instrument "is at the center of ERISA." *US Airways, Inc.*, 569 U.S. at 101; *see also Heimeshoff*, 571 U.S. at 108 (explaining that the written plan document is the "linchpin" of ERISA's administrative system). Notably, ERISA expressly tasks plan sponsors with creating "a procedure for amending [the] plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3). ERISA likewise contains a "comprehensive civil enforcement scheme," codified in Section 502(a), which allows participants to enforce their rights under the written plan instrument. *Pilot Life Ins. Co.*, 481 U.S. at 54 (citing 29 U.S.C. § 1132(a)). This enforcement scheme "represents a careful

balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Id.*

Congress also intended for ERISA to occupy the field of employee benefit plans exclusively. Section 514(a) states that ERISA preempts "any and all State laws" if they "relate to any employee benefit plan." 29 U.S.C. § 1144. As the Supreme Court recognized:

> Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a **uniform body of benefits law**; the goal was to **minimize the administrative and financial burden of complying with conflicting directives** among States or between States and the Federal Government.

Ingersoll-Rand Co., 498 U.S. at 142 (emphasis added). Thus, among the core aims of ERISA were to resolve tensions and inconsistencies in the laws regulating benefit plans and to provide plan sponsors with clear directives regarding the establishment and maintenance of such plans.

C. The FAA and ERISA Can and Must be Harmonized.

Generally, federal statutes should be harmonized, and "[a] party seeking to suggest that two statutes cannot be harmonized . . . bears the heavy burden of showing 'a **clearly expressed congressional intention**' that such a result should follow." *Epic Sys. Corp.*, 138 S. Ct. at 1624 (emphasis added). Thus, absent an express congressional intention to the contrary, the District Court should have harmonized the FAA and ERISA. Indeed, here, where the purpose and text of the two statutes are in complete harmony, the correct outcome—compelling arbitration—appears to have fallen victim to the exact hostility to arbitration that the FAA was enacted to prevent.

ERISA contains no express (or even implied) intention by Congress that these two statutes cannot be harmonized. This is significant because, when Congress enacted ERISA in 1974, the FAA had been in force for nearly 50 years. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) ("The FAA was enacted in 1925."); 29 U.S.C. § 1001 *et seq.* (citing An Act to Provide Pension Reform, Pub. L. 93-406, Title I, § 2, 88 Stat. 829, 832 (1974)). It is

well recognized that "Congress will specifically address preexisting law before suspending the law's normal operations in a later statute." *Epic Sys. Corp.*, 138 S. Ct. at 1617 (internal quotation marks omitted). Had Congress intended to displace portions of the FAA when enacting ERISA, it would have done so explicitly in ERISA's text. The fact that it did not should end the inquiry. *See Iselin v. United States*, 270 U.S. 245, 251 (1926) (declining to read omitted words into a federal statute, noting that "[t]o supply omissions transcends the judicial function").

Because there is no express congressional directive showing conflict between the FAA and ERISA, the District Court should have "give[n] effect to both." *Epic Sys. Corp*., 138 S. Ct. at 1624. Where an arbitration provision is included in an ERISA plan's governing document, the FAA's directive to enforce arbitration agreements, *see id.* at 1621, and ERISA's directive to enforce plan documents as written, *see US Airways, Inc.*, 569 U.S. at 101, are both fulfilled by enforcing the arbitration provision. As acknowledged by the District Court, numerous other circuits recognize that ERISA and the FAA are compatible, holding that ERISA claims can be subject to arbitration where parties have so agreed. *Smith*, 2020 WL 4926560, at *2; *see also Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 7 F.3d 1110, 1112 n.1 (3d Cir. 1993) ("[S]tatutory ERISA claims are subject to arbitration under the FAA when the parties have executed a valid arbitration agreement encompassing the claims at issue."); *VanPamel v. TRW Vehicle Safety Sys., Inc.*, 723 F.3d 664, 669-70 (6th Cir. 2013) (holding ERISA claims subject to arbitration); *Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000) (same); *Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996) (same); *Bird v. Shearson Lehman/Am. Express, Inc.*, 926 F.2d 116, 120 (2d Cir. 1991) (same); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc*., 847 F.2d 475, 479 (8th Cir. 1988) (same). Most recently, the Ninth Circuit held that an

arbitration provision within a plan document—like the one here—was enforceable. *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107, 1112 (9th Cir. 2019). This Court should not create a circuit split by ruling otherwise.

The District Court should have analyzed the Plan's arbitration provision consistent with its obligation to "interpret Congress's statutes as a harmonious whole rather than at war with one another." *Epic Sys. Corp.*, 138 S. Ct. at 1619. The District Court's failure to reconcile two significant federal statutory directives is reason enough for this Court to reverse the ruling of the District Court.

II. The District Court Erroneously Relied on State Law to Invalidate the Plan's Express Arbitration Provision.

A. The District Court Should Have Analyzed the Validity of the Plan's Terms and Amendments Under ERISA, Not State Law.

i. State Law is Preempted by ERISA.

The District Court recognized "that ERISA plans are not typical contracts." *Smith*, 2020 WL 4926560, at *3. Despite this, the District Court was "unwilling to conclude that traditional contract analysis that governs the issue of the existence of an arbitration agreement is displaced in the context of ERISA plans." *Id.* This conclusion is unsupportable. ERISA contains a clear and broad preemption provision. *See* 29 U.S.C. § 1144(a). Without preemption, ERISA's "policy choices . . . would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." *Pilot Life Ins. Co.*, 481 U.S. at 54. "ERISA pre-empts a state law that has an impermissible 'connection with' ERISA plans, meaning a state law that 'governs ... a central matter of plan administration' or 'interferes with nationally uniform plan administration.'" *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016). Indeed, ERISA's centralized and comprehensive set

of regulations benefits plan sponsors and participants alike by ensuring uniform regulation of benefit plans. *See Ingersoll-Rand Co.*, 498 U.S. at 142. The "traditional contract analysis" followed by the District Court—here, under Missouri state law, *see* Smith, 2020 WL 4926560, at *2-3—would "interfere[] with nationally uniform plan administration." *Gobeille*, 136 S. Ct. at 943. It therefore cannot supersede ERISA's own clear directives regarding establishment and amendment of employee benefit plans.

ii. ERISA's Comprehensive Rules Regarding Plan Documents Control.

When interpreting the terms of an ERISA plan, "the relevant principles of contract interpretation are not those of any particular state's contract law, but rather are a body of federal common law tailored to the policies of ERISA." *Mathews v. Sears Pension Plan*, 144 F.3d 461, 465 (7th Cir. 1998) (Posner, J.). This is not surprising, given that ERISA, its regulations, and its interpreting case law set forth comprehensive rules for establishing and enforcing plan documents. *See, e.g.*, 29 U.S.C. §§ 1102(a), (b). In addition, plan sponsors have "large leeway to design [employee benefit plans] as they see fit." *Heimeshoff*, 571 U.S. at 108. The written plan document binds participants, beneficiaries, and plan sponsors, and governs claims made under the plan. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (holding that ERISA's statutory scheme is "built around reliance on the face of written plan documents").

Importantly, a plan sponsor may amend a plan at any time without the individualized consent or advanced notice of plan participants, as long as participants' vested benefits are not reduced. As this Court has recognized:

> [P]ension plans are usually not negotiated. . . . [A] common reservation in [ERISA] plans, [] the right *unilaterally* to amend the plan[,] underscores the degree to which this particular kind of contract goes beyond even "take it or leave it." **The potential beneficiary, though not consulted or consenting, ordinarily is bound nevertheless by the amendment** unless it violates a provision of ERISA, as by cutting down on his accrued rights under the plan.

Mathews, 144 F.3d at 465 (second emphasis added); *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 442 (1999) ("ERISA provides an employer with broad authority to amend a plan."); *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 930 (6th Cir. 2014) ("[T]he 'large leeway' granted to employers in the design of pension plans applies equally to their modification or amendment of those plans."). Indeed, notification to participants of a material modification to a plan's terms is not required under ERISA until well *after* the amendment takes effect, absent certain limited circumstances not applicable here.[2] Thus, under ERISA, a plan participant is bound by the terms of any plan, and any amendments thereto, while participating in such plan.

iii. Applying State Law Contract Principles to ERISA Plans Defeats ERISA's Objectives.

The comprehensive federal framework regulating ERISA plans is fundamentally incompatible with variations in state contract law, as is the case of a problem revealed by the District Court's application of Missouri law here. Indeed, the District Court's approach illustrates the exact state-by-state analysis that should never occur in the context of ERISA claims.[3] State contract law cannot be applied to determine the validity of ERISA plan terms,

[2] *See* 29 U.S.C. § 1054(h) (requiring advance notice of an amendment only if there would be a significant reduction in the rate of a participant's future benefit accrual); 29 C.F.R. § 2520.104b-3 (requiring that a plan administrator issue a "Summary of material modification" regarding plan amendments in the first 210 days of the year *after* the year in which the Plan was amended); 26 CFR § 54.4980F-1 (describing notice requirements for changes to a participant's future benefits and elimination or reduction of an early retirement benefit or retirement-type subsidy, but not referring to amendments involving arbitration, forum selection, or other such provisions).

[3] For example, state laws vary with respect to the contract defense of unconscionability. Comparing Missouri's law, which the District Court applied to the Plan's Arbitration provision, to that of Texas and Tennessee, for example, illustrates the variation between states' approaches to contract formation and interpretation. *Compare Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 508 n.2 (Mo. 2012) (focusing analysis on "procedural" versus "substantive" unconscionability, both of which are required for a contract to be deemed unconscionable), *with*

because ERISA itself—which supersedes state statutes regarding benefit plans—dictates what is necessary for the creation and implementation of an ERISA-governed plan. 29 U.S.C. §§ 1144(a), 1102(a). "And once a plan is established, the administrator's duty is to see that the plan is "maintained pursuant to [that] written instrument." *Heimeshoff*, 571 U.S. at 108. To rely on state law, as the District Court did here, to determine the validity of an ERISA plan's provisions would create the very "patchwork scheme of regulation" Congress sought to avoid. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987) (noting that such "a patchwork scheme . . . would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them."). Such a result would defeat ERISA's policy aim of bringing uniformity to the regulation of benefit plans to encourage employers to offer plans. H.R. REP. NO. 93–533, at 12 (1973), 1974 U.S.C.C.A.N. 4639, 4650 ("The uniformity of decision which [ERISA] is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.").

This Court's treatment of individually-contracted releases of ERISA claims is instructive. This Court properly applies federal law—not state law—when interpreting a plan participant's individual release waiving ERISA claims. *See Howell v. Motorola, Inc.*, 633 F.3d 552, 561 (7th Cir. 2011) (applying federal common law factors derived from trust law in holding plan

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Delfingen US-Texas, L.P. v. Valenzuela, 407 S.W.3d 791, 798 (Tex. App. 2013) (applying a 5-factor test to determine unconscionability, and holding that "[u]nconscionability has no precise legal definition because it is not a concept but a determination to be made in light of a variety of factors"), *and Wofford v. M.J. Edwards & Sons Funeral Home Inc.*, 490 S.W.3d 800, 818 (Tenn. Ct. App. 2015) (stating Tennessee's standard for unconscionability is that "inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other").

participant's release of ERISA claims valid). It would be nonsensical to apply state law to determine the validity of ERISA plan provisions selecting an arbitral forum when this Court does not evaluate agreements waiving ERISA claims—which exist *outside* a plan document—under state law.

Thus, the "traditional contract analysis" applied by the District Court was inappropriate in light of ERISA's superseding and comprehensive rules governing creation and amendment of plan documents. *Smith*, 2020 WL 4926560, at *3. ERISA's clear directives regarding written plan documents should not be modified by the numerous and varied laws of the states—the very state laws ERISA unequivocally preempts. *See Ingersoll-Rand Co.*, 498 U.S. at 142. Instead, the District Court should have determined the Arbitration Provision's validity under ERISA.

B. Under ERISA, Plan Amendments Adopting Arbitration Provisions Are Valid.

A key feature of ERISA is its complete delegation to plan sponsors of the power to unilaterally create, amend, and terminate employee benefit plans. *See* 29 U.S.C. §§ 1102(a), (b); *see also Lockheed Corp.*, 517 U.S. at 887. At the center of this feature is the written plan document. *Heimeshoff*, 571 U.S. at 108 ("[O]nce a plan is established, the administrator's duty is to see that the plan is 'maintained pursuant to [that] written instrument.'") (alteration in original); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 150 (2001) (noting "ERISA's requirements that plans be administered . . . in accordance with plan documents"). As previously discussed, this Court has held that plan amendments bind participants and beneficiaries unless they violate ERISA by, for example, reducing accrued benefits. *Mathews*, 144 F.3d at 465. Similarly, other circuits have found that "[a] plan participant agrees to be bound by a provision in the plan document when he participates in the plan while the provision is in effect." *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 512-13 (9th Cir. 2019) (citing *Chappel v. Lab Corp.*

of Am., 232 F.3d 719, 723-24 (9th Cir. 2000)); *see also Pratt v. Petroleum Prod. Mgmt. Inc. Emp. Sav. Plan & Tr.*, 920 F.2d 651, 661 (10th Cir. 1990) ("A pension plan is a unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in employment for the requisite number of years.") (internal quotation marks omitted); *cf. Brown v. Wilmington Tr., N.A.*, No. 3:17-cv-250, 2018 WL 3546186, at *5 (S.D. Ohio July 24, 2018) (declining to enforce plan arbitration provision because plaintiff was not a participant in the plan when the arbitration provision was adopted).

The Plan here is no exception. *See* R. Dkt. 31-1, McCormick Declaration, Ex. A "Triad Manufacturing, Inc. Employee Stock Ownership Plan," PageID#174 ("The Primary Sponsor reserves the right at any time **to modify or amend or terminate** the Plan or the Trust in whole or in part.") (emphasis added).[4] By participating in the Plan when the arbitration provision took effect, *see* Defendants-Appellants' Brief at 8-9, Plaintiff-Appellee consented to all Plan terms, including the Plan's Arbitration Provision. Interjecting Missouri state law notions of individual participant "consent" as somehow impacting the validity of such an amendment runs directly counter to ERISA, and the District Court's rationale was in error.[5] *Smith*, 2020 WL 4926560, at

[4] Material in the District Court Record is cited to the District Court's docket number as R. Dkt. __.

[5] A plan sponsor's leeway to design and amend a plan extends to such features as a particularized statute of limitations for bringing claims, *Heimeshoff*, 571 U.S. at 108, or a requirement that plan-related claims to be brought in a particular forum, *In re Mathias*, 867 F.3d 727, 733 (7th Cir. 2017) (holding ERISA plan sponsors may amend a plan to add a forum selection clause), *cert. denied*, 138 S. Ct. 756 (2018). Courts apply ERISA and federal law when analyzing and construing such provisions, not the patchwork dictates of individualized state laws. *See Heimeshoff*, 571 U.S. at 108, 110 (acknowledging employers' "large leeway to design disability and other welfare plans as they see fit" and finding plan's express limitations period enforceable); *Aegon*, 769 F.3d at 930 ("[G]iven the discretion available to plan administrators, we see no reason why this [plan's] venue selection clause is invalid."); *see also In re Mathias*, 867 F.3d at 732-33 (holding "[n]othing in [ERISA's] text *expressly* invalidates forum-selection clauses in employee-benefits plans," and recognizing "forum-selection clauses promote

*3. Accordingly, Plaintiff-Appellee consented to arbitrate the breach of fiduciary duty claims asserted in the Complaint. Plaintiff's Complaint, R. Dkt. 1 ("Compl."), ¶¶ 1-3.

The District Court's discussion of whether Plaintiff-Appellee received notice of the Arbitration Provision is therefore inapposite. As discussed previously, ERISA does not require advance notice of a plan amendment prior to its ratification. *See supra* p. 10-11. It is therefore irrelevant whether Plaintiff-Appellee received notice of the Arbitration Provision before the Plan adopted it. Moreover, if this Court were to treat plan documents like ordinary contracts and require notice of a plan amendment for it to become effective, plan sponsors would be burdened with the task of determining which participants received notice, when they received it, and who agreed or disagreed with the amendment at issue. This would be not only contrary to ERISA's notice requirements but entirely unworkable for plan sponsors. It would be so burdensome to determine individualized notice for every plan amendment that many plan sponsors likely would decide not to offer benefit plans in the first place—a result fundamentally at odds with ERISA's purpose of "encouraging the formation of employee benefit plans." *Pilot Life Ins. Co.*, 481 U.S. at 54.

III. Plan Arbitration Provisions Do Not Infringe on Substantive Rights Under ERISA § 502(a)(2).

The District Court erroneously concluded that plan terms requiring individual arbitration "do not comport with ERISA's remedial scheme" under ERISA Section 502(a)(2). *Smith*, 2020

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uniformity in plan administration and reduce administrative costs and in that sense are consistent with the broader statutory goals of ERISA"). Indeed, the Arbitration Provision here functions like a forum selection clause: it is merely "contractually channeling" Plaintiff-Appellee's claims to individual arbitration. *See In re Mathias*, 867 F.3d at 733; *see also Sherwood v. Marquette Transp. Co., LLC*, 587 F.3d 841, 844 (7th Cir. 2009) ("An arbitration agreement is a specialized forum-selection clause."). The District Court's error in refusing to give effect under ERISA to a plan amendment adding an arbitration provision is doubly compounded by the FAA, which strongly favors honoring arbitration provisions.

WL 4926560, at *4. This conclusion is incorrect for several reasons. ERISA's remedial scheme is not constrained by an arbitration provision because participants remain free to assert individual claims for breach of fiduciary duty that, if fiduciaries are found liable, allow them to recover any amount by which their individual Plan account was harmed. Plan provisions requiring individual arbitration do not run afoul of participants' substantive rights under ERISA. That is because, while ERISA provides participants may hold fiduciaries liable for "losses to the plan," 29 U.S.C. § 1109(a), plan participants do not have a substantive right under ERISA Section 502(a)(2) to bring an action on behalf of an entire plan or its other participants. Accordingly, the arbitration provision here does not constrain ERISA's remedial scheme and should be enforced.

A. A Defined Contribution Plan Participant Has an Interest Only in His or Her Own Plan Account.

In holding that an arbitration provision interferes with ERISA's remedial scheme in the context of claims brought on behalf of a plan under ERISA Section 502(a)(2), the District Court misinterpreted the Supreme Court's holding in *LaRue v. DeWolff, Boberg & Assocs., Inc*., 552 U.S. 248 (2008). The District Court brushed aside *LaRue*, concluding that it does not suggest that "an individual plan participant's claim can somehow be split from a claim seeking plan-wide relief." *Smith*, 2020 WL 4926560, at *4. The District Court relied on the Supreme Court's holding in *Massachusetts Mutual Life Insurance Co. v. Russell*, which was in the context of a defined *benefit* plan—as opposed to a defined *contribution* plan, like the Plan here—to hold that Section 502(a)(2) claims are "brought in a representative capacity on behalf of the plan as a whole." *Id.* (citing *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985)).[6]

[6] A defined benefit plan is a retirement plan that provides a specified benefit (often a monthly annuity) to participants, regardless of the aggregate value of the plan's assets. A defined contribution plan, by contrast, consists of individual participant plan accounts, and a

The District Court's interpretation of *LaRue* misconstrues the opinion and ignores its discussion of *Russell*. In *LaRue*, the Supreme Court explained that its prior decision in *Russell* was limited to the historical context of defined benefit plans. *LaRue*, 552 U.S. at 254 ("*Russell*'s emphasis on protecting the 'entire plan' from fiduciary misconduct reflects the former landscape of employee benefit plans. That landscape has changed.") (citing *Russell*, 473 U.S. at 142). The District Court misunderstands *LaRue*'s point about Section 502(a)(2) not recognizing "individual injuries distinct from plan injuries." *Smith*, 2020 WL 4926560, at *4 (quoting *LaRue*, 552 U.S. at 256). That portion of *LaRue* is a reference to its contrast to *Russell*, where the Supreme Court held that a plaintiff could not pursue "consequential damages arising from a delay in the processing of her claim," because they were not injuries suffered within the plan. *LaRue*, 552 U.S. at 254 (citing *Russell*, 473 U.S. at 136-37). *LaRue*'s point about "individual injuries distinct from plan injuries" does not refer to claims regarding an individual's plan account, like the one at issue here, but rather to individual injuries *outside* a plan—like the consequential damages at issue in *Russell*. *See id.* at 256. Indeed, *LaRue* expressly held that ERISA allows "recovery for fiduciary breaches that impair the value of plan assets *in a participant's individual account*." *Id.* (emphasis added). *LaRue* therefore instructs that a participant in a defined contribution plan has an ERISA-recognized interest in his or her own individual plan account under ERISA Section 502(a)(2), not in the "entire plan." *LaRue*, 552 U.S. at 256.

The Supreme Court's recent decision in *Thole v. U.S. Bank N.A.* established that even a participant in a defined benefit plan, which consists of a single, undivided trust corpus rather than individual accounts, "possess[es] no equitable or property interest in the plan," just the right

participant is entitled only to the value of the assets allocated to his or her own account. *See LaRue*, 552 U.S. at 254-55.

to receive benefit payments over time as defined by the plan. 140 S. Ct. 1615, 1620 (2020). Taken together, *LaRue* and *Thole* confirm that a participant in a defined contribution plan *only* has a substantive interest in the plan assets contained in his or her individual plan account, not in other participants' plan accounts or the plan as a whole. As such, an arbitration provision within a plan document limiting participants to individual relief does not impinge on a participant's rights under ERISA Section 502(a)(2).

B. The Ability to Pursue a Class or Plan-Wide Action Is Not a Substantive Right.

In its order, the District Court seemed to suggest that, when asserting claims under 502(a)(2), a defined contribution plan participant somehow has the statutory right to represent other participants or the Plan. *Smith*, 2020 WL 4926560, at *4 ("ERISA's remedial scheme[] . . . goes beyond an individual participant's account and extends to the entire plan"). That is incorrect. The text of ERISA grants no express substantive right to sue on behalf of a plan or other participants. Plan participants, beneficiaries, fiduciaries, and the Department of Labor ("DOL") are permitted to bring civil actions under ERISA. 29 U.S.C. § 1132(a). When one of those individuals sues for fiduciary breach pursuant to Section 409(a), the statute simply states that breaching fiduciaries may be held "personally liable to make good to such plan any losses to the plan resulting from each such breach." *Id.* § 1109(a). Nowhere in those grants of statutory authority is there any reference to participants bringing "plan-wide claims" or claims on behalf of the "entire plan."

Likewise, because participants in individual account plans do not have a substantive interest in other participants' accounts or in the "entire plan," *see supra* p. 16-17, participants like Plaintiff-Appellee do not have a substantive right to pursue fiduciary breach claims on behalf of other participants or on behalf of the plan as a whole under ERISA Section 502(a)(2).

ERISA and the Federal Rules of Civil Procedure may permit participants to assert class claims as a procedural mechanism, but that procedural option may be contracted away through an arbitration agreement. Supreme Court precedent makes clear that arbitration agreements that prohibit class or other forms of representative actions do not affect a plaintiff's substantive statutory rights. For example, the Supreme Court held that an arbitration agreement containing a class action waiver was enforceable as applied to Age Discrimination in Employment Act ("ADEA") claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991). The Supreme Court so held despite the ADEA's express provision allowing employees to recover on behalf of "themselves and other employees similarly situated." 29 U.S.C. § 216(b); *see also Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 237 (2013) (noting that *Gilmer* upheld arbitration agreement and class waiver even though the ADEA "expressly permitted collective actions"). In upholding the arbitration agreement and class waiver, the Court noted that the EEOC remained authorized to bring ADEA enforcement actions on a class-wide basis. *Gilmer*, 500 U.S. at 32.

ERISA should fare no differently than the ADEA under the same analysis. ERISA does not even contain an express provision, like that in the ADEA, describing, for example, that a plaintiff may pursue claims on behalf of "themselves and other [participants] similarly situated." Like the EEOC's enforcement of the ADEA, the DOL can—and frequently does—bring enforcement actions on behalf of entire plans, including employee stock ownership plans.[7]

[7] *See generally* Dep't of Labor, *Fact Sheet - EBSA Restores Over $3.1 Billion to Employee Benefit Plans, Participants and Beneficiaries* (Oct. 14, 2020), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results-2020.pdf (describing ERISA enforcement actions on behalf of plans for fiscal year 2020).

Thus, looking to both the text of ERISA and Supreme Court jurisprudence, Plaintiff-Appellee does not have a substantive right under ERISA Section 502(a)(2) to seek plan-wide relief related to the accounts of other Plan participants.

C. The Supreme Court's Effective Vindication Doctrine Is Inapplicable Here.

Relying on the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*, the District Court also incorrectly found that the Plan's arbitration provision operated as a "prospective waiver" of Plaintiff-Appellee's right to pursue statutory remedies under ERISA. *Smith*, 2020 WL 4926560, at *4 (citing *Italian Colors*, 570 U.S. at 235-36). The District Court's reliance on *Italian Colors* is misguided.[8] It is true that the Court *in Italian Colors* recognized, in *dictum* in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985), that the Supreme Court suggested the possibility of "invalidat[ing], on 'public policy' grounds," arbitration agreements that prevent a plaintiff from effectively vindicating his rights under federal law.[9] *Italian Colors*, 570 U.S. at 235. But the District Court failed to recognize that this "effective vindication" exception is narrow: it covers "a provision in an arbitration agreement forbidding the assertion of certain statutory rights" (also known as the

[8] Despite discussing a portion of *Italian Colors*, the District Court failed to fully acknowledge the Supreme Court's sweeping holding in that case—that "courts must 'rigorously enforce' arbitration agreements according to their terms" unless "the FAA's mandate has been overridden by a contrary congressional command." *Italian Colors*, 570 U.S. at 233 (internal quotation marks omitted). Of course, ERISA contains no congressional command even suggesting—let alone explicitly stating—that the ability to represent other plan participants cannot be waived.

[9] The Supreme Court has never invalidated an arbitration agreement on this ground. *See Italian Colors*, 570 U.S. at 236-37 (declining to invalidate arbitration agreement on effective vindication grounds); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-74 (2009) (same); *Green Tree*, 531 U.S. at 91-92 (same); *Gilmer*, 500 U.S. at 28 (same); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987) (same).

"prospective waiver" the District Court mentions).[10] *Id*. at 235-36; *see also Smith*, 2020 WL 4926560, at *4.

A plan arbitration provision does not "prospective[ly] waive[]" participants' statutory rights under ERISA. *Italian Colors*, 570 U.S. at 235-36. The District Court cites no examples of a Circuit Court invalidating an arbitration agreement based on the prospective waiver of statutory rights. If it had, it would have recognized that the "prospective waiver" language in *Italian Colors* is applied primarily to invalidate arbitration agreements where a choice of law clause completely forecloses federal claims. *See, e.g.*, *Gibbs v. Sequoia Cap. Operations, LLC*, 966 F.3d 286, 293 (4th Cir. 2020) (holding arbitration agreements invalid where choice of law clause allowed claims exclusively under tribal law); *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 238 (3d Cir. 2020) (invalidating arbitration agreement where disputes could be resolved only under tribal law, effectively "forbid[ding] federal claims from being brought"); *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 127 (2d Cir. 2019) (holding arbitration agreement invalid where choice of law clause "appears wholly to foreclose [claimants] from vindicating rights granted by federal and state law"), *cert. denied sub nom. Sequoia Cap. Operations, LLC v. Gingras*, 140 S. Ct. 856 (2020). In contrast, here, a plan participant like Plaintiff-Appellee may still pursue relief under ERISA as it pertains to his individual Plan account. *See LaRue*, 552 U.S. at 256. In hearing that individual claim, an arbitrator will apply the same federal law (ERISA) that a federal court would if the arbitration provisions did not exist. Thus, plan terms like the Arbitration Provision do not operate as impermissible "prospective waivers" and do not prevent

[10] *Italian Colors* also recognized that this exception "would perhaps cover [arbitration] filing and administrative fees . . . so high as to make access to the forum impracticable." *Italian Colors*, 570 U.S. at 236. Plaintiff-Appellee did not raise any argument regarding arbitration costs before the District Court. *See* Plaintiff's Opposition to Defendants' Motion to Compel Arbitration and/or Dismiss, R. Dkt. 46. This consideration is therefore irrelevant here.

effective vindication of rights under ERISA. As such, they are enforceable under the FAA and ERISA.

Conclusion

For the foregoing reasons, the Council urges the Court to reverse the ruling of the District Court.

Respectfully submitted,

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Dated November 4, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and the length limitation of Fed. R. App. P. 29 and Cir. Rule 29 for a brief produced with a proportionally spaced font. The length of this brief is 6,933 words.

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CERTIFICATE OF SERVICE

The undersigned counsel for *amicus curiae* American Benefits Council hereby Certifies that on November 4, 2020 he caused a digital version of the foregoing Brief of American Benefits Council as Amicus Curiae in Support Of Appellants to be served via ECF on all counsel of record for this matter.

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