# TAKING THE S OUT OF ERISA: HOW THE SECURITY OF RETIREMENT ACCOUNTS MAY CHANGE IN THE FACE OF RECENT SUPREME COURT AND CIRCUIT COURT DECISIONS

Kyle R. Cox*

## ABSTRACT

The Employee Retirement Income Security Act of 1974 (ERISA) is the statutory framework that protects the retirement funds of millions of employees across the country, applying strict fiduciary liabilities against those with access to plan funds and instituting enforcement provisions. Employers have imposed mandatory arbitration clauses on claims that arise out of ERISA, seemingly in direct conflict with ERISA's promise of "ready access to the Federal courts." Although the Supreme Court has been silent on the enforceability of these clauses, it has weighed in on the enforceability of similar clauses within other contexts in *Epic Systems v. Lewis* and *Lamps Plus v. Varela*. Circuit courts have also begun to re-affirm employees' rights back with the Effective Vindication Doctrine, ensuring that mandatory arbitration clauses do not block the exercise of an employee's federal statutory right.

This Comment analyzes the Supreme Court's precedent in *Epic Systems* and *Lamps Plus*, highlighting the Court's continued favor of arbitration clauses. Although the cases do not mandate the enforcement of arbitration clauses under ERISA, they do signal the Court's likelihood to enforce such agreements. This Comment also delves into the viability of the Effective Vindication Doctrine to limit the scope of arbitration agreements under ERISA, finding that the doctrine is a tool that could challenge the enforceability of arbitration agreements in limited circumstances—but that it is unlikely to be a saving grace for most plan participants. For the foreseeable future, employees are unlikely to have the "access to the Federal

* Kyle Cox is from Toronto, Ontario and graduated from Washington University in St. Louis School of Law in 2025. For his B.S. in Psychology and Cognitive Science, he attended University of Toronto. His research interests include ERISA and issues surrounding income and estate taxation. He is currently clerking for Judge David L. Vancil, Jr. of the Appellate Court of Illinois, Fourth District.

courts" that they were promised, and decisions regarding plan funds will continue to lay at the mercy of arbitrators.

## INTRODUCTION

Since 1974, Americans have had the privilege of employer-sponsored retirement savings accounts protected by one of the most comprehensive regulatory programs ever created by Congress.[1] Legislators enacted the Employee Retirement Income Security Act of 1974 (ERISA)[2] to protect retirement savings accounts controlled by employers after misuse of plan funds led to scandals where employees effectively lost their retirement savings.[3] Millions of Americans depend on employer-sponsored retirement savings accounts to maintain their standard of living after retirement.[4]

With over $12 trillion in assets held by ERISA-covered pension and welfare plans,[5] there are plenty of hands trying to dig into the deep pockets of pension funds, including employers and plan managers themselves. ERISA attempts to regulate this by providing strict fiduciary liabilities for anyone with access to plan funds[6] and providing enforcement provisions so that plans and participants can put converted cash back into their pockets.[7]

In recent years, employers have tried to limit the ability of ERISA plan participants to enforce these rules through the courts by mandating arbitration of claims that arise out of ERISA, in direct conflict, seemingly, with ERISA's promise of "ready access to the Federal courts."[8] While the Supreme Court remains silent on the enforceability of these clauses, in recent years it has weighed in on their enforceability in the employment

1. *See infra* note 15, at 1–50 (describing the legislative history behind ERISA and its formation, describing it as the "bible in this field").

2. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001–1461).

3. *See, e.g.*, Michael S. Gordon, *Overview: Why Was ERISA Enacted?, in* PENSION AND EMPLOYEE BENEFIT LAW 71-75 (John H. Langbein & Bruce A. Wolk eds., 6th ed. 2015).

4. *See EBSA Restores Over $1.4 Billion to Employee Benefit Plans, Participants, and Beneficiaries*, U.S. DEP'T OF LAB. (Oct. 14, 2022), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results#:~:text=The%20agency%20oversees%20approximately%202.8,estimated%20%2412.8%20trillion%20in%20assets [https://perma.cc/NG24-4WDQ].

5. *Id.*

6. *See generally* 29 U.S.C. §§ 1101–1114 (defining fiduciary duties and liabilities and extending liability not only to plan sponsors but to any entities with control over plan funds).

7. *See generally* 29 U.S.C. §§ 1109, 1131–1153 (defining enforcement provisions).

8. 29 U.S.C. § 1001(b).

context in *Epic Systems v. Lewis*[9] and *Lamps Plus v. Varela*.[10] Despite a long history of enforcing these clauses,[11] circuit courts have also begun to claw some employees' rights back with the "Effective Vindication Doctrine," preventing the enforcement of mandatory arbitration provisions when they would block the exercise of an employee's federal statutory rights.[12]

This Comment critically examines the enforceability of mandatory arbitration clauses for claims arising out of ERISA after recent Supreme Court and circuit court decisions. Part I provides a background on ERISA, the Federal Arbitration Act (FAA),[13] the development of Supreme Court and Circuit Court arbitration jurisprudence, and recent decisions in the Supreme Court and Circuit courts. Part II provides a critical analysis of whether *Lamps Plus* and *Epic Systems* mandate enforcement of mandatory arbitration clauses for claims arising from ERISA, and whether the Effective Vindication Doctrine used by circuit courts in recent years can provide a safe harbor for ERISA plan participants.

## I. HISTORY

### *A. The Employee Retirement Income Security Act of 1974*

ERISA stands as a landmark piece of legislation in the United States, shaping the landscape of private-sector employee retirement plans. Its journey from conception to implementation, however, is a story of political wrangling, evolving priorities, and ongoing debates.

Prior to ERISA, the world of private-sector retirement plans was rife with inconsistencies and vulnerabilities. Many plans lacked clear vesting schedules, meaning employees often lost their accrued benefits if they left their jobs before retirement. Additionally, funding standards were lax, leaving participants exposed to the risk of plan insolvency. Fiduciary duties were also poorly defined, creating opportunities for mismanagement and abuse. These issues were tragically exemplified by the Studebaker-Packard Corporation's pension plan collapse in the early 1960s. The company failed

9. Epic Sys. Corp. v. Lewis, 584 U.S. 497, 505–21 (2018).
10. Lamps Plus, Inc. v. Varela, 587 U.S. 176, 186–89 (2019).
11. *See infra* Part I.D.i.
12. *See infra* Part I.D.ii.
13. Federal Arbitration Act of 1925, ch. 213, 43 Stat. 883 (current version at 9 U.S.C. §§ 1–14).

to diversify, isolate, and adequately fund the pension plan of their hourly employees, leaving it with assets insufficient to meet its obligations. When the company closed the Studebaker plant in 1963, thousands of employees were left with significantly reduced retirement benefits or none at all.[14]

Responding to the growing crisis, Congress engaged in more than a decade of debate and hearings, culminating in the passage of ERISA in 1974. ERISA established a comprehensive framework with several key policy aims. ERISA imposed minimum standards for participation, vesting, and funding of private pension plans.[15] These standards aimed to ensure that participants' benefits would accrue steadily over time and mandate that plans were adequately funded to meet promised payouts.[16]

ERISA defined who qualified as fiduciaries[17] for employee benefit plans and codified their duties of prudence,[18] diversification of investments,[19] and loyalty.[20] This was designed to hold plan administrators personally accountable for their management decisions, deterring conflicts of interest and safeguarding the assets of beneficiaries. Moreover, fiduciary liability applied to all discretionary determinations, including denials of benefits.[21]

To promote transparency, ERISA instituted detailed reporting and disclosure requirements.[22] Participants gained increased visibility into the nature of their plans, their investment performance, and the fees associated with administration.

Seeking to deter abuse, ERISA created mechanisms for both civil and criminal enforcement by the Department of Labor (DOL) and private

14. *See* James A. Wooten, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 683–85 (2001); JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 51–79 (2004) (describing the Studebaker collapse and its impact on the early development of ERISA).

15. 29 U.S.C. §§ 1052, 1053, 1081–1085.

16. 29 U.S.C. § 1001(c).

17. 29 U.S.C. § 1002(21).

18. 29 U.S.C. § 1104(a)(1)(B).

19. 29 U.S.C. §§ 1101(a)(35), 1104(a)(1)(C) (requiring that in general, the plan must offer at least three investment options that a plan participant may choose from, each of which is diversified (spread among multiple investments to minimize the risk of large losses) and has materially different risk and return characteristics).

20. 29 U.S.C. § 1104(a)(1)(A).

21. 29 U.S.C. § 1002(21)(A) (defining a fiduciary as a person who exercises any authority or control respecting disposition of plan assets).

22. 29 U.S.C. §§ 1021–1029.

beneficiaries through lawsuits.[23] It established federal jurisdiction over benefit disputes,[24] empowering workers to hold plan administrators to account.

ERISA also established a delicate balance between protecting the rights of beneficiaries and promoting flexibility for plan sponsors. At its core, the statute acknowledges the need for cost containment to maintain the viability of employee benefit plans, while simultaneously preserving a degree of choice for plan sponsors in designing those plans.[25] ERISA, through a combination of its preemption provision,[26] reserved authority for employers to amend or terminate the plan,[27] and powers given to trustees,[28] seeks to contain costs for sponsors so that they are willing to provide pension and welfare benefits in the first place. The statute's broad preemption clause often shields self-funded employer plans from state laws that might mandate certain benefit levels or impose administrative burdens, thereby increasing expenses.[29] This balance between cost considerations and choice reflects the legislative intent behind ERISA; safeguarding employee benefits while allowing employers the flexibility necessary to offer sustainable plans.

ERISA has perhaps the most comprehensive federal preemption clauses in the entire U.S. code.[30] ERISA also provides participants and beneficiaries of employer-sponsored pension plans with "ready access to the Federal courts."[31] With thousands of ERISA claims filed per year,[32] it is no surprise that plan sponsors are trying to limit this access through a more efficient means of settling disputes. Some employers are turning to mandatory

23. 29 U.S.C. §§ 1109, 1131–1134.

24. 29 U.S.C. § 1144(a).

25. James G. McMillan III, *Misclassification and Employer Discretion under ERISA*, 2 U. PA. J. LAB. & EMP. L. 837, 839 (1999).

26. 29 U.S.C. § 1144(a).

27. 29 U.S.C. § 1102(b), 1341.

28. 29 U.S.C. § 1103.

29. *See generally* Elizabeth Y. McCluskey *State Cost-Control Reforms and ERISA Preemption*, THE COMMONWEALTH FUND (May 16, 2022), https://www.commonwealthfund.org/publications/issue-briefs/2022/may/state-cost-control-reforms-erisa-preemption [https://perma.cc/AT8R-E3EG] (describing how health care cost reforms pursued by states since 2019 run into ERISA preemption and how it threatens the ability for states to implement their own regulations).

30. 29 U.S.C. § 1144(a); FMC Corp v. Holliday, 498 U.S. 52, 58 ("The pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan governed by ERISA.").

31. 29 U.S.C. § 1001(b).

32. Gloria Huang, *ERISA Litigation Report*, LEX MACHINA (May 30, 2019), https://lexmachina.com/blog/erisa-litigation-report-2019/ [https://perma.cc/39SB-ZUND].

arbitration of ERISA claims coupled with class action waivers. Mandatory arbitration clauses decrease the cost of litigation and may force participants to pursue claims on an individual basis, reducing the chance of large class-wide settlements.

The combination of issues decided solely by statutes and a policy promoting cost-containment for sponsoring employers suggest that ERISA would be a prime candidate for arbitration.

### *B. The Federal Arbitration Act of 1925 and ERISA*

The FAA, enacted in 1925, reflects a strong federal policy favoring arbitration as a means for resolving disputes outside of traditional court litigation.[33] The Supreme Court has repeatedly reinforced the FAA's broad reach, creating a presumption of arbitrability and upholding arbitration agreements unless specific challenges against them can be proven.[34] This pro-arbitration stance has been accompanied by a significant increase in the use of forced arbitration across various domains.[35] Initially designed to overcome judicial hostility towards arbitration agreements, particularly in commercial contexts, arbitration has experienced a remarkable expansion in scope and application under the guidance of the Supreme Court.

The Court has adopted a presumption of arbitrability, holding that doubts regarding the scope of an arbitration agreement should be resolved in favor of arbitration.[36] This presumption, coupled with the FAA's preemption of contrary state law,[37] has significantly broadened the reach of arbitration across a wide array of legal domains.

Furthermore, the Supreme Court has consistently upheld the enforceability of arbitration agreements, even those containing class action

33. Epic Sys. Corp. v. Lewis, 584 U.S. 497, 505–06 (2018).

34. *See infra* Part I.C.

35. AAJ Research, *Forced Arbitration by Corporations Surges to Unprecedented Levels*, AM. ASSOC. FOR JUST. (Dec. 2023), https://www.justice.org/resources/research/forced-arbitration-by-corporations-surges-to-unprecedented-levels [https://perma.cc/F644-AQDN].

36. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984); Moses H. Cone Memorial Hospital v. Mercury Construction Corp, 460 U.S. 1, 24–25 (1983).

37. While the FAA contains no express preemption clause forbidding state regulation of arbitration, in *Southland Corp v. Keating*, the Court held that the FAA was intended to limit the power of the states to limit the enforceability of arbitration agreements, and that state law contrary to the FAA violates the supremacy clause of the United States Constitution. *See* 465 U.S. at 9–11. *See generally* Ronald A. Conway, *Federal Preemption of Arbitration* - Southland Corp. v. Keating, 1984 MO. J. DISP. RESOL. 193 (1984) (analyzing the case in depth and looking at its consequences).

waivers. The landmark decision in *AT&T Mobility LLC v. Concepcion*[38] cemented this approach, emphasizing the FAA's mandate to enforce arbitration agreements according to their terms—including waivers to class-based litigation.[39]

The Supreme Court's pro-arbitration rulings have extended to cases involving statutory rights. The Court has held that an age discrimination claim could be subject to mandatory arbitration.[40] This decision signaled a willingness to enforce contracts that compel arbitration even where vital statutory protections are at stake, prompting debate about the balance between the FAA's principles and the vindication of substantive rights.

The Supreme Court has left the question of the enforceability of these clauses in the context of legal questions under ERISA unanswered, leaving lower federal courts to develop analyses answering how and when these clauses may be applied. Whether motivated by a desire to keep their caseload down or to ensure employers continue to sponsor retirement savings plans for their employees, the circuit courts have taken up this task with seemingly one goal in mind: to enforce mandatory arbitration clauses to settle questions of ERISA. The Ninth Circuit in 2019 decided to reverse its prior authority in *Amaro v. Continental Can Co.*[41] with *Dorman v. Charles Schwab Corp*.[42] With *Dorman*, all circuit courts to look at the issue have held in favor of enforcing mandatory arbitration clauses for ERISA claims.[43] The Supreme Court has also furthered its pro-arbitration tendency in *Epic Systems v. Lewis*[44] and *Lamps Plus v. Varela*,[45] supporting employers' rights to force arbitration of employment claims, even when dealing with issues preempted by federal labor law. These cases were both five to four decisions applying a contract law analysis to issues under federal labor law with vigorous dissents. However, neither case addressed the issue of the enforceability of arbitration clauses in controversies governed by ERISA.

Without specific guidance on ERISA, federal courts have struggled

38. 563 U.S. 333 (2011).
39. *Id.* at 351–52.
40. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (2011).
41. Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir. 1984).
42. Dorman v. Charles Schwab Corp., 934 F.3d 1107, 1112 (9th Cir. 2019).
43. *See infra* Part I.D.i.
44. Epic Sys. Corp. v. Lewis, 584 U.S. 497, 525 (2018).
45. Lamps Plus, Inc. v. Varela, 587 U.S. 176, 189 (2019).

with how to apply these decisions to legal questions governed by the statute. This has spawned several questions that federal courts continue to work through. One question is whether general employment agreements can mandate arbitration despite a lack of any arbitration clause in ERISA plan documents.[46] The Ninth Circuit found that an arbitration clause from an employment agreement addressing individual claims was not broad enough to cover ERISA claims raised on behalf of the plan.[47] The Second Circuit found that an employee handbook with an arbitration clause covering all legal claims relating to employment did not cover ERISA claims.[48] It remains to be seen whether the Supreme Court would rule similarly.

Another question is whether arbitration clauses may limit relief to individual accounts. ERISA mandates that when a breach of a fiduciary duty occurs, the breaching fiduciary must reimburse the plan for any losses resulting from the breach.[49] Participants may bring suits against fiduciaries on behalf of the plan to have funds restored to the plan.[50] In 2008, the Supreme Court ruled in *LaRue v. DeWolff*[51] that participants may sue for relief related to their individual accounts under these statutes. Some arbitration clauses have mandated that claimants' remedies be limited to losses to the Claimant's individual accounts.

*LaRue* did not address whether plan-wide relief could be denied in favor of individual relief. This would be at odds with ERISA's exculpatory provision, which prohibits any provision purporting to "relieve a fiduciary from responsibility or liability" as void.[52] The Seventh Circuit held that an

46. ERISA § 102 requires a Summary Plan Description (SPD) that is issued to employees containing a summary of the plan provisions, that "shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022; *see also* Edward B. Miller & Marc A. Dorenfeld, *ERISA: Adequate Summary Plan Descriptions*, 14 HOUS. L. REV. 835, 835–840 (1977) (describing the contents of adequate summary plan descriptions and the issues leading up to ERISA that led to the inclusion of ERISA § 102); *see generally* Peter J. Wiedenbeck, *Inconceivable?-Understandable ERISA Disclosures*, 33 ELDER L.J. 39 2025 (dissecting the policy of summary plan descriptions and how plan sponsors have sacrificed understandability for completeness to shield themselves from liability. It also provides guidance in the context of a legislation-mandated study of the effectiveness of pension plan disclosures. This study is currently being conducted and is due at the end of this year).

47. Munro v. Univ. of S. Cal., 896 F.3d 1088, 1091–94 (9th Cir. 2018).

48. Cooper v. Ruane Cunniff & Goldfarb Inc., 990 F.3d 173, 179 (2d Cir. 2021).

49. 29 U.S.C. § 1109(a).

50. 29 U.S.C. § 1132(a)(2).

51. LaRue v. DeWolff, Boberg, & Assocs., Inc., 552 U.S. 248, 256 (2008).

52. 29 U.S.C. § 1110(a).

arbitration clause limiting remedy to individual accounts was invalid.[53] The Third and Tenth circuits used the Effective Vindication Doctrine to invalidate similar clauses.[54]

The expansive reach of the FAA into areas governed by federal statutes, including ERISA, demonstrates the broad impact of the Supreme Court's labor jurisprudence. While questions persist regarding the enforceability of class action waivers in the ERISA context and the Supreme Court has not issued a decision regarding ERISA directly, the Supreme Court's unwavering pro-arbitration approach has undeniably shaped the resolution of ERISA-related claims.

### *C. The Supreme Court and Its Pro-Arbitration Jurisprudence.*

Since the enactment of the FAA, the Supreme Court has interpreted its scope broadly and developed a strong pro-arbitration jurisprudence.[55] The following cases involved key questions that relate directly to the question of whether arbitration agreements are enforceable for disputes arising from ERISA. In *Gilmer*, the Supreme Court decided that even in cases involving other federal statutory claims, arbitration clauses are enforceable under the FAA.[56] In *Epic Systems* and *Lamps Plus*, the Supreme Court made similar decisions in cases involving labor laws that otherwise preempt outside statutes and regulations.[57]

#### i. Gilmer v. Interstate/Johnson Lane Corp

*Gilmer v. Interstate/Johnson Lane Corp.*, a landmark five to four Supreme Court decision, reshaped the landscape of arbitration law and significantly impacted the enforceability of arbitration agreements within

53. Smith v. Bd. of Dirs. of Triad Mfg., Inc., 13 F.4th 613, 621–22 (7th Cir. 2021).

54. Henry v. Wilmington Tr. N.A., 72 F.4th 499, 507 (3d Cir. 2023); Harrison v. Envision Mgmt. Holding, Inc. Bd. Of Dirs., 39 F.4th 1090, 1104–12 (10th Cir. 2023). *See* Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 375–80 (2014) (outlining the Effective Vindication Doctrine).

55. *See* Martin H. Malin, *The Three Phases of the Supreme Court's Arbitration Jurisprudence: Empowering the Already-Empowered*, 17 NEV. L.J. 23, 27–39 (2016) (describing in detail the development of the Supreme Court's arbitration jurisprudence from the 1950s until now).

56. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

57. Epic Sys. Corp. v. Lewis, 584 U.S. 497, 516 (2018). *See generally* Lamps Plus, Inc. v. Varela, 587 U.S. 176 (2019).

employment contracts.[58] The central question in *Gilmer* was whether an employee's claim under the Age Discrimination in Employment Act (ADEA) could be subjected to compulsory arbitration based on an agreement contained within a securities registration application.

The facts of the case involved Robert Gilmer, who was required to register with several stock exchanges as a condition of his employment with Interstate/Johnson Lane Corporation (Interstate).[59] As part of the registration process, Gilmer signed an application that included an agreement to arbitrate any controversies arising between him and Interstate.[60] Several years later, Gilmer was terminated from his position at the age of 62. Subsequently, he filed a lawsuit against Interstate, alleging that his termination constituted a violation of the ADEA. Interstate, in response, filed a motion to compel arbitration of the ADEA claim pursuant to the agreement Gilmer had signed within his registration application.[61]

The Supreme Court's ruling in Gilmer established a strong presumption in favor of arbitration, solidifying its pro-arbitration stance. The Court began by emphasizing the robust federal policy preference for arbitration that the FAA embodies.[62] The FAA expresses that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[63] The Court suggested that this language reflects a clear "liberal federal policy favoring arbitration agreements."[64]

Furthermore, the Court stressed that any doubts concerning the scope of an arbitration agreement should be resolved in favor of arbitration.[65] This presumption places the burden on the party resisting arbitration to demonstrate a valid legal reason for avoiding it. The Court, however, was careful to note that arbitration agreements are subject to the same contract defenses, such as fraud or duress, that could invalidate other types of

58. *See generally* Joseph B. Stulberg, *Introduction:* Gilmer v. Interstate/Johnson Lane Corporation*: Ten Years After*, 16 OHIO ST. J. DISP. RESOL. 463 (2001) (outlining the effects of *Gilmer* and the critical response that followed in the decade following the case).
59. *Gilmer*, 500 U.S. at 23.
60. *Id.*
61. *Id.* at 24.
62. *Id.*
63. *Id.* at 24–25; 9 U.S.C. § 2.
64. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991).
65. *Id.* at 26.

agreements.[66]

A central argument that Gilmer presented was that the underlying purposes of the ADEA were inherently incompatible with compulsory arbitration. The Court rejected this reasoning, finding no evidence to support the claim that Congress intended to preclude the arbitration of ADEA claims.[67]

Justice Stevens, joined by Justice Marshall, authored a forceful dissent. The majority's position rested on the argument that compulsory arbitration of employment discrimination claims undermines the fundamental purposes of the ADEA.[68] The dissent highlighted the inherent power imbalance between employers and employees, asserting that arbitration agreements in this context often result from unequal bargaining power. They expressed concern that the arbitral forum may lack the necessary expertise and procedural safeguards to adequately adjudicate complex discrimination claims.[69] Citing the ADEA's remedial and deterrent objectives, the dissent argued that arbitration could diminish the effectiveness of the statute by limiting both the visibility of discriminatory practices and the scope of potential remedies.[70]

### ii. Epic Systems Corp. v. Lewis

In the case of *Epic Systems Corp. v. Lewis*, the Supreme Court grappled with a complex question: does the FAA require courts to enforce arbitration agreements that prevent employees from pursuing class or collective actions even if such a provision potentially conflicts with protected rights under the NLRA?[71] Ultimately, the Court held in a five to four decision that the FAA's mandate to enforce arbitration agreements as written supersedes any potential conflict with the NLRA's protection of concerted activity.[72]

The case originated from three consolidated lawsuits where employees argued that they had a right to bring class or collective actions against their employers under the Fair Labor Standards Act (FLSA) and related state

66. *Id.* at 33.
67. *Id.* at 26–27.
68. *Id.* at 36 (Stevens, J., dissenting).
69. *Id.* at 39–40.
70. *Id*. at 42–43.
71. Epic Sys. Corp. v. Lewis, 584 U.S. 497, 502 (2018).
72. *Id.* at 511–12.

law.[73] However, these employees had all signed agreements with their employers that mandated individualized arbitration proceedings for any employment-related disputes.[74] The employers, relying on the FAA, moved to compel arbitration on an individual basis, claiming that these agreements were legally enforceable. The employees countered this motion, arguing that the agreements violated the NLRA by interfering with their right to engage in concerted activities for mutual aid and protection.[75]

The central issue the Court considered was whether the FAA's directive to enforce arbitration agreements according to their terms clashes with the NLRA's protection of employees' rights to engage in concerted activities—including the right to pursue class or collective actions.[76] Ultimately, the Court held that the FAA does indeed require courts to enforce arbitration agreements—even those that stipulate individualized proceedings and effectively preclude class or collective actions.[77]

Firstly, the Court emphasized the FAA's strong presumption in favor of arbitration.[78] Moreover, the Court found that the FAA's saving clause, which allows courts to refuse to enforce arbitration agreements upon "grounds as exist at law or in equity for the revocation of any contract,"[79] does not apply to defenses that specifically target arbitration.[80]

Secondly, the Court underscored that the primary focus of the NLRA is protecting employees' rights to organize and bargain collectively, not guaranteeing the availability of class or collective action procedures in employment disputes.[81] The Court noted that class and collective actions were not widely used mechanisms when the NLRA was enacted in 1935.[82]

The Court also reasoned that Congress knows how to explicitly override the FAA when it intends to do so, but it chose not to do so in the case of the NLRA.[83] The Court further argued that allowing a general term in the NLRA to dictate the particulars of dispute resolution procedures would go

73. *Id.* at 497.
74. *Id.* at 497–98.
75. *Id.*
76. 29 U.S.C. § 157.
77. Epic Sys. Corp. v. Lewis, 584 U.S. 497, 525 (2018).
78. *Id.* at 502.
79. 9 U.S.C. § 2.
80. *Epic Sys. Corp.*, 584 U.S. at 507–08.
81. *Id.* at 511.
82. *Id.* at 511–12.
83. *Id.* at 514.

against congressional intent.[84]

Finally, the Court suggested that individualized arbitration may offer certain advantages over class or collective actions in some instances, such as speed, cost-effectiveness, and a less formal atmosphere.[85]

The dissenting justices, however, took a starkly different position. They forcefully argued that the FAA's saving clause should be interpreted broadly to include defenses grounded in other federal statutes, including the NLRA.[86] The dissent emphasized that the NLRA's express guarantee of concerted activities necessarily includes the right to pursue work-related claims through class or collective actions.[87] The dissent warned that the Court's decision undermines the fundamental purpose of the NLRA: the protection of employees' rights in the workplace.[88]

The Supreme Court's decision in *Epic Systems* has implications for the future of enforceability of arbitration clauses concerning causes of action stemming from ERISA. The decision's strong affirmation of the FAA's mandate to enforce arbitration agreements as written signals a continued pro-arbitration stance by the Court, which could make it more difficult for employees to challenge such agreements in the context of ERISA disputes.

### iii. Lamps Plus, Inc. v. Varela

In *Lamps Plus, Inc. v. Varela*, the Supreme Court addressed whether a court can compel class arbitration when the relevant arbitration agreement is ambiguous regarding the availability of class arbitration. The case arose when in 2016, a hacker tricked a Lamps Plus employee into disclosing the tax information of approximately 1,300 other employees. Frank Varela, a Lamps Plus employee, had his tax information compromised in the breach.[89] He subsequently filed a putative class action lawsuit against Lamps Plus in federal district court, alleging various state and federal claims. Like most Lamps Plus employees, Varela had signed an arbitration agreement as a condition of his employment. Relying on that agreement, Lamps Plus moved to compel individual arbitration and dismiss the lawsuit. The District

84. *Id.* at 522.
85. *Id.* at 508–09.
86. *Id.* at 547–48 (Ginsburg, J., dissenting).
87. *Id.* at 541.
88. *Id.* at 536.
89. Lamps Plus, Inc. v. Varela, 587 U.S. 176, 176 (2019).

Court granted the motion to compel arbitration, but authorized class arbitration. Lamps Plus appealed.

The Supreme Court held that the FAA does not permit courts to compel class arbitration when the arbitration agreement is ambiguous on the issue.[90] The Court began its analysis by reaffirming that "[a]rbitration is strictly a matter of consent."[91] Accordingly, courts must "give effect to the intent of the parties" when interpreting arbitration agreements.[92] The Court emphasized the "fundamental difference[s] between class arbitration and the individualized form of arbitration envisioned by the FAA."[93] Class arbitration sacrifices informality, efficiency, and cost-effectiveness, the principal advantages of arbitration. Given these "crucial differences," the Court previously held in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* that the judiciary cannot infer consent to class arbitration solely from the parties' agreement to arbitrate.[94]

The Court reasoned that the same principle applies when an agreement is ambiguous rather than silent. Like silence, ambiguity "does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[] the principal advantage of arbitration.'"[95] The Court rejected the Ninth Circuit's reliance on the state-law doctrine of *contra proferentem*, which counsels that contractual ambiguities should be construed against the drafter. In the Court's view, that default rule seeks policy ends other than the intent of the parties and is thus inconsistent with the "foundational FAA principle that arbitration is a matter of consent."[96]

The legal principles established in *Epic Systems* and *Lamps Plus* reveal a consistent approach by the Supreme Court in strongly favoring the enforcement of individual arbitration agreements. While both cases deal with distinct legal issues, they collectively bolster the Court's position that the FAA mandates honoring private agreements to arbitrate and preempting conflicting state law interpretations and policy considerations.

---

90. *Id.*

91. *Id.* at 177 (quoting Granite Rock Co. v. Teamsters, 561 U.S. 287, 299 (2010)).

92. *Id.* at 1416 (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010)).

93. *Id.* (internal quotation marks omitted) (citing Epic Sys. Corp. v. Lewis, 584 U.S. 497, 507–08 (2018)).

94. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686 (2010).

95. Lamps Plus, Inc. v. Varela, 587 U.S. 176, 185 (2019) (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011)).

96. *Id.* at 177 (quoting *Stolt-Nielson*, 559 U.S. at 684).

Both cases underscore the Court's belief that parties entering into arbitration agreements do so with the primary expectation of resolving disputes through individualized proceedings. In *Epic*, this meant upholding the right of employers to include clauses in arbitration agreements that prevent employees from engaging in class or collective action lawsuits. This prioritizes the FAA's broad policy of enforceability over the potential for obtaining larger remedies collectively.[97]

The *Lamps Plus* decision then reinforces this pro-individual arbitration approach by preventing courts from assuming consent for class-wide arbitration where the agreement is silent or ambiguous. Thus, the connective thread between the two cases is the Court's clear determination to limit judicial interference in arbitration matters. The FAA is interpreted as a strong mandate to uphold the original intent of the parties entering the contract.

### *D. Circuit Courts: A History of Arbitrability.*

The history of arbitration clauses in ERISA-governed pension and welfare benefit plans is a sad one for employees believing in ERISA's promise of "ready access to the Federal Courts."[98] Despite ERISA's strong preemption clause,[99] and strong policy towards access to the courts,[100] circuit courts have routinely favored enforcing arbitration agreements inside pension and benefit plans in accordance with the Supreme Court's guidance on arbitration clauses in other statutory frameworks. By 2014, every circuit that had addressed the issue had ruled in favor of enforcing mandatory arbitration clauses for questions under ERISA, except for the Ninth Circuit, which had long held in favor of access to the federal court system.[101] The First Circuit followed suit in 2017 by ruling that an arbitration agreement was binding on an issue related to ERISA's preemption clause, leaving the Seventh Circuit as the final appellate court not to have directly addressed the issue.[102]

---

97. Epic Sys. Corp. v. Lewis, 584 U.S. 497, 524–25 (2018).
98. 29 U.S.C. § 1001(b).
99. 29 U.S.C. § 1144(a).
100. § 1001(b).
101. Kate Watson Moss, *ERISA and Arbitration: How Safe is Your 401(k)*, 64 DEPAUL L. REV. 773, 783–85 (2015) (outlining the history of mandatory arbitration clauses under ERISA until 2014).
102. Prime Healthcare Servs. v. United Nurses & Allied Pros., 848 F.2d 41, 48–50 (1st Cir. 2017).

Later in 2019, the Ninth Circuit flipped its handling of arbitration agreements when it came to ERISA claims to join the majority of circuit courts, overruling a twenty-five-year precedent ruling that arbitration agreements were unenforceable in that context.[103] The Seventh Circuit used the Effective Vindication Doctrine to limit the scope of arbitration agreements for claims arising out of ERISA, a doctrine which has been since been followed by the Third and Tenth Circuits.[104]

i. Dorman v. Charles Schwab Corp.

Michael Dorman was a participant in a defined contribution 401(k) retirement plan governed by ERISA. Dorman alleged that the defendants violated ERISA and breached their fiduciary duties under the plan.[105] In December 2014, the Plan was amended to include a mandatory arbitration provision that included a class action waiver.[106] The central issue before the Ninth Circuit was whether ERISA claims are subject to mandatory arbitration.[107] The Ninth Circuit ultimately held that they are, overruling its prior holding in *Amaro v. Continental Can Co.* that ERISA claims are not arbitrable.[108]

The Ninth Circuit's decision to overrule *Amaro* was based on intervening Supreme Court precedent holding that federal statutory claims are generally arbitrable, due to arbitrators being competent to interpret and apply federal statutes.[109] It also reasoned that since *Epic Systems* demonstrated the NLRA does not preempt class-action waivers, neither should ERISA.[110]

The Ninth Circuit's decision, like those in other circuits, reflects the Supreme Court's strong endorsement of arbitration as a means of resolving disputes, including those involving federal statutory claims.

103. *See generally* Dorman v. Charles Schwab Corp., 934 F.3d 1107 (9th Cir. 2019).
104. *See generally* Smith v. Bd. of Dirs. of Triad Mfg., Inc., 13 F.4th 613 (7th Cir. 2021); Henry v. Wilmington Tr. N.A., 72 F.4th 499 (3d Cir. 2023); Harrison v. Envision Mgmt. Holding, Inc. Bd. Of Dirs., 39 F.4th 1090 (10th Cir. 2023).
105. *Dorman*, 934 F.3d at 1109.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 1111 (citing Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228 (2013)).
110. *Id.*

ii. Smith v. Bd. of Directors of Triad Mgf., Inc.

In 2020, James Smith filed a class action lawsuit against Triad's board of directors, alleging a breach of their fiduciary duties under ERISA. Smith participated in Triad's Employee Stock Ownership Plan (ESOP), a defined contribution plan governed by ERISA.[111] In July 2018, Triad's board amended the ESOP to include an arbitration provision with a class-action waiver. This amendment required binding arbitration for claims arising out of or relating to the plan, including breach of the plan or ERISA violations.[112] The provision prohibited relief that "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."[113]

The central issue before the Seventh Circuit was whether the ESOP's arbitration provision, particularly its prohibition on relief extending beyond the individual claimant, is enforceable under ERISA. The court reasoned that the arbitration provision was unenforceable because the provision would bar "effective vindication" of Smith's right to statutory remedies under ERISA.[114]

At the heart of the court's analysis rests the "effective vindication" doctrine. This doctrine, rooted in Supreme Court precedent like *Mitsubishi v. Soler*,[115] establishes that a party cannot be compelled to arbitrate a claim if doing so would preclude them from effectively vindicating their federal statutory rights.[116]

The court's analysis centered on the interplay between ERISA's remedial provisions and the FAA. ERISA § 409(a) authorizes remedies including the removal of fiduciaries and other equitable relief deemed appropriate by the court.[117] The Supreme Court has interpreted these provisions as primarily focusing on protecting the plan as a whole, rather than remedying individual harms.[118]

111. Smith v. Bd. of Dirs. of Triad Mfg., Inc., 13 F.4th 613, 615 (7th Cir. 2021).
112. *Id.* at 616.
113. *Id.*
114. *Id.* at 623.
115. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985) ("[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.").
116. Smith v. Bd. of Dirs. of Triad Mfg., Inc., 13 F.4th at 620–21.
117. 29 U.S.C. § 1109(a).
118. *See, e.g.,* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985).

By explicitly limiting relief to the individual claimant, the Triad ESOP arbitration provision precluded precisely the kind of plan-wide remedies ERISA authorizes. ERISA's structure contemplates both individual actions and class actions as a means to remedy fiduciary breaches. Prohibiting any relief with an effect beyond the individual claimant effectively eliminates the possibility of class action suits, acting as "prospective waiver of a party's right to pursue statutory remedies."[119]

The court stressed, however, that "the problem with the plan's arbitration provision is its prohibition on certain plan-wide remedies, not plan-wide representation."[120] The court made it clear that individualized arbitration is not inherently incompatible with ERISA unless it prevents vindication of the participant's rights.[121] It ended the decision by stating that the "effective vindication exception may be rare, but it applies here."[122]

## II. ANALYSIS

### *A. How Do Epic Systems and Lamps Plus Relate to ERISA-Specific Questions? Do They Mandate Enforcement of Arbitration Agreements Under ERISA?*

*Epic Systems* and *Lamps Plus* address the enforceability of arbitration agreements in the context of the FAA, but do not directly mandate enforcement of such agreements under ERISA. While both cases offer insights into the legal landscape surrounding arbitration agreements, they are not dispositive on the specific question of ERISA, which can be distinguished by its strong policy favoring access to the courts and its broad enforcement mechanisms.

*Epic Systems* demonstrated that arbitration clauses and class action waivers can be enforceable in the context of federal labor laws, even in the face of the FAA's saving clause allowing courts to refuse to enforce arbitration agreements upon grounds existing at law or in equity.[123] This separate conclusion, however, does not necessitate that ERISA must share

119. Smith v. Bd. of Dirs. of Triad Mfg., Inc., 13 F.4th at 621 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).
120. *Id.* at 622.
121. *Id.*
122. *Id.* at 623.
123. Epic Sys. Corp. v. Lewis, 584 U.S. 497, 509 (2018).

the same fate.

ERISA contains a specific policy declaration stating that its purpose is to protect the interests of participants and beneficiaries of employee benefit plans "by providing for appropriate remedies, sanctions, and ready access to the Federal courts."[124] This provision highlights the importance Congress placed on ensuring that individuals with ERISA claims have the ability to seek redress in federal courts. While this falls under ERISA's statement of policy and does not have force by itself, it provides a framework through which one must interpret ERISA and its interaction with other statutes. ERISA also provides that when the duties it creates have been breached, "a civil action may be brought" to redress the wrongdoing.[125] When coupled together, this suggests that Congress intended for civil enforcement of ERISA to be done through the expertise of federal courts.

The FAA includes a saving clause that allows courts to refuse the enforcement of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."[126] This clause raises the question of whether ERISA's policy favoring access to federal courts could provide a basis for invalidating arbitration agreements that would otherwise be enforceable under the FAA. ERISA's policy favoring access to federal courts falls within the ambit of the FAA's saving clause, providing a valid basis for refusing to enforce arbitration agreements under ERISA.

*Epic* does demonstrate that the Supreme Court intends the saving clause to be applied very narrowly, and while not directly addressing ERISA, strengthens the presumption in favor of enforcing arbitration agreements. However, ERISA's unique policy favoring access to federal courts creates tension with the FAA.

*Epic* also demonstrated that the congressional intent to promote collective action under the NLRA was not strong enough to override that of the FAA. It reasoned that the intention must be "'clear and manifest,'"[127] and that Congress has "shown that it knows how to override the Arbitration Act when it wishes."[128] *Epic* proceeds to cite four statutes with strong anti-arbitration measures, such as, "[n]o predispute arbitration agreement shall

124. 29 U.S.C. § 1001 (b)
125. 29 U.S.C. § 1132(a).
126. 9 U.S.C. § 2.
127. *Epic Sys.*, 584 U.S. at 510 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).
128. *Id.* at 514.

be valid or enforceable."[129] These statutes, while having much stronger anti-arbitration measures than ERISA, were all enacted after seeing the Supreme Court's strong jurisprudence in favor of the FAA. The cited statues were enacted in 2002,[130] 2006,[131] and 2010.[132] Yet the Supreme Court could not find any language in statutes prior to these that show Congress's intent to preclude the FAA from its legislation.

Congress today certainly knows how to combat the Supreme Court's strong policy in favor of arbitration. In 2022, for example, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, adding a section to the FAA forbidding the enforcement of arbitration agreements with respect to sexual harassment disputes.[133] However, Congress in the time of ERISA, enacted in 1975, may not have deemed such language necessary, and weaker language may be enough to show a Congressional intent to preclude arbitration in statutes from around this time.

In *Epic*, the court clearly states the presumption that "'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute."[134] While Congress has been disappointingly silent on the issue of the enforceability of arbitration clauses, ERISA is technical, specialized legislation, and there is unlikely to be public pressure forcing Congress to address the issue. All we have left then is Congress's original intent, which clearly favors access to federal courts.

Interestingly, the Court in *Dorman* did not address the question of ERISA's policy favoring access to federal courts, despite it being a central argument in the precedent, *Amaro*, that it overruled. In *Amaro v. Continental Can Co.*, the Ninth Circuit was sure to mention that "to hold [that arbitration clauses are enforceable for claims arising from ERISA] would endanger the protection afforded employees by Congress' enactment

129. 12 U.S.C. § 5567(d)(2).
130. 15 U.S.C. § 1226.
131. 10 U.S.C. § 987.
132. 7 U.S.C. § 26; 12 U.S.C. § 5567.
133. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117–90, § 402, 136 Stat. 26, 27 (Mar. 3, 2022); *see also* H.R. REP. NO. 117–234, at 7–8 (2022) (citing the Supreme Court's expansion of the FAA beyond Congress' intent and stating that "large companies have largely eviscerated the congressional intent of arbitration as a voluntary process agreed to between parties of equal bargaining power").
134. Epic Sys. Corp. v. Lewis, 584 U.S. 497, 510 (2018) (citing United States v. Fausto, 484 U.S. 439 (1988)).

of ERISA. . .The 'ready access to the Federal courts' that ERISA was intended to provide would be eliminated."[135] Clearly, courts are capable of recognizing this policy, but have refused to apply it in recent decisions such as in *Dorman*.

There is another potential avenue that the Supreme Court could use to distinguish ERISA from the NLRA and other statutes where it has ruled in favor of arbitration: its sheer complexity. The Supreme Court itself has described ERISA as "an enormously complex and detailed statute."[136] They have acknowledged that even administrators of ERISA plans can make mistakes regarding complicated plans nestled within the labyrinth of ERISA.[137] This increases the risk that arbitrators will "render conflicting awards in cases involving similar employees; even employees working for the same employer."[138]

Thus, while the Supreme Court's recent arbitration jurisprudence suggests that ERISA will share a similar fate to the NLRA and other federal statutes, it does not mandate such destiny. These decisions can, and perhaps should, be distinguished in looking at the distinct context of arbitration clauses in ERISA plans.

### *B. How Does the Effective Vindication Doctrine Apply in the ERISA Context, and Does It Provide a Safe Harbor for Plan Participants?*

The Effective Vindication Doctrine is a legal principle that can be applied in certain circumstances to invalidate arbitration agreements, even if they are otherwise enforceable under the FAA.[139] The Effective Vindication Doctrine originated as dictum in *Mitsubishi Motors*. The Court expressed a willingness to invalidate arbitration agreements on public policy grounds that "operate as a prospective waiver of a party's right to pursue statutory remedies," preventing effective vindication of a party's rights.[140] Depending on how broadly courts deploy it, Effective Vindication Doctrine could prevent the enforcement of arbitration clauses in several ways, depending upon what litigated arbitration clauses mandate.

135. Amaro v. Cont'l Can Co., 724 F.2d 747, 750 (9th Cir. 1984) (citing 29 U.S.C. § 1001).
136. Mertens v. Hewitt Associates, 508 U.S. 248, 262 (1993).
137. Conkright v. Frommert, 559 U.S. 506, 509 (2010).
138. *Epic Sys.*, 584 U.S. at 553 (Ginsburg, J., dissenting).
139. Smith v. Bd. Of Dirs. Of Triad Mfg., 13 F.4th 613, 621 (7th Cir. 2021).
140. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985).

The Effective Vindication Doctrine has been used in the Third, Seventh, and Tenth Circuits to deny enforceability arbitration agreements when they have restricted the types of relief available to participants in a way that is inconsistent with ERISA's remedial framework.[141] ERISA § 502(a)(3) empowers courts to fashion "appropriate equitable relief" to redress violations of the Act.[142] This includes removing a fiduciary, appointing a new one, and restoring losses to the plan.[143]

Under this doctrine, courts should deem arbitration agreements unenforceable that limit participants solely to equitable relief, like removal of the plan trustee and preclusion from recovering compensatory damages for losses. Such limitations significantly hinder a participant's ability to fairly recoup their full losses, undermining ERISA's remedial objective.

Additionally, ERISA § 502(a)(2) provides that a civil action may be brought "by a participant, beneficiary or fiduciary for appropriate relief under section 409 of this title."[144] ERISA § 409(a) provides that any fiduciary who breaches his duties is "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."[145] Taken together, § 409(a) creates fiduciary liability while § 502(a)(2) provides a mechanism for enforcement.[146]

Here, the Effective Vindication Doctrine can prevent arbitration provisions that prohibit a claimant from seeking remedies that would provide additional benefits to anyone other than the claimant.[147] Such provisions expressly limit ERISA's statutorily provided right to ensure that liable fiduciaries "make good to such plan any losses" resulting from the breach, as it would benefit parties besides the claimant.[148]

The DOL has voiced its support in favor of participants trying to use the Effective Vindication Doctrine to limit the arbitration agreements in ERISA

141. Henry v. Wilmington Tr. N.A., 72 F.4th 499 (3d Cir. 2023); Harrison v. Envision Mgmt. Holding, Inc. Bd. Of Dirs., 39 F.4th 1090 (10th Cir. 2023); *Smith*, 13 F.4th at 613, 621.
142. 29 U.S.C. § 1132(a)(3).
143. *Id.*
144. § 1132(a)(2).
145. 29 U.S.C. § 1109(a).
146. *Id.*; § 1132(a)(2).
147. *See, e.g.*, Henry v. Wilmington Tr. N.A., 72 F.4th 499, 503 (3d Cir. 2023).
148. 29 U.S.C. § 1109(a).

plan documents. In the pending case *Coleman v. Brozen*, the Department of Labor concluded that "arbitration agreements cannot prospectively waive participants' statutory right to pursue plan-wide relief for claims under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2)."[149]

The Effective Vindication Doctrine offers a potential tool to challenge the enforceability of arbitration agreements in certain ERISA cases. However, its application is highly fact-specific and depends on the specific provisions of the agreement and their potential impact on a participant's ability to vindicate their rights under ERISA. At its narrowest, the Effective Vindication Doctrine should be used in all cases where an arbitration agreement prevents parties bringing claims under ERISA from enforcing their statutorily provided rights under ERISA §§ 409 and 502.[150] This means that courts should declare arbitration clauses invalid that attempt to prevent the ability of plaintiffs to file suit on behalf of the plan or try to limit the degree of liability to individual liability for ERISA §§ 502(a)(2), (a)(3).[151]

## CONCLUSION

In conclusion, while *Epic Systems* and *Lamps Plus* further develop the Supreme Court's strong jurisprudence in favor of arbitration, they do not mandate the enforcement of arbitration clauses for claims arising from ERISA. They do, however, signal to employers that if the Supreme Court were to decide today, it would likely enforce these agreements. With the addition of another pro-arbitration justice, it is more likely than ever that the Supreme Court will rule in favor of arbitration in the context of ERISA.[152]

While the Effective Vindication Doctrine has been used to limit the breadth of arbitration agreements in some circuits, it is a long way from providing the access to federal courts originally promised under ERISA. At best, it may rarely allow participants to effectively vindicate their rights under ERISA where those rights are completely blocked off by an arbitration clause. While it remains to be seen how courts apply the

149. *See* Brief for the U.S. Sec'y of Lab. as Amicus Curiae Supporting Plaintiffs-Appellees at 1–2, Coleman v. Brozen, No. 23-10832 (5th Cir. Nov. 16, 2023).

150. 29 U.S.C. §§ 1109, 1132.

151. §§ 1132(a)(2), (a)(3).

152. *See* Brian Farkas, *Arbitration at the Supreme Court: The FAA from RBG to ACB*, 42 CARDOZO L. Rev. 2927, 2949–58 (2021) (analyzing Amy Coney Barrett's decisions in arbitration and FAA-related cases in the Seventh Circuit).

Effective Vindication Doctrine in the ERISA context, it is unlikely to be a saving grace for most participants.

The saga between mandatory arbitration clauses and ERISA is ongoing, but the fact is that we are in a bleak state of affairs for anyone envisioning a world where employees participating in employer-sponsored pension plans get the "access to the Federal courts" that they were promised.[153] With these decisions, it appears that employers and arbitrators can, for now, assume that ERISA claims will continue to be subjects of arbitration for the foreseeable future.

153. 29 U.S.C. § 1001(b).