No.

In the Supreme Court of the United States

LORNA CLAUSE, PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PETER K. STRIS
BRENDAN S. MAHER
DANIEL L. GEYSER
Counsel of Record
DANA BERKOWITZ
DOUGLAS D. GEYSER
STRIS & MAHER LLP
725 S. Figueroa St., Ste. 1830
Los Angeles, CA 90017
(213) 995-6811
daniel.geyser@strismaher.com

Counsel for Petitioner

QUESTION PRESENTED

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, "to protect * * * the interests of participants in employee benefit plans," safeguarding their rights with "appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). Congress sought to secure that "ready access" with a liberal venue provision. This provision guarantees plan beneficiaries a specific choice to bring suit in *any* of three venues: "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).

Petitioner filed suit in Arizona as expressly authorized by that provision. But respondents moved to transfer her suit under the plan's forum-selection clause; this clause, unlike ERISA's specific venue rights, restricts all suits to "the U.S. District Court for the Eastern District of Missouri," a location over a thousand miles away.

The Arizona district court granted the transfer, and the Missouri district court refused to retransfer the case to its initial location.

The question presented is:

Whether a contractual forum-selection clause purporting to override ERISA's venue provision is invalid and unenforceable under ERISA.

PARTIES TO THE PROCEEDING

Petitioner Lorna Sue Clause was the mandamus petitioner in the court of appeals and the plaintiff in the district court.

Respondents Sedgwick Claims Management Services, Inc., and Ascension Health Alliance were the real-parties-in-interest in the court of appeals and the defendants in the district court. Respondent the United States District Court for the Eastern District of Missouri was the mandamus respondent in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Page

Cases—continued:

Page

Cases—continued:

Statutes and rule:

Miscellaneous:

Page

Miscellaneous—continued:

In the Supreme Court of the United States

No.

LORNA CLAUSE, PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Lorna Clause respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying the petition for a writ of mandamus (App., *infra*, 1a) is unreported. The order of the Missouri district court (App., *infra*, 3a-8a) denying retransfer is unreported. The order of the Arizona district court (App., *infra*, 9a-19a) granting the original transfer is unreported but available at 2016 WL 213008.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2016. A petition for rehearing was denied

on October 26, 2016 (App., *infra*, 2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1132(e)(2) of Title 29 of the United States Code grants ERISA beneficiaries the right to bring suit in any of three places, and provides as follows:

> 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.

Section 1104(a)(1) of Title 29 of the United States Code prohibits ERISA fiduciaries from enforcing any plan terms inconsistent with the Act's terms, and provides in relevant part:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and * * * (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III [which includes 29 U.S.C. 1132(e)(2)].

INTRODUCTION

This case presents an exceptionally important question of federal law: whether a contractual forum-selection clause can override ERISA's statutory venue provision. When the issue last reached this Court, it called for the views of the Solicitor General even though only a single circuit (the Sixth) had decided it.

In response to that invitation, the United States firmly declared that such clauses are prohibited by ERISA and constitute a legal violation of enormous consequence. The government recommended denying review, however, so the issue could percolate. In taking that position, it assumed that ERISA beneficiaries (often individuals with limited means) could and would find opportunities to obtain appellate review of the question presented.

It is now clear that the government's core assumption was incorrect. Every year, the question presented affects thousands of individuals and generates dozens of district-court decisions. But the circuit below (the Eighth) is now only the *second* in over a decade to decide the question. And the reason why is quite simple:

Transfer orders are interlocutory. They are effectively unreviewable on final judgment, because it is nearly impossible to prove prejudice. Multiple circuits prohibit review via 28 U.S.C. 1292(b), because the issue will not advance the "ultimate termination" of the litigation. And mandamus is extraordinarily difficult and expensive, meaning no rational plaintiff will pursue it (unless public-interest lawyers get involved, as happened here).[1]

It is equally clear that nothing will be achieved by further percolation. The question presented split the Sixth Circuit, and it has been addressed by dozens of district courts. In each case, plaintiffs (as here) make precisely the same arguments advanced by the United States that were embraced by the Sixth Circuit dissent. And, in each case, defendants (as here) make precisely

[1] Critically, mootness concerns also present a serious barrier to appellate review because few courts (as experience below shows) are willing to grant a stay. If a case reaches finality below while a mandamus petition is still pending, the venue issue becomes effectively unreviewable.

the same arguments embraced by the Sixth Circuit majority.

The Court should grant review now. Either it will adopt the position of the United States and restore the rights of countless ERISA beneficiaries, who are losing by default as a result of unlawful forum-selection clauses. Or it will reject the position of the United States—in which case unnecessary litigation can give way to lobbying by relevant stakeholders.

At a minimum, the Court should again call for the views of the Solicitor General. In light of recent experience (which has revealed the futility of percolation), petitioner believes the United States will explain that the Court's review is both warranted and urgently needed.

STATEMENT

1. Congress enacted ERISA "to protect * * * the interests of participants in employee benefit plans and their beneficiaries," safeguarding their rights with "appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b); see also *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 207 (2004). In crafting those safeguards, Congress recognized that "jurisdictional and procedural obstacles" had "hampered effective enforcement of fiduciary responsibilities." H.R. Rep. No. 93-533, at 17 (1973). ERISA beneficiaries are often vulnerable (*e.g.*, widows, disabled workers, pensioners), and the inability to seek relief in convenient locations often meant an inability to seek relief at all.

Congress sought to overcome those obstacles with a liberal venue provision, granting beneficiaries the right to seek judicial relief in *any* of three 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 adminis-

> tered, where the breach took place, or where a defendant resides or may be found * * * .

29 U.S.C. 1132(e)(2). Congress intended this provision to "expand, rather than restrict, the range of permissible venue locations." *Varsic* v. *U.S. Dist. Ct. for C.D. Cal.*, 607 F.2d 245, 248 (9th Cir. 1979).[2]

2. Petitioner has lived and worked in Arizona for well over a decade. D. Ct. Doc. 12-1 at 1-2. She worked for the same company for 11 years, until a serious disability forced her to give up her position. *Id.* at 2. At the time, she was earning less than $14.41 per hour. *Ibid.* When respondents refused to provide her the benefits she earned under her ERISA plan, she exhausted her administrative remedies and sought judicial relief.[3] She

---

[2] Plans, like respondents, have tried to undermine Section 1132(e)(2)'s protections since its enactment. They initially attacked ERISA venue rights by advancing narrow constructions of a key venue provision ("where the breach took place"). After courts rejected that strategy, plans instead resorted to forum-selection clauses in the mid-2000s. See, *e.g.*, *Dumont* v. *Pepsico, Inc.*, No. 1:15-cv-369-NT, 2016 WL 3620736, at *10 & n.18 (D. Me. June 29, 2016). The use of those clauses has "proliferated in recent years." U.S. Amicus Br. 20, *Smith* v. *Aegon Cos. Pension Plan*, No. 14-1168 (U.S. filed Dec. 3, 2015) (*Smith* U.S. Br.).

[3] Petitioner's experience in the administrative process is telling. Her claim for disability benefits was initially granted in August 2012, only for respondents to change course and deny benefits in October 2013. D. Ct. Doc. 12-1 at 3. Petitioner filed a successful administrative appeal (*ibid.*), but respondents again terminated her benefits six months later, invoking a new justification (*id.* at 4). When petitioner asserted her statutory right to obtain all documents relevant to her claim (*id.* at 5), respondents refused to comply and instead claimed they were reconsidering their decision (*id.* at 6). Respondents then terminated petitioner's benefits (again), asserting still another new rationale. *Id.* at 7-8. When petitioner challenged that new determination, respondents again denied her appeal; rather than address her challenge on the merits, respondents instead

availed herself of ERISA's venue provision, filing suit in the U.S. District Court for the District of Arizona, *i.e.*, "where the breach took place" (29 U.S.C. 1132(e)(2)).

In response, respondents moved to transfer the case to Missouri. D. Ct. Doc. 15. It was undisputed that petitioner properly filed suit in Arizona under ERISA's protective venue provision. But respondents maintained that petitioner's statutory rights were trumped by a forum-selection clause in her ERISA plan. Under that clause, notwithstanding ERISA's enumeration of a specific choice of venue, all suits had to be filed in "the U.S. District Court for the Eastern District of Missouri." D. Ct. Doc. 16-1 at 42. Respondents asserted that this venue provision required petitioner to pursue her claims in a venue over a thousand miles from where she lived, worked, and received benefits under the plan, despite her lack of any connection to Missouri.

3. a. The Arizona district court granted respondents' transfer motion, enforcing the forum-selection clause. App., *infra*, 9a-19a. Despite ERISA's overarching statutory scheme, the district court treated the case like any other private contract dispute. It reasoned that forum-selection clauses are presumptively valid and enforceable, and it found no basis for overcoming that presumption here. *Id.* at 11a-18a.

The court also rejected the notion that the forum-selection clause "'contravene[d]'" ERISA's strong public policy. App., *infra*, 16a-18a. The court asserted that forcing all disputes to Missouri would advance ERISA's interests "by bringing uniformity to ERISA decisions." *Id.* at 17a. It further found ERISA distinguishable from

---

modified their rationale (yet again), citing still another new justification for refusing relief. *Id.* at 9-11.

statutes with binding venue provisions, as ERISA's version is couched in "permissive," not mandatory, language. *Ibid.* The court finally analogized forum-selection clauses to arbitration provisions, which courts have upheld under ERISA. *Id.* at 17a-18a.

The district court thus ordered the clerk to transfer the matter to the Eastern District of Missouri. App., *infra*, at 18a. The clerk implemented the order that same day (D. Ct. Doc. 27), foreclosing any opportunity for petitioner to seek review of the initial transfer order in the Ninth Circuit.[4]

b. In the Eastern District of Missouri, petitioner immediately sought a short stay to litigate the venue issue (D. Ct. Docs. 39, 40), and also moved to retransfer her case to Arizona (D. Ct. Doc. 45). She again argued that the plan's forum-selection clause was unenforceable because it conflicted with ERISA's venue provision.[5]

The Missouri district court refused retransfer and rejected the stay request as moot. App., *infra*, at 3a-8a. In a cursory analysis, the court invoked the "general rule" that "courts enforce valid forum selection clauses," "'which represent[] the parties' agreement as to the most proper forum.'" *Id.* at 5a (quoting *Atl. Marine Constr.*

---

[4] See, *e.g.*, *In re Nine Mile Ltd.*, 673 F.2d 242, 243 (8th Cir. 1982) (per curiam) ("'physical transfer of the original papers in a case to a permissible transferee forum deprives the transferor circuit of jurisdiction to review the transfer'"); accord, *e.g.*, *Alexander* v. *Erie Ins. Exch.*, 982 F.2d 1153, 1156 (7th Cir. 1993).

[5] A retransfer motion is the accepted means of preserving legal challenges to a transfer order. See, *e.g.*, *St. Jude Med. Inc.* v. *Lifecare Int'l, Inc.*, 250 F.3d 587, 593 (8th Cir. 2001) (so explaining); cf. *Hill* v. *Henderson*, 195 F.3d 671, 677 & n.2 (D.C. Cir. 1999) ("If the party transferred against its will to a new court failed to move for retransfer, the omission might waive any claim on the subject.").

Co. v. *U.S. Dist. Ct. for W.D. Tex.*, 134 S. Ct. 568, 581 (2013)). The court "agree[d]" with the Arizona district court and other courts finding that "ERISA forum selection clauses are enforceable." *Id.* at 5a-6a. It reasoned that if Congress actually wanted parties to honor ERISA's venue provision, Congress "'could have specifically prohibited'" private agreements "waiving" that statutory provision. *Ibid.* It further declared that Clause could "litigate effectively" in Missouri, and that keeping the case would result in "greater uniformity" for ERISA plans. *Id.* at 6a. It accordingly denied the retransfer.[6]

4. a. Petitioner subsequently sought mandamus relief in the court of appeals, and sought a stay pending the disposition of her mandamus petition.[7] The court denied

---

[6] The district court also declined to certify the issue for interlocutory appeal under 28 U.S.C. 1292(b). App., *infra*, at 7a-8a. In addition to suggesting transfer was not a "controlling question of law" and would not "affect the ultimate outcome," the court found no "'substantial grounds for difference of opinion,'" declaring other courts not "significantly split" on the issue. *Ibid.* The court did not attempt to square that finding with the fact that (i) this issue directly divided the Sixth Circuit; (ii) the federal agency charged with enforcing ERISA thinks the district court's analysis is wrong; (iii) other district courts (at least two flagged by the district court itself (at 5a)) also disagree with the court's analysis; and (iv) this Court called for the views of the Solicitor General after only a single circuit (the Sixth) decided the question, suggesting the issue is indeed substantial (see *Smith* v. *Aegon Cos. Pension Plan*, No. 14-1168 (U.S. June 1, 2015) (inviting the Solicitor General to express the government's views on this issue); *Smith* U.S. Br. 7-22 (arguing that forum-selection clauses are unenforceable under ERISA, but recommending additional percolation before granting review)).

[7] It is settled that mandamus is an appropriate vehicle for challenging erroneous transfer rulings. See, *e.g.*, *Atl. Marine*, 134 S. Ct. at 575 (holding the Fifth Circuit erred in denying mandamus where the district court "misunderstood the standards to be applied in adjudicating a § 1404(a) motion"); *Van Dusen* v. *Barrack*, 376 U.S. 612,

the stay (despite ordering a response to the petition), and later refused petitioner leave to file a reply in support of the petition. Respondents opposed both the stay and petitioner's request to file a reply.

Notably, the Secretary of Labor filed an amicus brief supporting petitioner, explaining that respondents' forum-selection clause was invalid and unenforceable under ERISA. C.A. Amicus Br. 3-15.

Nonetheless, a three-judge panel rejected the petition. App., *infra*, 1a. This was the panel's one-line order: "The petition for a writ of mandamus has been considered by the court and is denied." *Ibid.* It did not provide any basis for rejecting the views of the expert federal agency charged with administering ERISA; it did not explain why petitioner's position was incorrect, why the dissenting judge in the Sixth Circuit was wrong, or why multiple district courts siding with petitioner and the Secretary (and rejecting respondents' position) were mistaken. It simply denied the mandamus petition without explanation.

b. Petitioner filed a petition for rehearing en banc, which was denied without dissent. App., *infra*, 2a.

REASONS FOR GRANTING THE PETITION

Immediate review by this Court is needed to resolve intolerable lower-court division over the question presented. It is beyond any serious dispute that the question

---

615 n.3 (1964) (mandamus is proper where "the courts below erred in interpreting the legal limitations upon and criteria for a [Section] 1404(a) transfer"); *In re Rolls Royce Corp.*, 775 F.3d 671, 681 (5th Cir. 2014); *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d 30, 37 (2d Cir. 2014); *In re Pruett*, 133 F.3d 275, 280 (4th Cir. 1997); *In re Bieter Co.*, 16 F.3d 929, 933 (8th Cir. 1994); *In re Hicks* v. *Duckworth*, 856 F.2d 934, 935-936 (7th Cir. 1988).

presented is one of extraordinary legal and practical significance. Indeed, when the question divided the Sixth Circuit (*Smith* v. *Aegon Cos. Pension Plan*, 769 F.3d 922 (6th Cir. 2014)), it prompted an immediate CVSG.

Although the Eighth Circuit below unanimously joined the Sixth Circuit majority (rejecting the position of the United States), there is simply no longer any benefit to further percolation. This issue has been thoroughly vetted. After dozens of decisions, district courts are simply adopting the discussion of earlier courts. Each case pits the same arguments by the United States against the same arguments by institutional defendants. All that is left is for additional circuits to pick one side of the split.

Review is also warranted because the decision below directly frustrates an Act of Congress. Two circuits have now fundamentally misinterpreted critical provisions and purposes of ERISA. Each circuit expressly rejected the contrary position asserted by the Department of Labor—the agency charged with administering ERISA. These decisions eliminate a statutory right that Congress considered paramount in securing individual rights under the Act.

Finally, the question presented has become all but immune from appellate review. There is a reason that this issue affects thousands of individuals and generates dozens of district-court decisions—but has generated *two* appellate rulings. This case presents an exceedingly rare opportunity and ideal vehicle to decide this question. The petition should be granted.

A. There Is Intolerable Lower-Court Division Over This Important Question

Review is warranted because there is intolerable lower-court division that will not be resolved without this Court's review. Multiple courts have decided this issue,

and they are all stacking up on one side or the other. See, *e.g.*, *Feather* v. *SSM Health Care*, No. 16-CV-393-NJR-SCW, 2016 WL 6235772, at *4 (S.D. Ill. Oct. 25, 2016) (cataloging dozens of decisions nationwide).[8]

There is no benefit to further percolation. The Sixth Circuit resolved the issue in a comprehensive set of opinions (*Smith*, *supra*), and the Secretary has articulated at length the competing views of the United States (*e.g.*, *Smith* U.S. Br., *supra*). Indeed, the issue has been so thoroughly examined that a recent court found "no need to rewrite or rehash at length what has already been said." *Ibid.*; see also, *e.g.*, *Mathias* v. *Caterpillar, Inc.*, No. 1:16-cv-01323-MMM-JEH, Doc. 26 at 3 (C.D. Ill. Oct. 27, 2016) ("The arguments made by the Plaintiff are not novel.").

Other courts of appeals have also examined closely related questions, rounding out the full spectrum of relevant considerations. See, *e.g.*, *Gulf Life Ins. Co.* v. *Arnold*, 809 F.2d 1520, 1525 & n.7 (11th Cir. 1987) (invoking ERISA's "unequivocal purpose" in rejecting a plan's attempt to "defeat efforts by participants/beneficiaries to avail themselves of ERISA's broad venue provision"); see also Part I.C.1, *infra* (discussing cases from this

---

[8] In all likelihood, the reported decisions vastly understate the incidence of the issue. Cf. Roger Michalski, *Transferred Justice: An Empirical Account Of Federal Transfers In The Wake Of* Atlantic Marine, 53 Hous. L. Rev. 1289, 1294 n.16 (2016) ("Roughly 5000 non-MDL, non-bankruptcy civil cases are transferred each year, compared with roughly 200 reported opinions on Westlaw."); cf. also, *e.g.*, *Martin* v. *Ascension Health Long-Term Disability Plan*, No. 15-CV-02633-PAB-CBS (D. Colo. Sept. 7, 2016) (unreported decision enforcing forum-selection clause); *Harris* v. *BP Corp. N. Am. Inc.*, No. 15-C-10299 (N.D. Ill. July 8, 2016) (unreported decision invalidating forum-selection clause).

Court and other circuits striking down forum-selection clauses in analogous statutory contexts).[9]

While this Court does not often grant review without an unequivocal circuit conflict, this case fits comfortably within the Court's exceptions. The question is extraordinarily important but also circumscribed and narrow. The competing viewpoints are confined to a known subset of arguments, all of which have been extensively vetted in lower courts. While other courts of appeals have yet to pick sides, the only work left would in fact be *picking sides*—there is nothing new to add after dozens of decisions (litigated by well-funded institutional defendants), repeated filings by the federal government (articulating the opposing position), and a thoughtful set of split opinions from a court of appeals. The competing viewpoints nationwide are now represented perfectly by the opposing sides of this case, mirroring the conflict below.

Nor is there any reason to believe that this issue will resolve itself. These unlawful clauses have "proliferated" in recent years (*Smith* U.S. Br. 20), and institutional defendants will continue to secure (often-insurmountable) advantages in light of their success in the lower courts. And beneficiaries will not give up, especially in light of

---

[9] In *Gulf Life*, a plan participant filed a benefits claim in Tennessee, where he lived and worked. 890 F.2d at 1522. Gulf Life responded by filing its own suit for declaratory relief, invoking ERISA's venue provision to litigate in Florida—a venue lacking any connection to the participant. *Ibid.* The Eleventh Circuit rejected the plan's lawsuit. Looking to ERISA's text and purpose, it held that only participants and beneficiaries can invoke ERISA's protective venue provision. Congress's goal was providing the protected class "ready access to the Federal courts," a goal frustrated when plans (not plaintiffs) dictate the venue. *Id.* at 1524-1525 & n.7. While *Gulf Life* did not involve a forum-selection clause, its rationale is incompatible with *Smith* and the decision below.

the United States' longstanding position that such clauses are invalid—and the devastating effect such clauses have in the mine run of ERISA cases. Those beneficiaries may not be able to secure appellate review, but a significant number will press the issue in district court to keep it alive.

This deep confusion will persist until this Court grants review and resolves the conflict.[10] Percolation is necessary where an issue is underdeveloped; this issue is past ripe. Delay promises only added confusion, which makes the situation worse for everyone, forcing all sides to incur extra cost litigating ERISA claims.

This Court often grants review to resolve lower-court conflicts in similar settings, and it should do so here. See, *e.g.*, *City of Newport* v. *Fact Concerts Inc.*, 453 U.S. 247, 257 & n.14 (1981) (citing four district-court decisions on "important" and "recur[ring]" question); *Dawson Chem. Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 185 & n.4 (1981) (granting certiorari "to forestall a possible conflict in the lower courts"); *Curtis* v. *Loether*, 415 U.S. 189, 191 n.2 (1974) (granting certiorari where "[t]he Seventh Circuit here was the first court of appeals to consider this issue, but the reported decisions of the district courts are evenly divided on the question"); see also, *e.g.*, *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 5 (2006) (granting certiorari to re-

[10] The conflict is so pronounced that the outcome even varies within the same State. See, *e.g.*, Compare *Feather*, *supra* (enforcing forum-selection clause), *Mroch* v. *Sedgwick Claims Mgmt. Servs., Inc.*, No. 14-CV-4087, 2014 WL 7005003 (N.D. Ill. Dec. 10, 2014) (same), and *Mathias*, *supra* (same), with *Harris*, *supra* (declaring indistinguishable clause unenforceable), and *Coleman* v. *Supervalu, Inc. Short Term Disability Program*, 920 F. Supp. 2d 901 (N.D. Ill. 2013) (same).

solve a statute's application "to an important and increasingly popular form of business organization").

B. As The United States Explains, The Decision Below Directly Frustrates An Act Of Congress On A Question Of "Substantial Practical Importance"

Review is also warranted because the decision below directly frustrates an Act of Congress. The entire point of securing a *choice* of venue was to protect beneficiaries' "ready access" to court. Forum-selection clauses eliminate that ready access and write this critical statutory protection out of existence. Congress's statutory design cannot function if plans refuse to follow the Act and courts are unavailable to enforce ERISA's mandates. For many beneficiaries, a decision ushering their suit far from home is effectively a bar to judicial relief. That has devastating effects on the rights of the protected class, and it effectively renders Congress's venue provision unenforceable in this setting.

This is why the United States previously acknowledged the issue's "substantial practical importance." *Smith* U.S. Br. 7, 20. For petitioner and countless other litigants, ready access to a local court is essential in protecting their rights. ERISA suits are typically brought by some of the most vulnerable members of the population: retirees on limited budgets, sick and disabled workers, widows, and dependents. These individuals rarely have the financial means or legal sophistication to navigate a lawsuit in a venue hundreds or thousands of miles away, in a district with no connection to their personal or professional lives. See *Dumont*, 2016 WL 3620736, at *9; *Harris*, slip op. 10, 14; Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. Rev. 423, 446-447 (1992).

When respondents elevate the difficulty of pursuing relief, they erect a serious impediment to the already-imposing challenge of litigating technical ERISA claims. See *Smith*, 769 F.3d at 935 (Clay, J., dissenting) ("Requiring Plaintiff to litigate in a distant venue imposes a substantial increase in expense and inconvenience that obstructs his access to federal courts.").

Congress recognized those difficulties and the disparity of resources between typical ERISA plaintiffs and plan defendants. Cf. H.R. Rep. No. 93-533, at 17; Kevin M. Clermont & Theodore Eisenberg, *Exorcising The Evil Of Forum-Shopping*, 80 Cornell L. Rev. 1507 (Appendix) (1995) (finding that transfer in ERISA cases lowered plaintiffs' odds of prevailing from 82.10% to 55.56%). ERISA's broad venue provision is designed to ease the burdens on plaintiffs and to prevent institutional defendants—already buoyed by greater resources and expertise—from gaining an undue hometown advantage. Yet these forum-selection clauses routinely direct all suits to the plan's or company's headquarters—no matter how difficult that may prove for the beneficiary.

Enforcing these clauses has predictable consequences. Many plaintiffs simply give up. See, *e.g.*, *Keever* v. *NCR Pension Plan*, No. 1:15-cv-4397-CB (N.D. Ga. 2016) (voluntary dismissal after transfer from S.D. Ohio); *Marin* v. *Xerox Corp.*, No. 6:13-cv-06133-FPG (W.D.N.Y. 2013) (voluntary dismissal after transfer from N.D. Cal.); *Rodriguez* v. *PepsiCo Long Term Disability Plan*, No. 1:10-cv-04646-LTS (S.D.N.Y. 2010) (voluntary dismissal after transfer from N.D. Cal.). Others face competitive disadvantages or incur much greater costs to prosecute their claims. *E.g.*, *Smith*, 769 F.3d at 935 (Clay, J., dissenting); cf. Michalski, *supra*, at 1293-1294.

The seriousness of the problem is obvious. Take two representative examples:

In *Haughton* v. *Plan Adm'r of the Xerox Corp. Ret. Income Guarantee Plan*, the plaintiff filed suit in the Western District of Louisiana, but the case was transferred to the Western District of New York. 2 F. Supp. 3d 928 (W.D. La. 2014). The plaintiff's attorney was not admitted in the new location and could not find a sponsoring attorney for his application. The attorney was forced to delay his client's suit for statutory benefits, seeking a stay to "obtain admission pro hac vice" or to "find substitute counsel for plaintiff admitted to practice" in that district. *Haughton* v. *Plan Adm'r of the Xerox Corp. Retirement Income Guarantee Plan*, No. 6:14-cv-06116-FPG, Doc. 33 at 1-2 (W.D.N.Y. Apr. 1, 2014). That delay shortly became a forfeiture. The plaintiff's same attorney—still not admitted in the Western District—voluntarily dismissed the case with prejudice. Doc. 36 (May 22, 2014).

Likewise, in *Williams* v. *Cigna Corp.*, No. 5:10–CV–00155, 2010 WL 5147257 (W.D. Ky. Dec. 13, 2010), the beneficiary's suit was transferred from Kentucky to Iowa. His lawyer moved to withdraw because "he is unable to practice law" in Iowa, and simultaneously asked the court "for an extension of time for Plaintiff to find representation." *Williams* v. *Cigna Corp.*, No. 1:10-CV-00161-LRR, Doc. 43 at 1 (N.D. Iowa Feb. 22, 2011). The judge granted the withdrawal but rejected the extension, explaining that she had earlier "admonished" that it was "plaintiff's decision" whether to "retain[] new counsel or proceed pro se." Doc. 45 at 2 (Feb. 23, 2011). The court failed to acknowledge that such "decisions" are hardly free or easy for ERISA beneficiaries, especially those litigating pro se in States far from home.

The *Williams* plaintiff eventually did find an attorney, but to little effect. In responding to Cigna's motion

to dismiss, the new attorney explained the hardship resulting from transfer and its impact on the merits:

> Plaintiff contacted numerous Cedar Rapids attorneys [including me]. Based on my schedule [at the time], I did not want to get involved. Then I received a call from the Plaintiff himself on or about February 28, 2011. He was extremely frustrated that he had apparently went through almost every law firm he could find in the area and nobody would help him. He was being told that firms were not excited about taking a case with a pending dispositive motion and a shrinking time to respond. * * * I felt sorry for him * * * . I have tried to get up to speed in that time, but it has not been adequate time. That being said, the Court set a firm deadline of today to file a response, so I am doing the best I can under the circumstances.

Doc. 47 at 2-3 (Mar. 7, 2011). Despite the plaintiff's best efforts, the transfer materially impaired his ability to assert his federal rights.

Moreover, it is difficult to assess how many other claims have been abandoned before a lawsuit is even filed. Local attorneys are understandably reluctant to accept low-value cases subject to forum-selection clauses; the additional cost and inconvenience of litigating in remote venues eliminates any realistic prospect of a fair return. And few ERISA beneficiaries are aware how to find counsel in venues hundreds or thousands of miles away. The predictable result, again, is many ERISA beneficiaries will simply forfeit their rights.

The vital importance of this question is obvious, and the decision below leaves an Act of Congress effectively unenforceable. This Court frequently grants review in such situations, and review is warranted here.

C. This Issue Is All But Immune From Appellate Review, And This Case Presents The Exceedingly Rare Opportunity To Decide It

Despite its obvious importance, this issue rarely finds its way to the appellate courts. The best proof is the utter absence of decisions at the circuit level: this issue affects thousands of litigants and produces dozens of published opinions, and yet there have been *two* appellate decisions (including the one below) in the last decade. When the government last weighed in, it noted only *three* cases total to even reach an appellate court across a six-year span. *Smith* U.S. Br. 21.

The difficulty of obtaining review is manifest. Parties cannot appeal from final judgment, because it is virtually impossible to prove prejudice. Interlocutory review under 28 U.S.C. 1292(b) is foreclosed in multiple circuits, and an unrealistic option even were it theoretically available. And mandamus is prohibitively time-consuming and too expensive for common ERISA litigants.

Most ERISA suits involve amounts in controversy that are life-changing to the beneficiaries, but relatively minor compared to most federal-court litigation. Yet to preserve the issue, this is what petitioner (with assistance from public-interest counsel) was forced to do: she filed full briefing on a motion to retransfer, a district-court stay request, a mandamus petition, a circuit-court stay request, a reply in support of her petition (which the Eighth Circuit refused to accept), and a petition for rehearing—all to have a *chance* at obtaining a ruling before the case reaches finality below, thus mooting the issue. No rational litigant (without external assistance) is willing to expend the hundreds of hours of attorney time and resources to challenge this issue on appeal. Immediate review is warranted.

1. The Court should take this rare opportunity to decide this important and recurring question. This petition is the optimal vehicle for deciding the issue. It is undisputed that petitioner initially filed in a proper ERISA venue, and the plan's forum-selection clause provided the exclusive basis for transfer. The venue issue was correctly preserved with a retransfer motion, and it was squarely presented on mandamus (the appropriate vehicle for challenging erroneous transfer decisions). There are no relevant facts in dispute or other impediments to resolving the question presented. The entire dispute turns on a single and pure question of law: whether the forum-selection clause may trump ERISA's venue provision. This is a rare and ideal vehicle, and the Court should take advantage of it.

2. If the Court declines review, it is unclear when it will have another opportunity to decide the issue. This is the rare case to percolate up to the court of appeals, and it did so by virtue of the concerted efforts of public-interest lawyers. The substantial impediments to appellate review are clear.[11]

a. "[I]t has long been 'settled that an order granting a transfer or denying a transfer is interlocutory and not appealable.'" *Miller* v. *Toyota Motor Corp.*, 554 F.3d 653,

[11] Petitioner is unaware of any relevant case after *Smith* to even reach a court of appeals. The single exception: On October 31, petitioner's counsel filed a mandamus petition on behalf of another ERISA beneficiary raising the same issue. *In re Mathias*, No. 16-3808 (7th Cir.). On November 3, the Seventh Circuit ordered a response to the petition and invited the Secretary of Labor to file an amicus brief. While the case was temporarily stayed in district court, the district court lifted the stay and set immediate deadlines after ruling on the retransfer motion. That appellate proceeding therefore faces a material risk of mootness unless the Seventh Circuit itself imposes a stay, which it has yet to do.

655 (6th Cir. 2009); see, *e.g.*, *Hill* v. *Potter*, 352 F.3d 1142, 1144 (7th Cir. 2003) (citing cases from the First, Second, Fourth, and D.C. Circuits). Yet it is all but futile to seek review of a transfer order after final judgment. Parties cannot obtain reversal without showing prejudice, and it is virtually impossible "to show that [the plaintiff] would have won the case had it been tried in a convenient forum." *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003); accord, *e.g.*, *In re Apple, Inc.*, 602 F.3d 909, 912 (8th Cir. 2010) ("If Apple were to appeal from an adverse final judgment rendered in Western Arkansas, it could not show that it would have prevailed in a hypothetical trial in Northern California.").

b. With ordinary appeals off the table, parties must seek interlocutory relief. But the only options for interlocutory review are expensive, unrealistic, or no option at all.

First, it is far from obvious that interlocutory review is available under 28 U.S.C. 1292(b). Multiple circuits categorically foreclose review of transfer orders under that section. See, *e.g.*, *Rolls Royce*, 775 F.3d at 676 ("circuit precedent forecloses reviews of transfer orders under" 28 U.S.C. 1292(b)). Congress limited Section 1292(b) to orders that "materially advance the ultimate termination of the litigation" (28 U.S.C. 1292(b)), and venue "is not likely" to "terminate" a case. *A. Olinick & Sons* v. *Dempster Bros., Inc.*, 365 F.2d 439, 443 (2d Cir. 1966). Indeed, that is precisely what the district court found below when it refused to certify the issue for interlocutory appeal. App., *infra*, 7a-8a.[12]

---

[12] Transfer, of course, might terminate the litigation if the plaintiff cannot pursue her suit in the transferee district. See *Red Bull Assocs.* v. *Best W. Int'l, Inc.*, 862 F.2d 963, 965 n.5 (2d Cir. 1988) (district court "found that if the action were transferred to Arizona, ap-

Second, while mandamus is a recognized vehicle for reviewing transfer decisions, few ERISA beneficiaries have the resources or expertise to pursue that remedy. These cases, again, are vital to a beneficiary's wellbeing. But without large amounts at stake, litigants cannot afford endless rounds of briefing on all issues. To preserve the transfer issue, plaintiffs have to oppose transfer, move for retransfer, obtain a ruling, seek a stay in district court (to avoid remote litigation and mootness in the new venue), seek a second stay at the circuit level (if the first stay is denied), and brief the mandamus petition (often after paying an appellate filing fee). Most institutional defendants, as here, resist at every turn, making it as difficult as possible to present the issue or obtain relief.

And the expected value of mandamus is already low given the risk of mootness: Absent a stay, the case continues on the merits in the trial court. This forces the beneficiary to proceed on two separate fronts, and if the underlying case reaches finality, the mandamus petition becomes moot. Even with a stay, the litigant is forced to endure months (or more) of delay before recovering critical benefits.

These additional steps themselves compound the "jurisdictional and procedural obstacles" that ERISA sought to eliminate, H.R. Rep. No. 93-533, at 17 (1973), and these obstacles are made worse by requiring protracted litigation to vindicate a party's simple right to litigate in a fair venue. Aside from pro-bono assistance, few, if any, beneficiaries will find counsel willing to endure the expense of multiple filings in multiple courts, all

---

pellees would not pursue their case"). But parties are not typically required to abandon their rights to obtain meaningful appellate review.

in the hope of possibly obtaining a venue ruling before the case is over.

c. Nor is there any other adequate means of pursuing review. It is theoretically possible that courts could enforce a forum-selection clause via a Rule 12(b)(6) dismissal, which would produce an appealable final judgment. Cf. *Smith* U.S. Br. 21 (explaining *Atlantic Marine* left that issue unresolved). As a practical matter, however, this does not happen. Courts consistently prefer transfer over dismissal as a matter of fairness and efficiency. See, *e.g.*, *Valley Elec. Consol., Inc.* v. *TFG-Ohio LP*, No. 4:16-CV-00060, 2016 WL 3570813, at *3 (N.D. Ohio June 30, 2016) (finding dismissal over transfer "inexpedient" because the plaintiff "would simply commence the action anew in the preselected forum"); *Keever* v. *Plan*, No. 3:15-cv-196, 2015 WL 9255342, at *6 (S.D. Ohio Dec. 17, 2015) ("[G]iven [*Atlantic Marine*'s] express holding that § 1404(a) is the appropriate mechanism for enforcing a forum selection clause, the Court finds that this is preferable, and better serves the interests of justice."); *McCusker* v. *hibu PLC*, No. 14-5670, 2015 WL 1600066, at *2 (E.D. Pa. Apr. 8, 2016) ("the interests of justice favor" transfer instead of dismissal). Given this Court's approval of Section 1404(a) as a mechanism to enforce forum-selection clauses, that preference is unlikely to fade. Indeed, petitioner is unaware of *any* case raising this issue post-*Atlantic Marine* that was dismissed instead of transferred.

Nor is there any reasonable prospect that an institutional defendant will seek further review. Those defendants would still face the same impediments to appealing the issue on final judgment, and would also face the same restrictions on seeking interlocutory review. While defendants have additional resources at their disposal—making mandamus more palatable—they have different

incentives to avoid an appeal. Any loss in district court is not binding on other courts, and will have little effect on defendants' overall interests. But vindicating a single transfer denial on appeal risks invalidating the forum-selection clause in all cases—which perhaps explains why plans (like respondents) resist appellate review so strenuously. Cf., *e.g.*, *Smith* U.S. Br. 21 (noting the parties settled a Fifth Circuit case on the eve of oral argument where a district court had denied transfer and subsequently awarded benefits) (citing *Nicolas* v. *MCI Health & Welfare Benefit Plan No. 501*, No. 09-40326 (5th Cir.)); *Dumont* v. *PepsiCo Admin. Committee*, No. 1:15-CV-369-NT (D. Me. Sept. 29, 2016) (notice of settlement after transfer denied).

Despite these formidable obstacles, this case squarely presents the issue for review. The petition should be granted.

D. The Decision Below Is Incorrect

Review is also warranted because the decision below is incorrect.

1. a. As the United States explained, these forum-selection clauses conflict with ERISA and are therefore unenforceable. *Smith* U.S. Br. 8-15. A core goal of ERISA was to guarantee "ready access to the Federal courts" (29 U.S.C. 1001(b)), and Congress accomplished that goal with an expansive venue provision. This provision expressly granted beneficiaries a broad choice of where to sue. 29 U.S.C. 1132(e)(2). By "expand[ing]" "the range of permissible venue locations" (*Varsic*, 607 F.2d at 248), this provision maximized judicial access and eliminated the "jurisdictional and procedural obstacles" that previously "hampered effective enforcement of fiduciary duties." H.R. Rep. No. 93-533, at 17; see also, *e.g.*, *Trustees of the Plumbers & Pipefitters Nat'l Pension Fund* v. *Plumbing Servs., Inc.*, 791 F.3d 436, 444 (4th

Cir. 2015); *Nicolas* v. *MCI Health & Welfare Plan No. 501*, 453 F. Supp. 2d 972, 974-975 (E.D. Tex. 2006). In short, ERISA entitles plaintiffs a choice of where to sue, and a plan contravenes that entitlement by eliminating that choice.

Congress further established how to resolve any conflict between ERISA and a plan's terms, declaring unenforceable any terms "[in]consistent" with ERISA's core provisions. 29 U.S.C. 1104(a)(1)(D). "Were the rule otherwise, parties could elude ERISA's commands by the simple expedient of sharp bargaining." *Gastronomical Workers Union Local 610* v. *Dorado Beach Hotel Corp.*, 617 F.3d 54, 62 (1st Cir. 2010). ERISA itself thus ensures that plans "cannot contract around the statute." *Esden* v. *Bank of Boston*, 229 F.3d 154, 173 (2d Cir. 2000) (invoking Section 1104(a)(1)(D)).

Yet that describes exactly what respondents have attempted here. The conflict between ERISA's venue provision and the plan's forum-selection clause is plain. ERISA grants beneficiaries the right to sue in *any* of three places, while the plan eliminates two of those choices. The plan thus prohibits suit in jurisdictions expressly authorized by ERISA. And the choice guaranteed by statute is essential to Congress's aims: all three statutory venues are not always accessible to each beneficiary, so ERISA secured multiple options for pursuing a beneficiary's rights. The plan's attempt to eliminate the statutory choice defies ERISA's text and frustrates its purpose. See 29 U.S.C. 1001(b), 1132(e)(2). It is accordingly unenforceable under Section 1104(a)(1)(D). See, *e.g.*, *Harris*, *supra*, at 11-12; *Dumont*, 2016 WL 3620736, at *8-*9; *Nicolas*, 453 F. Supp. 2d at 974-975; see also *Gulf Life*, 809 F.2d at 1525 & n.7.

Nor does it matter that the plan's forum-selection clause picked one of the *three* distinct venues available

under Section 1132(e). The *choice itself* is an essential part of the statutory scheme: Section 1132(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*, 920 F. Supp. 2d at 906. The point is to facilitate judicial access by providing a *choice*, and Congress gave beneficiaries the right to exercise that choice and select the suit's location (*Gulf Life*, 809 F.2d at 1523-1524). Plans cannot override that choice and impede judicial access by forcing all suits to the plan's backyard. Cf. *id.* at 1525 n.7 ("We believe that ERISA's legislative history unquestionably demonstrates that Congress did not intend to allow a fiduciary to force a plan participant/beneficiary who worked for a company for 30 years in Maine and who files a claim for benefits with that company, to be required to litigate his claim in Los Angeles.").

In short, unlike the statute that Congress drafted, the plan's forum-selection clause restricts all litigation to a single location—"the Eastern District of Missouri." ERISA guarantees beneficiaries the right to sue in districts where the breach occurred, and Defendants' forum-selection clause strikes that option from the list. "Such a restrictive clause not only conflicts with the broad venue provision set forth in § 502(e) of ERISA, but also undermines the very purpose of ERISA and contravenes the strong public policy evinced by the statute." *Smith*, 769 F.3d at 935 (Clay, J., dissenting). It is accordingly unenforceable under ERISA.

b. In related statutory contexts, courts routinely apply the same analysis to invalidate forum-selection clauses, and the decision below stands at odds with those decisions. For instance, the Ninth Circuit invalidated such a clause as inconsistent with the venue provisions of the

Carmack Amendment, which governs interstate-shipping contracts. See *Smallwood* v. *Allied Van Lines, Inc.*, 660 F.3d 1115 (9th Cir. 2011). Like ERISA, the Carmack Amendment provided that a lawsuit "may be brought" in one of two "judicial district[s]," "assur[ing] the shipper a choice of forums as plaintiff." *Id.* at 1121-1122. Because the forum-selection clause would have "limit[ed] shippers' choice of venues enumerated in the statute," it was "unenforceable under Carmack." *Id.* at 1123; see also *Kawasaki Kishen Kaisha Ltd.* v. *Regal-Beloit Corp.*, 561 U.S. 89, 98 (2010) ("if Carmack's terms apply to the bills of lading here, the cargo owners would have a substantial argument that the Tokyo forum-selection clause in the bills is pre-empted by Carmack's venue provisions"). The ruling below is incompatible with this reasoning.

c. The decision below is further in tension with this Court's refusal to enforce forum-selection clauses that "contravene a strong public policy of the forum in which suit is brought, *whether declared by statute* or by judicial decision." *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972) (emphasis added). As *The Bremen* made clear, this "strong public policy" is often reflected in statutory venue provisions. *The Bremen* itself relied on *Boyd* v. *Grand Trunk W. R.R.*, 338 U.S. 263 (1949) (per curiam), which invalidated a forum-selection clause for improperly restricting a statutory choice of venue under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.* The same logic applies here: in each case, enforcing a forum-selection clause "would thwart" the rights secured by a statutory venue provision (*Boyd*, 338 U.S. at 265-266), undermining Congress's goal of securing easy access to federal court. Just as in *Boyd*, the plan's "preclusive venue selection clause" is "inconsistent with the purpose, policy, and text of ERISA," and is therefore

"unenforceable." *Smith*, 769 F.3d at 934 (Clay, J., dissenting) (quoting *The Bremen*, 407 U.S. at 15).

2. While the Eighth Circuit did not explain its views, the orders below reiterate the same limited arguments repeated at length by other courts. Those arguments are demonstrably wrong.

First and foremost, the courts below erred in relying on generic transfer rules for ordinary contracts. App., *infra*, 5a-6a, 11a-16a. This is no ordinary contract, but a regulated plan under a comprehensive statutory scheme. Parties cannot simply contract however they wish. ERISA has careful protections to prevent sophisticated parties from subverting judicial access, and respondents cannot enforce a forum-selection clause inconsistent with those protections. See 29 U.S.C. 1104(a)(1)(D). That pure legal question drives the analysis, and the conventional inquiry for unregulated contracts has nothing to do with it.

For the same reasons, *Atlantic Marine* is irrelevant to this dispute. Contra App., *infra*, 5a (following *Atlantic Marine* to enforce the forum-selection clause as a "valid" contract provision "'represent[ing] the parties' agreement as to the most proper forum'"). *Atlantic Marine* did not involve an overriding statutory scheme, and its entire analysis *presumed* that the forum-selection clause at issue was "valid." 134 S. Ct. at 581 & n.5. The entire question here is whether the clause *is* valid under ERISA's controlling framework, a question *antecedent* to *Atlantic Marine*'s analysis. See, *e.g.*, *Harris*, slip op. 5.

Nor does it matter that ERISA's venue provision uses permissive language (where suits "may" be brought). Contra App., *infra*, 17a. That language is permissive only in the sense that it *permits* beneficiaries to *choose* one of three options; it is *mandatory* in the sense that bene-

ficiaries have the absolute right to make that choice. Forbidding the protected class from selecting any of the three options still creates a clear conflict. Cf. *Pet Quarters, Inc.* v. *Depository Trust & Clearing Corp.*, 559 F.3d 772, 780 (8th Cir. 2009) ("conflict preemption applies where state law forbids conduct that federal law authorizes") (citing *Barnett Bank of Marion Cty., N.A.* v. *Nelson*, 517 U.S. 25, 31 (1996)).

The courts below also said that limiting all suits to a single district promotes ERISA's interest in "uniformity." App., *infra*, 6a, 16a-17a. But Congress was concerned about a *different* kind of uniformity: the problem of subjecting ERISA plans to multiple legal regimes with different requirements. *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 148 (2001). That is why Congress preempted conflicting state laws in this area. See 29 U.S.C. 1144(a); *Davila*, 542 U.S. at 208. But that kind of uniformity is not relevant here. No matter where this action is brought, all federal courts will be applying the same law to the same plan, construed the same way by the same plan administrator. If Congress felt that "uniformity" required vesting a single court with jurisdiction over all claims, it would not have granted beneficiaries an affirmative right to select among *multiple* venues. See *Dumont*, 2016 WL 3620736, at *9, *10 n.16.

Nor are these clauses valid because ERISA claims might be subject to arbitration: under this view, "[i]t is illogical to say that, under ERISA, a plan may preclude venue in federal court entirely, but a plan may not channel venue to one particular federal court." *Smith*, 769 F.3d at 932; but see *id.* at 935-936 (Clay, J., dissenting) (refuting this logic). This overlooks that arbitration is permitted (if at all) as a result of the *compelling federal policy favoring arbitration*, which itself is codified in an independent federal statute (the Federal Arbitration

Act, 9 U.S.C. 1 *et seq.*). If arbitration agreements override ERISA's venue provision, it is only because a *separate* federal statute (the FAA) says they can. There is no analogous statute granting primacy to generic forum-selection clauses, let alone at ERISA's expense. *Dumont*, 2016 WL 3620736, at *11; *Harris*, slip op. 13 n.7.

Finally, the Missouri court did not believe that petitioner would find it hard to litigate in Missouri. App., *infra*, 6a. Congress, of course, did not afford district courts any discretion to decide when to enforce ERISA's binding venue provision. But the Missouri court was wrong even on its own terms. ERISA suits are typically brought by some of the most vulnerable members of the population, and petitioner is no exception. She is able to litigate this case now only because pro-bono lawyers are litigating the matter below to preserve this issue for appeal. It is far from obvious that she otherwise could have found a lawyer (much less fought respondents on her own).

The question presented is of critical importance to Congress's statutory scheme. Forum-selection clauses wipe out the statutory venue rights of countless citizens, whose cases will be routed to distant locations no matter where those citizens live, what obstacles they may face in litigating far from home, or how little of a connection the new venue has to the dispute. "Because the express purpose and policy of ERISA is to provide unobstructed access to a forum in which participants and beneficiaries can pursue their claims for benefits, the unilaterally added venue selection clause at issue in this case should be deemed unenforceable * * * ." *Smith*, 769 F.3d at 935 (Clay, J., dissenting). Further review is plainly warranted.

E. At A Minimum, The Court Should Call For The Views Of The Solicitor General

The United States has confirmed that these forum-selection clauses violate ERISA and the question is of "substantial practical importance." *Smith* U.S. Br. 7, 19-20. Despite recognizing the Sixth Circuit's error and the "significance" of the issue, the government recommended denying review to permit further percolation in the courts of appeals. *Id.* at 20.

The government, respectfully, was mistaken.

First, the government believed that the issue could reach other circuits without undue difficulty. But, as discussed earlier, the government overlooked restrictions on 28 U.S.C. 1292(b), and it minimized the obvious obstacles to obtaining a decision on mandamus. Its brief failed to explain how either option presented a viable path for ordinary ERISA litigants—or why so few cases (three in total) had reached the appellate courts despite the issue's obvious "importance." Indeed, the government acknowledged (Br. 21-22) that these concerns were not "without force"; additional scrutiny now shows the concerns are far stronger than the government originally believed.[13]

Second, the government suggested that percolation would "shed light on the practical consequences" of the Sixth Circuit's rule. Br. 20. But the practical conse-

---

[13] The government noted that "all three appeals in which the Secretary [of Labor] has participated since 2009 arose in a posture that can reach this Court." Br. 21. Three appeals in six years is cold comfort to hundreds or thousands of ERISA beneficiaries struggling against forum-selection clauses. And only one of those cases—*Smith* itself—actually decided the issue; another settled and the third resolved the appeal without addressing the question. *Ibid.* The decision below is the only other appellate ruling on the issue.

quences are plain: these clauses "hinder claimants' access to courts" (as the government itself acknowledged, *ibid.*), and there is no reason to await other fact-patterns (such as the unrealistic possibility that plans will start sending cases to locations falling outside ERISA's venue provision, *ibid.*).[14] The common fact-pattern is clear and predictable: plans routinely usher suits to their own backyard ("where the plan is administered"), and that itself dislodges suits hundreds or thousands of miles away from their initial location. This case represents that classic fact-pattern, rendering it an ideal vehicle for resolving the question.

While the petitioner in *Smith* had an opportunity to explain these deficiencies, his supplemental brief did not address any of these key errors: it did not discuss the extraordinary costs of seeking interlocutory review, the doubtful availability of Section 1292(b) (including its categorical rejection in multiple circuits), the possibility of

---

[14] Indeed, the United States' only example was a hypothetical forum-selection clause specifying a district falling outside Section 1132(e)(2) with "no connection" to "the plan administrator." Br. 20. But the government did not identify any such case, and petitioner is aware of only a single reported opinion suggesting one even *might* exist. See *Malagoli* v. *AXA Equitable Life Ins. Co.*, No. 14-CV-7180, 2016 WL 1181708, at *2 (S.D.N.Y. Mar. 24, 2016) ("[n]either party addresses whether or not New Jersey" falls within Section 1132(e)(2)). The lack of real-world examples is hardly surprising: plans are seeking a hometown advantage, easing litigation on themselves at the expense of ERISA plaintiffs; they are not trying to burden themselves, too.

Regardless, such a situation would constitute a *more* egregious violation of ERISA's text and purpose. If the forum-selection clause here violates ERISA, then *a fortiori* so would this hypothetical clause. It is pointless to await hypothetical scenarios when the representative case is ready today.

mootness resulting from a final judgment, or the hypothetical nature of the missing "fact patterns" supposedly warranting percolation. Supp. Br., *Smith* v. *Aegon Cos. Pension Plan*, No. 14-1168 (filed Dec. 8, 2015). It instead argued only that courts rarely grant certification or mandamus (*id.* at 7-8), which is true—but only a small reason that the government's pitch for percolation has little promise.

The bottom line is the merits debate is clear, and it is exceedingly unlikely the Court will encounter many other opportunities to decide the question. There is a reason that this issue has yielded just two appellate decisions over a decade, despite its acknowledged importance and frequent recurrence. Petitioner, through significant effort and expense, managed to navigate the issue to this Court. The Court should grant the petition now; at a minimum, the Court should again call for the views of the Solicitor General. In light of recent experience (and as confirmed by the Secretary's participation below), we are confident the United States would now recommend a grant.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PETER K. STRIS
BRENDAN S. MAHER
DANIEL L. GEYSER
Counsel of Record
DANA BERKOWITZ
DOUGLAS D. GEYSER
STRIS & MAHER LLP
725 S. Figueroa St., Ste. 1830
Los Angeles, CA 90017
(213) 995-6811
daniel.geyser@strismaher.com

NOVEMBER 2016

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-2607

IN RE: LORNA CLAUSE,
Petitioner

Appeal from U.S. District Court for the Eastern District of Missouri – St. Louis (4:16-cv-00071-RLW)

Filed: September 27, 2016

JUDGMENT

Before: COLLOTON, ARNOLD and KELLY, Circuit Judges.

The petition for a writ of mandamus has been considered by the court and is denied.

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-2607

IN RE: LORNA CLAUSE,
Petitioner

SECRETARY OF LABOR,
Amicus Curiae

Appeal from U.S. District Court for the Eastern District of Missouri – St. Louis (4:16-cv-00071-RLW)

Filed: October 26, 2016

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No: 4:16-CV-71 RLW

LORNA CLAUSE,
Plaintiff,

v.

SEDGWICK CLAIMS MANAGEMENT
SERVICES, INC., et al.,
Defendant.

Filed: May 17, 2016

MEMORANDUM AND ORDER

Before: RONNIE L. WHITE, United States District Judge.

This matter is before the Court on Plaintiff's Motion to Retransfer (ECF No. 44), filed on February 22, 2016. This matter is fully briefed and ready for disposition.

DISCUSSION

In this action, Plaintiff alleges a claim under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1101, *et seq.* Plaintiff asks this Court to (1) retransfer this action to the U.S. District Court for the

District of Arizona,[1] which transferred this action to this Court on January 19, 2016; and (2) preserve her appellate rights to challenge the improper transfer of this action under a forum-selection clause that is invalid under ERISA. (ECF No. 45 at 1).

A. Retransfer

Clause contends that the forum selection clause in the Ascension Plan is in conflict with ERISA's liberal venue provision. (ECF No. 48 at 3-4; ECF No. 45 at 9-11). Clause relies on ERISA's provision that states an ERISA action "may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found." (ECF No. 48 at 4 (citing 29 U.S.C. §1132(e)(2)). Clause maintains that the use of the word "may" is permissive in the sense that it lets the plaintiff choose one of the three options, but it does not give the plan the right to unilaterally modify or restrict those options. (ECF No. 48 at 6). Clause emphasizes the difficulty for an individual to litigate in a foreign court. (ECF No. 45 at 12). Clause contends that Congress gave plaintiffs, not plans, the right to select the location of the suit. (ECF No. 48 at 5).

In response, Defendants argue that the forum selection clause at issue in this case is valid. (ECF No. 47 at 7). Defendants maintain that ERISA's venue clause is permissive and not mandatory in that it uses "may" rather than "shall." (ECF No. 47 at 7). Further, Defendants assert that the forum selection clause does not contravene public policy in either Arizona or the United States. (ECF No. 47 at 6). Defendants state that a "clear majority" of the lower federal courts have found such

---

[1] *Clause v. Sedgwick Claims Mgmt. Servs., Inc.*, No. CIV 15-388-TUC-CKJ, 2016 WL 213008 (D. Ariz. Jan. 19, 2006).

forum selection clauses to be valid. Indeed, Defendants note that only two district courts have found that a plan's forum selection clause was invalid. (ECF No. 47 at 6). Finally, Defendants assert that their forum selection clause furthers the goal of bringing uniformity to ERISA decisions. (ECF No. 47 at 10-11). Defendants contend that otherwise the Plan and its participants would be subject to varying interpretations and outcomes. (ECF No. 47 at 11).

As a general rule, courts enforce valid forum selection clauses. "[W]hen the parties' contract contains a valid forum-selection clause, which represents the parties' agreement as to the most proper forum.'" *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 581 (2013) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988)). The "enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." *Stewart Org., Inc.*, 487 U.S. at 33. The Arizona District Court has previously held that the forum selection clause in this case is enforceable. *See Clause v. Sedgwick Claims Mgmt. Servs., Inc.*, No. CIV 15-388-TUC-CKJ, 2016 WL 213008, at *4 (D. Ariz. Jan. 19, 2016) ("Clause has failed to overcome the strong presumption in favor of enforcing forum selection clauses."). The Court agrees with the Arizona District Court and numerous district and circuit courts that have found that ERISA forum selection clauses are enforceable. *See Smith v. Aegon Companies Pension Plan*, 769 F.3d 922, 931 (6th Cir. 2014), *cert. denied*, 136 S. Ct. 791, 193 L. Ed. 2d 708 (2016) ("A majority of courts that have considered this question have upheld the validity of venue selection clauses in ERISA-governed plans. These courts reason that if Congress had wanted to prevent private parties

from waiving ERISA's venue provision, Congress could have specifically prohibited such action."); *Clause*, 2016 WL 213008, at *4; *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) ("Had Congress sought to prevent plaintiffs from waiving the statutory venue provision by private agreement, it could have done so by express provision."); *Klotz v. Xerox Corp.*, 519 F. Supp. 2d 430, 435 (S.D.N.Y. 2007) ("The vast majority of district courts have enforced forum selection clauses in ERISA plans."); *Sneed v. Wellmark Blue Cross & Blue Shield of Iowa*, No. 1:07CV292, 2008 WL 1929985, at *2 (E.D. Tenn. Apr. 30, 2008) ("Every other court that considered this issue upheld the forum selection clause."); *Schoemann ex rel. Schoemann v. Excellus Health Plan, Inc.*, 447 F. Supp. 2d 1000, 1007 (D. Minn. 2006) ("The Court finds nothing in the language or purposes of ERISA that renders invalid a forum-selection clause in a welfare-benefit plan.").

Further, the Court does not believe that any of Clause's concerns weigh in favor of retransfer of this action. In particular, the Court does not believe that Clause will be unable to litigate effectively in this forum. The Court notes that Clause has retained counsel to represent her interests. Likewise, the Court finds little inconvenience for plaintiff because this matter will more likely than not be decided on the administrative record. *See Schoemann ex rel. Schoemann v. Excellus Health Plan, Inc.*, 447 F. Supp. 2d 1000, 1005 (D. Minn. 2006). Indeed, the Court agrees that greater uniformity will result from having this district review the ERISA decisions. Therefore, the Court finds that the interests of justice weigh in favor of this Court enforcing the forum selection clause and retaining this action.

B. Interlocutory Appeal

Clause requests that this Court *sua sponte* certify the retransfer issue under 28 U.S.C. §1292(b) for interlocutory appeal. (ECF No. 45 at 13-14). Clause notes that if the Court does not *sua sponte* certify this issue, then she will file a formal motion seeking permission for interlocutory appeal and will solicit amicus support from the U.S. Department of Labor. (ECF No. 48 at 11).

Defendants state that certification of the transfer order is not appropriate in this case. First, Defendants argue that transfer under §1404(a) is not a controlling question of law. (ECF No. 47 at 14-15). Likewise, Defendants assert that Clause has overstated the difference of opinions related to this issue, particularly because there is no circuit split and the district opinions overwhelmingly support enforcing the forum selection clauses.

The Court will not *sua sponte* certify this action for interlocutory appeal. The Court agrees that the transfer under §1404(a) does not present a controlling issue of law. That is, the Court's transfer decision does not affect the ultimate outcome of this case. *Moses v. Bus. Card Exp., Inc.*, 929 F.2d 1131, 1136 (6th Cir. 1991). The Court further holds that "substantial grounds for difference of opinion" does not exist here. Substantial grounds exist when: "(1) the question is difficult, novel and either a question on which there is little precedent or one whose correct resolution is not substantially guided by previous decisions; (2) the question is one of first impression; (3) a difference of opinion exists within the controlling circuit; or (4) the circuits are split on the question." *Graham v. Hubbs Mach. & Mfg., Inc.*, 49 F. Supp. 3d 600, 612 (E.D. Mo. 2014) (citing *Emerson Elec. Co. v. Yeo*, No. 4:12CV1578 JAR, 2013 WL 440578, at *2

(E.D. Mo. Feb. 5, 2013)). As previously noted, the courts are not significantly split on this issue. Rather, courts have largely enforced the forum selection clauses in ERISA contracts. Based upon the foregoing, the Court will not *sua sponte* certify its Order.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff's Motion to Retransfer (ECF No. 144) is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff's Motion to Stay Proceedings Pending the Final Disposition of Plaintiff's Forthcoming Retransfer Motion (ECF No. 39) is **DENIED** as moot.

Dated this 17th day of May, 2016.

/s/ Ronnie L. White
RONNIE L. WHITE
UNITED STATES DISTRICT JUDGE

APPENDIX D

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No: CIV 15-388-TUC-CKJ

LORNA CLAUSE,
Plaintiff,

vs.

SEDGWICK CLAIMS MANAGEMENT
SERVICES, INC., et al.,
Defendants.

Filed: January 19, 2016

ORDER

Before: CINDY K. JORGENSON, United States District Judge.

Pending before the Court is the Motion to Dismiss, or in the Alternative, to Transfer Venue (Doc. 15) filed by Defendants Sedgwick Claims Management Services, Inc. (Sedgwick") and Ascension Health Alliance ("Ascension") (collectively, "Defendants"). The Court declines to schedule this matter for argument. See LRCiv 7.2(f); 27A Fed.Proc., L. Ed. § 62:367 ("A district court generally is not required to hold a hearing or oral argument before ruling on a motion.").

Factual and Procedural History[1]

Plaintiff Lorna Sue Clause ("Clause") was employed as a Patient Care Technician for Carondelet. Because of two shoulder surgeries, calcifying tendonitis, supraspinatus tendon tear shoulder impingement and trapezius pain, Clause has been unable to work since August 2012 as a Patient Care Technician.

Clause applied for disability benefits through the Ascension Long-Term Disability Plan ("Plan"). The Plan is administered through Ascension and Sedgwick provides benefits and performs as the Claim Administrator of the Plan. Clause's claim for long-term disability benefits was accepted, reflecting an onset of disability by August 2012.

Following an initial termination of benefits and a successful appeal, Clause's benefits were again terminated on November 18, 2014. By letter of January 8, 2015, Defendants again terminated Clause's benefits without mentioning its previous November 18, 2014, termination letter – the rationale for the termination of benefits was modified.

Clause appealed the termination of her benefits. Defendants confirmed the termination of benefits, but again modified its rationale for the termination of benefits.

Clause initiated this action seeking declaratory relief, to recover benefits and enforce her rights under the Plan, and to obtain equitable relief.[2]

---

[1] For purposes of this Motion to Dismiss, the facts are taken from the First Amended Complaint (Doc. 14).

[2] Although the First Amended Complaint requests supplemental relief pursuant to "1131(a)(3)." there is no such provision. Indeed,

Defendants filed their Motion to Dismiss, or in the Alternative, to Transfer Venue (Docs. 15 and 16).[3] A response and a reply have been filed.

Forum Selection Clause

Defendants claim that venue is improper in this Court because the forum selection clause contained in the Plan identifies the United States District Court for the Eastern District of Missouri as the exclusive venue for any claim "relating to or arising under" the Plan. Motion, Ex. A, § 9.20 (Doc. 16-1). Defendants assert that, absent exceptional circumstances, the forum selection clause is mandatory and must be enforced. Further, Defendants assert Clause has not and cannot show exceptional circumstances. Clause asserts, however, that when Congress has granted a plaintiff the a right to choose venue in a statute, as in the venue provision of the Employee Retirement Income Security Act of 1974 (ERISA), codified at 29 U.S.C. § 1132(e)(2), a defendant may not restrict or alter that statute's special venue provision through contract.[4]

---

29 U.S.C. § 1131 addresses criminal remedies. The Court accepts Clause's reference to "1131(a)(3)" as a reference to 29 U.S.C. § 1132(a)(3) which provides for injunctive and equitable relief.

[3] This motion supersedes the prior Motion to Dismiss filed by Sedgwick. The Court will deny the superseded motion as moot.

[4] Clause points out that the Supreme Court has been asked to make a determination as to whether the policy considerations underlying ERISA's venue provision preclude enforcement of forum selection clauses that plan administrators include in ERISA plans. Since the filing of the response, the Supreme Court has denied review. *Smith v. Aegon Companies Pension Plan*, 2016 WL 100358 (Mem) (Jan. 11, 2016).

"The presence of a valid forum-selection clause requires district courts to adjust their usual § 1404(a) analysis in three ways." *Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas*, — U.S. — , 134 S.Ct. 568, 581, 187 L.Ed.2d 487 (2013). "First, the plaintiffs choice of forum merits no weight ..., as the party defying the forum-selection clause, the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted." *Id.* at 582. Second, the district court should not "consider arguments about the parties' private interests." *Id.* "When parties agree to a forum-selection clause, they 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. A court accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum." *Id.* A district court is to only consider arguments regarding public-interest factors. *Id.* "Third, when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules – a factor that in some circumstances may affect public-interest considerations." *Id.*

The enforceability of forum selection clauses is governed by federal law. *Manetti–Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir.1988). A forum selection clause is presumptively valid and "should control absent a strong showing that it should be set aside." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996) ("Although *Bremen* is an admiralty case, its standard has been widely applied to forum selection clauses in general."). To avoid the application of a forum selection clause, the party opposing its enforcement

must show that it is unreasonable under the circumstances. *M/S Bremen*, 407 U.S. at 10; *see also Manetti-Farrow*, 858 F.2d at 514-15. The enforcement of a forum selection clause is unreasonable where: (1) the inclusion of the clause in the agreement was the product of fraud or overreaching; (2) the party objecting to the clause would effectively be deprived of his day in court if the clause is enforced; and (3) the enforcement of the clause would "contravene a strong public policy of the forum in which suit is brought." *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004) (citations omitted). Forum selection clauses are also evaluated for fundamental fairness. To determine whether a forum selection clause is fundamentally fair, and thus enforceable, courts consider the absence of a bad-faith motive, the absence of fraud or overreaching, and notice of the forum provision. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991); *Dempsey v. Norwegian Cruise Line*, 972 F.2d 998, 999 (9th Cir.1992)).

In this case, Clause asserts that Defendants concealed an oppressive change of venue clause in the Plan documents to cause participants, including Clause, to lack a judicial remedy without obtaining counsel and engaging in litigation away from their home state. However, information regarding the forum selection clause was not only included in the Plan, Motion, Ex. A, § 9.20 (Doc. 16-1), it was also included in the Summary Plan Description ("SPD"). After discussing administrative remedies, including an appeal of a denial of benefits, the SPD discusses other recourses available to someone seeking to challenge a denial of benefits. The SPD informs the reader he/she has right to bring a civil action under Section 502(a) of ERISA, he/she may have other voluntary alternative dispute resolution options, he/she may contact the U.S. Department of Labor office and your state

insurance regulatory agency for information as to options available, and he/she could contact the Employee Benefits Security Administration (providing a contact number). The SPD then states:

> **The Plan contains a forum selection clause, which requires that any action relating to or arising under this Plan shall be brought in and resolved only in the U.S. District Court for the Eastern District of Missouri, and in any courts in which appeals from that court are heard.**

Motion, Ex. C, SPD, p. 22 (Doc. 16-3). Additionally, Defendants assert the SPD is posted on the Carondelet Health Network benefits website, and participants are notified that an SPD is available upon request at any time from the benefits department. The Court finds there is no evidence of a bad-faith motive by Defendants, fraud or overreaching. Moreover, as the clause is included in both the Plan and the SPD, the Court finds Plan and the SPD provided sufficient notice of the forum selection clause. *See e.g. Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899, 908 (9th Cir. 2009) (there is no duty on plan administrators to "inform participants separately of provisions already contained in the SPD").

Here, the forum selection clause removes any uncertainty about where jurisdiction lies, thus avoiding confusion regarding venue selection. Moreover, since it is arguably more cost efficient for Defendants to litigate in Missouri, those savings could be passed along to the Plan itself. *See Cent. States, Southeast and Southwest Areas Pension Fund v. O'Brien & Nye Cartage Co.*, No. 06-4988, 2007 WL 625430, at *3 (N.D. Ill. Feb. 22, 2007) (finding that "[t]he purpose of including the venue selec-

tion clauses is obviously to allow for the Trustees to better exercise efficient administration of the Funds by reducing cost associated with litigating claims against multiple employers . . . ."). Additionally, lead counsel for Defendants are located in Missouri. Clause argues, however, that the restrictive forum selection clause would require her to litigate in a venue that is more than 1000 miles from her home and most recent place of work and in a venue with which Clause has no connection. Further, Clause asserts that her disability has already worked a substantial financial hardship upon her and litigating in Missouri, where she cannot afford to travel to hearings, would present an oppressive burden. Clause also asserts that she would be unable to have her current counsel represent her and it would be burdensome to retain another attorney to represent her in Missouri.[5] In other words, Clause asserts that enforcement of the forum selection clause would deprive her of her day in court. *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004) (refusing to enforce forum selection clause where party's substantial "physical and financial limitations" would preclude him from having "his day in court").

Initially, the Court notes that it is more than likely that neither Clause nor her attorney would be required to travel to Missouri; ERISA cases are normally decided by cross-motions and without the need for trial or discovery. *See, e.g., Russell v. Comcast Corp.*, 381 Fed.Appx. 657 (9th Cir. 2010). Further, even if Clause could obtain discovery in this case, any information that

---

[5] Defendants point out that out-of-state counsel are regularly admitted *pro hac vice* to litigate on behalf of their clients against the Plan without any need for local counsel and without the need for physical appearances.

Clause could theoretically discover would likewise be located in Missouri, making travel possible no matter where the case is litigated. Additionally, if a trial were to occur, Clause could then seek a transfer of venue back to this district, based on her inability to appear in Missouri. 28 U.S.C. § 1404(a) (allowing the court to "transfer any civil action to any other district or division where it might have been brought" "[f]or the convenience of parties and witnesses" and "in the interest of justice"). *See e.g. Rodriguez v. PepsiCo Long Term Disability Plan*, 716 F.Supp.2d 855, 862 (N.D.Cal. 2010). Further, these factors address Clause's personal interests, which the *Atl. Marine Const. Co., Inc.*, Court stated should not be considered. "Enforcement of the forum selection clause [] will not deprive [Clause] of [her] day in court." *Rodriguez*, 716 F.Supp.2d at 862.

Additionally, the record fails to establish that the enforcement of the forum selection clause would "contravene a strong public policy of the forum in which suit is brought." *Bremen*, 407 U.S. at 15. Rather, as another district court has stated:

> Enforcement of the forum selection clause in this case, moreover, actually furthers one of the purposes of ERISA by 'bring[ing] a measure of uniformity in an area where decisions under the same set of facts may differ' as a result of geographic location. . . . (quoting H.R. Rep. No. 93-533 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4650). The forum selection clause contained in [the] LTD 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.

Klotz v. Xerox Corp., 519 F. Supp. 2d 430 (S.D.N.Y. 2007). Although Clause argues that public policy requires fiduciaries to "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries" and "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter," 29 U.S.C. § 1104(a)(1)(D), and the enforcement of the forum selection clause would violate that fiduciary duty. The interests of all participants and beneficiaries are benefitted by bringing uniformity to ERISA decisions.

Lastly, the Court does not find Clause's argument that *Boyd v. Grand Trunk W. R. Co.*, 338 U.S. 263 (1949), and similar cases should govern the enforceability of forum selection clauses in ERISA cases. Rather, *Boyd* did not involve a forum selection clause in an ERISA case. The Court agrees with Defendants that, not only have the rules governing the validity of forum selection clauses been relaxed, *see* 7 Williston on Contracts § 15:15 (4th ed.), but the venue statute in *Boyd* was mandatory, while the ERISA venue provision has permissive language. Further, the federal governing statute has been broadened since *Boyd*. Additionally, the Ninth Circuit was discussing an arbitration clause in a contract case in *Smallwood v. Allied Van Lines, Inc.*, 660 F.3d 1115 (9th Cir. 2011), which is relied upon by Clause. The Ninth Circuit has recognized that "in the past, [it has] expressed skepticism about the arbitrability of ERISA claims, *see Amaro v. Cont'l Can Co.*, 724 F.2d 747, 750 (9th Cir.1984), but those doubts seem to have been put to rest by the Supreme Court's opinions in [*Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987)] and [*Rodriguez de Quijas v. Shear-*

son/American Express, Inc., 490 U.S. 477, 481 (1989)]." *Comer v. Micor, Inc.*, 436 F.3d 1098, 1100 (9th Cir. 2006). As an arbitration clause is similar to a specialized forum selection clause, *Smith v. Aegon Companies Pension Plan*, 769 F.3d 922, 932 (6th Cir. 2014), it is difficult to conclude that *Smallwood* should govern in this case.

The Court finds Clause has failed to overcome the strong presumption in favor of enforcing forum selection clauses. Further, Clause has not set forth any basis for which this Court should schedule an evidentiary hearing, as requested by Clause, to determine whether the forum selection clause was included in the Plan for a motive contrary to public policy.

Dismiss or Transfer

Because Clause would likely incur additional costs should this Court dismiss this case rather than transfer venue, the Court will deny the Motion to Dismiss, but will grant the Motion to Transfer Venue.

Accordingly, IT IS ORDERED:

1. The Motion to Dismiss, or in the Alternative, to Transfer Venue (Doc. 10) is DENIED AS MOOT.

2. The Motion to Dismiss, or in the Alternative, to Transfer Venue (Doc. 15) is GRANTED IN PART AND DENIED IN PART.

3. The Clerk of Court shall transfer this matter to the United States District Court for the Eastern District of Missouri.

DATED this 15th day of January, 2016.

/s/ Cindy K. Jorgenson
CINDY K. JORGENSON
UNITED STATES DISTRICT JUDGE