No. 14-1168

In the Supreme Court of the United States

ROGER L. SMITH, PETITIONER

v.

AEGON COMPANIES PENSION PLAN

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

M. PATRICIA SMITH
Solicitor of Labor
G. WILLIAM SCOTT
Associate Solicitor
ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation
STACEY E. ELIAS
Attorney
Department of Labor
Washington, D.C. 20210

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
SCOTT A.C. MEISLER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's civil action for pension benefits under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(1)(B), was properly dismissed based on a venue-selection clause in the ERISA plan.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Employee Retirement Income Security Act of 1974 (ERISA or Act), 29 U.S.C. 1001 *et seq.*, is designed "to protect * * * the interests of participants in employee benefit plans and their beneficiaries * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). ERISA's statutory scheme reflects "Congress' desire to offer employees enhanced protection for their benefits." *Metropolitan Life Ins.*

Co. v. *Glenn*, 554 U.S. 105, 114 (2008) (quoting *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996)). The statute requires those administering benefits plans to provide "a full and fair review" of benefits claims that are denied, 29 U.S.C. 1133(2); see *Glenn*, 554 U.S. at 115, and also provides for judicial review of claims denials.

ERISA permits a participant or beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. 1132(a)(1)(B). Suits under that provision may be brought in either state court or federal district court. 29 U.S.C. 1132(e)(1). When the suit is brought in federal court, "it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found." 29 U.S.C. 1132(e)(2).

2. Petitioner was an employee of Commonwealth General Corporation (CGC) in Louisville, Kentucky, and a participant in an ERISA-covered pension plan that CGC sponsored. Compl. ¶¶ 5-8; see Pet. App. 29-30. Following CGC's merger with AEGON USA, Inc., an insurance company that operates across the United States, petitioner became a participant in a successor ERISA plan, the AEGON Companies Pension Plan (the Plan, or respondent). Pet. App. 30. CGC offered some employees, including petitioner, enhanced retirement benefits if they remained with the company during the merger. *Id.* at 3. Petitioner agreed and, upon retiring, began receiving $2189.51 in monthly retirement benefits under the Plan. *Id.* at 3-4.

In 2007, seven years after petitioner retired and started receiving benefits, respondent amended the

Plan to include a clause stating: "*Restriction on Venue*. A [P]articipant or Beneficiary shall only bring an action in connection with the Plan in Federal District Court in Cedar Rapids, Iowa." Pet. App. 4. Four years after the Plan amendment, respondent informed petitioner that it determined in a recent audit that it had been overpaying him by $1122.97 per month for the previous 11 years. *Ibid.* Respondent notified petitioner that he needed to repay more than $150,000 in overpayments and that, if he failed to do so, his monthly benefit would be eliminated until the amount of the alleged overpayment was recouped. *Id.* at 4-5.

3. a. Petitioner initially filed state-law claims in a Kentucky court against CGC, which removed the case to federal court based on preemption under ERISA and moved to dismiss. Pet. App. 5, 30. The district court granted the motion, and the court of appeals affirmed. *Id.* at 5-6; see 589 Fed. Appx. 738.

b. While his appeal from the dismissal of that suit was pending, petitioner sued respondent in the United States District Court for the Western District of Kentucky, seeking (as relevant here) to recover plan benefits under ERISA, 29 U.S.C. 1132(a)(1)(B). Pet. 30; Compl. ¶¶ 42-45. Respondent moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that the Plan's venue-selection clause required petitioner to bring suit in Cedar Rapids, Iowa. Pet. App. 2, 31.[1]

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[1] By requiring that suit be filed in federal district court in Cedar Rapids, Iowa, the clause specifies both forum (*i.e.*, the "court or other judicial body" that would hear the suit) and venue (*i.e.*, the geographic location or "territory" where "a lawsuit [is] to proceed"). *Black's Law Dictionary* 769, 1790 (10th ed. 2014). This Court has described similar provisions as "forum-selection" clauses, *e.g.*, *Atlantic Marine Constr. Co.* v. *United States Dist. Court*,

Respondent also argued for the first time in its reply memorandum that the Western District of Kentucky was not a proper venue under ERISA's venue provision, 29 U.S.C. 1132(e)(2), because no breach had taken place in that district and the Plan was administered and could be found only in Iowa. D. Ct. Doc. 13, at 3-5 (Dec. 12, 2012).

c. The district court granted respondent's motion to dismiss, ruling that the venue-selection clause in the Plan was "enforceable and reasonable." Pet. App. 32, 35. The court reasoned that, although the clause had been added after petitioner began receiving benefits, respondent was free under ERISA and the Plan terms to modify the Plan at any time so long as the amendment did not reduce the amount of benefits to which petitioner was entitled. *Id.* at 33-34. The court also concluded that the clause was consistent with ERISA's venue provision because it specified a location—Cedar Rapids, Iowa—where the Plan is administered and resides. *Id.* at 34. The court did not address respondent's suggestion that venue was not proper in the Western District of Kentucky.

4. Petitioner appealed. The Secretary of Labor (Secretary) filed an amicus brief in support of petitioner, arguing that (i) venue was proper in the Western District of Kentucky, where the allegedly wrongful denial of plan benefits occurred; and (ii) the venue-selection clause in the Plan is inconsistent with ERISA and thus was unenforceable. Sec'y of Labor

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134 S. Ct. 568, 575 (2013), and the Secretary of Labor used that term in his amicus brief below, *e.g.*, Sec'y of Labor C.A. Amicus Br. 15. But because the court of appeals (Pet. App. 16, 19) and petitioner (Pet. 4; Reply Br. 4) use the term "venue-selection clause," this brief uses that term for the sake of consistency.

C.A. Amicus Br. 9-27. A divided panel of the court of appeals held that "the venue selection clause is enforceable and applies to [petitioner's] claims." Pet. App. 13; see *id.* at 22-23. The court therefore affirmed the dismissal of petitioner's suit without deciding "whether [Section] 1132(e)(2) permits venue in the * * * Western District of Kentucky." *Id.* at 13.

a. The court of appeals first held that the venue-selection clause was enforceable despite having been unilaterally added to the Plan "seven years after [petitioner's] benefits commenced." Pet. App. 14. The court reasoned that ERISA plans may be amended at any time, that the venue-selection clause fell within the "large leeway" afforded employers in adopting amendments, and that such clauses are presumed valid under this Court's precedents "even when [they are] not the product of an arms-length transaction." *Ibid.* (citing *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 595 (1991)). The court noted petitioner's concern that enforcing such clauses "could lead to an excessive burden on" plan participants and beneficiaries forced to litigate in distant forums, but explained that litigants "may always challenge the reasonableness" of a clause in individual cases. *Id.* at 15.

The court of appeals then addressed "whether ERISA precludes venue selection clauses." Pet. App. 16. Noting that a majority of district courts had enforced them, the court of appeals rejected arguments by petitioner and the Secretary that venue-selection clauses conflict with ERISA's statutory framework and goals.[2] *Id.* at 16-17 & n.8. The court

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[2] The court of appeals rejected, as a threshold matter, petitioner's request that the court defer to the Secretary's interpretation of ERISA. Pet. App. 6-12; see *id.* at 6 n.3 (noting that petitioner,

reasoned that the clause in the Plan did not "inhibit[]" access to the federal courts because "it provides for venue in a federal court" and that, more generally, such clauses advance ERISA's goal of uniformity by "limiting claims to one federal district." *Id.* at 18 (citation omitted). The court also saw no conflict between the clause in the Plan and "ERISA's venue provision," 29 U.S.C. 1132(e)(2), because that provision speaks in permissive terms ("may be brought") and the Plan designates one of the places listed in ERISA's venue provision—"where the plan is administered"—as the place to bring suit. Pet. App. 19 (citation omitted). But the court suggested that the Plan's venue-selection clause would "control" even if it "laid venue outside of the three options provided by [Section] 1132." *Id.* at 19-20. That result followed, the court reasoned, from decisions enforcing "arbitration clauses in ERISA plans," which "are, 'in effect, a specialized kind of forum-selection clause.'" *Id.* at 20 (quoting *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)). The court believed it "illogical to say that, under ERISA, a plan may preclude venue in federal court entirely, but a plan may not channel venue to one particular federal court." *Ibid.*

b. Judge Clay dissented, concluding that the venue-selection clause "is inconsistent with the pur-

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not the Secretary, urged deference). In so doing, the court stated that the Secretary had taken a position on the enforceability of venue-selection clauses in only one prior case. *Id.* at 6. That is incorrect: the Secretary had done so in both of the prior appeals presenting the issue. See Sec'y of Labor Amicus Br. at 7-19, *Mozingo* v. *Trend Pers. Servs.*, 504 Fed. Appx. 753 (10th Cir. 2012) (No. 11-3284); Sec'y of Labor Amicus Br. at 4-14, *Nicolas* v. *MCI Health & Welfare Benefit Plan No. 501*, No. 09-40326 (5th Cir. filed Sept. 1, 2009).

pose, policy, and text of ERISA, and contravenes the 'strong public policy' declared by ERISA." Pet. App. 24 (quoting *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)). Judge Clay would have held that the clause conflicts with ERISA's "broad venue provision," which he understood as "intended to grant an affirmative right to ERISA participants and beneficiaries." *Id.* at 25 (citation and internal quotation marks omitted). He believed that right to be "indispensable for many of those individuals whose rights ERISA seeks to protect," who "are often the most vulnerable individuals in our society" and the least likely to enforce their rights in distant venues. *Ibid.* In Judge Clay's view, ERISA's venue provision and policy of providing ready access to courts "supersede the general judicial policy of enforcing" contractual venue-selection provisions. *Id.* at 26. He also distinguished the Plan's venue-selection clause here from arbitration provisions in ERISA plans previously enforced by the courts, because those provisions are enforced "not based on some general policy favoring forum selection clauses," but on the specific mandates of the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.* Pet. App. 27.

DISCUSSION

The court of appeals erred in affirming the dismissal of petitioner's benefits suit under ERISA based on the Plan's venue-selection clause. Although the enforceability of such clauses in ERISA plans is a question of substantial practical importance, the Court's review is not warranted at this time. The Sixth Circuit in this case is the first appellate court to resolve the question presented, and its decision does not squarely conflict with any decision of this Court or

another court of appeals. Nor does petitioner's concern that the enforceability issue often arises in an interlocutory posture justify this Court's review before any other court of appeals has addressed that issue. The petition should therefore be denied.

1. The court of appeals erred in affirming the dismissal of petitioner's suit for benefits under ERISA based on the venue-selection clause in the Plan.

a. The Plan's venue-selection clause contravenes a central objective reflected in the text, structure, and legislative history of ERISA: protecting benefits to which plan participants and beneficiaries are entitled. *U.S. Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1548 (2013). Congress enacted ERISA in part to eliminate "jurisdictional and procedural obstacles" that had "hampered effective enforcement of fiduciary responsibilities" with regard to employee benefit plans. H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973). Congress emphasized that objective in the first section of the Act itself, declaring ERISA's policy to "protect * * * the interests of participants in employee benefit plans and their beneficiaries[] by," *inter alia*, "providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). Accordingly, while placing the plan at the center of the statutory scheme, see *McCutchen*, 133 S. Ct. at 1548, Congress sought to ensure both that fiduciaries would be bound by the Act's terms in circumstances where the plan is not "consistent" with those terms, 29 U.S.C. 1104(a)(1)(D), and that beneficiaries would have opportunities to assert their rights under ERISA plans.

To achieve the latter objective, Congress prescribed a two-tiered process for challenging the denial

of a benefits claim: "a full and fair review" by a plan fiduciary, 29 U.S.C. 1133(2), followed by judicial review of the fiduciary's decision, 29 U.S.C. 1132(a)(1)(B). See *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 613 (2013). Congress granted participants seeking benefits under an ERISA plan the option of suing in federal or state court. 29 U.S.C. 1132(e)(1) (providing for concurrent state and federal jurisdiction in benefits cases, but exclusive federal jurisdiction in other ERISA actions). Congress further afforded a choice of venue to claimants who opt to bring "an action under * * * subchapter" I of ERISA, 29 U.S.C. 1132(e)(2)—the subchapter entitled "Protection of Employee Benefit Rights"—in federal court. ERISA provides that, when such an action

> is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

Ibid.

Congress was aware that these were "[l]iberal venue and service provisions," S. Rep. No. 383, 93d Cong., 1st Sess. 106 (1973), that could result in plan fiduciaries "having to defend actions in court far removed from their principal places of business." *Tax Proposals Affecting Private Pension Plans: Hearings Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. 784 (1972) (statement of Employee Trusts Committee of the Corporate Fiduciaries Association of Illinois). But Congress enacted the provision despite that objection, thereby avoiding the prob-

lems that had hindered enforcement of earlier statutes that forced individuals "who were injured where they resided * * * to seek out the wrongdoing company in a distant forum to secure venue and service of process." *United States* v. *National City Lines, Inc.*, 334 U.S. 573, 582 n.17 (1948) (describing problems under an earlier venue provision in the Sherman Act, 15 U.S.C. 1 *et seq.*); see *Baltimore & Ohio R.R.* v. *Kepner*, 314 U.S. 44, 49-50, 53-54 (1941) (explaining similar impetus for venue provision in Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*).

b. In light of ERISA's text and design, the court of appeals erred in enforcing the venue-selection clause in the Plan. That clause—which respondent added to the Plan seven years after petitioner's retirement—precludes suit anywhere other than in the federal district court in Cedar Rapids, Iowa, a distant venue with which petitioner has no connection. Pet. App. 25 (Clay, J., dissenting). In so doing, the clause deprives petitioner of the choice afforded by ERISA's venue provision, which would otherwise permit him to sue in any one of several venues, including (as here) where the breach occurred, 29 U.S.C. 1132(e)(2).[3] The clause

[3] Respondent errs in suggesting (Br. in Opp. i-ii, 5 & n.7) that, as the case reaches this Court, it presents an antecedent question about whether venue is proper in the Western District of Kentucky under Section 1132(e)(2). Respondent raised that issue for the first time in a reply brief supporting its motion to dismiss, p. 4, *supra*, which had been based solely on the venue-selection clause, D. Ct. Doc. 7-1, at 4-15 (Nov. 5, 2012). The district court did not reach the issue, and—at respondent's urging (C.A. Br. 50-55)—neither did the court of appeals. Pet. App. 13 (declining to decide "whether [Section] 1132(e)(2) permits venue in the" Western District of Kentucky). In any event, respondent's argument that venue is improper lacks merit. See Sec'y of Labor C.A. Amicus Br.

therefore conflicts with the liberal venue choice that Congress conferred, and runs contrary to Congress's overarching objective of protecting plan benefits by ensuring "ready access to the Federal courts." 29 U.S.C. 1001(b). And because the venue-selection clause is not "consistent" with ERISA's protections, 29 U.S.C. 1104(a)(1)(D), it is unenforceable.

The court of appeals believed the clause to be consistent with ERISA's terms and policies because "it provides for venue in a federal court" that happens to be among ERISA's three venue choices. Pet. App. 18-19. But a plan term is not consistent with ERISA when it eliminates two of the three places where the Act authorizes claimants to sue. Moreover, contrary to the court of appeals' view (*id.* at 18), the clause "inhibits ready access" to the federal courts precisely because it specifies a forum that may be geographically distant from a claimant's residence and where the claimant may have difficulty obtaining counsel and participating in judicial proceedings. Those difficulties can be particularly acute in ERISA suits for benefits, which may be brought by "retirees on a limited budget, sick or disabled workers, widows and other dependents—[who] are often the most vulnerable individuals in our society, and are the least likely to have the * * * wherewithal to litigate in a distant venue." *Id.* at 25 (Clay, J., dissenting)

The court of appeals also deemed it unproblematic that respondent unilaterally added the venue-selection clause to the Plan, reasoning that this "Court has rec-

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11-15; 14D Charles Alan Wright et al., *Federal Practice and Procedure* § 3825, at 476 (4th ed. 2013) ("The better view, supported by an analogy to contract law, is that the breach took place where the payment was to be received.").

ognized the validity of forum selection clauses even when those clauses were not the product of an arms-length transaction." Pet. App. 14 (citing *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 595 (1991)). *Carnival Cruise Lines*, however, did not involve a suit under a federal statute containing its own venue provision. And the Court there relied in part on notice principles that are largely inapplicable in the ERISA context. 499 U.S. at 595 (explaining that the cruise passengers "were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity"); see 29 U.S.C. 1024(b)(1)(B) (providing only for post-modification notice); *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995) (employers generally can modify plans at any time).

In any event, the venue-selection clause is invalid under the analytical framework that this Court articulated in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972). In retreating from the "historical judicial resistance to" forum-selection clauses, *id.* at 12, the Court in *Bremen* made clear that such clauses should nonetheless "be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision," *id.* at 15. The Court cited as an example its decision in *Boyd* v. *Grand Trunk W. R.R.*, 338 U.S. 263 (1949) (per curiam), which involved an employee's suit under FELA. See *Bremen*, 407 U.S. at 15. In connection with post-injury payments by the employer, the employee in *Boyd* had agreed to bring any suit against its employer in Michigan, but ultimately sued in Illinois state court, an eligible forum under FELA's venue provision. 338

U.S. at 263-264. The Court held that enforcing the agreement "would thwart" FELA's "express purpose" and that the right conferred by the venue provision was of "sufficient substantiality" to fall within a separate provision voiding all agreements the purpose of which was to enable the employer to exempt itself from liability under FELA. *Id.* at 265-266.

ERISA is analogous in relevant respects. Its venue provision is designed to ease claimants' access to court. Cf. *Atlantic Marine Constr. Co.* v. *United States Dist. Court*, 134 S. Ct. 568, 582 n.7 (2013) (noting that most venue provisions aim to protect defendants, not plaintiffs). And ERISA contains protections against contractual terms that depart from the Act's minimum requirements. See 29 U.S.C. 1104(a)(1)(D). ERISA therefore embodies the kind of "strong" statutorily-declared "public policy" that renders a venue-selection clause unenforceable. Pet. App. 26 (Clay, J., dissenting) (quoting *Bremen*, 407 U.S. at 15).

c. Respondent's other arguments in support of the decision below lack merit. Respondent relies on decisions enforcing arbitration agreements in ERISA cases. Br. in Opp. 13-14 (citing decisions from the Second, Third, Fifth, Sixth, and Eighth Circuits).[4] Respondent reasons, as did the court of ap-

[4] Only one of the cited cases—*Simon* v. *Pfizer, Inc.*, 398 F.3d 765, 773 n.13 (6th Cir. 2005)—involved a benefits claim under 29 U.S.C. 1132(a)(1)(B). In the context of health and disability benefits, which were not at issue in *Simon*, the Secretary's claims regulations have provided since 2001 that any mandatory arbitration provision cannot limit a claimant's ability to challenge the benefits determination in court, and that any binding arbitration must be voluntary and agreed to after the dispute arises. 29 C.F.R. 2560.503-1(c)(3) and (4); see 65 Fed. Reg. 70,246, 70,253-70,254 (Nov. 21, 2000).

peals, that because arbitration clauses "preclude venue in federal court entirely," it would be "illogical" to hold that "a plan may not channel venue to one particular federal court." Pet. App. 20.

That conclusion does not follow. Federal courts have "enforce[d] arbitration agreements with regard to" ERISA and other "federal statutory claims not based on some general policy favoring forum selection clauses, but because that is what the [FAA], 9 U.S.C. §§ 2, 3, requires." Pet. App. 27 (Clay, J., dissenting) (citing *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 226, 238 (1987), which involved federal securities and RICO claims); see, *e.g.*, *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 669 (2012) (noting the FAA's liberal federal policy favoring arbitration agreements). Thus, to the extent arbitration provisions in ERISA plans are enforceable, it would be because the FAA constitutes a specific statute that overrides a plaintiff's choice of venue under another statutory provision such as Section 1132(e)(2). But that reasoning does not support enforcement of a venue-selection clause that, as here, is *not* an arbitration agreement. See Reply Br. 8-9.

Respondent contends (Br. in Opp. 18, 20-21, 25) that the venue-selection clause should be enforced because, by channeling all disputes under a plan to one district court, it furthers ERISA's goal of uniformity. Congress's primary uniformity concern, however, was that ERISA plans not be subject to different (possibly conflicting) legal requirements under the laws of "different States." *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 148 (2001). It addressed that concern through ERISA's preemption provision, 29 U.S.C. 1144(a), not by providing that one federal court

would decide all issues involving any particular plan. And, while this Court has recognized that uniformity concerns can also arise from differing judicial interpretations of a plan, the Court has presumed that conflicting interpretations are possible precisely because ERISA's venue provision affords employees some control over "where they bring a legal action." *Conkright* v. *Frommert*, 559 U.S. 506, 520 (2010).

Finally, the court of appeals suggested that courts can mitigate "an[y] excessive burden" to ERISA litigants through case-specific "reasonableness" challenges to venue-selection clauses. Pet. App. 15. But the test that requires a litigant to show that a particular forum is so inconvenient as to be unjust, *ibid.*, was designed to place "a heavy burden of proof" on the party challenging a forum-selection clause, *Bremen*, 407 U.S. at 17, a burden antithetical to ERISA's goal of removing jurisdictional and procedural barriers to suit. See p. 8, *supra*. If any party must show that it is inconvenienced by litigating in a distant forum, that burden should not fall on ERISA plan participants.

2. Although the court of appeals erred in enforcing the Plan's venue-selection clause, this Court's review is not warranted at this time. The court of appeals' decision is the first appellate decision to address the enforceability of a venue-selection clause in an ERISA plan; that decision does not squarely conflict with the decisions of this Court or other courts of appeals; and, on balance, neither the practical importance of the issue nor petitioner's suggestion that it could evade review warrants certiorari at this time.

a. Petitioner argues (Pet. 10-12) that the court of appeals' decision is contrary to this Court's decisions in *Boyd* and *National City Lines*, *supra*. Although

the United States agrees that those decisions support petitioner's position that venue-selection clauses in ERISA plans are unenforceable, see pp. 10-13, *supra*, the decision below does not squarely conflict with either.

The Court in *Boyd* held unenforceable an agreement limiting an injured employee's right to bring suit in one of the districts listed in FELA's venue provision. 338 U.S. at 265-266. That result turned in part on a neighboring statutory provision prohibiting "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by" FELA. *Id.* at 265 (quoting 45 U.S.C. 55). Although ERISA bars a fiduciary from following any "documents [or] instruments governing the plan" that are not "consistent" with ERISA's terms, 29 U.S.C. 1104(a)(1)(D), that provision does not feature the "comprehensive phraseology" of the FELA section that the *Boyd* Court cited in voiding the venue-restricting agreement, 338 U.S. at 265 (quoting *Duncan* v. *Thompson*, 315 U.S. 1, 6 (1942)).

There is also no square conflict between the decision below and *National City Lines*. The Court there addressed whether an antitrust plaintiff's choice of venue under the Clayton Act, 15 U.S.C. 12 *et seq.*; see 15 U.S.C. 22, could be overridden by applying the doctrine of *forum non conveniens*. 334 U.S. at 581, 596-597. The Court concluded from an extensive review of the venue provision's "history" that Congress had left no "room * * * for judicial discretion" to apply that doctrine to deprive a plaintiff of the venue choice conferred by statute. *Id.* at 588. But the Court did not, as petitioner suggests, adopt a general rule

that "a plaintiff's choice of venue is 'conclusive'" whenever "Congress grants plaintiffs a choice of venue options for claims brought under a statute." Pet. 12 (quoting *National City Lines*, 334 U.S. at 580); see Br. in Opp. 12-13 (explaining that, in *United States* v. *National City Lines, Inc.*, 337 U.S. 78 (1949), the Court held at a later stage of the same case that the *forum non conveniens* doctrine was applicable to antitrust suits following the intervening enactment of 28 U.S.C. 1404(a)).

b. Petitioner contends (Pet. 14-20) that the decision below conflicts with the decisions of other courts of appeals. But there can be no square conflict, because the decision below is the first appellate decision specifically addressing the enforceability of a venue-selection clause in an ERISA plan.[5]

Nor do decisions addressing "special venue provision[s]" (Pet. 14) in other statutes establish a conflict warranting review. Petitioner cites (Pet. 15-16) *Volkswagen Interamericana, S.A.* v. *Rohlsen*, 360 F.2d 437, cert. denied, 385 U.S. 919 (1966), where the First Circuit declined to enforce a contractual clause requiring a car dealer in the U.S. Virgin Islands to sue its Mexico-based distributor in "the courts of Mexico." *Id.* at 439. The court grounded its ruling in the Automobile Dealers' Day in Court Act, 15 U.S.C. 1221 *et seq.*, which has "its own venue provisions," the "very purpose" of which was "to give the dealer certain rights against a manufacturer independent of the terms of the [franchise] agreement." 360 F.2d at 439. Given that purpose, the court held unenforceable a

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[5] Petitioner cites (Pet. 20-22) disagreement among district courts, but this Court does not ordinarily grant review to resolve conflicts among district courts. See Sup. Ct. R. 10(a).

clause "limit[ing] jurisdiction to a forum" that was not among the statute's venue options and that was "practically inaccessible to the dealer." *Ibid.* That statute-specific result does not conflict with the decision in this ERISA case, which, moreover, involves a clause specifying a forum that is among those the Act allows. See *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193, 204 (2000) (cautioning that "analysis of special venue provisions must be specific to the statute").

Likewise, petitioner's cited decisions (Pet. 16-17) involving the Carmack Amendment to the Hepburn Act, ch. 3591, § 7, 34 Stat. 595, do not conflict with the decision below. Petitioner relies on *Smallwood* v. *Allied Van Lines, Inc.*, 660 F.3d 1115 (2011), where the Ninth Circuit declined to enforce a foreign arbitration clause in an agreement between a motor carrier and a shipper. *Id.* at 1118. But the court in *Smallwood* rested its decision on features of the Carmack Amendment in addition to its venue clause—specifically, a provision barring certain carriers from contracting around the statute's requirements (including the venue clause), and "Carmack's own arbitration provision," under which a "shipper cannot be required to appear in an inconvenient forum even if he chooses arbitration." *Id.* at 1122; see *id.* at 1121-1123. The cited Second and Tenth Circuit decisions (Pet. 16-19) were based on a similar Carmack-specific rationale. See *Aaacon Auto Transp., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 537 F.2d 648, 653-655 (2d Cir. 1976) (reasoning that the Carmack Amendment venue provision then in effect was intended to codify a shipper's preexisting right to sue in a convenient forum), cert. denied, 429 U.S. 1042 (1977); *Aluminum Prods. Dis-*

tribs., Inc. v. *Aaacon Auto Transp., Inc.*, 549 F.2d 1381, 1384-1385 (10th Cir. 1977) (adopting the Second Circuit's reasoning).[6]

Finally, the two ERISA decisions cited by petitioner (Pet. 17) do not establish a conflict because neither resolved the enforceability of a venue-selection clause. Rather, both involved attempts by a plan fiduciary to sue for declaratory relief regarding its liability under an ERISA plan. *Transamerica Occidental Life Ins. Co.* v. *DiGregorio*, 811 F.2d 1249, 1250 (9th Cir. 1987); *Gulf Life Ins. Co.* v. *Arnold*, 809 F.2d 1520, 1522 (11th Cir. 1987). Petitioner correctly points out (Pet. 17) that, in *Gulf Life*, the Eleventh Circuit observed that allowing the company's suit to proceed could force beneficiaries to litigate in distant forums, a result that the court believed contrary to ERISA's purpose. 809 F.2d at 1525 & n.7.; cf. Sec'y of Labor C.A. Amicus Br. 24 (relying on this aspect of *Gulf Life*). But that observation does not establish a square conflict because the court made it after independently concluding, based on "ERISA's language," that the fiduciary's suit was not the kind of "action" that permitted the company to "avail itself of [S]ection 1132(e)(2)'s venue provision[]." *Gulf Life*, 809 F.2d at 1524.

c. Petitioner asserts (Pet. 28-33) that review is warranted because the question presented is of signif-

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[6] The Second and Tenth Circuits also reasoned that the arbitration clause contravened the Carmack Amendment's prohibition on contractual clauses limiting a carrier's liability. *Aacon Auto Transp.*, 537 F.2d at 656-666; *Aluminum Prods. Distribs.*, 549 F.2d at 1385. As the Ninth Circuit has recognized, that rationale is in tension with this Court's subsequent decision in *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528 (1995). See *Smallwood*, 660 F.3d at 1123 n.8.

icant practical importance and could evade this Court's review given the procedural posture in which it arises. As reflected by the Secretary's participation as amicus curiae in this case and two others, see note 2, *supra*, the United States agrees that the enforceability of venue-selection clauses in ERISA plans is an important issue: such clauses may hinder claimants' access to courts, and their use appears to have proliferated in recent years. See Pet. 29.

Nevertheless, on balance, we do not believe that the significance of the issue counsels departure from the Court's usual practice of allowing percolation among the courts of appeals. Further percolation would furnish this Court with the perspective of other appellate courts on the legal issue, and also shed light on the practical consequences of the rule adopted by the Sixth Circuit. For example, petitioner emphasizes (Pet. 25) that, while the venue-selection clause in this case fixes venue in the place where the Plan is administered, the court of appeals' decision appears to permit clauses fixing venue in locations other than those provided in 29 U.S.C. 1132(e)(2) and with which the plan administrator has no connection. Pet. App. 19-20 (stating that a venue-selection clause would control "even if [it] laid venue outside of the three options provided by [Section] 1132"). Further litigation in the lower courts may reveal whether ERISA plans in fact include (or add) clauses of that nature, and whether courts enforce them if they do.

Petitioner suggests (Pet. 31-33) that additional appellate decisions are unlikely because venue-selection clauses are often enforced through interlocutory orders granting a motion to transfer, which are not appealable as of right and which might not be ap-

pealed and ultimately reach this Court following a final judgment. Petitioner's practical concerns are not without force, but in the government's view, they do not require immediate review. Indeed, all three appeals in which the Secretary has participated since 2009 arose in a posture that can reach this Court. In the first case (which settled on the eve of argument), a plan administrator appealed rulings refusing to enforce a venue-selection clause and eventually awarding benefits under the plan. See *Nicolas* v. *MCI Health & Welfare Benefit Plan No. 501*, No. 09-40326 (5th Cir.). In the second case, the Tenth Circuit did not resolve the enforceability of a venue-selection clause, which had been raised as an alternative basis for affirmance. See *Mozingo* v. *Trend Pers. Servs.*, 504 Fed. Appx. 753, 755-758 & n.2 (10th Cir. 2012); see also Appellees' Br. at 7-17, *Mozingo*, *supra* (No. 11-3284). And this case reaches the Court following a decision affirming a Rule 12(b)(6) dismissal based on a venue-selection clause. Pet. App. 22-23.

It is true that most district courts have enforced venue-selection clauses in ERISA plans through transfer orders, which are typically not subject to immediate appeal. See Pet. 31-32. Courts may continue that practice following this Court's recent decision in *Atlantic Marine*, *supra*, which confirmed that forum-selection clauses may be enforced through a motion to transfer under 28 U.S.C. 1404(a). 134 S. Ct. at 575, 579-580. The Court in *Atlantic Marine*, however, reserved the question whether such clauses can also be enforced through Rule 12(b)(6) motions to dismiss. *Id.* at 580. Some courts of appeals, including the court in this case, have approved of such motions since *Atlantic Marine*. Pet. App. 22-23; see *Claudio-*

De León v. *Sistema Universitario Ana G. Méndez*, 775 F.3d 41, 46 n.3 (1st Cir. 2014). District courts may therefore continue to enforce venue-selection clauses by entering (appealable) dismissal orders, as some did before *Atlantic Marine*. See, *e.g.*, *Scaglione* v. *Pepsi-Cola Metro. Botteling Co.*, 884 F. Supp. 2d 642 (N.D. Ohio 2012); *Fort Transfer Co.* v. *Central States, Se. & Sw. Areas Pension Fund*, No. 05-1236, 2006 WL 1582451 (C.D. Ill. June 6, 2006). Litigants may also obtain review by seeking certification of a transfer order under 28 U.S.C. 1292(b),[7] or by petitioning for a writ of mandamus, which is how *Atlantic Marine* reached this Court. See 134 S. Ct. at 576-577; cf. *Varsic* v. *United States Dist. Court*, 607 F.2d 245, 251-252 (9th Cir. 1979) (granting mandamus relief from transfer order in ERISA case).

[7] Petitioner represents (Pet. 32) that no court has certified the question presented "for appeal under [Section] 1292(b)." The government's review of the dockets in the eight transferred cases cited by petitioner (*ibid.*) reveals that none of the claimants in those cases sought Section 1292(b) certification.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

M. PATRICIA SMITH
Solicitor of Labor
G. WILLIAM SCOTT
Associate Solicitor
ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation
STACEY E. ELIAS
Attorney
Department of Labor

DONALD B. VERRILLI, JR.
Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
SCOTT A.C. MEISLER
Assistant to the Solicitor General

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