No. 16-641

IN THE

Supreme Court of the United States

LORNA CLAUSE,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE PENSION RIGHTS CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF PENSION RIGHTS CENTER FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

The Pension Rights Center respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the petitioner. Counsel of record for the parties received timely notice of *amicus curiae's* intent to file this brief as required by this Court's Rule 37.2(a). Counsel for the petitioner has filed blanket consent with this Court for briefs filed by December 2, 2016. Counsel for the respondent has withheld consent necessitating the filing of this motion pursuant to Supreme Court Rule 37.2(b).

The Pension Rights Center is a non-profit consumer organization founded in 1976, whose mission is to protect and promote the pension rights of workers, retirees, and their families. Since its inception, the Pension Rights Center has provided legal assistance to thousands of retirement plan participants and beneficiaries, helping them to understand their rights, recover benefits, and ensure their plans are adequately funded and prudently managed. As we note in our statement of interest, the Pension Rights Center is the primary national resource for helping individual plan participants find experienced counsel to help them contest benefit denials.

The effect of forum-selection clauses, such as the one involved in this case, will force many participants in retirement, disability, and health-care plans to seek judicial review hundreds or even thousands of miles from where the plan sponsor employed them and where they earned their benefits. The effect will be to increase the obstacles plan participants already face in locating counsel willing to represent them, to substantially increase the costs of litigation for

participants who are often elderly, sick, or disabled, and, at worst, to lead to the abandonment of meritorious claims. The decision, if left to stand, will undermine ERISA's carefully crafted enforcement scheme, which was designed to provide plan participants with ready access to Federal courts and to enable them to contest benefit denials. It will, in short, create unnecessary financial burdens for the thousands of American workers and retirees whose retirement benefits Congress intended to protect when it enacted ERISA forty two years ago.

For these reasons, the Pension Rights Center respectfully requests that it be granted leave to file the accompanying brief as *amicus curiae* in support of the Petitioner.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Established in 1976, less than two years after the enactment of the Employee Retirement Income Security Act ("ERISA"), the Pension Rights Center ("Center") is a Washington, D.C. nonprofit, consumer organization. The Center's mission is to protect and promote the retirement security of workers, retirees and their families.[1] For the past 40 years, the Center has provided legal assistance to thousands of retirement plan participants and beneficiaries seeking to understand their rights and responsibilities under their plans and the law, to recover benefits under the terms of their plans, and to ensure that their plans are adequately funded and prudently managed in their interest.

In 1986, the Center created the National Pension Lawyers Network, ("NPLN") to link individuals with lawyers willing to pursue their claims for retirement benefits. Since most claims involve small amounts, and since clients often have little income other than Social Security payments, finding experienced ERISA attorneys willing to litigate their cases in federal court is a continual challenge. Only a small percentage of NPLN lawyers agree to take cases on a reduced fee or pro bono basis, and the cases they accept tend to be those involving particularly sympathetic clients or

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[1] Pursuant to this Court's Rule 37.2(a), Amicus Curiae has given both parties timely notice of its intention to file this brief. The attorney for the Respondent has refused to consent to the filing of this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

novel legal issues.[2] The Center's experiences in administering NPLN have provided it with valuable perspectives on the real-life obstacles faced by workers, retirees, and their families seeking to enforce their benefit rights in court.

This case involves one such obstacle: a plan provision designed to force participants to litigate benefit claims in a single designated district court, making it more difficult and in some cases a practical impossibility for a participant to challenge an improper benefit denial in court when the participant is geographically distant from the designated judicial forum. Despite ERISA's express purpose—embodied in the statutory text—of facilitating "ready" access to the Federal courts, ERISA § 2(b), 29 U.S.C. § 1002(b), two circuit courts, including the one below, have upheld the validity of such clauses in cases involving individual benefit claims, requiring claimants to either abandon their claims or litigate them in a forum distant from where they were employed and where they reside. *See Smith v. Aegon Companies Pension Plan*, 769 F.3d 922 (6th Cir. 2014).

These venue clauses are being adopted with increasing frequency, as law firms advise their clients to add these "too good to be true" clauses because they can "promote significant cost savings" for the plan

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[2] Many of the individuals who contact NPLN are referred by one of seven regional pension counseling projects. The projects, which serve residents of 30 states, represent retirement plan participants in their plans' claims and appeals processes. Project attorneys do not litigate. The Center provides technical assistance and training to the counseling projects. The Center's work with the projects and NPLN is supported by a cooperative agreement with the U.S. Administration for Community Living/Administration on Aging.

sponsor. See Caleb L. Baron and J. S. Christie Jr., *Should Your ERISA Plan Have a Forum Selection Clause?*, Firm Alert Blog, www.bradley.com/insights/publications/2016/11/should-your-erisa-plan-have-a-forum-selection-clause.

Of course, those cost savings to the plan sponsor are not free to the system: they will come directly out of the pockets of plan participants, particularly those with individual benefit claims, who will incur new costs in finding lawyers and litigating in distant federal courts—unless they are forced to drop their claims altogether because they cannot find a lawyer willing to help them or cannot afford the increased litigation costs. These individual claimants are the participants that Congress sought to protect in providing "ready access to the Federal Courts."

If left to stand, decisions such as the one below and in *Smith v. Aegon, supra,* will have adverse systemic effects on the remediation system so deliberately crafted by Congress in 1974 to insure that benefit promises would be kept: meaningful internal plan review, so that fewer errors will be made by the plan, followed by ready access to the Federal courts to correct errors when they do occur. The use of forum-selection clauses will result not only in abandonment of meritorious claims by some participants and higher costs for those who pursue them, but will necessarily result in less thorough and less fair plan administrative review of participant claims, since the reduction of judicial review of benefit denials will reduce the consequences to the plan of errors and the concomitant incentives to avoid and correct them.[3]

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[3] In the Center's experience, many if not most meritorious claims for denied benefits are resolved at the plan administrative

At the Pension Rights Center, we are also concerned that the number of lawyers willing to take on representation of participants with individual benefit claims will decline and that our ability, through NPLN, to link lawyers with participants will become even more challenging than it is today. We generally begin the NPLN process by finding lawyers that are geographically proximate to the participants who seek our assistance, which allows the participant to meet with the lawyer, often an essential part of effective legal assistance. If forum selection clauses are allowed to substitute for the statutory language that allows individuals to sue where they earned and were denied their benefits ("where the breach took place"), our ability to find local lawyers will be reduced, since lawyers are less likely to be willing to take individual cases if they cannot litigate them locally.[4] And we suspect it will be virtually impossible to find lawyers who will be willing to take repeated pro bono or reduced fee representation in a forum to which dozens

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level. The reasons for this are manifold—many plans use administrative review as an opportunity to review benefit denials with an even hand and to identify and correct errors. But another reason is to avoid outside judicial scrutiny and to avoid unnecessary litigation. The forum-selection clauses make litigation, particularly litigation involving small but meritorious individual benefit claims, less likely and thus will, for some plans, result in a less robust and fair administrative review procedure.

[4] Although the Center's principal focus is on retirement benefits, it is our understanding that disability claimants typically retain a lawyer to represent them before the plan and before the Social Security Administration. Venue selection clauses could have the result of requiring disability claimants to retain two lawyers, with a resulting duplication of work and expense to our overall legal system.

of participants are annually funneled through forum-selection clauses.[5]

As we will discuss in our argument, we are also concerned that restrictive venue clauses are part of a broader trend by many plans to impede participants from bringing meritorious civil actions to correct plan errors. Plan sponsors have been adding provisions to their plans that require that participants bring lawsuits within periods as short as 90 days from a claim denial, that place limits on attorney's fees, and that provide for automatic assessment of attorney's fees when a participant loses in court.[6] Pursuing an ERISA claim increasingly means navigating a litigation obstacle course, far from the vision that Congress had of "ready access to Federal Courts." Indeed, one of the nation's leading ERISA firms has advised clients to add such provisions to their plans to "reduce the risk of being sued, or being liable if a suit is brought." Stacey Cerrone, *Avoiding Liability Through ERISA Plan Design: Statute of Limitations Periods, Venue Provisions and Anti-Assignment Clauses,* Proskauer ERISA Litigation Newsletter (March 2015), http://www.proskauer.com/file/News/ffa

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[5] Most pension disputes involve run-of-the-mill factual disputes, such as how many years a participant has worked, or the initial date of hire, or whether a spouse signed a waiver of survivor benefits. High-profile retirement plan cases, such as class actions alleging high fees in section 401(k) plans, are far more publicized but far less common. The restrictions on venue are likely to have a far harsher effect on participants with the former types of claims than those with latter type.

[6] Some of these plan provisions—including the venue provisions and fee limitation provisions—have been drafted to apply not only to benefit cases, but also to cases involving fiduciary breaches and prohibited transactions and other statutory violations.

58696-b201-4a35-885a-031ae1b65e9a/Presentation/NewsAttachment/33ae9595-e574-46e2-8e7d-0676982c2027/erisa-litigation-march-2015.pdf. *See also* Gretchen Morgenson, *When Duty to Retirees Comes Last*, N.Y. TIMES, June 5, 2016, at BU1.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Holding that ERISA Permits Employee Benefit Plans to Restrict Venue Is Legally Wrong and Abrogates the Statute's Purpose to Provide Participants in Employee Benefit Plans With Ready Access to the Federal Courts to Protect Their Rights.

A central theme and purpose in Congress's enactment of ERISA was to ease obstacles to the fair and full review of claims, internally at the plan level, and externally through ready access to the federal courts. Thus, Congress wrote ERISA to facilitate such access: it provided for federal jurisdiction and without regard to the amount in dispute, 29 USC § 1132(f); it provided that a participant could sue an employee benefit plan as an entity, 29 USC § 1132(d)(1); it provided for nationwide service of process, 29 USC § 1132(e)(2); it provided that a court could award attorney's fees, 29 USC § 1132(g)(1); and it expanded venue beyond that permitted generally in civil litigation in Federal court, 29 USC § 1132(e)(2).

Aside from ERISA's legislative history, which affirms that the statute was intended, among other purposes, to assure that plans maintain meaningful and fair internal claims and appeals procedures, followed by review of plan decisions in Federal district court without being subject to "jurisdictional and procedural obstacles," Sen. Rep. No. 93-127, 93rd Cong., 1st Sess. 35 (1973), *as reprinted in*, 1974

U.S.C.C.A.N. 4838, 4871 ("intent of the Committee is 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"); H.R. Rep. No. 533, 93rd Cong., 1st Sess. 17 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4655, the statute itself includes as one of its express purposes providing participants with "ready access to the Federal courts." ERISA § 2(b), 29 USC § 1001(b). This unusual textual endorsement of one of Congress's legislative purposes in enacting ERISA should serve as a lodestar to interpreting the statute's claims and enforcement provisions.

The question raised in the *certiorari* petition can be stated as follows: are the venue provisions merely an outer statutory limit on where venue lies, which can be further limited by the plan sponsor by putting appropriate language in its plan document, or are the venue provisions an integral part of a statutory scheme that is designed to facilitate ready access to federal courts for plan participants? If venue can be restricted to a single court, hundreds or even thousands of miles from where a participant lives, worked and earned benefits, judicial access would be limited and some participants in multi-state plans would be unable to seek redress in court for an erroneous denial of benefits. The idea that such restrictions on venue will not impair ready access to federal courts is one that defies the realities of the world in which most ERISA participants must litigate, where distance and additional cost can be disabling obstacles to filing a civil action. This becomes particularly problematic when the claim is an individual claim, small in amount, that cannot efficiently be joined with the claims of other participants in a class action.

Moreover, ERISA's venue provisions are part of "a carefully crafted and detailed enforcement scheme," *Mertens v. Hewitt Associates*, 508 U.S. 248, 254 (1993), one that was, as noted, designed to remove jurisdictional and procedural obstacles to participants seeking judicial review and to provide them ready access to the Federal courts. ERISA's venue provisions are integral to that carefully crafted enforcement scheme. Unlike the general Federal civil venue provisions of 28 USC § 1391, which direct venue choices to a subset of fora in which jurisdiction would comport with Constitutional jurisdictional standards, the ERISA venue provisions expand venue choices up to and arguably beyond the limits of Constitutional minimum contacts. *Compare Peay v. BellSouth Medical Assistance Plan*, 205 F.3d 1206 (10th Cir. 2000)(acknowledging possible jurisdictional Constitutional constraints on ERISA venue) *with Board of Trustees v. Elite Erectors*, 212 F.3d 1031 (7th Cir. 2000)(holding that ERISA's nationwide service of process provisions itself creates nationwide personal jurisdiction). This difference between the structure and language of the two venue provisions, even in the absence of ERISA's expressed purpose to facilitate ready access to Federal Courts (and its legislative history that identifies removing procedural obstacles as an important congressional goal), indicates that Congress designed ERISA's venue provisions to ensure that a participant could litigate in a forum convenient to the participant.[7] Congress intended that

[7] It is inconceivable that the 1974 Congress would have authorized plans to force participants to litigate small benefit claims hundreds or thousands of miles from where they were employed, since in that pre-computer era the obstacles to such litigation were even more formidable than they are today.

ERISA bring "the workers interest up to parity with those of employers." Introductory Remarks of Mr. Javits on S.4, Legislative History of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 94th Cong., 2d Sess. 203, 204 (1976).

Indeed, one of the nation's leading ERISA law firms has expressed surprise at the contrary direction in which courts have moved, even as it advises its clients to adopt forum-selection clauses to limit participant access to the federal courts:

> One of Congress' goals in enacting ERISA was to remove jurisdictional and procedural obstacles that hindered plan participants and beneficiaries from pursuing claims for benefits promised to them by their employers. Consistent with that goal, ERISA broadly provides that suits may be commenced where the plan is administered, where the breach took place or where the defendant resides or may be found. Notwithstanding the congressional design, courts with increasing frequency have allowed plans to limit the venue in which a claim for benefits may be brought.

Stacey Cerrone, *Avoiding Liability Through ERISA Plan Design: Statute of Limitations Periods, Venue Provisions and Anti-Assignment Clauses,* Proskauer ERISA Litigation Newsletter (March 2015), http://www.proskauer.com/files/News/ffa58696-b201-4a35-885a-031ae1b65e9a/Presentation/NewsAttachment/33ae9595-e574-46e2-8e7d-0676982c2027/erisa-litigation-march-2015.pdf.

This Court's decision in *Atlantic Marine Construction, Inc. v. United States District Court for the Western District of Texas*, 134 S.Ct. 568 (2013), does not compel the enforcement of forum-selection clauses

in ERISA. *Atlantic Marine* considered whether a district court can dismiss a case under Rule 12(b)(3) when there is a contractual forum-selection clause but venue nevertheless comports with the general Federal civil venue provisions in 28 USC § 1391, and whether a court may consider private inconvenience when deciding whether to transfer a case under 28 USC § 1404(a) to the forum identified in the contract. *Atlantic Marine* held, first, that a 12(b)(3) motion was not proper, since the plaintiff had sued in a proper section 1391 venue, and second, that a court could not consider private convenience to the parties in such cases, since the parties had by contract agreed to the identified forum and thus waived such objection.[8] But *Atlantic Marine* considered the general venue provision in section 1391 and not ERISA's specific venue provisions.[9]

We acknowledge that several district courts and one circuit court have previously held that venue transfers under 28 USC § 1404(a) to an ERISA plan's choice of forum are proper and that courts should not generally consider the "inconvenience" to the participant in deciding whether transfer is appropriate, although there are contrary opinions as well. *See Coleman v. Supervalu Inc. Short Term Disability Program,* 920 F.

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[8] Of course, employee plans, which are not negotiated and which can be infinitely and often retroactively varied by amendment (as in the *Aegon* plan, where the venue provision was added after the participant had already retired), and are nevertheless a major part of compensation, are different from the type of commercial contract the Court considered in *Atlantic Marine*. Moreover, retirement plans are structured as trusts rather than contracts.

[9] See discussion, infra, on the differences between 29 USC § 1132(e)(2), the ERISA-specific venue provision, and 28 USC § 1391, the general Federal civil venue provision.

Supp. 2d 901 (N.D. Ill. 2013)("Congress clearly desires open access to several venues for beneficiaries seeking to enforce their rights and it is equally clear that an employer's unilateral restriction of that access would undermine Congress's stated desire."); *Harris v. BP Corp. N. Am. Inc.,* 2016 U.S. Dist. LEXIS 89593 (N.D. Ill. July 8, 2016); *Aegon, supra,* at 934 (Clay, J. dissenting).

The *Aegon* majority opinion captures the range of reasons courts have used to justify their holdings. The majority opinion begins by noting that ERISA's venue provision is permissive since it provides that a suit "may" be brought in one of three designated fora.[10] This is, of course, true, but it is not pertinent to the legal issue that the court faced in *Aegon*, which was whether ERISA's venue language leaves the choice of permissible venue to the claimant filing suit to recover benefits or to the plan defending its decision to deny benefits. Rather than look to the statute's language, structure, and purpose for the answer, the *Aegon* court rests its decision on five unrelated and incorrect justifications.

First, the *Aegon* majority writes that if Congress wanted to prohibit the plan from limiting permissible venue, it could have done so explicitly. But the opposite can be said with equal authority, that if Congress wanted to allow the plan sponsor to limit a participant's ability to choose venue, it could and would have done so explicitly. What is probable is that Congress did not anticipate this question arising and

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[10] We do not think that the arguments for or against the validity of forum-selection clauses would be materially affected had Congress used either the word "shall" or "can" in place of "may."

thus failed to provide an explicit answer to it.[11] Thus, courts and regulatory agencies must turn to the statute—its language, purpose, and history—to determine the answer. Had the *Aegon* majority engaged in this exercise its conclusion almost certainly would have been different

Second, the *Aegon* majority, while acknowledging the relevance of ERISA's express purpose to facilitate "ready access to the federal courts" to the question of the legality of a venue-restrictive plan provision, wrote that since the forum-selection clause provided for venue "in *a* federal court" *Aegon,* 769 F.3d at 932 (emphasis supplied) it did not "inhibit ready access to federal courts." The opinion, however, removes the adjective "ready" from the statutory language "ready access." In order to give proper effect to each word in the statute, "ready access" must mean more than some access: it must mean, at the least, relatively unobstructed access, free of the pre-ERISA obstacles that made it difficult for participants to receive independent judicial review of benefit denials. Courts should not be willfully blind to the obvious: that a participant in an employee plan, unless unusually well resourced, does not have "ready access to Federal courts" if he or she is required to litigate a claim hundreds or thousands of miles from where the participant worked and lives.

Third, the *Aegon* majority noted that "ERISA's 'statutory scheme . . . is built around reliance on the face of written plan documents," and that "employers are granted "large leeway" in the "design of pension plans," whether through initial plan design or subsequent amendment. But ERISA provides that

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[11] *See* note 7, *supra*.

fiduciaries shall discharge their duties under a plan "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title." 29 USC § 1104(a)(1)(D). Thus, the ultimate question is not whether the provision appears in the written plan document, which it does, but whether it is consistent with statute, which it is not.

Fourth, the *Aegon* majority held that restricting venue (even restricting it to a venue not mentioned in the statute) was permissible because the Sixth Circuit had "previously upheld the validity of mandatory arbitration clauses in ERISA Plans," and "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." *Aegon,* 769 3d at 932 (citing *Simon v. Pfizer, Inc.*, 398 F.3d 765, 773 (6th Cir. 2005)). But even if it were settled that mandatory arbitration were permitted under ERISA in cases such as this, it would not mean that ERISA's venue provisions would be irrelevant. They would remain relevant for plans (such as the one in this case) that do not include mandatory arbitration clauses. They would remain relevant in determining where the arbitration is held. *See Aegon,* 769 F.3d at 935 (Clay, J. dissenting). And they would remain relevant for any post-arbitral civil action filed in Federal Court.

Fifth, the *Aegon* majority also justified its holding with an ERISA "policy" of encouraging "uniformity . . . which furthers ERISA's goal of enabling employers to establish a uniform administrative scheme so that plans are not subject to different legal obligations in different states." But courts are not part of a plan's administrative apparatus—they are the legal check on ensuring that a plan's administrative and claims

review functions are performed fairly and in accordance with Federal law. Also, ERISA created a unified body of Federal law, broadly preempting state law. If Congress had wanted a plan to be subject to a single trial court, it would have said so. And virtually all plans include a so-called *Firestone* clause, providing that a court's review of a plan's factual and interpretative decisions can be reversed only if the plan administrator has engaged in arbitrary decision-making. The plan, thus, already has a heavy thumb on the scale to ensure "uniformity," regardless of what court hears a particular case.

Moreover, most ERISA individual claims—such as the one involved in this case—turn on factual questions rather than plan interpretation issues. And cases that do turn on the meaning of ERISA plan interpretations or legal interpretations of ERISA are often litigated as class actions, so that the results are generally binding on the plan and participants. And if a plan's concern was simply uniformity of judicial result rather than forum shopping and/or imposing obstacles to discourage participants from challenging benefit denials, a plan could include a clause that, for example, provides that a plan will be subject to the law of a particular circuit court on legal matters, or that a court's resolution of a plan interpretation issue of first impression will be binding on the plan in all future cases.

II. This Case Provides the Court An Opportunity to Clarify that Plan Fiduciaries May Not Enforce Plan Provisions Modifying ERISA's "Carefully Crafted and Detailed Enforcement Scheme," *Mertens v. Hewitt Associates*, 508 U.S. 248, 251 (1993).

ERISA requires that plan fiduciaries administer a plan "solely in the interests of participants and beneficiaries," but this Court and the Department of Labor have long recognized that plan sponsors do not act as fiduciaries when they design, amend, or terminate a plan. These "settlor" functions are performed in the plan sponsor's business capacity and as such are not judicially reviewable under ERISA's fiduciary standards. 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 (2015). But while a plan sponsor has a free hand in formal plan design, ERISA permits fiduciaries to enforce plan provisions only insofar as they are "consistent with the provisions of this title." 29 USC § 1104(a)(1)(D). Plan fiduciaries are therefore prohibited from enforcing plan provisions that are inconsistent with the statute. Thus, it is widely accepted that a plan fiduciary may not enforce terms that contradict a specific ERISA minimum benefit standard (such as one of the vesting rules applicable to pension plans) or relieve a fiduciary from a statutory obligation (such as the duty of prudence), but this Court has yet to consider the validity of a plan provision or series of provisions that reconfigure ERISA's carefully crafted and detailed enforcement scheme or that limit ready access to Federal courts.

Some plan sponsors have exploited this doctrinal uncertainty to adopt plan provisions clearly designed

to retard participant access to judicial review of either the denial of benefits or the behavior of fiduciaries. Venue-selection clauses often appear as part of a mix of provisions that impede access to the federal courts and adjust the careful Congressional design for ERISA enforcement. Thus, plan sponsors are increasingly amending plans to add new provisions that require participants to pay attorney's fees unless they prevail in a lawsuit (unless a court has explicitly ruled that the participant does not have to pay the fees); that require participants to bring lawsuits within as few as 90 days of a benefit denial on appeal or even earlier if the cause of action accrued prior to the claim denial[12]; that permit the plan administrator but not the plan participant to substitute arbitration for a judicial forum; that bar a court from awarding attorney's fees on a contingency basis to a prevailing plaintiff; that bar a court from awarding relief for plan misrepresentations; and that bar a participant from arguing that the plan administrator or fiduciary had a conflict of interest if the issue of conflict were not raised at the plan claims level.[13] While each of these

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[12] It has been our experience that, unless participants are represented by a counseling project attorney, they generally handle cases *pro se* in the plan claims and appeals process, in part because ERISA provides attorney's fees only for work done in court, after the administrative process has been exhausted. Thus, a client under these plans has barely time to locate an attorney with ample time to investigate and evaluate and prepare a civil action.

[13] For an example of a plan that has adopted all of the described provisions, *see* Law Offices of Steven R. Bruce, Comment Letter on Department of Labor Claims Procedures Regulations for Plans Providing Disability Benefits, attachment 2, (January 19, 2016), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB39/00091.pdf.

provisions on its own impedes ready access to Federal Courts and many of the provisions conflict with explicit provisions in ERISA's carefully crafted enforcement scheme, the effect of a combination of these provisions will render the idea of access to Federal courts or indeed any independent forum an absolute nullity in many cases. And this is what is intended.

In an interview with the publication *Fiduciary News*, an ERISA plan-side lawyer explained the trend to such clauses as follows:

> There is more and more a focus in plan draftsmanship on including terms that could limit, either substantively or tactically, the ability of participants or beneficiaries to successfully bring suit, such as the increased use of contractual limitations periods and venue selection clauses, which are both issues that have garnered the attention, to varying degrees, of the Supreme Court. I think plaintiffs' successes in ERISA litigation over the recent past have really driven plan sponsors and their lawyers to think proactively about what they can do, in writing their plans, to raise the level of difficulty for plaintiffs and their lawyers in ERISA litigation. Absent the increased and often high profile successes of the plaintiffs' bar over the past several years, I doubt you would see this focus on that aspect of plan design.

See ERISA Attorney Stephen Rosenberg Says Litigation's Legacy is Improved Plan Design, FiduciaryNews.Com (Oct. 20, 2015), http://astrogoread.astro.com.my/topics/article/s_1226-s_1226-1483726.

This case offers the Court an opportunity to provide much needed clarification of the enforceability of plan terms such as those described, which are intended to and do in fact prevent ready access to federal court and that disrupt the detailed enforcement scheme that Congress crafted. A decision on the enforceability of venue clauses will provide much needed guidance to lower courts and plans on the circumstances under which plan sponsors may unilaterally revise the detailed enforcement scheme that Congress created during the lengthy and deliberate legislative process that produced ERISA.

CONCLUSION

The Court should grant the writ of certiorari in this case to correct the Eighth Circuit's error that ERISA, designed to provide plan participants with ready access to Federal courts, permits plans to force participants to sue in a court chosen by a plan.

Respectfully submitted,

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