No. 22-1098

In the United States Court of Appeals for the Tenth Circuit

ROBERT HARRISON on behalf of himself, the ENVISION MANAGEMENT HOLDING INC. ESOP, and all other similarly situated individuals,

Plaintiff-Appellee,

v.

ENVISION MANAGEMENT HOLDING, INC. BOARD, et al.,

Defendants-Appellants.

On Appeal from the
United States District Court for the District of Colorado
Case No. 1:18-cv-304, Hon. Regina M. Rodriguez

BRIEF OF *AMICUS CURIAE* PUBLIC JUSTICE IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Public Justice states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. Public Justice has no parent company, and no publicly held company has 10% or greater ownership interest in Public Justice.

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INTEREST OF *AMICI CURIAE*[1]

Public Justice is a national public interest advocacy organization dedicated to pursuing justice for the victims of corporate and governmental abuses. Public Justice specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct and preserving the civil justice system as an effective tool for holding the powerful accountable and ensuring justice. To further its goal of defending access to justice for workers, consumers, and others harmed by corporate wrongdoing, Public Justice has long conducted a special project devoted to fighting abuses of mandatory arbitration. It has also defended the rights of workers in several high-profile ERISA cases. This case is of particular interest to Public Justice both because it involves the enforcement of a forced arbitration provision imposed without the consent of the individual worker and because it concerns the remedies available to workers in vindicating their federal statutory rights to preserve retirement savings. As explained below,

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[1] No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund this brief, and no person other than Public Justice, its members, and its counsel contributed money to fund this brief. All parties have consented to the filing of this brief.

individualized arbitration of ERISA fiduciary breach and prohibited transaction claims will undermine and threaten the security of retirement savings on which workers rely—seriously undermining Congress' intent in enacting ERISA.

SUMMARY OF ARGUMENT

When Congress enacted the Employment Retirement Income Security Act of 1974 ("ERISA"), it gave individual plan beneficiaries the right to hold fiduciaries liable for breaches of their fiduciary duties to the entire plan and to obtain plan-wide remedies if they proved such breaches. *See* 29 U.S.C. §§ 1109(a), 1132(a)(2)–(3). As the district court correctly concluded below, a contractual clause that purports to forbid the assertion of those statutory rights and preclude those statutory remedies is not protected by the Federal Arbitration Act ("FAA") and cannot be enforced. *See* AA0187–89.

After the district court issued its opinion, the Supreme Court decided *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), its most recent arbitration opinion. *Viking River* not only confirms the district court's holding, but also sheds additional light on why the FAA cannot shield a provision like the one at issue here. As the Court held, statutorily created "non-class representative actions" are compatible with arbitration as understood by the FAA. *Id.* at 1922–23. Nothing in the FAA "render[s] all forms of representative standing waivable by contract." *Id.* at 1922. The FAA therefore does not mandate enforcement

of contract provisions purporting to waive the right to proceed in that representative fashion and does not supersede other sources of law invalidating such provisions. *Id.* at 1919–23.

Despite the clear relevance of *Viking River*, Defendants relegate it to a single mention in a footnote. *See* Appellants' Br. at 22 n.3. Their silence speaks volumes: the district court's opinion, which was correct before *Viking River*, is now even more incontestable.

Amicus submit this brief to fill the gap left by Defendants' briefing. Part I explains *Viking River* and the relationship between the FAA and non-class representative claims, and shows that the ERISA claims at issue here are non-class representative claims as defined in *Viking River*. Part II explains why *Viking River* bolsters the district court's holding, confirming that the FAA does not require courts to enforce waivers of statutory rights to bring non-class representative claims, like those created by ERISA. It then provides two additional bases for affirmance. First, Congress explicitly protected ERISA actions—including representative claims providing plan-wide relief—from waiver. *See* 29 U.S.C. § 1110(a). Second, even without ERISA's explicit provision rendering such waivers void, the contractual waiver here would be void

as against public policy. Requiring individual arbitrations that would leave an employee stock ownership plan ("ESOP") free to treat other participants differently would interfere with ERISA's fundamental goal of consistent and uniform application of fiduciary standards and would place employers and employees at the risk of massive tax penalties. *See* Rev. Rul. 80-155, 1980-1 C.B. 84 (1980) (denying tax-qualified status to plans that use "different valuation methods . . . for different participants"); *see also* H.R. Rep. No. 93-533, at 12 (1973), *as reprinted* in 1974 U.S.C.C.A.N. 4639, 4650 (noting Congress's goal of "bring[ing] a measure of uniformity in an area where decisions under the same set of facts may differ").

For these reasons and those stated in the district court's opinion and Plaintiff's brief, the district court's opinion should be affirmed.

ARGUMENT

I. The Federal Arbitration Act Does Not Require Enforcement of Waivers of Non-Class Representative Claims, Including Claims under Section 1132(a)(2)–(3) of ERISA

1. When enacting ERISA, Congress gave individual plan beneficiaries the right to hold fiduciaries liable for breaches of their fiduciary duties to the entire plan. *See* 29 U.S.C. §§ 1109(a), 1132(a)(2).

In addition to Section 1132(a)(1), which entitles an individual beneficiary to sue "to recover benefits due to him . . . , to enforce his rights . . . , or to clarify his rights to future benefits," Section 1132(a)(2) explicitly authorized individual beneficiaries to bring a civil action for relief under Section 1109(a). Section 1109(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

Congress thus authorized an individual beneficiary to bring two different types of claims: a claim for his or her own individual losses under Section 1132(a)(1), and a claim to obtain plan-wide relief under Section 1132(a)(2).[2] It similarly authorized a beneficiary to bring a claim "to enjoin any act or practice which violates any provision of [ERISA subchapter I] or the terms of the plan, or (B) to obtain other appropriate

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[2] ERISA allows beneficiaries to bring other claims as well. *See, e.g.*, 29 U.S.C. § 1132(a)(4), (8), (9). Such claims are not at issue in this case.

equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA subchapter I] or the terms of the plan." *Id.* § 1132(a)(3).

In authorizing individuals to bring a representative claim in addition to an individual claim, Congress was following a well-trod path. As the Supreme Court has explained, "[n]on-class representative actions in which a single agent litigates on behalf of a single principal are part of the basic architecture of much of substantive law." *Viking River*, 142 S. Ct. at 1922. They include "shareholder-derivative suits, wrongful-death actions, trustee actions, and suits on behalf of infants or incompetent persons." *Id.* Such actions are not "class or collective" actions but rather "single-agent, single-principal action[s]." *Id.*

2. In *Viking River*, the Supreme Court explained the relationship between such claims and the FAA. The FAA's mandate is only "to enforce '*arbitration agreements*.'" *Id.* at 1919 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)). An arbitration agreement is "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Id.* (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)).

Therefore, unless a statutorily created claim requires a "procedural mechanism at odds with arbitration's basic form," it is not inconsistent with the FAA, *id.* at 1921, and the FAA does not mandate that courts enforce contractual waivers of such claims.

In addition, *Viking River* reiterated the longstanding rule that "the FAA does not require courts to enforce contractual waivers of substantive rights and remedies." *Id.* at 1919. Because arbitration agreements as recognized by the FAA "do[] not alter or abridge substantive rights," *id.*, contractual provisions that purport to do so are not entitled to the FAA's protection.

Viking River then considered whether non-class representative actions require a "procedural mechanism at odds with arbitration's basic form," in which case a legal rule preventing them from being waived would be preempted. *Id.* at 1921. The petitioner argued that a proceeding is consistent with the arbitral form only if it is "conducted by and on behalf of the individual named parties only." *Id.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011)). Because the California statute at issue (the Private Attorneys General Act, or "PAGA") allowed a plaintiff to represent a separate entity, the petitioner argued, it

"create[d] a form of class or collective proceeding" that was incompatible with traditional, bilateral arbitration. *Id.* at 1918.

The Court disagreed, holding that "single-principal, single-agent representative actions" do not deviate from "traditional arbitral practice" because they "involve the rights of only the absent real party in interest and the defendant, and litigation need only be conducted by the agent-plaintiff and the defendant." *Id.* at 1922. Nothing in the FAA "render[s] all forms of representative standing waivable by contract." *Id.* at 1922. Nor, "in enacting the FAA, [did] Congress intend to . . . reshape . . . agency law to ensure that parties will never have to arbitrate in a proceeding that deviates from 'bilateral arbitration' in the strictest sense." *Id.* at 1923.

Because the FAA is indifferent to whether the parties are proceeding "on behalf of the individual named parties only" or rather as an agent for a larger principal entity, it does not require enforcement of contractual provisions that purport to waive or limit non-class representative actions. *Id.* at 1921–22. This is so even where the representative action "ha[s] something important in common with class

actions" in that the principal has "a potentially vast number of claims at its disposal." *Id.* at 1921.

Contractual provisions limiting a party's ability to bring a non-class representative claim thus fall entirely outside the FAA's aegis, because they are not "alien to traditional arbitral practice." *Id.* at 1922. For this reason, the Supreme Court held, the FAA did not require enforcement of a contractual provision restricting a plaintiff's ability to bring such a claim in arbitration, and it did not supersede a legal requirement (there, a provision in PAGA) preventing such a waiver. *Id.* at 1923.[3]

3. Returning to ERISA, claims under Sections 1132(a)(2) and (a)(3) are exactly the type of representative actions described by the Court in *Viking River*. A Section 1132(a)(2) claim is "brought in a representative capacity on behalf of the plan as a whole." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985). Like a plaintiff suing under PAGA, a Section 1132(a)(2) plaintiff "represents a single principal," 142 S. Ct. at 1920: the employee stock ownership plan ("ESOP"). Like a proceeding

[3] *Viking River* also considered a statutory rule of claim joinder, which it held *did* implicate a procedural mechanism within the FAA's purview. *See* 142 S. Ct. at 1923–24. That portion of the opinion is not at issue here, because Plaintiff did not bring an individual claim under Section 1132(a)(1). *See* AA0040–50.

under PAGA, a proceeding under Section 1132(a)(2) "involve[s] the rights of only the absent real party in interest and the defendant, and litigation need only be conducted by the agent-plaintiff and the defendant." *Id.* at 1922. And like a suit under PAGA, a Section 1132(a)(2) suit "exhibit[s] virtually none of the procedural characteristics of class actions." *Id.* at 1920; *see also* Appellees' Br. at 34–37 (explaining how representing a *plan* differs from representing a *class*).

Defendants do not try to distinguish the claim here from the non-class representative claim in *Viking River*—presumably because no meaningful distinction can be drawn. Instead, Defendants' only acknowledgement of *Viking River* is to cite the case's summary of earlier holdings that it is "inconsistent with the FAA" to force "unwilling parties" to choose between "class procedures" and "forgoing arbitration altogether." *Viking River*, 142 S. Ct. at 1918 (citing *Concepcion*, 563 U.S. at 347, and *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 684 (2010)); *see* Appellants' Br. at 22 n.3. Defendants fail to mention that the Supreme Court spent the next several pages explaining why those holdings *do not* apply to non-class representative claims. *See Viking River*, 142 S. Ct. at 1919–23.

This silence is fatal to Defendants' attempt to overturn the district court's holding. Defendants are not defending a provision that merely "require[s] claimants to assert claims on an individual basis in arbitration, rather than on a class or collective basis in federal court," as they claim. Appellants' Br. at 21–22. They are defending a provision that prohibits claimants from bringing a statutorily authorized claim at all, even on an individual basis. That is exactly what *Viking River* said fell beyond the FAA's protection.

II. A Contractual Provision Purporting to Prohibit a Plan Participant or Beneficiary from Bringing a Representative ERISA Claim and Obtaining Plan-Wide Relief Is Void

Because the FAA does not mandate enforcement of clauses purporting to waive non-class representative ERISA claims, they should not be enforced if any other source of law requires their invalidation. Here, three such grounds exist: (1) the ground on which the district court relied, that the contractual provision obstructs the assertion of statutory rights; (2) ERISA's explicit prohibition on contractual provisions that purport to limit fiduciaries' liability, 29 U.S.C. § 1110(a); and (3) ERISA's policy goals of uniform treatment of beneficiaries and preferential tax treatment of ERISA plans, which would be jeopardized by arbitrations

that are not binding on fiduciaries. Any one of these grounds would suffice to require non-enforcement of the provision at issue in this case.

A. The District Court Correctly Concluded that the Challenged Provision Is Invalid Because It Acts as a Prospective Waiver of Plaintiff's Right to Pursue Statutory Remedies

First, the district court correctly concluded that the arbitration provision at issue here "acts as a prospective waiver because it disallows plan-wide relief, which is expressly contemplated by ERISA." AA0180. As the district court explained, the FAA does not immunize "a provision in an arbitration agreement forbidding the assertion of . . . statutory rights." AA0180 (quoting *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013). Plaintiff's brief shows at length why this holding was correct. Appellee's Br. at 21–32.

Viking River reaffirms this conclusion, reiterating the longstanding rule that "the FAA does not require courts to enforce contractual waivers of substantive rights and remedies." 140 S. Ct. at 1919. There can be no doubt that the remedies created by Sections 1109(a) and 1132(a)(3) are substantive remedies, or that the rights to pursue those remedies created by Section 1132(a)(2) and (a)(3) are substantive rights. Therefore, as the district court and numerous cases before it concluded, a prospective

waiver of the right to pursue those remedies is foreclosed. *See* Appellees' Br. at 1 (collecting cases).

B. The Waiver Provision Is Void under ERISA Section 1110

Second, even without the general principle that a "provision in an arbitration agreement forbidding the assertion of certain statutory rights" should not be enforced, *Italian Colors*, 579 U.S. at 236, the waiver provision here is plainly void under 29 U.S.C. § 1110(a).

As part of ERISA, Congress provided that, with certain exceptions not applicable here, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under [ERISA] shall be void as against public policy." 29 U.S.C. § 1110(a). This provision "prohibits agreements that diminish the statutory obligations of a fiduciary." *Leavitt v. Nw. Bell Tel. Co.*, 921 F.2d 160, 161 (8th Cir. 1990).[4] Thus, while "parties may decide how much authority to vest in any person, they may not decide how much liability attaches to the exercise of that authority." *Chicago Bd. Options Exch., Inc. v. Conn. Gen. Life Ins. Co.*, 713 F.2d 254, 259 (7th

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[4] *Accord, e.g.*, *Howell v. Motorola, Inc.*, 633 F.3d 552, 561 (7th Cir. 2011); *In re Schlering Plough Corp. ERISA Litig.*, 589 F.3d 585, 593 (3d Cir. 2009); *Pfahler v. Nat'l Latex Prods. Co.*, 517 F.3d 816, 837 (6th Cir. 2007).

Cir. 1983); *see also Travelers Cas. & Sur. Co. of Am. v. IADA Servs., Inc.*, 497 F.3d 862, 866 (8th Cir. 2007) (explaining that Section 1110(a) "voids any agreement that purports to limit a fiduciary's responsibility or liability, except for those specifically allowed by statute").

The contractual provision here does exactly what Section 1110(a) forbids. It prohibits an arbitrator from awarding remedial or equitable relief that "include[s] or result[s] in the provision of additional benefits or monetary relief to any Eligible Employee, Participant or Beneficiary other than the Claimant." AA0119. It prohibits an arbitrator from awarding any relief that is "binding on the Plan Administrator or Trustee with respect to any Eligible Employee, Participant or Beneficiary other than the Claimant." *Id.* And it prohibits a claimant from bringing a claim "in a representative capacity" or "seek[ing] or receiv[ing] any remedy which has the purpose or effect of providing additional benefits or monetary or other relief to any Eligible Employee, Participant or Beneficiary other than the Claimant." *Id.*

These remedial limitations purport to "decide how much liability attaches" to Defendants' exercises of authority. *Chicago Bd. Options Exchange,* 713 F.2d at 259. By prohibiting a court or arbitrator from

awarding relief expressly authorized by statute even if it finds that Defendants violated ERISA, the provision purports to "limit a fiduciary's responsibility or liability." *Travelers*, 497 F.3d at 866. It is thus void under Section 1110(a).

Indeed, even if every single beneficiary were to bring suit, Defendants would *still* not be exposed to the full liability Congress established because no arbitrator could award and no beneficiary could receive a remedy that has the "effect of providing additional benefits or monetary or other relief to any Eligible Employee, Participant or Beneficiary other than the Claimant." AA0119. This provision on its face purports to apply to any remedy that affects the plan as a whole, since that would have the *effect* of providing benefits to participants or beneficiaries other than the claimant. *See, e.g.*, AA0051 (requesting, *inter alia*, removing the ESOP's trustee and appointing a "new independent fiduciary"). Indeed, although Defendants do not come right out and say it, their argument implicitly concedes that, if their contractual waiver is valid, *no* participant or beneficiary may seek the plan-wide remedies authorized by statute. *See, e.g.*, Appellants' Br. at 49 (noting that the

waiver "allows for the enforcement of plan-wide remedies *by the DOL*" (emphasis added)).

It is of no moment that the Secretary of the Department of Labor could obtain plan-wide relief in a hypothetical stand-alone proceeding. *Cf.* Appellants Br. at 46-50. Under ERISA as written, a fiduciary is liable for the full equitable remedies of Sections 1109(a) and 1132(a)(3) if a court finds that it has breached its duties—regardless of whether the court made that finding in a suit by the Secretary or by a plan beneficiary. 29 U.S.C. §§ 1109(a), 1132(a)(2)–(3).

Congress could have made such relief available only in suits by the Secretary; it chose not to do so, and that decision must be respected. Just as the California legislature did in enacting PAGA, Congress "decided to enlist employees as private attorneys general to enforce [ERISA]." *Viking River*, 142 S. Ct. at 1914; *see* H.R. Rep. 93-533, at 17, 1974 U.S.C.C.A.N. at 4655 ("The enforcement provisions have been designed specifically to provide both the Secretary *and participants and beneficiaries* with broad remedies for redressing or preventing violations of the Act." (emphasis added)). Congress clearly determined that the possibility of enforcement by the Secretary of Labor was not alone sufficient to protect the public

interest. And it further determined that the public policy interests driving that decision were sufficiently great that private parties should not be able to alter the congressional structure. *See* 29 U.S.C. § 1110(a); S. Rep. No. 93-127, at 34 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4870 ("The large numbers of people and enormous amounts of money involved in such plans coupled with the public interest in their financial soundness as expressed in the Act, require that no . . . exculpatory provision be permitted."). Defendants offer no basis for overruling Congress's decision.

Finally, were there any doubt, "ERISA and its legislative history emphasize Congress's intent to provide those protected by the Act 'ready access to the federal courts,' 29 U.S.C. § 1001(b), and liberal remedies." *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 473 (10th Cir. 1990). Section 1110(a), "like the rest of ERISA, is remedial legislation that should be construed liberally in favor of those persons it was meant to benefit and protect, namely, participants in and beneficiaries under covered pension and welfare plans; persons, in short, like appellee[] . . . ." *Jenkins v. Green Bay Packaging, Inc.*, 39 F.3d 1192, at *2 (10th Cir. 1994) (table) (internal

quotation omitted). Accordingly, any ambiguity in Section 1110(a) should be construed in favor of beneficiaries—and in favor of Plaintiff.

C. Contractual Avoidance of Binding Judgments Is Void as Against Public Policy Because It Will Result in Conflicting Resolution of Fiduciary Breach Claims Affecting the Plan as a Whole

Even if Section 1110(a) did not void agreements relieving fiduciaries from liability to beneficiaries, such agreements would conflict with ERISA's purpose and therefore be void. Courts "may not enforce a [contract] that is contrary to public policy." *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 103 S. Ct. 2177, 2183 (1983). "If the contract as interpreted by [an arbitrator] violates some explicit public policy, [courts] are obliged to refrain from enforcing it." *Id.* While courts must be "[m]indful of the strong federal policy favoring arbitration," this gives way where an award would "violate explicit public policy." *Lewis v. Circuit City Stores, Inc.*, 500 F.3d 1140, 1150 (10th Cir. 2007) (quoting *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001)).

A contractual waiver under which no judgment binds the fiduciaries as to the plan as a whole violates explicit public policy and is therefore void. Arbitration limited to individualized relief, rather than

for "any losses to the plan" as provided by 29 U.S.C. § 1109(a), would yield conflicting decisions for similarly or even identically situated plan participants, who may bring dozens, hundreds, or even thousands of individual arbitration claims concerning the same fiduciary conduct in managing an ERISA plan. This threatens conflicting and inequitable treatment of plan participants—an outcome ERISA was designed to prevent—and risks a host of undesirable tax consequences. Thus, while ERISA claims are generally arbitrable, *see Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000), a contractual provision purporting to deny the resulting judgments plan-wide effect is void.

1. One of ERISA's fundamental underpinnings is the consistent treatment of participants across a plan. *See, e.g.*, *Spradley v. Owens-Ill. Hourly Emps. Welfare Ben. Plan*, 686 F.3d 1135, 1140 (10th Cir. 2012) (noting the goal of "promot[ing] consistent treatment of claims."); H.R. Rep. No. 93-533, at 12, 1974 U.S.C.C.A.N. at 4650 ("[A] fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state."). ERISA's implementing regulations therefore require that "plan provisions [be]

applied consistently with respect to similarly situated claimants." 29 C.F.R. § 2560.503–1(b)(5); *see, e.g.*, *Mary D. v. Anthem Blue Cross Blue Shield*, 778 F. App'x 580, 590 (10th Cir. 2019); *Glista v. Unum Life Ins. Co. of Am.*, 378 F.3d 113, 123 & n.3 (1st Cir. 2004) (noting DOL's "long-standing requirement of consistency"). "A plan administrator's failure to consistently apply the terms of an ERISA plan is arbitrary and capricious." *Tracy O. v. Anthem Blue Cross Life & Health Ins.*, 807 F. App'x 845, 854 (10th Cir. 2020).

Consistent treatment of trust beneficiaries is also a tenet of trust law, from which much of ERISA springs. *See Varity Corp. v. Howe*, 516 U.S. 489, 514 (1996) ("The common law of trusts . . . requires a trustee to take impartial account of the interests of all beneficiaries.") (citing Restatement (Second) of Trusts § 183); *Gaither v. Aetna Life Ins. Co.*, 394 F.3d 792, 808 n.6 (10th Cir. 2004) ("[A] fiduciary must be impartial among the various beneficiaries . . . .").

If enforced, the contractual provision here would produce multiple, individualized arbitrations involving participants in the same plan, each resulting in a decision that binds the fiduciaries only with respect to the claims of a single, given claimant. This would inevitably result in

conflicting rulings. Some participants would win a judgment incorporating one stock valuation; some would win a judgment incorporating a different one; and some would lose altogether—even if the claims all involved a common plan, common fiduciaries, common fiduciary breaches, common prohibited transactions, common parties in interest, and common damages. Some participants might receive thousands of dollars whereas others might receive nothing. The plan would never be made whole and the participants would be treated inconsistently. Such conflicting outcomes are arbitrary and antithetical to fundamental ERISA requirements.

Indeed, the contractual provision here expressly purports to prohibit arbitrators from issuing judgments "binding on the Plan Administrator or Trustee with respect to any Eligible Employee, Participant or Beneficiary other than the Claimant." AA0119. Defendants sought to contract for something directly contrary to ERISA and its implanting regulations' requirements: freedom to treat beneficiaries and plan participants unequally. This conflict with ERISA's public policy precludes enforcement of the contractual limitation.

2. Additionally, inconsistent rulings in individual arbitrations as to the fair market value of an ESOP's private company stock would put the ESOP's tax-qualified status at risk and expose all plan participants to substantial tax penalties, because inconsistent valuations violate the Internal Revenue Code (the "Code"). Applying the remedial limitation at issue here could therefore subject all plan participants to disastrous consequences—even if all claimants win in arbitration. This contravenes the public policy of ERISA and the Code, and therefore renders the provision void.

The Code provides substantial tax advantages to qualified retirement plans. "A trust associated with a qualified plan is exempt from taxation, I.R.C. § 501(a), and plan participants are not taxed on contributions until plan benefits are distributed, I.R.C. § 402(a)." *DNA Pro Ventures, Inc. Emp. Stock Ownership Plan v. Comm'r*, 856 F.3d 557, 559 (8th Cir. 2017) (citations omitted). Plan participants do not have to pay taxes on their plan benefits until the money is distributed from their accounts. I.R.C. § 402(b)(2).

However, "[a] plan may be disqualified for operational failures, which occur if a plan fails to operate in accordance with [I.R.C.] § 401(a)

statutory requirements." *DNA Pro Ventures ESOP*, 856 F.3d at 559. Both the plan and plan participants lose the tax benefits of a retirement plan if the plan is disqualified. When a plan is disqualified, the plan participant pays income taxes immediately on the contributions to the extent those contributions are vested. I.R.C. § 402(b)(1).

"A defined contribution plan does not qualify where … different valuation methods are used for different participants." Rev. Rul. 80-155, 1980-1 C.B. 84 (1980). ESOPs, like the plan here, are retirement plans invested primarily in employer securities. 29 U.S.C. § 1107(d)(6). If company stock is valued differently for different participants, the ESOP will be disqualified from tax benefits.

The plan's qualification is squarely threatened by the remedial limitation at issue here. The core of Plaintiff's substantive claim is that Defendants engaged in a prohibited, self-dealing transaction where they sold their own stock to the ESOP at an inflated price, thereby reducing the value of the plan's assets. *See* AA0027–32. To resolve a claim like this, the court or arbitrator must "subtract the stock's fair market value, as determined by the court, from the inflated price paid by the ESOP." *Brundle v. Wilmington Tr., N.A.*, 919 F.3d 763, 781 (4th Cir. 2019).

Because the stock at issue here was not publicly traded, *see* AA0028, there is no definitive source for the fair market value; it must be determined by the adjudicator.

Where an adjudicator reaches one decision for the entire plan—as ERISA requires—this poses no problems for the plan's tax status; the same valuation method and same valuation applies to all participants. But if each participant must proceed through separate arbitrations, none of which is binding on any other, then different arbitrators will inevitably apply different valuation methods and reach different results, requiring the plan to use "different valuation methods . . . for different participants" in violation of Revenue Ruling 80-155. This could jeopardize the tax status of the plan for all participants—even those who declined to file a claim at all. This is no fanciful scenario; it is the direct result of the clause Defendants drafted, which specifically purports to free them from treating any one arbitrator's judgment as "binding on the Plan Administrator or Trustee with respect to any Eligible Employee, Participant or Beneficiary other than the Claimant." AA0119.

In addition, the Code imposes substantial excise tax penalties on prohibited transactions between an ESOP and "disqualified persons,"

which includes the employer. Code § 4975(a), (e)(2)(C). Because distributions of benefits in a private company ESOP occur by plan participants selling their stock to the employer upon retirement or after termination of employment, distributions are subject to tax penalties if they violate the Code's requirements. One such requirement is that such transactions be for fair market value. Code § 4975(d)(13); *see also* Code § 409(h)(1)(B).

As already discussed, different arbitrations could—and likely will—result in different determinations of fair market value. If this happens, every ESOP distribution to a participant is a potential prohibited transaction. If one arbitrator rules that the stock's fair market value is $10 a share and another rules that it is $8 a share, which must the ESOP apply to other transactions? If the ESOP determines that the fair market value is actually $6 a share, notwithstanding the arbitrators' decisions, how must it value the stock for the claimants who obtained higher valuations? Each benefit distribution will arguably be a prohibited transaction triggering an excise tax under Code § 4975. And this excise tax is substantial. *See* Code § 4975(a)–(b) (providing for a 15% tax of the

amount involved, or 100% if the prohibited transaction is not corrected within the taxable period).[5]

Appellants' eagerness to limit their exposure to liability for violating ERISA's rules places the ESOP and its participants at the risk of substantial tax liability. This contradicts the public policy of granting tax incentives to ESOPs and their participants, providing yet another reason to find the contractual provision at issue here void.

CONCLUSION

For the foregoing reasons and those in the district court's opinion and Plaintiff's brief, the judgment below should be affirmed.

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Respectfully Submitted,

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[5] It is of no comfort to plan participants that the excise tax is assessed on the disqualified person, rather than the participant. The company is the disqualified person and the participants own the company, so the imposition of the excise tax would impair the value of the participants' investment.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the type-volume limitation of 32(a)(7)(B) because it contains 5232 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Tenth Circuit Rule 32(B).

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This filing also complies with Circuit Rule 25. No privacy redactions were required in this brief. The document has been scanned for viruses and has been found to be free of viruses. The electronically filed version of the brief is an exact copy of the paper version that will be filed with the clerk.

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CERTIFICATE OF SERVICE

I, Jeffrey B. Dubner, counsel for Proposed *Amici*, certify that on September 7, 2022, a copy of the foregoing brief was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Jeffrey B. Dubner
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September 7, 2022