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 SUPPLEMENTAL BRIEF

MICHAEL D. GRABHORN
GRABHORN LAW OFFICE PLLC
2525 Nelson Miller Parkway, Suite 107
Louisville, KY 40223

MATTHEW W.H. WESSLER
Counsel of Record
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
matt@guptawessler.com

LEAH M. NICHOLLS
JENNIFER BENNETT
PUBLIC JUSTICE, P.C.
1825 K Street NW
Suite 200
Washington, DC 20006

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative History

PETITIONER'S SUPPLEMENTAL BRIEF

In its invitation brief, the United States agrees that the Sixth Circuit "erred" in enforcing the Plan's venue-selection clause; it agrees that the "enforceability of such clauses in ERISA plans is a question of substantial importance"; it agrees that "their use has proliferated in recent years"; and it agrees that the issue almost always evades appellate review because "most district courts" enforce venue-selection clauses through unappealable "transfer orders"—a trend that will "continue" in the wake of *Atlantic Marine Construction Co. v. U.S. District Court*, 134 S. Ct. 568 (2013). Nevertheless, the government recommends denying the petition to allow further "percolation." That conclusion does not follow.

From the start, this case has presented a clean and straightforward vehicle for resolving a question of considerable importance for beneficiaries and plan fiduciaries alike. The Sixth Circuit's decision is at odds with precedent from both this Court and other circuits, and, even though venue-selection clauses are now ubiquitous, *Atlantic Marine* will make it all but impossible for more appellate courts to weigh in. The government, like Aegon, has advanced no compelling reason why this Court should stay its hand. The petition should be granted.

I. The decision below conflicts with multiple decisions from this Court and other courts of appeals.

A. The government argues that, although this Court's case law "support[s]" overruling the Sixth Circuit's decision, certiorari is nonetheless unwarranted because the conflict between the decision below and this Court's precedent is not "square." U.S. Br. 16. This is just

hairsplitting. The conflict is certainly clear: This Court has repeatedly held that where Congress enacts a statute protecting a plaintiff's right to choose venue, it is "utterly inconsistent with the purpose of Congress"—and therefore impermissible—"to deprive [a] plaintiff of" the venue he has chosen. *United States v. Nat'l City Lines*, 334 U.S. 573, 588 (1948); *see Boyd v. Grand Trunk W. R. Co.*, 338 U.S. 263, 266 (1949); *Baltimore & O. R. Co. v. Kepner*, 314 U.S. 44, 54 (1941). Here, Congress passed a statute protecting ERISA plaintiffs' right to choose venue, and yet the Sixth Circuit deprived Mr. Smith of his choice. That is a clear conflict.

The government's attempt to trivialize this conflict focuses entirely on inconsequential differences. For example, it notes that *Boyd* "turned in part on" a FELA provision voiding any contractual clause that would exempt a common carrier from FELA liability. U.S. Br. 16. This particular FELA provision, the government observes, has more "comprehensive phraseology" than the ERISA analogue, which prohibits an ERISA fiduciary from enforcing any term in an ERISA plan that contradicts the statute. *Id.* (quotation marks omitted). True enough. But the relative comprehensiveness of the provisions' "phraseology" is irrelevant. Both provisions do the same thing and serve the same purpose: They prohibit defendants from contracting around statutory mandates, including the statutes' special-venue provisions. *See* Pet. 13–14; Reply 6–7. And it is this prohibition—the same in ERISA as it is in FELA—that *Boyd* relied on. *See Boyd*, 338 U.S. at 265.

The same goes for the government's effort to distinguish *National City Lines*. In that case, the government notes that the Court relied on statutory interpretation *and* legislative history to conclude that

the Clayton Act's special-venue provision "left no room" for a court "to deprive a plaintiff of the venue choice conferred by statute." U.S. Br. 16 (quotation marks omitted). But, as we explained in our petition, not only is the relevant language of ERISA's special-venue provision *exactly the same* as that of the Clayton Act, its legislative history leads inexorably to the same conclusion: Congress intended "'to remove jurisdictional and procedural obstacles'"—such as narrow venue restrictions—"'which in the past appear[ed] to have hampered'" plaintiffs' ability to enforce the statute. Pet. 12–13, 23 (quoting H.R. Rep. No. 93-533, at 17 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4655). Indeed, the government stresses that very aspect of ERISA's legislative history in concluding that ERISA plans' venue-selection clauses are unenforceable. U.S. Br. 8.

And, though the government claims this Court's cases do not reflect "a general rule" that special-venue provisions must always be enforced, its lone exception is a case in which a statutory venue provision was overridden by another statute. U.S. Br. 16–17. Of course one statute can be overridden by another. The question here is whether a special-venue provision may be overridden in the absence of a countervailing statute. And the unanimous answer in this Court's cases is no. *See* Pet. 10–12; *Kepner*, 314 U.S. at 54 (explaining that "[a] privilege of venue granted by the legislative body" may be overridden only by "legislative" action). The decision below contradicts those cases, and therefore warrants review.

B. The government's hairsplitting continues apace when it argues that there is no "square conflict" between the Sixth Circuit here and other circuits. Although it acknowledges that, unlike the Sixth Circuit, other

circuits have refused to permit defendants to override statutory special-venue provisions, *see* U.S. Br. 17–19, the government argues that none specifically address a venue-selection clause in an ERISA plan. U.S. Br. 17. But that means the split is *broader* than just ERISA—a reason *for* review, not against it. Reply 1.

Nor are the government's specific reasons for ignoring other circuits' case law any more convincing. *First*, the government argues that this Court should disregard the First Circuit's opinion in *Volkswagen* because that case involved the Automobile Dealers' Day in Court Act, the purpose of which was to grant car dealers "'certain rights against a manufacturer independent of the terms of the [franchise] agreement.'" U.S. Br. 17 (quoting *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437, 439 (1st Cir. 1966)). But ERISA's role is not materially different: It protects the rights of plan beneficiaries, independent of the terms of an ERISA plan. *See* 29 U.S.C. § 1104(a)(1)(D) (prohibiting the enforcement of plan documents that are inconsistent with ERISA). Like the venue-selection clause in *Volkswagen*, Aegon's venue-selection clause requires suit to be brought in a venue that is "practically inaccessible," *Volkswagen*, 360 F.2d at 439. *See* Pet. 30–31. The Sixth Circuit's conclusion that such a clause is enforceable—despite a statute that says otherwise—clearly conflicts with the First Circuit's decision that it is not.

Second, the government argues that the Carmack Amendment cases are irrelevant here because they relied on ostensibly "Carmack-specific rationale[s]": that the Carmack Amendment prohibits "certain carriers from contracting around the statute's requirements" and that the Amendment was intended to protect a shipper's "right to sue in a convenient forum." U.S. Br. 18. But

those rationales are not, in fact, Carmack-specific. As explained above, like the Carmack Amendment, ERISA also prohibits parties (in this case, plan fiduciaries) from contracting around its requirements. And like Carmack, the purpose of ERISA's special venue provision is to ensure that plaintiffs can bring suit in a convenient forum.

Equally unconvincing is the government's attempt to minimize the disagreement between the decision below and the Ninth and Eleventh Circuits, which hold that ERISA "unquestionably" prevents plans from "forc[ing]" a beneficiary "to litigate his benefit plan rights" at the company's headquarters, instead of where the beneficiary lives and worked, *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1525 n.7 (11th Cir. 1987); *see Transamerica Occidental Life Ins. Co. v. DiGregorio*, 811 F.2d 1249, 1250 (9th Cir. 1987). U.S. Br. 19. These cases leave no doubt that there is a disagreement with the Sixth Circuit's opinion here that an ERISA plan can force its beneficiaries to bring suit at its headquarters—or anywhere else the plan chooses.

In short, the split 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. There is no reason to delay review of this issue.

The United States offers no good reason for postponing review of the question whether a venue-selection clause in an ERISA plan that forces beneficiaries to litigate their benefits claims in far-flung jurisdictions violates ERISA. In fact, its request to let this question "percolat[e]," U.S. Br. 20., does not even

square with its own views: that the issue is one of "substantial practical importance," *id.* at 7, rarely results in appellate review, and is being decided wrongly in most jurisdictions. Those facts are exactly why review should be granted now.

On the question of importance, there should be no doubt. Throughout its brief, the United States emphasizes what we have said from the beginning: that permitting plan beneficiaries to bring suit in the venues provided for in ERISA—including where the beneficiaries live or work—is an important practical measure Congress designed to protect plan benefits. The United States explains that ERISA's venue-selection provision prevents plan beneficiaries from having "to seek out the wrongdoing company in a distant forum." U.S. Br. 10 (quoting *National City Lines*, 334 U.S. at 582 n.17). Exactly so. And this safeguard, as the government emphasizes, is crucial for "the most vulnerable individuals in our society"—retirees, the disabled, and the sick—who often face insurmountable challenges if forced to litigate far from their home. U.S. Br. 11 (quoting Pet. App. 25 (Clay, J., dissenting)).

The United States is also right that the issue rarely reaches the appellate courts but wrong to downplay that fact. For starters, the government accepts (as it must) that virtually all decisions over the enforceability of venue-selection clauses in ERISA plans come in the form of interlocutory transfer orders, which are not immediately appealable. U.S. Br. 21; *see* Pet. 32. Nevertheless, the government identifies two (and only two) cases that have been appealed, *see* U.S. Br. 21, and suggests that this should persuade the Court to stay its hand here. But these cases are of no help. First, in neither case did the court *actually decide* the issue—

meaning it could not have ultimately reached this Court. And second, both cases predate this Court's decision in *Atlantic Marine*—which held that courts should enforce a venue-selection clause through transfer rather than dismissal. *See* 134 S. Ct. at 575, 579–80. The United States speculates that, despite *Atlantic Marine*, some district courts might still dismiss in the course of enforcing a venue-selection clause in an ERISA plan, but in no case has that happened, and why would it? So far, to our knowledge, *every* post-*Atlantic Marine* case involving this issue has been transferred—not dismissed.[1] *Atlantic Marine*, in other words, means even less chance at review, not more.

And, given *Atlantic Marine*'s impact here, the United States is forced into even more far-fetched speculation. It suggests that someone could seek mandamus or a 28 U.S.C. § 1292(b) certification of a transfer decision to obtain appellate review. U.S. Br. 22. But the odds of mandamus or a § 1292(b) certification on this, or any other issue, are vanishingly small—the United States points to no case in which a party successfully sought § 1292(b) certification for an issue even remotely similar to this one and can cite only one example, from the 1970s, of mandamus in an ERISA case. We looked, too, and found nothing else. *See* Pet. 32

[1] *See Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp., Inc.*, 99 F. Supp. 3d 1110 (C.D. Cal. 2015); *Pinney v. Aegon Cos. Pension Plan*, 2015 WL 1456082 (N.D. Iowa Mar. 30, 2015); *Turner v. Sedgwick Claims Mgmt. Servs., Inc.*, 2015 WL 225495 (N.D. Ala. Jan. 16, 2015); *Loeffelholz v. Ascension Health, Inc.*, 34 F. Supp. 3d 1187 (M.D. Fla. 2014); *Haughton v. Plan Adm'r of Xerox Corp. Retirement Income Guarantee Plan*, 2 F. Supp. 3d 928 (W.D. La. 2014); *Mroch v. Sedgwick Claims Mgmt. Servs., Inc.*, 2014 WL 7005003 (N.D. Ill. Dec. 10, 2014); *Musson Brothers, Inc. v. Central States*, 2014 WL 1356611 (N.D. Ill. Apr. 2, 2014).

n.3. That is because the number of § 1292(b) certifications by appellate courts is tiny and because, as this Court has made clear, the bar for granting the "drastic and extraordinary remedy" of mandamus is extremely high. *Cheney v. U.S. District Court*, 542 U.S. 367, 380 (2004) (internal quotations omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL D. GRABHORN
GRABHORN LAW OFFICE PLLC
2525 Nelson Miller Parkway Suite 107
Louisville, KY 40223

MATTHEW W.H. WESSLER
Counsel of Record
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
matt@guptawessler.com

LEAH M. NICHOLLS
JENNIFER BENNETT
PUBLIC JUSTICE, P.C.
1825 K Street NW
Suite 200
Washington, DC 20006

Counsel for Petitioner