Michelle C. Yau
Mary J. Bortscheller
Daniel R. Sutter
Jamie L. Bowers
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW, Suite 500
Washington, DC 20005
(202) 408-4600
myau@cohenmilstein.com
mbortscheller@cohenmilstein.com
dsutter@cohenmilstein.com
jbowers@cohenmilstein.com

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

Yvonne Becker,

Plaintiff,

vs.

Wells Fargo & Co.; Employee Benefit Review Committee; Ronald L. Sargent; Wayne M. Hewett; Donald M. James; Maria R. Morris; Wells Fargo Bank, National; and Galliard Capital Management,

Defendants.

Case No: 4:20-cv-1803-JST

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

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I. INTRODUCTION

The case concerns Defendants' mismanagement of the Wells Fargo & Co. 401(k) Plan ("Plan"). Plaintiff sued under the Employee Retirement Income Security Act ("ERISA") in the judicial district where she lives, where she worked for Wells Fargo & Co. for 26 years, and where Wells Fargo & Co. is currently headquartered. Defendants now seek to enforce a forum selection clause forcing Plaintiff's case to a distant court in Minnesota, a state in which Plaintiff never lived or worked. However, the forum selection clause Defendants rely on conflicts with ERISA's liberal venue provision by eliminating two of the three venues expressly given to ERISA plaintiffs by statute. Defendants' decision to insert a clause limiting a nationwide putative class action to a single handpicked venue is therefore invalid.

ERISA grants employee benefit plan participants the affirmative right to bring suit in any of three venues: (1) where the plan is administered; (2) where the breach took place; or (3) where any defendant resides or may be found. 29 U.S.C. § 1132(e)(2). But the Plan's forum selection clause purports to strip away Plaintiff's right to sue in the federal court that is most readily accessible to both her and Wells Fargo & Co., and instead limit her to the District of Minnesota. Contrary to Defendants' arguments, ERISA invalidates any provisions or terms of the plan document that are inconsistent with the statutory framework and goals of ERISA. 29 U.S.C. § 1104(a)(1)(D).[1] Thus, as the U.S. Solicitor General and the Department of Labor have repeatedly explained, forum selection clauses like Wells Fargo's are invalid and unenforceable because they eliminate two of the three venues where ERISA permits participants to bring suit under 29 U.S.C. § 1132(e)(2).

Additionally, the forum selection clause should not be enforced because doing so would contravene strong public policies of allowing benefit plan participants like Plaintiff "ready access" to federal courts. 29 U.S.C. § 1001(b) (ERISA's policy declaration). This goal is accomplished by allowing participants to sue in the judicial district that is easily accessible to them. California also has codified a similar policy in their Labor Code prohibiting a California employer from requiring a

[1] The Plan document is a written document required by ERISA that describes the terms of the Plan and a participant's rights, benefits, and obligations within the Plan. 29 U.S.C. § 1102 ("Every employee benefit plan shall be established and maintained pursuant to a written instrument.").

California employee to litigate a claim arising in California in an outside forum. The forum selection clause violates these policies; accordingly, it is unreasonable and should not be enforced. *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 15 (1972); *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004).

Furthermore, even assuming the forum selection clause is valid (it is not), the Court should exercise its discretion to decline to enforce it because it would split up Plaintiff's claims in this action and create inefficiencies. The plan document containing the forum selection clause is a contract only between Plaintiff and her employer, Wells Fargo & Co. The other Defendants are not parties to this contract—meaning the terms of the contract only apply to the claim between Plaintiff and Wells Fargo & Co. Enforcing the forum selection clause would split Plaintiffs' claims between judicial districts, creating inefficiency, expense, and burden on the parties.

Finally, Defendants (the moving party) have not met their substantial burden of demonstrating that transfer is warranted under the factors enumerated in 28 U.S.C. § 1404. Two of the parties are located in this District. Plaintiff (whose choice of forum is afforded deference under ERISA) worked for Wells Fargo & Co. in this District and all agreements related to her employment are based here. Wells Fargo is also headquartered in this District. The parties' contacts are strongest within this forum, and the potential witnesses Defendants identify that manage or administer the Plan are scattered around the country (not concentrated in Minnesota), rendering travel necessary no matter the forum. Indeed, Defendants have not shown how litigation in this forum as opposed to Minnesota would even slightly inconvenience Defendants (especially given that Wells Fargo & Company is ***headquartered*** here). For all of these reasons, the Court should decline to enforce the forum selection clause and deny Defendants' Motion to Transfer the Venue pursuant to 28 U.S.C. § 1404(a).

II. FACTUAL BACKGROUND

A. Parties

The Plaintiff in this action is Yvonne Becker, a participant in the Wells Fargo & Company 401(k) Plan. Complaint ("Compl.") ¶¶ 12-17, ECF No. 1. She currently lives in Martinez, California, and she worked for Wells Fargo & Company in Concord, California for 26 years. *Id.* ¶¶ 12-13.

Defendant Wells Fargo & Co. ("Wells Fargo" or "Wells Fargo & Co.") is "a Delaware

company with its principal place of business located at 420 Montgomery Street, San Francisco, California 94163." *Id.* ¶ 21. It provides "diversified financial services, including wholesale banking, mortgage banking, consumer finance, equipment leasing, agricultural finance, commercial finance, securities brokerage and investment banking, computer and data processing services, trust services, investment advisory services, mortgage-backed securities servicing and venture capital investment." *Id*. Wells Fargo is the sponsor of the Wells Fargo & Company 401(k) Plan. *Id.* ¶ 22.

The Employee Benefit Review Committee ("Committee") is a named fiduciary with the authority to manage the assets of the Plan. Compl. ¶ 24. Plaintiff does not yet know the identities of the members of the Committee and has named them as John and Jane Does. *Id.* ¶ 25. The Committee Defendants select and monitor the investments in the Plan. *Id.* ¶¶ 26-27. Although Plaintiff does not yet know the individual members of the Committee, Defendants represent that there are seven members who are located in six different states—one is located in Minnesota, and the other six are located in Iowa, Missouri, New York, North Carolina, and Texas. Declaration of Gretchen Lennon ("Lennon Decl."), ECF No. 41-1.

Defendant Wells Fargo Bank, National ("Wells Fargo Bank") is the sponsor and trustee to a series of collective investment trusts ("CITs") that Wells Fargo & Co. placed into the Plan. Compl. ¶¶ 43-45. "The Committee Defendants authorized Wells Fargo Bank to have exclusive management, with respect to the acquisition, investment, reinvestment, holding, or disposition of any securities or other property at any time held by it and constituting part of any Plan's assets within the CITs." *Id.* ¶ 45. As part of this exclusive management authority, Wells Fargo & Co. incorporated the Declaration of Trust—which elucidates the powers of Wells Fargo Bank—into the Plan. *See id.* ¶¶ 46-48.

Defendant Galliard Capital Management is "a registered investment advisor and a wholly owned subsidiary" of Wells Fargo and Wells Fargo Bank. Compl. ¶ 54. Galliard is a fiduciary of the Plan and has "authority to manage and invest the Plan's assets that are held in the Wells Fargo Stable Value Fund." *Id.* ¶ 56.[2]

[2] Defendant Human Resources Committee of the Board of Directors is also named as a Defendant, along with individual members of the Board. Compl. ¶¶ 31-42. Based on representations from Defendants that the Board did not appoint members of the Employee Benefit Review Committee during the Class Period, nor did the Board members have any other fiduciary functions related to the

B. Plaintiff's Claims

Congress passed ERISA because of its concern that retirement plans "are abused by those responsible for their management who manipulate them for their own purposes or make poor investments with them." 3 Leg. Hist. 4811; 120 Cong. Rec. 29957 (1974); *see* 29 U.S.C. § 1001(a). For this reason, ERISA broadly prohibits self-dealing by fiduciaries of plans, and those who provide services to plan fiduciaries, through a reticulated statutory regime. Plaintiff alleges that Defendants engaged in self-dealing to benefit themselves rather than the Plan participants. Specifically, Defendants' conflicts permeated their fiduciary choices: they opted to include newly created target-date collective investment trusts ("CITs") as Plan investment options despite the CITs' lack of performance history, Compl. ¶¶ 78-97, added the Wells Fargo Fargo/Causeway International Value Fund to the Plan shortly after its creation to seed the fund despite a lack of performance history, *id.* ¶¶ 98-119, retained the Wells Fargo Treasury Money Market Fund in the Plan despite continued poor performance and high fees, *id.* ¶¶ 120-30, and retained the struggling Wells Fargo Growth Fund in the Plan despite ongoing poor performance and other investors pulling their investment, *id.* ¶¶ 131-48.

Based on these allegations, Plaintiff brings four claims for violation of ERISA. Counts II and III are against the Wells Fargo Committee Defendants, Wells Fargo Bank, and Galliard Capital Management for engaging in prohibited transactions in violation of ERISA. *Id.* ¶¶ 191-202, 203-13. Count I is a claim against the Wells Fargo Committee Defendants for breach of their fiduciary duties to participants to prudently and loyally select and monitor investments for the Plan. Compl. ¶¶ 180-90. And Count V is against Wells Fargo & Co. for engaging in prohibited transactions in violation of

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Plan, the parties stipulated to the dismissal of the Board. Stipulation to Dismiss Def. Human Res. Comm. Without Prejudice, ECF No. 39; Order Granting Stipulation to Dismiss Def. Human Res. Comm. Without Prejudice, ECF No. 40. The dismissal is without prejudice, but for purposes of this motion, they are not part of the analysis of whether the action should be transferred.

ERISA. *Id.* ¶¶ 226-39.[3] To remedy these violations of ERISA, Plaintiff seeks restoration of monetary losses resulting from Defendants' breaches, disgorgement of all ill-gotten gains, a declaration that Defendants breached their fiduciary duties, and additional relief. Compl. at Prayer for Relief.

C. Wells Fargo 401(k) Plan

Defendants selected and retained investments for the Wells Fargo 401(k) Plan, which is an "employee pension benefit plan" within the meaning of ERISA, 29 U.S.C. §1002(2)(A). Compl. ¶ 59. The Plan is a defined contribution plan that provides retirement income to Wells Fargo & Co. employees throughout the United States. Wells Fargo & Co. is the sponsor of the Plan and headquartered in this District. Compl. ¶ 22. The Plan also contains the following forum selection clause:

> "[a]ll controversies, disputes, and claims arising hereunder shall be submitted to the United States District Court for the District of Minnesota, except as otherwise provided in the Trust Agreement."

Plan Document at § 1.4, ECF No. 41-2. The Plan currently has 344,287 participants, Compl. ¶ 172, and Wells Fargo & Co. currently employs about 262,800 individuals.[4] The greatest percentage of those employees work in California (39,000), followed by North Carolina (35,000), Minnesota (18,000), Iowa (15,000) and New York (4,600).[5]

III. ARGUMENT

A. The Forum Selection Clause is Invalid and Not Enforceable.

The forum selection clause limiting venue to the District of Minnesota conflicts with ERISA's

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[3] Count IV is brought against the Board Defendants for failure to monitor and remove Plan fiduciaries who breached their ERISA duties. Compl. ¶¶ 214-25. It is currently voluntarily dismissed without prejudice pursuant to the parties' stipulation dismissing the Human Resources Committee Board of Directors. ECF Nos. 39, 40.

[4] *See* Kathleen Pender, "Wells Fargo's HQ is San Francisco. Its new CEO will run it from New York", *San Francisco Chronicle* (Sept. 27, 2019),https://webcache.googleusercontent.com/search?q=cache:tegpF2w96QsJ:https://www.sfchronicle.com/business/article/Wells-Fargo-s-new-CEO-will-run-the-SF-bank-from-14473535.php+&cd=19&hl=en&ct=clnk&gl=us.

[5] *Id.*

liberal venue provision and is thus invalidated under ERISA's statutory framework that prohibits plan terms contrary to the statute. The clause also contravenes ERISA's strong policy affording participants their choice of venue to bring suit and California's policy against requiring residents to litigate California disputes in outside states. Accordingly, this Court should either deem the forum selection clause invalid or decline to enforce it and allow this action to remain here.

(1) The forum selection clause conflicts with ERISA's venue provision and is invalid under 29 U.S.C. § 1104(a)(1)(D).

When enacting ERISA, Congress expressly stated in its "declaration of policy" that it sought to grant participants in ERISA plans "ready access to Federal courts" to protect their rights under the statute. 29 U.S.C. § 1001(b). ERISA's legislative history shows that Congress intended to clear procedural obstacles that had previously "hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants."[6] ERISA's purpose is not just to provide "access to the federal courts;" instead, its goal was to provide "ready access" to the federal courts.[7]

To ensure this broad judicial access, Congress included a flexible venue provision that allows participants and beneficiaries to bring suits in ***any*** of the following venues:

> 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(e)(2). This access to multiple venues is a right given to participants rather than plan sponsors. *See Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1525 (11th Cir. 1987); *Varsic v. U.S. Dist. Court for Central Dist. of California*, 607 F.2d 245, 248 (9th Cir. 1979).

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[6] Christine P. Bartholomew & James A. Wooten, *The Venue Shuffle: Forum Selection Clauses and ERISA*, 66 UCLA L. Rev. 862, 882 (2019) (citing S. Rep. No. 93–127, at 35 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4871) (attached as Exhibit 1).

[7] *See Robertson v. United States Dist. Court for the Eastern Dist. of Pennsylvania*, No.18-1341, 2019 WL 1874230 (U.S.), at 11 (Apr. 23, 2019) ("'Ready access,' as used by Congress in its declaration of policy, was intended 'in the sense of being 'immediately available or at hand: that can be had or used at once.'"(citing *Dumont v. Pepsico, Inc.*, 192 F. Supp. 3d 209, 220 (D. Me. 2016) (citation omitted))).

The Plan's forum selection clause undermines ERISA's purpose of providing Plaintiff (and other Plan participants) a choice of venue, including this District where Plaintiff and thousands of other participants reside. 29 U.S.C. § 1132(e)(2). Because the Plan's forum selection clause eliminates two of the three places where ERISA authorizes Plaintiff to sue, it is not "consistent with the provisions of [ERISA subchapter I]" and is thus invalidated. 29 U.S.C. § 1104(a)(1)(D); *Coleman v. Supervalu, Inc. Short Term Disability Program*, 920 F. Supp. 2d 901, 906 (N.D. Ill. 2013) (venue provision is an affirmative right ERISA confers on participants); *cf. Boyd v. Grand Trunk Western R. Co.*, 338 U.S. 263, 266 (1949) (right of plaintiff to choose any forum enumerated by FELA was "substantial right").

Although the Ninth Circuit has not directly ruled on whether a forum selection clause that conflicts with ERISA's venue provision is invalid, it has ruled that contractual provisions that eliminate access to venues permitted by statute are invalid. In *Smallwood v. Allied Van Lines, Inc.*, 660 F.3d 1115 (9th Cir. 2011), the Ninth Circuit addressed a contractual forum provision that restricted venues specified in an amendment to the Interstate Commerce Act. The Interstate Commerce Act provided that "[a] civil action ... may be brought ... in a district court of the United States ... in a judicial district ... through which the defendant carrier operates" or "in the judicial district in which such loss or damage is alleged to have occurred." 49 U.S.C. § 14706(d)(1) & 2. The shipping contract at issue in *Smallwood* included a requirement for foreign arbitration of any dispute, despite the statute giving the shippers the "right [...] to sue the carrier in a convenient forum of the shipper's choice." 660 F.3d at 1121 (citing *Aacon Auto Transp., Inc. v. State Farm Mut. Auto. Ins. Co.*, 537 F.2d 648, 654 (2d Cir. 1976)).

The Ninth Circuit affirmed the district court's refusal to enforce the foreign arbitration clause, noting that entities subject to the Interstate Commerce Act were "prohibited from contracting around [the statute]." *Smallwood*, 660 F.3d at 1121. The Ninth Circuit found that the foreign arbitration clause in the contract "plainly contravenes [the statute's] directive that Smallwood have recourse in the enumerated venues unless he agrees to arbitrate elsewhere after the dispute arises," and that the shipper could "not be forced to select a forum at the time of contracting." *Id.* at 1122; *see also Boyd*, 338 U.S. at 266 (declining to enforce a forum selection clause in a FELA action where FELA contained a venue provision enumerating particular forums where plaintiffs could sue and the Supreme Court determined

that "[t]he right to select the forum granted in [FELA's venue provision] is a substantial right.").[8]

The conflict here is identical—while ERISA provides a participant the right to bring suit in any of three judicial districts, the Plan's forum selection clause purports to limit a plaintiff's choice of venue to solely the District of Minnesota. Like the contractual provision in *Smallwood*, the forum selection clause "contract[s] around [the statute]," 660 F.3d at 1121, and "contravenes [the statute's] directive that [plaintiff] have recourse in the enumerated venues[.]" *Id.* at 1122; *see also Boyd*, 338 U.S. at 265 (invalidating contract as void that conflicted with FELA's venue provision). Accordingly, here too the restrictive forum selection clause is invalid.[9]

In the ERISA context, the Ninth Circuit has also recognized the "liberal Congressional intent embodied in section 1132(e)(2)" and the hardship that ensues for participants to sue outside of their judicial district. *Varsic v. U.S. Dist. Court for Central Dist. of California*, 607 F.2d 245, 252 (9th Cir. 1979). Although *Varsic* did not involve a forum selection clause, the Ninth Circuit reversed an order transferring an ERISA action from the Central District of California, where the plaintiff lived and worked, to the Southern District of New York. Based on "the severe prejudice that Varsic would suffer as a result of the district court's transfer order" and its conclusion that Congress "clearly struck the balance in favor of liberal venue[,]" the Ninth Circuit granted Varsic's mandamus petition and reversed the district court's order transferring Varsic's ERISA action to New York. *Id.* at 248, 252.

The U.S. Solicitor General and the Department of Labor ("DOL")[10] have consistently taken

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[8] *Smallwood* was neither briefed by the parties nor addressed by the court in *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. 2019).

[9] The Plan's forum selection clause is not only in conflict with ERISA, but also with the Declaration of Trust ("DOT") that governs the assets invested in the CITs. *See* Declaration of Trust (attached as Exhibit 2). All investors in the CITs have an undivided interest in the assets of the trust. *See* 29 C.F.R. § 2510.3-101(h)(1)(ii). An undivided interest bestows each investor in the trust the same rights regarding the assets as all other investors in the trust. But the forum selection clause violates the requirement that the investors have an undivided interest—the Declaration of Trust does not restrict the CIT investors' ability to bring suit regarding their assets in any venue, but the Plan participants that invest in the CITs can only sue regarding this investment in the District of Minnesota. *See* Plan Document § 1.4, ECF No. 41-2. Accordingly, the forum restriction in the Plan is further invalid because it conflicts not only with ERISA, but also with the Declaration of Trust and limits the rights of the Plan participants as compared to the rights of all other investors in the CIT.

[10] The DOL (and specifically the "Employee Benefits Security Administration" within DOL) is the agency that "administers and enforces the provisions of Title I of the Employee Retirement Income Security Act." *See* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-

the position that a forum selection clause purporting to eliminate ERISA's enumerated venues is invalid. The Secretary of Labor filed in support of plaintiff's position that the forum selection clause in an ERISA plan was invalid in *Smith v. Aegon Co. Pension Plan*, 769 F.3d 922 (6th Cir. 2014), arguing that "Congress intended that the venue provision for ERISA claimants be broad so as to advance their claims" and "forum selection clauses in ERISA plans that purport to eliminate proper statutory venues are inconsistent with ERISA and its protective purposes." Br. for the Secretary of Labor as Amicus Curiae, *Smith v. Aegon Co. Pension Plan*, No. 13-5492, 2013 WL 4401190 at *11, 15 (6th Cir. Aug. 12, 2013). The Solicitor General then reiterated that position in a *certiorari*-stage brief requested by the Supreme Court. Br. of U.S. Solicitor General 8-15, *Smith v. Aegon Co. Pension Plan*, No. 14-1168 (U.S. 2015).[11] The DOL also filed in support of the plaintiff in *In re Mathias*, 867 F.3d 727 (7th Cir. 2017), stating that an ERISA plan "cannot avoid that which is dictated by the terms of ERISA," and that "ERISA's codified policy grants plaintiffs a choice of venue, a policy choice that cannot be abrogated by a contractual plan provision purporting to limit that right." Br. for the Secretary of Labor as Amicus Curiae, *In re Mathias*, No. 16-3808, 2016 WL 7212256 at *5, 8-9 (7th Cir. Dec. 8, 2016). The Secretary of Labor again filed in support of a writ of mandamus challenging an order enforcing a forum selection clause in an ERISA plan in *In re Clause*, No. 16-cv-2607 (8th Cir. 2016), arguing that the forum selection clause was "inconsistent" with ERISA's affirmative grant of a choice of venues to participants and was thus invalid. Br. for the Secretary of Labor as Amicus Curiae at 11, *In re Clause*, No. 16-cv-2067 (attached as Exhibit 3).

Defendants cite two circuit court decisions[12] and various district court decisions deeming forum selection clauses valid. Defendants' Br. in Support of Motion to Transfer ("Mot.") at 9-10, ECF No. 41 (citing *Rapp v. Henkel of Am.*, No. 18-cv-1128, 2018 WL 6307904, at *4 (C.D. Cal. Oct. 3, 2018), among other cases). But courts have not been uniform in enforcing forum selection clauses in

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manual-full ("Description of Employee Benefits Security Administration").

[11] *Available at* https://www.scotusblog.com/wp-content/uploads/2015/11/14-1168-Smith-Invitation-Brief-FINAL.pdf.

[12] As discussed *infra* page 23, both circuit court decisions—*In re Mathias*, 867 F.3d 727, 734-37 (7th. Cir. 2017), *Smith v. Aegon Co. Pension Plan*, 769 F.3d 922, 934-36 (6th Cir. 2014)—included strong dissents from judges that would have deemed the forum selection clause at issue invalid.

ERISA plans—as Defendants acknowledge, numerous courts have held these restrictions on forum invalid. *See Dumont v. PepsiCo, Inc.*, 192 F. Supp. 3d 209 (D. Me. 2016); *Harris v. BP Corp. N. Am. Inc.*, No. 15 C 10299, 2016 WL 8193539 (N.D. Ill. July 08, 2016); *Coleman*, 920 F. Supp. 2d at 906–09; *Nicolas v. MCI Health & Welfare Plan No. 501*, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006). Further, the Ninth and Eleventh Circuit have opined that the "ready access to the Federal courts" provided for in ERISA provides "nationwide service of process [...] to remove a possible procedural obstacle to having all parties before the court." *Varsic*, 607 F.2d at 248; *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1525 (11th Cir. 1987).

As Senator Javits stated, "service of process, venue, and jurisdictional requirements compound even further the difficulty facing individual employees who might want to institute a suit to protect their rights under present law . . . . [ERISA] is specifically designed to remedy these defects, as well as to provide additional protections to plan participants." 116 Cong. Rec. 7279 (1970). The Court should follow this reasoning and decline to enforce the forum selection clause, which is also consistent with the Ninth Circuit's position in *Smallwood* rejecting a contract that limited venues provided for a plaintiff by statute.

(2) Because the forum selection clause contravenes ERISA's clearly articulated public policy, it is unenforceable.

The Supreme Court and Ninth Circuit have repeatedly recognized that forum selection clauses "should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *M/S Bremen*, 407 U.S. at 15; *Murphy*, 362 F.3d at 1140 (9th Cir. 2004). Here, ERISA's plain text confers on plaintiff-participants a choice of venues in which to file an ERISA claim. 29 U.S.C. § 1132(e). Congress stated in ERISA's text that a "policy" of ERISA is to "protect . . . the interests of participants . . . by providing . . . ready access to the Federal courts." 29 U.S.C. § 1001(b); *see also Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984) (the "underlying purposes of ERISA are to protect the interests of participants in employee benefit plans," which includes "effective access to federal courts."). As discussed *supra*, part of the reasoning behind ERISA's policy of ready access to federal courts was the clear procedural obstacles that "hampered effective enforcement of fiduciary

responsibilities under state law or recovery of benefits due to participants." S. Rep. No. 93–127, at 35 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4871; *see also Varsic*, 607 F.2d at 248.

Here, Wells Fargo's forum selection clause undermines the policy Congress set forth in 29 U.S.C § 1001(b), by resurrecting an obstacle that Congress eliminated when it gave ERISA participants seeking to enforce their rights a choice of venue. Because ERISA embodies a "strong" statutorily-declared "public policy" for providing participants ready access to federal courts, including this District, Wells Fargo's forum selection clause, which directly conflicts with ERISA's stated policy, is unenforceable. *Smith*, 769 F.3d at 934 (Clay, J., dissenting) (quoting *M/S Bremen*, 407 U.S. at 15).

Predating *Bremen*, the Supreme Court invalidated a forum selection agreement as contrary to the policy of the governing statute that the plaintiff choose the venue. *Boyd*, 338 U.S. at 265. *Boyd* involved a forum-selection agreement in an action brought under the Federal Employers Liability Act ("FELA"), which contains its own venue provision. 338 U.S. at 265. The venue provision in section 6 of FELA states, "[u]nder this Act an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. § 56. Section 5 of FELA, 45 U.S.C. § 55, states, "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created to this chapter, shall to that extent be void . . . ." Reading these provisions together, the Supreme Court found that the "petitioner's right to bring the suit in any eligible forum [under section 6 of FELA] is a right of sufficient substantiality" to be protected by section 5 of FELA, which voids any contract or agreement that serves to purposefully or intentionally exempt the employer from any liability. *Boyd*, 338 U.S. at 265. The Court therefore held that "contracts limiting the choice of venue are void as conflicting with [FELA]" because they "would thwart" FELA's "express purpose" by "sanction[ing] defeat of that right [to select the forum]." *Boyd*, 338 U.S. at 265-66.

Here too, the forum selection clause in the Plan "thwarts" ERISA's purpose of allowing participants "ready access to federal courts" by taking away Plaintiff's right to sue in the district where she lives, the Northern District of California. *See Dumont*, 192 F. Supp. 3d at 219-20; *Varsic*, 607 F.2d

at 247. In *Dumont*, the district court found a similar forum selection clause in an ERISA plan prohibited the plaintiff from suing in the district where he lives, the most "ready" federal court. *Id.* The court acknowledged the contrary authority, but systematically refuted those decisions' arguments, explaining that enforcing the clause would violate ERISA and Supreme Court precedent. *Id.* at 215-16, 220-22. The court stated that the plaintiff was not able to negotiate the plan or approve the forum selection clause, and that the court could not conclude that plaintiff agreed to the forum selection clause. *Id.* at 214-16. The district court declined to apply a presumption of validity and ultimately declined to enforce the forum selection clause as "unreasonable because it contravenes a strong public policy." *Id.* at 221; *see also Smallwood*, 660 F.3d at 1121 (stating that the Interstate Commerce Act gives shippers the right to sue in a convenient forum and invalidated a portion of the contract dictating venue elsewhere); *Boyd*, 338 U.S. at 265. The same is true here—as Defendants point out in their declaration, the forum selection clause has been in the plan for "more than four decades." *See* Lennon Decl. ¶ 7. Like the *Dumont* plaintiff, Plaintiff had no opportunity to bargain over or sign off on the forum selection clause; so here too the forum selection clause should not be enforced as contrary to ERISA's policy permitting liberal selection of venue for participants.

Additionally, the Plan's forum selection clause contravenes California's state public policies and thus should not be enforced. California Labor Code § 925 provides that "[a]n employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following: (1) [r]equire the employee to adjudicate outside of California a claim arising in California [or] (2) [d]eprive the employee of the substantive protection of California law with respect to a controversy arising in California."[13] This provision evinces a strong policy of the state of California against forcing residents to litigate disputes arising in California outside of the state.

Here, the dispute is between Plaintiff and her former employer Wells Fargo & Co. and arose

[13] The California Business and Professions Code § 20040.5 also provides that "A provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state."

in California, where Plaintiff receives her benefits. Transferring the action to the District of Minnesota would violate the "strong public policy of the State of California" to protect California entities and residents from "the expense, inconvenience, and possible prejudice of litigating in a non-California venue." *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000); *see also Pierman v. Stryker Corporation*, No. 3:19-cv-00673-BEN-MDD, 2020 WL 406679, at *4 (S.D. Cal. Jan. 24, 2020) (invalidating a forum selection clause that forced parties to litigate a California labor dispute in another state in violation of Cal. Lab. Code § 925); *Karl v. Zimmer Biomet Holdings, Inc.*, No. C 18-04176, 2018 WL 5809428, at *3 (N.D. Cal. Nov. 6, 2018) (California has a "strong public policy against enforcing forum-selection clauses in employment agreements" and finding a forum selection clause forcing plaintiff to litigate a California labor dispute in Indiana unreasonable and unenforceable); *Yeomans v. World Financial Group Insurance Agency, Inc.*, No.19-cv-00792, 2019 WL 5789273, at *7 (N.D. Cal. Nov. 6, 2019). Indeed, this Court has recognized that the Ninth Circuit and its district courts decline to enforce forum selection clauses that contravene California statutes evincing a policy against designating out-of-state forums. *Salesforce.com, Inc. v. GEA, Inc.*, No. 19-cv-01710-JST, 2019 WL 3804704, at *11 (N.D. Cal. Aug. 13, 2019) (Tigar, J.). Forcing a dispute between Plaintiff Becker (a California resident) and her employer (which is headquartered here) to a distant state where Plaintiff Becker has never worked or lived conflicts with California's policy of protecting residents from the expense, inconvenience, and possible prejudice of being required to bring suit outside of California. Accordingly, the Wells Fargo Plan's forum selection clause should not be enforced under the Supreme Court's holding in *Bremen*.

(3) *Dorman* and *Gipson* are inapposite.

Defendants' reliance on *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. 2019), which sent an ERISA class action to individual arbitration, is misplaced. First, federal courts have "enforce[d] arbitration agreements with regard to" ERISA and other "federal statutory claims not based on some general policy favoring forum selection clauses, but because that is what the [Federal Arbitration Act], 9 U.S.C. §§ 2, 3, requires." *Smith*, 769 F.3d at 935 (Clay, J., dissenting) (citing S*hearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226, 238 (1987), which involved federal securities and RICO claims); *see, e.g.*, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012)

(noting the FAA's liberal federal policy favoring arbitration agreements). Thus, to the extent arbitration provisions in ERISA plans are enforceable, it is because the FAA specifically overrides a plaintiff's choice of venue under another statutory provision such as Section 1132(e)(2). Br. of U.S.S.G 13-14. *Dorman* is inapplicable here, because there is no arbitration agreement, and no statute analogous to the FAA requires enforcement of a contract term mandating litigation in a particular judicial district. *Contra* Mot. at 10. Accordingly, *Dorman* does not control here.

Additionally, Defendants cite *Gipson v. Wells Fargo & Co.* as a similar case against Wells Fargo that was transferred to the District of Minnesota pursuant to the same forum clause. 563 F. Supp. 2d 149 (D.D.C. 2008). But the *Gipson* plaintiff never contended that the forum selection clause was invalid because it conflicted with ERISA's venue provision or declaration of policy—only that the forum selection clause should not be enforced because it was "unreasonable and unjust." *Id*. at 154. Specifically, the *Gipson* plaintiff argued that the transfer would be "unjust" because she had liquidated her plan assets and Eighth Circuit case law would deprive her of Article III standing to pursue her claims. *Id.* at 154. This is different from the arguments being raised here—Plaintiff argues that the forum selection clause is invalid because it conflicts with ERISA's venue provision and ERISA's prevailing policy affording ready access to federal courts.

Accordingly, this Court should decline to enforce the Plan's forum selection clause because it is at odds with the venue choices provided for in ERISA. Declining to enforce the clause comports with the Ninth Circuit's position that contractual provisions that eliminate venues permitted by statute are invalid, and the DOL's position that ERISA plans cannot contract around the statute to eliminate a participant's choice of venue.

B. Even if the Forum Selection Clause is Valid, it Should Not be Enforced

Even if the Court decides that the forum selection clause is valid and enforceable, it should decline to transfer the case based on public interest factors. In *Bronstein v. U.S. Customs and Border Protection*, this Court declined to enforce a valid forum selection clause where only one set of defendants had signed the contract containing the forum selection clause with the plaintiff, and the other defendants had not and were unaware of the contract's terms. No. 15-cv-02399-JST, 2016 WL 861102, at *5-6 (N.D. Cal. 2016) (Tigar, J.).

Like in *Bronstein*, here, enforcement of the forum selection clause would contravene the public interest in conserving judicial resources because Wells Fargo & Co. is the only Defendant able to enforce the forum selection clause. The forum selection clause is contained within the Plan document, which constitutes a contract between the employee and employer, or plan sponsor. *See Carr v. First Nationwide Bank*, 816 F. Supp. 1476, 1488 (N.D. Cal. 1993) (stating that it is well settled that pension benefit plans are unilateral contracts accepted by employee through performance, citing *Pratt v. Petroleum Production Management Inc. Employee Sav. Plan & Trust*, 920 F.2d 651, 661 (10th Cir.1990)); *see also Hurd v. Illinois Telephone Bell Co.*, 234 F.2d 942, 946 (7th Cir. 1956) (same); *Williams v. Cordis Corp.*, 30 F.3d 1429, 1432 (11th Cir. 1994) (same); *McGrath v. Rhode Island Retirement Bd.*, 88 F.3d 12, 16 (1st Cir. 1996) (stating that an employee benefit plan is a part of an employee's compensation and is treated as a unilateral contract).

In this contractual relationship, Plaintiff is the employee and Wells Fargo & Co. is the plan sponsor. Compl. ¶¶ 12, 15-16, 22. Plaintiff worked for Wells Fargo & Co. for 26 years, *id.* ¶ 12, and in return received compensation in the form of Plan benefits. *Id.* ¶¶ 14-16. Her 26 years of work constitutes consideration, an essential component of a contract under California and Minnesota law. Cal. Civ. Code § 1550; Minn. Statutes § 336.3-303. None of the other Defendants—the individual Defendants, Wells Fargo Bank, or Galliard Management—are named parties to the contract, nor have they provided consideration sufficient to make them parties to the contract.

The only two parties to the Plan contract are Plaintiff and Defendant Wells Fargo & Co.; thus, the forum selection clause may only be enforced as to the claims litigated between those parties. *See Bronstein*, 2016 WL 861102, at *6 (noting that one set of Defendants was not party to the contract containing the forum selection clause and thus it would be unfair to bind them to the contract without knowledge of its terms).[14] Only Count V—out of four remaining counts—is levied against Wells Fargo

[14] It is a general principle of contract interpretation that "only a party to a contract or an intended third-party beneficiary may sue to enforce the terms of a contract or obtain an appropriate remedy for breach. *GECCMC 2005-C1 Plummer Street Office Ltd. Partnership v. JPMorgan Chase Bank, Nat. Ass'n*, 671 F.3d 1027, 1033 (9th Cir. 2012). To the extent Defendants other than Wells Fargo & Co. argue that they are third party beneficiaries of the contract that should be able to enforce the forum selection clause, "the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party." *Id.* at 1033. The outside party cannot just be one that incidentally benefits from the contract, the parties must have directly intended to benefit the

& Co. and consequently is the only claim that can be transferred subject to the forum selection clause.[15]

Transferring only Count V and letting Counts I-III remain in this District would contravene the public interest in "efficient resolution of controversies." *Bronstein*, 2016 WL 861102, at *6 (citing *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 13-3349 SI, 2014 WL 1477748, at *1-2 (N.D. Cal. April 14, 2014)); *see also CZ Services, Inc. v. Express Scripts Holding Company*, No. 3:18-cv-04217-JD, 2018 WL 3972030, at *4 (N.D. Cal. Aug. 20, 2018) ("The optimal outcome is to retain all of plaintiffs' claims here for supervision "in a single court by a single judge" [...] [which is] most consistent with the fair and efficient administration of justice, and the parties' contractual expectations."). There are similar facts at issue in the claims in this lawsuit that would be best resolved by the same court. Litigating Plaintiff's claims piecemeal with the claim against Wells Fargo & Co. in the District of Minnesota and the claims against the other Defendants in the Northern District of California would be "needlessly inconvenient and burdensome [and] plainly contrary to the policy of the federal judiciary of promoting the consistent and complete adjudication of disputes." *Bronstein*, 2016 WL 861102, at *6 (quoting *Frigate Ltd. v. Damia*, No. C 06-04734 CRB, 2007 WL 127996, at *3 (N.D. Cal. Jan. 12, 2007)). Therefore, this Court should decline to enforce the forum selection clause.

C. Defendants Have Not Met Their Substantial Burden of Justifying Transfer

If the Court finds that the forum selection clause is *not* valid, then the action is only transferrable to the District of Minnesota upon a showing that it is justified under the eight factors listed in 28 U.S.C. § 1404(a).[16] Defendants, as the party moving to transfer, bear the "substantial

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third party in order for the third party to be able to enforce the contract. *Id.*; *see also Klamath Water Users Prot. Assoc. v. Patterson*, 204 F.3d 1206, 1210-11 (9th Cir. 1999). There is no indication in the Wells Fargo Plan document that the document intends to benefit any of the Defendants such as Wells Fargo Bank, Galliard Management, or any of the individual Defendants—the contract exists with the participants as the sole beneficiaries in exchange for their employment for Wells Fargo.

[15] While courts occasionally enforce forum selection clauses in favor of non-parties sued under derivative claims "where the alleged conduct of the nonparties is closely related to the contractual relations," *Lewis v. Liberty Mutual Insurance Company*, 321 F. Supp. 3d 1076, 1081 (N.D. Cal. 2018), here the claims against Wells Fargo Bank, the individual Defendants, and Galliard Management are independent claims for breach of their fiduciary duties or engaging in prohibited transactions—not derivative of the claim against Wells Fargo. These claims may only be transferred if Defendants meet their substantial burden of showing that transfer is warranted pursuant to § 1404.

[16] The same applies as to Counts I-III if the Court finds the forum selection clause is valid as to Count

burden of demonstrating why a change of venue is appropriate." *Dumont*, 192 F. Supp. 3d at 216; *see also Reyes v. Bakery and Confectionery Union and Indus. Int'l Pension Fund*, No. 14-cv-05536-JST, 2015 WL 1738269, at *2 (N.D. Cal. Apr. 9, 2015) (Tigar, J.) ("The moving party bears the burden to show that the proposed transferee district is the more appropriate forum for the action.") (citing *Jones*, 211 F.3d at 499).

Defendants have not met that burden. None of the eight factors support transferring this action to the District of Minnesota; rather, they support litigating the case in this District, where Wells Fargo & Co. is headquartered and where Plaintiff and the majority of Wells Fargo employees live.

The relevant factors under § 1404(a) are as follows:

> (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof.

Jones, 211 F.3d at 498. The first factor—the location where the relevant agreements were negotiated and executed—weighs heavily in favor of the Northern District of California as the forum. Plaintiff Becker worked for Wells Fargo in California for 26 years. Compl. ¶ 12. Any negotiations or agreements related to her employment occurred in this District. Her association with Wells Fargo & Co. and the receipt of her benefits has always occurred and continues to occur in the Northern District of California. The establishment of the Plan—which Defendants cite—has no relation to Plaintiff's claims. The contract between Plaintiff and Defendant Wells Fargo & Co. was entered into in California.

The second factor—the state most familiar with the governing law—is mostly neutral, as the claims in this case are all under ERISA, a federal law. But to the extent that interpretation of the relevant documents is required, the Declaration of Trust is subject to California law where relevant

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V—Defendants still have the burden of showing that transfer of the remaining counts are warranted under 28 U.S.C. § 1404, since those counts are not subject to a forum selection clause.

(such as interpretation of the terms). Exhibit 2 § 1.5. The Northern District of California is more suited to interpret California law than the District of Minnesota, so this factor weighs in favor of the case remaining in this forum.

The third factor—the plaintiff's choice of forum—weighs heavily in favor of allowing the case to remain in this Court. Plaintiff resides in Martinez, California, and chose to file the case in this District as the Court most readily available to her. Compl. ¶ 26. As this Court recognizes, "a plaintiff's choice of forum is accorded great deference in ERISA cases." *Reyes,* 2015 WL 1738269, at *3 (citing *Jacobson v. Hughes Aircraft Co.*, 105 F.3d 1288, 1302 (9th Cir. 1997), *rev'd on other grounds,* 525 U.S. 432 (1999)). Defendants argue that Plaintiff's choice of forum is entitled to less deference because this is a putative class action with participants located outside of California. *See* Mot. at 13-14. But this Court considered this factor in an ERISA class action case, noting that—like here—the class had not yet been certified, the class representative would bear the weight of the litigation responsibilities, and there was no indication that putative class members outside of the forum state would have to appear. *Reyes*, 2015 WL 1738269, at *3. Moreover, the greatest percentage of Wells Fargo employees—39,000 out of 262,800—work in California. *See* Section II.C. In comparison, Minnesota only employs 18,000 Wells Fargo & Co. employees, less than half of the number in California. *Id.* In the event that putative class members wish to appear for hearings (*e.g.*, class certification, settlement), this District is the most convenient forum for the most class members. Like in *Reyes*, this factor weighs against transfer.

Factors four and five relate to the parties' and the claims' contacts with Plaintiff's chosen forum. Plaintiff and Wells Fargo & Co. both have strong contacts with the Northern District of California—Wells Fargo & Co. is headquartered here and Plaintiff lives in this judicial district. Moreover, the CITs, which are at issue in this lawsuit as investment vehicles for Plan assets, are managed in California pursuant to the Declaration of Trust. Exhibit 2 § 1.5. Documents and deposition testimony regarding the management of those CITs will likely be located in this District. And to the extent Defendants' argument relies on the staff responsible for selecting and monitoring the funds in the Plan—the Committee Defendants—Defendants admit that only one of those Committee Defendants is located in Minnesota, and the others are scattered across five separate states. *See* Mot.

at 14; Lennon Decl. ¶ 12. Document production will be done electronically, as Defendants note (*see* Lennon Decl. ¶ 17), and producing any remaining hard copy documents located in Minnesota is not a sufficient burden to support transfer. *See Reyes*, 2015 WL 1738269, at *4 ("With technological advances in document storage and retrieval, transporting documents does not generally create a burden." (citing *David v. Alphin*, No. 06–cv–04763–WHA, 2007 WL 39400, at *3 (N.D. Cal. Jan. 4, 2007))); *Peters v. Wells Fargo Bank, N.A.*, No. -cv-04367-JST, 2018 WL 398238, at *5 (N.D. Cal. 2018) (Tigar, J.) (location of electronic documents irrelevant). Moreover, as Defendants admit by declaration, some of the documents relating to Plan administration are stored in hard copy in North Carolina, so hard copy documents may have to be transported regardless of the forum. Lennon Decl. ¶ 17. Overall, Defendants' contacts with Minnesota are minimal, at best, as is any nexus between Plaintiff's cause of action and Minnesota.[17] The Northern District of California is much more closely tied to the parties and claims in this case, which supports denial of this motion.

Factor six involves the differences in cost of litigation in the two forums. This factor weighs in favor of keeping the action in California. Defendants' arguments fail—despite their claims that some documents related to the Plan may be located in Minnesota, "transporting documents does not generally create a burden" sufficient for transfer, especially in a case that will largely rely on electronic production. *See Reyes*, 2015 WL 1738269, at *4 (citing *David v. Alphin*, No. C06-041763 WHA, 2007 WL 39400, at *3 (N.D. Cal. Jan. 4, 2007)). And with respect to Defendants' argument that many witnesses are in Minnesota, Mot. at 14, their declaration makes clear that the potential witnesses are scattered across the country and are not concentrated in any particular forum. Lennon Decl. ¶¶ 10-17. In fact, their declaration points out that only one of seven Committee Members, who are responsible for selecting and monitoring Plan investments, is located in Minnesota. *Id.* ¶ 12. The declaration lists many individuals involved with the Plan who are located in various states including Minnesota, Connecticut, North Carolina, Colorado, Tennessee, and abroad in the Philippines. *Id.* ¶¶ 10-17. Public records also demonstrate that the greatest percentage of Wells Fargo employees work in California

[17] To the extent that Defendants also rely on the location of any of the location of the members of the HRC Committee, Defendants requested that those individuals be dismissed from the case, and the parties stipulated as such pursuant to Defendants' representations. ECF Nos. 39, 40.

(over twice as many Wells Fargo employees as Minnesota), which makes the Northern District of California more convenient for potential witnesses and for the putative class members. *See* Section II.C. It is clear that given the vast array of locations for witnesses, there will be associated travel with their testimony, regardless of the forum. One plaintiff and one defendant share their location in this District, along with the greatest number of Wells Fargo & Co. employees, so this District is optimal for minimizing litigation costs. Compl. ¶¶ 13, 21; *see also* Section II.C.

The seventh factor is the availability of compulsory process to compel attendance of unwilling non-party witnesses. Plaintiff is unaware of any witnesses relevant to the action who could not be compelled to appear in the Northern District of California.

Finally, the eighth factor concerns "ease of access to sources of proof." *Devaux-Spitzley v. Prudential Ins. Co. of Am.*, No. 18-CV-04436-JST, 2019 WL 935137 (N.D. Cal. Feb. 26, 2019). This factor has largely been covered in the discussion of factors four and five, but the sources of proof will be most likely contained in this District, where Defendant Wells Fargo & Co. is located. To the extent documents related to the administration of the Plan are located in Minnesota, electronic production of those documents is not a burden. *Reyes*, 2015 WL 1738269, at *4. Additionally, as discussed under factor six, most of the non-party witnesses are not located in Minnesota, they are scattered throughout the country. Two parties—Plaintiff and Wells Fargo & Co.—are located in this District, where it would be easiest for them to give testimony. Compl. ¶¶ 13, 21. On balance, this factor weighs in favor of the action remaining here.

D. In the Event the Court Transfers this Action, Plaintiff Respectfully Requests the Transfer Be Stayed to Allow Plaintiff to File for a Writ of Mandamus, or Alternatively that the Court Certify the Question of Whether the Forum Selection Clause is Invalid for Interlocutory Appeal under § 1292(b)

Lastly, in the event that the Court does decide to transfer this action, Plaintiff respectfully requests that the Court either (1) stay the transfer pending resolution of a writ of mandamus petition; or (2) certify for appeal the question of whether the forum selection clause is invalid as conflicting with ERISA.

(1) Stay of Transfer Pending Mandamus Petition

Mandamus is a proper vehicle to seek relief from a venue transfer. *See In re Bozic*, 888 F.3d

1048, 1054 (9th Cir. 2018); *Varsic v. U.S. Dist. Court for Cent. Dist. of California*, 607 F.2d 245 (9th Cir. 1979) (granting writ of mandamus and reversing transfer order in ERISA case). Ideally, review of any transfer order from a district court is conducted by the corresponding circuit court. *In re Mathias*, 867 F.3d at 729 (accepting writ of mandamus to review transfer order but noting that review would have been more appropriate in the transferor's appellate court). However, once the case is transferred and is received and docketed by the transferee court, the Ninth Circuit loses jurisdiction to review under writ of mandamus. *See In re Donald*, 328 B.R. 192, 197 (9th Cir. 2005) ("Once the transferee court receives and dockets the case files, the transferor court generally loses jurisdiction over the case, as does the transferor court's appellate court."); *see also Howmedica Osteonics Corp. v. Sarkisian*, No.16-cv-05079-PJH, 2018 WL 3428755, at *2 (N.D. Cal. July 16,2018) (transferor court loses jurisdiction when transferee court receives and dockets the case); *Wilson v. City of San Jose*, 111 F.3d 688, 693 (9th Cir. 1997) (transfer of the case was not fully complete until the new district received and docketed the case). Not only does the Ninth Circuit lose jurisdiction, but the Circuit to which Defendants seek to transfer this case, the Eighth Circuit, has no authority to review the order directing transfer. *See Tricome v. eBay, Inc.*, 486 F. App'x 639, 640 (9th Cir. 2012) ("[W]e may not review a transfer under 28 U.S.C. § 1404 by a district court outside of our circuit to a district court within our circuit.") (quoting *Posnanski v. Gibney*, 421 F.3d 977, 980 (9th Cir.2005)); *United States v. Copley*, 25 F.3d 660, 662 (8th Cir.1994) ("We lack jurisdiction to consider [Petitioner's] first argument, which concerns the North Carolina district court's decision to transfer this case to the Missouri district court.").

Granting a motion to transfer venue leaves the party opposing transfer in an odd procedural posture where she has only a limited (and unknown) amount of time to file for a writ of mandamus in the transferor court before the transfer order takes effect and the appellate court of both the transferor and transferee court lose jurisdiction to review the decision. And once that happens, it becomes next to impossible to obtain review of this important question about the validity of forum selection clauses under ERISA. Plaintiff would have to file a motion to *re*transfer and likely a motion to stay proceedings to forestall the possibility of a merits decision mooting the transfer issue.

The alternative scenario is also problematic without a stay pending the resolution of a

mandamus petition. If Plaintiff successfully files a writ of mandamus in the Ninth Circuit before the transferee court receives the case, the Ninth Circuit would be reviewing the transfer decision while the case proceeds in the District of Minnesota. As Wright & Miller notes, "[t]his creates the possibilities of unseemly duplication of effort by all concerned, and perhaps even inter-circuit conflict, if an appeal is going forward in one circuit while the papers are lodged in a district court in another." Charles Alan Wright & Arthur R. Miller, 15 Fed. Prac. & Proc. Juris. § 3846 (4th ed.). Subsequently, if the Ninth Circuit reverses the transfer, it would necessarily undo any progress made by the District of Minnesota. Accordingly, Plaintiff respectfully requests—if the action is transferred—that this Court stay the transfer to allow a writ of mandamus to be ruled upon by the Ninth Circuit, which would avoid any procedural inefficiencies created by the case proceeding in district court.

(2) Certification of the Question under § 1292(b)

Alternatively, Plaintiff submits that the question of whether a forum selection clause that conflicts with ERISA is invalid meets the requirements for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), which provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b). Certification of this issue for the Ninth Circuit under § 1292(b) is certainly proper. *See* Br. of U.S. Solicitor General 22, *Smith*, No. 14-1168 (stating "[l]itigants may also obtain review by seeking certification of a transfer order under 28 U.S.C. 1292(b)[.]"). Here, the controlling question of law is whether a forum selection clause that conflicts with the venue choices provided for by ERISA is invalid. *See, e.g.*, *Stewart Organization, Inc. v. Ricoh Corp*., 487 U.S. 22, 24 (1988) (noting that the court below certified its ruling refusing to enforce a forum selection clause as inconsistent with state policy to the Eleventh Circuit); *Snyder Oil Corp. v. Samedan Oil Corp.*, 208 F.3d 521, 522 (5th Cir. 2000) (certifying for interlocutory appeal a transfer order based on choice of law issues); *see also* Charles Alan Wright & Arthur R. Miller, 15 Fed. Prac. & Proc. Juris. § 3855 (4th ed.) (discussing mandamus review as a mechanism for challenging a transfer decision).

Next, there is substantial ground for difference of opinion on whether the contractual provision's conflict with ERISA renders it invalid. As Defendants note, two divided circuit courts and several district courts in this circuit have ruled that the forum selection clause should be enforced even if it eliminates choice of venues provided for by ERISA. *See* Mot. at 9-10 (citing *In re Mathias*, 867 F.3d at 732–734; *Smith*, 769 F.3d at 931–933;[18] *Rapp*, 2018 WL 6307904, at *4). On the other hand, the Ninth Circuit has ruled that forum selection clauses that eliminate venues provided for by statute are invalid. *See Smallwood*, 660 F.3d at 1121-22. Moreover, the Ninth and Eleventh Circuit agree that ERISA protects a plaintiff's choice of forum, and several district courts have refused to enforce forum selection clauses that are inconsistent with ERISA. *See supra* Section III.A.1. The Solicitor General and Department of Labor have also consistently argued that forum selection clauses that conflict with ERISA's venue provision are invalid. *Id.* These conflicting rulings constitute substantial ground for a difference of opinion sufficient to certify this question for interlocutory appeal.

Finally, review of this issue now would materially advance the ultimate termination of this litigation. If the case is transferred to the District of Minnesota, and if the result is appealed after trial and the transfer is found to be legal error, all actions taken by the District of Minnesota in the case would be "rendered ineffectual" and would require significant expense to be undone. *In re Handel*, 240 B.R. 798, 802 (1st Cir. 1999) (immediate review of a transfer order would materially advance the litigation because if the party opposing transfer prevails on appeal at the end of litigation, the result is undone causing substantial expense and delay).

In sum, the issue of whether the forum selection clause is valid (due to its conflicts with ERISA's statutory framework) satisfies the requirements for certification under § 1292(b) and should be certified for interlocutory appeal.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that Defendants' Motion to Transfer

[18] While *Smith* and *Mathias* enforced the forum selection clause, both panels were divided, with Judges Clay and Ripple arguing that the forum selection clause was contrary to ERISA and should not have been enforced. *Smith*, 769 F.3d at 934-36; *In re Mathias*, 867 F.3d at 734-37. Those splits further demonstrate the substantial ground for difference of opinion.

Pursuant to 28 U.S.C. § 1404(a) be denied. If Defendants' Motion is granted, Plaintiff alternatively requests that the Court either stay the transfer to permit Plaintiff to file a writ of mandamus or certify the issue of whether the forum selection clause is valid for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Dated: June 12, 2020

COHEN MILSTEIN SELLERS & TOLL PLLC

By: /s/ Michelle C. Yau

COHEN MILSTEIN SELLERS & TOLL PLLC
Michelle C. Yau
Mary J. Bortscheller
Daniel R. Sutter
Jamie L. Bowers
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW, Suite 500
Washington, DC 20005
(202) 408-4600
myau@cohenmilstein.com
mbortscheller@cohenmilstein.com
dsutter@cohenmilstein.com
jbowers@cohenmilstein.com

FEINBERG, JACKSON, WORTHMAN & WASOW, LLP
Todd Jackson (Cal. Bar No. 202598)
Nina Wasow (Cal. Bar No. 242047)
2030 Addison Street, Suite 500
Berkeley, CA 94704
(510) 269-7998
todd@feinbergjackson.com
nina@feinbergjackson.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2020, I served the forgoing through CM/ECF on all counsel of record.

/s/ Jamie L. Bowers
Jamie L. Bowers

EXHIBIT 1

U.C.L.A. Law Review

The Venue Shuffle: Forum Selection Clauses and ERISA

Christine P. Bartholomew & James A. Wooten

ABSTRACT

Forum selection clauses are ubiquitous. Historically, the judiciary was hostile to contracts limiting a plaintiff's venue options. The tide has since turned. Today, lower courts routinely enforce such clauses. This Article challenges this reflexive response in the special context of ERISA cases. It mines ERISA's statutory text, rich legislative history, and historical context to supply an in-depth exploration of ERISA's unique policy goal of providing employees "ready access to the Federal courts." The Article then explains how forum selection clauses undermine this goal and thus should be invalid under controlling Supreme Court jurisprudence.

AUTHORS

Associate Professor and Professor, University at Buffalo School of Law, the State University of New York.

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INTRODUCTION

In 1992, Chronic Fatigue Syndrome and Fibromyalgia[1] forced Janice Laakso to end her twelve-year career at Xerox.[2] After paying total disability benefits for almost fourteen years, Xerox stopped in 2006.[3] Ms. Laakso sued in the Central District of California.[4] After she went on disability, she suffered three heart attacks and an aneurism, thus necessitating she sue where she lived.[5] Unbeknownst to Ms. Laakso and after her disability began, Xerox amended its disability plan to add a forum selection clause limiting lawsuits to the Western District of New York, well over 2000 miles away.[6] Bedridden for days on end because of her disability, Ms. Laakso challenged the motion,

1. Laakso suffered from Chronic Fatigue Syndrome (CFS) and Fibromyalgia. In some medical circles, CFS remains a controversial diagnosis. This controversy has seeped into ERISA decisions. *See, e.g.*, Osobka v. MetLife, No. 16-12311, 2017 WL 3668498 (E.D. Mich. Aug. 25, 2017) (finding it was not arbitrary and capricious for an insurance company to deny Plaintiff's long-term disability (LTD) benefits claim even though Plaintiff's own treating physicians, themselves leading experts in the CFS field, opined that Plaintiff was disabled due to CFS).
2. Plaintiff's Opposition to Defendants' Motion to Dismiss or in the Alternative to Transfer Venue at 3:16–19, Laakso v. Xerox Corp., No.808-CV-00489 (C.D. Cal. June 22, 2008), 2008 WL 7120920 [hereinafter Laakso Opp]. In our research, we learned several published opinions spell the plaintiff's surname incorrectly. Her surname is Laakso, not Laasko. Notice of Motion and Motion by Defendants to Dismiss or in the Alternative to Transfer Venue at n.1, Laasko v. Xerox, 2008 WL 7120918 (C.D. Cal.) ("The Plaintiff's correct last name is 'Laakso,' but it will be referred to herein as 'Laasko' because the Complaint consistently so misnamed her." In this Article, we use the correct version unless citing a court document with the misspelling.").
3. *Id.* at 3:12. For 14 years, Xerox recognized and respected Ms. Laakso's medical diagnosis. It was not until March 2006 that the employer contended "her disability was no longer medically supportable." Laakso v. Xerox Corp., No. 08-CV-6376-CJS, 2011 WL 3360033, at *1 (W.D.N.Y. Aug. 3, 2011).
4. *See* First Amended Complaint for Benefits Under Employee Welfare Plan (ERISA), Declaratory Relief, & for Civil Penalties for Failure to Provide Documents (ERISA) ¶ 2, Laasko v. Xerox Corp., No. 808-CV-00498 (C.D. Cal. June 12, 2008), 2008 WL 7120919.
5. Laakso Opp., *supra* note 2, at 3:8.
6. Laasko v. Xerox Corp., 566 F. Supp. 2d 1018, 1020 (C.D. Cal. 2008). The forum selection clause specified the Rochester Division of the Western District of New York. Notably, there are only five judges sitting in that division. *District Judges,* U.S. DIST. CT., W. D. OF N.Y., http://www.nywd.uscourts.gov/district-judges [https://perma.cc/BL8R-5TL7]. Thus, by adding a forum selection clause, Xerox not only picked the forum but greatly narrowed the group of judges who would hear the case. Supporters of these clauses cite the ability to direct litigation to a handful of judges as a justification for enforcement. *See, e.g.*, Davidson v. Ascension Health Long Term Disability Plan, No. 6:16-CV-00193-RP-JCM, 2017 WL 8640929, at *7 (W.D. Tex. Feb. 1, 2017) (internal citation omitted); Klotz v. Xerox Corp., 519 F. Supp. 2d 430, 436 (S.D.N.Y. 2007).

arguing she had neither the ability nor the means to litigate in New York.[7] Nonetheless, the district court granted Xerox's motion.

Ms. Laakso is not alone. Benefit plans governed by ERISA cover more than 141 million participants and beneficiaries.[8] During the last two decades, more and more of these plans incorporate forum selection clauses, meaning more and more employees must sue in a distant forum handpicked by their employer.[9] The power to designate a court affects the course of litigation. Forum selection clauses shift litigation costs to plaintiffs and reduce settlement pressure on defendants.[10] They also threaten to deprive plaintiffs of witnesses who are unable or unwilling to travel to the more distant locale.[11] In some cases, a forum selection clause forecloses any realistic opportunity for a day in court.[12] Even for those able to continue with

7. Laakso Opp. at 4:13–21. No longer receiving benefits, Ms. Laasko lost her home and was living with a friend at the time of suit.

8. *See Fact Sheet: What is ERISA?*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/what-is-erisa [https://perma.cc/7AUL-JE53] (providing figures from fiscal year 2013).

9. *See* Motion for Leave to File Brief & Brief of the Pension Rights Center as Amicus Curiae in Support of Petitioner at 2-3, Clause v. U.S. Dist. Ct., 137 S. Ct. 825 (2017) (mem.) (No. 16-641), 2016 WL 7048330, at *2-3 [hereinafter Pension Rights Center Amicus Brief]; *It's Never Too Late for a Forum Selection Clause—Court Enforces Clause Added After the Plaintiff Retired*, LITTLER: ASAP (Feb. 19, 2013), https://www.littler.com/publication-press/publication/its-never-too-late-forum-selection-clause-%E2%80%93-court-enforces-clause [https://perma.cc/T8WQ-CQ2F] (discussing the increased use of such clauses in pension plans); *see also, e.g.*, David A. Pratt, *The Effect of Forum Selection Clauses in ERISA Litigation*, 24 J. PENSION BENEFITS, 24 (2017) (noting the Department of Labor only took up the issue after 2000 because that is when plans started adopting forum selection clauses). For discussion of other sponsor initiatives "to constrict access to the federal courts," see Dana Muir & Norman Stein, *Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction*, 93 N.C. L. REV. 459, 525-26 (2015).

10. *See, e.g.*, Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 490 n.253 (1992) ("Although forum-selection clauses will reduce the settlement costs of companies, that reduction will not reduce the aggregate costs of injuries. Rather, a decrease in settlement payments will simply mean that those who suffer losses will bear higher percentages of the costs of those losses."); Dan Schechter, *Despite Supreme Court Ruling Endorsing Enforcement of Forum Selection Clauses, Bankruptcy Court Holds That German Forum Clause Is Invalid Due to Forum Non Conveniens*, 2017–46 COMM. FIN. NEWS. NL 88 (Nov. 20, 2017) (discussing increased discovery costs associated with a forum selection clause).

11. *See, e.g.*, Alpha Sys. Integration, Inc. v. Silicon Graphics, Inc., 646 N.W.2d 904, 909 (Minn. Ct. App. 2002) (enforcing forum selection clauses despite plaintiff's evidence that the transfer impacted plaintiff's ability to call certain witnesses); Arthur Young & Co. v. Leong, 383 N.Y.S.2d 618, 619 (N.Y. App. Div. 1976) (stating that by agreeing to a forum, the parties "obviated considerations of inconvenience to a party or a witness"), *appeal dismissed*, 40 N.Y.2d 984 (N.Y. App. Div. 1976).

12. *See* Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 722 (1992) (discussing how

litigation, the chance of success drops upon transfer.[13] As one scholar concludes, "The gains that *International Shoe* and its progeny made toward allowing plaintiffs to sue in their home jurisdictions [are] largely recaptured by corporations in a frenzy to lower legal costs."[14] This result is particularly troubling in ERISA cases because plaintiffs "often are elderly, sick, or disabled."[15]

This raises the focal question of this Article: Should courts enforce ERISA forum selection clauses against participants and beneficiaries? The two federal courts of appeals[16] and a large majority of the district courts that have considered this issue sided with enforcement.[17] Other decisions treat such clauses as contrary to Congress's goal of clearing procedural hurdles that

some "may view enforcement of forum clauses as depriving them of their day in court, not to mention compensation for, perhaps, grievous injury." (footnote omitted)). Current interpretations of ERISA already burden plaintiffs with an exhaustion requirement and deferential judicial review of claims denials. *See, e.g.*, Brendan S. Maher, *The Affordable Care Act, Remedy, and Litigation Reform*, 63 Am. U. L. Rev. 649, 656-62 (2014); James A. Wooten, *A Reflection on ERISA Claims Administration and the Exhaustion Requirement*, 6 DREXEL L. REV. 573, 575-76 (2014).

13. *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1511-12 (1995) ("In recent federal civil cases, the plaintiff wins in 58% of the nontransferred cases that go to judgment for one side or the other, but wins in only 29% of such cases in which a transfer occurred.").

14. John McKinley Kirby, *Consumer's Right to Sue at Home Jeopardized Through Forum Selection Clause in* Carnival Cruise Lines v. Shute, 70 N.C. L. REV. 888, 915 (1992) (footnotes omitted); *see also* Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 296–97, 362 (1988) (discussing how such clauses prioritize freedom of contract over due process).

15. Pension Rights Center Amicus Brief, *supra* note 9, at 1; *cf.* Christine P. Bartholomew, *Redefining Prey and Predator in Class Actions*, 80 BROOK. L. REV. 743, 749 (2015) (discussing the role of vulnerability in legal theory).

16. *In re* Mathias, 867 F.3d 727 (7th Cir. 2017); Smith v. Aegon Cos. Pension Plan, 769 F.3d 922 (6th Cir. 2014); *see also In re* Jefferson A. Robertson, No. 18-2812, slip. Op. at 1 (3d Cir. Dec. 17, 2018) (denying petition for mandamus); Petition for a Writ of Certiorari, Clause v. U.S. Dist. Ct., 137 S. Ct. 825 (2017) (mem.) (No. 16-641), 2016 WL 6696021 [hereinafter Clause Petition for Writ of Certiorari] (referencing Sept. 27, 2016, decision by the Eighth Circuit denying petition for writ of mandamus from lower court decision enforcing venue clause).

17. *See, e.g.*, Rogal v. Skilstaf, Inc., 446 F. Supp. 2d 334, 338 (E.D. Pa. 2006); 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); Schoemann *ex rel.* Schoemann v. Excellus Health Plan, Inc., 447 F. Supp. 2d 1000, 1007 (D. Minn. 2006); Wellmark, Inc. v. Deguara, No. 4:02-CV-40534, 2003 WL 21254637, at *1 (S.D. Iowa May 28, 2003).

hindered employees'[18] enforcement of their rights.[19] During the last four terms, the intersection of forum selection clauses and ERISA triggered four separate petitions for certiorari to the Supreme Court.[20] While the Court denied each appeal,[21] the split in the lower courts invites resolution by the highest court.

On both sides of the divide, in-depth statutory interpretation is a rarity.[22] Further, no scholarship to date has wrestled with this interpretative imbroglio.[23] Such analysis is critical because forum selection clauses that conflict with public policy are unenforceable.[24] Our Article fills this gap. Relying on bills, reports, and the conduct of key actors in pension reform, it deciphers ERISA's public policy of providing "ready access to the Federal courts."[25] With this interpretative compass, we explain why most courts have missed the mark.

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18. ERISA refers to "participants and beneficiaries." For sake of economy, we generally refer to "employees" or "plaintiffs."
19. 29 U.S.C. § 1132(e)(2) (2012) (listing venue options); *infra* Part II.A and accompanying text; *see, e.g.,* Dumont v. Pepsi, Co., Inc. 192 F. Supp. 3d 209, 219 (D. Me. 2016); Nicolas v. MCI Health & Welfare Plan No. 501, 453 F. Supp.2d 972, 974 (E.D. Tex.2006).
20. Petition for a Writ of Certiorari, Robertson v. U.S. Dist. Ct., – S. Ct. – (No. 18-609), 2019 WL 1874230 (2019); Petition for a Writ of Certiorari, Mathias v. U.S. Dist. Ct., 138 S. Ct. 756 (2018) (mem.) (No. 17-740), 2017 WL 5564204; Clause Petition for Writ of Certiorari, *supra* note 16; Petition for a Writ of Certiorari, Smith v. Aegon Cos. Pension Plan, 136 S. Ct. 791 (2016) (mem.) (No. 14-1168), 2015 WL 1322266.
21. Mathias v. U.S. Dist. Ct., 138 S. Ct. 756, 756 (2018) (mem.), *cert. denied*; Clause v. U.S. Dist. Ct., 137 S. Ct. 825 (2017) (mem.), *cert. denied*; *Smith*, 136 S. Ct. at 791.
22. *See, e.g.*, Testa v. Becker, No. CV 10-638-GHK (FMOx), 2010 WL 1644883, at *5 (C.D. Cal. Apr. 22, 2010) (enforcing a forum selection clause without engaging in a thorough statutory interpretation of ERISA); Laasko v. Xerox Corp., 566 F. Supp. 2d 1018, 1023 (C.D. Cal. 2008); Klotz v. Xerox Corp., 519 F. Supp. 2d 430, 436 (S.D.N.Y. 2007); 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); *Wellmark*, 2003 WL 21254637, at *4; *Rogal*, 446 F. Supp. 2d at 338.
23. Articles to date focus more on reporting what courts and plans have done rather than engaging with statutory interpretation. *See, e.g.*, Barry L. Salkin, *Forum Selection Provisions in ERISA Plans*, 29 BENEFITS L.J. 1 (2016); Kathryn J. Kennedy, *Protective Plan Provisions for Employer-Sponsored Employee Benefit Plans*, 18 MARQ. BENEFITS & SOC. WELFARE L. REV. 1, 58-60 (2016); Pratt, *supra* note 9, at 24. *But see* Michelle Streifthau-Livizos, *Protecting the Loyal Hardworker: The Need for a Fair Analysis of Venue Clauses in ERISA Plans*, available at https://www.laborandemploymentcollege.org/images/pdfs/October2017newsletter/Venue-Clauses-in-ERISA-Plans.pdf [https://perma.cc/275H-BMCF] (addressing the merits of such clauses).
24. *See* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972) ("A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." (citing Boyd v. Grand Trunk W. R. Co., 338 U.S. 263 (1949))); *accord Boyd*, 338 U.S. at 265.
25. 29 U.S.C. § 1001(b) (2012).

The Article unfolds as follows. Part I provides necessary background on venue, including the evolution of jurisprudence enforcing forum selection clauses and an overview of the case law involving claims under ERISA. Part II provides the analytical heavy lifting. It begins with a thorough synthesis of the legislative history of ERISA. This history explains Congress's goals during its pension reform effort. The Article then provides evidence about the historical context for ERISA, explaining why, given the state of the law at the Act's passage, all interested players understood a statutory venue would control. Part III completes the analysis, bridging this legislative intent and a close reading of the statutory language. These various sources show the current trend toward enforcement of ERISA forum selection clauses is wrong.

I. VENUE BASICS

As any first-year law student can recite, a plaintiff may only pursue litigation in a court with subject matter jurisdiction;[26] with personal jurisdiction over the person(s) or property involved;[27] and in a permissible venue.[28] Whereas subject matter and personal jurisdiction are constitutional requirements,[29] venue is governed by statutory and decisional law. For federal actions, 28 U.S.C. section 1391 provides the general venue rules,[30] though

26. *See, e.g.*, Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701–02 (1982) ("Federal courts are courts of limited jurisdiction. The character of the controversies over which federal judicial authority may extend are delineated in Art. III, § 2, cl. 1. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. Again, this reflects the constitutional source of federal judicial power: Apart from this Court, that power only exists 'in such inferior Courts as the Congress may from time to time ordain and establish.'" (citing Art. III, § 1)); *see also* 28 U.S.C. §§ 1331, 1332 (2012) (providing for federal question and diversity subject matter jurisdiction).

27. *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011) ("A court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" (quoting Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945))); *see also* FED. R. CIV. P. 4(k)(1)(a) (stating that service of process establishes personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located").

28. *See* 28 U.S.C. § 1390 (2012) (establishing venue as "the geographic specification of the proper court").

29. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

30. 28 U.S.C. § 1391 provides three options in descending order of priority. First, venue is appropriate in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located . . . ." 28 U.S.C. § 1391(b)(1) (2012). If there are multiple defendants residing in different districts, the next preferred venue is "a judicial district in which a substantial part of the events or omissions giving rise to the

many federal regulatory statutes, ERISA among them,[31] include specialized provisions that override or supplement the venues section 1391 identifies.[32]

A defendant has a variety of options for contesting venue. If a plaintiff files suit in an improper venue, the defendant may file a motion to dismiss under Federal Rule of Civil Procedure 12(b)(3)[33] or under 28 U.S.C. section 1406.[34] If a plaintiff sues in a statutorily proper but otherwise inconvenient venue, a defendant may seek a transfer under 28 U.S.C. section 1404.[35] This Part focuses on a third option for challenging venue: a motion seeking dismissal or transfer of a lawsuit on the basis of a forum selection clause. Increasingly, putative parties are bound by forum selection clauses that identify specific fora for litigation.[36] Part I.A explains why, when, and how forum selection clauses alter judicial analysis of venue. Part I.B then describes

claim occurred, or a substantial part of property that is the subject of the action is situated . . . ." 28 U.S.C. § 1391(b)(2) (2012). If no such district exists, then venue is appropriate in any district having personal jurisdiction over any defendant. 28 U.S.C. § 1391(b)(3) (2012).

31. 29 U.S.C. § 1132(e)(2) (2012).

32. *See, e.g.*, 28 U.S.C. § 1394 (2012) (laying venue "in the judicial district where such [defendant national banking] association is located"); 28 U.S.C. § 1396 (2012) (laying venue "in the district where the liability for such tax accrues, in the district of the taxpayer's residence, or in the district where the return was filed"); 28 U.S.C. § 1397 (2012) (authorizing venue for interpleader actions in the district "in which one or more of the claimants reside"); 28 U.S.C. § 1398 (2012) (limiting venue for challenging certain Interstate Commerce Orders to "a judicial district in which any one of the parties bringing the action resides or has its principal office"); 28 U.S.C. § 1400(b) (2012) (laying venue "where the defendant resides, or where the defendant has committed acts of [patent] infringement and has a regular and established place of business").

33. FED. R. CIV. P. § 12(b)(3) (improper venue).

34. 28 U.S.C. § 1406 (2012) (cure or waiver of defects).

35. 28 U.S.C. § 1404 (2012) (change of venue).

36. *See, e.g.*, Dumont v. Pepsico, Inc., 192 F. Supp. 3d 209, 211 (D. Me. 2016) (discussing forum selection clause limiting venue to Southern District of New York); Harris v. BP Corp. N. Am., No. 15 C 10299, 2016 WL 8193539, at *2 (N.D. Ill. July 8, 2016) (discussing forum selection clause limiting venue to Harris County, Texas); Feather v. SSM Health Care, 216 F. Supp. 3d 934, 937 (S.D. Ill. 2016) (limiting venue to Eastern District of Missouri); *see also* Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 Hastings L.J. 643, 645–46 (2015) ("Good lawyers increasingly try to contract their clients' way around the morass of the law on authority to adjudicate, and to do so in a way that advantages their clients."); John McKinley Kirby, *Consumer's Right to Sue at Home Jeopardized Through Forum Selection Clause in* Carnival Cruise Lines v. Shute, 70 N.C. L. Rev. 888, 888 (1992) ("During this century American courts increasingly have enforced forum selection clauses in contracts."); Matthew J. Sorensen, *Enforcement of Forum-Selection Clauses in Federal Court After Atlantic Marine*, 82 Fordham L. Rev. 2521, 2528 (2014) ("Forum-selection clauses have permeated American commercial activity to such an extent that even many of today's form contracts designate the appropriate forum to litigate disputes.").

ERISA's special statutory venue provision, and the current judicial split over the enforceability of such clauses.

A. Venue Rules and Forum Selection Clauses

Through the first six decades of the twentieth century, courts in the United States were generally skeptical of or even hostile to forum selection clauses.[37] In the words of the Restatement of Contracts:

> A bargain to forego a privilege, that otherwise would exist, to litigate in a Federal Court rather than in a State Court, or in a State Court rather than in a Federal Court, or otherwise to limit unreasonably the tribunal to which resort may be had for the enforcement of a possible future right of action . . . , is illegal.[38]

Nonetheless, an undercurrent of support for enforcement of forum selection clauses existed in some contexts.[39] This support viewed a court's failure to

37. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972) ("Forum-selection clauses have historically not been favored by American courts."); *see also, e.g.*, Carbon Black Exp., Inc. v. The Monrosa, 254 F.2d 297, 300–01 (5th Cir. 1958) (discussing "the universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced" (footnote omitted)); Nat'l Equip. Rental, Ltd. v. Sanders, 271 F. Supp. 756, 761 (E.D.N.Y. 1967) (stating that "a contractual commitment to an alien court, although of a civilized country, may be of doubtful validity"); Murillo Ltda. v. The Bio Bio, 127 F. Supp. 13, 14 (S.D.N.Y. 1955) ("To say that the effect to be given to [forum selection clause] is controversial would be more than mild understatement."), *aff'd per curiam*, 227 F.2d 519 (2d Cir. 1955).

38. RESTATEMENT (FIRST) OF CONTRACTS § 558 (AM. LAW INST. 1932).

39. For example, the Restatement of Conflict of Laws appears not to have taken as strict a view as the Restatement of Contracts. *Compare* RESTATEMENT (FIRST) OF CONTRACTS § 558 (AM. LAW INST. 1932), *with* RESTATEMENT (FIRST) OF CONFLICTS OF LAWS § 617 (AM. LAW INST. 1934) ("Parties to a contract may provide that all actions for breach of the contract shall be brought only in a certain court, and the courts of other states will usually give effect to such a provision; but the requirement can be imposed only by consent of the parties and as a term of the contract. If the parties agree, it is not like the case of one state prescribing by its statute what the courts of another state may do."); *accord* Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 145 n.41 (1982) (noting that section 558 of the Restatement of Contracts "is much more restrictive" than Comment *a* to section 617 of the Restatement of Conflict of Laws); *see also* Krenger v. Penn. R. Co., 174 F.2d 556, 561 (2nd Cir. 1949) (Learned Hand, J., concurring) ("In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all; in the words of the Restatement [of Contracts, § 558], they are invalid only when unreasonable." (footnote omitted)).

enforce a forum selection clause as endorsing both forum shopping and "welch[ing]" on contractual obligations.[40]

The Supreme Court's June 1972 decision in *M/S Bremen* v. *Zapata Off-Shore Co.*[41] signaled a shift in attitude toward forum selection clauses.[42] *The Bremen* involved two sophisticated parties with relatively equal bargaining power in what was anything but a run-of-the-mill deal.[43] A Houston, Texas drilling company contracted a German firm to tow a six-million-dollar drilling rig from Louisiana to the Adriatic.[44] The governing contract included a forum selection clause, which "figur[ed] prominently" in the parties' negotiations because their novel, risky transaction would "traverse the waters of many jurisdictions."[45] Invoking "present-day commercial realities and expanding international trade," the Court held the clause controlling "absent a strong showing that it should be set aside."[46] A plaintiff could make such a showing with evidence that the clause: (1) contravened public policy;[47] (2) was

40. *In re* Unterweser Reederei, GmB.H., 446 F.2d 907, 909 (5th Cir. 1971) (Wisdom, J., dissenting) ("In these circumstances Zapata, represented by experienced counsel, should not be allowed to welch on its bargain."), *vacated sub nom.* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); *see also* Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 64 (2013); *accord* Kurt H. Nadelmann, *Comment*, *Choice-of-Court Clauses in the United States: The Road to* Zapata, 21 AM. J. COMP. L. 124, 133–34 (1973) (discussing how the facts of *The Bremen* "rais[ed] questions of commercial honesty," making *The Bremen* "a so-called easy case").

41. 407 U.S. 1 (1972).

42. *See* Michael D. Moberly, *Judicial Protection of Forum Selection: Enforcing Private Agreements to Litigate in State Court*, 1 PHOENIX L. REV. 1, 10 (2008) ("Judicial dissatisfaction with the ouster principle ultimately culminated in the Supreme Court's decision in *M/S Bremen v. Zapata Off-Shore Co.* . . . ." (footnote omitted)).

43. *See Bremen*, 407 U.S. at 12 ("The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.").

44. *In re* Unterweser Reederei, GMBH, 428 F.2d 888, 896 (5th Cir. 1970) (Wisdom, J., dissenting), *on reh'g en banc sub nom. In re* Unterweser Reederei, GMBH, 446 F.2d 907 (5th Cir. 1971), *vacated sub nom.* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

45. *Bremen*, 407 U.S. at 13–14 ("There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." (footnote omitted)).

46. *Id.* at 15.

47. *Id.* at 10 n.11, 15 (citing case law refusing to enforce forum selection clauses conflicting with a statutory-based public policy); *see also* Mullenix, *supra* note 14, at 356 n.351 ("The Court also noted that *Muller* was overruled in Indussa Corp. v. S.S. Rangborg, 377 F.2 200, 203-04 (2d Cir. 1967), as in conflict with COGSA, thereby anticipating *The Bremen's* 'public policy' exception.").

unreasonable or unjust, and thus unenforceable; or (3) was unenforceable because it was a product of fraud or overreaching.[48]

The potential impact of *The Bremen*, however, remained uncertain for almost two decades.[49] Much of the decision's reasoning focused on the historical use of forum selection clauses in admiralty cases and the sophistication of the two parties.[50] Whether the Court would expand this line of reasoning to general commercial contracts, let alone to contracts between businesses and consumers, remained an open question.[51]

In 1988, the Court limited *The Bremen* in *Stewart v. Ricoh*,[52] when it declined to uphold a forum selection clause in an agreement between a dealer and a copier manufacturer.[53] The Eleventh Circuit Court of Appeals held the clause enforceable as a matter of law under *The Bremen*.[54] Rather than focusing solely on the existence of a venue clause, the Supreme Court instead instructed lower courts to consider such clauses as part of a broader section 1404 analysis. The Court explained, "[a]lthough we agree with the Court of Appeals that the *Bremen* case may prove 'instructive' in resolving the parties' dispute, . . . we disagree with the court's articulation of the relevant inquiry as 'whether the forum selection clause in this case is unenforceable under the standards set forth in *The Bremen*.'"[55]

It was not until *Carnival Cruise Lines, Inc. v. Shute*[56]—decided seventeen years after ERISA's enactment—that the Court addressed a contract not involving sophisticated businesspeople but a company and individual

48. Mullenix, *supra* note 14, at 318, 355–56. ("[T]hat enforcement would be unreasonable or unjust," "that the clause was invalid for such reasons as fraud or overreaching," or that "enforcement would contravene a strong public policy of the forum in which the suit is brought . . . ."); *see also* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991); Haughton v. Plan Adm'r of Xerox Corp. Ret. Income Guarantee Plan, 2 F. Supp. 3d 928, 933 (W.D. La. 2014).

49. *See, e.g.*, Nadelmann, *supra* note 40, at 124 (describing the opinion "as a decision of unusual importance to international trade" rather than to forum selection). In part, this confusion stems from the limited scope of the decision. *See* David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 815 n.167 (1993) ("There is no discussion in the Court's opinion of a forum selection clause contained in a purely domestic contract specifying a domestic forum.").

50. *Bremen*, 407 U.S. at 10, 13-14.

51. *See, e.g.*, Nadelmann, *supra* note 40, at 134–35 (characterizing *The Bremen* as "control[ing] the field of admiralty . . . [but i]n the area of general commercial law where state law has control the decision . . . is not of direct assistance" (footnote omitted)).

52. 487 U.S. 22 (1988).

53. *Id.* at 28–29.

54. Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1071 (11th Cir. 1977) (subsequent history omitted).

55. *Stewart*, 487 U.S. at 28.

56. 499 U.S. 585 (1991).

consumers. There, the Court moved away from its more reserved holding in *The Bremen*, and certainly further away from its holistic approach in *Stewart*.[57] In *Carnival Cruise*, the Court enforced a forum selection clause found in "a passage contract [that] was purely routine and doubtless nearly identical to every commercial passage contract."[58] In doing so, the Court expanded the enforceability of such clauses not only to consumer contracts,[59] but more generally to contracts of adhesion[60] and those between parties with unequal bargaining power.[61] Even as it did so, however, the Court retained *The Bremen*'s proviso that conflicting public policy could invalidate a forum selection clause.[62]

The Court most recently addressed forum selection clauses in 2013 in *Atlantic Marine Construction Co., Inc. v. District Court*.[63] While *The Bremen* and *Carnival Cruise* focus on the scope of enforcement for forum selection clauses, *Atlantic Marine* focuses on the mechanics. In *Atlantic Marine*, the Court held a plaintiff who complies with the relevant federal statutory venue provision has sued in the correct court—even if that court conflicts with a

57. *See* Edward P. Gilbert, *We're All in the Same Boat:* Carnival Cruise Lines, Inc. v. Shute, 18 BROOK. J. INT'L L. 597, 604–05 (1992) ("Since *The Bremen*, the Supreme Court has supported the use of forum selection clauses in contracts between sophisticated businesspersons and has held these clauses to be *prima facie* valid. Nonetheless, the Court has also displayed hesitation in enforcing such clauses if a party can show that enforcement would be unreasonable, against public policy, or if the parties who sued would be deprived of their day in court because the contractual forum would be gravely inconvenient."). This broadening of *The Bremen* drew criticism from Justices Stevens and Marshall. *Carnival Cruise Lines*, 499 U.S. at 601–02 (1991) (Stevens & Marshall, J. dissenting) ("*The Bremen*, which the Court effectively treats as controlling this case, had nothing to say about stipulations printed on the back of passenger tickets. That case involved the enforceability of a forum-selection clause in a freely negotiated international agreement between two large corporations providing for the towage of a vessel from the Gulf of Mexico to the Adriatic Sea. The Court recognized that such towage agreements had generally been held unenforceable in American courts, but held that the doctrine of those cases did not extend to commercial arrangements between parties with equal bargaining power.").

58. *Id.* (citations omitted).

59. *Carnival Cruise*, 499 U.S. at 595.

60. As the Court explained, given the economic realities of this sort of transaction, "[c]ommon sense dictate[d]" that the Shutes' ticket would "be a form contract the terms of which [we]re not subject to negotiation, and that an individual purchasing the ticket [would] not have bargaining parity with the cruise line." *Id.*; *see also* Kirby, *supra* note 14, at 894–901 (discussing the evolution of judicial treatment of forum selection clauses).

61. *Carnival Cruise*, 499 U.S. at 593 ("As an initial matter, we do not adopt the Court of Appeals' determination that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining.").

62. *Id.* at 595–97 (analyzing alleged conflict between forum selection clause and statutory provision governing vessel owners' contracts with passengers).

63. 571 U.S. 49 (2013).

forum selection clause.[64] Thus, section 1404, not 1406, is the proper procedural mechanism to enforce a valid forum selection clause.[65] Since venue was technically proper, the defendant could not enforce the clause via a motion to dismiss under Rule 12(b)(3) or 28 U.S.C. section 1406.[66] From there, the Court addressed how a forum selection clause alters the analysis for a section 1404(a) motion to transfer.[67] Specifically, when the lawsuit involves a valid forum selection clause a court affords "the plaintiff's choice of forum . . . no weight."[68] In this morass of procedural technicality, the Court effectively generalized *The Bremen* principles to all contracts.[69]

64. *See id.* at 56 ("The structure of the federal venue provisions confirms that they alone define whether venue exists in a given forum.").

65. *Id.* at 59 ("Although a forum-selection clause does not render venue in a court 'wrong' or 'improper' within the meaning of § 1406(a) . . . the clause may be enforced through a motion to transfer under § 1404(a)."); *see also id.* at 61 (in which the Court declined to apply its holding to Rule 12(b)(6) motions). This finding builds on the Court's prior discussion of the scope of section 1404 in *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) ("Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer [involving forum selection clauses] according to an 'individualized, case-by-case consideration of convenience and fairness.'" (citation omitted)).

66. *Atl. Marine*, 571 U.S. at 56 ("[A] case filed in a district that falls within § 1391 may not be dismissed under § 1406(a) or Rule 12(b)(3)."). Before *Atlantic Marine* settled the issue, the federal statutes governing venue and the Federal Rules of Civil Procedure appeared to give defendants two seeming statutory alternatives: sections 1404 and 1406 to enforce a forum selection clause. *Compare* 28 U.S.C. § 1404 (2012) (authorizing transfer "[f]or the convenience of parties . . . , in the interest of justice" to "transfer any civil action to any other district or division where [the action] might have been brought or . . . to which all parties have consented"), *with* 28 U.S.C. § 1406 (2012) (authorizing a district court to dismiss the case, "or, if it be in the interest of justice, [to] transfer [the] case to any district or division in which [the case] could have been brought"). The Federal Rules of Civil Procedure also provided two additional options: Rule 12(b)(3) and Rule 12(b)(6). *Compare* FED. R. CIV. P. 12(b)(3) (authorizing dismissal for improper venue), *with* FED. R. CIV. P. 12(b)(6) (authorizing dismissal for "failure to state a claim upon which relief can be granted").

67. *Atl. Marine*, 571 U.S. at 59 ("Section 1404(a) . . . provides a mechanism for enforcement of forum-selection clauses that point to a particular federal district.").

68. *Id.* at 63. Thus, whereas *Carnival Cruise* limited potential unenforceability challenges, *Atlantic Marine* narrowed potential factors for transfer of an otherwise valid, enforceable clause. In the absence of a forum selection clause, a district "must evaluate both the convenience of the parties and various public-interest considerations," *Id.* at 62 (footnote omitted), and "also give some weight to the plaintiffs' choice of forum." *Id.* at 62 n. 6 (footnote omitted) (listing public and private-interest factors). With a forum selection clause, however, the Court held "the private-interest factors to weigh entirely in favor of the preselected forum." *Id.* at 64. This would leave only the public-interest factors to consider, and they "will rarely defeat a transfer motion . . . ." *Id.*; *see also id.* at 52 (holding a court "should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer").

69. *Id.* at 62.

Together, these cases provide a roadmap for challenging forum selection clauses.[70] First, the plaintiff can show a forum selection clause is invalid. This requires an analysis of whether the clause violates public policy, including policy embodied in a federal venue statute.[71] Second, a plaintiff can contest enforceability by showing the clause was the product of fraud, overreaching, or lack of notice.[72] Third, a plaintiff can argue a court should override a valid, enforceable forum selection clause when transfer would contravene what courts call "public factors."[73] It is only in the "extraordinary" case, however, that these factors will overcome enforcement.[74]

Even with this guidance, many questions remain. The Court's holding in *Atlantic Marine* applies only if there is "a contractually valid forum-selection clause."[75] As Professor Stephen Sachs has observed, this decision "places enormous weight on whether a forum-selection clause is valid and enforceable. . . . Yet the opinion says nothing about which clauses are valid in the first place."[76] Moreover, *Atlantic Marine* does not address how a special statutory venue provision, such as the one in ERISA, affects a forum selection clause. The Supreme Court's most recent decision on the subject, *Boyd v. Grand Trunk Western Railroad Company*,[77] was issued seventy years ago.[78] In *Boyd*, the Court held a forum selection clause void when the clause conflicted

70. *Id.*; Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).
71. *See Bremen*, 407 U.S. at 15 (citing Boyd v. Grand Trunk W. R. Co., 338 U.S. 263 (1949)).
72. *See Carnival Cruise*, 499 U.S. at 595. Drawing a meaningful distinction between validity and enforceability is vital to principled analysis. Validity addresses whether a forum selection clause is ever possible for a particular substantive claim. If invalid, the clause can never apply to the cause of action. Enforcement considers whether an otherwise valid clause may not apply to a particular transaction or relationship. By collapsing validity and enforcement, courts risk allowing forum selection clauses to bind parties in the absence of fraud or duress without first fully ensuring the clause is valid under public policy.
73. *Atl. Marine*, 571 U.S. at 62 n.6. Though not an exhaustive list, public factors courts consider include: "(1) the administrative difficulties flowing from court congestion; (2) the interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws or the application of foreign law." *E.g.*, *In re* Volkswagen of Am., Inc., 545 F.3d 304, 315 (5th Cir. 2008).
74. *Atl. Marine*, 571 U.S. at 64.
75. *Id.* at 62 n.5 ("Our analysis presupposes a contractually valid forum-selection clause.").
76. Stephen E. Sachs, *Five Questions after* Atlantic Marine, 66 HASTINGS L.J. 761, 766 (2015); *see also* Adam N. Steinman, Atlantic Marine *Through the Lens of* Erie, 66 HASTINGS L.J. 795, 800 (2015) ("[T]he *Atlantic Marine* opinion itself places no restrictions on a court's assessment of contractual validity in the first instance.").
77. 338 U.S. 263 (1949).
78. *Id.*

with a statutorily declared policy.[79] Some courts question whether subsequent judicial decisions undermine *Boyd*.[80] Consequently, whether parties can use a forum selection clause to override a special statutory venue provision remains hotly debated.[81]

B. Forum Selection Clauses and ERISA

Given the trend toward enforcement, it is not surprising ERISA plans are increasingly employing forum selection clauses.[82] These clauses generally designate a single locale from the multiple options authorized by ERISA's venue provision.[83] This provision, Section 502(e)(2) of ERISA, codified at 29 U.S.C. section 1132(e)(2), provides:

> Where an action under [Title I of ERISA] 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.[84]

While lower courts are generating a growing body of jurisprudence on ERISA forum selection clauses, decisions on both sides focus primarily on the second or third steps in evaluating forum selection clauses, namely enforceability or

79. *Id.* at 266.
80. *See In re* Mathias, 867 F.3d 727, 733 (7th Cir. 2017) (characterizing *Boyd* as "a bit of a relic" from "an era of marked judicial suspicion of contractual forum selection"); Turner v. Sedgwick Claims Mgmt. Servs., Inc., No. 7:14-CV-1244-LSC, 2015 WL 225495, at *11–14 (N.D. Ala. Jan. 16, 2015).
81. *Compare, e.g.*, Nicolas v. MCI Health & Welfare Plan No. 501, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006) ("[T]he policies of the ERISA statutory framework supercede [sic] the general policy of enforcing forum selection clauses."), *with* Williams v. CIGNA Corp., No. 5:10-CV-00155, 2010 WL 5147257, at *4 (W.D. Ky. Dec. 13 2010) ("[F]orum selection clauses are enforceable in ERISA plans."); Rodriguez v. PepsiCo Long Term Disability Plan, 716 F. Supp. 2d 855, 860–61 (N.D. Cal. 2010) (holding forum selection clauses are not inconsistent with ERISA's venue provision).
82. *See, e.g.*, *It's Never Too Late for a Forum Selection Clause—Court Enforces Clause Added After the Plaintiff Retired*, LITTLER: ASAP (Feb. 19, 2013), https://www.littler.com/publication-press/publication/its-never-too-late-forum-selection-clause-%E2%80%93-court-enforces-clause [https://perma.cc/T8WQ-CQ2F] (discussing the increased use of such clauses in pension plans); Pension Rights Center Amicus Brief, *supra* note 9, at 2 ("[V]enue clauses are being adopted with increasing frequency . . . .").
83. *See, e.g.*, Harris v. BP Corp. N. Am., No. 15 C 10299, 2016 WL 8193539, at *4 (N.D. Ill. July 8, 2016); Loeffelholz v. Ascension Health, Inc., 34 F. Supp. 3d 1187, 1191 (M.D. Fla. 2014); Mroch v. Sedgwick Claims Mgmt. Servs., Inc., No. 14-CV-4087, 2014 WL 7005003, at *2 (N.D. Ill. Dec. 10, 2014).
84. 29 U.S.C. § 1132(e)(2) (2012).

the public interest factors.[85] Decisions enforcing such clauses acknowledge employees' lack of bargaining power.[86] For example, the District Court in Minnesota upheld such a clause, after noting the plaintiff was not involved in negotiating the clause and likely did not know it existed.[87] These decisions often analogize enforcing such clauses to upholding contractual arbitration provisions.[88] As for public interest factor challenges, courts usually find insufficient reason to overcome the presumption that forum selection clauses control.[89] Some decisions even approve of clauses requiring suit in a court not described in section 1132(e)(2).[90]

85. *Compare, e.g.*, Feather v. SSM Health Care, 216 F. Supp. 3d 934, 943 (S.D. Ill. 2016) (finding public interest factors do not override the forum selection), *with, e.g.*, Coleman v. Supervalu, Inc., Short Term Disability Program, 920 F. Supp. 2d 901, 908 (N.D. Ill. 2013) (concluding forum selection clause was unenforceable, in part because "ERISA plans are rarely the subject of arms'-length negotiation").

86. *See, e.g.*, *In re* Mathias, 867 F.3d 727, 731 (7th Cir. 2017) (finding "contractual forum-selection clauses are presumptively valid even in the absence of arm's-length bargaining") (citation omitted); *Loeffelholz*, 34 F. Supp. 3d at 1191 (upholding forum selection clause even though "employees do not participate in the negotiation process by design"); Angel Jet Servs. v. Red Dot Bldg. Sys.' Emp. Benefit Plan, No. CV-09-2123-PHX-GMS, 2010 WL 481420, at *2 (D. Ariz. Feb. 8, 2010) (upholding forum selection clause so long as the employer, not the participant, had notice of the clause); Laasko v. Xerox Corp., 566 F. Supp. 2d 1018, 1024 (C.D. Cal. 2008) (explaining plaintiff "was not given notice of the forum provision in advance.").

87. Schoemann *ex rel.* Schoemann v. Excellus Health Plan, Inc., 447 F. Supp. 2d 1000, 1007 (D. Minn. 2006) ("[W]hen, as here, the contract [containing the clause] was negotiated between a plan administrator and an employer, the forum-selection clause obviously does not reflect any 'preference' of the beneficiaries. Indeed, it is likely that a typical beneficiary does not even know that the forum-selection clause exists."); *see also Mathias*, 867 F.3d at 736 (Ripple, J., dissenting) ("An ERISA beneficiary has *no* role in the negotiation or even the acceptance of the plan terms."); Mozingo v. Trend Pers. Servs., No. 10-4149-JTM, 2011 WL 3794263, at *6 (D. Kan. Aug. 25, 2011), *aff'd*, 504 F. App'x 753 (10th Cir. 2012) (pointing out that plaintiff was not a signatory to the plan document containing a forum selection clause); Conte v. Ascension Health, No. 11-12074, 2011 WL 4506623, at *2 (E.D. Mich. Sept. 28, 2011) (upholding forum selection clause even though "Plaintiff did not have bargaining power to negotiate the inclusion or exclusion of the forum selection clause . . . .").

88. *See, e.g.*, Turner v. Sedgwick Claims Mgmt. Servs., Inc., No. 7:14-CV-1244-LSC, 2015 WL 225495, at *14 (N.D. Ala. Jan. 16, 2015); Haughton v. Plan Adm'r of Xerox Corp. Ret. Income Guarantee Plan, 2 F. Supp. 3d 928, 934 (W.D. La. 2014) ("Clearly, if ERISA does not prohibit parties from agreeing to arbitrate statutory ERISA claims outside of a judicial forum, *a fortiori* it does not prohibit parties from agreeing to resolve their dispute before a stipulated judicial forum." (footnote omitted)).

89. *See Mathias*, 867 F.3d at 732; *see also* Clause v. Sedgwick Claims Mgmt. Servs., Inc., No. CIV 15-388-TUC-CKJ, 2016 WL 213008, at *4 (D. Ariz. Jan. 19, 2016); Klotz v. Xerox Corp., 519 F. Supp. 2d 430, 436 (S.D.N.Y. 2007).

90. *See* Robertson v. Pfizer Ret. Comm., No. 18-0246, 2018 WL 3618248, at *6 n.8 (E.D. Pa. July 27, 2018) (granting transfer of the case to the Southern District of New York, even though the defendant did not reside in New York, the breach did not occur there, nor

A few courts, however, have resisted wholesale approval of ERISA forum selection clauses.[91] These courts follow the same analytical cycle as those approving such clauses, focusing primarily on the second and third grounds for challenging the provisions. They distinguish clauses previously upheld by the Supreme Court,[92] move on to a truncated discussion of validity,[93] and then focus on enforceability.[94] These decisions often recognize ERISA plaintiffs have no bargaining power,[95] not merely uneven power.

Yet, a key analytical question has gone underanalyzed. Because ERISA does not address forum selection clauses in so many words, the validity inquiry requires thorough analysis of ERISA's policy, history, and text.[96] Under the first step of analysis, forum selection clauses must be valid,

was the plan administered in that venue); *accord* Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 932 (6th Cir. 2014) (stating in dicta "even if the venue selection clause laid venue outside of the three options provided by § 1132, the venue selection clause would still control.").

91. *See, e.g.*, Dumont v. PepsiCo, Inc., 192 F. Supp. 3d 209, 214 (D. Me. 2016); Coleman v. Supervalu, Inc. Short Term Disability Program, 920 F. Supp. 2d 901, 907–08 (N.D. Ill. 2013).

92. *See, e.g.*, *Dumont*, 192 F. Supp. 3d at 214 ("*Bremen*, *Shute*, and *Atlantic Marine*, all of which focus on an agreement between the parties, do not fit the situation before me.").

93. *See, e.g.*, *id.* at 214-15. These short discussions sometimes consider policies other than the one explicitly declared by ERISA in section 1001. *See Coleman*, 920 F. Supp. 2d at 906–07 (analyzing the policy behind ERISA section 1104 but not section 1001). *But see* Nicolas v. MCI Health & Welfare Plan No. 501, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006) (analyzing sections 1001 and 1132).

94. *See, e.g.*, *Dumont*, 192 F. Supp. 3d at 214; *Coleman*, 920 F. Supp. 2d at 908.

95. *See, e.g.*, *Dumont*, 192 F. Supp. 3d at 214 ("An important distinction between the controlling forum selection clause cases and this case is that Mr. Dumont never agreed to the forum selection clauses contained in the Plans. As pled, Mr. Dumont did not play a part in the negotiation of the Plans, he did not sign off on the Plans, and he did not agree to the addition of the forum selection clauses in 2010." (footnote omitted)); *Coleman*, 920 F. Supp. 2d at 908 ("Although there may be exceptions, ERISA plans are rarely the subject of arms'-length negotiation.").

96. *See, e.g.*, Abramski v. United States, 537 U.S. 169, 180 (2014) ("[W]e must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'") (citing Maracich v. Spears, 570 U.S. 48, 76 (2013)); *cf.* Stonite Prods. Co. v. Melvin Lloyd Co., 315 U.S. 561, 563 (1942) (stating that venue patent interpretation "can best be determined from an examination of the reasons for [the patent statute's] enactment"); FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 162 (2009) ("[S]tatutes are often linguistically unclear, whether intentionally or accidentally, and . . . although there are large debates about where judges should go in such cases, there are no debates about whether judges must go somewhere, for in such cases no amount of staring at the indeterminate language of a vague or ambiguous statute will provide an answer absent some sort of supplementation from elsewhere.").

meaning they cannot conflict with public policy.[97] The Supreme Court requires courts to analyze each statutory venue provision separately to evaluate its effect.[98] Most courts slight this step,[99] giving little consideration, let alone weight, to the policy behind ERISA.[100] Statutory interpretation in these cases is often limited to noting that ERISA lacks an express prohibition against forum selection clauses[101] or a passing acknowledgment that ERISA is a "special kind of contract" subject to a unique statutory scheme.[102]

The few decisions wading into this interpretative thicket have reached contrary conclusions.[103] Some read section 1132 as "permissive,"[104] not "specifically prohibit[ing]" "private parties from waiving ERISA's venue

97. *See* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972); *see also* Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 62 (2013) ("When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause." (footnote omitted)).

98. Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 204 (2000) ("[A]nalysis of special venue provisions must be specific to the statute . . . .").

99. *See, e.g.*, Price v. PBG Hourly Pension Plan, No. 12-15028, 2013 WL 1563573, at *2 (E.D. Mich. Apr. 15, 2013) (spending a fraction of the two page opinion on the validity of the forum selection clause); Testa v. Becker, No. CV 10-638-GHK (FMOx), 2010 WL 1644883, at *5 (C.D. Cal. Apr. 22, 2010) (enforcing a forum selection clause without engaging in a thorough statutory interpretation of ERISA); Laasko v. Xerox Corp., 566 F. Supp. 2d 1018, 1023 (C.D. Cal. 2008); Klotz v. Xerox Corp., 519 F. Supp. 2d 430, 436 (S.D.N.Y. 2007); 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).

100. *See, e.g.*, Shah v. Wellmark Blue Cross Blue Shield, No. CV 16–2397, 2017 WL 1186341, at *2 (D.N.J. Mar. 30, 2017), *appeal dismissed sub nom.* Shah v. Wellmark Blue Cross & Blue Shield, No. 17–1982, 2017 WL 5157741 (3d Cir. Aug. 23, 2017) (upholding clause without analysis of ERISA's goals); Clause v. Sedgwick Claims Mgmt. Servs., Inc., No. CIV 15-388-TUC-CKJ, 2016 WL 213008, at *4 (D. Ariz. Jan. 19, 2016) (enforcing clause based on uniformity interests rather than analyzing "ready access").

101. *See, e.g.*, Rodriguez v. PepsiCo Long Term Disability Plan, 716 F. Supp. 2d 855, 861 (N.D. Cal. 2010) ("Congress could have—but has not—expressly barred parties from agreeing to restrict ERISA's venue provisions." (citation omitted)); *see also Klotz*, 519 F. Supp. 2d at 436 ("If Congress had wished to prevent parties from waiving ERISA's venue provision by private agreement, it could have done so through an express provision in the statute."); *Bernikow*, 2006 WL 2536590, at *2 ("Had Congress sought to prevent plaintiffs from waiving the statutory venue provision by private agreement, it could have done so by express provision. Until the Ninth Circuit or Congress speaks to the contrary, there is little justification to hold against the general presumption in favor of enforcing forum selection clauses." (citation omitted)).

102. *See, e.g.*, *In re* Mathias, 867 F.3d 727, 731 (7th Cir. 2017).

103. *Compare, e.g.*, Dumont v. PepsiCo, Inc., 192 F. Supp. 3d 209, 219 (D. Me. 2016) (holding ERISA supersedes employer's forum selection clause), *and* Nicolas v. MCI Health & Welfare Plan No. 501, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006) (same), *with, e.g.,* Feather v. SSM Health Care, 216 F. Supp. 3d 934, 943 (S.D. Ill. 2016) (enforcing forum selection clause), *and* Haughton v. Plan Adm'r of Xerox Corp. Ret. Income Guar. Plan, 2 F. Supp. 3d 928, 936 (W.D. La. 2014) (enforcing forum selection clause).

104. Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 932 (6th Cir. 2014).

provision."[105] Under this logic, private parties may narrow the options listed in section 1132(e)(2). Others read the section as Congress's means of comprehensively addressing venue for ERISA claims under Title I. Thus, a forum-selection clause is void as against public policy if it forecloses the range of options afforded by section 1132(e)(2).[106]

In the midst of this disagreement, appellate review of these decisions is slowly growing. The Sixth and Seventh Circuits allow forum selection clauses to control in ERISA cases,[107] and in three of its last four terms, the Supreme Court has denied a petition for certiorari challenging the validity of such clauses, suggesting it is only a matter of time before the Supreme Court weighs in.

This Article argues that a close reading of ERISA requires courts to protect employees' potential range of venue options. It seeks to provide the essential analysis to show how section 1132 makes forum selection clauses void as against public policy. As the next Part details, section 1001(b) is not the only basis for courts to reject forum selection clauses. Rather, a close reading of the statute as a whole, given both its legislative history and historical context, supports such a conclusion.

II. FORUM SELECTION CLAUSES CONFLICT WITH THE POLICY GOALS OF ERISA

ERISA's legislative history and historical context indicate a clear public policy against forum selection clauses.[108] These clauses resurrect geographic

105. *Id.* at 931 ("[I]f Congress had wanted to prevent private parties from waiving ERISA's venue provision, Congress could have specifically prohibited such action.").

106. *See, e.g.,* Nicolas v. MCI Health & Welfare Plan No. 501, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006). The Solicitor General of the United States has made such an argument. *See* Brief for the United States as Amicus Curiae, Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 932 (6th Cir. 2014) (No. 14-1168), 2015 WL 7625682, at *11 [hereinafter United States Brief] ("[A] plan term is not consistent with ERISA when it eliminates two of the three places where the Act authorizes claimants to sue.").

107. *See Mathias*, 867 F.3d at 728; *Smith*, 769 F.3d at 931–34. The Eighth and Third Circuits both declined petitions for mandamus in decisions enforcing a forum selection clause but did not issue opinions. Clause Petition for Writ of Cert; *In re* Jefferson A. Robertson, No. 18-2812, Slip Op. at 1 (3d Cir. Dec. 17, 2018) (denying petition for mandamus).

108. *Cf.* RONALD M. DWORKIN, LAW'S EMPIRE 338–50 (1986) (arguing for statutory interpretation to consider pre- and post-enactment history); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1410–17 (10th ed. 1958); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 157–59 (1990) (supporting reliance on historical context to interpret contracts); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) ("The significance of an enactment, its

obstacles Congress aimed to eliminate.[109] ERISA's enforcement regime, including the statutory venue clause in section 502(e)(2), reflects Congress's decision to rebalance the interests of potential parties and remove procedural barriers.[110] Benefit claims litigation, the legislative process, and the prevailing law when Congress passed ERISA, likewise, reflect an understanding that forum selection clauses would not override a special statutory venue provision.[111] This evidence provides essential guidance for interpreting ERISA.

A. Clearing Obstacles to Protect Employees

First, ERISA's legislative history signals a clear intent to provide putative plaintiffs "ready access to the Federal courts."[112] Pre-ERISA, employees faced substantive and procedural obstacles to recovering benefits. Lawmakers recognized that without legislative change, "many employees" would not receive the benefits they reasonably expected from their pension plan.[113] The substantive problems stemmed in part from the tenuousness of the promises some pension plans made.[114] The major reforms in ERISA—minimum

antecedents as well as its later history, its relation to other enactments, all may be relevant to the construction of words for one purpose and in one setting but not for another."); Bradley C. Karkkainen, "*Plain Meaning*": *Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 470 (1994) ("[P]lacing the statute in its appropriate legal and historical contexts is a necessary part of the interpretive enterprise.").

109. *See infra* Part III and accompanying notes.

110. 29 U.S.C. § 1132 (e)(2) (2012).

111. *See infra* II.A–II.B and accompanying notes.

112. 29 U.S.C. § 1001(b) (2012).

113. 29 U.S.C. § 1001(a) (2012) ("[M]any employees with long years of employment are losing anticipated retirement benefits . . . .").

114. One threat was "forfeiture risk." Some pension plans required employees to complete many years of service before they would receive a "vested" or nonforfeitable right to a pension. *See, e.g.*, 29 U.S.C. § 1001(a) (2012) ("[M]any employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans . . . ."). For a fuller discussion of forfeiture risk, see JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 54–56, 92–94 (2005) (discussing employees who quit or were laid off before they satisfied the service requirement, thus forfeiting the pension credit they had accrued). Another threat to employees' interests was "default risk," which arose when an employer did not set aside sufficient assets to pay all of the benefits promised by a pension plan. *See, e.g.*, 29 U.S.C. § 1001(a) (2012) ("[O]wing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered . . . ."). For a fuller discussion of default risk, see WOOTEN, *supra*, at 57–60 (discussing instances in which employees failed to receive the pension benefits because their employer went out of business or terminated an

vesting standards,[115] minimum funding requirements,[116] a government-run guaranty program,[117] and federal fiduciary standards of conduct[118]—resolved many of these "substantive" risks.

But fragility of substantive rights was not the lone barrier. Rights only matter if they can be enforced.[119] Drafters also sought to clear procedural obstacles that previously "hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants."[120] These barriers ranged from participants' lack of basic information about their plan to complex issues of jurisdiction, service, and venue.[121] Frank Cummings, a former Senate staffer and the principal drafter of the first comprehensive pension-reform bill introduced in Congress,[122] described these impediments in testimony to the Senate Finance Committee in June 1973.[123] To start, the employee likely would not know the basic features of the plan. As Cummings put it:

> How many employees know the corporate name of the employer, the exact name, and location of the trust and trustees, the location of the bank holding the money, the name of the insurance company through which the plan is funded, if it is funded that way, the identity and addresses of the unions involved, including the international and local unions and their officers, and those of the

underfunded pension plan). A third threat to employees' interests in retirement plans was "agency risk," which arose because the people charged with running a pension or welfare benefit plan might mismanage it. For a fuller discussion of agency risk, see *id.* at 43–47 (discussing instances in which plan officials wasted or misappropriated plan assets).

115. *See* 29 U.S.C. §§ 1051-61 (2012).
116. *See* 29 U.S.C. §§ 1081-85 (2012).
117. *See* 29 U.S.C. §§ 1301-1453 (2012).
118. *See* 29 U.S.C. §§ 1101-14 (2012).
119. *See Second Panel Discussion on Private Pension Plan Reform, Vesting and Funding Provisions; Termination Insurance; Portability; and Fiduciary Standards: Hearing Before the Subcomm. on Private Pension Plans of the S. Comm. on Fin.*, 93d Cong. 107–08 (1973) [hereinafter *Hearing*] (statement of Frank Cummings, attorney, Gall, Lane & Powell); *see also* KENNETH J. VANDEVELDE, THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING 11 (2d ed. 2011) ("[P]rocedural law shapes substantive law. An ancient maxim of the law holds that 'where there is no remedy, there is no right.' To say that I have a certain right arguably is an insignificant statement unless I can enforce that right in the courts.").
120. S. REP. NO. 93–127, at 35 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4871.
121. *See generally Hearing*, *supra* note 119, at 106–10 (statement of Frank Cummings, attorney, Gall, Lane & Powell).
122. For Cummings's role, see 113 CONG. REC. 4650 (Feb. 28, 1967).
123. *Hearing*, *supra* note 119, at 106–10 (statement of Frank Cummings, attorney, Gall, Lane & Powell).

> officers who have been designated as trustees? How many employees even know the real name of the plan or the trust or its technical terms?"[124]

Even presuming an employee could obtain this information, he continued, "the legal problems have just begun."[125] Choice of law and jurisdictional barriers added further complications: "Whose law applies? The bank is in one state, the corporation in another state, the employees in several other states, the union in another state, and the contract may not specify a choice of law."[126] And "even if you could decide (probably after costly litigation) which law applies," said Cummings, "what court would have jurisdiction to serve process in all those states, and bring in all the necessary parties? I know of none . . . ."[127]

The text of ERISA memorializes Congress's intent to empower employees to enforce their benefit rights. No challenging deduction is necessary to derive this intent: the "Findings and Declaration of Policy" codified in 29 U.S.C. section 1001 expressly "declar[e]" it to be "the policy" of ERISA "to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . ."[128] "[P]roviding for . . . ready access to the Federal courts"[129] was one means Congress adopted to this end.

Lawmakers neutralized procedural barriers through a calculated, multipronged approach, ensuring participants and beneficiaries did not just have "access" but "ready access to the Federal courts."[130] The various

124. *Id.* at 107–08. ERISA's disclosure requirements, in particular the required contents of the summary plan description that must be provided to plan participants and beneficiaries, address the informational obstacles Cummings describes. *See* 29 U.S.C. § 1022(b) (2012); 29 C.F.R. § 2520.102–3 (2019).

125. *Hearing*, *supra* note 119, at 108 (statement of Frank Cummings, attorney, Gall, Lane & Powell). Cummings was quick to note the questionable nature of such an assumption. See *id.* (stating "you have *no right* to assume in most cases" that employees would have detailed knowledge about their plan) (emphasis in original).

126. *Id.*

127. *Id.*

128. 29 U.S.C. § 1001(b) (2012); *see also* Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 935 (6th Cir. 2014) (Clay, J., dissenting).

129. 29 U.S.C. § 1001(b) (2012); *Smith*, 769 F.3d at 935.

130. 29 U.S.C. § 1001(b) (2012). The legislative history of what became 29 U.S.C. § 1001(b) demonstrates the importance pension reformers accorded to "ready access to the Federal courts." The "ready access" language in section 1001(b) first appears in the Nixon administration's 1970 fiduciary standards bill and reappears in similar legislation Nixon sent to Congress in 1971 and 1973. S. 3589, 91st Cong. § 2(c) (1970) (revising § 2(b)(2) of the Welfare and Pension Plans Disclosure Act of 1958, as amended); S. 3024, 92d Cong. § 2(c) (1971) (revising § 2(b) of the Welfare and Pension Plans Disclosure Act of 1958, as amended); S. 1557, 93d Cong. § 2(c) (1973) (revising § 2(b) of the Welfare and Pension Plans Disclosure Act of 1958, as amended). The "ready access" language

provisions of section 1132 do much of the work.[131] Section 1132(a) authorizes causes of action to remedy breaches of ERISA or the terms of a benefit plan, identifying the parties authorized to bring each type of action.[132] Section 1132(d)(1) allows a plan to sue and be sued as an entity and specifies how a plan may be served.[133] Section 1132(e)(1) provides for exclusive federal jurisdiction of most actions authorized under section 1132(a) and concurrent jurisdiction for claims enforcing benefit rights under section 1132(a)(1)(B).[134] Section 1132(f) gives the district courts of the United States "jurisdiction, without respect to amount in controversy or the citizenship of the parties, to grant the relief provided for in [§ 1132(a)] in any action."[135] Most importantly for this Article, in enacting section 1132(e)(2) Congress intentionally provided liberal venue options that, in the words of an early commentator, authorized plaintiffs under Title I of ERISA to sue "pretty much everywhere."[136]

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also appears in the "Findings and Declaration of Policy" provision in bills introduced by John Dent, who led pension reform efforts in the House of Representatives; in the pension-reform bill the House Education and Labor Committee reported in October 1973; and in the bill the House passed in February 1974. H.R. 1269, 92d Cong. § 2(b) (1971); H.R. 2, 93d Cong. § 2(b) (as introduced in House, Jan. 3, 1973); H.R. 2 § 2(b) (as reported by H. Comm. on Educ. & Labor, Oct. 2, 1973); H.R. 2 § 2(b) (as passed by House, Feb. 28, 1974). Bills introduced by Jacob Javits and Harrison Williams, who led pension reform efforts in the Senate, and bills reported by the Senate Labor and Public Welfare Committee included similar "ready access" language in their "Findings and Declaration of Policy." S. 3598, 92d Cong. § 2(b) (as introduced in Senate, May 11, 1972) (declaring policy "to provide for more appropriate and adequate remedies, sanctions, and ready access to the courts"); S. 3598 § 2(b) (as referred to S. Comm. on Fin., Sept. 19, 1972); S. 4 § 2(b) (as introduced in Senate, Jan. 4, 1973); S. 4 § 2(b) (as reported by S. Comm. on Labor & Pub. Welfare, Apr. 18, 1973). The Senate pension reform bill did not have a Findings and Declaration of Policy provision, and so did not include the "ready access" language. *See* H.R. 2 (as passed by Senate, Mar. 4, 1974).

131. 29 U.S.C. § 1132 (2012); *see also* Frank Cummings, *ERISA Litigation: An Overview of Major Claims and Defenses*, 588 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. COURSE OF STUDY 517, 521–22 (1991).
132. 29 U.S.C. § 1132(a) (2012).
133. 29 U.S.C. § 1132(d)(1) (2012).
134. 29 U.S.C. § 1132(e)(1) (2012).
135. 29 U.S.C. § 1132(f) (2012). At the time ERISA was enacted, there was a $10,000 amount-in-controversy requirement for federal-question jurisdiction. *See* Act of July 25, 1958, Pub. L. No. 85–554, § 1, 72 Stat. 415. Congress eliminated this requirement in 1980. *See* Act of Dec. 1, 1980, Pub. L. No. 96–486, § 2(a), 94 Stat. 2369. It is important to note Congress considered many pension reform bills in which employees would have had to satisfy the then-existing amount in controversy requirement. Section 1132(f) rejected this approach. 29 U.S.C. § 1132(f).
136. The full quote reads as follows: "For instance, section 502(e)(2) provides that venue in the federal courts can be where the plan is administered, where the breach took place, and where the defendant resides or can be found. That means pretty much everywhere." Robert J. Hickey, *Liability for Breach of Fiduciary Responsibilities*, 31 BUS. LAW. 175, 176

Forum selection clauses undermine the policy Congress adopted in ERISA by resurrecting an obstacle the drafters aimed to eliminate. Employees now may live and work in one state but be forced to sue for benefits well over 2000 miles away.[137] Additionally, employees must possess a degree of precognition to protect their future rights. By participating in a benefit plan, employees are bound to the plan's selected forum for a potential future suit, without regard to whether they move or retire[138] or their plan later amends the clause to select another forum in a distant locale.[139] This means an employee may initially accept a job with pension benefits, thinking the benefits are enforceable in one locale. Should the employee need to sue for such benefits years later, however, that locale may no longer be a viable option for suit. Instead, the employee may be limited to some far-flung court, in a state in which she never lived or worked.[140] At the time of filing, putative plaintiffs can no longer rely on the range of venue options drafters consciously added in section 1132.[141]

Rather than squarely addressing Congress's declared policy of expanding "ready access to the Federal courts," decisions enforcing such clauses frequently invoke other policy considerations not declared in the ERISA statute.[142] These include everything from establishing a uniform

(1975); *see also* Richard T. Phillips, *Civil Litigation Under the Employee Retirement Income Security* Act, 49 MISS. L.J. 241, 253 (1978) ("The statutory venue provisions for civil litigation under ERISA are extremely broad.").

137. *See* Marin v. Xerox, 935 F. Supp. 2d 943, 947 (N.D. Cal. 2013) (transfer from Northern District of California to Western District of New York); Testa v. Becker, No. CV 10-638-GHK (FMOx), 2010 WL 1644883, at *7-8 (C.D. Cal. Apr. 22, 2010) (transfer from Central District of California to Western District of New York); Rodriguez v. Pepsico Long Term Disability Plan, 716 F. Supp. 2d 855, 862 (N.D. Cal. 2010) (transfer from Northern District of California to Southern District of New York); Laasko v. Xerox Corp., 566 F. Supp. 2d 1018, 1024 (C.D. Cal. 2008) (transfer from Central District of California to Western District of New York); Bernikow v. Xerox Corp. Long-Term Disability Plan, No. CV 06-2612 RGKSHX, 2006 WL 2536590, at *2 (C.D. Cal. Aug. 29, 2006) (transfer from Central District of California to Western District of New York).

138. *See, e.g.*, *In re* Mathias, 867 F.3d 727, 729, 733–34 (7th Cir. 2017); *Laasko*, 566 F. Supp. 2d at 1020.

139. *See, e.g.*, *Testa*, 2010 WL 1644883, at *2-3 (Apr. 22, 2010); Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 925-26 (6th Cir. 2014); Dumont v. Pepsico, Inc., 192 F. Supp. 3d 209, 211 (D. Me. 2016).

140. *See, e.g.*, Schoemann *ex rel.* Schoemann v. Excellus Health Plan, Inc., 447 F. Supp. 2d 1000, 1001 (D. Minn. 2006) (transferring case to New York, even though employee worked in Kansas and now lives in Minnesota).

141. *See, e.g.*, Gipson v. Wells Fargo & Co., 563 F. Supp. 2d. 149, 156 (D.D.C. 2008) (acknowledging the District of Columbia, where the plaintiff filed suit, was a proper venue, but transferred the case to Minnesota based on forum selection clause).

142. *See infra* notes 123–125.

administrative scheme[143] to lowering costs of bringing suit[144] to "remov[ing] any uncertainty about where jurisdiction lies, thus avoiding confusion regarding venue selection."[145]

Still other courts rely on policies wholly unconnected with pension reform. These decisions enforce forum selection clauses based on a greater-includes-the-lesser analogy to the policy underlying the Federal Arbitration Act (FAA).[146] After presuming ERISA claims are arbitrable,[147] these courts infer forum selection clauses must be enforceable as well.[148]

Interpretative misdirection of this sort should be rebuffed. While greater-includes-the-lesser reasoning may be appropriate for common law, it is illegitimate under separation of powers principles when a court interprets a statute: the legislature, not the judiciary, made the law the courts are applying. In section 1001 Congress declared "the policy" of ERISA, but declined to declare other policies lawmakers undoubtedly considered. To borrow Chief Justice Burger's words in *The Bremen* decision, section 1001 is "'a strong public policy . . . declared by statute.'"[149] Consequently, courts ought to prioritize the protective policy Congress declared over policies it did not.

"[P]roviding for . . . ready access to the Federal courts" is the fundamental policy courts must consider in enforcing forum selection

143. Klotz v. Xerox Corp., 519 F. Supp. 2d 430, 436 (S.D.N.Y. 2007) (stating "[e]nforcement of the forum selection clause . . . . contained in Xerox's LTD [long-term disability] 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"); *see also, e.g.*, *Mathias*, 867 F.3d at 733; *Smith*, 769 F.3d at 931–32; Rodriguez v. PepsiCo Long Term Disability Plan, 716 F. Supp. 2d 855, 861 (N.D. Cal. 2010); *Laasko*, 566 F. Supp. 2d at 1023.

144. *See, e.g.* Feather v. SSM Health Care, 216 F. Supp. 3d 934, 941 (S.D. Ill. 2016); Williams v. Ascension Long-Term Disability Plan, No. 16-1361-JTM, 2017 WL 1540635, at *2 (D. Kan, Apr. 28, 2017); Conte v. Ascension Health, No. 11-12074, 2011 WL 4506623, at *4 (E.D. Mich. Sept. 28, 2011); *Schoemann*, 447 F. Supp. 2d at 1007; Scaglione v. Pepsi-Cola Metro. Bottling Co., 884 F. Supp. 2d 642, 643 (N.D. Ohio 2012).

145. *Williams*, 2017 WL 1540635, at *2; *accord* Martinez v. Bloomberg LP, 740 F.3d 211, 219–20 (2d Cir. 2014); Haynsworth v. Corp., 121 F.3d 956, 962 (5th Cir. 1997).

146. Turner v. Sedgwick Claims Mgmt. Servs., Inc., No. 7:14-CV-1244-LSC, 2015 WL 225495, at *13, *14 (N.D. Ala. Jan. 16, 2015); *Klotz*, 519 F. Supp. 2d at 436; 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); Williams v. CIGNA, No. 5:10-CV-00155, 2010 WL 5147257, at *4 (W.D. Ky. Dec. 13, 2010).

147. *See, e.g.*, *Smith*, 769 F.3d at 932 (6th Cir. 2014) (citing Sixth Circuit law upholding mandatory arbitration of ERISA claims).

148. *Id.* ("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."); *Williams*, 2010 WL 5147257, at *4; *Sneed*, 2008 WL 1929985, at *2.

149. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

clauses.[150] It should take more to override a declared policy than facile invocation of policies Congress did not declare.[151] If section 1001(b) does not declare a "strong public policy" or if enforcing a venue-selection clause does not "contravene[]" that policy,[152] courts should simply explain why. In either scenario, external policy considerations are mere red herrings.

Furthermore, the FAA analogy flouts core principles of statutory interpretation. Courts enforce arbitration clauses because a federal statute compels it.[153] Section 2 of the FAA authorizes enforcement of "[a] written provision . . . to settle by arbitration a controversy thereafter arising out of" certain contracts.[154] While the FAA may embody a "legislative policy . . . [that] . . . strongly favors the enforcement of agreements to arbitrate,"[155] no comparable legislative policy requires courts to enforce forum selection clauses.[156] Thus, extrapolating the enforceability of venue selection

150. *See* 29 U.S.C. § 1001(b); *Bremen*, 407 U.S. at 15.

151. Aaron v. Sec. & Exch. Comm'n, 446 U.S. 680, 695 (1980). When the language of a statute, here section 1001(b), "is sufficiently clear in its context and not at odds with the legislative history, it is unnecessary 'to examine the additional considerations of policy . . . that may have influenced the lawmakers in their formulation of the statute.'" *Id.* *Cf.* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 38 (1988) (Scalia, J., dissenting) ("In general, while interpreting and applying substantive law is the essence of the 'judicial Power' created under Article III of the Constitution, that power does not encompass the making of substantive law." (citation omitted)); *see* Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 714 (2019) ("Enacted [legislative] findings and purposes are law just like any other part of the law, and there is no reason why they should not be given the full weight of law."); *see also* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17–18 (Amy Gutmann ed., 1997) ("[U]nder the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.").

152. *See, e.g.*, *Smith*, 769 F.3d at 934 (Clay, J., dissenting).

153. *See, e.g.*, *id.* at 935.

154. 9 U.S.C. § 2 (2012).

155. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 479 (1989). *But see* Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created A Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 123 (2006) (questioning whether the FAA established a strong policy favoring arbitration).

156. *But see Smith*, 769 F.3d at 932 (upholding venue clause based on FAA analogy). In declaring that arbitration clauses are "in effect, a specialized kind of forum-selection clause," however, the Sixth Circuit completely ignored the legal context that distinguishes forum selection clauses and arbitration clauses. *Id.* (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)). Interestingly, in *Barrowclough*, the Third Circuit had previously held that ERISA's venue provision indeed barred the enforcement of arbitration clauses for statutory ERISA claims. *See* Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923, 941 (3d Cir. 1985). In coming to this conclusion, the court specifically considered Congress's intention to provide "ready access" to the federal

clauses by considering the enforceability of arbitration is akin to comparing apples and orangutans.[157]

Moreover, the FAA allows parties to move cases wholly out of the court system,[158] whereas ERISA aims to ensure participants and beneficiaries have "ready access to the Federal courts."[159] This tension, alone, makes reliance on the FAA for interpretative guidance questionable. Since the FAA neither applies to nor even addresses forum selection clauses,[160] it neither binds nor helps with the validity query.

Judicial reliance on uncodified policies and unrelated statutes only risks undermining Congress's stated purpose of giving participants and beneficiaries the means to protect their benefit rights.[161] Considering Congress's legislative intent coupled with its declared purpose, the policy of ERISA becomes clear: ensuring "ready access to the Federal courts."[162]

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courts pursuant to section 1001(b). *Id.* ("Congress further sought 'to protect . . . the interests of participants and beneficiaries, by . . . providing for appropriate remedies, sanctions, and ready access to the Federal courts.'" (quoting 29 U.S.C. § 1001(b)). It was not until *Pritzker* that the appellate court decided that Supreme Court decisions favoring the "strong federal policy" of enforcing arbitration could not be ignored. Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1115 (3d Cir. 1993) ("[H]owever, we have not hesitated to act when we discover that our decisions have fallen out of step with current Supreme Court jurisprudence." (citation omitted)).

157. *See* Taylor, *supra* note 49, at 797 n.68 (1993) ("Because Congress has the authority under Article III of the United States Constitution to determine the extent of the federal courts' jurisdiction, Congress may also determine when the federal courts should decline to exercise that jurisdiction. Such situations must be distinguished from situations in which the courts themselves decline jurisdiction, particularly when they do so to enforce an agreement of private individuals.").

158. *See, e.g.*, Benjamin P. Edwards, *Arbitration's Dark Shadow*, 18 NEV. L.J. 427, 435 (2018) (discussing how arbitration "removes cases from public courts and public processes, casting entire fields of law into shadow"); *see also* Hugh J. Ault, *Improving the Resolution of International Tax Disputes*, 7 FLA. TAX REV. 137, 146 (2005) ("[A]rbitration ('alternative' dispute resolution) in most other contexts intentionally removes the substantive matter at issue from the domestic judicial system (though there may be a judicial review of the procedural aspects of the case).").

159. 29 U.S.C. § 1001(b) (2012); *see also* H.R. REP. NO. 93-533, at 17 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4655.

160. *See* 9 U.S.C. § 2 (2012).

161. *See* Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373–74 (1986) ("Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action."); *see also* Shobe, *supra* note 151, at 714 (2019) ("Enacted [legislative] findings and purposes are law just like any other part of the law, and there is no reason why they should not be given the full weight of law.")

162. 29 U.S.C. § 1001(b) (2012); H.R. REP. NO. 93-533; *see also* Mertens v. Hewitt Assocs., 508 U.S. 248, 264 (1993) (White, J., dissenting) (acknowledging ERISA's "ready access" goal).

B. Venue Options Throughout ERISA's Evolution

Second, the legislative history of pension reform confirms that ERISA's drafters meant for employees to have venue options that would facilitate enforcement of their benefit rights. Recognition of employees' need for broad venue options is clear from the beginnings of ERISA's evolution. In February 1967, the Johnson administration introduced legislation to impose federal fiduciary standards on people who managed plan assets.[163] Johnson's bill authorized employees to sue to enforce these standards. To facilitate enforcement, the legislation allowed for suits "in any district court of the United States and in the United States courts of any place subject to the jurisdiction of the United States where the fund is administered or where the breach took place or where the defendant is an inhabitant or may be found . . . ."[164]

Roughly three years later, in March 1970, the Nixon administration proposed a revised fiduciary standards bill that included the precise venue language that would ultimately appear in section 502(e)(2) of ERISA.[165] Like

163. *See* S. 1024, 90th Cong. § 9(h) (1967). Johnson's bill proposed federal fiduciary standards for administrators of employee benefit funds and authorized participants and beneficiaries of a fund (as well as the Department of Labor) to sue fiduciaries who breached those standards. *See id.* §§ 9(h) and 14; *see also* Wooten, *supra* note 114 at 121-23 (discussing the genesis of this bill).

164. S. 1024 § 9(h)(2); *cf.* 29 U.S.C. § 1132(e)(2) (2012) (authorizing a plaintiff to file "where the plan is administered, where the breach took place, or where a defendant resides or may be found"). Like section 1132(e)(2), the venue provision in Johnson's bill also authorized nationwide service of process. *See id.*; S. 1024 § 9(h)(2). Interestingly, one early critic of the venue language in Johnson's bill was Senator Jacob Javits, who spearheaded pension reform in Congress. About a week after Johnson's bill was introduced in the Senate, Javits introduced his own pension-reform legislation. In remarks touting his own bill, Javits claimed the venue language in Johnson's legislation was too broad. *See* 113 CONG. REC. 4659 (1967) ("The Administration bill (S. 1024) would permit an action in any United States District Court and then allow the court's process to reach beyond the confines of its district—indeed, nationwide. The result would be that anyone could be made to respond anywhere, subject to a later motion to transfer the case to a more convenient forum."). Javits later changed his mind and endorsed the approach in Johnson's bill. *See*, *infra* notes 174 and 175.

165. *Compare* S. 3589, 91st Cong. § 9(b) (1970) (adding section 9(f)(2) to the Welfare and Pension Plans Disclosure Act of 1958) ("Where such an action is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found."), *with* 29 U.S.C. § 1132(e)(2) (2012) ("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.").

Johnson's bill, Nixon's bill authorized employees to enforce its fiduciary standards.[166] In addition, Nixon's bill authorized employees to sue to recover benefits due under their plan.[167] Such actions could be brought in state or federal court,[168] and when brought in federal court, a plaintiff could sue "where the plan is administered, where the breach took place, or where a defendant resides or may be found."[169]

Explaining S. 3589, Senator Jacob Javits, who introduced the bill on behalf of the Nixon administration, noted the obstacle venue rules posed to enforcement of benefit rights and the need for improving employees' access to the federal courts.[170] "[I]n the case of plans covering employees and beneficiaries in many States," Javits observed, "service of process, venue, and jurisdictional requirements compound even further the difficulty facing individual employees who might want to institute a suit to protect their rights under present law."[171] "The administration bill which I am introducing today," he continued, "is specifically designed to remedy these defects, as well as to provide additional protections to plan participants."[172] Thus, by Javits's own words, venue options at filing were an essential component of pension reform.

The venue language in S. 3589 later reappeared in bills proposed by the Nixon Administration,[173] by Javits,[174] by Javits and Senate Labor and Public

166. S. 3589 § 9(b) (adding section 9(e)(2) to the Welfare and Pension Plans Disclosure Act of 1958).
167. *Id.* (including a new provision that authorized "a participant or beneficiary" to bring an action "to recover benefits due him under the terms of his plan or to clarify his rights to future benefits under the terms of the plan").
168. *Id.* (adding § 9(f)(1) to the Welfare and Pension Plans Disclosure Act of 1958, as amended).
169. *Id.* (adding § 9(f)(2) to the Welfare and Pension Plans Disclosure Act of 1958, as amended).
170. 116 CONG. REC. 7279 (1970).
171. *Id.*
172. *Id.* Javits made the same statement when he introduced a similar fiduciary-standards bill for the Nixon administration in December 1971. *See* 117 CONG. REC. 46914 (1971) ("Finally, in the case of plans covering employees and beneficiaries in many States service of process, venue, and jurisdictional requirements compound even further the difficulty facing individual employees who might want to institute a suit to protect their rights under present law. The administration bill which I am introducing today is specifically designed to remedy these defects, as well as to provide additional protections to plan participants.").
173. S. 3024, 92d Cong. § 9(b) (1971) (adding § 9(f)(2) to the Welfare and Pension Plans Disclosure Act of 1958, as amended); S. 1557, 93d Cong. § 9(b) (1973) (adding § 9(f)(3) to the Welfare and Pension Plans Disclosure Act of 1958, as amended).
174. S. 2, 92d Cong. § 504 (1971).

Welfare Committee chair Harrison Williams,[175] and by Congressman John Dent,[176] who led pension-reform efforts in the House Labor and Education Committee. This venue language also appeared in bills reported by the House Education and Labor Committee,[177] the Senate Labor and Public Welfare Committee,[178] and the Senate Finance Committee.[179] Indeed, after the introduction of Nixon's bill in 1970, this venue language appears in every bill addressing private enforcement of benefit rights that Congress seriously considered.[180] Finally, the language appears in the pension-reform bills passed by each chamber of Congress[181] and, again, in ERISA itself.[182]

175. S. 3598, 92d Cong. § 603 (1972) (as introduced in Senate, May 11, 1972); S. 4, 93d Cong. § 603 (1973) (as introduced in Senate, Jan. 4, 1973). It should be noted that Javits and Williams' major bills in the 92d and 93d Congresses did not authorize participants and beneficiaries to bring claims for benefits in the federal district "where the breach took place." See S. 3598 § 604 (as introduced in Senate, May 11, 1972); S. 4 § 604 (as introduced in Senate, Jan 4, 1973). This limitation on venue must be seen in the context of the overarching enforcement strategy of the legislation. These bills placed the primary burden for enforcing employee benefit rights on a government agency—the Department of Labor—and authorized the Department to bring benefit claims on behalf of participants and beneficiaries. See S. 3598 § 602 (as introduced in Senate, May 11, 1972); S. 4 § 602 (as introduced in Senate, Jan 4, 1973). For discussion of the enforcement strategy of these bills, see Hearing, supra note 119, at 110 (statement of Frank Cummings, attorney, Gall, Lane & Powell).

176. H.R. 1269, 92d Cong. § 106(g)(2) (1971); H.R. 2, 93d Cong. § 503(g)(2) (as introduced in House, Jan. 3, 1973).

177. *See* H.R. 2 § 503(g)(2) (as reported by H. Comm. on Educ. & Labor, Oct. 2, 1973).

178. *See* S. 4 § 603 (as reported by S. Comm. on Labor & Pub. Welfare, Apr. 18, 1973).

179. S. 1179, 93d Cong. § 501(d)(4) (1973). The venue clause in section 501(d)(4) applied to fiduciary breach claims but not to claims for benefits. As in the case of Javits and Williams's bills, the Finance Committee's failure to propose broader venue options for such claims must be seen in light of the broader enforcement strategy of the Finance Committee's bill. Section 602 of the bill proposed an entirely new enforcement regime for benefit claims, authorizing the Secretary of Labor "to hear and decide disputes arising under qualified plans . . . with respect to the present or future benefits of such participants or their beneficiaries, upon application made by any such participant or beneficiary." *Id.* § 602(a) (as reported August 21, 1973). The committee proposed this administrative regime because of doubts about whether employees could effectively enforce benefit claims in the courts even if Congress enhanced their access to the courts. *See* S. REP. NO. 93-383, at 116-17 (1973), *as reprinted in* 1974 U.S.C.C.A.N 4889, 4890.

180. Congress gave serious consideration to some bills that did not address enforcement of benefit rights. *See, e.g.*, S. 1179 (as introduced in Senate, Mar. 13, 1973).

181. H.R. 2 § 693 (as passed by Senate, Mar. 4, 1974); H.R. 2 § 503(g)(2) (as passed by House, Oct. 2, 1973). The enforcement provisions of the Senate version of H.R. 2 derived from Javits and Williams's bills, so it too did not authorize employees to sue to enforce benefit claims in the federal district "where the breach took place." *See* H.R. 2 § 694 (as passed by Senate, Mar. 4, 1974); *see also supra* note 175.

182. Employee Retirement Income Security Act (ERISA) of 1974, § 502(e)(2), 29 U.S.C. § 1132(e)(2) (2012).

Congressional reports further confirm ERISA drafters' policy goal of clearing procedural hurdles. House and Senate Labor Committee reports use identical language to describe the procedural reforms in their bills:

> The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and 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. For actions in federal courts, nationwide service of process is provided in order to remove a possible procedural obstacle to having all proper parties before the court.[183]

The report of the Finance Committee also notes that the Committee's bill established "[l]iberal venue and service provisions . . . for actions brought in Federal district court."[184] In sum, while pension reformers disagreed about some things, they were unanimous in their belief that employees needed broad venue options to enforce their benefit rights effectively.

C. ERISA in Historical Context

The historical context in which ERISA was drafted further suggests forum selection clauses are unenforceable.[185] As Judge Torreson from the District Court of Maine notes, "[w]hat Congress intended by offering venue choices to participants and beneficiaries is best understood in light of the climate that existed in 1974 when ERISA was enacted."[186] As this Subpart explains, given the state of the law in 1974, ERISA's drafters had every reason to believe section 1132 would control venue in pension benefit actions. Forum selection clauses were not on the radar of drafters or pension benefit

183. S. REP. NO. 92-1150, at 43 (1972); S. REP. NO. 93-127, at 35 (1973), as *reprinted in* 1974 U.S.C.C.A.N. 4838, 4838; H.R. REP. NO. 93-533, at 17 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4655.

184. S. REP. NO. 93-383, at 106 (report on S. 1179).

185. The value of historical context for statutory interpretation is well-established. *See supra* note 108.

186. Dumont v. PepsiCo, Inc., 192 F. Supp. 3d 209, 222 (D. Me. 2016); *accord* Melvin Aron Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13, 35 (1995) ("[P]urposeful words, like those of statutes, have no intelligible meaning out of the context of the applicable legal, social, and historical propositions in which the words were written. Words out of context are like fish out of water—dead or dying."); Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 868 (2002) ("While contemporary legal context should not always be the most important factor in statutory interpretation, courts should consider the state of the law at the time of a statute's enactment as a relevant factor in interpreting it." (footnote omitted)).

experts. Rather, the prevailing presumption was such clauses would not be enforced, as evidenced by pension benefit litigation pre-ERISA.[187] This much-needed historical context clarifies why ERISA drafters did not explicitly discuss forum selection clauses. Because such clauses were presumed to be unenforceable, there was no reason for ERISA to address them.

1. Pre-ERISA Law Voided Forum Selection Clauses

ERISA's drafters and the specialists who managed employee-benefit plans presumed courts would not allow terms in the governing documents of a benefit plan to supersede a statutory grant of venue options. Such a presumption would have been wholly in line with the prevailing law during the period ERISA was enacted. No pre-ERISA employee benefits cases appear to invoke such clauses, which is unsurprising given the then-existing state of the law.[188]

Moreover, at the time ERISA percolated through Congress, Supreme Court authority held statutory provisions overrode attempts to contractually select a court.[189] In the 1949 decision, *Boyd v. Grand Trunk Western Railroad Company*,[190] the Court refused to enforce a forum selection clause that conflicted with a provision in the Federal Employers' Liability Act (FELA or the Act).[191] The plaintiff, a railroad employee, suffered a work-related

187. *See infra* Subpart II.C.2 (discussing historical case law).

188. Forum selection clauses appear not even to have been a "rarity" when Congress passed ERISA. *See* Turner v. Sedgwick Claims Mgmt. Servs., Inc., No. 7:14-CV-1244-LSC, 2015 WL 225495, at *21 (N.D. Ala. Jan. 16, 2015) ("[I]t does not appear that issues related to forum-selection clauses in ERISA plans began appearing in the caselaw until about the mid–2000's, and those cases suggest that the forum-selection clauses had been added by amendments made around that same period." (citation and footnote omitted)). *Cf.* CompuCredit Corp. v. Greenwood, 565 U.S. 95, 103 (2012) (upholding arbitration clause in Credit Report Organization Act (CROA) case because "[a]t the time of the CROA's enactment in 1996, arbitration clauses in contracts of the type at issue here were no rarity"). The earliest case discovered discussing a forum selection clause in an employee benefit plan is Green v. Picker Corp., No. 38621, 1979 WL 210070 (Ohio Ct. App. Mar. 29, 1979). The Trust Agreement for the plan required suit in New York. *Id.* at *2. Citing *Bremen*, the Court of Appeals of Ohio held it "unreasonable to require [Plaintiff, a former employee], whose financial resources are far less than those of Picker Corporation, to bring this action in New York when he worked for the corporation in Ohio, and the parties to the lawsuit, appellant, the corporation, and the five members of the Retirement Income Plan Committee, are all Ohio residents, subject to the jurisdiction of the Ohio courts." *Id.*

189. Boyd v. Grand Trunk W. R. Co., 338 U.S. 263 (1949).

190. *Id.*

191. *Id.* at 264–65.

injury.[192] His employer advanced him money twice in the following months.[193] With each advancement, the employee signed an agreement that contained a forum selection clause.[194] He subsequently sued his employer under FELA to recover for the injuries suffered.[195] The venue provision in FELA gave employees who sued in federal courts three options: "in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."[196]

In a concise decision, the Court held that a contractual forum selection clause could not override the statutory policy.[197] Even though the statute at issue did not expressly forbid forum selection clauses, the Court justified its holding as necessary to ensure the Act would "have the full effect that its comprehensive phraseology implies."[198] In doing so, the Court recognized that forum selection clauses compromise an employee's right to select a venue provided by statute.[199] The Court equated forum selection clauses with a device to limit a potential employee's right to sue, characterizing the clause as "a device which obstructs the right of the [FELA] plaintiff to secure the maximum recovery if he should elect judicial trial of his cause."[200] Hence, in

192. *Id.* at 263.
193. *Id.*
194. *Id.* at 263–64.
195. *Id.*
196. *Id.* at 265 (quoting Federal Employers' Liability Act).
197. *Id.* at 266 ("28 U.S.C. § 1404(a) . . . 'does not limit or otherwise modify any right granted in § 6 of the Liability Act or elsewhere to bring suit in a particular district.'") (citation omitted).
198. *Id.* at 265 (quoting Duncan v. Thompson, 315 U.S. 1, 6 (1942)). In a decision issued the same term, the Court held that defendants can still pursue venue transfer under 28 U.S.C. § 1404 without violating the Act's statutory venue provision. *Ex parte* Collett, 337 U.S. 55, 60 (1949). Such arguments, however, are distinct from arguments to enforce a forum selection clause.
199. *Boyd*, 338 U.S. at 266 ("The right to select the forum granted in § 6 is a substantial right. It would thwart the express purpose of the Federal Employers' Liability Act to sanction defeat of that right by the [forum selection clause].").
200. *Id.* (footnote omitted). Some courts argue that *Boyd* is not controlling simply because of the wording of the Liability Act. *See, e.g.*, Mroch v. Sedgwick Claims Mgmt. Servs., Inc., No. 14-CV-4087, 2014 WL 7005003, at *3 n. 1 (N.D. Ill. Dec. 10, 2014) ("But the plain language in [the FELA] is mandatory, "*shall* to that extent be void"; and, thus, the analysis in *Boyd* is . . . inapplicable to ERISA's permissive language . . . ."). *Boyd*, however, turned on the purpose of the Liability Act, which was to prevent a defendant's from "exempt[ing] itself from any liability created by [the] Act." *Boyd*, 338 U.S. at 265 (quoting Federal Employers' Liability Act). The Boyd decision does not discuss Congress's word choice of "shall" versus "may" in reaching its holding. Similarly, for the purpose of ERISA, the use of the word "may" is irrelevant. Rather, the declared policy

accord with several lower decisions,[201] the Court refused to enforce the provision.[202]

In the years leading up to ERISA's passage, federal circuit and district courts faithfully applied the principles in *Boyd*. For example, the First Circuit in 1966 declared that a statutory venue provision "cannot so easily be thwarted" by a contractual forum selection clause.[203] Similar conclusions were reached by federal district courts in the 1960s and early 1970s when they assessed venue selection clauses that conflicted with the venue provision of the Miller Act.[204]

This context sheds light on the drafter's silence on such clauses in ERISA. As evidenced from scholars' writings pre-ERISA, the caselaw was notably clear: a contractual forum selection clause was not enforceable in the face of a federal statute that expanded a plaintiff's venue options.[205] Given *Boyd* and

providing potential plaintiffs "ready access to the Federal courts" is controlling. *See* 29 U.S.C. § 1001(b) (2012).

201. *See Boyd*, 338 U.S. at 264 n.3 (1949) (listing cases).

202. *Id.* at 264–65.

203. Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437, 439 (1st Cir. 1966) (citing *Boyd*, 338 U.S. 263). Notably, the statutory venue provision in question, like ERISA's, uses "may." 15 U.S.C. § 1222 (2012) ("An automobile dealer *may* bring suit . . . .") (emphasis added).

204. U.S. *ex rel.* Gigliello v. Sovereign Const. Co., 311 F. Supp. 371, 373 (D. Mass. 1970) ("Parties cannot by contract oust the District Court of the jurisdiction conferred upon it."); U.S. *ex rel.* Ray Gains, Inc. v. Essential Constr. Co., 261 F. Supp. 715, 720 (D. Md. 1966) ("Since the use plaintiff would not be entitled to its Miller Act rights in the New York state courts, such forum cannot do substantial justice to its cause of action."); U.S. *ex rel.* Vt. Marble Co. v. Roscoe-Ajax Constr. Co., 246 F. Supp. 439, 443 (N.D. Cal. 1965) ("[T]he only district in which the action may properly be brought under the Miller Act is the Northern District of California and . . . the parties cannot by their contract prescribe a different jurisdiction . . . ."); *see also* Lukas A. Anton, C.H. Robinson Worldwide, Inc. v. FLS Transportation, Inc.: *How Minnesota's Closely-Related-Party Doctrine Undermines Long-Settled Principles of Contract Law*, 35 HAMLINE L. REV. 497, 521 & n.178 (2012) (discussing the impact of these decisions); Gruson, *supra* note 39, at 173–79 ("Statutory Restrictions on Forum Selection Clauses").

205. *See, e.g.*, B. Nathaniel Richter & Lois G. Forer, *Proposed Changes in the Laws Governing Injuries in Interstate Transportation*, 67 HARV. L. REV. 1003, 1012 (1954) ("The importance of the plaintiff's right to choose his forum was deemed so substantial that agreements between employee and carrier limiting the jurisdictions in which the employee might sue are invalid."); B. Nathaniel Richter & Lois G. Forer, *Federal Employers' Liability Act*, 12 FED. RULES DECISIONS 13, 61 (1952) ("An agreement entered into by an employee with the carrier to bring suit only in the jurisdiction where the employee resided or where the injury was sustained was invalidated as being in violation of Section 5 of the Act." (footnote omitted)); *see also* David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 1011 (2008) ("Statutes that specifically afforded plaintiffs access to a particular venue precluded clause enforcement . . . .").

its progeny, ERISA drafters would have logically assumed a statutory grant of venue choices would supersede a contractual forum selection provision.[206]

The Supreme Court's 1972 decision to uphold a forum selection clause in *M/S Bremen v. Zapata Off-Shore, Co.* does not alter this conclusion.[207] Rather than a tidal shift toward contractual autonomy,[208] *The Bremen* was an extension of earlier admiralty cases where forum selection clauses had roots back to the late 1770s.[209] Every Supreme Court decision to this point had rejected forum selection clauses as improper attempts to contractually override judicial authority.[210] The Court still acknowledged that forum selection was historically disfavored as "contrary to public policy."[211] Further, the Court recognized that this position "still ha[d] considerable acceptance."[212] That said, the Court was willing to break from this tradition for the specific international towage contract at issue in the case.[213]

Essentially, the Supreme Court addressed different venue queries in *Boyd* and *The Bremen*.[214] If a controlling statute already determined venue,

206. *See Boyd*, 338 U.S. at 266; *see also Volkswagen Interamericana*, 360 F.2d at 439.
207. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 20 (1972).
208. *See infra* notes 226–230 and accompanying text; *see also* Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After* Carnival Cruise*: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 58 (1992) ("Because *Bremen* was an admiralty case, there was a serious question as to whether its standards were limited to that context, or were applicable to federal question and diversity actions as well." (footnote omitted)).
209. *See, e.g.*, Thompson v. Catharina, 23 F. Cas. 1028 (D. Pa. 1795). For a thorough discussion of the historical application of forum selection clauses in admiralty cases, *see* David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973 (2008). In fact, Chief Justice Burger's opinion, explicitly defines the parameters of the holding, stating "[w]e believe this is the correct doctrine to be followed by federal district courts sitting in admiralty." *Bremen*, 407 U.S. at 10.
210. *See, e.g.*, Baltimore & Ohio R. Co. v. Kepner, 314 U.S. 44, 54 (1941) ("A privilege of venue, granted by the legislative body which created this right of action, cannot be frustrated for reasons of convenience or expense."); *accord Boyd*, 338 U.S. at 266; Home Ins. Co. v. Morse, 87 U.S. 445, 451 (1874) ("[A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.").
211. *Bremen*, 407 U.S. at 9 ("Forum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court." (footnote omitted)).
212. *Id.* at 10.
213. *Id.* at 15 ("Thus, in the light of present-day commercial realities and expanding international trade . . . the forum clause should control absent a strong showing that it should be set aside.").
214. The Southern District Court of New York explained the coexistence of the two cases. In *City of New York v. Pullman, Inc.*, the court acknowledged that "[a]greements entered into by knowledgeable parties in an arm's-length transaction that contain a forum

parties could not contractually agree to a venue under *Boyd*.[215] In the absence of such a statute, and within the limited confines of narrowly defined contractual agreements, *The Bremen* applied.[216] Nonetheless, *The Bremen* reinforces the underlying principles in *Boyd*.[217] The decision cites *Boyd*[218] and reaffirms that a "contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared *by statute* or by judicial decision."[219]

Congress had little reason to think *The Bremen* would undo its statutory work providing plaintiffs "ready access" to enforce pension benefits.[220] Subsequent lower court decisions reinforced a narrow interpretation of *The Bremen*.[221] Lower court decisions that read *The Bremen* more broadly to apply to all commercial cases come out well after ERISA's enactment.[222] Even the

selection provision are enforceable absent a showing of fraud, overreaching, unreasonableness or unfairness." City of New York v. Pullman, Inc., 477 F. Supp. 438, 441 n.10 (S.D.N.Y. 1979) (citing *Bremen*, 407 U.S. 1). "[A] contractual choice of forum clause," however, "is unenforceable if its enforcement would contravene a strong policy of a forum in which suit is brought, whether declared by statute or by judicial decision." *Id.* (citing *Boyd*, 338 U.S. 263).

215. *See, e.g.*, Jeremy Jones, *Forum and Venue Selection Clauses in Seamen's Employment Contracts: Can Contractual Stipulations be Used to Defeat a Seaman's Choice of Forum or Venue in a Jones Act Claim?*, 85 TUL. L. REV. 519, 530 (2010) (explaining "the continued vitality of *Boyd*" should be recognized "despite the general trend toward enforcing forum and venue selection clauses following *Bremen*"; the author further notes that "*Bremen* cites *Boyd* as an example of a public policy that would mandate holding a forum selection clause unenforceable" (footnote omitted)).

216. *See Bremen*, 407 U.S. at 15 (citing *Boyd*, 338 U.S. 263).

217. *See* Jones, *supra* note 215, at 530.

218. *Bremen*, 407 U.S. at 15.

219. *Id.* (citing *Boyd*, 338 U.S. 263) (emphasis added).

220. *See* 29 U.S.C. § 1001(b) (2012).

221. *See* Green v. Picker Corp., No. 38621, 1979 WL 210070 (Ohio Ct. App. 1979); Copperweld Steel Co. v. Demag-Mannesmann-Boehler, 354 F. Supp. 571, 573 (W.D. Pa. 1973) (holding that *Bremen* did not apply because "the reason for the policy behind *M/S Bremen* does not exist here," and further noting that "the Supreme Court appears to be telling us to apply *M/S Bremen* in admiralty cases"); Smith, Valentino & Smith, Inc. v. Sup. Ct., 551 P.2d 1206 (Cal. 1976) (the majority and dissenting opinions disagree about whether the scope of *The Bremen* extends past admiralty cases); Case Comment, *Forum Selection Clauses in Contracts Governing Multinational Transactions*, 86 HARV. L. REV. 52, 56 (1972) ("The *Zapata* decision pronounces only federal admiralty law.").

222. *See, e.g.*, Hoffman v. Nat'l Equip. Rental, Ltd., 643 F.2d 987, 989 n.2 (4th Cir. 1981) (citing to *Bremen* in non-admiralty action); *In re* Fireman's Fund Ins. Cos., 588 F.2d 93, 95 (5th Cir. 1979) ("While *The Bremen* dealt with admiralty matters, its teaching is appropriate for the situation in the instant [Miller Act] case."); Farrington v. Centrust Mortg. Corp., No. 88-2633-WF, 1989 WL 120698, at *1 (D. Mass. Oct. 2, 1989) (applying *Bremen* to a domestic employment agreement); C. Pappas Co. v. E. & J. Gallo Winery, 565 F. Supp. 1015, 1017 (D. Mass. 1983); D'Antuono v. CCH Computax Sys., Inc., 570 F. Supp. 708,

Supreme Court seemed to retreat from a more expansive application of *The Bremen* in 1988.[223] It was not until 1991, seventeen years after ERISA was enacted, that the Court shifted toward upholding forum selection clauses in contracts of adhesion.[224]

In upholding ERISA venue clauses, some courts reject *Boyd*'s direct application, deeming it a relic of "an era of marked judicial suspicion of contractual forum selection."[225] *Boyd's* utility as a relic, however, is what matters for understanding why ERISA's drafters saw no need to expressly negate forum selection clauses.[226] The argument here is distinct from straight stare decisis principles.[227] *Boyd* may be a governing precedent.[228] But even if it is not now, it was in 1974 and would have informed what the legislature believed when it passed ERISA.[229] The decision sheds light on why ERISA drafters did not expressly negate forum selection clauses. Such an express declination was simply unnecessary at the time of drafting.[230] This would have

711 (D.R.I. 1983); Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 383 n.258 (2013) (citing post–*Bremen* decisions).

223. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28 (1988) (citing Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641-642 (1981) for the proposition that "federal common law developed under admiralty jurisdiction [is] not freely transferable to [the] diversity setting"). The Court goes on to say:

> [W]e disagree with the court's articulation of the relevant inquiry as "whether the forum selection clause in this case is unenforceable under the standards set forth in *The Bremen*." Rather, the first question for consideration should have been whether § 1404(a) itself controls respondent's request to give effect to the parties' contractual choice of venue and transfer this case to a Manhattan court. For the reasons that follow, we hold that it does.

Id. at 28–29 (internal citations omitted).

224. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

225. *In re* Mathias, 867 F.3d 727, 733 (7th Cir. 2017).

226. *See* Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437, 439 (1st Cir. 1966) (reiterating the declaration from *Boyd* that a statutory venue provision cannot "easily be thwarted" by a forum selection clause); Case Comment, *supra* note 221, at 56 ("The *Zapata* decision pronounces only federal admiralty law.").

227. Though, under such principles, the argument that *Boyd* controls in the ERISA context remains colorable. *Boyd* is the Supreme Court's only decision squarely addressing when a federal statute voids a forum selection clause. *See* Boyd v. Grand Trunk Western Railway Co., 338 U.S. 263, 266 (1949).

228. The Supreme Court has never overruled the decision. It last cited the decision in *Evans v. Jeff D.*, 475 U.S. 717 (1986), though a circuit court has favorably cited it most recently in *Liles v. Ginn-La West End, Ltd.*, 631 F.3d 1242, 1251 (11th Cir. 2011).

229. *See Boyd*, 338 U.S. at 266 ("The right to select the forum granted in [statute] is a substantial right.").

230. *See* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972) ("A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong

been particularly true when employees had little choice but to adhere to the employers' terms because, at the time, a forum selection clause in a contract of adhesion was unenforceable.[231]

Nonetheless, courts enforcing venue selection clauses in ERISA cases commonly point to ERISA's failure to explicitly negate such clauses as a justification for enforcing them. For example, the Sixth Circuit argues in *Smith v. AEGON Companies Pension Plan* that "if Congress had wanted to prevent private parties from waiving ERISA's venue provision, Congress could have specifically prohibited such action."[232] But silence, alone, is indeterminate and equally supports invalidating such clauses.[233] As the court states in *Dumont v. Pepsico, Inc.*, "the flip side of this argument also holds true: if Congress had wanted to allow forum selection clauses, it could have expressly permitted them."[234] Courts should replace silence with evidence, because without evidence they run the risk, in Justice Scalia's words, "of projecting current attitudes upon the helpless past."[235]

2. Contemporary Pension Benefit Actors Presumed Unenforceability

The actions of benefits professionals and legislators active in pension reform reveal a shared presumption that forum selection clauses were unenforceable. Parties who undertook pension benefit litigation pre-ERISA appear to have presumed that a court would not enforce forum selection

public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.") (citing *Boyd*, 338 U.S. 263).

231. Willis L. M. Reese, *The Supreme Court Supports Enforcement of Choice-of-Forum Clauses*, 7 INT'L LAW. 530, 535-56 (1973) ("It seems likely that the courts will continue to follow earlier cases holding that effect should be denied choice-of-forum clauses contained in insurance and other form contracts."); Gruson, *supra* note 39, at 166 ("If the agreement containing the forum-selection clause is a contract of adhesion, the clause would not be enforceable.").

232. Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 931 (6th Cir. 2014) (citing 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)); *see also In re* Mathias, 867 F.3d 727, 732 (7th Cir. 2017) ("Nothing in [the] text [of § 1132(e)(2)] *expressly* invalidates forum-selection clauses in employee-benefits plans." (emphasis in original); *Bernikow*, 2006 WL 2536590, at *2 ("Had Congress sought to prevent plaintiffs from waiving the statutory venue provision by private agreement, it could have done so by express provision.").

233. Perhaps such a result is why the Ninth Circuit cautions against reliance on statutory silence. *See* Polar Bear Prods., Inc. v. Timex Corp., 384 F.3d 700, 717 (9th Cir. 2004) ("The district court's interpretation attempts to divine congressional intent from congressional silence, an enterprise of limited utility that offers a fragile foundation for statutory interpretation.") (citation omitted).

234. Dumont v. Pepsico, Inc., 192 F. Supp. 3d 209, 211 (D. Me. 2016).

235. Mertens v. Hewitt Assocs., 508 U.S. 248, 257 n.7 (1993).

clauses. This evidence shows why Congress would have had no reason to think venue selection clauses could override venue options under section 1132(e)(2).

For example, consider the legal gymnastics defense counsel for United Mine Workers Welfare and Retirement Fund (the Fund) undertook.[236] Beginning in the late 1940s miners sought to recover retirement benefits from the Fund.[237] Many sued where they resided.[238] There followed twenty years of jurisdictional skirmishing over where such cases ought to be heard.[239] In many of these cases, the Fund moved to dismiss suits filed outside the District of Columbia, contending it was a trust of movables.[240] Under the trust of movables doctrine, suits involving trust administration could be brought only in the situs of the trust.[241] The Fund argued payment of retirement benefits was trust administration, which would mean retirees could only sue in the District of Columbia where the Fund was organized.[242] Though the Fund enjoyed initial success,[243] the courts ultimately rejected the trust of movables

236. For a discussion of the history and creation of the Fund, see RICHARD P. MULCAHY, A SOCIAL CONTRACT FOR THE COAL FIELDS: THE RISE AND FALL OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND 12-22 (2001); *see also* Van Horn v. Lewis, 79 F. Supp. 541 (D.D.C. 1948).

237. *See, e.g.*, George v. Lewis, 228 F. Supp. 725 (D. Colo. 1964); Pavlovscak v. Lewis, 168 F. Supp. 839 (W.D. Pa. 1958); Hobbs v. Lewis, 270 S.W.2d 352 (Tenn. 1954); Kane v. Lewis, 125 N.Y.S.2d 544 (N.Y. App. Div. 1953); *see also* MULCAHY, *supra* note 236, at 22 (noting fund began issuing pension checks in 1948).

238. *See, e.g.*, Miller v. Davis, 507 F.2d 308 (6th Cir. 1974) (plaintiffs were residents of Kentucky who brought suit in Federal District Court of Kentucky); *Hobbs*, 270 S.W.2d at 352 (plaintiff was a resident of Tennessee, case was brought in Tennessee State Court).

239. *See supra* notes 237–238 (including cases as early as 1954 and as late as 1974).

240. *See Hobbs*, 270 S.W.2d at 353 (defendant argued that because "the trust in question is one of movables with its situs in Washington," the case must be heard "by a court having jurisdiction within the territory in which the situs of the trust is located, to wit, a court in Washington, D.C.") (internal quotation marks omitted).

241. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 299 (AM. LAW. INST. 1934) ("The administration of a trust of movables is supervised by the courts of that state only in which the administration of the trust is located."); *see also Hobbs*, 270 S.W.2d at 353 (stating that "the situs of the administration of the trust is the proper forum for all actions by or against the trustees").

242. *See Hobbs*, 270 S.W.2d at 353–54.

243. *See, e.g.*, *id.* at 354 ("Since the situs of this trust of movables is at Washington, D.C., it seems necessary to hold, both by reason of principle as well as persuasive precedent, that the Courts of Tennessee have no jurisdiction to entertain Hobbs' suit for any purpose connected with the administration of that trust.").

doctrine.[244] The last of these cases was not decided until November 1974, two months after Congress passed ERISA.[245]

The Fund's twenty years of litigation make little sense were forum selection clauses enforceable pre-ERISA. If it had been understood that courts would enforce a forum selection clause against employees in a benefit plan, why did the Fund's lawyers not add such a clause to the Fund's governing documents? The Fund had competent counsel.[246] If the Fund's attorneys had reason to believe such a clause even might have been enforced, they certainly would have added one.[247] It would have been a lot cheaper to add a forum selection clause than to litigate the trust of movables doctrine for two decades.

244. Rittenberry v. Lewis, 222 F. Supp. 717, 721–22 (E.D. Tenn. 1963), *aff'd*, 333 F.2d 573 (6th Cir. 1964) ("When a trust seeks to operate upon a nationwide basis, as does the Welfare Fund here, with 1,500,000 beneficiaries scattered across the nation, it is difficult to understand how a rule of convenience in the law of administration of trusts could so dominate the judicial mind as to cause it to disregard the rights and convenience of 1,500,000 beneficiaries across the nation in favor of a rule that accords a theoretical uniformity of instruction to the trustee.") (footnote omitted). Upon affirming the case on appeal, a very different Sixth Circuit than the one that decided *Smith v. Aegon* found itself in "full agreement" and thus saw no need "to rewrite such an opinion and deprive the trial court of its careful consideration of the issues and arguments, and complete determination of the cause." Rittenberry v. Lewis, 333 F.2d 573, 574 (6th Cir. 1964) (quoting Patrol Valve Co. v. Robertshaw-Fulton Controls Co., 210 F.2d 146, 146 (6th Cir. 1954)).

245. Miller v. Davis, 507 F.2d 308 (6th Cir. 1974).

246. *See, e.g.*, *Longtime Lawyer E.H. Rayson Jr. Dies*, KNOX NEWS (Jan. 11, 2017, 1:50 PM), https://www.knoxnews.com/story/news/local/tennessee/2017/01/11/longtime-lawyer-eh-rayson-jr-dies/96446956 [https://perma.cc/JS6H-JP5H]; *Edward Carey, SSA Law Judge, Dies at Home*, WASH. POST (Oct. 19, 1983), https://www.washingtonpost.com/archive/local/1983/10/16/edward-carey-ssa-law-judge-dies-at-home/5b3464aa-7505-488e-8fc9-4e1527cc9453/?noredirect=on&utm_term=.f98fcd94001a [https://perma.cc/5ZWH-7JPE]; *Hopkins, Welly K., 1898-1994*, LBJ PRESIDENTIAL LIBRARY, https://discoverlbj.org/item/hopkinswk [https://perma.cc/KE2Q-G4XD].

247. The trust governing the Fund granted the trustees extensive powers. One term read as follows:

> Subject to the stated purposes of this Fund, the trustees shall have full authority, within the terms and provisions of the "Labor-Management Relations Act, 1947," and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing and arranging for provisions for benefits, investment of trust funds, and all other related matters.

Dersch v. United Mine Workers of Am. W. & R. Fund, 309 F. Supp. 395, 396–97 (S.D. Ind. 1969) (internal quotation marks omitted). It is important to recall that trust lawyers often wrote terms to override general provisions of trust law at this point in time. *See* H.R. REP. NO. 93–533, at 12 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4655; *Pension and Welfare Plans: Hearing before the Subcomm. on Labor of the S. Comm. on Labor & Pub. Welfare*, 90th Cong. 227 (1968) (statement of Thomas Donahue, Assistant Secretary, U.S. Department of Labor). Similarly, if the fund attorneys thought they could have drafted their way around venue problems, they would have done so.

The Fund's behavior is only rational if the lawyers presumed adding such a clause would have been futile.[248]

Like the fund's litigation strategy, the conduct of people involved in the legislative process reveals a similar presumption.[249] The legislative and executive branch officials who drafted bills with broad venue language endorsed it as a means of "remov[ing] . . . procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants."[250] Other commentators sought to modify the language to make it even broader. For example, the National Senior Citizens Law Center claimed the venue clauses in the various pension-reform bills were "definitely slanted against the average plan participant" and recommended expanding permitted venues to include the district in which the plaintiff resided.[251]

If advocates for broader venue options had suspected courts would enforce forum selection clauses, they would have demanded express language to prevent this. As current events show, anything less would have been insufficient to protect employees. The same goes for drafters of the leading bills because venue selection clauses would undermine the "ready access" they sought to provide. The best inference from ERISA's legislative history and the conduct of benefit professionals is that Congress failed to expressly address forum selection clauses in ERISA because these clauses were not, and were understood not to be, enforceable.[252]

248. As the Seventh Circuit stated, these cases are from "an era of marked judicial suspicion of contractual forum selection." *In re* Mathias, 867 F.3d 727, 733 (7th Cir. 2017).

249. Venue selection clauses appear not to have been mentioned at all during the lead-up to ERISA. In its amicus brief to the Sixth Circuit, the Department of Labor writes that "[t]here is no legislative history specifically concerning forum selection clauses as far as we have been able to ascertain." Brief of the Secretary of Labor as Amicus Curiae in Support of Plaintiff/Appellant and Urging Reversal, Smith v. Aegon Cos. Pension Plan, 769 F.3d 922 (6th Cir. 2014) (No. 13-5492), 2013 WL 4401190, at 22 n.4 (Aug. 12, 2103). Our own efforts have had the same result.

250. H.R. REP. No. 93-533, at 17 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4655; S. REP. NO. 93-127, at 35 (1973), as *reprinted in* 1974 U.S.C.C.A.N. 4838, 4838; S. REP. 92-1150, at 43 (1972); *see also* 116 CONG. REC. 7279 (1970) (statement of Sen. Javits).

251. H. WAYS & MEANS COMM., 93D CONG., WRITTEN STATEMENTS SUBMITTED BY INTERESTED ORGANIZATIONS AND INDIVIDUALS ON H.R. 10470, "RETIREMENT INCOME SECURITY FOR EMPLOYEES ACT," 15, 18, 787 (Comm. Print 1973) (including statements by the National Senior Citizens Law Center and AARP).

252. *See supra* Part II.C and accompanying notes.

III. READING ERISA TO PROTECT THE INTERESTS OF EMPLOYEES

Forum selection clauses not only conflict with ERISA's policy, they also conflict with its text. As this section explains, the express language of section 1132 affords plan participants the choice of venue options at filing. Since forum selection clauses remove participants' choice at filing, a literal application of the text prohibits them. Arguments to the contrary improperly strain the text of ERISA, thus compromising ERISA's "policy . . . to protect . . . the interests of [employees] . . . .by providing for . . . ready access to the Federal courts."[253]

The text of section 1132 rebalances the legal entitlements generally associated with federal venue.[254] Constitutionally, a plaintiff may choose any forum that satisfies subject matter and personal jurisdiction requirements.[255] The general venue statute in 28 U.S.C. section 1391 provides defendants with a counterbalance, giving them a mechanism to limit the plaintiff's range of otherwise constitutional filing options.[256] While some special statutory venue provisions confirm this jurisdictional balance,[257] others recalibrate a defendant's check by expanding or narrowing a plaintiff's range of venue options.[258] By narrowing where a plaintiff may sue, a statutory venue provision enlarges a defendant's checking power.[259] In contrast, a statutory

253. 29 U.S.C. § 1001(b) (2012).
254. *See* 29 U.S.C. § 1132(e)(2) (2012) (affording broader venue options than available under section 1391 at enactment); *see also* Varsic v. U.S. Dist. Ct., 607 F.2d 245, 248 (9th Cir. 1979) (stating that Congress "clearly struck the balance in favor of liberal venue" in enacting ERISA).
255. *See* Watson McDaniel Co. v. Nat'l Pump & Control, Inc., 493 F. Supp. 18, 21 (E.D. Pa. 1979) ("The test for venue is not the minimal contacts with the forum state required for constitutional procedural due process, but rather the venue statute enacted by Congress.").
256. *See* Young Again Prods. v. Acord, 459 F. App'x 294, 306 (4th Cir. 2011); U.S. v. Meade, 110 F.3d 190, 200 (1st Cir. 1997); Myers v. Am. Dental Assoc., 695 F.2d 716, 732 (3d Cir. 1982); Concession Consultants, Inc. v. Mirisch, 355 F.2d 369, 371 n.1 (2d Cir. 1966) ("Unlike the matter of jurisdiction venue was (and remains) a privilege personal to each defendant, which can be waived, and is waived by him unless timely objection is interposed.") (citation omitted).
257. *See, e.g.*, 15 U.S.C. § 45b(e)(5) (2012) (permitting "any action brought under paragraph (1)" to be brought in "the district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28").
258. *See* Hoffman v. Blaski, 363 U.S. 335, 341 n.10 (1960) (comparing the venue provision for patent infringement lawsuits with the general venue provision codified in 28 U.S.C. § 1391).
259. *See, e.g.*, Int'l Refugee Org. v. Bank of Am. Nat'l Tr. & Sav. Ass'n, 86 F. Supp. 884, 886 (S.D.N.Y. 1949) (finding section 1391 inapplicable).

venue provision that broadens the range of courts where a plaintiff may sue restricts a defendant's power.[260]

Section 1132(e)(2) falls squarely into the latter category. At the time of enactment, ERISA narrowed defendants' check and returned greater venue choice to plaintiffs. Pre-ERISA, section 1391 limited a plaintiff suing in diversity to "the judicial district where all plaintiffs or all defendants reside, or in which the claim arose," while in all other cases, a plaintiff could file in a district where "all defendants reside" or "where the claim arose."[261] In contrast, section 1132(e)(2) expanded the range of venues by authorizing suit "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, . . . "[262] This change significantly enhanced plaintiffs' capacity to enforce their rights. For example, take a case where a plaintiff wanted to sue two defendants residing in different districts. Under 1391 circa 1974, no venue would satisfy the "all defendants reside" provision. Under ERISA, however, the plaintiff could sue in either district based on a single defendant's residence in that venue.[263]

The choice of venue options is one means Congress adopted to empower employees to enforce their benefit rights.[264] The phrase "ready access" is not a decision rule or standard for gauging a plaintiff's access to the federal courts. Rather, it is a description of what section 1132 does by its operation: courts comply with the "ready access" language by allowing participants and beneficiaries to choose from section 1132's venue options at filing. Section 1001(b) provides no other benchmark to assess "ready access to the Federal

260. *See, e.g.*, Lipp v. Nat'l Screen Serv. Corp., 95 F. Supp. 66, 69–70 (E.D. Pa. 1950) ("The venue provisions of the anti-trust laws were enacted to give anti-trust plaintiffs special venue privileges in addition to those granted by general venue statutes . . . they were intended to facilitate the prosecution of anti-trust actions, not to replace or make unavailable general venue provisions.") (*citing* U.S. v. Nat'l City Lines, 334 U.S. 573 (1948)).

261. 28 U.S.C. § 1391(a) (as enacted Nov. 2, 1966).

262. 29 U.S.C. § 1132(e)(2) (2012).

263. Some courts fail to recognize the significance of ERISA's expansion of plaintiffs' venue options. *See, e.g.*, Turner v. Sedgwick Claims Mgmt. Servs., Inc., No. 7:14-CV-1244-LSC, 2015 WL 225495, at *11 (N.D. Al. Jan. 15, 2015) (presuming ERISA section 502(e)(2) was only "incrementally broader" than section 1391). At the time of ERISA's enactment, informed observers took a different view. *See supra* note 136 and accompanying text.

264. Just as ERISA's statutory provisions "provid[e] for appropriate" "remedies" and "sanctions," section 1001(b) declares that ERISA's statutory provisions "provid[e] for appropriate . . . ready access to the Federal courts." 29 U.S.C. § 1001(b) (2012); *see also* Boggs v. Boggs, 520 U.S. 833, 845 (1997) (noting, with respect to §§ 1001(b) & 1001(c), "[t]he general policy is implemented by ERISA's specific provisions").

courts" than the operation of ERISA's statutory provisions by their terms.[265] Accordingly, just as a court should not ignore a remedy afforded by ERISA, it cannot ignore the venue options made available by ERISA.

A comparison with Congress's declaration of policy in section 1001(c) illustrates this point. Section 1001(c) declares a congressional policy to "protect the interests [of employees] by improving the equitable character and the soundness of [private pension] plans by requiring them to vest the accrued benefits of employees with *significant* periods of service . . . ."[266] The reference to "*significant* periods of service" does not purport to create a benchmark for courts to apply in determining whether a particular employee ought to be vested in her benefit accruals. Rather, it describes what ERISA's vesting rules do by their operation, namely, "vest the accrued benefits of employees with significant periods of service."[267] The job of a court is to enforce the vesting rules as written to ensure the rules can serve the function for which Congress adopted them.

The same is true for sections 1001 and 1132.[268] Courts ensure ERISA's venue rules serve the function for which Congress adopted them by permitting beneficiaries and participants to decide, at filing, which section 1132 venue best serves to enforce their benefit rights. Any other approach denies employees the "ready access to the Federal courts" Congress meant them to have. Notwithstanding these textual cues, however, most courts enforce forum selection clauses. In doing so, they cut loose from the statutory text and substitute their own watered down concepts of "ready access," thereby replacing congressional mandate with judicial whim. Each of these new constructions, however, is questionable.

First, some courts conclude that a forum selection clause does not conflict with ERISA as long as the clause permits an employee to sue in a

265. Where Congress meant to delegate the courts authority to exercise judgment in the application of statutory remedies it did so expressly. *See* 29 U.S.C. §§ 1109(a) and 1132(a)(2), (3), (4), (5) (2012) (illustrating how the word "appropriate" specifies a standard to guide judicial discretion in the implementation of particular remedial provisions). *See, e.g.*, Harris Tr. & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 249–53 (2000) (explaining how the word "appropriate" contributes to the limiting effect of the phrase "appropriate equitable relief" in 29 U.S.C. § 1132(a)(3) and thereby provides courts guidance on the remedy available).

266. 29 U.S.C. § 1001(c) (2012) (emphasis added).

267. 29 U.S.C. § 1053(a) (2012); *see also Boggs*, 520 U.S. at 845 ("The general policy is implemented by ERISA's specific provisions.").

268. 29 U.S.C. §§ 1001, 1132 (2012).

federal court.[269] Take *In re Mathias*.[270] Upholding a forum selection clause that forced an ERISA plaintiff to litigate over 700 miles from his home,[271] the Seventh Circuit relies on the Sixth Circuit's opinion in *Smith v. Aegon* for the proposition "forum-selection clauses channeling litigation to a particular federal court preserve ready access to federal court, consistent with the general policy expressed in section 1001(b)."[272] Under this line of reasoning, access to some federal court—even one not named in section 1132(e)(2)—counts as "ready access to the Federal courts," thereby rendering the modifier "ready" superfluous.[273] But as Justice Scalia admonished in *Mertens v. Hewitt Associates*, courts should "not read [a] statute to render the modifier superfluous."[274]

Moreover, the reasoning in *Smith v. Aegon* hangs on a slender reed. To support its conclusion, the court cites a district court's bald assertion that "a contractual venue provision 'certainly does not conflict with ERISA's provision for "ready access to the federal courts."'"[275] The underlying premise of such a conclusion is that the phrase "ready access" creates a decision rule that licenses judges to substitute their own ideas of what counts as "ready access" rather than applying section 1132.[276] Thus, these courts bootstrap their way to their preferred result instead of confronting ERISA's enacted text and declared purpose.

A second tack courts take is to treat section 1132(e)(2) as "permissive," then enforce a forum selection clause so long as employees may sue in a

269. *See, e.g.*, Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 931 ("[N]either Smith nor the Secretary explains how a venue provision inhibits ready access to federal courts when it provides for venue in a federal court."); Feather v. SSM Health Care, 216 F. Supp. 3d 934, 941 (S.D. Ill. 2016) ("the forum selection clause is not inconsistent with the policy rationales of ERISA because it does not inhibit Feather's access to federal courts when it provides for venue in a federal court."

270. 867 F.3d 727 (7th Cir. 2017).

271. *See id.* at 729 & n.2 (transferring case from Pennsylvania to Illinois); *see also* Mathias Petition for Writ of Cert., Mathias v. U.S. Dist. Ct.,2017 WL 5564204, at *I (S. Ct. Nov.14, 2017).

272. *Mathias*, 867 F.3d at 732 (citing *Smith*, 769 F.3d at 931).

273. *See* Harris v. BP Corp. N. Am., Inc., No. 15 C 10299, 2016 WL 8193539, at *6 (N.D. Ill. Sept. 8, 2016) ("This Court declines to read '*ready* access' out of ERISA's stated goal of providing 'ready access to the Federal courts.'") (emphasis in original).

274. Mertens v. Hewitt Assocs., 508 U.S. 248, 248 (1993).

275. *Smith*, 769 F.3d at 931 (quoting Smith v. Aegon USA, L.L.C., 770 F. Supp. 2d 809, 812 (W.D. Va. 2011)).

276. Even if the reference to "ready access" could be understood to be a decision rule, the standard the *Feather* court used would be wrong. It renders the "ready" in "ready access" superfluous. *See infra* notes **Error! Bookmark not defined.**-273.

district court described in section 1132(e)(2).[277] These courts negate Congress's rebalancing of venue options. In 1974, as today, many benefit plans operated nationwide, and many employees lived hundreds or thousands of miles from where their plan was administered or where a putative defendant "reside[d] or [might] be found."[278] Lawmakers saw how difficult it might be for employees in this position to enforce a claim for benefits.[279] For this reason, Congress gave employees a wide range of venue options and the power to choose among them at filing. Taking the language in section 1001(b) at face value, then, "the interest of participants in employee benefit plans and their beneficiaries" are best protected when they make the choice Congress

277. *See, e.g.*, Mathias v. Caterpillar, Inc., 203 F. Supp. 3d 570, 578 (E.D. Pa. 2016); Price v. PBG Hourly Pension Plan, No. 12-15028, 2013 WL 1563573, at *2 (E.D. Mich. Apr. 15, 2013); Rodriguez v. Pepsico Long Term Disability Plan, 716 F. Supp. 2d 855, 861 (N.D. Cal. 2010); Laasko v. Xerox Corp., 566 F. Supp. 2d 1018, 1023 (C.D. Cal. 2008); Klotz v. Xerox Corp., 519 F. Supp. 2d 430, 436 (S.D.N.Y. 2007) (noting that "nothing in ERISA's statutory text or legislative history" prevents narrowing to one of the three in section 1132(e)(2)); Smith v. Aegon Cos. Pension Plan, No. 3-12-CV-697-H, 2013 WL 321632, at *3 (W.D. Ky. Jan. 28, 2013) (finding no conflict because clause requires suit in court described in 1132(e)(2)).

278. *See, e.g.*, George v. Lewis, 204 F. Supp. 380, 382 (D. Colo. 1964) (Colorado plaintiffs suing pension trust administered in Washington, D.C.).

279. Recall Senator Javits's comments to the Senate upon introducing the first bill to include the broad venue language in section 1132(e)(2) of ERISA, the Nixon Administration's 1970 fiduciary reform legislation: "[I]n the case of *plans covering employees and beneficiaries in many States*, service of process, venue, and jurisdictional requirements compound even further the difficulty facing individual employees who might want to institute a suit to protect their rights under present law. The administration bill which I am introducing today is specifically designed to remedy these defects . . . ." 116 CONG. REC. 7279 (1970) (emphasis added). It is clear from opinions in litigation involving the United Mine Workers Welfare and Retirement Fund that federal judges also understood that many employees did not have "ready access" to the courts where a plan was administered. *Two months after ERISA's enactment*, the Sixth Circuit rejected the Fund's attempt to use the trust-of-movables doctrine to force the plaintiff-miners to sue in Washington, D.C., where the trust was administered. The court quoted and endorsed the following passage from *Rittenberry v. Lewis*, 222 F. Supp. 717, 721-22 (E.D. Tenn. 1963):

> "When a trust seeks to operate upon a nationwide basis, as does the Welfare Fund here, with 1,500,000 beneficiaries scattered across the nation, it is difficult to understand how a rule of convenience in the law of administration of trusts could so dominate the judicial mind as to cause it to disregard the rights and convenience of 1,500,000 beneficiaries across the nation in favor of a rule that accords a theoretical uniformity of instruction to the trustee. Under such a rule the Fund could locate in Hawaii, where presumably no miners live, and for all practical purposes escape any court supervision of the rights of the beneficiaries. *To a destitute and disabled miner in Tennessee, Washington, D.C. can be about equally unavailable as Hawaii*."

Miller v. Davis, 507 F.2d 308, 317-18 (6th Cir. 1974) (emphasis added).

provided in section 1132(e)(2).[280] Allowing employers to choose revives the very obstacles Congress sought to eliminate by passing ERISA.[281]

Decisions that invoke the "permissive" character of section 1132(e)(2) also misunderstand the function of the phrase "may be brought." As we explained above, Congress used this phrase to give employees a broader range of venue options. 28 U.S.C. section 1391 has long authorized venue in a list of courts "[e]xcept as otherwise provided by law."[282] The words "may be brought" indicate that section 1132(e)(2) supplements rather than supplants section 1391. As a result, employees can sue to enforce benefit rights in a federal district court that satisfies section 1391 or section 1132(e)(2).[283]

Third, courts also enforce forum selection clauses on different, but related, grounds. These courts presume forum selection clauses to be an employee's exercise of venue options before any claim arises.[284] The Supreme Court has accepted such a characterization in a context not involving a contrary public policy.[285] In such a case, Justice Alito writes in *Atlantic Marine*, the parties "waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation."[286] In the ERISA context, this approach would allow employers to hand-pick[287] the site of litigation without regard to the resulting

280. 29 U.S.C § 1001(b) (2012).

281. Harris v. BP Corp. N. Am., Case No. 15 C 10299, 2016 WL 8193539, at *6 (N.D. Ill. Sept. 8, 2016) (forcing an employee "to litigate her claim in an inconvenient location seems hardly consistent with ERISA's purpose of removing procedural obstacles that have 'hampered effective enforcement of fiduciary duties.'").

282. 28 U.S.C. § 1391(a) (2012). The phrase "except as otherwise provided by law" appeared in section 1391 at the time of ERISA's enactment. *See* PUB. L. NO. 89–714, 80 Stat. 1111 (amending 28 U.S.C. § 1391(a) [venue in cases "founded only on diversity of citizenship"] and (b) [venue in cases "not founded solely on diversity of citizenship"]). This phrasing also appeared in 28 U.S.C. § 1391 when Congress adopted it in 1948. *See* Act of June 25, 1948, ch. 646, § 1, 62 Stat. 935 (current version at 28 U.S.C. § 1391(c) (2011)).

283. *See* 14 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3803.1 (4th ed. 2018). Even though section 1132(e)(2) venues may completely encompass those in section 1391, the "may be brought" ensures that ERISA plaintiffs benefit when section 1391 provides venues not available under section 1132(e)(2). *Id.*

284. *See, e.g.*, *In re* Mathias, 867 F.3d 727, 731 (7th Cir. 2017) ("Although ERISA plans are a special kind of contract and courts are attentive to the statutory goal of protecting beneficiaries, an ERISA plan is nonetheless a contract." (citations omitted)).

285. *See, e.g.*, Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 63 (2013) ("[W]hen a plaintiff agrees by contract to bring suit only in a specified forum—presumably in exchange for other binding promises by the defendant—the plaintiff has effectively exercised its 'venue privilege' before a dispute arises.").

286. *Atl. Marine*, 571 U.S. at 64.

287. The Sixth Circuit acknowledges as much in *Smith v. Aegon Companies Pension Plan* when it describes the court mandated by the venue-selection clause in AEGON's pension

difficulties for employees.[288] Congress's statutorily declared "policy . . . to protect . . . the interests of [employees] . . . .by providing for . . . ready access to the Federal courts" cannot be reconciled with such a result.[289]

Forum selection clauses impose procedural obstacles of the sort Congress put to rest in 1974. Enforcement of these clauses contravenes ERISA's declared policy and the textual implementation of this policy.[290] Accordingly, ERISA invalidates venue-selection clauses across the board.

CONCLUSION

The purpose of forum selection clauses is, by definition, to allow a defendant to forum shop. Courts have willingly traded the pernicious impact of such clauses for the illusory gains of contractual autonomy. While scholars have long bemoaned this decision, forum selection clauses are endemic. That does not mean, however, that such clauses should go unchallenged. Supreme Court authority has repeatedly maintained such clauses cannot supersede public policy.

Perhaps ERISA provides the clearest example of such a policy. As we detailed, multiple avenues of statutory interpretation support a narrative of ERISA that runs fully counter to the prevailing trend toward enforcing such clauses. The drafters of ERISA sought to protect employees by clearing obstacles to the federal courts. The statutory text, the legislative history, and the historical context each confirm this clear policy goal. Rather than defer to this policy, the majority of courts are either ignoring or misinterpreting ERISA.

Freedom of contract, legitimate or questionable depending on the parties' relative bargaining strength, should not override Congressional regulatory intent. Invalidating forum selection clauses in ERISA cases is a

plan as "*AEGON's chosen* venue." Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 932 (6th Cir. 2014) (emphasis added).

288. Justice Alito's holding in *Atlantic Marine* that a plaintiff "effectively exercised [her] 'venue privilege' before a dispute arises" should not extend to ERISA plans. Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 63 (2013). Benefit plans commonly involve long-term relationships and "[p]lan administrators and employers 'are generally free . . . , for any reason at any time to adopt, modify, or terminate benefit plans." *Smith*, 769 F.3d at 930 (6th Cir. 2014). An employee has no choice in the matter, particularly when a plan adds a clause subsequent to an employee's retirement or onset of disability. *See, e.g.*, *id*. at 930 (noting plan amended forum selection clause seven years after benefits commenced); *see also supra* note 87 (discussing additional examples).

289. 29 U.S.C § 1001(b) (2012). *See supra* Part II and accompanying text.

290. *Id.*

first step toward redirecting courts back to giving employees the protection Congress intended.

EXHIBIT 2

WELLS FARGO

Wells Fargo Bank, N.A. Collective Investment Trust Funds for Employee Benefit Trusts

DECLARATION OF TRUST

Together we'll go far

Wells Fargo Bank Declaration of Trust Establishing Investment Funds for Employee Benefit Trusts as amended and restated

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Investments in the Funds are NOT bank deposits, are NOT guaranteed by Wells Fargo, are NOT insured by the Federal Deposit Insurance Corporation ("FDIC") or any other agency of the U.S. Government, and are subject to investment risks, including loss of principal.

The interests offered hereby are exempt from registration under the federal securities laws and accordingly this disclosure does not contain information which would otherwise be included if registration were required.

Article I: Title, establishment, and definitions

1.1 Establishment

(a) In order to provide satisfactory diversification of investments for certain Qualified Accounts as defined herein, Wells Fargo Bank, National Association, hereby establishes a trust, which trust qualifies as a "group trust" under the Internal Revenue Service Ruling 81-100 or any successor ruling, to be known as "Wells Fargo Bank Declaration of Trust Establishing Investment Funds for Employee Benefit Trusts" ("Declaration of Trust") and declares that it will hold and administer in trust, upon the terms and conditions hereinafter set forth, all money and other property acceptable to it that may be delivered to it hereunder by any Qualified Account, together with the income, proceeds, and other increment of such money and property.

(b) The Investment Funds are intended to qualify for an exception from the definition of "investment company" under Section 3(c)(11) of the Investment Company Act of 1940, exemption from registration under the Securities Exchange Act of 1934 and exemption under the Securities Act of 1933.

(c) This Declaration of Trust amends and restates the Wells Fargo Bank Declaration of Trust Establishing Investment Funds for Employee Benefit Trusts established on December 14, 2009.

1.2 Definitions

(a) "Bank" means Wells Fargo Bank, National Association, an affiliate of Wells Fargo Bank, National Association, or any successor Bank or trust company into which Wells Fargo Bank, National Association shall be merged or with which it shall be consolidated, or any corporation resulting from any merger, consolidation, or reorganization to which Wells Fargo Bank, National Association, shall be a party.

(b) "Business Day" means a day on which the New York Stock Exchange is open for business.

(c) "Code" means the Internal Revenue Code of 1986, as amended from time to time.

(d) "ERISA" means the Employee Retirement Income Security Act of 1974, as amended from time to time.

(e) "Fiscal Year" means the annual period selected by the Trustee as the basis for accounting for an Investment Fund.

(f) "Investment Fund" means a collective investment fund established pursuant to Article II.

(g) "Participating Account" means a Qualified Account of which some or all of the assets are invested in the Investment Funds.

(h) "Qualified Account" means an account described in clauses (i), (ii), (iii), (iv), (v), (vi), or (vii) that follow, and that otherwise meets the requirements of clauses (viii)–(xi).

(i) An employee pension, profit sharing or stock bonus plan (i) which is qualified within the meaning of Code Section 401(a) and is therefore exempt from tax under Code Section 501(a) including an employee pension, profit sharing or stock bonus plan created or organized in Puerto Rico which is treated as qualified within the meaning of Code Section 401(a) and is exempt from tax under Code Section 501(a) pursuant to Section 1022(i) of ERISA; (ii) which is administered under one or more documents which authorize part or all of the assets of the trust to be commingled for investment purposes with the assets of other such trusts in a collective investment trust and which adopt each such collective investment trust as a part of the plan; and (iii) with respect to which the Bank is acting as trustee, co-trustee, custodian, investment manager, or agent for the trustee or trustees.

(ii) A governmental plan or unit described in Code Section 401(a)(24) or in Code Section 818(a)(6) which satisfies the requirements of Section 3(a)(2), or any other available exemption, of the Securities Act of 1933 and any applicable requirements of the Investment Company Act of 1940 and any eligible governmental plan which meets the requirements of Code Section 457(b) and with respect to which the Bank is acting as trustee, co-trustee, custodian, investment manager, or agent.

(iii) A trust for the collective investment of assets of any investor otherwise described in this section 1.2(h) (including without limitation an Investment Fund created under this Declaration of Trust), which trust qualifies as a "group trust" under the Internal Revenue Service Ruling 81-100 or any successor ruling.

(iv) Any separate account maintained by an insurance company, the assets of which are insulated from the claims of the insurance company's general creditors and are derived solely from contributions made under a plan qualified under section 401(a) and which is exempt under section 501(a) of the Code or a governmental plan or unit described in subparagraph (2) above or other Qualified Account as defined herein.

(v) A custodial account that is treated as a trust under Code Section 401(f) or under Code Section 457(g)(3) and satisfies all of the other conditions set forth herein.

(vi) A retirement income account under Code § 403(b)(9).

(vii) The trustee of this group trust is also permitted, unless restricted in writing by a named fiduciary, to hold Investment Funds in this group trust that consist of assets of custodial accounts under Code § 403(b)(7), provided that if assets of a custodial account under § 403(b)(7) are invested in the group trust, all assets of the group trust, including the § 403(b)(7) custodial accounts, are solely permitted to be invested in stock of regulated investment companies. For this purpose a Qualified Account includes a custodial account that is treated as a trust under Code § 401(f), 403(b)(7), 408(h), or 457(g)(3).

(viii) The Qualified Account must be maintained pursuant to an instrument which authorizes it to participate in the Trust or in any other common, collective, or commingled trust fund for which the Qualified Account is an eligible participant. In addition, to the extent required by applicable law, the Declaration of Trust must be specifically or in substance and effect incorporated into and adopted as part of the plan or plans of which the Qualified Account is a part. The assets invested in any Investment Fund shall be subject to all the terms of this Declaration of Trust as they may be amended from time to time, and such terms shall be deemed incorporated and made a part of the governing document for any Participating Account as if fully set forth therein.

(ix) Notwithstanding any other provision of this Declaration of Trust, including but not limited to the other subparagraphs of this Section 1.2(h), this group trust is operated or maintained exclusively for the commingling and collective investment of funds from other trusts that it holds. Notwithstanding any contrary provision in this Declaration of Trust, the trustee is permitted, unless restricted in writing by a named fiduciary for a Participating Account, to hold in this group trust funds that consist exclusively of trust assets held under plans qualified under Internal Revenue Code ("Code") § 401(a) that are exempt under Code § 501(a); funds from Code § 401(a)(24) governmental retiree benefit plans that are not subject to Federal income taxation; funds from retirement income accounts under Code § 403(b)(9); and funds from eligible governmental plan trusts or custodial accounts under Code § 457(b) that are exempt under Code § 457(g).

The trustee of this group trust is also permitted, unless restricted in writing by a named fiduciary, to hold funds in this group trust that consist of assets of custodial accounts under Code § 403(b)(7), provided that if assets of a custodial account under § 403(b)(7) are invested in the group trust, all assets of the group trust, including the § 403(b)(7) custodial accounts, are solely permitted to be invested in stock of regulated investment companies. For this purpose a Qualified Account includes a custodial account that is treated as a trust under Code § 401(f), 403(b)(7), 408(h), or 457(g)(3).

(x) For purposes of valuation, the value of the interest maintained by the Investment Fund with respect to any plan or account in the group trust shall be the fair market value of the portion of the Investment Fund held for that plan or account, determined in accordance with generally accepted accounting principles and generally recognized valuation procedures.

(xi) Notwithstanding the foregoing, no investment in the Stable Return Funds established under Section 2.2 shall be made by defined benefit plans other than those invested in such funds as of January 15, 2006.

(i) "Trustee" means Wells Fargo Bank, National Association, in its capacity as trustee under this Declaration of Trust.

(j) "Valuation Date" means any Business Day which the Trustee in its discretion shall establish as a day as of which the assets of an Investment Fund shall be valued.

1.3 Title and words of number

The headings and subheadings of this instrument are inserted for convenience of reference only and are not to be considered in the construction of the Declaration of Trust. Wherever appropriate, words used in the singular may include the plural, plural may be read as the singular, and the masculine may include the feminine.

1.4 Effect of the Declaration of Trust

With respect to any moneys invested in an Investment Fund by any Participating Account, the Trustee, or a co-fiduciary with respect to such Participating Account and all persons interested therein, shall be bound by the provisions of this Declaration of Trust as the same may be amended from time to time pursuant to its terms.

1.5 Effect of statutes and regulations

Notwithstanding any of the provisions of the Declaration of Trust, the Investment Funds shall be administered in conformity with applicable laws of the State of California and of the United States of America and all rules and regulations promulgated from time to time under the authority of such laws, including specifically ERISA, the Code, the rules and regulations prevailing from time to time of the Comptroller of the Currency, and any applicable rules and regulations of the Board of Governors of the Federal Reserve System, all of which shall be deemed to be a part of this Declaration of Trust.

Article II: Investment Funds

The Trustee in its sole discretion may establish one or more Investment Funds under this Declaration of Trust. In turn, any Investment Fund, as described in this section and shown in Exhibit A, may issue multiple unit classes. The Trustee shall hold, manage, administer, invest, and otherwise deal with each Investment Fund separately, and no Investment Fund, directly or indirectly, shall be responsible for the obligations of any other Investment Fund. Every Investment Fund established pursuant to this Declaration of Trust shall be managed, administered, and otherwise operated in conformance therewith.

2.1 Short-Term Investment Funds

The purpose of the Short-Term Investment Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment primarily in fixed income securities, including, but not limited to, bonds, notes, or other evidences of indebtedness such as government securities, commercial paper, certificates of deposits, master notes, or variable amount notes, with the objective of providing high current income consistent with the preservation of capital and the maintenance of liquidity. The Funds shall seek to operate with a stable net asset value of $1.00 per participating interest as a primary Fund objective subject to the requirements of this Declaration of Trust.

2.2 Stable Return Funds

The purpose of the Stable Return Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in a portfolio of securities and other financial instruments having fixed income characteristics, including, but not limited to, guaranteed investment contracts, security backed contracts, certificates of deposit, obligations fully guaranteed by the United States as to principal and interest, money market funds, with the objectives of preserving capital and maintaining a stable level of return with low volatility.

2.3 Bond Index Funds

The purpose of the Bond Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in debt securities representative of the United States bond market with the objective of achieving, before Fund expenses, a total rate of return equal to the total rate of return of all outstanding United States government and investment grade corporate bonds, as represented by the Bloomberg Barclays U.S. Government/Credit Bond Index.

2.4 U.S. Aggregate Bond Index Funds

The purpose of the U.S. Aggregate Bond Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in debt securities representative of the taxable United States bond market with the objective of approximating, before fees and expenses, the total return of all outstanding United States government and investment-grade corporate bonds and asset-backed and mortgage-backed securities as represented by the Bloomberg Barclays U.S. Aggregate Bond Index.

2.5 Bloomberg Barclays US Aggregate ex-Corporate Index Funds

The purpose of the Bloomberg Barclays US Aggregate ex-Corporate Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in debt securities representative of the taxable United States bond market with the objective of approximating, before fees and expenses, the total return of investment-grade U.S. Treasury bonds, government-related bonds, mortgage-backed pass-through securities, commercial mortgage-backed securities, and asset-backed securities that are publicly offered for sale in the United States as represented by the Bloomberg Barclays US Aggregate ex-Corporate Index.

2.6 Investment Grade Corporate Bond Index Funds

The purpose of the Investment Grade Corporate Bond Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in debt securities exhibiting similar risks and characteristics as the Wells Fargo US Investment Grade Corporate Bond Index with the objective of approximating before fees and expenses the total rate of return of the Wells Fargo US Investment Grade Corporate Bond Index. This rules-based proprietary index is designed to measure the performance of publicly issued U.S. dollar denominated investment grade, fixed rate corporate bonds issued by U.S. or foreign issuers that have a remaining maturity of at least one year, regardless of optionality and provide increased diversification and liquidity versus traditional passive corporate credit indexes.

2.7 Strategic Retirement Bond Index Funds

The purpose of the Strategic Retirement Bond Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in debt securities which seek to replicate the total return, before fees and expenses, of a blended index that is weighted 50% to the Bloomberg Barclays US Treasury Inflation-Linked 1-10 Year Bond Index and 50% to the Bloomberg Barclays US Intermediate Government Bond Index.

2.8 High Yield Corporate Bond Index Funds

The purpose of the High Yield Corporate Bond Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in debt securities exhibiting similar risks and characteristics as the Wells Fargo US High Yield Bond Index with the objective of approximating before fees and expenses the total rate of return of the Wells Fargo US High Yield Bond Index. This rules-based proprietary index is constructed to provide increased diversification and liquidity versus traditional high yield bond indexes.

2.9 Global Bond Index Funds

The purpose of the Global Bond Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in domestic and foreign debt securities with the objective of approximating before fees and expenses the equal weighted total rate of return of sub-asset classes represented by four fixed income indices sponsored by Bloomberg Barclays by investing in such securities in substantially the same percentages as the Index.

2.10 Emerging Markets Bond Index Funds

The purpose of the Emerging Markets Bond Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in debt securities which represent similar risks and characteristics as the J.P. Morgan Emerging Markets Bond Index Global Diversified with the objective of approximating before fees and expenses the total rate of return of the J.P. Morgan Emerging Markets Bond Index Global Diversified. The Index is designed to measure the performance of publicly issued U.S. dollar-denominated emerging markets bonds issued by governmental and quasigovernmental entities.

2.11 Fixed Income Funds

The purpose of the Fixed Income Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in a portfolio of fixed income securities issued by domestic and foreign issuers, including corporate bonds, debentures and notes, U.S. Government securities, corporate fixed income securities convertible into common stocks, and mortgage-related securities with the objective of seeking current income and growth of capital.

2.12 Targeted Duration Funds

The purpose of the Targeted Duration Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in debt securities and other derivative financial instruments, including, but not limited to, interest rate swap agreements, with the objective of achieving specific targeted durations.

2.13 Total Return Bond Funds

The purpose of the Total Return Bond Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in a variety of debt securities of domestic and foreign governments and corporations, including general obligations and secured obligations, mortgage-backed securities, asset-backed securities, and high yield bonds. The term of such securities shall range from two to forty years.

2.14 S&P 500 Index Funds

The purpose of the S&P 500 Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in common stocks in substantially the same percentages as the S&P 500 Index with the objective of approximating before fees and expenses the total return of the S&P 500 Index.

2.15 Large Cap Growth Index Funds

The purpose of the Large Cap Growth Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment primarily in a portfolio of common stocks with the objective of approximating as closely as practicable the capitalization weighted total rate of return, before deduction of fees and expenses, of the Russell 1000 Growth Index.

2.16 Large Cap Value Index Funds

The purpose of the Large Cap Value Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment primarily in a portfolio of common stocks with the objective of approximating as closely as practicable the capitalization weighted total rate of return, before deduction of fees and expenses, of the Russell 1000 Value Index.

2.17 S&P MidCap Index Funds

The purpose of the S&P MidCap Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in common stocks in substantially the same percentages as the S&P MidCap 400 Index with the objective of approximating before fees and expenses the total rate of return of the S&P MidCap 400 Index.

2.18 Russell 2000 Index Funds

The purpose of the Russell 2000 Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in common stocks in substantially the same percentages as the Russell 2000 Index with the objective of approximating before fees and expenses the total return of the Russell 2000 Index.

2.19 Global Equity Index Funds

The purpose of the Global Equity Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in domestic and foreign equity securities with the objective of approximating before fees and expenses the equal weighted total rate of return of sub-asset classes represented by nine equity indices sponsored by Russell and MSCI, respectively, by investing in such securities in substantially the same percentages as the Index.

2.20 International Equity Index Funds

The purpose of the International Equity Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in foreign equity securities with the objective of approximating before fees and expenses the capitalization-weighted total rate of return of the MSCI EAFE Index by investing in such securities in substantially the same percentages as the Index.

2.21 Enhanced Stock Market Funds

The purpose of the Enhanced Stock Market Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in a portfolio of stocks with market capitalizations within the range of the stocks in the S&P 500 Index with the objective of seeking to achieve long term total return greater than the return on the S&P 500 Index while maintaining risk characteristics similar to the risk characteristics of the stocks in the S&P 500 Index.

2.22 Factor Enhanced Large Cap Index Funds

The purpose of the Factor Enhanced Large Cap Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in stocks in substantially the same percentages as the Wells Fargo Factor Enhanced Large Cap Index with the objective of approximating before fees and expenses the total rate of return of the Wells Fargo Factor Enhanced Large Cap Index. This rules-based proprietary index is designed to deliver exposure to equity securities of large capitalization U.S. issuers, and is constructed to provide exposure to factors that are commonly tied to a stock's potential for enhanced risk-adjusted returns relative to the market.

2.23 Factor Enhanced Small Cap Index Funds

The purpose of the Factor Enhanced Small Cap Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in stocks in substantially the same percentages as the Wells Fargo Factor Enhanced Small Cap Index with the objective of approximating before fees and expenses the total rate of return of the Wells Fargo Factor Enhanced Small Cap Index. This rules-based proprietary index is designed to deliver exposure to equity securities of small capitalization U.S. issuers, and is constructed to provide exposure to factors that are commonly tied to a stock's potential for enhanced risk-adjusted returns relative to the market.

2.24 Factor Enhanced Global Equity Index Funds

The purpose of the Factor Enhanced Global Equity Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in stocks in

countries within the MSCI World Index with the objective to add value before fees and expenses above the MSCI World Index. The Funds will employ a systematic, rules-based methodology designed to build a portfolio of stocks that provides exposure to characteristics commonly tied to a stock's potential for enhanced risk-adjusted returns relative to the market.

2.25 Factor Enhanced International Index Funds

The purpose of the Factor Enhanced International Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in stocks in substantially the same percentages as the Wells Fargo Factor Enhanced International Index with the objective of approximating before fees and expenses the total rate of return of the Wells Fargo Factor Enhanced International Index. This rules-based proprietary index is designed to deliver exposure to equity securities of foreign issuers in developed markets, and is constructed to provide exposure to factors that are commonly tied to a stock's potential for enhanced risk-adjusted returns relative to the market.

2.26 Factor Enhanced Emerging Markets Index Funds

The purpose of the Factor Enhanced Emerging Markets Index Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in stocks in substantially the same percentages as the Wells Fargo Factor Enhanced Emerging Markets Index with the objective of approximating before fees and expenses the total rate of return of the Wells Fargo Factor Enhanced Emerging Markets Index. This rules-based proprietary index is designed to deliver exposure to equity securities of emerging market issuers (defined as constituents of the Index, which includes but is not limited to issuers located in Brazil, Chile, China, Colombia, Egypt, Greece, Indonesia, India, Malaysia, Mexico, Pakistan, the Philippines, Poland, Russia, South Africa, South Korea, Taiwan, Thailand, Turkey, and Venezuela), and is constructed to provide exposure to factors that are commonly tied to a stock's potential for enhanced risk-adjusted returns relative to the market.

2.27 Large Company Growth Funds

The purpose of the Large Company Growth Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment primarily in a portfolio of domestic common stocks, preferred stocks, and debt securities that are convertible to common stocks, of companies the majority of which have a market capitalization falling within the range of the Russell 1000 Growth Index, with a view to producing long-term capital appreciation.

2.28 Large Company Value Funds

The purpose of the Large Company Value Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment primarily in a portfolio of domestic common stocks, preferred stocks, and debt securities that are convertible to common stocks, of companies that majority of which have a market capitalization falling within the range of the Russell 1000 Value Index, with a view to producing long-term capital appreciation.

2.29 Small Company Stock Funds

The purpose of the Small Company Stock Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in portfolios consisting primarily of stocks of companies with market capitalizations falling within the range of the Russell 2000 Index and with the objective of achieving long term capital appreciation.

2.30 Mid-Capitalization Stock Funds

The purpose of the Mid-Capitalization Stock Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in portfolios consisting primarily of stocks of companies with market capitalizations falling within the range of the Russell Midcap Index and with the objective of achieving long term capital appreciation.

2.31 Multi-Capitalization Growth Stock Funds

The purpose of the Multi-Capitalization Growth Stock Funds is to provide Qualified Accounts with vehicles for collective investment and reinvestment in portfolios consisting primarily of stocks of companies with market capitalizations falling within the ranges of either the Russell 2500 Growth Index or the Russell 3000 Growth Index and with the objective of achieving long-term capital appreciation.

2.32 International Equity Funds

The purpose of the International Equity Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in foreign equity securities with the objective of long-term capital appreciation and portfolio diversification. The Funds seek to exceed the performance of the MSCI All Country World Index excluding U.S. ("MSCI ACWI ex USA Index") and/or the MSCI Europe, Australasia, and Far East Index ("MSCI EAFE Index").

2.33 Emerging Markets Equity Funds

The purpose of the Emerging Markets Equity Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in emerging market countries as defined by the MSCI Emerging Markets Index. The Funds may have exposure to equities across any capitalizations and styles and will be diversified across countries and sectors. The Funds objective is long-term capital appreciation.

2.34 US REIT Index Funds

The purpose of the US REIT Index Funds is to provide Qualified Accounts with a vehicle for collective

investment and reinvestment in stocks in substantially the same percentages as the Wells Fargo US REIT Index with the objective of approximating before fees and expenses the total rate of return of the Wells Fargo US REIT Index. This rules-based proprietary index is a market capitalization weighted index of publicly traded real estate investment trusts ("REITs") and is comprised of companies whose charters are the equity ownership and operation of commercial and/or residential real estate and which operate under the REIT Act of 1960.

2.35 Target Date Funds

The purpose of the Target Date Funds is to provide Qualified Accounts with a vehicle for collective investment and reinvestment in portfolios which invest in a combination of equity, fixed income, and money market securities using an asset allocation strategy designed to replicate, before fees and expenses, the total return of a target date index that has the same target year as an individual Target Date Fund.

Article III: Investment and administration of the Funds

3.1 Investment powers and duties of Trustee

Subject to applicable law and notwithstanding the provisions of Article II, the Trustee shall have exclusive management, with respect to the acquisition, investment, reinvestment, holding, or disposition of any securities or other property at any time held by it and constituting part of any Investment Fund, except as a prudent person might delegate responsibilities to others. Without limitation of the foregoing, the Trustee shall have the following powers to be exercised in its discretion:

(a) To acquire investments of any kind, wherever situated, including securities issued by Wells Fargo & Company, its subsidiaries or affiliates or any successors thereto, to the extent not prohibited by ERISA.

(b) To purchase securities in an initial public offering, including an offering in which an affiliate of the trustee is a member of the syndicate, to the extent not prohibited by ERISA.

(c) To retain any property at any time received by it.

(d) To sell or exchange any property at public or private sale for cash or on credit and to grant options for the purchase or exchange thereof.

(e) To consent to or participate in any plan or reorganization, consolidation, merger, combination, liquidation or other similar plan of any corporation, any stock or security of which is held for an Investment Fund, and to pay any and all calls and assessments imposed upon the owners of such stock or securities as a condition of their participation therein; and to consent to, or to oppose, any such plan or any action thereunder, or any contract, lease, mortgage, purchase, sale, or other action by any person or corporation.

(f) To deposit any property with any protective, reorganization or similar committee; to delegate discretionary power thereto and to pay or agree to pay part of the expenses and compensation of any such committee and any assessments levied with respect to any such property so deposited as the Trustee may deem proper.

(g) To exercise or dispose of all conversion and subscription rights pertaining to any property held by it or to acquire an additional stock or security, to make payments, to exchange any stock or security or to do any act with reference thereto which it may deem advisable.

(h) To renew or extend the time of payment of any obligation.

(i) To enter into stand-by agreements for future investment either with or without a stand-by fee.

(j) To lend securities of an Investment Fund upon a secured basis, permitting custody and control of the securities to pass to a borrower during the period of the loan, to commingle assets received as collateral in connection with securities lending activities in a separate Investment Fund, and to receive an additional fee for such lending services in accordance with the provisions of ERISA.

(k) To borrow money for any trust purpose and to convey in trust, mortgage, pledge or otherwise encumber Investment Fund property or any part thereof as security therefor provided such borrowings and/or encumbrances are to protect the Investment Fund property or otherwise to the extent not prohibited by the rules or regulations of the Comptroller of the Currency.

(l) To purchase foreign currency to the extent not prohibited by ERISA.

(m) To invest in repurchase agreements, forward contracts, futures contracts, options on futures, or options on stock indices or fixed income instruments.

(n) To hold such portion of an Investment Fund as it may deem necessary for ordinary administration and for the disbursement of funds in cash, without liability for interest, by depositing the same in (i) any bank (including deposits which bear a reasonable rate of interest in a bank or similar financial institution supervised by the United States or a State, notwithstanding that the bank or financial institution is the Trustee, or is otherwise a fiduciary of the Plan, including Wells Fargo Bank, National Association), subject to the rules and regulations governing such deposits, and without regard to the amount of any such deposits; or (ii) investment-grade money market instruments, including an Investment Fund which invests in such instruments.

(o) To invest all or a portion of the assets of an Investment Fund directly or indirectly in any collective investment funds or funds presently

in existence or hereafter established which is maintained by the Trustee, or an affiliate of the Trustee, or a person other than the Trustee who may also be appointed by the Trustee as an investment manager within the meaning of Section 3(38) of ERISA or as a separate trustee with respect to the assets of the Investment Fund invested herein, notwithstanding that such person may be a party in interest with respect to an employee benefit plan's assets which are invested in the Investment Fund. The assets invested in such a collective investment fund shall be subject to all the terms of the instrument establishing such fund as they may be amended from time to time, and such terms are hereby incorporated and made a part of this Declaration of Trust as if fully set forth herein. The combining of assets of the Investment Fund with the assets of other trusts participating in such a collective investment fund is specifically authorized.

(p) To execute and deliver any proxies or powers of attorney to such person or persons as the Trustee may deem proper, granting to such person or persons such power and authority with relation to any property or securities at any time held for an Investment Fund as it may deem proper.

(q) To exchange any property for other property upon such terms and conditions as the Trustee may deem proper, and to give and receive money to effect equality in price.

(r) To grant options to purchase any property.

(s) To foreclose on any obligation by judicial proceedings or otherwise.

(t) To borrow money with or without giving security for the repayment thereof by pledging all or any parts of the property held in a liquidating account.

(u) To invest in any pooled investment fund, including any company, partnership, real estate investment trust or business trust not subject to registration under the Securities Act of 1933 or the Investment Company Act of 1940, as amended, including a company, partnership or business trust for which the trustee or an affiliate of the trustee acts as managing member, general partner, trustee, investment manager, or in any other capacity.

(v) To purchase any defaulted investment held by an Investment Fund (in lieu of segregating the investment in accordance with Section 6.1) to the extent not prohibited by ERISA if, in the judgment of the Trustee, the cost of segregating the investment is excessive in light of the market value of the investment. If a Trustee or an affiliate of the Trustee elects to purchase a defaulted investment, it shall do so at the greater of market value or the sum of cost and accrued unpaid interest.

3.2 Brokerage commissions

In connection with the selection of such brokers or dealers and the placing of such orders for securities transactions, the Trustee will seek execution at the most reasonable price by responsible broker-dealer firms or other financial intermediaries at reasonably competitive commission rates. In making such selection, the Trustee may take into account such relevant factors as (i) price, fees, and/or commission; (ii) the broker-dealer's facilities, reliability, and financial responsibility; (iii) the ability of the broker-dealer to effectuate securities transactions, particularly with respect to such aspects as timing, order size, execution of orders, and the ability to complete a transaction through clearance, settlement, and delivery; and (iv) the value of research and other services provided by such broker-dealer, in accordance with the requirements of Section 28(e) of the Securities Exchange Act of 1934.

3.3 Other powers and duties of Trustee

In addition to the powers provided in Section 3.1, the Trustee shall have power and authority:

(a) To exercise all voting rights with respect to any investment and grant proxies, discretionary, or otherwise.

(b) To cause any investments to be registered and held in the name of one or more of its nominees, or in the name of one or more nominees of any system for the central handling of securities, without increase or decrease of liability.

(c) To collect and receive any and all money and other property due to an Investment Fund and to give full discharge therefor.

(d) To commence or defend suits or legal proceedings whenever, in its judgment, any interest of an Investment Fund requires it; to represent an Investment Fund in all suits or legal proceedings in any court or before any other body or tribunal; and to compromise, arbitrate, or otherwise adjust or settle claims or other rights in favor of or against the Investment Funds, including, but not limited to, class action settlements, and to deliver or accept in either total or partial satisfaction of any indebtedness or other obligation any property or cash proceeds, to continue to hold for such period of time as the Trustee may deem appropriate any property or cash so received and to allocate such property or cash proceeds to one or more Investment Funds, as the Trustee deems reasonable in its absolute discretion.

(e) To hold such portion of an Investment Fund in foreign currencies as is reasonably necessary to consummate investment transactions and to effect collection of income and other payments accruing to securities held by an Investment Fund.

(f) Subject to all applicable provisions of Section 404(b) of ERISA and applicable regulations of the U.S. Department of Labor, to hold securities issued by a foreign government or business entity at a foreign branch or office of the Trustee or any of its affiliates or any foreign custodian appointed by the Trustee or any of its affiliates, or to deposit such securities with a foreign securities depository or bank regulated by a government agency or regulatory authority in the foreign jurisdiction, and to permit the securities so deposited to be held in the nominee name of the depository or bank; provided, the records of the Trustee or any custodian appointed by the Trustee shall show that such securities belong to the Trust.

(g) To appoint agents including affiliates of the trustee, as may be reasonably necessary, including agents for custody throughout the world of the assets of an Investment Fund (which may include central securities depositories outside the United States of America), and agents for the provision of accounting and other administrative services for the Investment Funds.

(h) To appoint investment advisors or investment managers within the meaning of Section 3(38) of ERISA to which the Trustee, to the extent not prohibited by ERISA, may delegate investment authority and which may be affiliates of the Trustee or any investment wrap contract provider.

(i) To reorganize an Investment Fund by surrendering or transferring all or a portion of its assets and/or units to another collective investment fund, including but not limited to, a fund for which the Trustee may be the trustee.

(j) To audit a Participating Account for any purpose related to an Investment Fund or the terms of this Declaration of Trust.

(k) To hold an interest in an Investment Fund only in its fiduciary capacity, including as a fiduciary for the exclusive benefit of its own employees.

(l) Generally to do all acts whether or not expressly authorized which the Trustee deems necessary or desirable for the protection of an Investment Fund, a Qualified Account, or to comply with applicable law.

3.4 Dealing with other persons

Persons dealing with the Trustee shall be under no obligation to see to the proper application of any money paid or property delivered to the Trustee or to inquire into the Trustee's authority as to any transaction.

3.5 Employer Securities

The Trustee shall not be responsible for (a) determining whether any security purchased on behalf of an Investment Fund is a "qualifying employer security" within the meaning of Section 407(d)(5) of ERISA with respect to any employee benefit plan which is subject to Title I, Part 4 of ERISA and whose assets are held in a Participating Trust which is invested in such Investment Fund, or (b) monitoring or ensuring the compliance of such employee benefit plan with the limitations on investment in qualifying employer securities under Section 407 of ERISA, all such responsibilities therefore to be undertaken by the named fiduciary for plan investments for such employee benefit plan.

Article IV: Interests of participating accounts and valuation of Investment Funds and units

4.1 Record of interests

The Trustee shall record an accurate statement of all assets of each Participating Account contributed to an Investment Fund and the interest of each Participating Account therein. Each Participating Account shall have a proportionate interest in an Investment Fund and no such interest shall have any prior or preferential interest over any other such interest in any Investment Fund. Each Participating Account shall have a proportionate fractional undivided interest in the assets of an Investment Fund, and not in any specific security or other property held by an Investment Fund. The proportionate interest of each Participating Account shall be the fair market value of the portion of the Investment Fund held for that Participating Account.

4.2 Valuation of Investment Funds

As of each Valuation Date, but no less frequently than once every three months, the Trustee shall determine the fair market value of the Investment Funds consistent with generally recognized valuation procedures and in the manner prescribed in this Section. The fair market value on a Valuation Date shall be determined prior to the next Valuation Date. Notwithstanding the foregoing and except as otherwise authorized in this Section or under any applicable law or regulation, the Trustee shall value each Investment Fund asset at mark-to-market value as of each Valuation Date unless the Trustee cannot readily ascertain mark-to-market value, in which case the Trustee shall use a fair value determined in good faith.

(a) Assets of a Short-Term Investment Fund ("Fund") created under this Trust shall be valued on a cost basis, rather than mark-to-market value as provided above, for purposes of admissions and withdrawals, and administered in compliance with the regulations of the Office of the Comptroller of the Currency specifically applicable to short-term investment funds.

(i) Operate with a stable net asset value of $1.00 per participating interest as a primary Fund objective.

(ii) Maintain a dollar-weighted average portfolio maturity of 60 days or less and a dollar-weighted average portfolio life maturity of 120 days or less as determined in the same manner as is required

by the Securities and Exchange Commission pursuant to Rule 2a-7 for money market mutual Funds (17 CFR 270.2a-7).

(iii) Accrue on a straight-line or amortized basis the difference between the cost and anticipated principal receipt on maturity.

(iv) Hold the Fund's assets until maturity under usual circumstances.

(v) Adopt portfolio and issuer qualitative standards and concentration restrictions.

(vi) Adopt liquidity standards that include provisions to address contingency funding needs.

(vii) Adopt shadow pricing procedures that:

(A) Require the Trustee to calculate the extent of difference, if any, of the mark-to-market net asset value per participating interest using available market quotations (or an appropriate substitute that reflects current market conditions) from the Fund's amortized cost price per participating interest, at least on a calendar week basis and more frequently as determined by the Trustee when market conditions warrant.

(B) Require the Trustee, in the event the difference calculated pursuant to this subparagraph exceeds $0.005 per participating interest, to take action to reduce dilution of participating interests or other unfair results to participating accounts in the Fund.

(viii) Adopt procedures for stress testing the Fund's ability to maintain a stable net asset value per participating interest that shall provide for:

(A) The periodic stress testing, at least on a calendar month basis and at such intervals as an independent risk manager or a committee responsible for the Fund's oversight that consists of members independent from the Fund's investment management determines appropriate and reasonable in light of current market conditions.

(B) Stress testing based upon hypothetical events that include, but are not limited to, a change in short-term interest rates, an increase in participant account withdrawals, a downgrade of or default on portfolio securities, and the widening or narrowing of spreads between yields on an appropriate benchmark the Fund has selected for overnight interest rates and commercial paper and other types of securities held by the Fund.

(C) A stress testing report on the results of such testing to be provided to the independent risk manager or the committee responsible for the Fund's oversight that consists of members independent from the Fund's investment management that shall include: the date(s) on which the testing was performed; the magnitude of each hypothetical event that would cause the difference between the Fund's mark-to-market net asset value calculated using available market quotations (or appropriate substitutes which reflect current market conditions) and its net asset value per participating interest calculated using amortized cost to exceed $0.005; and an assessment by the Trustee of the Fund's ability to withstand the events (and concurrent occurrences of those events) that are reasonably likely to occur within the following year.

(D) Reporting adverse stress testing results to the Trustee's senior risk management that is independent from the Fund's investment management.

(ix) Adopt procedures that require the Trustee to disclose to Fund participants and to the OCC's Asset Management Group, Credit & Market Risk Division, within five business days after each calendar month-end, the Fund's total assets under management (securities and other assets including cash, minus liabilities); the Fund's mark-to-market and amortized cost net asset values both with and without capital support agreements; the dollar-weighted average portfolio maturity; the dollar-weighted average portfolio life maturity of the Fund as of the last business day of the prior calendar month; and for each security held by the Fund as of the last business day of the prior calendar month:

(A) The name of the issuer

(B) The category of investment

(C) The Committee on Uniform Securities Identification Procedures (CUSIP) number or other standard identifier

(D) The principal amount

(E) The maturity date for purposes of calculating dollar-weighted average portfolio maturity

(F) The final legal maturity date (taking into account any maturity date extensions that may be effected at the option of the issuer) if different from the maturity date for purposes of calculating dollar-weighted average portfolio maturity

(G) The coupon or yield

(H) The amortized cost value

(x) Adopt procedures that require the Trustee to notify the OCC's Asset Management Group, Credit

& Market Risk Division, prior to or within one business day thereafter of the following:

(A) Any difference exceeding $0.0025 between the net asset value and the mark-to-market value of a Fund participating interest as calculated using the method as prescribed by any applicable law or regulation

(B) When a Fund has re-priced its net asset value below $0.995 per unit

(C) Any withdrawal distribution in-kind of the Fund's participating interests or segregation of portfolio participants

(D) Any delays or suspensions in honoring Fund participating interest withdrawal requests

(E) Any decision to formally approve the liquidation, segregation of assets or portfolios, or some other liquidation of a Fund

(F) In those situations when the Trustee, its affiliate, or any other entity provides financial support to a Fund, including a cash infusion, a credit extension, a purchase of a defaulted or illiquid asset, or any other form of financial support in order to maintain a stable net asset value per participating interest

(xi) Adopt procedures that in the event a Fund has re-priced its net asset value below $0.995 per participating interest, the bank administering the Fund shall calculate, admit, and withdraw the Fund's participating interests at a price based on the mark-to-market net asset value.

(xii) Adopt procedures that, in the event the Trustee suspends or limits withdrawals and initiates liquidation of a Fund as a result of redemptions, require the Trustee to:

(A) Determine that the extent of the difference between a Fund's amortized cost per participating interest and its mark-to-market net asset value per participating interest may result in material dilution of participating interests or other unfair results to participating accounts

(B) Formally approve the liquidation of a Fund

(C) Facilitate the fair and orderly liquidation of a Fund to the benefit of all Fund participants

(b) Assets of Stable Return Funds shall be valued at fair value which the Trustee has determined to be the book value of the underlying investment contracts held in such Stable Return Funds. Assets of all other Investment Funds shall be valued at their market value as of the close of business on the Valuation Date. Market values will be determined as follows:

(i) The investments of each Investment Fund shall be valued at the price of the last sale on the Valuation Date, or if no sale was made on that date, at the closing bid on the Valuation Date.

(ii) For purposes of this Section 4.2 the Trustee may rely on the bid prices and sales on recognized securities exchanges and over-the-counter quotations reported in newspapers in either New York or San Francisco, or in standard financial periodicals and quotation services, or obtained from established and reputable security dealers or upon appropriate valuations supplied by a generally accepted pricing service. The Trustee may, in its discretion, rely upon the price quote of a security maintained and reported by any foreign stock exchange. If such price quote does not, in the opinion of the Trustee, fairly indicate the true value of a security, or if there is no price quote available, then the Trustee may use a quotation from a reputable broker or investment banker, either foreign or domestic, and such other information as in its judgment may be useful or necessary in determining value, including valuations supplied by a pricing service periodically determined by the Trustee to be accurate. The Trustee specifically is authorized, if price quotations are unavailable or if in its judgment such quotations do not fairly indicate the true value of an asset of the Investment Fund, to estimate the value of the asset.

Since all values of international securities are to be expressed in terms of currency of the United States of America, the Trustee may, in its discretion, rely upon any currency exchange rates maintained or reported by any one or more of the following:

(A) A bank, including the Trustee, which is active in foreign exchange currency transactions

(B) The mean of the market rates as quoted by a foreign stock exchange

(C) Any other currency exchange rate sources deemed to be competent by the Trustee

(c) An investment purchased, but not yet paid for, shall be included for valuation purposes as a security held, and the principal amount due on the purchase, including broker's commissions or other expenses of purchase, shall be reflected in the records as an amount payable on pending securities transactions.

(d) An investment sold, but for which payment has not yet been received, shall be valued at the net sale price.

(e) For the purpose of valuation of any investment, except an investment sold but for which payment has not been received, it shall be unnecessary to deduct from the value ascertained as indicated above broker's commissions or other expenses which would be incurred upon a sale thereof.

(f) For the purpose of valuation of futures contracts the following formula shall apply:

Fair Futures Price = I [1 + r(n/365)] - D

I = index level of the underlying index

r = rate of interest on applicable local market instruments of comparable duration maturity

n = number of days between the next business day after the valuation date and the next business day after the expiration of the future

D = dividend (in index points) expected between valuation date and expiration date

(g) Notwithstanding the foregoing provisions, the Trustee may determine the value of any asset by another method it deems fair and equitable if available data are insufficient to warrant unqualified reliance thereon or would tend to distort the value of any asset.

4.3 Income, profits, losses, expenses, and fees

(a) The income and profits receivable on, and losses attributable to, each asset of each Investment Fund shall be calculated and included in the value of the assets of that Investment Fund. Dividend income shall be recognized on the ex-dividend date. Interest income shall be recognized proportionately over the period during which it is earned.

(b) Expenses and fees payable by each Investment Fund as described in Section 7.3 shall be accumulated and recorded as liabilities and deducted from the value of the assets of each Investment Fund. The liabilities shall be discharged upon payment from time to time.

4.4 Division into units

For convenience in determining the proportionate interest of each Participating Account in an Investment Fund, each Investment Fund shall at all times be divided into units of equal value, and the proportionate interest of each Participating Account shall be expressed by the number of such units allocated to such Participating Account times the net asset value of such unit. Upon receiving the first contributions thereto, the Trustee shall divide the Investment Fund into such number of units as in its discretion it may determine, and shall allocate to each Participating Account the number of said units proportionate to this original contribution to the Investment Fund. When any further funds are added thereto, the amount so added shall be equal to the then value of one or more such units and the number of units shall be increased accordingly. The Trustee may, from time to time, divide the units of an Investment Fund into a greater number of units of lesser value or combine them into a lesser number of units of greater value.

4.5 Valuation of units

The value on any Valuation Date of each unit into which an Investment Fund is divided shall be determined by dividing the then value of the Investment Fund by the number of units into which the Investment Fund is then divided, as provided in the previous section "Division into units", rounded to the number of decimal places established by the Trustee.

Article V: Admissions and distributions

5.1 Admission to participation

Pursuant to notice received on a Valuation Date or an established interval prior to any Valuation Date as established by the Trustee and entered in the records of the Trustee on or before a Valuation Date, any Qualified Account may become a Participating Account as of such Valuation Date by the transfer of all or part of its assets to the Trustee and the acceptance thereof by the Trustee for one or more of the Investment Funds. Under no circumstances shall any account which is not a Qualified Account be admitted to participation in any Investment Fund. Pursuant to similar notice, additional assets may be transferred to any Investment Fund from time to time by any Participating Account in the discretion of the Trustee. Assets shall be accepted by an Investment Fund only as of a Valuation Date and (subject to the provisions of Section 5.4 dealing with liquidating accounts) on the basis of the value of such Investment Fund as of such Valuation Date, as provided in Article IV. While any assets of any Participating Account are held in the Investment Fund, this Declaration of Trust shall be a part of the plan or plans of which such Participating Account is a part.

5.2 Distributions

(a) Pursuant to notice received on a Valuation Date or an established interval prior to any Valuation Date as established by the Trustee and entered in the records of the Trustee on or before a Valuation Date, the Trustee may distribute to any Participating Account all or part of the securities or other property in any Investment Fund as of such Valuation Date. Subject to the provisions of Section 5.4 (dealing with liquidating accounts), each such distribution shall be made on the basis of the fair market value of such security or other property held by the Investment Fund as of such Valuation Date, as provided in Article IV. Any distribution may be made, in the discretion of the Trustee, in cash, or ratably in kind, or partly in cash and partly ratably in kind; provided, however, that all distributions as of any one Valuation Date shall be made on the same basis.

(b) The Trustee may deduct from an Investment Fund and pay to a designated service provider payments for

plan expenses as directed by a fiduciary for the Plan, including by a standing direction by the fiduciary.

(c) The Trustee in the exercise of its sole discretion may (i) distribute in whole or in part any income earned by any Investment Fund to Participating Accounts, (ii) issue new units to Participating Accounts to reflect such earned income, (iii) may retain such income and instead reinvest it, in which case, no additional units shall be issued to reflect any income earned, or (iv) may deduct from an Investment Fund and pay to a designated service provider payments for plan expenses as directed by a fiduciary for the Plan, including direction by the fiduciary.

(d) If the Trustee determines that any accrued income on any Investment Fund will not be collectible due to default by the payer, the Trustee shall have the right to charge back to and collect from each Participating Account the amount of such income to the extent that it has been distributed to the Participating Account under section (b) or paid to the Participating Account in the form of proceeds for the redemption of units. The Trustee shall not, however, be liable to the Investment Fund or to any Participating Account for any income which may have been accrued but not collected for the Fund.

(e) The Trustee may impose, in its sole discretion, a prior notice period of up to 12 months for any withdrawal of assets from any Investment Fund, including, but not limited to, the Stable Return Funds, initiated by a fiduciary for a Qualified Account. At the sole discretion of the Trustee, the notification periods identified for withdrawals may be waived only under limited and extenuating circumstances.

(f) The Trustee may require a fiduciary for a Qualified Account, as a pre-condition to investing in an Investment Fund, including any of the Stable Return Funds, to commit that such Qualified Account or a participant in such Account will not transfer monies out of an Investment Fund, including any of the Stable Return Funds, to a competing fund, as determined by the Trustee, within 90 days after such fiduciary for a Qualified Account or a participant in such Account has withdrawn from participation in such Investment Fund.

5.3 Distribution on disqualification

When, to the actual knowledge of the Trustee, an event has occurred which vests legal ownership of a Participating Account in whole or in part in a person or entity that does not satisfy the definition of a Qualified Account, the interest of such Participating Account shall be withdrawn from the Investment Fund and distributed on a Valuation Date of the Investment Fund as soon as practicable as provided in Section 5.2.

5.4 Liquidating accounts

(a) At any time the Trustee, in its discretion, may transfer to a liquidating account any security or other property held in an Investment Fund which the Trustee decides to distribute in kind or to liquidate for the benefit of Participating Accounts. In determining the basis upon which admissions to and distributions from the Investment Fund may be made under this Article V, the value of any property that has been transferred to a liquidating account shall be excluded. Any property held in a liquidating account shall be segregated and shall be administered or realized upon solely for the benefit ratably of those Participating Accounts which are participants in the Investment Fund from which such property has been transferred at the time of the transfer of such property to a liquidating account.

(b) The Trustee shall have, with respect to any security or other property held in a liquidating account, or any property received in exchange therefor, the same powers and authority as are set forth in Article IV hereof. It shall be the duty of the Trustee to effect liquidation of the property held in any liquidating account when, but not until, it deems such liquidation to be in the best interests of the Participating Accounts invested therein.

(c) After the establishment of a liquidating account, no further money shall be invested in that liquidating account. However, in order to protect any investment held therein, the Trustee may borrow moneys for such purpose to the extent not prohibited by applicable law.

(d) Distribution of cash received by way of income or liquidation of any investment held in a liquidating account shall be made at such convenient intervals as the Trustee deems appropriate, but not less often than annually.

(e) All reasonable expenses incurred by the Trustee in the administration of liquidating accounts, which would be chargeable to the respective Participating Accounts if incurred in the administration of such Participating Accounts, may be charged to the liquidating accounts.

5.5. Transition accounts

At any time the Trustee, in its discretion, may transfer to a transition account any security or other property held in an Investment Fund which the Trustee decides to distribute in kind and to liquidate for the benefit of Participating Accounts; or to hold and manage pending transfer to the Investment Fund cash, securities, or other property contributed to an Investment Fund to conform to the investment guidelines of the Investment Fund. In determining the basis upon which admissions to and distributions from the Investment Fund may be made

under this Article V, the value of any property that has been transferred to a transition account shall be excluded. Any property held in a transition account shall be segregated and shall be administered or realized upon solely for the benefit ratably of those Participating Accounts which (i) are participants in the Investment Fund from which such property has been transferred, or (ii) have a beneficial interest in the property being contributed to an Investment Fund, whichever is the case, at the time of the transfer of such property to a transition account.

The Trustee shall have, with respect to any security or other property held in a transitional account, or any property received in exchange therefor, the same powers and authority as are set forth in Article IV hereof. It shall be the duty of the Trustee to effect the liquidation or other disposition of the cash or other property held in any transition account when, but not until, it deems such liquidation or other disposition to be in the best interests of the Participating Accounts invested therein and the Investment Fund.

After the establishment of a transition account and the initial contribution of cash, securities or other property thereto, no further property shall be invested in that transition account. However, in order to protect any investment held therein, the Trustee may borrow moneys for such purpose to the extent not prohibited by applicable law.

Distribution of cash received by way of income, or liquidation or other disposition, of any investment held in a transition account created for the purpose of a distribution from an Investment Fund shall be made at such intervals as the Trustee deems appropriate, but not less often than annually.

The Trustee may terminate a transition account at any time it determines in its discretion that there is no longer a need for a transition account and transfer the securities or other property in the transition account to the Investment Fund or distribute such securities or other property in kind to the Participating Accounts invested in the transition account.

All reasonable expenses incurred by the Trustee in the administration of transition accounts, which would be chargeable to the respective Participating Accounts if incurred in the administration of such Participating Accounts, may be charged to the transition accounts.

Article VI: Accounting

6.1 Trustee's accounts

The Trustee shall keep full accounts of all of its receipts and disbursements. Its books and records with respect to the Investment Funds shall be open to inspection at all reasonable times during business hours of the Trustee by the authorized representative of any person to whom a regular periodic accounting of any Participating Account would ordinarily be rendered.

6.2 Audits and reports of Investment Funds

(a) At least once during each period of 12 months, the Trustee shall cause an audit to be made of the Investment Funds by auditors of the Bank or independent certified public accountants responsible only to the Board of Directors of the Bank. The compensation and reasonable expenses of any such independent certified public accountant attributable to an Investment Fund may be charged to that Investment Fund. Within 120 days after the close of each Fiscal Year of each Investment Fund and after the termination of any Investment Fund, the Trustee shall render to each person or entity to which a regular periodic accounting of any Participating Account ordinarily would be rendered a written report, or a notice of the availability thereof,

(i) Listing the assets and liabilities of each Investment Fund

(ii) Listing the cost and fair market value of each investment held in such Investment Fund at the close of such Fiscal Year or upon such termination

(iii) Setting forth a summary of all purchases, with costs; all sales, with profit or loss; and any other investment changes, income, and disbursements in each such Investment Fund during the period since the last report

(iv) Containing an appropriate notation as to any investment in default in each such Investment Fund

(v) Giving such other pertinent information as the Trustee may decide to include

(b) The Trustee shall provide to a representative of each Participating Account a written report of the audit performed pursuant to this Article VI. Each such official may upon receipt of such report, file with the Trustee either its written approval or its written disapproval with reasons therefor. If a written approval is filed, or if no written disapproval is filed the report of the Trustee shall be deemed to have been approved and the Trustee shall be relieved from all liability, responsibility, and accountability as to all matters and items set forth in such report.

6.3 Judicial accounting and legal proceedings

The Trustee and any person or entity to whom a regular periodic accounting of any Participating Account ordinarily would be rendered, or any of them, shall have the right to apply at any time to a court of competent jurisdiction for the judicial settlement of the Trustee's account, and in any such action or proceeding it shall be

necessary to join as parties only the Trustee and any such person or entity, and any judgment or decree which may be entered therein shall be conclusive.

Article VII: Taxes, compensation, and expenses

7.1 Taxes

The Trustee shall deduct from and charge against an Investment Fund any taxes or assessments which may be imposed upon the Investment Fund or the income thereof or which the Trustee may be required to pay.

7.2 Compensation

The Trustee may charge a reasonable fee for its management and administration of an Investment Fund and withdraw the amount thereof from the Investment Fund for its own use and benefit from time to time, to the extent not prohibited by ERISA or under the rules and regulations of the Office of the Comptroller of the Currency.

7.3 Expenses

To the extent not prohibited by applicable law, all reasonable expenses incurred by the Trustee in the administration of an Investment Fund may be charged to the Investment Fund, including the expenses of agents, including agents which may be affiliates of the trustee as authorized under this Declaration of Trust and to the extent not prohibited by applicable law, provided that the Bank shall pay all costs in establishing and organizing any Investment Fund established under this Declaration of Trust. Distributions under Section 5.2(b) shall be treated as expenses of the applicable Investment Fund.

Article VIII: Amendment or termination

8.1 Amendment

This Declaration of Trust may be amended from time to time by resolution of the Board of Directors of the Trustee or by a committee authorized by the Board of Directors. Any amendment adopted by such Board or Committee shall be binding upon all persons with respect to each Participating Account and beneficiaries thereof. Any Amendment to this Declaration of Trust which is made to conform its provisions to any amendments of the rules and regulations of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and/or any statute, regulation, or rule of any nation or political subdivision thereof shall take effect as of the effective date of the amendment of such rules, regulations, and/or laws. Each other amendment shall take effect upon a date specified in the resolution of the Trustee's Board of Directors approving the amendment or in the records of a committee authorized by the Board of Directors.

8.2 Termination

The Board of Directors of the Trustee or a committee authorized by the Board of Directors may at any time in its discretion direct the termination and liquidation of an Investment Fund created pursuant to this Declaration of Trust. Thereafter, no further Qualified Accounts shall be admitted thereto, and all of the assets then held in an Investment Fund shall thereupon be deemed to be transferred to a liquidating account as provided in Section 5.4 hereof and shall be held and disposed of as provided therein.

Article IX: Successor Trustee

9.1 Successor Trustee

Any corporation into which the Bank may merge, or with which it may be consolidated, or to which substantially all of its assets may be transferred, shall be the successor trustee hereunder and shall have all of the powers and duties herein conferred upon the Trustee without the execution or filing of any additional instrument or the performance of any additional act.

Article X: Miscellaneous

10.1 Representation by the Trustee in judicial proceedings

In any judicial proceeding affecting any property or security owned by an Investment Fund or any liquidating account thereof, each Participating Account and each and every person having or claiming to have any interest in any Participating Account, in the Investment Fund, or in any liquidating account thereof shall be deemed to be fully represented by the Trustee for all purposes if the Trustee shall be a party to such proceedings and as such shall be duly before the tribunal in which such proceeding shall be pending.

10.2 Advice of counsel

The Trustee may consult with legal counsel of its choice upon any question or matter regarding its duties and responsibilities under this Declaration of Trust and shall be fully protected in acting in good faith upon advice of such counsel.

10.3 Effect of mistake

No mistake made in good faith and in the exercise of due care in connection with the administration of any Investment Fund shall be deemed to be a violation of this Declaration of Trust or any applicable law, regulation, or rule if promptly after the discovery of the mistake the Trustee shall take whatever action may be practicable in the circumstances to remedy the mistake.

10.4 Notices

Where any action may be or is required to be given by the Trustee to any person, such notice shall be given by service thereof upon such person personally or by mailing to such person at this last address in the records of the Trustee. Notices to the Trustee shall be given as follows:

Wells Fargo Bank, N.A., Trustee
Wells Fargo Bank
Institutional Retirement and Trust
550 South 4th Street, 8th floor
Minneapolis, MN 55415

10.5 Successors and assigns

This Declaration of Trust and all the provisions thereof shall be binding upon and inure to the benefit of the Trustee and its successors, the auditors and their successors, the co-fiduciaries of each Participating Account and their successors, and each person, his executors, administrators, successors, and assigns, having or claiming to have any interest in any Participating Account of any Investment Fund, or any liquidating account.

10.6 Availability of copies of Declaration of Trust

A copy of this Declaration of Trust shall be available at the Head Office of the Trustee for inspection during all banking hours or on its website and a written or electronic copy of the Declaration of Trust shall be furnished to any person upon request.

10.7 Availability of Investment Fund Information

The Trustee will make available Investment Fund information, including but not limited to, current and historical expenses, portfolio holdings, net asset values, and performance upon the request of unit holders. In addition, each Investment Funds most recent Annual Report (audited), Disclosure Document and Fact Sheet will appear on the following website: **wellsfargofunds.com,** keyword "collective".

10.8 Exclusive benefit

No part of a Participating Account's interest in the corpus or income of an Investment Fund shall be used for or diverted to any purposes other than the exclusive benefit of the participants or their beneficiaries who are entitled to benefits under such Participating Account.

10.9 Prohibitions against assignment

No Participating Account shall assign, transfer, mortgage, pledge, or hypothecate any of its interest or equity in an Investment Fund, and the Trustee shall not recognize any such assignment, transfer, mortgage, pledge, or hypothecation.

10.10 Discretion of the Trustee to be absolute; How exercised

The discretion of the Trustee, regarding acts or powers provided for in this agreement and exercised with good faith and reasonable care, shall be absolute and uncontrolled. All acts performed, or powers exercised, shall be binding upon each Participating Account, the co-fiduciaries thereof, and each person having or claiming interest therein.

10.11 Prohibition against certificates

No transferable certificate or document evidencing an interest in an Investment Fund shall be issued. The Trustee may document a withdrawing account interest in a segregated investment.

10.12 Controlling law

This Declaration of Trust is created and organized in the United States and is maintained at all times as a domestic trust in the United States. The terms, provisions, and effect of this Declaration of Trust shall be construed and enforced according to the laws of the State of California to the extent not preempted by ERISA the rules and regulations prevailing from time to time of the Comptroller of the Currency and any applicable rules and regulations of the Board of Governors of the Federal Reserve System, all of which shall be deemed to be part of this Declaration of Trust.

IN WITNESS WHEREOF, Wells Fargo Bank, National Association, has caused this Wells Fargo Bank Declaration of Trust Establishing Investment Funds for Employee Benefit Trusts, as amended and restated, to be signed by its duly authorized officers, effective July 31, 2019.

WELLS FARGO BANK, NATIONAL ASSOCIATION

By Samuel J. Kopchick

Name: Samuel J. Kopchick Title: SVP

By _____

Name: **David A. Violett** Title: **Vice President**

Exhibit A — Wells Fargo Collective Investment Trust Funds

2.1 Wells Fargo/BlackRock Short Term Investment Fund

2.2 Wells Fargo Stable Return Fund F
Wells Fargo Stable Return Fund G
Wells Fargo Stable Return Fund I
Wells Fargo Stable Return Fund I15
Wells Fargo Stable Return Fund I25
Wells Fargo Stable Return Fund I35
Wells Fargo Stable Return Fund I60
Wells Fargo Stable Return Fund N
Wells Fargo Stable Return Fund N15
Wells Fargo Stable Return Fund N25
Wells Fargo Stable Return Fund N35
Wells Fargo Stable Return Fund N60
Wells Fargo Stable Return Fund TR
Wells Fargo Stable Return Fund TR1
Wells Fargo Stable Value Fund A
Wells Fargo Stable Value Fund B
Wells Fargo Stable Value Fund C
Wells Fargo Stable Value Fund D
Wells Fargo Stable Value Fund E
Wells Fargo Stable Value Fund F
Wells Fargo Stable Value Fund H
Wells Fargo Stable Value Fund J
Wells Fargo Stable Value Fund K
Wells Fargo Stable Value Fund L
Wells Fargo Stable Value Fund M
Wells Fargo Stable Value Fund MW
Wells Fargo Stable Value Fund N
Wells Fargo Stable Value Fund O
Wells Fargo Stable Value Fund Q
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EXHIBIT 3

No. 16-2607

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE LORNA CLAUSE,
Petitioner,

On Petition for a Writ of Mandamus to the United States District Court
for the Eastern District of Missouri in No. 4.16-cv-ooo71-RLW,
Hon. Ronnie L. White

The Secretary of Labor's Amicus Curiae Brief in Support of Petitioner

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M. PATRICIA SMITH
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor, Plan Benefits Security Division

ELIZABETH HOPKINS
THOMAS TSO
Counsels for Appellate and Special Litigation

SARAH HUGHES
Trial Attorney
U.S. Department of Labor, Plan Benefits Security Division
200 Constitution Ave., N.W., N-4611
Washington, DC 20210
(202) 693-5594

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act ("ERISA") invalidates a welfare plan's forum-selection clause that deprives the petitioner-participant of the venue choices afforded by ERISA's venue provision, and instead requires her to bring suit at a considerable distance from her home.

THE SECRETARY'S INTEREST

At the invitation of the Supreme Court, the United States recently articulated its position on the question presented that forum-selection clauses which restrict a participant's choice of venue conferred by ERISA, 29 U.S.C. § 1132(e), are not "consistent" with ERISA, 29 U.S.C. § 1104(a)(1)(D), and, hence, are unenforceable. Brief of the United States as Amicus Curiae, Smith v. Aegon Companies Pension Plan, 134 S. Ct. 2459 (Nov. 2015) (No. 14-1168), http://1.usa.gov/24P2gbV. The Secretary of Labor has primary authority to interpret and enforce the provisions of Title I of ERISA to ensure fair and impartial plan administration and compliance with ERISA's requirements. See 29 U.S.C. §§ 1132, 1135. The Secretary has a substantial interest in ensuring that ERISA's jurisdictional provision in section 502(e)(2), 29 U.S.C. § 1132(e)(2), rather than a more restrictive forum-selection clause in the plan documents, governs ERISA benefits suits. Under the forum-selection clause at issue here, a plan participant's suit for disability benefits was transferred to the U.S. District Court for the Eastern

District of Missouri, a distant forum to which plaintiff has no connection. Giving effect to a plan provision such as this allows employers to unilaterally erect obstacles that impede plan participants from enforcing their important statutory rights, an effect antithetical to ERISA's purposes.

STATEMENT OF THE CASE

Plaintiff Lorna Sue Clause was a Patient Care Technician at Carondelet St. Joseph's Hospital in Tucson, Arizona. Dkt. 12-1 ¶¶ 7-8. Clause is a participant in the Ascension Plan, which is administered by her employer and plan sponsor, Ascension Health Alliance, and Sedgwick Claims Management Services, the claims administrator. Id. ¶¶ 1, 3. In 2012, Clause claimed and was granted long-term disability benefits under the Plan. Id. ¶ 10. In 2013, Sedgwick notified Clause that it was terminating her benefits; Clause successfully appealed, and her benefits were reinstated. Id. ¶¶ 13-15. In January 2015, Sedgwick again terminated her benefits, claiming that she was not disabled. Id. ¶ 43-44. Clause alleges that defendants relied on incorrect information and therefore improperly denied her benefits. Id. ¶ 48.

On August 28, 2015, Clause filed a complaint in the U.S. District Court for the District of Arizona. The complaint seeks declaratory relief and asserts a claim for benefits under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and for equitable relief under section 502(a)(3), 29 U.S.C. § 1132(a)(3). On October 15,

2015, defendants filed a Motion to Dismiss, or in the Alternative, to Transfer Venue, based on a forum-selection clause in the Plan's documents. Clause v. Sedgwick Claims Mgmt. Servs., Inc., No. CIV 15-388-TUC-CKJ, 2016 WL 213008, at *1 (D. Ariz. Jan. 19, 2016). The Plan provides:

> **9.20 Forum Selection Clause.** Except as the laws of the United States may otherwise require, any action by any Plan Participant relating to or arising under this Plan shall be brought and resolved only in the U.S. District Court for the Eastern District of Missouri . . . .

Defendants' Memorandum [Dkt. 16], at *3, Clause v. Sedgwick Claims Mgmt. Servs., Inc., No. 4:15-cv-00388 (D. Ariz. filed Oct. 15, 2015). The District Court of Arizona entered an order transferring the case to the Eastern District of Missouri. Clause, 2016 WL 213008, at *5. Clause then moved to retransfer the case back to the District Court of Arizona, which the District Court for the Eastern District of Missouri denied (Dkt. 51) ("Op."). Clause has lived and worked in Arizona for over a decade, Dkt. 12-1, and has no connection to Missouri.

DISCUSSION

The Forum-Selection Clause Is Unenforceable Because It Contradicts ERISA and Is Contrary to the Policy Concerns Underlying the Statute

1. Public Policy is Sufficient to Invalidate a Forum-Selection Clause

While forum-selection clauses are "'prima facie valid[,]' . . .public policy against enforcement" may be "sufficient to invalidate the forum selection clause." Union Elec. Co. v. Energy Ins. Mut. Ltd., 689 F.3d 968, 973, 975 (8th Cir. 2012)

(citation omitted). In M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972), the Supreme Court recognized that forum-selection clauses "should be held unenforceable if enforcement would contravene strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." Id. (citing Boyd v. Grand Trunk W. R. Co., 338 U.S. 263, 265 (1949) (per curiam)).

ERISA's plain text confers on plaintiff-participants a choice of venues in section 502(e), 29 U.S.C. § 1132(e), to file an ERISA claim. Congress stated in ERISA's text that a "policy" of ERISA is to "protect . . . the interests of participants . . . by providing . . . ready access to the Federal courts." 29 U.S.C. § 1001(b). Here, the forum-selection clause contravenes this text by eliminating the plaintiff's choice of venue. The clause is not "consistent" with ERISA, 29 U.S.C. § 1104(a)(1)(D), and thus is unenforceable.

As an example of how the Bremen standard applies, the Supreme Court in Bremen, 407 U.S. at 15, cited to its prior decision in Boyd. Boyd involved a forum-selection agreement in an action brought under the Federal Employers Liability Act ("FELA"), which has its own venue provision. 338 U.S. at 265. The venue provision in section 6 of FELA states, "[u]nder this Act an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. § 56. Section

5 of FELA, 45 U.S.C. § 55, 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 to this chapter, shall to that extent be void . . . ." Reading these provisions together, the Supreme Court found that the "petitioner's right to bring the suit in any eligible forum [under section 6 of FELA] is a right of sufficient substantiality" to be protected by section 5 of FELA, which voids any contract or agreement that serves to purposefully or intentionally exempt the employer from any liability. Boyd, 338 U.S. at 265. The Court therefore held that "contracts limiting the choice of venue are void as conflicting with [FELA]" because they "would thwart" FELA's "express purpose" by "sanction[ing] defeat of that right [to select the forum]." 338 U.S. at 265-66.

ERISA is analogous to FELA in many respects. Like the broad venue provision in section 6 of FELA, the venue provision in ERISA section 502(e) provides several choices where the plaintiff "may" bring suit. 29 U.S.C. § 1132(e). Like section 5 of FELA, ERISA also contains protections against contractual terms that depart from the Act's minimum requirements. ERISA section 404(a)(1)(D) provides that plan fiduciaries are required to follow plan documents only "insofar as such documents and instruments are consistent with the provisions of [title I] and title IV [of ERISA]." 29 U.S.C. § 1104(a)(1)(D). "The Plan cannot contract around the statute." Esden v. Bank of Bos., 229 F.3d 154, 173 (2d Cir. 2000). By

eliminating the plaintiff's choice of venue, a forum-selection clause in an ERISA plan is inconsistent with ERISA's text, and thus unenforceable.

In addition to the similarities between FELA and ERISA's plain text, the Supreme Court identified several other characteristics of FELA that animated the Court's finding a "substantial right" to venue in Boyd that warranted protection. In South Buffalo Ry. Co. v. Ahern, the Court noted, in citing Boyd, that the Court, "mindful of the benevolent aims of the Act, [has] jealously scrutinized private arrangements for the bartering away of federal rights." 344 U.S. 367, 372-73 (1953). In Bisso v. Inland Waterways Corp., 349 U.S. 85, 91 (1955), the Court, citing Boyd, articulated a general rule that courts may "prevent enforcement of [obligations under] contracts in many relationships such as . . . employers and employees, [in order] . . . to discourage [wrongdoing] by making wrongdoers pay damages, and . . . to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." Id. at 90-91 (applying the rule to releases of negligence claims). The Court thus scrutinizes private contracts in situations with special relationships, like employers and employees, where there is unequal bargaining power and the contractual arrangement impedes the pursuit of statutory claims to deter wrongdoing.

2. The Congressional Intent and Policy Behind ERISA Support the Protection of the ERISA Participants' Right to Choose Venue

The analysis of FELA that supported the Court's decision to recognize

plaintiff's right to choose venue in Boyd leads to the same conclusion in ERISA because: (1) the text and purpose of ERISA is to protect participants' and beneficiaries' rights, which includes a participant's right to choose venue; (2) ERISA creates a special fiduciary relationship within an employment context, obligating fiduciaries to protect and not impede participants' rights; (3) participants' legal actions are necessary to deter and police fiduciary misconduct, and participants should be granted ready access to court; and (4) individual participants typically do not have bargaining power with respect to plan design, including the forum selected in a plan's forum-selection clause. For these reasons, this Court should conclude that the participant's right to choose venue in ERISA section 502(e) is protected under ERISA section 404(a)(1)(D), which requires that plan terms that are inconsistent with ERISA be disregarded.

First and foremost, ERISA provides: "It is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries" by, among other things, "providing . . . ready access to the Federal courts." 29 U.S.C. § 1001(b) (emphasis added). To "safeguar[d] . . . the establishment, operation, and administration" of employee benefit plans, ERISA sets "minimum standards . . . assuring the equitable character of such plans and their financial soundness . . . ." 29 U.S.C. § 1001(a) (emphasis added). As Congress recognized, ERISA provides "[l]iberal venue and service provisions," S.

Rep. No. 383, 93d Cong., 1st Sess. 106 (1973), which were enacted despite objections that they could result in plan fiduciaries "having to defend actions in court far removed from their principal places of business." Tax Proposals Affecting Private Pension Plans: Hearings Before the H. Comm. on Ways & Means, 92d Cong. 784 (1972) (statement of Emp. Trusts Comm. of the Corp. Fiduciaries Ass'n of Ill.). ERISA's plain text and legislative history demonstrate the clear congressional intent "to open the federal forum to ERISA claims to the fullest extent possible." Fulk v. Bagley, 88 F.R.D. 153, 167 (M.D.N.C. 1980); see Nicolas v. MCI Health & Welfare Plan No. 501, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006). ERISA's venue provision is distinct from typical venue provisions because ERISA protects the plaintiff's choice to venue, not the defendants' choice. Atl. Marine Constr. Co. v. U.S. Dist. Ct., 134 S. Ct. 568, 582 n.7 (2013). ERISA, including its venue provisions, must be construed to protect participants' rights. E.g., Maune v. Int'l Bhd. of Elec. Workers, Local No. 1, Health & Welfare Fund, 83 F.3d 959, 964 (8th Cir. 1996).

Specifically, ERISA's venue provision provides that venue is proper "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). Section 502(e)(2) governs "an action under this subchapter," which is entitled "Subchapter I – Protection of Employee Benefit Rights." 29 U.S.C. § 1132(e)(2); see also Gulf Life Ins. Co. v. Arnold, 809

F.2d 1520, 1525 n.9 (11th Cir. 1987). Courts readily interpret the ERISA venue provision broadly to ensure the protection of beneficiaries' and participants' rights. See, e.g., Varsic v. U.S. Dist. Ct. for Cent. Dist. of Cal., 607 F.2d 245, 252 (9th Cir. 1979). As an example, courts have repeatedly interpreted the phrase, "where the breach took place," to allow participants to bring benefit claims where they reside. See, e.g., Barnum v. Mosca, No. 108-CV-567(LEK/RFT), 2009 WL 982579, at *4 (N.D.N.Y. Apr. 13, 2009). Thus, section 502(e)(2) "is not a neutral provision merely describing the venues in which ERISA actions can be heard, but is rather 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). ERISA, including section 502(e)(2), protects participants' rights to seek their benefits in the venue they select.

Second, ERISA places the defendant-fiduciary in a special relationship to the plaintiff-participant or -beneficiary. This fiduciary relationship further counsels protection of the participant's access to court over a defendant-fiduciary's choice of venue. "ERISA abounds with the language and terminology of trust law." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989). In Gulf Life Insurance Co., 809 F.2d at 1524-25, the U.S. Court of Appeals for the Eleventh Circuit concluded that if it allowed a plan fiduciary to use ERISA section 502(e)(2) to file a declaratory judgment action where it was headquartered, even if

that were hundreds or thousands of miles from the participant, "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." Section 502(e)(2) protects plaintiffs' choice of venue, not that of defendants. See id. at 1525 n.7.

Third, the right of plan participants and beneficiaries to select the venue in which to file suit is vital to protecting their promised benefits and also to ensure the fiduciary's proper plan and claim administration. Cf. Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 689 (7th Cir. 1986) (recognizing that the monitoring of fiduciaries has traditionally relied on the "initiative of the individual employee to police the management of his plan" (quoting S. Rep. No. 1150, 92d Cong., 2d Sess. 5 (1972))). Accordingly, ERISA was intended to eliminate "jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary duties." H.R. Rep. No. 93-553 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4655. "The express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties [such as individual participants] as to whom Congress presumably determined the right to enter federal court was necessary to further the statute's purposes." Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 21 (1983) (emphasis added).

The U.S. Court of Appeals for the First Circuit in Volkswagen Interamericana, S. A. v. Rohlsen, 360 F.2d 437, 439 (1st Cir. 1966), discussed a

similarly "broad" venue provision in the Automobile Dealers' Day in Court Act, which was "designed to assure the dealer as accessible a forum as is reasonably possible" because

> [t]he very purpose of the act is to give the dealer certain rights against a manufacturer independent of the terms of the agreement itself. . . . This protection would be of little value if a manufacturer could contractually limit jurisdiction to a forum practically inaccessible to the dealer. The act cannot so easily be thwarted.

Id. Similarly, a participant's right to sue under ERISA section 502(a)(1)(B) is independent of plan terms. A participant's section 502(a)(1)(B) claim for benefits, in part, enforces the statutory requirement that those administering benefits plans provide "a full and fair review" of benefits claims that are denied, 29 U.S.C. § 1133(2); see Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 115 (2008), including procedural requirements governed by regulation and fiduciary obligations that override contrary plan terms. See Bond v. Twin Cities Carpenters Pension Fund, 307 F.3d 704, 707 (8th Cir. 2002); Werdehausen v. Benicorp Ins. Co., 487 F.3d 660, 666-67 (8th Cir. 2007). An ERISA statutory claim is thus separate and apart from a claim under the plan; it invokes judicial review of plan administration in light of statutory, regulatory, and fiduciary obligations. See, e.g., Aetna Health Inc. v. Davila, 542 U.S. 200, 219 (2004). This statutory claim should be governed by the statutory venue provision, not the plan's own forum-selection clause.

If participants and beneficiaries are prevented from choosing a local forum

permitted under ERISA, they may be prevented from protecting their ERISA benefits and rights and from ensuring proper plan and claims administration. "[M]any of those individuals whose rights ERISA seeks to protect," including "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." Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 935 (6th Cir. 2014) (Clay, J., dissenting) (citation omitted); see also French v. Dade Behring Life Ins. Plan, Civil Action No. 09-394-C, 2010 WL 2360457, at *3 n.12 (M.D. La. Mar. 23, 2010); Gulf Life Ins., 809 F.2d at 1525 n.7; cf. Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc., 680 A.2d 618, 628 (N.J. 1996); Tandy Comput. Leasing v. Terina's Pizza, Inc., 784 P.2d 7, 8 (Nev. 1989). Here, Clause is disabled with a "maximum earning potential before disability [that] was limited to $14.41/hour," Dkt. 12-1 ¶ 73.5, and is now forced to litigate over a thousand miles from her home in order to assert her right to disability benefits. Clause's original attorney could not represent her, because he was not licensed in Missouri, id. ¶ 73.4, and the law firm now representing her was "retained exclusively for the specific purpose of litigating the public-interest venue issue on appeal." Plaintiff's Petition, at *29 n.9. ERISA’s venue provision is necessary to ensure participants have ready access to the courts so they can ensure proper claims review.

Finally, employers that sponsor plans and their employees, the plan participants, have unequal bargaining power. This unequal bargaining power also counsels against enforcement of venue provisions in plan documents that cede important participant rights. "[E]mployees are rarely involved in plan negotiations." Glenn, 554 U.S. at 114 (citing Langbein, Trust Law as Regulatory Law, 101 Nw. U. L. Rev. 1315, 1323-24 (2007)); see also Coleman, 920 F. Supp. 2d at 908; Viti v. Guardian Life Ins. Co. of Am., 817 F. Supp. 2d 214, 228 (S.D.N.Y. 2011); cf. Kubis & Perszyk Assocs., 680 A.2d at 627 (identifying unequal bargaining power as a basis for restricting forum-selection clause). Generally, plans cannot be considered bilateral arms-length contracts but are designed by the employer/plan sponsor. Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995) (employers generally can modify plans at any time).

ERISA's protective purpose extends to the creation of a broad venue provision that protects a participant's right to police plan administration. The venue provision ensures the participant has the ability to perform this important role. These statutory policies cannot be thwarted by plan terms that are a product of unequal bargaining and favor the fiduciary-defendant or employer. 29 U.S.C. § 1104(a)(1)(D); Smith, 769 F.3d at 934 (Clay, J., dissenting).

3. Arguments for Enforcing Forum-Selection Clauses Are Unsupported

The district court enforced the forum-selection clause because, in its view,

such clauses promote ERISA's goal of uniformity. Op. at *4; see also Smith, 769 F.3d at 931. The district court misunderstood this particular goal, which might support a choice-of-law provision, but does not support applying a forum-selection clause.[1] Coleman, 920 F. Supp. 2d at 909. Congress was concerned about uniformity because it did not want plans to be subject to different legal requirements under the laws of "different States." Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001); Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936, 945 (2016). Congress included a preemption provision, section 514(a), 29 U.S.C. § 1144(a), to ensure that the federal courts would have jurisdiction over ERISA claims, not that one federal court would have jurisdiction over all claims for one ERISA plan.

Some courts have also concluded that such clauses are analogous to arbitration agreements, which can be enforceable in some ERISA contexts. See Smith, 769 F.3d at 932 (citing cases). This argument is misguided. Courts enforce arbitration agreements not on the basis of a general judicial policy favoring arbitration, but because that is what federal law – in this case the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 2, 3 – requires. In Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc., 847 F.2d 475, 479 (8th Cir. 1988), this Court relied on

[1] For example, the Eleventh Circuit stated that a choice-of-law provision can choose a state's substantive law the parties wish to use for gaps not covered by ERISA. Buce v. Allianz Life Ins. Co., 247 F.3d 1133, 1148 (11th Cir. 2001). The chosen law must, however, still be consistent "with the language of ERISA or the policies that inform that statute and animate the common law of the statute." Id.

decisions interpreting the FAA to conclude that there was "no congressional intent to single out ERISA claims for exemption from the general federal policy favoring rigorous enforcement of agreements to arbitrate." Sulit, 847 F.2d at 479. There is no such similar requirement regarding forum-selection clauses under any federal statute. Moreover, the FAA serves a different purpose than ERISA section 502(e)(2). See Coleman, 920 F. Supp. 2d at 909. Rather than addressing where the action should be brought – which could result in "a substantial increase in expense and inconvenience" – the FAA addresses whether arbitration is required – which focuses on the dispute resolution procedure "without necessarily creating such hardships for the individual." Id. Finally, arbitration of ERISA benefit claims is non-binding. Franke v. Poly-Am. Med. & Dental Benefits Plan, 555 F.3d 656, 658 (8th Cir. 2009); 29 C.F.R. § 2560.503–1(c)(4). Thus, while an arbitration agreement may narrow the district court's review, an arbitration agreement does not void or interfere with a participant's right to choose the venue for his section 502(a) suit. See Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 385-86 (2002); 29 C.F.R. § 2560.503-1(c)(4). The congressional policy favoring arbitration is simply not implicated here, either directly or by analogy.

CONCLUSION

For the reasons set forth above, the forum-selection clause under which this case was transferred is inconsistent with ERISA and unenforceable.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor
Plan Benefits Security Division

ELIZABETH HOPKINS
THOMAS TSO
Counsels for Appellate and Special Litigation

/s/_Thomas Tso_____
Attorney
U.S. Department of Labor
Room N-4611
200 Constitution Ave., N.W.,
Washington, DC 20210
(202) 693-5632

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FOR CASE NO. 16-2607

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/s/ Thomas Tso
Attorney for the U.S. Department of Labor, Plan Benefits Security Division

Dated: June 16, 2016

CERTIFICATE OF VIRUS CHECK

I hereby certify that a virus check, using McAfee Security VirusScan Enterprise 8.0, was performed on the PDF file and paper version of this brief, and no viruses were found.

/s/ Thomas Tso
Attorney for the U.S. Department of Labor, Plan Benefits Security Division

Dated: June 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

/s/ Thomas Tso
Thomas Tso
Plan Benefits Security Division
U.S. Department of Labor
Room N-4611
200 Constitution Avenue, N.W.
Washington DC, 20210
(202) 693-5532 – Phone
(202) 693-5610 – Fax
tso.thomas@dol.gov