No. _______

IN THE
Supreme Court of the United States

ROGER L. SMITH,

Petitioner,

v.

AEGON COMPANIES PENSION PLAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

There are numerous federal laws in which Congress has granted a plaintiff the right to choose a particular venue in which to bring suit. These statutory venue provisions, many of which employ materially identical language, are designed to "relieve[]" plaintiffs from the "obstacle of resorting to distant forums for redress of wrongs done in the places of their business or residence." *United States v. Nat'l City Lines*, 334 U.S. 573, 580 (1948) (internal quotation marks omitted). This Court has squarely held that, when a federal law specifically grants a plaintiff the right to choose venue from a set of options, a defendant may not defeat a plaintiff's choice by relying on a more restrictive venue-selection clause in a contract. *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 266 (1949).

Despite this straightforward rule, the lower courts have disagreed about whether, and the extent to which, a defendant may defeat a plaintiff's choice of venue made under a statutory venue provision. In this case, the Sixth Circuit held that an ERISA defendant's plan-imposed venue clause requiring all ERISA suits to be litigated in the defendant's home state could defeat a plaintiff's choice, under ERISA's special venue provision, 29 U.S.C. § 1132(e)(2), to sue where he lives.

The question presented is:

Whether ERISA's special venue provision, § 1132(e)(2), and a plaintiff's choice of venue under that provision, may be abrogated by a more restrictive venue-selection clause in an ERISA plan.

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JURISDICTION

The Sixth Circuit entered judgment on October 14, 2014. Pet. App. 1. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 502(e)(2) of the Employee Retirement Income Security Act of 1974 (ERISA), codified at 29 U.S.C. § 1132(e)(2), provides:

> Where an action under this subchapter 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.

INTRODUCTION

Many federal statutes—including some of the most frequently litigated laws in the country—contain a special statutory venue provision granting a plaintiff the right to choose where a case will take place. *See, e.g.*, 29 U.S.C. § 1132(e)(2) (ERISA); 42 U.S.C. § 2000e-5(f)(3) (Title VII); 45 U.S.C. § 56 (FELA). It has been the law for more than sixty years that, when Congress grants a plaintiff the

right to choose the venue in which he brings suit, a defendant may not defeat that choice by imposing a contrary venue-selection clause. As this Court has explained, federal laws that contain a special venue provision granting plaintiffs a right to choose venue—almost all of which provide that a plaintiff "may bring suit" in one of several places—give a plaintiff the "substantial right" to select where a case takes place. *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 266 (1949). The point of these provisions is to "relieve[]" plaintiffs from the "obstacle of resorting to distant forums for redress of wrongs done in the places of their business or residence." *United States v. Nat'l City Lines*, 334 U.S. 573, 580 (1948) (internal quotation marks omitted). Allowing a defendant to defeat a plaintiff's choice based on a restrictive venue clause in a contract or, in this case, an ERISA plan document "thwart[s] the express purpose" of the statute. *Boyd*, 338 U.S. at 266.

Most circuits have understood and applied this longstanding rule with little difficulty. The First Circuit, for instance, relying on this Court's case law, has observed that "[l]ittle time need be spent" on a defendant's argument that a contractual venue clause could defeat a plaintiff's choice of venue, where that choice is granted by statute. *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437, 439 (1st Cir. 1966). Special venue provisions that protect a plaintiff's right to choose venue, the court explained, were "designed to assure the [plaintiff] as accessible a forum as is reasonably possible" and give the plaintiff "certain rights" against a defendant "independent of the terms of" any agreement. *Id.*

Were the rule otherwise, a plaintiff—like (in this case) a retiree who lives on a modest pension in the same place he worked for many years—could be "force[d]" to "litigate his . . . rights" in a far-flung venue of the defendant's choosing. *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1525 n.7 (11th Cir. 1987). Faced with this possibility, both the Eleventh Circuit and the Ninth Circuit have explained that ERISA, like other federal laws that include special venue provisions, "unquestionably" prohibits a defendant from requiring a plaintiff to litigate his claim in a venue not of his choosing. *Id.* As these courts have observed, if a defendant were allowed to dictate venue, "the sword that Congress intended participants/beneficiaries to wield in asserting their rights could instead be turned against those whom it was designed to aid." *Id.* at 1525; *see also Transamerica Occidental Life Ins. Co. v. DiGregorio*, 811 F.2d 1249, 1255 (9th Cir. 1987) (agreeing that, under ERISA, Congress did not intend to permit an insurer "to circumvent the beneficiary's choice" of venue).

The Sixth Circuit, however, has now split with most of its brethren Circuits and this Court. In the 2-1 decision below, it held—over the strong objection of the Department of Labor—that a defendant in an ERISA case can defeat a plaintiff's choice of venue simply by adding a sentence in the plan document requiring all suits to take place somewhere else. Pet. App. 19-20. According to the Sixth Circuit, a restrictive venue clause in a plan document trumps the statutory venue provision in ERISA. *Id.* Not only that, but the lower court went further: It held that an ERISA plan could force its participants and beneficiaries to litigate their claims in *any* venue in

the country—a Kentucky resident, for example, could be forced to litigate in Hawai'i. *Id.* In 1987, the Eleventh Circuit labeled this possibility "extreme"; but for the Sixth Circuit today, it is now standard operating procedure. *Gulf Life*, 809 F.2d at 1525 n.7.

The Sixth Circuit's decision warrants this Court's review. It has deepened a pre-existing split in the circuits over whether a restrictive venue-selection clause may be enforced in the face of a conflicting statutory venue provision. And the issue has also sharply divided the district courts. It has been more than a half-century since this Court weighed in. Left to stand, the decision below will do untold damage to the thousands of ERISA participants and beneficiaries who live in the Sixth Circuit and may now be forced to litigate their claims in some faraway jurisdiction, hundreds or thousands of miles from their home. That result was not what Congress intended when it passed ERISA, and it should not be permitted to stand today.

STATEMENT OF THE CASE

1. Roger Smith worked for many years at the Commonwealth General Corporation in Louisville, Kentucky. Shortly before he retired, Aegon USA, Inc., a subsidiary of a large Dutch multinational insurance company, bought Commonwealth. As an incentive not to flee, Aegon offered some employees, including Mr. Smith, additional compensation if they stayed on through the corporate takeover. Mr. Smith agreed and remained with the company until March 1, 2000. Pet. App. 2-3.

When he retired, in 2000, Mr. Smith began receiving a modest pension, about $2200 a month,

under the Aegon Companies Pension Plan ("the Plan"), the successor to the Commonwealth plan. But, in 2007, seven years after Mr. Smith had begun receiving benefits, Aegon unilaterally added a venue-selection clause to each of its employee benefits plans, including its pension plan. The provision states: "*Restriction on Venue*. A Participant or Beneficiary shall only bring an action in connection with the Plan in Federal District Court in Cedar Rapids, Iowa." *Id.* at 4.

Four years after that—more than a *decade* after Mr. Smith began receiving his pension—the Aegon Plan informed Mr. Smith that, according to its records, he was entitled to only about half the benefits he had been receiving. As a result, Aegon told him that (1) he would be required to pay back over $150,000, and (2) his future monthly benefits would be permanently reduced by half. *Id.* at 4-5. Aegon also told Mr. Smith that, until he repaid the Plan, he would receive no pension payments at all. *Id*. Mr. Smith appealed to the Aegon Pension Committee, which denied his appeal. Left with no other alternative, Mr. Smith found a lawyer in Louisville and filed an ERISA lawsuit in federal court in Louisville against the Plan. *Id.* at 5-6.[1]

[1] Before filing this case against the Plan, Mr. Smith sued Commonwealth, alleging several state law claims, including breach of contract and wage and hour violations. Commonwealth removed the case to the United States District Court for the Western District of Kentucky on the basis that ERISA preempted the claims, and the district court dismissed the case on the basis that Commonwealth is neither the Plan nor its administrator and is therefore not a proper defendant under ERISA. The Sixth Circuit affirmed the district court's ruling. That decision is not at issue here. Pet. App. 5-6.

2. Mr. Smith's suit included claims alleging improper denial of benefits and breach of fiduciary duty. The Plan moved to dismiss Mr. Smith's suit under Federal Rule of Civil Procedure 12(b)(6), arguing that the Plan's venue-selection clause requires any such action to be brought in Cedar Rapids, Iowa. *Id.* at 29. The district court granted the motion. *Id.* at 35. The court reasoned that because Mr. Smith "ha[d] not argued that the clause was induced by fraud, that the Cedar Rapids federal court would ineffectively or unfairly handle the case, or that the inconvenience to [Mr. Smith of bringing suit in Cedar Rapids] is unjust or unreasonable," the clause is enforceable. *Id.* at 32.

The court rejected Mr. Smith's contention that the Plan's venue clause is precluded by ERISA's venue provision, which provides that an ERISA action "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). Although the district court acknowledged that the statute contains a "broad venue provision," the court, without further analysis or explanation, held that "[b]y requiring that a claim under the AEGON Plan be brought in Cedar Rapids, where the Plan is administered and the Defendant resides," Aegon's venue clause "is consistent with" ERISA. Pet. App. 34. The court determined that "ERISA's general 'plan document rule' dictates that the forum selection clause govern, and that claims under the AEGON Plan be brought in the federal district court in Cedar Rapids, Iowa." *Id.* at 34. Without considering whether transfer would be more appropriate, the court dismissed the case. *Id.* at 35.

3. Mr. Smith appealed to the Sixth Circuit, which—over a dissent by Judge Clay—affirmed. The Secretary of Labor filed an amicus brief in support of Mr. Smith, arguing that ERISA protects a beneficiary's right to bring suit in certain venues, and that a venue-selection clause restricting that right is unenforceable. Br. of Sec'y of Labor as Amicus Curiae Supp. Pl.-App., *Smith v. Aegon Cos. Pension Plan*, No. 13-5492 (6th Cir. Aug. 12, 2013) ("Labor Br."). The court refused to defer at all to the Secretary's view. Pet. App. 12.

Instead, the court held that ERISA does not preclude plans from adopting restrictive venue clauses. Mr. Smith and the Secretary argued that plan-imposed restrictive venue clauses violate ERISA's policy of providing "ready access to the Federal courts," 29 U.S.C. § 1001(b). Mr. Smith explained that he has "ready access" to the courts where he resides—in Louisville, Kentucky—and that Aegon's venue clause, requiring suit to be brought hundreds of miles away, limits his ability to access the courts. Reply Br. of Pl.-App. 5, *Smith v. Aegon Cos. Pension Plan*, No. 13-5492 (6th Cir. Oct. 17, 2013). The Secretary also explained that ERISA beneficiaries often lack the means required to litigate in a venue far from their home. Labor Br. 13-14. To allow ERISA plans to defeat plaintiffs' choice of venue and force them to litigate in a distant venue could make it difficult or impossible for these claimants to access the courts at all. *Id.* Despite these explanations, the Sixth Circuit concluded that "neither Smith nor the Secretary explain[ed] how a venue provision inhibits ready access to federal courts when it provides for venue in a federal court." Pet. App. 17-18.

The court also rejected the argument, raised by both Mr. Smith and the Secretary, that Aegon's venue clause contradicts ERISA's special venue provision, § 1132(e)(2). The court held that not only may an ERISA plan override that statutory provision and restrict venue to the defendant's home base, but, according to the Sixth Circuit, a plan may require participants and beneficiaries to bring suit in any venue the plan chooses—even if it does not fall within the venue options set forth in § 1132(e)(2). *Id.* at 19-20.

In so holding, the court did not address *Boyd*, 338 U.S. 263—a case both Mr. Smith and the Secretary discussed in detail in their briefs—in which this Court held that a venue provision in the Federal Employers' Liability Act (FELA), nearly identical to ERISA's venue provision, precludes the enforcement of contractual venue clauses. Instead, the Sixth Circuit thought that this case was no different from Sixth Circuit cases allowing ERISA claims to be arbitrated. If arbitration clauses are enforceable, the court reasoned, so too are venue clauses. Pet. App. 20. In the lower court's view, "[i]t is 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." *Id.*

Having concluded that the Plan's venue-selection clause is permissible under ERISA, the Sixth Circuit held that the district court did not abuse its discretion by dismissing, rather than transferring, the case. *Id.* at 23.

4. Judge Clay dissented. "In enacting ERISA," he explained, "Congress expressly sought to eliminate 'jurisdictional and procedural obstacles which in the

past appear to have hampered effective enforcement of fiduciary responsibilities.'" *Id.* at 23-24 (quoting H.R. Rep. No. 93-553, at 17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655). The statute's broad venue provision achieves that "goal" by "removing jurisdictional barriers that would prevent plan participants and their beneficiaries from asserting their statutory rights." *Id.* at 24. Judge Clay concluded, therefore, that ERISA's venue provision was intended to ensure "open access to *several* venues for beneficiaries seeking to enforce their rights." *Id.* at 26 (emphasis added). In his view, Aegon's venue-selection clause contradicts this provision and, more generally, the purpose and policy of ERISA, and is therefore unenforceable. *Id.* at 24.

Judge Clay recognized that "[r]equiring [Mr. Smith] to litigate in a distant venue imposes a substantial increase in expense and inconvenience that obstructs his access to federal courts." *Id.* at 28. That result, he explained, violates "the express purpose and policy of ERISA"—which "is to provide unobstructed access to a forum in which participants and beneficiaries can pursue their claims for benefits." *Id.* In Judge Clay's view, "the unilaterally added venue selection clause at issue in this case should be deemed unenforceable, and the Plan's motion to dismiss for improper venue should be denied." *Id.*

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted Because the Decision Below Conflicts with the Decisions of this Court and with Those of Other Circuit Courts.

A. The Decision Below Is Contrary to this Court's Case Law.

It has been the law for more than sixty years that, when Congress grants a plaintiff the right to choose from a set of venue options, a defendant is not free to alter those options. *See, e.g.*, *Boyd*, 338 U.S. at 266; *National City Lines*, 334 U.S. at 579-80. In reaching a contrary result, the Sixth Circuit adopted a rule completely at odds with the rule established by this Court. That alone warrants review.[2]

1. This Court has squarely held that, when Congress grants a plaintiff the right to choose venue in a statute, a defendant may not restrict or alter that choice. *See Boyd*, 338 U.S. at 266. In *Boyd*, this Court confronted a defendant's effort to alter FELA's special venue provision (a provision materially identical to ERISA's), which gave a plaintiff the

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[2] There are at least ten federal statutes in which Congress has granted a plaintiff the right to choose a particular venue in which to bring suit. In all ten, Congress employed similar operative language, providing that a suit "may be brought," "may be instituted," or that plaintiffs "may bring suit" in one or several particular venues. 29 U.S.C. § 1132(e)(2) (ERISA); 42 U.S.C. § 2000e-5(f)(3) (Title VII); 45 U.S.C. § 56 (FELA); 15 U.S.C. § 22 (Clayton Act); 18 U.S.C. § 1965(a) (RICO); 15 U.S.C. § 77v(a) (Securities Act of 1933); 15 U.S.C. § 78aa(a) (Securities Act of 1934); 15 U.S.C. § 1719 (Interstate Land Sales Full Disclosure Act); 15 U.S.C. § 1222 (Dealers' Act); 49 U.S.C. § 14706(d) (Carmack Amendment).

"right to select the forum" from one of three options. *Id.* The plaintiff chose one of those venues, but the defendant tried to defeat that choice by enforcing a contractual provision "restricting the choice of venue for an action based upon [FELA]." *Id.* at 263-64. This Court flatly refused to enforce the contract. In reaching this result, the Court explained that, when Congress specifically grants a plaintiff the choice of venue in a statute, the plaintiff's "right to select the forum" is "substantial" and may not be "defeat[ed]" through contract. *Id.* at 266. To hold otherwise would "thwart the express purpose" of the statute. *Id.*

Special venue provisions like those in FELA and ERISA (as well as Title VII, the Clayton Act, and others) reflect one core objective: to "relieve[]" plaintiffs "from the often insuperable obstacle of resorting to distant forums for redress of wrongs done in the places of their business or residence." *National City Lines*, 334 U.S. at 580 (internal quotations omitted) (applying this reasoning to the Clayton Act's special venue provision). When Congress includes in a federal law a venue provision that gives the plaintiff a right to choose where to sue, that "privilege" is designed to avoid the "injustices" of forcing a plaintiff to litigate his claim far away from home. *Baltimore & O.R. Co. v. Kepner*, 314 U.S. 44, 53-54 (1941) (explaining that Congress decided to codify this type of venue provision in FELA "for the benefit of employees"). In this way, plaintiffs'-choice venue provisions "secure a more effective, because more convenient, enforcement of [statutory] prohibitions." *National City Lines*, 334 U.S. at 586. They "aid plaintiffs by giving them a wider choice of venues" while at the same time deter a defendant from coming "to a district, perpetrat[ing] there the

injuries outlawed," and then "retreating . . . to its headquarters [to] defeat or delay the retribution due." *Id.* at 580, 586.

That is why this Court has consistently refused to allow a defendant to "defeat the plaintiff's choice of venue" under a special venue provision. *Id.* at 580. Permitting a defendant to override a plaintiff's statutory right to select venue "would be utterly inconsistent with the purpose of Congress in conferring the broader range of choice." *Id.* at 588. If a party believes a statutory venue provision is "unjust," the solution is not for a court to rewrite the statute. *Kepner*, 314 U.S. at 54. Rather, the "remedy is legislative"—a defendant must take the same "course followed in securing" the statutory venue provision in the first place. *Id.* But, in the absence of a statutory amendment, a "privilege of venue granted by the legislative body which created" the federal law may not be "frustrated" through some other means. *Id.*

The rule is clear: When Congress grants plaintiffs a choice of venue options for claims brought under a statute, a plaintiff's choice of venue is "conclusive"—the case must "take place in the district specified by the statute and selected by the plaintiff." *National City Lines*, 334 U.S. at 580, 582.

2. This rule of decision should have controlled the outcome here. ERISA's special venue provision is materially indistinguishable from FELA's and the Clayton Act's—both statutes which this Court has held grant plaintiffs a right to choose venue. All three provide plaintiffs with a choice of venue options, employing identical "may be brought" language. *See* 29 U.S.C. § 1132(e)(2) (ERISA); 45

U.S.C. § 56 (FELA); 15 U.S.C. § 22 (Clayton Act). And, like FELA and the Clayton Act, the venue provision in ERISA was intended "to remove jurisdictional and procedural obstacles which in the past appear[ed] to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants." H.R. Rep. No. 93-533, at 17 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655; S. Rep. No. 93-127, at 35 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871; *see also* S. Rep. No. 93-383 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4989 ("Liberal venue and service provisions are established for actions brought in Federal district court.").

Indeed, the similarities do not end there. ERISA, like FELA, contains a separate statutory provision prohibiting the enforcement of plan documents that violate the statute. *Compare* 29 U.S.C. § 1104(a)(1)(D), *with* 45 U.S.C. § 55. In *Boyd*, this Court explained that a contract purporting to override FELA's special venue provision would violate this prohibition. *See Boyd*, 338 U.S. at 265. ERISA is no different: Section 1104(a)(1)(D) provides that plan documents may only be enforced "insofar as [they] are consistent with" subchapters I and III of ERISA, which include the venue provision. *See US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1548 (2013) (plan administrator may only act "'in accordance with the documents and instruments governing the plan' insofar as they accord with the statute, § 1104(a)(1)(D)"). A restrictive venue clause in either a contract, *e.g.*, *Boyd*, 338 U.S. at 265, or a plan document, *e.g.*, *Unum Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 375-77 (1999), that would defeat a plaintiff's statutory right to select venue is

inconsistent with the statute, and therefore unenforceable.

The Sixth Circuit failed even to cite this Court's precedent, let alone explain how its conclusion that a defendant can defeat an ERISA plaintiff's choice of venue squares with this Court's case law. More troubling, it ignored this precedent despite the fact that both Mr. Smith and the Department of Labor spent considerable time arguing that *Boyd* provides the rule of decision here. Br. of Pl.-App. 27, *Smith v. Aegon Cos. Pension Plan,* No. 13-5492 (6th Cir. July 22, 2013); Labor Br. 24-25.

That omission is telling, and it underscores how wrong the Sixth Circuit was when it said that a restrictive venue clause in an ERISA plan document "does not conflict" with ERISA. Pet. App. 19. Allowed to stand, the decision below will "thwart the express purpose of" ERISA's special venue provision. *See Boyd*, 338 U.S. at 266.

B. The Interpretation of Special Venue Provisions Like ERISA's Has Now Divided Six Circuits.

Although this Court's case law is clear, the lower courts are in disarray. In addition to the Sixth Circuit, six other circuits have considered similar provisions. Three—the First, Ninth, and Tenth Circuits—have, like this Court, concluded that a special venue provision that grants plaintiffs a right to choose venue precludes the enforcement of a more restrictive contractual venue-selection clause. The Eleventh Circuit, too, has voiced its strong agreement with this rule. But the Eighth Circuit, like the Sixth Circuit below, has followed the

opposite path, choosing to enforce a defendant's contract over a statute's own venue provision. And, adding to the confusion, the Second Circuit has gone both ways: Six years after refusing to allow a defendant to defeat a plaintiff's choice of venue, it flipped—without even noting it was doing so.

1. Three Circuits Have Followed This Court's Rule. In accordance with this Court's rule, three circuits have held that special venue provisions like the one in ERISA cannot be defeated by a defendant.

To begin, following *Boyd*, the First Circuit held that a defendant may not override a statutory special venue provision by relying on a restrictive venue clause in a contract. *Volkswagen*, 360 F.2d at 439. In *Volkswagen*, a defendant car manufacturer tried to defeat a plaintiff's choice of venue under the special venue provision of the Automobile Dealers' Day in Court Act ("the Dealers' Act"). Like ERISA, the Dealers' Act gives plaintiffs a venue choice: "An automobile dealer may bring suit against any automobile manufacturer . . . in the district in which said manufacturer resides, or is found, or has an agent." 15 U.S.C. § 1222. The plaintiff in *Volkswagen* filed suit in one of those districts, but the defendant tried to defeat this choice based on a clause in its franchise agreement that restricted actions to the courts of Mexico—its home base. *Volkswagen*, 360 F.2d at 439.

The First Circuit flatly rejected this effort. "Little time need be spent" on the defendant's argument that its contract could defeat the Dealers' Act's venue provision, the court explained. *Id.* That provision was "designed to assure the [plaintiff] as accessible a

forum as is reasonably possible" and to give the plaintiff "certain rights against a manufacturer independent of the terms of the agreement itself." *Id.* Permitting a defendant to "contractually limit jurisdiction" to some venue not of the plaintiff's choosing would "thwart[]" the protections of the law itself. *Id.*

In holding that a defendant may not defeat a plaintiff's choice of venue under a statutory special venue provision, the First Circuit is in good company. Two additional circuits—the Ninth and Tenth—have reached the same conclusion in cases arising out of the Carmack Amendment to the Interstate Commerce Act. *See Smallwood v. Allied Van Lines, Inc.*, 660 F.3d 1115, 1122 (9th Cir. 2011); *Aluminum Prods. Distribs., Inc. v. Aaacon Auto Transp., Inc.*, 549 F.2d 1381, 1385 (10th Cir. 1977). In both of these cases, a plaintiff had properly filed suit in one of the venue options provided by the Carmack Amendment's special venue provision. *See Smallwood*, 660 F.3d at 1121-22. The defendants then challenged venue, arguing that a contract required suit somewhere else. *Id.* at 1118.

Both courts refused to allow the defendants' contracts to defeat the plaintiffs' choices. *Id.* at 1122; *Aluminum Products Distributors*, 549 F.2d at 1385. As the Ninth Circuit explained, the statutory venue provision "states plainly that shippers may sue particular carriers in particular venues." *Smallwood*, 660 F.3d at 1122 n.7. That right, the court explained, is an "inalienable requirement[]" of the statute that "guarantee[s] . . . the right of the shipper to sue the carrier in a convenient forum of the shipper's choice." *Id.* at 1121 (internal quotation marks omitted). A

contract purporting to limit that right is therefore unenforceable. *Id.*; *Aluminum Products Distributors*, 549 F.2d at 1385.

The Eleventh Circuit, too, has joined the chorus. In *Gulf Life*, 809 F.2d 1520, that court all but shut the door on an ERISA plan's effort to defeat a plaintiff's choice of venue under § 1132(e)(2). In the Eleventh Circuit's view, "forc[ing]" an ERISA beneficiary "to litigate his benefit plan rights" wherever the fiduciary is headquartered would "unquestionably" violate ERISA. *Id.* at 1525 n.7. As the court explained, ERISA's legislative history "demonstrates that Congress did not intend to allow a fiduciary to force a plan participant/beneficiary who worked for a company for 30 years in Maine and who files a claim for benefits with that company, to be required to litigate his claim in Los Angeles." *Id.* To permit that result, the court concluded, would allow "the sword that Congress intended participants/beneficiaries to wield in asserting their rights [to] be turned against those whom it was designed to aid." *Id.* at 1525. The Ninth Circuit also shares this view. *See Transamerica Occidental Life*, 811 F.2d at 1255 (agreeing that, under ERISA, Congress did not intend to permit an insurer "to circumvent the beneficiary's choice of a state forum in every ordinary case on the insurance contract").

2. Two Circuits Have Departed From This Court's Rule. In contrast to the four circuits discussed above, two circuits (including the Sixth Circuit in this case) have refused to follow this Court's rule and have allowed a defendant to defeat a plaintiff's choice of venue made under a statutory special venue provision.

Like the Sixth Circuit, the Eighth Circuit has held that a statutory venue provision employing the "may be brought" language can be overridden by a more restrictive contract. *See Servewell Plumbing, LLC v. Fed. Ins. Co.*, 439 F.3d 786, 791 (8th Cir. 2006). In *Servewell*, the court considered a statute that identified three venue options in which "[a]n action by or in behalf of an insured or beneficiary against a domestic or foreign surety on a contractor's payment or performance bond may be brought," Ark. Code Ann. § 16-60-115. *See Servewell*, 439 F.3d at 791. Like the Sixth Circuit here, the Eighth Circuit allowed a defendant to override a plaintiff's choice of venue by enforcing a restrictive contractual venue clause. In reaching this result, the court explained that it was "unconvinced that such a permissive venue statute constitutes the kind of 'strong public policy' sufficient to invalidate a [contractual] forum selection clause." *Id.* (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)). "Moreover," the Eighth Circuit concluded, "invalidating a forum selection clause because it conflicts with a statutory venue provision ignores the strong countervailing public policy in favor of holding parties to their agreements." *Id.*; *compare* Pet. App. 14 (venue-selection clause is "presumptively valid").

3. The Second Circuit Goes Both Ways. The Second Circuit has one foot in each camp. First, in considering the Carmack Amendment, the court followed *Boyd* and held that a defendant could not defeat a plaintiff's choice of venue under the Amendment's special venue provision through a restrictive contractual venue clause. *Aaacon Auto Transp., Inc. v. State Farm Mut. Auto. Ins. Co.*, 537 F.2d 648, 654-55 (2d Cir. 1976). In reaching this

result, the court observed that *Boyd*'s rule "is not restricted to FELA cases but has general application," and, like FELA, the Carmack Amendment's special venue provision demonstrates that the plaintiff's right to choose venue "is a right that Congress intended to codify." *Id.* Thus, the court breezily dismissed the idea that the defendant could—even "conceivably"—"contract with its customers to provide that suits could not be brought against it except in a New York City court." *Id.* at 655.

Then, six years later, the Second Circuit went the other way—holding that a defendant's contractual venue clause *could* override Congress' decision to codify a plaintiff's right to choose venue. *See Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718, 720-21 (2d Cir. 1982). This time, without even citing *Boyd* (or its own decision in *Aaacon*), the court held that the enforcement of a contractual venue clause trumped Congress' decision to allow a plaintiff to choose venue for antitrust claims. *Id.* at 720. The plaintiff had filed suit in Vermont—one of the choices available to him under the Clayton Act's special venue provision—but the defendant moved to dismiss the case based on a contractual venue clause requiring suit be brought in Texas. *Id.* at 719. In allowing the defendant to move the case to Texas, the court held that a contract could, in fact, defeat a plaintiff's statutory right to choose venue. *Id.* at 720 (explaining that the plaintiff had made "no showing that his antitrust action could not be prosecuted as vigorously in Texas as in Vermont" and had not shown that moving the case to Texas would "subvert[]" Congressional purpose); *but see National City Lines*, 334 U.S. at 580 (holding that "any idea

that the defendant corporation can defeat the plaintiff's choice of venue as given" is "inconsistent" with the Clayton Act's special venue provision).

4. The District Courts Are Sharply Divided. Given the confusion among the courts of appeals, it is not surprising that district courts are also in disagreement as to whether—and under what circumstances—venue-selection clauses are enforceable when they conflict with a statutory venue provision. This sharp disagreement is evident even in just those cases that have addressed ERISA's special venue provision.

a. District courts throughout the country have declined to enforce ERISA plan venue-selection clauses. In *Coleman v. Supervalu, Inc. Short Term Disability Program*, for example, the district court held that the plan's venue-selection clause, which would have required an employee living and working in Illinois to litigate her denial-of-disability-benefits claim in Minnesota, was unenforceable. 920 F. Supp. 2d 901, 909 (N.D. Ill. 2013). The court reasoned that ERISA's special venue provision is "intended to grant an affirmative right to ERISA participants." *Id.* at 906. ERISA, the court explained, was intended to grant plan participants "'ready access to the Federal courts'" and "'to remove jurisdictional and procedural obstacles'" to holding fiduciaries liable for violating an ERISA plan or the statute itself. *Id.* (emphasis omitted) (quoting 29 U.S.C. § 1001(b) and H.R. Rep. No. 93-533, at 17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655)). In rejecting many of the same rationales as those relied on by the Sixth Circuit below, the *Coleman* court explained that if ERISA participants could not sue in a venue

convenient to them, ERISA would be "no better than an unenforceable wish list." *Id.* at 908.

Coleman is not alone in concluding that ERISA plan venue-selection clauses cannot be enforced in light of ERISA's special venue provision. *See Nicolas v. MCI Health & Welfare Plan No. 501*, 453 F. Supp. 2d 972 (E.D. Tex. 2006) (declining to require participant residing in Texas to litigate in D.C. or Virginia); *see also Mezyk v. U.S. Bank Pension Plan*, 2009 WL 3853878 (S.D. Ill. Nov. 18, 2009) (declining to enforce Minnesota venue-selection clause where, as here, it was unilaterally added to a pension plan long after the participants had retired); *cf. Trs. of Wash. State Plumbing & Pipefitting Indus. Pension Plan v. Tremont Partners, Inc.*, 2012 WL 3537792 (S.D.N.Y. Aug. 16, 2012) (declining to enforce Cayman Islands venue-selection clause under ERISA § 1132(e)(1)).

b. Conversely, a number of district courts have enforced plans' venue-selection clauses in spite of ERISA's special venue provision. Some decisions rest on reasoning similar to that of the Sixth Circuit here: that because, in their view, § 1132(e)(2) is permissive, contrary venue-selection clauses do not conflict with the statute. *See, e.g.*, *Price v. PBG Hourly Pension Plan*, 2013 WL 1563573, at *2 (E.D. Mich. Apr. 15, 2013); *Smith v. Aegon USA, LLC*, 770 F. Supp. 2d 809, 812 (W.D. Va. 2011); *Rodriguez v. PepsiCo Long Term Disability Program*, 716 F. Supp. 2d 855, 861-62 (N.D. Cal. 2010); *Williams v. CIGNA Corp.*, 2010 WL 5147257, at *4 (W.D. Ky. Dec. 13, 2010); *Klotz v. Xerox Corp.*, 519 F. Supp. 2d 430, 435-36 (S.D.N.Y. 2007).

Other district courts reason that by participating in an ERISA plan, ERISA participants have agreed to any venue-selection clause contained therein. According to these courts, an ERISA plan venue-selection clause is therefore an agreement that must be enforced under contract law. *See, e.g.*, *Rogal v. Skilstaf, Inc.*, 446 F. Supp. 2d 334, 338 & n.3 (E.D. Pa. 2006); *Bernikow v. Xerox Corp. Long-Term Disability Income Plan*, 2006 WL 2536590, at *1 (C.D. Cal. Aug. 29, 2006).

* * * *

All this confusion points up one thing: This Court's guidance is sorely needed. It has been more than sixty years since this Court last weighed in on the rules governing a defendant's effort to defeat a plaintiff's choice of venue under a statutory special venue provision. The time has come for the Court to weigh in again.

II. The Sixth Circuit's Rule that a Plan May Force ERISA Claims To Be Litigated Anywhere in the Country Contradicts ERISA.

The Sixth Circuit's rule that an ERISA plan can defeat a plaintiff's choice of venue under § 1132(e)(2) could hardly have strayed more from the plain text of the statute and Congress' intent.

A. To begin, § 1132(e)(2) unambiguously grants an ERISA plaintiff the right to choose venue. It states that an ERISA suit "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." Like its counterpart provisions in

FELA and the Clayton Act, ERISA's venue provision constitutes a "plain grant of privilege" to the plaintiff to choose venue. *Kepner*, 314 U.S. at 54. But, in ruling that a defendant in an ERISA suit can defeat a plaintiff's choice under § 1132(e)(2) by adding a different venue requirement into its plan documents, the Sixth Circuit handed ERISA plans the right to blue-pencil the statute. A plan is not free to "displace" a specific provision in ERISA "simply by inserting a contrary term in plan documents." *Unum Life*, 526 U.S. at 376.

And make no mistake: The Sixth Circuit's decision not only contradicts the text of § 1132(e)(2), it also eviscerates the provision's intent. When Congress designed ERISA's "comprehensive" and carefully "crafted" remedial scheme, *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1995) (internal quotation marks omitted), it had two goals in mind: (1) to provide participants and beneficiaries with "the full range of legal and equitable remedies" to safeguard their benefits, and (2) "to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants." S. Rep. No. 93-127, at 35 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871; *accord* H.R. Rep. No. 93-533, at 17 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655. These objectives are embodied in ERISA's express policy of providing plan participants "ready access to the Federal courts." 29 U.S.C. § 1001(b).

In enacting ERISA, Congress also struck a balance between two competing concerns: "offer[ing] employees enhanced protection for their benefits"

and "not . . . creat[ing] a system that is so complex that administration costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1995); *see also Russell*, 473 U.S. at 47 ("We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA."). ERISA does not require employers to offer benefit plans or mandate that particular benefits be offered. But if an employer chooses to provide benefits, ERISA holds employers to the benefits that they have agreed to provide and offers plan participants "higher-than-marketplace" procedural safeguards—including an expansive venue choice for potential ERISA plaintiffs—to ensure participants receive these benefits. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115 (2008); *see* S. Rep. No. 93-383 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4989 (observing that ERISA's procedural safeguards include "[l]iberal venue and service provisions"); *see also Varsic v. U.S. Dist. Ct. for the C.D. Cal.*, 607 F.2d 245, 248 (9th Cir. 1979) (Congress "struck the balance in favor of liberal venue").

Section 1132(e)(2) is a key part of this scheme. The right to bring suit where an ERISA participant or beneficiary lives is crucial to ERISA's effort to "remove jurisdictional and procedural obstacles" that, before the statute's passage, "hampered effective enforcement of fiduciary responsibilities . . . or recovery due to participants." S. Rep. No. 93-127, at 35 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871. For the average plan participant, being forced to bring suit in a venue far from home is undoubtedly a major practical barrier—especially since many ERISA plaintiffs are necessarily disabled, in poor

health, or elderly—so it makes sense that Congress gave plan participants the option of suing plans where they live. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 39-40 (1988) (Scalia, J., dissenting) ("Venue is often a vitally important matter . . . . Suit might well not be pursued, or might not be as successful, in a significantly less convenient forum."); *Yoder v. Heinold Commodities, Inc.*, 630 F. Supp. 756, 759 (E.D. Va. 1986) ("[W]here the clause requires the filing of a suit in a distant state it can serve as a large deterrent to the filing of suits by consumers against large corporations.").

In other words, the statute makes clear that "Congress did not intend to allow a fiduciary to force a plan participant/beneficiary . . . to litigate his claim" in some far-flung venue. *Gulf Life*, 809 F.2d at 1525 n.7. Congress instead intended plaintiffs to be able to sue their plan where they received their benefits.

The Sixth Circuit's decision, by eliminating one of ERISA's procedural safeguards, cuts the legs out from under ERISA's carefully orchestrated remedial scheme. Under the Sixth Circuit's rule, if Aegon believed that the District of North Dakota was a particularly favorable venue, it could unilaterally amend its plan tomorrow and require all its beneficiaries—even those who retired years ago—to bring any ERISA suit in Fargo, even if no Aegon employee has ever set foot in Fargo, and even though Aegon itself is based in Cedar Rapids. *See* Pet. App. 19-20 ("[E]ven if the venue selection clause laid venue outside of the three options provided by § 1132, the venue selection clause would still

control."). This is precisely what ERISA's venue provision was designed to prevent.

Indeed, courts have consistently blocked ERISA plan efforts to out-maneuver a plaintiff's choice of venue. For example, even before restrictive venue-selection clauses in ERISA plans became commonplace in the last decade or so, plans routinely attempted to prevent participants from bringing suit where they lived. *See, e.g.*, *Ballinger v. Perkins*, 515 F. Supp. 673, 675 (W.D. Va. 1981) (rejecting plan's argument that, because the plan is located in Richmond, Virginia, "venue properly lies only" in the Eastern District of Virginia). These efforts were roundly rejected. Congress intended to allow the ERISA *plaintiff* to choose "venue for actions brought under [the statute]." *Id.* at 674. In rejecting plan arguments that a plaintiff's choice could be defeated, courts have emphasized that permitting participants to bring suit where they live is the only interpretation consistent with the text and purpose of ERISA—to remove the obstacles to holding fiduciaries liable by providing ready access to courts. *See, e.g.*, *Schoemann v. Excellus Health Plan, Inc.*, 447 F. Supp. 2d 1000, 1002 (D. Minn. 2006); *Schrader v. Trucking Emps. of N.J. Welfare Fund, Inc.*, 232 F. Supp. 2d 560, 573-74 (M.D.N.C. 2002); *Ballinger*, 515 F. Supp. at 675. The Sixth Circuit's decision simply rewrites the playbook.

B. The Sixth Circuit offered no explanation for how Aegon's restrictive venue clause could possibly be squared with ERISA's plain grant of choice-of-venue to the plaintiff. Nor did the court explain how its view—that an ERISA plan may require participants to sue in *any* venue it chooses—can be

reconciled with the text of the statute, which specifically limits venue to three locations. In short, the Sixth Circuit's theory is as novel as it is wrong.

Instead of enforcing ERISA's venue provision, the Sixth Circuit held that ERISA plans may simply ignore it. The court reasoned that, because § 1132(e)(2) uses the word "may," its venue choices are "permissive" and are therefore open to alteration or, even, deletion. Pet. App. 19. But Congress' use of the word "may" to identify a range of venue options does not necessarily give a party the right to alter—or curtail—those options. *See, e.g.*, *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198-99 (2000); *United States v. Rodgers*, 461 U.S. 677, 706 (1983); *Mercantile Nat'l Bank at Dallas v. Langdeau*, 371 U.S. 555, 560-62 (1963) (holding that the venue provision of the National Bank Act—which, at the time, specified that suits against a national banking association "may be had" where the association is located—was mandatory).

ERISA contains several distinct provisions that use the word "may" to grant an ERISA plaintiff a set of rights—none of which have even been thought to be open to plan alteration. Consider § 1132(a), which provides that an action "may be brought" by a participant or beneficiary to "recover benefits due . . . , to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." § 1132(a)(1)(B). Under the Sixth Circuit's decision, the use of the word "may" means that, despite this provision, an ERISA plan can unilaterally decide which civil remedies are available to participants. But there is no doubt that it would violate ERISA for a plan to, for example,

prohibit participants from bringing suits to "recover benefits due," but allow suits that "clarify [a participant's] rights to future benefits." Nothing in the text of § 1132(e)(2) indicates that it should be treated any differently.

* * * *

The goal of ERISA's special venue provision is to ensure that plans may not use procedural hurdles to prevent participants from enforcing their statutory rights. The provision therefore protects the right of plan participants to bring an action in a venue convenient to them by providing a range of venue options, including the venue in which the participant lives. That range of options is an integral aspect of ERISA's comprehensive enforcement scheme. Aegon's venue-selection clause conflicts with this scheme, and the Sixth Circuit was wrong to enforce it.

III. The Enforceability of Venue-Selection Clauses that Conflict with a Statute Is an Important Issue that Warrants Review Now.

A. The Increasing Ubiquity of Venue Clauses Undermines ERISA.

Writing in 1987, just thirteen years removed from ERISA's passage, the Eleventh Circuit discussed the possibility that a defendant in an ERISA case "would be able to force [a plaintiff] to litigate his benefit plan rights in [Guam]." *Gulf Life*, 809 F.2d at 1525 n.7. Although it thought this hypothetical was "most extreme," it understood that ERISA "unquestionably" prohibited a fiduciary from

"forc[ing] a plan participant/beneficiary who worked for a company for 30 years in Maine and who files a claim for benefits with that company, to be required to litigate his claim in Los Angeles." *Id.*

Twenty-five years later, those "extreme" hypotheticals are commonplace. Venue-selection clauses are now common features of many of the country's largest employers' ERISA plans. For example, Pepsi, Xerox, Maytag, and Wells Fargo plans all include these venue-selection clauses, which, if enforced, may require participants in those retirement, disability, and health plans to litigate benefits disputes on the other side of the country. *See, e.g.*, *Rodriguez v. PepsiCo*, 716 F. Supp. 2d 855 (enforcing clause requiring low-income participant with significant physical limitations residing in California to litigate his disability benefits dispute in New York); *Gipson v. Wells Fargo & Co.*, 563 F. Supp. 2d 149 (D.D.C. 2008) (requiring D.C.-area employee to litigate her retirement plan breach of fiduciary duty claims in Minnesota); *Sneed v. Wellmark Blue Cross & Blue Shield of Iowa*, 2008 WL 1929985 (E.D. Tenn. Apr. 30, 2008) (requiring Maytag employee residing in Tennessee to litigate his medical benefits dispute in Iowa); *Bernikow v. Xerox*, 2006 WL 2536590 (enforcing clause requiring California resident to litigate his disability benefits dispute in New York). For any retiree, injured employee, or family member who believes their rights or benefits have been improperly curtailed, being forced to litigate that claim hundreds or thousands of miles away from home is now a serious reality.

As the Department of Labor's involvement in this case demonstrates, the impact of this change is substantial. *See* Labor Br. 1. The Secretary explained that, as practical matter, requiring disabled, elderly, and ill participants to litigate disputes hundreds or thousands of miles from home in—what is for them—an arbitrary and distant location means that those disputes will not be litigated at all. *See id.* at 2, 27 (enforcement of venue-selection clauses "preclude[s]" plan participants "from pursuing their benefit claims"); *see also Stewart Org.*, 487 U.S. at 39-40 (Scalia, J., dissenting); *Yoder*, 630 F. Supp. at 759. Moreover, even if the plaintiff filed suit initially in her home venue, a transfer halfway across the country may also mean the end—plaintiffs are "half as likely to be successful once their case has been transferred." Ryan T. Holt, Note, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 Vand. L. Rev. 1913, 1917 (2009).

The reason why forcing plaintiffs to litigate in far-away venues ends up suppressing claims is simple: Few individuals, especially those relying on fixed disability or retirement incomes, have the resources and acumen to find an attorney across the country willing to take on his or her case, to travel to any necessary hearings, and to convince any witnesses to do the same. *See* Labor Br. 14 (plan participants "are often the most vulnerable individuals and the least likely to have the financial or other wherewithal to litigate in a distant forum"); Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. Rev. 423, 446-47 (1992) ("The threshold task of merely retaining counsel in a distant location,

which may seem routine to attorneys and judges, is profoundly daunting to ordinary people.").

The Secretary well understood the threat posed by Aegon's restrictive venue clause: Interfering with participants' ability to enforce their statutory rights is antithetical to ERISA. Labor Br. 15-27. And the sheer ubiquity of these venue-selection clauses in ERISA plans severely undermines the comprehensive remedial enforcement scheme created by Congress. *See id.* at 27 (explaining that ERISA's declared policy "would be significantly undermined" if restrictive venue-selection clauses were enforced). Coupled with the confusion among the lower courts, this Court's review is necessary.

B. Review Is Warranted Now.

Given the number of companies employing restrictive venue clauses in their plan documents and the number of district courts that have addressed their enforceability, one might wonder why so few circuit courts have weighed in on this issue. The answer is straightforward: Orders transferring venue are interlocutory, and therefore they are infrequently appealed. This Court should take this rare opportunity to grant review on the venue-selection-clause question now; it is unlikely that another opportunity will present itself any time soon.

The rarity of appellate review arises out of the procedural posture in which these questions arise. When a defendant plan seeks to enforce its venue-selection clause, regardless of whether the plan requests dismissal or transfer (or both), district courts have the discretion to transfer the case under

28 U.S.C. § 1404(a) if the court determines that it is "in the interest of justice" to do so. *See, e.g.*, *Smith*, 770 F. Supp. 2d at 813. As it turns out, the vast majority of district courts that decide to enforce ERISA plans' venue-selection clauses transfer the participants' cases rather than dismissing them. *See, e.g.*, *Turner v. Sedgwick Claims Mgmt. Servs., Inc.*, __ F. Supp. 3d __, 2015 WL 225495, at *1 (N.D. Ala. Jan. 16, 2015); *Mroch v. Sedgwick Claims Mgmt. Servs., Inc.*, 2014 WL 7005003, at *1 (N.D. Ill. Dec. 10, 2014); *Smith*, 770 F. Supp. 2d at 811; *Williams*, 2010 WL 5147257, at *1; *Rodriguez*, 716 F. Supp. 2d at 856; *Klotz*, 519 F. Supp. 2d at 432; *Rogal*, 446 F. Supp. 2d at 335; *Bernikow*, 2006 WL 2536590, at *2.

Since transfer is an interlocutory order that is not immediately appealable, the only potential path for immediate appellate review of most district court decisions on venue-clause enforcement is 28 U.S.C. § 1292(b), which provides for review of interlocutory orders in limited circumstances. To our knowledge, despite the importance of venue, not even a single district court—much less a court of appeals—has ever certified this issue for appeal under § 1292(b).[3] As a result, this recurring question rarely makes it to the court of appeals. As if to underscore the point, in

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[3] Statistics on every circuit are not available, but we do know that between 2001 and 2012, the First Circuit granted just eleven § 1292(b) appeals—a rate of one per year. Tory Weigand, *Discretionary Interlocutory Appeals Under 28 U.S.C. § 1292(b): A First Circuit Survey and Review*, 19 Roger Williams U. L. Rev. 183, 265 (2014). Between 1995 and 2010, the Federal Circuit heard forty appeals via § 1292(b), a rate of fewer than three per year. Alexandra B. Hess, Stephanie L. Parker & Tala K. Toufanian, *Permissive Interlocutory Appeals at the Court of Appeals for the Federal Circuit: Fifteen Years in Review (1995-2010)*, 60 Am. U. L. Rev. 757, 770 (2011).

just the few months since the Sixth Circuit issued its decision in this case, at least two district courts have addressed the question, both resulted in transfers, and, like nearly all the cases that came before them, neither of those decisions can be appealed. *Turner*, 2015 WL 225495; *Mroch*, 2014 WL 7005003. This case qualifies as a rarity—the district court dismissed rather than transferred the claims—allowing Mr. Smith to bring an immediate appeal and gain appellate review. The unusual lack of possible review weighs in favor of review now, when the Court has the chance.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROGER L. SMITH, *Plaintiff-Appellant,* *v.* AEGON COMPANIES PENSION PLAN, *Defendant-Appellee.*	No. 13-5492

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 3:12-cv-00697 – John G. Heyburn, District Judge.

Argued: January 24, 2014

Decided and Filed: October 14, 2014

Before: SILER, BATCHELDER, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Stacey E. Elias, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Amicus Curiae. Michael D. Grabhorn, GRABHORN LAW OFFICE, PLLC, Louisville, Kentucky, for Appellant. David R. Levin, DRINKER BIDDLE & REATH LLP, Washington, D.C., for Appellee. **ON BRIEF:** Michael D. Grabhorn, GRABHORN LAW OFFICE, PLLC,

Louisville, Kentucky, for Appellant. David R. Levin, DRINKER BIDDLE & REATH LLP, Washington, D.C., Michael D. Risley, STITES & HARBISON PLLC, Louisville, Kentucky, for Appellee. Stacey E. Elias, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Amicus Curiae.

BATCHELDER, J., delivered the opinion of the court, in which SILER, J., joined. CLAY, J. (pp. 15-17), delivered a separate dissenting opinion.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Appellant Roger Smith appeals the district court's dismissal of his claims without prejudice because of improper venue. The district court held that the venue selection clause in the Employee Retirement Income Security Act ("ERISA")-governed AEGON Pension Plan requiring that suit be brought in federal court in Cedar Rapids, Iowa, was enforceable and applied to Smith's claims. Accordingly, the court dismissed his complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). We AFFIRM.

I.

Prior to his retirement in 2000, Smith was an employee of Commonwealth General Corporation

("CGC"). When CGC agreed to merge with AEGON USA, Inc. ("AEGON"), CGC offered some employees, including Smith, enhanced compensation if they would remain with CGC until its merger with AEGON was completed. The offer's terms were reflected in the Voluntary Employee Retention and Retirement Program ("VERRP"), which the CGC Board of Directors ("Board") adopted and approved on October 10, 1997.

The VERRP provided that Smith would retire on March 1, 2000. Smith elected to receive $1,066.54 under the qualified plan, and $1,122.97 under the non-qualified plan, for a total of $2,189.51 per month.[1] The document through which Smith selected this election was titled "AEGON USA Pension Plan: Election for Distribution and Explanation of Benefits," and an attached letter informed Smith that "[i]f you elect to participate in the Voluntary Employee Retention & Retirement Program ('VERRP'), you will be entitled to receive additional benefits from the Commonwealth General Corporation Retirement Plan under that program." VERRP Attachment A stated that Smith was entitled to a $154,976.12 benefit under the CGC Change in Control Plan. Attachment B stated, "As a participant in the [VERRP], you are entitled to receive a supplemental benefit either as a lump sum or in the same annuity form that your regular retirement benefit will be paid."

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[1] Neither the VERRP booklet nor the AEGON Companies Pension Plan booklet explains the difference between qualified and non-qualified benefits.

On February 1, 2000, Smith received a booklet from the AEGON Insurance Group with information on the CGC Retirement Plan and the VERRP, as well as a notice that, effective January 1, 2000, the CGC Plan and the AEGON Companies Pension Plan ("Plan") had been integrated pursuant to the merger. The Plan defines "CGC VERRP Participant" as "a CGC Grandfathered Participant . . . who was also a participant in the [VERRP] . . . which was an early retirement program in effect in the CGC Plan from September 8, 1997 until December 31, 1999 and in effect in this Plan from January 1, 2000 until February 29, 2000, as a result of the merger of the CGC Plan with this Plan. . . ."

Smith retired on March 1, 2000, and the Plan paid him both a lump sum benefit and $2,189.51 per month. In 2007, the AEGON Board of Directors amended the Plan to add a "venue provision."[2] The provision states: "*Restriction on Venue*. A participant or Beneficiary shall only bring an action in connection with the Plan in Federal District Court in Cedar Rapids, Iowa." In August 2011, the Plan told Smith that they had been overpaying him by $1,122.97 per month, or the amount of the benefit categorized as "non-qualified" under the VERRP, for the previous eleven years. The Plan reduced, and then eliminated, Smith's entire monthly benefit payments, stating that it would continue to do so until it had recouped

[2] Litigants and the district court refer to this provision as a "forum selection clause."

the overpayment or Smith remitted to the Plan $153,283.25.

Smith exhausted the administrative remedies provided by the Plan by appealing to the AEGON Pension Committee. In that appeal Smith complained that the Plan had refused "to produce all relevant documents and information in accordance with the Plan terms and the applicable laws and regulations," and cited a number of "ERISA claims regulations." Further, he argued that "[t]he VERRP specifically provided enhanced benefits under the Plan, payable either as a lump sum or in this case in an increased monthly annuity of $1,079.48 per month. The VERRP also entered the date on which Mr. Smith could commence receiving his Plan benefits (including the VERRP enhancement)." The Pension Committee denied Smith's appeal, and Smith filed suit against CGC in Jefferson County Circuit Court, asserting claims for breach of contract, wage and hour state statutory violations, estoppel, and breach of the duty of good faith and fair dealing. CGC removed the action to the U.S. District Court for the Western District of Kentucky, and filed a Rule 12(b)(6) motion to dismiss.

The district court granted CGC's motion and dismissed Smith's complaint under Rule 12(b)(6) for failure to state a claim. The court found that the VERRP was regulated by ERISA, and that Smith was suing to recover benefits under this ERISA plan. The court concluded that because the Pension Committee controlled and administered the Plan, only the Pension

Committee – not CGC – was a proper party defendant. We affirmed. *See Smith v. Commonwealth General Corp.,* No. 12-6284 (6th Cir. Oct. 9, 2014) (*Smith I*). After the district court dismissed the *Smith I* complaint, Smith filed suit against the AEGON Companies Pension Plan in the U.S. District Court for the Western District of Kentucky. The district court dismissed Smith's complaint without prejudice under Rule 12(b)(6) because of the Plan's venue selection clause, and Smith appealed.

II.

A.

We are required at the outset to determine the level of deference to be afforded the Secretary of Labor's ("Secretary") position, expressed in an amicus brief, that venue selection clauses are incompatible with ERISA.[3] The Secretary's interpretation of ERISA appears in the Secretary's amicus brief in this case, and in one prior amicus brief. *See* Brief of the Secretary of Labor as Amicus Curiae Supporting Appellant, *Mozingo v. Trend Personnel Services,* 504 F. App'x 753 (10th Cir. 2012) (No. 11-3284), 2012 WL 1966227. Smith contends that "[t]he DOL's position is entitled to *Chevron,* or at the very least *Skidmore,* deference."

[3] The Secretary does not request deference, but Smith asks that we defer to the Secretary's construction of ERISA.

The Supreme Court has yet to address the appropriate level of deference to give the construction of a statute articulated by an agency *only* in amicus briefs. *See* Bradley George Hubbard, Comment, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The* Chevron *Two-Step and the* Skidmore *Shuffle,* 80 U. Chi. L. Rev. 447, 459 (2013). Although our Court has provided no answer either, some of our sister circuits have concluded that agency positions expressed in amicus briefs deserve *Skidmore* deference.[4] We decline to afford either *Chevron* or *Skidmore* deference to the Secretary's "regulation by amicus"[5] in this case.

The Secretary's interpretation is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). The Court in *United States v. Mead Corp.,* 533 U.S. 218, 221 (2001), made it clear that *Chevron*'s two-step procedure for determining when controlling weight should be given an agency's construction of a statute is triggered only when an agency is acting with the force of law. In our case, the Secretary's

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[4] *See, e.g., Ball v. Memphis Bar-B-Q Co.,* 228 F.3d 360, 365 (4th Cir. 2000); *Serricchio v. Wachovia Securities LLC,* 658 F.3d 169, 178 (2d Cir. 2011).

[5] The Secretary of Labor has been particularly aggressive in "attempt[ing] to mold statutory interpretation and establish policy by filing 'friend of the court' briefs in private litigation." Deborah Thompson Eisenberg, *Regulation by* Amicus: *The Department of Labor's Policy Making in the Courts,* 65 Fla. L. Rev. 1223, 1223 (2013).

interpretation of ERISA is not entitled to *Chevron* deference because the interpretation was not made with the force of law. *See Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 212 (1988) ("We have never applied the principle of [*Chevron*] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice."); *Rosales-Garcia v. Holland,* 322 F.3d 386, 403 n.22 (6th Cir. 2003) ("An interpretation contained in a brief – like interpretations contained in opinion letters, policy statements, agency manuals, and enforcement guidelines – lacks the force of law and is therefore not entitled to *Chevron* deference.").

Whether the Secretary's amicus interpretations of 29 U.S.C. §§ 1001(b), 1132(e)(2), and 1104(a)(1)(D) are entitled to *Skidmore* deference is a more difficult question. Despite their factual dissimilarity to our case, cases from both the Supreme Court and our Court have featured deference to amicus briefs. *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944), required the Supreme Court to determine whether the time spent within a certain proximity of the Swift plant by fire-response employees was compensable overtime under the Fair Labor Standards Act ("FLSA"). The Department of Labor ("DOL") had outlined factors to determine compensable work time through informal rulings and an interpretive bulletin. *Id.* at 138-39. The DOL then applied its guidelines to the specific facts in *Skidmore* in an amicus brief. The Court held that these informal positions

> constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore, 323 U.S. at 140. *Mead,* 533 U.S. at 228, added other contextual factors for courts to consider in conducting the *Skidmore* inquiry: "The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." (citations omitted).

In *Kasten v. Saint-Gobain Performance Plastics Corp.,* 131 S. Ct. 1325 (2011), the Court also gave "a degree of weight to [the DOL's] views about the meaning of" the word "filed," and whether oral complaints were covered by the FLSA's anti-retaliation protections. *Id.* at 1335. The Court held that *Skidmore* governed because the DOL's interpretation had been held consistently for close to fifty years, evidenced by enforcement actions, amicus briefs, agency practice, and Equal Employment Opportunity Commission guidelines. *See id.* The Court held that the agencies' views "add force to our conclusion" under *Skidmore* because "[t]he length of time the agencies

have held them suggests that they reflect careful consideration. . . ." *Id.*; *see also Christopher v. SmithKline Beecham Corp.,* 635 F.3d 383, 400 (9th Cir. 2011), *aff'd,* 132 S. Ct. 2156 (2012) ("[W]e cannot accord even minimal *Skidmore* deference to the position expressed in the *amicus* brief. . . . The about-face regulation, expressed only in ad hoc *amicus* filings, is not enough to overcome decades of DOL nonfeasance and the consistent message to employers [to the contrary]. . . .").

Two Sixth Circuit cases are also relevant. In *OfficeMax, Inc. v. United States,* 428 F.3d 583, 584 (6th Cir. 2005), the government asked this Court to defer to its interpretation of "toll telephone service," which Congress subjected to a federal excise tax. One of the government's interpretations was "not yet embraced by any administrative ruling" and was expressed solely in the government's merits brief. *See id.* at 596. We held that "*Skidmore* deference does not apply to a line of reasoning that an agency could have, but has not yet, adopted." *Id.* at 598.

In *Rosales-Garcia,* 322 F.3d at 403 n.22, we noted in passing that the Immigration and Naturalization Service's interpretation, "contained in a brief," of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, was "entitled to respect pursuant to" *Skidmore.* But because "the government's position has been inconsistent" and was advocated only during the litigation, we held that the interpretation was "unpersuasive," and instead adopted our own reading

of the statute. *See id.* Thus, *Skidmore* informed the outcome of neither case.

An analysis of the contextual factors discussed by *Skidmore* and its progeny convinces us that the Secretary's position in this case is not entitled to *Skidmore* deference. First, we defer to agencies under *Skidmore* because of their relative expertise. *See Mead,* 533 U.S. at 228. *Skidmore* directs that we consider "the thoroughness evident in [the agency's] consideration." *Skidmore,* 323 U.S. at 140. But the Secretary is no more expert than this Court is in determining whether a statute proscribes venue selection. Even were the Secretary more expert, the Secretary's bare textual analysis of ERISA, without more, does not "constitute a body of experience and informed judgment to which courts" should defer. *Id.*; *see also Shikles v. Sprint/United Mgmt. Co.,* 426 F.3d 1304, 1315-16 (10th Cir. 2005) ("In this case, the EEOC simply asserts its position in an amicus brief. . . . The EEOC's brief provides no indication of whether the agency has been thorough in its consideration of the issue, and it appears that the agency's position has not been subjected to any sort of public scrutiny.").

Second, the Secretary's interpretation of ERISA has been expressed only once previously, in one other circuit-court amicus brief. The Secretary had taken no position, even an informal one, against the enforceability of venue or forum selection clauses under ERISA for the thirty-nine years prior to these two amicus positions. The Secretary's new interpretation

is not consistent with prior acquiescence, *see Mead,* 533 U.S. at 228; is an "about-face," *see SmithKline Beecham Corp.,* 635 F.3d at 400; and lacks longevity, suggesting the interpretation does not "reflect careful consideration," *see Kasten,* 131 S. Ct. at 1335.

Third, unlike *Skidmore* and *Kasten,* the only indication here that the agency has adopted this particular interpretation of ERISA is the amicus briefs themselves. The *Skidmore* amicus brief pointed the Court to an interpretive bulletin, *see* 323 U.S. at 138-39, and the amicus brief at issue in *Kasten* cited fifty years of enforcement proceedings and agency practice, *see* 131 S. Ct. at 1335. But the amicus brief in this case can only be characterized as, to borrow a phrase from Justice Frankfurter, an expression of a mood. *See Universal Camera Corp. v. NLRB,* 340 U.S. 474, 487 (1951). An agency's mood is not entitled to *Skidmore* deference. There has never been an enforcement action brought related to a venue selection clause, and only one other amicus brief exists that has articulated the Secretary's current position. The Secretary has promulgated no regulation or interpretive guidance related to venue selection clauses. As we have noted, "*Skidmore* deference does not apply to a line of reasoning that an agency could have, but has not yet, adopted." *OfficeMax, Inc.,* 428 F.3d at 598.

B.

The level of deference to be afforded the Secretary's interpretation does not determine the outcome

of this case because, even were we to give the Secretary's interpretation heightened deference under *Skidmore,* ERISA and our precedent do not support adopting the Secretary's position. *See Rosales-Garcia,* 322 F.3d at 403 n.22 (concluding that "although the government's position is entitled to respect pursuant to *Skidmore,*" the government's interpretation was unpersuasive). Because, as we explain below, we conclude that the venue selection clause is enforceable and applies to Smith's claims, we do not opine whether 29 U.S.C. § 1132(e)(2) permits venue in the U.S. District Court for the Western District of Kentucky.

III.

We review de novo the enforceability of a forum selection clause. *Wong v. PartyGaming Ltd.,* 589 F.3d 821, 826 (6th Cir. 2009). Smith, as the party opposing enforcement of the forum selection clause, "bears the burden of showing that the clause should not be enforced." *Id.* at 828.

ERISA's "statutory scheme . . . is built around reliance on the face of written plan documents." *US Airways, Inc. v. McCutchen,* 133 S. Ct. 1537, 1548 (2013) (internal quotation marks omitted); *see also* 29 U.S.C. § 1102(a)(1) ("Every employee benefit plan shall be established and maintained pursuant to a written instrument."). Plan administrators and employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare

plans. This rule applies equally to pension benefit plans." *Coomer v. Bethesda Hosp., Inc.,* 370 F.3d 499, 508 (6th Cir. 2004) (internal quotation marks and citation omitted). "The 'large leeway' granted to employers in the design of pension plans applies equally to their modification or amendment of those plans." *Id.* at 508. The Plan was amended in 2007 to include the venue selection clause at issue.[7]

Smith argues that the amendment was not the product of an arms-length transaction because the venue selection clause was added seven years after his benefits commenced. But the Supreme Court has recognized the validity of forum selection clauses even when those clauses were not the product of an arms-length transaction. *See Carnival Cruise Lines v. Shute,* 499 U.S. 585, 595 (1991) (enforcing a forum selection clause contained on the back of a cruise ticket). The logic supporting enforcement of such clauses applies equally to the venue selection clause here. And given the discretion available to plan administrators, we see no reason why this venue selection clause is invalid. The AEGON Pension Plan's venue selection clause is presumptively valid and enforceable. *See M/S Bremen v. Zapata Off-Shore Co.,*

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[7] A plan amendment by an employer does not disturb our conclusion in *Smith I* that only the Plan controls administration of the VERRP. *See Lockheed Corp. v. Spink,* 517 U.S. 882, 890 (1996) ("[B]ecause [the] defined functions [in the definition of fiduciary] do not include plan design, an employer may decide to amend an employee benefit plan without being subject to fiduciary review." (internal quotation marks omitted)).

407 U.S. 1, 15 (1972) ("The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."); *F.D. Rich Co. v. Indus. Lumber Co.,* 417 U.S. 116, 125 (1974) (holding that a Miller Act requirement that suits be brought in specific federal courts was "merely a venue requirement" that could be waived).

Smith believes our holding could lead to an excessive burden on ERISA litigants were venue to lie only in Hawai'i or Alaska. That is not this case. And a party may always challenge the reasonableness of a forum selection clause. In *Wong,* 589 F.3d at 828, we provided a three-part test to use in evaluating the enforceability of a forum selection clause: "(1) whether the clause was obtained by fraud, duress, or other unconscionable means; (2) whether the designated forum would ineffectively or unfairly handle the suit; and (3) whether the designated forum would be so seriously inconvenient such that requiring the plaintiff to bring suit there would be unjust." But as the district court noted, "Plaintiff has not argued that the clause was induced by fraud, that the Cedar Rapids federal court would ineffectively or unfairly handle the case, or that the inconvenience to Plaintiff is unjust or unreasonable."

Smith argues in the alternative that the Plan document under which he retired should control his case because his pension claims accrued in 2000, and

thus the venue selection amendment adopted in 2007 is inapplicable. Smith alleges that although claims accrue when benefits are denied, claims also accrue when they are paid because each payment inherently repudiates a claim to additional benefits. The Sixth Circuit, however, follows the "clear repudiation rule," under which a cause of action accrues "when a fiduciary gives a claimant clear and unequivocal repudiation of benefits." *Morrison v. Marsh & McLennan Cos.,* 439 F.3d 295, 302 (6th Cir. 2006). Thus, Smith's claims did not accrue until 2011 – after the venue selection clause was added – when the AEGON Pension Plan informed him that it was reducing his payments. Smith cites to *Fallin v. Commonwealth Industries, Inc. Cash Balance Plan,* 521 F. Supp. 2d 592, 597 (W.D. Ky. 2007), in support of his argument that a cause of action also accrues when benefits are paid. The problem for Smith is that he does not dispute the level of benefits he received from 2000-2011. Smith might theoretically have a cause of action that accrued as early as 2000, but the claims he is raising here only relate to action taken in 2011. Thus, the venue selection clause applies to Smith's claims.

IV.

We turn next to the question whether ERISA precludes venue selection clauses. A majority of courts that have considered this question have upheld the validity of venue selection clauses in ERISA-governed

plans.[8] These courts reason that if Congress had wanted to prevent private parties from waiving ERISA's venue provision, Congress could have specifically prohibited such action. *See, e.g., Bernikow v. Xerox Corp. Long-Term Disability Income Plan,* No. CV 06-2612 RGKSHX, 2006 WL 2536590, at *2 (C.D. Cal. Aug. 29, 2006).

Smith argues that "Aegon is required to abide by ERISA where the terms of the Plan Conflict with ERISA." The Secretary and Smith point to a number of statutory provisions they think conflict with venue selection clauses. None of them does.

First, ERISA's policy is to provide "ready access to the Federal courts." 29 U.S.C. § 1001(b). Smith and the Secretary argue that this "Congressional policy behind ERISA cannot be ignored." But neither Smith

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[8] *See Bernikow v. Xerox Corp. Long-Term Disability Income Plan,* CV 06-2612 RGKSHX, 2006 WL 2536590 (C.D. Cal. Aug. 29, 2006); *Gipson v. Wells Fargo & Co.,* 563 F. Supp. 2d 149 (D.D.C. 2008); *Klotz v. Xerox Corp.,* 519 F. Supp. 2d 430 (S.D.N.Y. 2007); *Rodriguez v. PepsiCo Long Term Disability Plan,* 716 F. Supp. 2d 855 (N.D. Cal. 2010); *Rogal v. Skilstaf, Inc.,* 446 F. Supp. 2d 334 (E.D. Pa. 2006); *Schoemann ex rel. Schoemann v. Excellus Health Plan, Inc.,* 447 F. Supp. 2d 1000 (D. Minn. 2006); *Smith v. Aegon USA, LLC,* 770 F. Supp. 2d 809 (W.D. Va. 2011); *Sneed v. Wellmark Blue Cross & Blue Shield of Iowa,* No. 1:07-CV-292, 2008 WL 1929985 (E.D. Tenn. Apr. 30, 2008); *Williams v. CIGNA Corp.,* No. 5:10-CV-00155, 2010 WL 5147257 (W.D. Ky. Dec. 13, 2010). *But see Coleman v. Supervalu, Inc. Short Term Disability Program,* 920 F. Supp. 2d 901 (N.D. Ill. 2013); *Nicolas v. MCI Health & Welfare Plan No. 501,* 453 F. Supp. 2d 972 (E.D. Tex. 2006).

nor the Secretary explains how a venue provision inhibits ready access to federal courts when it provides for venue in a federal court. *See Smith v. Aegon USA, LLC,* 770 F. Supp. 2d 809, 812 (W.D. Va. 2011) (holding that a contractual venue provision "certainly does not conflict with ERISA's provision for 'ready access to the federal courts.'" (citation omitted)). And other ERISA policies are furthered by venue selection clauses. For instance, "limiting claims to one federal district encourages uniformity in the decisions interpreting that plan, which furthers ERISA's goal of enabling employers to establish a uniform administrative scheme so that plans are not subject to different legal obligations in different States." *Rodriguez v. PepsiCo Long Term Disability Plan,* 716 F. Supp. 2d 855, 861 (N.D. Cal. 2010); *see also Klotz v. Xerox Corp.,* 519 F. Supp. 2d 430, 436 (S.D.N.Y. 2007) ("The forum selection clause contained in Xerox's LTD [Long Term Disability Income] Plan allows one federal court to oversee the administration of the LTD Plan and gain special familiarity with the LTD Plan Document, thereby furthering ERISA's goal of establishing a uniform administrative scheme."). The cost to employees of one plan's being subject to the varying pronouncements of federal district courts around the country would also undermine ERISA's goal of providing a low-cost administration of employee benefit plans. *See Scaglione v. Pepsi-Cola Metro. Bottling Co. Inc.,* 884 F. Supp. 2d 642, 643 (N.D. Ohio 2012) ("Forum selection clauses in ERISA plans promote ERISA's goal of uniformity of administration and reduce costs. . . .").

Second, Smith and the Secretary point to ERISA's venue provision, which provides:

> Where an action under this subchapter 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.

29 U.S.C. § 1132. ERISA's venue provision is permissive: suit "may be brought" in one of several districts. AEGON's venue selection clause provides that suit is to be brought in one of these statutorily designated places, namely, the district where the plan is administered – Cedar Rapids, Iowa. ERISA's venue provision does not conflict with AEGON's chosen venue. *See Price v. PBG Hourly Pension Plan,* No. 12-15028, 2013 WL 1563573, at *2 (E.D. Mich. Apr. 15, 2013) ("The *may* of § 1132(e)(2) does not mean *cannot.* Congress provided that an action *may* be brought in several venues. Congress did not provide that private parties *cannot* narrow the options to one of these venues."); *Williams v. CIGNA Corp.,* No. 5:10-CV-00155, 2010 WL 5147257, at *4 (W.D. Ky. Dec. 13, 2010) (concluding that Congress did not "intend to usurp the right of private parties to predetermine the situs of anticipated litigation under ERISA" because ERISA's venue selection provision is permissive).

But even if the venue selection clause laid venue outside of the three options provided by § 1132, the

venue selection clause would still control. We have previously upheld the validity of mandatory arbitration clauses in ERISA plans, *see Simon v. Pfizer Inc.,* 398 F.3d 765, 773 (6th Cir. 2005), which are, "in effect, a specialized kind of forum-selection clause," *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 519 (1974). It is 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. Smith tries to distinguish *Simon* by arguing that arbitration affects only forum, not venue. But an arbitration clause may prescribe the geographic location of the proceedings as well as the forum. *See Sneed v. Wellmark Blue Cross & Blue Shield of Iowa,* No. 1:07-CV-292, 2008 WL 1929985, at *2 (E.D. Tenn. Apr. 30, 2008) ("A forum selection clause merely requires the parties to submit their dispute to a different judge in a different courthouse who will use a substantially similar process to reach a decision. An arbitration clause will prevent a litigant from submitting the dispute to a judge or formal court proceeding at all. If arbitration clauses are enforceable the Court sees no reason to conclude forum selection clauses are not enforceable."). Thus, ERISA's venue provision does not invalidate AEGON's venue selection clause.

Third, Smith raises two arguments regarding fiduciary duties under ERISA. Smith argues that the venue selection clause violates 29 U.S.C. § 1110(a), which states, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation,

or duty under this part shall be void as against public policy." But Smith did not raise this argument until his Federal Rule of Civil Procedure 59 motion to alter, vacate, or amend the district court's judgment, and he has waived it.[9] *See Am. Family Prepaid Legal Corp. v. Columbus Bar Ass'n,* 498 F.3d 328, 335 (6th Cir. 2007); *Am. Meat Inst. v. Pridgeon,* 724 F.2d 45, 47 (6th Cir. 1984).

Smith tries to distinguish his benefits claims from his breach of fiduciary duty claims, arguing that venue cannot be limited with regard to the latter, even if it can be for benefit claims. Smith did not raise this argument until his Rule 59 motion, and

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[9] Even absent waiver, this argument would fail. 29 U.S.C. § 1110(a) refers to responsibilities, obligations, and duties "under this part," which is Part 4 of ERISA. AEGON's venue selection clause appears in Part 5, not Part 4. *See* § 1132(e)(2). Furthermore, a forum or venue selection clause does not attempt to free a fiduciary from its substantive obligations under ERISA. *See Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.,* 847 F.2d 475, 478 (8th Cir. 1988) ("Section 1132(e), unlike sections in part 4 of subtitle B of the statute, does not impose any substantive duties or liabilities on ERISA fiduciaries."). Both the Supreme Court and our Court have held that forum selection clauses do not waive substantive rights. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628 (1985) ("We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."); *Roney & Co. v. Goren,* 875 F.2d 1218, 1221 (6th Cir. 1989) ("We are unable to discern how an agreement limiting a customer to one [particular arbitration entity] would constitute a waiver of any substantive rights under the [Securities] Exchange Act.").

thus has waived it as well. Regardless, none of the statutory provisions Smith cites provides a reason not to apply the venue selection provision to both his fiduciary and benefits claims. The venue selection provision applies to *all* actions brought by a participant or beneficiary, not just claims for benefits.

V.

Finally, Smith contends that the district court impermissibly dismissed his claims rather than transferring them under 28 U.S.C. § 1404(a). We review for an abuse of discretion. *See First of Michigan Corp. v. Bramlet,* 141 F.3d 260, 262 (6th Cir. 1998) ("The decision of whether to dismiss or transfer is within the district court's sound discretion, and accordingly, we review such a decision for an abuse of discretion."). Smith never sought transfer before the district court, though the Secretary argued in an amicus brief at the motion to dismiss stage that "the appropriate remedy is not dismissal, but transfer." In an additional citation filed with this Court after briefing, Smith points to the Supreme Court's recent decision in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas,* 134 S. Ct. 568 (2013), as support for his argument on appeal that transfer is the proper remedy. The *Atlantic Marine* Court stated:

> The question in this case concerns the procedure that is available . . . to enforce a forum-selection clause. We reject petitioner's argument that such a clause may be enforced

> by a motion to dismiss under 28 U.S.C. § 1406(a) or Rule 12(b)(3) of the Federal Rules of Civil Procedure. Instead, a forum-selection clause may be enforced by a motion to transfer under § 1404(a).

Id. at 575. Noting that the defendant had not filed a motion to dismiss under Rule 12(b)(6), and further noting the specific differences between Rule 12(b)(6) and § 1404(a), the Court declined to apply its holding to Rule 12(b)(6) dismissals. *See id.* at 580. In our case, Smith's complaint was dismissed pursuant to Rule 12(b)(6), not Rule 12(b)(3). The district court did not abuse its discretion in dismissing the case instead of transferring it.

VI.

For the foregoing reasons, we AFFIRM the judgment of the district court.

DISSENT

CLAY, Circuit Judge, dissenting. The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.,* was designed to provide "ready access to the Federal courts" so as "to protect . . . the interests of participants in employee benefit plans and their beneficiaries." § 1001(b). In enacting ERISA, Congress expressly sought to eliminate

"jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities." H.R. REP. NO. 93-553, at 17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655. Consistent with the congressional goal of removing jurisdictional barriers that would prevent plan participants and their beneficiaries from asserting their statutory rights, ERISA § 502(e)(2) provides broad jurisdiction for benefit claims:

> Where an action under this subchapter 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 the defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

29 U.S.C. § 1132(e)(2). The preclusive venue selection clause that the AEGON Companies Pension Plan ("the Plan") unilaterally added in 2007 is inconsistent with the purpose, policy, and text of ERISA, and contravenes the "strong public policy" declared by ERISA; therefore, the clause should be deemed unenforceable. *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 15 (1972). Because the United States District Court for the Western District of Kentucky is a proper venue for Plaintiff's ERISA pension benefits claims pursuant to § 502(e), 29 U.S.C. § 1132(e), and because the venue selection clause should be deemed unenforceable, I respectfully dissent.

The venue selection clause that the Plan seeks to enforce forbids Plaintiff from bringing a suit for benefits anywhere other than Cedar Rapids, Iowa – a venue that is located more than 500 miles away from Plaintiff's home and place of work, and with which Plaintiff has no connection. Such a restrictive clause not only conflicts with the broad venue provision set forth in § 502(e) of ERISA, but also undermines the very purpose of ERISA and contravenes the strong public policy evinced by the statute. Section 502(e), which provides broad jurisdiction for benefit claims, is "intended to grant an affirmative right" to ERISA participants and beneficiaries. *Coleman v. Supervalu, Inc. Short Term Disability Program,* 920 F. Supp. 2d 901, 906 (N.D. Ill. 2013) (holding that a forum selection clause in an ERISA plan was unreasonable as contrary to public policy and unenforceable). This right is indispensable for many of those individuals whose rights ERISA seeks to protect, since claimants in suits for plan benefits – retirees on a limited budget, sick or disabled workers, widows and other dependents – are often the most vulnerable individuals in our society, and are the least likely to have the financial or other wherewithal to litigate in a distant venue. *See French v. Dade Behring Life Ins. Plan,* No. 09-394-C-M2, 2010 WL 2360457, at *3 (M.D. La. Mar. 23, 2010). A venue selection clause that purports to eliminate proper statutory venues conflicts with ERISA's venue provision as well as the strong statutory public policy against imposing obstacles to beneficiaries in pursuit of benefit claims.

ERISA's policies and provisions supersede the general judicial policy of enforcing "contractual choice-of-forum" clauses, which the Supreme Court has cautioned "should be held unenforceable if enforcement would contravene a strong public policy," including a policy "declared by statute." *Bremen,* 407 U.S. at 15. The statutory text and legislative history of ERISA clearly demonstrate that Congress desires open access to several venues for beneficiaries seeking to enforce their rights. *See, e.g.,* 29 U.S.C. § 1001(b) (declaring that it is the policy of ERISA "to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by providing for . . . ready access to the Federal courts."); H.R. REP. NO. 93-553, at 17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655 (explaining that Congress intended ERISA's enforcement provisions "to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities."). As the district court recognized in *Coleman,* "an employer's unilateral restriction of that access would undermine Congress' stated desire." *Coleman,* 920 F. Supp. 2d at 908. This is especially true where, as here, the restrictive venue selection clause was unilaterally added to the Plan seven years after Plaintiff agreed to its terms. These circumstances compel the conclusion that the venue selection clause is unreasonable, inasmuch as it contravenes the strong and clearly stated public policies of ERISA.

The majority relies upon a decision from this Court enforcing an arbitration agreement in the

context of an ERISA benefit claim, and reasons that it is "illogical" to conclude that a plan may mandate arbitration, but may not restrict venue to a specific geographic location. Majority Op. at 12. In so concluding, the majority overlooks the important distinctions between the arbitration agreement at issue in *Simon v. Pfizer Inc.,* 398 F.3d 765 (6th Cir. 2005), and the venue selection clause at issue in the present case. We enforce arbitration agreements with regard to federal statutory claims not based on some general policy favoring forum selection clauses, but because that is what the Federal Arbitration Act, 9 U.S.C. §§ 2, 3, requires. *See Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 226 (1987) (holding that an arbitration clause was enforceable under the Federal Arbitration Act with respect to a claim under the Securities Exchange Act of 1934). Though the majority opinion states otherwise, *see* Majority Op. at 12, this Court has never held that an arbitration clause may prescribe the geographic location of the proceedings as well as the forum. The majority's conclusion that an arbitration clause may prescribe the geographic location of the proceedings does not appear in, or naturally flow from, our opinion in *Simon,* and does not appear elsewhere in our case law. Arbitration provides an alternative decisionmaker, but does not necessarily require a claimant to travel to a distant venue to pursue a claim for benefits. The distinction between arbitration provisions and venue selection clauses is not, in the words of the majority, "illogical;" upon closer inspection, such a distinction can be rather easily reconciled.

Requiring Plaintiff to litigate in a distant venue imposes a substantial increase in expense and inconvenience that obstructs his access to federal courts. Because the express purpose and policy of ERISA is to provide unobstructed access to a forum in which participants and beneficiaries can pursue their claims for benefits, the unilaterally added venue selection clause at issue in this case should be deemed unenforceable, and the Plan's motion to dismiss for improper venue should be denied.

I therefore respectfully dissent.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3-12-CV-697-H

ROGER L. SMITH PLAINTIFF

v.

AEGON COMPANIES
PENSION PLAN DEFENDANT

MEMORANDUM OPINION AND ORDER

(Filed Jan. 28, 2013)

On October 23, 2012, Plaintiff, Roger Smith, filed this ERISA claim to contest Defendant's alleged "belated and untimely efforts to recalculate and reduce [his] vested pension benefits." Within two weeks Defendant, AEGON Companies Pension Plan ("AEGON Plan"), moved to dismiss the complaint without prejudice on the grounds that the Plan's forum selection clause requires that all such claims be brought in the federal courts in Cedar Rapids, Iowa. The question as to the validity and enforceability of the forum selection clause is a matter of law which the Court should consider at the earliest reasonable time.

I.

The case is somewhat complicated with an unusual procedural history. Smith was a longtime employee of Commonwealth General Corporation ("CGC"), and accrued non-forfeitable pension benefits under

the CGC Retirement Plan ("CGC Plan"). In the late 1990s, AEGON USA merged with CGC. Smith retired and began receiving his pension benefits effective March 1, 2000 from the AEGON Plan, the successor to the CGC Plan. After receiving pension payments for about eleven years, AEGON contacted Smith and informed him that it had been overpaying Smith monthly benefits and would be reducing his monthly benefits by roughly one-half. Moreover, until such time as the overpayments were repaid, a sum over $150,000, Smith would receive no payments. AEGON took this action on its own, without any outside approval and, apparently, without setting forth in any detail the reasons for the reduction.

Smith, upset by Aegon's sudden action, attempted unsuccessfully to resolve the matter through some administrative process. Then, he attempted to bring his claim against his prior employer, CGC, in a state court action. CGC removed the case to federal court where Judge Joseph McKinley determined that an ERISA preemption applied, and that Smith's claims should be dismissed, as his claims were against the AEGON Plan, not CGC. That decision is currently on appeal to the Sixth Circuit Court of Appeals.

In the interim and apparently at the directive of Judge McKinley, Smith filed this action to enforce the particular terms of the AEGON Plan, which he believes Defendant has disregarded. There seems to be no dispute that Defendant is the proper party against whom such a claim should be asserted. Ultimately, some court must decide whether Defendant's decision

to reduce benefits and collect overpayments should be upheld based on the administrative record or whether that decision was arbitrary and capricious. Presently, Defendant has moved for dismissal under Federal Rule of Civil Procedure 12(b)(6) for improper venue and to strike Plaintiff's jury request.

Looking to the Complaint, a court will grant a 12(b)(6) Motion to Dismiss if the Complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The factual allegations must support "a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Further, the Court can consider the AEGON Plan documents themselves to determine the sufficiency of the claims for dismissal without transforming the motion to a motion for summary judgment, because the Plaintiff refers to the documents in his Complaint and the actual plan itself is central to the Plaintiff's claim. *Greenberg v. Life Ins. Co. of Va.*, 177 F.3d 507, 514 (6th Cir. 1999).

II.

Defendant's argument is quite straightforward. The Plan contains a forum selection clause which requires any litigation involving the AEGON Plan to be brought in federal court in Cedar Rapids, Iowa, where the Plan is administered. No one contests the existence of a forum selection clause or its meaning.

This Court has previously reviewed the forum selection clause of the AEGON Plan and found it enforceable and reasonable. *Williams v. CIGNA Corp.*, 2010 WL 5147257, at *4-5 (W.D. Ky. Dec. 13, 2010).

This Court agrees in the present context. The Sixth Circuit has described the circumstances under which a forum selection clause may be unenforceable. *See Wong v. PartyGaming LTD.*, 589 F.3d 821 (6th Cir. 2009). The Plaintiff bears the burden of showing that the forum selection clause should not be enforced based on the following factors: "(1) whether the clause was obtained by fraud, duress, or other unconscionable means; (2) whether the designated forum would ineffectively or unfairly handle the suit; and (3) whether the designated forum would be so seriously inconvenient such that requiring the plaintiff to bring the suit there would be unjust." *Id.* at 828. Plaintiff has not argued that the clause was induced by fraud, that the Cedar Rapids federal court would ineffectively or unfairly handle the case, or that the inconvenience to Plaintiff is unjust or unreasonable. If this forum selection clause applies here, the Court has no doubt that it should be enforced.

III.

Plaintiff's most persuasive argument that the forum selection clause should not apply is that because Defendant added the venue provisions by amendment in 2007, its provisions are not applicable to Plaintiff's claim for benefits which accrued in the

year 2000. However, the law with respect to amendment of pension plans and the provisions of the AEGON Plan itself seem quite to the contrary.

First, in the Sixth Circuit, employers and benefit plans "'are generally free under ERISA, for any reason, at any time, to adopt, modify, or terminate welfare plans.' This rule applies equally to pension benefit plans." *Coomer v. Bethesda Hosp., Inc.*, 370 F.3d 499, 508 (6th Cir. 2004) (quoting *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995)). The Court can find no limitation upon this right, except to the extent a plan seeks to retroactively limit vested benefits. *Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) ("To vest benefits is to render them forever unalterable."). This ERISA anti-cutback rule only apples to accrued benefits. *Thornton v. Graphic Commc'ns Conference of the Int'l Bhd. of Teamsters Supplemental Ret. & Disability Fund*, 566 F.3d 597, 602 (6th Cir. 2009). The AEGON Plan defines an "accrued benefit" as "the Monthly Retirement Income, payable as a Life Annuity . . . " AEGON Plan, § 1.1, ECF 3:12-CV-00194-JHM, DN 1-2, p.3. Therefore, the employer and benefit plan are free to modify the pension benefit plan to the extent that it does not modify the monthly retirement income, which a forum selection clause, on its face, simply cannot do.

Second, the enforcement of the forum selection clause is also proper under the AEGON Plan itself. At this point, the Court makes no comment on the validity of Plaintiff's substantive complaint. However, ERISA establishes the "plan document rule", which

requires that "plans be administered, and benefits be paid, in accordance with plan documents," and therefore the terms of the AEGON Plan should govern where not in conflict with ERISA. *Egelhoff v. Egelhoff* ex rel. *Breiner*, 532 U.S. 141, 150 (2001); ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). In §11.1, the AEGON Plan reserves the right "without consent" of the Sponsoring Employer "to modify or amend, in whole or in part, any or all of the provisions of the Plan." AEGON Plan, at p.74. This section is limited by § 11.2 to the extent such changes might decrease accrued benefits. *Id.* Therefore, Defendant was free to amend the Plan to include the forum selection clause according to the Plan provisions.

Third, the AEGON Plan is consistent with general ERISA provisions. Plaintiff argues that the forum selection clause is unenforceable because it is contradictory to ERISA's broad venue provision allowing an ERISA action to be brought in a district court of the United States "in the district where the plan is administered, where the breach took place, and where a defendant resides or may be found." ERISA § 502(e)(2), 29 U.S.C. § 1132(e). By requiring that a claim under the AEGON Plan be brought in Cedar Rapids, where the Plan is administered and the Defendant resides, however, the forum selection clause at issue is consistent with ERISA's broad venue provision. ERISA's general "plan document rule" dictates that the forum selection clause govern, and that claims under the AEGON Plan be brought in the federal district court in Cedar Rapids, Iowa. Consequently,

the Plan's 2007 venue changes are valid under Sixth Circuit precedent, general ERISA law and the Plan itself.

The Court refrains from ruling on the motion to strike the jury request, because this motion is moot as a result of the outcome of the decision on the motion for dismissal.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the complaint is DISMISSED WITHOUT PREJUDICE due to the absence of proper venue.

This is a final order.

January 25, 2013 [SEAL]

/s/ John G. Heyburn
John G. Heyburn, II, Judge
United States District Court

cc: Counsel of Record