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

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE

PETITIONER'S REPLY

In its brief opposing certiorari, Aegon advances a flurry of reasons why review should be denied. It argues that, because the split on the question presented is broader than just ERISA, and "involve[s] other, unrelated statutes," review should be denied. Opp. 14-15. It also contends that the key cases from this Court are old, and so should be ignored. And, although Aegon agrees that the lower courts are irrevocably split on the question, it considers this a reason for denial—explicitly encouraging the Court to let the confusion fester.

Far from justifying denial, however, *every one* of these arguments actually explains why this Court should grant review. Aegon is right that the disagreement over the correct rule governing a defendant's effort to defeat a plaintiff's choice of venue spans the U.S. Code—from ERISA to Title VII to interstate shipping laws—but the far-reaching impact is all the more reason for this Court's review. The same goes for Aegon's claim that there is no reason to "hearken back to the days" of this Court's still-controlling case law. Opp. 13. These cases may be "old," but they have never been overruled and are still followed today—except by the Sixth Circuit in this case. That alone is reason enough for a grant here. And, given the interlocutory nature of the issue, the fact that lower courts are all over the map on this question weighs in favor of review, not against it. Very few appellate courts ever see this frequently recurring issue because it often (and easily) evades appellate review. The Court should take this opportunity to weigh in now.

In the absence of any serious challenge to the reasons why review is appropriate, Aegon spends the bulk of its brief looking for distractions. It argues that this Court's arbitration case law is somehow relevant, or that, in the very least, generic common-law forum-selection decisions are useful guides. None of this has anything to do with this case. The Sixth Circuit was wrong to permit a defendant to thwart a plaintiff's choice of forum under a duly-enacted statutory special venue provision, and Aegon has advanced no compelling reason why this Court should stay its hand. The petition should be granted.

I. The Decision Below Conflicts with the Decisions of Multiple Other Courts of Appeal.

Aegon does not dispute that the courts of appeal have come to conflicting conclusions about whether—and under what circumstances—a plaintiff's choice of venue may be defeated when that choice is explicitly protected by a statutory venue provision. Instead, it says the conflict should be ignored because it goes beyond just ERISA. Opp. 15. But that is a reason to grant review, not deny it.[1]

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[1] Aegon's odd "Counterstatement of Question Presented" badly mischaracterizes what happened in this case. *See* Opp. i. Contrary to Aegon's claim that the district court "rul[ed] that [Mr. Smith] had not chosen a proper venue under ERISA § 502(e)(2)," the court did *not* hold that his chosen venue, Kentucky, was invalid under 29 U.S.C. § 1132(e)(2). *Id.*; Pet. App. 29-35. Rather, the district court dismissed the case on the sole basis raised by Aegon below: that its plan-imposed venue-selection clause required any ERISA claim to be litigated in Iowa *notwithstanding* a plaintiff's choice of a different (and proper) venue under § 1132(e)(2). *Id.* That is the ruling Mr.

(*Footnote continued on next page*)

As we explained in our petition, many important federal laws contain special venue provisions like ERISA's: FELA, Title VII, interstate shipping law, the antitrust laws—the list goes on. *See* Pet. 10 n.2. Under all of these statutes, a plaintiff's choice of venue has, for decades, controlled where the litigation takes place. Most courts, including this one, have held that when a plaintiff selects venue under one of these provisions, a defendant may not override that choice. *See* Pet. 10, 15. The Sixth Circuit here, however, disregarded this rule—it explicitly held that a defendant may unilaterally override a plaintiff's choice and force litigation into the farthest corners of the country. A ruling from this Court on that conclusion would serve the interests of those parties who litigate under not just ERISA, but all these federal laws.

Forced to concede that this issue cuts across multiple federal statutory regimes, Aegon makes a series of technical arguments for why some of the relevant decisions should be overlooked. For instance, it says that the Court should disregard the Second and Tenth Circuit Carmack Amendment cases because the statute has since been revised. Opp. 15-16. But the Ninth Circuit reviewed the current version of the statute and reached the same

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Smith appealed to the Sixth Circuit, and that is the question Mr. Smith presents here for review.

Aegon also argues, without citing any cases, that § 1132(e)(2) "does not provide for venue 'where the plaintiff resides.'" Opp. 5 n.7. That is wrong. Court after court has held that a plan participant's decision to sue where he lives *is* a proper choice of venue under § 1132(e)(2). *See, e.g.*, Pet. 26 (citing cases).

conclusion—a point Aegon says nothing about. *See Smallwood v. Allied Van Lines, Inc.*, 660 F.3d 1115, 1121-22 (9th Cir. 2011) (holding that the Carmack Amendment "guarantee[s] . . . 'the right of the shipper to sue the carrier in a convenient forum of the shipper's choice'" and that such right is "inalienable" (quoting *Aacon Auto Transp., Inc. v. State Farm Mut. Auto. Ins. Co.*, 537 F.2d 648, 654 (2d Cir. 1976)). And Aegon claims that the First Circuit's decision in *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437 (1st Cir. 1966), was somehow impliedly overruled twenty years later by *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). But *Mitsubishi Motors* was a case about the enforceability of an arbitration clause—a type of forum-selection clause made enforceable by the Federal Arbitration Act (FAA). There is no similar law that mandates the enforcement of venue-selection clauses. *See infra*, at 8-9. And anyway, *Mitsubishi Motors* explicitly declined to address any conflict with the Automobile Dealers' Day in Court Act—the Act at issue in *Volkswagen*—because the issue had been raised for the first time before the Supreme Court. *See Mitsubishi*, 473 U.S. at 624 n.11.

As for ERISA, Aegon dismisses as non-binding the Ninth and Eleventh Circuits' view that ERISA "unquestionably" prevents ERISA plans from "forc[ing]" a beneficiary "to litigate his benefit plan rights" where the plan is headquartered, far from the plaintiff's home or job. *See* Opp. 16. But it's hard to imagine a clearer statement of ERISA's rule—or a clearer disagreement with the Sixth Circuit here, which held that ERISA plans may force participants to litigate *anywhere* the plan chooses, "even if the venue" the plan selects is not one of "the three

options" provided by ERISA. *Compare Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1525 n.7 (11th Cir. 1987), *with* Pet. App. 19-20.

In short, the split here is both clear and far-reaching. The Sixth Circuit has staked out an extreme position that conflicts with decisions of multiple circuits across numerous federal statutory regimes. This Court should therefore grant review.

II. Aegon's Plea To Disregard this Court's Longstanding Precedent Counsels in Favor of Review.

1. In our petition, we explained that this Court has consistently (and squarely) refused to allow a defendant to defeat a plaintiff's choice of venue under a special venue provision. Pet. 11-12 (citing *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 266 (1949) and *United States v. Nat'l City Lines*, 334 U.S. 573, 580 (1948)). Aegon's response: Why "hearken back to the days" of these old cases? Opp. 13. But the age of this precedent only strengthens the case for review. Lower courts may not refuse to apply Supreme Court case law simply because it is old. *Cf. Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) (the "antiquity" of a precedent weighs in favor of its continued application).

Nor does this Court silently overrule its own precedent, as Aegon seems to suggest. According to Aegon, *Boyd* is no longer good law because it was cited in *Wilko v. Swan*, 346 U.S. 427 (1953), and *Wilko* was overruled—on other grounds—by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). This Russian nesting-doll theory of overruling is, to be blunt, not how it works.

See Hohn v. United States, 524 U.S. 236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them."). *Boyd* continues to be controlling law—except, apparently, in the Sixth Circuit, which simply ignored it in this case. *See, e.g.*, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (explaining that, under *Boyd*, venue-selection clauses that contravene a statute are unenforceable); *Harrington v. Atl. Sounding Co.*, 602 F.3d 113, 120-21 (2d Cir. 2010) (explaining *Boyd* and distinguishing it from cases that are governed by the FAA); *Aaacon*, 537 F.2d at 654-55 (following *Boyd*). Aegon's plea for this Court to follow the Sixth Circuit's lead is all the more reason review should be granted.

2. Aegon also half-heartedly suggests that this Court's cases can be side stepped because, while they involve nearly identical special venue provisions, they don't involve ERISA's. But other courts have not found this distinction relevant—the Second Circuit, for example, has specifically said that *Boyd* is "not restricted to FELA cases but has general application." *Id.* at 654-55. And this Court itself has applied FELA's rule to other contexts. *See National City Lines*, 334 U.S. at 597-98 (1948) (citing *Baltimore & O.R. Co. v. Kepner*, 314 U.S. 44 (1941), a FELA case, for the proposition that "whenever Congress . . . has invested complaining litigants with a right of choice among [venues]," courts may not defeat that choice).

Even assuming *Boyd* applies broadly, Aegon throws up an ERISA-specific objection, contending that "any attempt to apply *Boyd* to this case founders on the significant difference between the FELA

voiding provision" and § 410 of ERISA, which prohibits limitations on fiduciary liability. Opp. 11. But Aegon entirely ignores 29 U.S.C. § 1104, which provides that plan documents are only enforceable "insofar as [they] are consistent with" subchapters I and III of the statute—subchapters that do, in fact, include the special venue provision. Aegon says nothing about this statutory command—a point we made clearly in our petition. The result under this provision is the same as that under FELA: A defendant cannot impose a venue-selection clause that would conflict with the statute's venue provision.

3. Instead of tackling the key cases directly, Aegon devotes the lion's share of its opposition to misdirection. It focuses on generic forum-selection cases and this Court's canon of arbitration decisions. Opp. 8-12. None of this is relevant.

First, this Court's general venue-selection cases, *M/S Bremen* and *Carnival Cruise*, did not involve a statutory special venue provision. The plaintiffs in these cases brought claims for "breach of contract," *M/S Bremen*, 407 U.S. at 4, and "negligence," *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 588 (1991). In the absence of a statute granting a plaintiff the right to choose venue, there is little doubt that venue-selection clauses "are prima facie valid" and "should be . . . enforced by the courts." Opp. 9 (quoting *M/S Bremen*, 407 U.S. at 10, 12). But this says nothing about what rule governs the enforceability of a venue-selection clause when (like

here) it would defeat a plaintiff's choice of venue specified by statute.[2]

Second, Aegon's effort to spin the Sixth Circuit's rule as merely derivative of this Court's arbitration decisions is misguided. *See* Opp. 8-12. Arbitration agreements are enforceable, even in the face of a statutory venue provision, because a separate federal statute—the FAA—makes them so. *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (the FAA imposes a "duty to enforce arbitration agreements" even where federal statutory claims are at stake). In fact, every case Aegon cites for the proposition that a forum-selection clause may be enforced despite a statutory venue provision was an arbitration case. *See* Opp. 8. And every case enforced the arbitration clause *because of* the FAA.[3]

But there is no similar statute for venue-selection clauses. So while it may be true that courts "have consistently upheld the validity of mandatory

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[2] Aegon suggests that *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116 (1974), establishes that statutory venue provisions "could be waived." Opp. 10. Not even close. *F.D. Rich* simply analyzed whether a plaintiff's choice of venue was proper under the Miller Act's venue provision and concluded that it was. 417 U.S. at 124-26 & 125 n.11.

[3] *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (concluding the plaintiff had not shown that Congress intended to exempt the ADEA from the FAA); *Roderiguez de Quijas*, 490 U.S. at 483 ("stress[ing] the strong language of the Arbitration Act"); *McMahon*, 482 U.S. at 225-27, 238; *Mitsubishi*, 473 U.S. at 628, 640 ("holding this agreement to arbitrate enforceable in accord with the explicit provisions of the Arbitration Act" (internal quotations omitted)).

arbitration clauses in ERISA cases," it is also irrelevant. Opp. 2. By statute, Congress has given ERISA plaintiffs the right to choose the venue in which their claims are litigated. Unlike in the arbitration context, there is no countervailing statute here that would empower plans to defeat this via venue-selection clause. *See Harrington*, 602 F.3d at 120-21.

That's why Aegon's argument about the passage of the *forum non conveniens* statute, 28 U.S.C. § 1404(a), only demonstrates our point. *See* Opp. 12-13. Before Congress passed § 1404(a), a defendant could not defeat a plaintiff's choice of venue under a special venue provision by seeking transfer on the basis of *forum non conveniens*. Congress, this Court held, had created no exception to the special venue statutes for convenience. *National City Lines*, 334 U.S. at 580. But, as it did for arbitration agreements via the FAA, Congress passed a statute for *forum non conveniens* to create such an exception—§ 1404(a). There is no such statute for venue-selection clauses. These clauses, therefore, may not override Congress's command that ERISA plaintiffs may litigate in the venue of their choice.

III. Aegon Offers No Persuasive Reason Why this Court Should Wait To Decide this Issue.

A. Another Opportunity to Review this Important Question Presented Is Unlikely To Arise Anytime Soon.

As with Aegon's other proffered reasons against a grant of certiorari, its discussion of the divergent holdings of the district courts, in fact, cuts in favor of

review. Aegon claims that the confusion among the district courts is "pretend[ ]," but its own lengthy discussion detailing the different approaches various district courts have taken proves that claim is wrong. Opp. 17, 18-21. Aegon even expressly "admit[s]" that district courts have reached conflicting conclusions—including conclusions that conflict with the Sixth Circuit here—regarding the enforceability of venue-selection clauses in ERISA plans. Nevertheless, Aegon urges this Court to let those disagreements fester. *See* Opp. 19.

The Court should step in now. As we explained in the Petition, this issue comes up almost exclusively in motions to transfer. Pet. 31-33. But because orders on motions to transfer are interlocutory, they almost always avoid appellate scrutiny, meaning opportunities for review are few and far between. Pet 31-33. There are dozens and dozens of district court decisions addressing the issue yet passing few of them are ever appealed. The rarity of appellate review, coupled with the disagreement among the district courts, the disagreement within the Sixth Circuit panel itself, and the conflict amongst the Circuits counsels in *favor* of review now, not later.

B. Whether a Plan-Imposed Venue Clause Can Trump a Plaintiff's Choice of Venue Is a Critical Issue.

Aegon spends considerable time arguing that no deference should be given to the Department of Labor's view that plan-imposed venue clauses cannot override a plaintiff's choice of venue under ERISA. Opp. 22-24. But regardless of what deference is given to the agency, its consistent and strongly-held view on this issue highlights its importance.

Venue "is often a vitally important matter" because a lawsuit "might well not be pursued, or might not be as successful, in a significantly less convenient forum." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 39-40 (1988) (Scalia, J., dissenting). This is especially true for ERISA plan participants, who "are often the most vulnerable individuals and the least likely to have the financial or other wherewithal to litigate in a distant forum." Labor Br. 14. Other than to argue that it's not worthy of deference, Aegon has no response to the agency's expert view that the practical effect of plan-imposed venue clauses 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").

Given the agency's position and the policy implications of the Sixth Circuit's decision to ignore decades of case law, review is warranted now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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