No. 14-1168

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

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

ERISA's venue provision states that an action "may be brought where a plan is administered, where the breach took place, or where a defendant resides or may be found." 29 U.S.C. § 1132(e)(2). In this case, the district court found as a matter of fact and law that the AEGON Companies Pension Plan ("Plan") is administered in Cedar Rapids, Iowa and that the Plan resides and may be found in Cedar Rapids, Iowa. The district court made no finding on where a fiduciary breach took place, because Smith did not argue that there was a fiduciary breach. Smith also made no argument that Kentucky was a venue permitted under ERISA § 502(e)(2), and the court dismissed "due to the absence of proper venue." The district court held that the Plan's forum selection clause, which requires litigation against the Plan to be in federal district court in Cedar Rapids, Iowa – where the Plan is administered, resides, and can be found – to be consistent with ERISA.

Smith did not appeal the district court's ruling that the Plan is administered, resides, and is found in Cedar Rapids, Iowa. In short, Smith did not appeal the district court's ruling that he had not chosen a proper venue under ERISA § 502(e)(2), and the court

COUNTERSTATEMENT OF QUESTION PRESENTED – Continued

of appeals expressly did not opine on that issue.[1] However, this issue is the basis on which the Petition is built:

> Whether ERISA's special venue provision, **and a plaintiff's choice of venue under that provision** may be abrogated by a more restrictive venue-selection clause in an ERISA plan.

No court found that Smith chose a venue permitted under ERISA. The Petition is predicated on an issue that Smith did not appeal and which the court of appeals did not review.

The court of appeals was asked to determine whether ERISA precludes forum selection clauses. In the first and only appellate ruling on this issue, the court held that ERISA does not preclude forum selection clauses. That holding is consistent with the vast majority of district court rulings on this specific issue and analogous rulings of this Court and the circuit courts.

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[1] "[W]e 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." *Smith v. Aegon Companies Pension Plan*, 769 F.3d 922, 929 (6th Cir. 2014).

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner is Roger L. Smith, who was the plaintiff/appellant. Respondent is the AEGON Companies Pension Plan, which was the defendant/appellee. Pursuant to Supreme Court Rule 29.6, Respondent states that it is not a corporation

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INTRODUCTION

Petitioner has not offered any "compelling reasons" in support of the Petition for a Writ of Certiorari, contrary to the requirements of Supreme Court Rule 10.

The appellate courts are not and cannot be irrevocably split on the question presented, because the ruling of the appellate court in the instant case is the only appellate ruling on the enforceability of an ERISA forum selection clause. At oral argument, counsel for the U.S. Department of Labor ("DOL") responded to the court's questioning on this point:

> COURT: There are district court cases. . . . and nothing out of the circuit court, right?
>
> DOL COUNSEL: Nothing out of the circuit court, your Honor. That's absolutely correct.[2]

The fact that the ruling at issue is the only federal appellate court ruling in the country to consider the enforceability of an ERISA plan forum selection provision is reason enough to deny review. Certainly, it cannot be said with confidence that another appellate court would reach a different result on the same or even similar facts. And, even if it could be said, then denial of the petition would be appropriate to

[2] The oral argument is found at http://www.ca6.uscourts.gov/internet/court_audio and the time of the cited colloquy is 12:37-13:00.

allow the issue to percolate in the other appellate courts.

This Court and the courts of appeals have consistently ruled that the presence and enforcement of a forum selection clause is consistent with statutes like ERISA that provide a federal cause of action and venue in particular federal courts, even though those same statutes (unlike ERISA) prohibit the waiver of any provision in those statutes.

This Court's rulings emphasize that the use of a forum selection clause is not a waiver of statutory substantive rights. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *F.D. Rich Co. v. Indus. Lumber Co.*, 417 U.S. 116, 125 (1974). In reliance on these rulings and this Court's recognition that arbitration clauses are "in effect, a specialized kind of forum-selection clause,"[3] the appellate courts have consistently upheld the validity of mandatory arbitration clauses in ERISA plans. Smith has ignored these rulings, but ignoring them will not make them go away. As the appellate court below ruled in the instant case, "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."[4] Smith attempts to fashion a circuit split by digging up old rulings about the Automobile Dealers' Day in Court Act and the Carmack

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[3] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

[4] *Smith*, 769 F.3d at 932.

Amendment to the Interstate Commerce Act, but they have nothing to do with the ERISA issue presented in the instant case.

Petitioner's assertion that this issue has "sharply divided" the district courts is fiction. In the 40 years since ERISA's enactment, the vast majority of courts have enforced ERISA plan forum selection clauses. In fact, there are only two district court rulings that ERISA forum selection provisions are inconsistent with ERISA's venue provision, and these two rulings have been repeatedly rejected by the district courts and also by the appellate court in the instant case.

Petitioner's unsupported assertion that ERISA forum selection clauses "will do untold damage" is contrary to the holdings of the court below and the holdings of the many district courts that forum selection clauses further ERISA's policies. "[L]imiting 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. . . . Forum selection clauses in ERISA plans promote ERISA's goal of uniformity of administration and reduce costs. . . ."[5]

This Court should decline petitioner's invitation to disturb the lower court's well-reasoned decision

[5] *Smith*, 769 F.3d at 931-32.

based on self-serving policy arguments that do not withstand even the mildest form of scrutiny.

STATEMENT OF THE CASE

The Plan is administered by the Plan's fiduciaries in Iowa; the Plan pays retirement benefits from Iowa to thousands of participants including Petitioner Smith. Smith claims that his Plan benefits were wrongfully reduced by the Plan's fiduciaries.

The basis for the determination to reduce Smith's benefit amount is described in a July 7, 2011 letter from the Retirement Plan Manager in Iowa to Smith. Smith invoked the Plan's appeal procedure in Iowa to challenge the calculation and reduction of his Plan benefits. The Plan Committee met in Iowa and reviewed and denied Smith's benefit appeal. In its denial letter, the Plan Committee explained the basis for the denial and again informed Smith (a) of his right to bring a lawsuit under ERISA if he disputed the adverse benefit determination and (b) that under the terms of the Plan any lawsuit relating to the Plan "must be brought in Federal District Court in Cedar Rapids, Iowa."

In response to the Plan Committee's denial of his appeal, Smith sued his former employer in state court in Kentucky ("*Smith I*") seeking the same benefits he is seeking in the instant case. That lawsuit was removed to federal district court and dismissed with

prejudice, because as a matter of fact and law, Smith had no viable claim against his former employer.[6]

Smith then filed the instant case against the Plan ("*Smith II*") in federal court in the Western District of Kentucky. The Plan filed a motion to dismiss, based on the Plan's forum selection clause. Smith filed a brief in opposition to dismissal. Smith argued that the Plan's forum selection clause is "incompatible" with the statement of Congressional policy to provide "ready access to the Federal Courts," 29 U.S.C. § 1001(b), despite the fact that the Plan's forum selection clause requires litigation in federal court.

In opposition to dismissal, Smith did not dispute that the Plan is administered and found in Iowa, and he did not present any facts or argument to support a finding that a Kentucky venue was proper under ERISA.[7] He made no showing that the Plan is administered, resides, or can be found anywhere but in Iowa or that there was a breach of fiduciary duty anywhere. By not presenting any argument in opposition

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[6] Smith appealed the dismissal of *Smith I*; the court of appeals affirmed the dismissal. *Smith v. Commonwealth Gen. Corp.*, 589 Fed. Appx. 738 (6th Cir. 2014).

[7] ERISA's venue provision does not provide for venue "where the plaintiff resides." If Congress had intended that, it could have said so. For example, 28 U.S.C. § 1402(a) permits an action to be brought in the judicial district "where the plaintiff resides." *See also* 28 U.S.C. § 1391(e)(1) ("in which . . . the plaintiff resides").

to these issues, Smith conceded these issues and did not preserve them for appeal.

The district court ruled that the Plan is administered, resides, and is found in Iowa, not Kentucky; the district court ruled that venue is not proper in Kentucky. The district court also found as a matter of fact that 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. The district court ruled that the Plan's forum selection clause was consistent with ERISA, reasonable, and enforceable against Smith. Accordingly, the court dismissed *Smith II* without prejudice to allow Smith to refile in Iowa. Smith moved for reconsideration. The district court denied his motion which the court found not to present "any substantially new arguments."

Smith then noticed his appeal to the Sixth Circuit. The U.S. Secretary of Labor filed an amicus curiae brief in support of Smith's appeal.

The appellate court held that the Plan's forum selection clause is consistent with ERISA and enforceable. The court rejected the Secretary of Labor's argument that forum selection clauses are contrary to ERISA. The court ruled that the Secretary's interpretation of ERISA – an interpretation which the Secretary has only presented in two amicus briefs, but on which the Secretary has never issued a rule, regulation, or opinion letter in the 40 years since ERISA was enacted – was not entitled to deference, was

unconvincing, and is inconsistent with the plain language used in ERISA and the weight of judicial authority.

The court ruled that the enforcement of a forum selection clause is consistent with the terms and policy rationales of ERISA. The court did not rule on whether Kentucky was a proper venue under ERISA, because that issue was not preserved for appeal. The court affirmed the dismissal of Smith's complaint.

REASONS FOR DENYING THE WRIT

I. REVIEW SHOULD BE DENIED BECAUSE THERE IS NO SPLIT IN THE CIRCUITS AND THE RULING BELOW IS CONSISTENT WITH THE RULINGS OF THIS COURT.

The appellate courts are not and cannot be irrevocably split on the issue presented, because the ruling of the appellate court in the instant case is the only appellate ruling on the enforceability of an ERISA forum selection clause. At oral argument, counsel for the U.S. Department of Labor ("DOL") responded to the court's questioning on this point:

> COURT: There are district court cases. . . . and nothing out of the circuit court, right?
>
> DOL COUNSEL: Nothing out of the circuit court, your Honor. That's absolutely correct.

The fact that the ruling at issue is the only federal appellate court ruling in the country to consider the enforceability of an ERISA Plan forum selection provision is reason enough to deny review. Certainly, it cannot be said with confidence that another court would reach a different result on the same or even similar facts. And, even if it could be said, then denial of the petition would be appropriate to allow the issue to percolate in the other circuits.

A forum section clause tells parties the geographic location where their dispute is to be heard. *See Carnival Cruise Lines v. Shute*, 499 U.S. 585, 588 (1991) (enforcing a forum selection clause requiring all disputes to be litigated in a court in the State of Florida). This Court has consistently ruled that the presence and enforcement of a forum selection clause is consistent with federal statutes that provide a federal cause of action and venue in particular federal courts, even though those same statutes prohibit the waiver of any provision in the statutes.[8]

This Court has consistently recognized forum selection clauses as legitimate and has required deference in their enforcement. *M/S Bremen v. Zapata*

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[8] *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 640 (1985) (Sherman Act); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) (Securities Act of 1933); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238 and 242 (1987) (Securities Exchange Act of 1934 and civil provisions of the Racketeer Influenced and Corrupt Organizations Act).

Off-Shore Co., 407 U.S. 1, 10, 12 (1972) ("[forum selection] clauses are prima facie valid" and "should be honored by the parties and enforced by the courts"). This presumption in favor of forum selection clauses extends to those clauses included in non-negotiated boilerplate contracts. *See Carnival Cruise Lines*, 499 U.S. at 595.

An arbitration clause is a forum selection clause that tells the parties not only the geographic location where their dispute is to be heard, but also tells the parties that their dispute will be resolved by an arbitrator and not by a judge. Thus, as this Court has recognized, arbitration clauses are "in effect, a **specialized kind of forum-selection clause**, that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (emphasis added).

This Court has repeatedly ruled that forum selection clauses which require arbitration of claims in a particular geographic location are consistent with federal laws that provide a federal cause of action and venue in particular federal courts, even though those same statutes prohibit the waiver of any provision in the statute. For example, this Court enforced a forum selection clause requiring arbitration in France of federal claims under the Securities Exchange Act of 1934 ("Exchange Act"), even though the Exchange Act provides a federal cause of action, provides for "exclusive jurisdiction" in U.S. courts, and provides that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this

chapter . . . shall be void." *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

Similarly, this Court reviewed the Miller Act provision that states: "Every suit instituted under this section **shall be brought** in . . . the United States District Court for any district in which the contract was to be performed and executed **and not elsewhere**. . . ." 40 U.S.C. § 270b(b) (emphasis added). The Court found that this is "**merely** a venue requirement" that could be waived. *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 125 (1974) (emphasis added). The Court emphasizes that the use of a forum selection clause is not a waiver of "substantive rights afforded by the statute. . . ." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

Petitioner has ignored these rulings, but ignoring them will not make them go away. As the appellate court below ruled in the instant case, "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."[9]

Petitioner has focused on *Boyd v. Grand Trunk Western R. Co.*, 338 U.S. 263 (1949). In *Boyd*, this Court ruled that the right to select a forum is a substantive right under § 6 of the Federal Employers' Liability Act ("FELA"), and a forum selection clause was void under § 5 of the FELA. In particular, FELA

[9] *Smith*, 769 F.3d at 932.

§ 5 states: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void." *See Boyd*, 338 U.S. at 265.[10] Any attempt to apply *Boyd* founders on the significant difference between the FELA voiding provision (FELA § 5) and ERISA's voiding provision (ERISA § 410). Unlike the broad voiding provision in FELA, ERISA's voiding provision is narrow. By its own terms, ERISA § 410 is expressly limited to part 4 of ERISA; part 4 does not contain ERISA's venue provision. This limitation on the scope of ERISA § 410 was discussed by the appellate court in the instant case.[11]

Aside from distinguishing *Boyd* on the difference between the statutory language in FELA § 5 and in ERISA § 410, the vitality of the ruling in *Boyd* is questionable. *Boyd* has been cited in only five subsequent Supreme Court cases, and in only one of those cases – *Wilko v. Swan*, 346 U.S. 427, 437 (1953) – did the Court rely on the holding in *Boyd*.

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[10] Unlike ERISA benefit actions, FELA actions are statutorily immune from removal to federal court. *See* 45 U.S.C. § 56 (1947 ed.); 28 U.S.C. § 1445(a); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987). Congress's unusual treatment of FELA claims would tend to indicate that an employee's choice of forum in such actions is to be treated as a matter of some importance.

[11] *See Smith*, 769 F.3d at 933 n.9.

In *Wilko*, this Court relied on *Boyd* to rule that a plaintiff's "right to select the judicial forum" under the Securities Act of 1933 cannot be waived by an agreement to arbitrate. 346 U.S. at 435-38. This is the approach the Petitioner wants the Court to follow. However, this Court subsequently rejected *Wilko*'s reasoning and expressly overruled the *Wilko* holding in *Rodriguez de Quijas v. Shearson/American Exp., Inc.,* 490 U.S. 477, 480-83 (1989).

Boyd's reach (if any) has been circumscribed by the later rulings by this Court that federal statutory enforcement and venue provisions that are in some cases materially indistinguishable from those found in FELA § 6 and ERISA § 502(e) do not preclude the waiver of the right to proceed in a judicial forum in the first instance or in a particular locale. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 29 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628 (1985).

Petitioner tries to find a conflict between the ruling below and this Court's ruling in *United States v. National City Lines, Inc.*, 334 U.S. 573 (1948) ("*National City I*"). In *National City I*, this Court ruled that a plaintiff's choice of forum under § 12 of the Clayton Act cannot be overridden by the judicial application of the doctrine of forum non conveniens. Within days of the *National City I* decision, Congress expressed its disagreement and passed 28 U.S.C. § 1404 to assure that the judicial doctrine of forum non conveniens could override a plaintiff's choice of forum. In *United States. v. National City Lines, Inc.*,

337 U.S. 78, 80 (1949) ("*National City II*"), this Court followed the intent of Congress (clarified by § 1404(a)) and affirmed the use of the doctrine of forum non conveniens to override plaintiff's choice of forum. Section 1404(a) and the doctrine of forum non conveniens have been held to apply to cases brought under "special venue" statutes. *See, e.g., Ex parte Collett*, 337 U.S. 55 (1949). *Cf. Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) ("the locality of a law suit – the place where judicial authority may be exercised – though defined by legislation relates to the convenience of litigants and as such is subject to their disposition").

Petitioner also relies on *Baltimore & O.R. Co. v. Kepner*, 314 U.S. 44 (1941), but Petitioner ignores the subsequent history of that case, too. *Kepner* is cited in the Revisor's Notes to 28 U.S.C. § 1404(a) as an example of the need for courts to be able to transfer cases. Without any basis for turning back the pages of the calendar, Petitioner would have this Court hearken back to the days of *National City I* and *Kepner*.

II. PETITIONER TRIES TO INVENT A SPLIT AMONG THE APPELLATE COURTS ON THE QUESTION PRESENTED.

In reliance on the rulings like *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, *F.D. Rich Co. v. Industrial Lumber Co.*, and *Gilmer v. Interstate/Johnson Lane Corp.*, the appellate courts (including

the Sixth Circuit) have consistently upheld the validity of mandatory arbitration clauses in ERISA plans. Based on the rulings of this Court, the courts of appeals have consistently ruled that Congress did not intend to prohibit arbitration of statutory ERISA claims. *See, e.g., Simon v. Pfizer Inc.*, 398 F.3d 765, 773 (6th Cir. 2005); *Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110, 1119 (3d Cir. 1993); *Bird v. Shearson Lehman/American Exp., Inc.*, 926 F.2d 116 (2d Cir. 1991), *cert. denied*, 501 U.S. 1251 (1991); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds*, 847 F.2d 475 (8th Cir. 1988).

As these cases show, the circuit courts – like this Court – have consistently enforced the specialized forum selection clauses that require not only arbitration, but arbitration in a specific geographic locale. These cases demonstrate that a forum selection clause which states both where a matter is to be decided and that it is to be decided by an arbitrator is consistent with statutes that contain venue provisions, require claims to be litigated in federal court, and prohibit the waiving of any provision in the statutes. *A fortiori*, a forum selection clause which only tells the geographic locale where a matter is to be decided cannot be inconsistent with a statutory venue provision. There is no reason to think that any circuit court would hesitate to enforce a forum selection clause that only dictated the specific locale.

Petitioner strains to manufacture a split among the circuits by citing cases that involve other, unrelated

statutes. Petitioner focuses on *Volkswagen Interamericana, SA v. Rohlsen*, 360 F.2d 437 (1st Cir. 1966), in which the court ruled that the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-25, did not countenance an agreement restricting litigation to the Mexican courts. Petitioner has overlooked the fact that twenty years later in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), this Court ruled that all of the claims at issue in that case could be arbitrated and that one of those claims had been brought under the Automobile Dealers' Day in Court Act. As discussed above, the ruling in the instant case is consistent with this Court's ruling in *Mitsubishi*, as well as this Court's similar rulings in *Gilmer, Rodriguez de Quijas*, and *Rich*. Therefore, the ruling in the instant case does not provide an appropriate platform for reviewing the validity (if any) of the First Circuit's 1966 pre-*Mitsubishi* ruling in *Volkswagen Interamericana, SA v. Rohlsen*.

Petitioner also points to the rulings in cases about the viability of forum selection clauses under the Carmack Amendment, which was first enacted in 1906 to modify the 1887 Interstate Commerce Act. *See Aluminum Products Distributors, Inc. v. Aaacon Auto Transport, Inc.*, 549 F.2d 1381 (10th Cir. 1977); *Aaacon Auto Transport, Inc. v. State Farm Mut. Auto. Ins. Co.,* 537 F.2d 648, 654 (2d Cir. 1976). In *Smallwood v. Allied Van Lines, Inc.,* 660 F.3d 1115, 1121-22 (9th Cir. 2011), the United States Court of Appeals for the Ninth Circuit ruled that it "need not determine the continuing validity of the *Aaacon* cases because

they considered an older version of Carmack and did not confront the current language" in the statute. *Smallwood*, 660 F.3d at 1132 n.8. Surely, the instant case involving the enforceability of an ERISA plan forum selection provision does not provide an appropriate setting for the Court to analyze the viability of forum selection clauses under the most recent iteration of the Carmack Amendment.

Petitioner cites *Transamerica Occidental Life Co. v. DiGregorio,* 811 F.2d 1249 (9th Cir. 1987) and *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520 (11th Cir. 1987), to argue that ERISA's venue provision cannot be overridden by a plan forum selection clause. In neither case was a forum selection clause at issue. In *Arnold*, the court was asked to "decide whether a fiduciary may invoke ERISA's liberal venue provision, when the fiduciary files a declaratory judgment action seeking to determine its liability for benefits claimed by a former employee." The appellate court ruled that the declaratory judgment action did not lie under ERISA, so the fiduciary could not avail itself of ERISA's liberal venue provision. In *DiGregorio*, the appellate court affirmed the use of the abstention doctrine to decline federal jurisdiction, in favor of state court litigation.

III. PETITIONER PRETENDS THERE IS "CONFUSION" AMONG THE DISTRICT COURTS ON THE QUESTION PRESENTED.

Simply put, Petitioner did not find a conflict among the circuit courts, so he tried to invent one. Similarly, Petitioner pretends that there is "confusion" among the district courts on the issue of ERISA plan forum selection provisions. Without any "confusion," the vast majority of district courts have found that ERISA plan forum selection clauses that only dictate the geographic locale for litigation are consistent with ERISA and should be enforced. *See, e.g., Klotz v. Xerox Corp.*, 519 F. Supp. 2d 430, 435-36 (S.D.N.Y. 2007). *See also Scaglione v. Pepsi-Cola Metropolitan Bottling Co.*, 884 F. Supp. 2d 642, 643 (N.D. Ohio 2012); *Rodriguez v. PepsiCo Long Term Disability Plan*, 716 F. Supp. 2d 855, 860 (N.D. Cal. 2010); *Sneed v. Wellmark Blue Cross & Blue Shield*, 2008 WL 1929985, at *3 (E.D. Tenn. Apr. 30, 2008) (collecting cases); *Gipson v. Wells Fargo & Co.*, 563 F. Supp. 2d 149 (D.D.C. 2008) (enforcing plan's forum selection clause); *Schoemann ex rel. Schoemann v. Excellus Health Plan*, 447 F. Supp. 2d 1000, 1007 (D. Minn. 2006) (enforcing plan forum selection provision to prevent a participant from cherry-picking the plan documents for his own convenience); *Rogal v. Skilstaf, Inc.*, 446 F. Supp. 2d 334, 338 (E.D. Pa. 2006) (enforcing forum selection clause in ERISA action); *Bernikow v. Xerox Corp. Long-Term Disability Income Plan*, 2006 WL 2536590 (C.D. Cal. 2006).

The courts recognize that there is no express ERISA provision that prohibits a forum selection clause. To the contrary, like the court of appeals in the instant case, the district court in *Laasko v. Xerox Corp.*, 566 F. Supp. 2d 1018, 1023 (C.D. Cal. 2008), ruled that enforcement of a forum selection clause

> actually advances one of the purposes of ERISA by "bringing a measure of uniformity in an area where decisions under the same set of facts may differ from state to state." The forum selection clause contained in the [plan] allows one federal court to oversee the administration of the [plan] and gain special familiarity with the [plan d]ocument, thereby advancing ERISA's goal of establishing a uniform administrative scheme.

Similarly, "[l]imiting 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." *Rodriguez*, 716 F. Supp. 2d at 861.[12]

Petitioner argues that this Court should follow the Illinois district court ruling in *Coleman v.*

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[12] Petitioner cites *Mezyk v. U.S. Bank Pension Plan*, 2009 WL 3853878 (S.D. Ill. 2009), where the court chose not to enforce the forum selection provision, solely because it was not "reasonably communicated to the plaintiffs," not as a result of a finding that forum selection provisions are prohibited by ERISA. The implication of the court's ruling is that if the participant in that case had been aware of the provision, the court would have enforced it.

Supervalu, Inc. Short Term Disability Program, 920 F. Supp. 2d 901 (N.D. Ill. 2013), which is admittedly an outlier.[13] In *Coleman*, an Illinois district court acknowledged that its refusal to enforce a plan forum selection clause was contrary to the "substantial majority" of decisions and that "the general consensus [is] that Congress would have needed to speak much more clearly to prevent private parties from agreeing to a particular venue ex ante." *Coleman*, 920 F. Supp. 2d at 907.

In *Coleman*, the court erroneously states that other courts have not analyzed plan forum selection clauses under ERISA § 404(a)(1)(D), which provides:

> [A] fiduciary shall discharge his duties . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments **are consistent with** the provisions of [ERISA].

(Emphasis added). In the majority of the cases enforcing ERISA plan forum selection provisions (discussed above), the courts asked whether the plan forum

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[13] Petitioner also asks this Court to follow the ruling in *Nicolas v. MCI Health & Welfare Plan No. 501*, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006), where the court ruled that a plan forum selection clause was contrary to ERISA. The only court that has followed *Nicolas* is the court in *Coleman*. Every other court to consider *Nicolas* has rejected the holding, including the appellate court in the instant case. *See, e.g., Haughton v. Plan Adm'r of Xerox Corp. Retirement Income Guarantee Plan*, 2 F. Supp. 3d 928, 934 n.3 (W.D. La. 2014) (rejecting *Coleman* and *Nicolas*).

selection clause is "consistent with" ERISA. That language – "consistent with" – only appears in ERISA § 404(a)(1)(D). The *Coleman* court simply ignored the fact that the analyses used by the courts in these cases is a § 404(a)(1)(D) analysis, whether or not that particular section is referenced in the holdings.

Just as the ruling in *Coleman* was rejected by the appellate court in the instant case, the ruling in *Coleman* was also rejected by another court within the same district. *See Mroch v. Sedgwick Claims Mgmt. Servs.*, 2014 U.S. Dist. LEXIS 171140 (N.D. Ill. 2014). *See also Price v. PBG Hourly Pension Plan*, 2013 U.S. Dist. LEXIS 54436 (E.D. Mich. Apr. 15, 2013) (rejecting *Coleman*).

Courts within the Sixth Circuit and other circuits have repeatedly found that forum selection clauses in ERISA plans actually promote ERISA's goal of uniformity of administration and reduction of costs, both to the benefit of all participants and beneficiaries. *See, e.g., Scaglione v. Pepsi-Cola Metropolitan Bottling Co.*, 884 F. Supp. 2d 642, 643 (N.D. Ohio 2012); *Conte v. Ascension Health*, 2011 WL 4506623 (E.D. Mich. Sept. 28, 2011); *Laasko v. Xerox Corp.*, 566 F. Supp. 2d 1018 (C.D. Cal. 2008); *Klotz v. Xerox Corp.*, 519 F. Supp. 2d 430 (S.D.N.Y.2007); *Central States, Southeast and Southwest Areas Pension Fund v. O'Brien & Nye Cartage Co.*, 2007 WL 625430, at *3 (N.D. Ill. Feb. 22, 2007) (the purpose of forum selection clauses "is obviously to allow for the Trustees to

better exercise efficient administration of the Funds by reducing costs associated with litigating claims").[14]

As the appellate court in the instant case and a number of district courts have concluded, it simply makes little sense to view the enforcement schemes of ERISA and similar federal statutes as manifesting a public policy that permits a plaintiff to waive his or her right to proceed in the first instance in any judicial forum at all, but precludes a waiver of the decidedly more limited right to select a specific federal judicial forum for that same proceeding. *See Smith,* 769 F.3d at 932-33; *Haughton v. Plan Adm'r of Xerox Corp. Retirement*, 2 F. Supp. 3d 928, 934-35 (W.D. La. 2014); *Williams v. CIGNA Corp.*, 2010 WL 5147257 at *4 (W.D. Ky. 2010); *Sneed v. Wellmark Blue Cross & Blue Shield*, 2008 WL 1929985, at *2 (E.D. Tenn. Apr. 30, 2008); *Klotz v. Xerox Corp.*, 519 F. Supp. 2d at 435-36.

If there were confusion among the district courts, that would be a reason for this Court to deny, rather than to grant the Petition. Any alleged "confusion"

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[14] Petitioner also cites *Trustees of Wash. State Plumbing & Pipefitting Indus. Pension Plan v. Tremont Partners*, 2012 WL 3537792 (S.D.N.Y. Aug. 16, 2012), but that was a ruling under ERISA § 502(e)(1) – ERISA's subject matter jurisdiction provision. Because of "the exclusive jurisdiction clause" in ERISA § 502(e)(1), the court declined to enforce a provision in an investment management agreement that required ERISA plan trustees to litigate ERISA fiduciary breach claims in the Cayman Islands. ERISA jurisdiction does not lie outside the United States.

among district courts should be resolved first at the appellate court level. *See* Supreme Court Rule 10.

IV. PETITIONER'S ASSERTION THAT THE SECRETARY OF LABOR'S LITIGATION POSITION IS ENTITLED TO DEFERENCE IS CONTRARY TO RULINGS OF THIS COURT.

In the 40 years since the passage of ERISA, the Secretary has not issued a single regulation or even an opinion letter on the use of forum selection clauses. If the Secretary of Labor had chosen "to adopt a . . . regulation, courts would examine that determination with appropriate deference. The Secretary has not chosen that course." *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 831 (2003).

The Secretary's interpretation of ERISA § 502(e) appears only in an amicus brief in this case, and in one prior amicus brief. Based on the rulings of this Court, the appellate court held that the Secretary's interpretation was not entitled to *Chevron* deference, because this Court ruled that *Chevron* deference is only triggered when an agency is acting with the force of law. *See United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

In this case, the Secretary's interpretation was not made with the force of law. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of

law – do not warrant *Chevron*-style deference."); *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.").

The court in the instant case also ruled that the Secretary's amicus ERISA interpretations were not entitled to *Skidmore* deference, because 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.

> [U]nlike *Skidmore* and *Kasten*, the only indication here that the agency has adopted this particular interpretation of ERISA is the amicus briefs themselves. . . . [T]he 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.

Smith, 769 F.3d at 929.

The courts have no obligation to show deference to the Secretary's litigation positions. The issue is not deference. The issue is whether the Secretary's position – like anyone else's litigation position – is convincing or not. For example, most recently, in *US Airways, Inc. v. McCutchen*, 569 U.S. ___, 133 S. Ct. 1537, 1547 (2013), this Court rejected the Secretary's litigation position that there is a policy exception to

the ERISA plan document rule in ERISA § 404(a)(1)(D), the ERISA section at issue in this case. *See also CIGNA Corp. v. Amara*, 563 U.S. ___, 131 S. Ct. 1866 (2011) (rejecting the Secretary's litigation position on the plan document rule in ERISA § 404).

Rather than analyze the case law with which he disagrees, the Secretary waves his hand and writes that the cases are "wrongly decided." By failing to analyze the cases that are not helpful to his argument, the Secretary demonstrated to the appellate court in this case that his analysis of the statute was not well considered and his litigation position was not convincing, let alone entitled to any deference.

V. THE APPELLATE COURT'S RULING IS CONSISTENT WITH THIS COURT'S PRIOR RULINGS, IS CONSISTENT WITH ERISA'S CORE PURPOSES, AND IS CORRECT.

ERISA "induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Conkright v. Frommert,* 559 U.S. 506, 517 (2010) (quoting *Rush Prudential HMO, Inc. v. Moran,* 536 U.S. 355, 379 (2002) (brackets in *Conkright*)); *see also Varity Corp. v. Howe,* 516 U.S. 489, 497 (1996) (recognizing "Congress' desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage

employers from offering [ERISA] plans in the first place.").

ERISA requires an "employee benefit plan [to] be established and maintained pursuant to a written instrument," *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 555 U.S. 285, 300 (2009). This Court repeatedly stresses the controlling nature of the "plan document rule" under ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). "The plan, in short, is at the center of ERISA." *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 612 (2013) (*citing US Airways, Inc. v. McCutchen*, 138 S. Ct. 1537, 1548 (2013)). Once an ERISA plan is established, the courts promote the administrator's duty to assure that the plan is "maintained pursuant to [that] written instrument." *See, e.g., Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. at 612.

The Plan's terms – including the Plan's forum selection clause – are controlling, consistent with this Court's rulings. The Plan's forum selection clause encourages uniformity in the decisions interpreting that Plan, which furthers ERISA's goal of enabling employers to establish a uniform administrative scheme.

Petitioner asserts that ERISA plan forum selection clauses are "ubiquitous." If this assertion were true, this Court should await consideration by other appellate courts of the issue of enforcement of ERISA plan forum selection clauses. There is simply no compelling reason for this Court to review the only

appellate ruling on the enforceability of an ERISA forum selection clause.

CONCLUSION

Petitioner has not offered any compelling reasons why this Court should grant the petition. Therefore, for the reasons stated above, Respondent requests that this Court deny the Petition and decline the invitation to disturb the appellate court's well-reasoned decision.

Respectfully submitted,

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