No. 18-703

IN THE
Supreme Court of the United States

UNIVERSITY OF SOUTHERN CALIFORNIA ET AL.,
Petitioners,
v.

ALLEN L. MUNRO ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does an employee's agreement to arbitrate all claims she may have against her employer encompass a claim under 29 U.S.C. § 1132(a)(2) that the employee brings on behalf of her retirement plan against its fiduciaries to obtain remedies for her plan?

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INTRODUCTION

ERISA fiduciary breach actions under 29 U.S.C. § 1132(a)(2) are unique. They are representative actions on behalf of a retirement plan in which the only remedies are those that provide relief to the plan. An individual participant has no personal remedy under § 1132(a)(2).

ERISA authorizes plan participants and beneficiaries to bring § 1132(a)(2) actions on behalf of their plan, just as it authorizes a plan fiduciary or the Secretary of Labor to do so. Those actions affect the interests of all participants and beneficiaries in the plan, and courts consistently certify those actions as class actions under Federal Rule of Civil Procedure 23(b)(1), from which class members cannot opt out.

The court below addressed agreements between employees and their employer to submit to arbitration all claims that the employee may have against her employer. The court interpreted the arbitration agreements to be limited to employees' personal claims against their employer and not to extend to claims on behalf of the employees' retirement plan against plan fiduciaries under § 1132(a)(2), just as they would not extend to compel arbitration of the employees' claim on behalf of the United States against their employer under the False Claims Act (31 U.S.C. § 3729).

The court's interpretation does not conflict with any decision of this Court or any other court of appeals. It is based on a plain reading of the text of the agreements and does not reflect any hostility to arbitration or conflict with the principles underlying the FAA.

There is no reason to issue a writ of certiorari.

STATEMENT OF THE CASE

I. The Employee Retirement Income Security Act (ERISA) and the representative nature of fiduciary breach claims.

ERISA provides for Federal regulation of all retirement plans that employers provide to their employees. 29 U.S.C. §§ 1101(a), 1003(a), 1002(2). In a defined contribution plan, money is contributed to a participant's account and upon retirement the participant receives only what is in her account, which is the sum of the contributions, gains and losses from investment, and expenses. 29 U.S.C. § 1002(34); *Tibble v. Edison Int'l*, 135 S.Ct. 1823, 1826 (2015); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 250 n.1 (2008). In contrast, a defined benefit pension plan provides the participant a specified monthly payment regardless of contributions, expenses, and investment performance of the plan. *LaRue*, 552 U.S. at 250 n.1; 29 U.S.C. § 1002(35). A defined benefit plan participant has an interest only in the promised benefit, not in the assets in the plan. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439–40 (1999)). Defined contribution plans dominate the retirement plan field today. *LaRue*, 552 U.S. at 255.

The assets of defined contribution plans are held in trust by one or more trustees. 29 U.S.C. § 1103(a). A recordkeeper tracks each participant's share of the plan's trust assets in bookkeeping accounts. *LaRue*, 552 U.S. at 262 (Thomas, J., concurring). "A defined contribution plan is not merely a collection of unrelated accounts." *Id.*

The terms of the defined contribution plan must be set forth in a written document that designates the fiduciaries of the plan. 29 U.S.C. § 1102(a). In

addition to the named fiduciaries, anyone who has or exercises discretionary authority or control over plan administration, as well as anyone who exercises any control over plan assets, also is a fiduciary of the plan. 29 U.S.C. § 1002(21)(A).

ERISA imposes upon fiduciaries strict duties that derive from the common law of trusts and are the "highest known to the law." *Tibble v. Edison Int'l*, 843 F.3d 1187, 1197 (9th Cir. 2016) (en banc, quoting *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996)); *Tibble*, 135 S.Ct. at 1828. ERISA's "prudent man standard of care" governs how a fiduciary "shall discharge his duties with respect to a plan[.]" 29 U.S.C. § 1104(a)(1). The fiduciary must act "solely in the interest of the participants and beneficiaries" and "for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan[.]" 29 U.S.C. § 1104(a)(1)(A). The fiduciary must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]" 29 U.S.C. §1104(a)(1)(B).

A fiduciary who breaches these duties "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[.]" 29 U.S.C. § 1109(a). In addition, the fiduciary is "subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." *Id.*[1] ERISA prohibits an agreement "to

[1] For example, a court can order plan fiduciaries to put plan recordkeeping services out for competitive bidding, preclude the

relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty" imposed by the statute. 29 U.S.C. § 1110(a).

As the text of the statute makes clear, ERISA's fiduciary duties are owed to the plan and the remedies for breach of those duties belong to the plan. 29 U.S.C. §§ 1104(a)(1), 1109(a).

A plan cannot act on its own, however. ERISA thus authorizes the plan fiduciaries and the Secretary of Labor to bring a civil action on behalf of the plan for the plan relief provided in § 1109(a). 29 U.S.C. § 1132(a)(2). It also authorizes any plan participant or beneficiary to bring that action. *Id.* The Secretary of Labor in fact "depends in part on private litigation to ensure compliance with the statute." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 n.8 (8th Cir. 2009). "[P]rivate actions by beneficiaries seeking in good faith to secure their rights under employee benefit plans are important mechanisms for furthering ERISA's remedial purpose." *Salovaara v. Eckert*, 222 F.3d 19, 28 (2d Cir. 2000) (quoting *Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 128–29 (7th Cir. 1991)); *see also Jander v. Ret. Plans Committee of IBM,* No. 17-3518, 2018 WL 6441116, at *3 (2d Cir. Dec. 10, 2018) (quoting same).

Section 1109(a) provides only for "relief singularly to the plan" and not individual participant damages. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985); *LaRue*, 552 U.S. at 262 n.* (Thomas, J. concurring) ("a participant suing to recover benefits

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plan's recordkeeper from providing the employer corporate services, and order plan fiduciaries to use the cheapest share class of mutual funds selected as plan investments. *Tussey v. ABB, Inc.*, No. 02-4305, 2012 WL 1113291, at *39 (W.D.Mo. 2012), *aff'd in part, vacated on other grounds*, 746 F.3d 327 (8th Cir. 2014) (equitable relief affirmed).

on behalf of the plan is not entitled to monetary relief payable directly to him; rather, any recovery must be paid to the plan."). Section 1132(a)(2) "does not provide a remedy for individual injuries distinct from plan injuries[.]" *LaRue*, 552 U.S. at 256.

An ERISA fiduciary breach claim that is brought by a participant thus is not that individual's claim. It is the plan's claim. The plan, not the participant, is the real party in interest. *Simon v. Hartford Life, Inc.*, 546 F.3d 661, 664 (9th Cir. 2008) (citing *Russell*, 473 U.S. at 140). The participant bringing the plan's claim "is not the actual beneficial owner of the claims being asserted." *Id.* Any benefit the participant might gain from the action derives from whatever relief is provided to the plan, whether that be an increase in plan assets through money damages, reformation of the plan, or removal of the fiduciaries.

In order to "properly proceed[] in a representative capacity" under § 1132(a)(2), a participant must take "steps to permit the court to safeguard the interests" of the other participants and beneficiaries, such as through a class action. *Coan v. Kaufman*, 457 F.3d 250, 260–62 (2d Cir. 2006).

Because of the trust-based and plan-wide nature of ERISA's fiduciary duties and remedies, separate participant actions against the same fiduciaries for the same conduct could result in inconsistent or varying adjudications that impose inconsistent standards on the fiduciaries, both as to whether the same conduct is a breach and the amount of plan losses the fiduciaries must make good under § 1109(a). Fed.R.Civ.P. 23(b)(1)(A). Similarly, judgments that determine whether a fiduciary breached its duty and how to calculate plan losses, to say nothing of injunctive relief that might be granted, as a practical matter could dispose of other participants' interests. Fed.R.Civ.P. 23(b)(1)(B); *see*,

e.g., *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009). Consequently, courts nearly universally recognize that § 1132(a)(2) actions are "paradigmatic examples of claims appropriate for certification" under Federal Rule of Civil Procedure 23(b)(1), which does not allow for any participant to opt out. *Schering*, 589 F.3d at 604; *see also*, *e.g.*, *Krueger v. Ameriprise Fin., Inc.*, 304 F.R.D. 559, 575–78 (D.Minn. 2014); *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111–12 (N.D.Cal. 2008).

One purpose of ERISA is to "provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. §1001(b). Another purpose is to develop Federal common law on the prudent administration of retirement plans. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110–11 (1989)). To meet both these purposes, ERISA provides Federal courts exclusive jurisdiction over fiduciary breach claims. 29 U.S.C. § 1132(e)(1).

Development of Federal common law under ERISA has been critical. The Court itself had to clarify that ERISA's six-year statute of repose does not release fiduciaries from their continuing duty to monitor the prudence of plan investment options, even if they have been imprudent for more than six years. *Tibble*, 135 S.Ct. at 1828–29. Courts have had to set standards for, *inter alia*, determining fiduciary breach (*e.g.*, *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917–19 (8th Cir. 1994) (citing cases)), allocating burdens of proof (*e.g.*, *id.* at 920), and calculating plan losses (*e.g.*, *Tussey v. ABB, Inc.*, 850 F.3d 951, 959–60 (8th Cir. 2017) (quoting *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985))).

ERISA does allow individual participants to pursue personal actions in other circumstances. ERISA allows a participant to sue for her personal

benefits under a plan. 29 U.S.C. § 1132(a)(1)(B). Those individual claims are not subject to exclusive Federal jurisdiction. 29 U.S.C. § 1132(e)(1). While ERISA specifies the time limits for fiduciary breach actions (29 U.S.C. § 1113), it does not do so for individual benefits claims. *Heimeshoff v. Hartford Life & Accid. Ins. Co.*, 571 U.S. 99, 105 (2013). The limitations period is provided by contract (*id.*) or by the most analogous State statute (*e.g., Chuck v. Hewlett Packard Co.*, 455 F.3d 1026, 1031 (9th Cir. 2006)). In plans that provide for discretionary determinations of individual benefit claims, court review is not available until exhaustion of those administrative remedies and is limited to review of the record developed in that administrative process for abuse of discretion. *Heimeshoff*, 571 U.S. at 105. Individual participant claims for benefits under § 1132(a)(1)(B) thus are categorically different from a plan's fiduciary breach claim under § 1132(a)(2).

II. The University's retirement plans and Plaintiffs' action on behalf of the plans.

The University of Southern California offers its employees a Retirement Savings Program that constitutes participation in two defined contribution plans. Each plaintiff participates in both plans. *Munro v. Univ. of S. Cal.*, No. 16-cv-6191, Doc. 65 at 8–9 (Amended Complaint).

Plaintiffs contend the University[2] breached its duties to the plans by causing the plans to incur unreasonable administrative expenses and by providing imprudent investment options. *Id.* at 122–33. In addition to restoring their plans' losses due

[2] Plaintiffs allege the University delegated various fiduciary functions to various officers and committees, but the fact and nature of those delegations are not pertinent to the question presented.

under § 1109(a), Plaintiffs seek plan-wide remedial relief, including *inter alia* a determination of the method by which to calculate plan losses under § 1109(a), all accountings necessary to calculate plan losses, reformation of the plans to include only prudent investments, putting plan recordkeeping services out for competitive bidding, and removal of the breaching fiduciaries. *Id.* at 135–36.

III. The University's arbitration agreements.

The University requires all employees to sign arbitration agreements as a condition of employment.[3] These are individual arbitration agreements, as shown by the fact that in this case alone there are five different iterations among the nine arbitration agreements signed by the plaintiffs. *Id.* Docs. 47-6 – 47-14. Seven agreements provide for arbitration at the American Arbitration Association. *Id.* Docs. 47-7 – 47-9, 47-11 – 47-14. Two provide for arbitration at JAMS. *Id.* Docs. 47-6, 47-10. Two agreements contain waivers of "any right to bring on behalf of persons other than Employee, or to otherwise participate with other persons in, any class or collective action." *Id.* Docs. 47-6, 47-10. The others do not.

The arbitration agreements provide that the University and the employee

> agree to the resolution by arbitration of all claims, whether or not arising out of Employee's University employment, remuneration or termination, that Employee may have against the University or any of its related entities, including but not limited to faculty practice plans, or its or their officers,

[3] https://policy.usc.edu/arbitration/

> trustees, administrators, employees or agents, in their capacity as such or otherwise; and all claims that the University may have against Employee.

E.g., *id.* Doc. 47-6 at 1. One agreement excludes from arbitration only worker's compensation and unemployment compensation claims. *Id.* Doc. 47-11. It also provides for the California Arbitration Act to govern its interpretation and enforcement. *Id.* Another version adds an exclusion of claims under California Code of Civil Procedure §1094.5. *Id.* Doc. 47-9 at 2. Different versions in different years exclude other claims. *See*, *e.g.*, *id.* Docs. 47-7, 47-8.

None of the arbitration agreements refer to the Retirement Savings Program or the two plans, the plan fiduciaries, or fiduciary breach actions under § 1132(a)(2). They do not indicate each employee is signing the agreement in his or her capacity as a participant in the plans (much less as a participant *on behalf of* the plans) or that the University is signing the agreement in its capacity as plan fiduciary (either for itself or for the other fiduciaries). The documents that establish and maintain the plans also do not require arbitration of the plans' claims against its fiduciaries for breach of duty. Pet. 21a.

IV. The proceedings below.

A. The district court.

Plaintiffs commenced their action on August 17, 2016 in the Central District of California (No. 16-6191). The University moved to compel each plaintiff to arbitrate his or her claim over the same fiduciary breach and same plan remedies in nine separate arbitration proceedings. Doc. 47. The University

argued that no participant could pursue the plans' claims or remedies in arbitration—each participant could pursue only the breach and amount of damage that she or he personally suffered.

The district court denied the University's motion. Pet. 13a–33a. The court found that plaintiffs' arbitration agreements did not cover their plans' fiduciary breach claims because no participant had authority to limit the plans to arbitration, no plan fiduciary had agreed to limit the plans' claims to arbitration, and the plan document did not authorize or require arbitration of the plans' fiduciary breach claims. Pet. 20a–33a.

B. The court of appeals.

The University timely appealed under 9 U.S.C. § 16. Doc. 57. After briefing but before argument, the court of appeals ordered counsel to address at argument the implications on the case of *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791 (9th Cir. 2017). *Munro v. Univ. of S. Cal.*, No. 17-55550, DktEntry 45 (9th Cir. May 11, 2018). In *Welch*, the Ninth Circuit held that an employment agreement that referred to arbitration all claims the employee "may have" against her employer did not encompass the employee's False Claims Act lawsuit against her employer. 871 F.3d at 799–800.

The court affirmed denial of the University's motion. Pet. 1a–12a. The court recognized that its function was limited to determining whether there is a valid agreement to arbitrate and whether the agreement encompasses the dispute in issue. Pet. 6a. (citing *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008)). Reading the plain language of the agreements, the court concluded that they did not encompass the plans' claims under § 1132(a)(2)

because the arbitration agreements covered only individual claims that the employee "may have" against the University. Pet. 8a. In the same way that an employee's individual arbitration agreement with her employer did not apply to a False Claims Act claim that the employee pursued on behalf of the United States against her employer, so also the plaintiffs' individual arbitration agreements did not apply to the §1132(a)(2) claims that they pursued on behalf of their plans. Pet. 8a–12a (citing *Welch*).

Because the court found the plain language of the arbitration agreements to be limited to individual claims and not extend to representative claims such as a § 1132(a)(2) action, it did not address other issues plaintiffs raised, such as whether a participant can bind a plan to arbitration and whether the plan's right to relief under § 1132(a)(2) and § 1109(a) can effectively be vindicated through individual participant arbitrations. Pet. 12a. The court denied the University's petition for rehearing and rehearing *en banc*.

REASONS FOR DENYING THE PETITION

The FAA does not elevate arbitration agreements above regular contracts so as to exempt them from regular rules of contract interpretation. Instead, the FAA only requires that courts "place arbitration agreements on an equal footing with other contracts" and "enforce them according to their terms[.]" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citing *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006), and *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.,* 489 U.S. 468, 478 (1989)).

That is all the Ninth Circuit did. It interpreted the plain terms of the arbitration agreements to limit their scope to individual claims employees may have

against the University. That interpretation did not depend on any hostility to arbitration or unique rules that apply only to arbitration agreements. The only unique factor the court considered was that § 1132(a)(2) actions are representative actions on behalf of another entity, not individual actions on behalf of the plaintiff-participant, much like False Claims Act actions.

The University cites no decision from this Court or the courts of appeal that even addresses representative actions, much less that compels an interpretation that these arbitration agreements encompass representative actions. While the University focuses on the "all-encompassing" and "capacious" phrases "all claims" and "any claims" (Pet. 11, 17, 20, 23), those are not the disputed phrases. The disputed phrase is "Employee may have against the University" and the University cites no court that has interpreted that phrase or a like phrase to cover not only the plaintiff's individual claim, but also representative claims a plaintiff may bring on behalf of another entity, such as her retirement plan or the United States.

The Ninth Circuit's decision does not conflict with any decision of this Court or other courts of appeal. The interpretation of "may have" in an employment arbitration agreement is a mundane, not an important, question that does not merit review by this Court. S. Ct. R. 10.

I. The decision below does not conflict with this Court's decisions or the decisions of other courts of appeal.

A. The Court has never held that an individual agreement to arbitrate extends to representative actions.

The Court has not addressed the question of whether an individual employment arbitration agreement encompasses a representative action the employee may bring in another capacity, such as under § 1132(a)(2) or the False Claims Act. None of the cases cited by the University even concerns such a representative action. They all concern actions the individual had directly against the other party.

In *AT&T Technologies*, workers through their union sought to arbitrate a grievance over lay offs they claimed violated their collective bargaining agreement. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 645–46 (1986). *Moses H. Cone* and *Volt* concerned claims for breach of construction contracts between the parties. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Volt*, 489 U.S. at 475–76. In *Gilmer* the plaintiff claimed his employer discriminated against him because of his age. *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). In *Buckeye* the plaintiffs claimed they were charged usurious interest in payday lending arrangements. *Buckeye*, 546 U.S. at 442–43. *AT&T Mobility* concerned claims of fraud in the sale of cell phones and services. *AT&T Mobility*, 563 U.S. at 336–38. *Mitsubishi* concerned a claimed breach of a car distributor agreement between the parties. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 616–17 (1985).

None of those cases concerned a representative action similar to § 1132(a)(2) or the False Claims Act. Nothing in those cases compels a court to interpret "may have" to extend beyond an employee's individual claims against her employer to claims the employee is authorized by statute to bring on behalf of another entity.

B. No other court of appeals has held that individual arbitration agreements encompass representative actions.

The appellate court decisions cited by the University likewise do not compel a different decision in this case. They also addressed only individual claims.

Dialysis Access Center, LLC v. RMS Lifeline, Inc., 638 F.3d 367 (1st Cir. 2011), concerned a claimed breach of a management agreement between the parties. That case did not concern the question of whether the language of the arbitration provision encompassed the claim at issue. It concerned only the question of whether the court or an arbitrator decides if the agreement was void because of fraudulent inducement. 638 F.3d at 371.

In re Prudential Insurance Company of America Sales Practice Litigation, 133 F.3d 225 (3d Cir. 1998), concerned NASD arbitration agreements between brokers and their employer and whether an NASD rule excluding insurance disputes from arbitration extended to the brokers' claims of retaliatory discharge for refusing to take part in insurance sales fraud. 133 F.3d at 227–28.

In *Sanchez v. Nitro-Lift Techs., LLC*, 762 F.3d 1139 (10th Cir. 2014), employees sued their employer for overtime wages. The employer sought to compel arbitration of those personal claims under an

arbitration clause in a Confidentiality/Non-Compete Agreement that encompassed any dispute between the employee and employer.

While those cases hold that broad arbitration clauses extend to all claims one party has against the other, they do not concern claims brought on behalf of other entities. Nothing in those decisions compels extension of broad arbitration clauses beyond claims a plaintiff has personally against the defendant to claims the plaintiff may pursue on behalf of another entity.

C. The University does not address *Welch*.

The University does not even address *Welch* in its Argument and barely discusses *Welch* in its Statement. Pet. 7–8. The University does not suggest, much less demonstrate, that *Welch* is incorrect, that *Welch* conflicts with any decision of this Court or other courts of appeals, that § 1132(a)(2) actions are not analogous to False Claims Act actions, or that the Ninth Circuit's finding the two actions to be analogous conflicts with the decision of any other court.

The University erroneously claims plaintiffs did not raise in the Ninth Circuit the argument that plaintiffs' arbitration agreements were personal and did not encompass their representative § 1132(a)(2) actions. Pet. 7. Plaintiffs in fact argued "Plaintiffs' arbitration agreements apply only to personal claims the plaintiffs might have against USC" (Appellees' Br. at 18) and "ERISA fiduciary breach claims of the sort Plaintiffs are pursuing are not individual claims, but instead are plan claims, in which a participant's individual account loss is merely a pro-rata share of the plans' losses" (Appellees' Br. at 22–23). While plaintiffs did not cite *Welch* as an analogous case,

they placed this argument squarely before the Ninth Circuit.

II. The Ninth Circuit's decision does not impair the "national policy favoring arbitration" or have any "far-reaching consequences."

The Ninth Circuit's interpretation of the University's arbitration agreements does not impair "national policy favoring arbitration" or have any "far-reaching" consequence. *Cf.* Pet. 21. The Ninth Circuit's decision is a mundane interpretation of contractual language according to its plain terms. Had the University intended those agreements to encompass the plans' § 1132(a)(2) claims, it would have specifically said so, particularly given its insistence on how prominent retirement plans are in the employment setting. Pet. 11. That it did not do so, did not even mention the plans or its fiduciaries or include an arbitration requirement in the plan documents, demonstrates that it did not intend these arbitration agreements to apply to the plans' fiduciary breach claims. That conclusion is bolstered by the fact that the University's various arbitration agreements do not each have the same scope or even provide for arbitration in the same tribunal. *See supra* at 8–9. The variety of these agreements demonstrates they apply only to individual claims and not to plan claims.

Plaintiffs do not concede that expressly including a provision for arbitration of the plans' § 1132(a)(2) claims in employment agreements and plan documents would be enforceable or provide for the effective vindication of the plans' statutory rights. Plaintiffs argued below they would not, especially given the University's attempt to limit such claims to individual, not plan-wide claims. As shown *supra* at

5–6 as to individual adjudications, individual arbitrations of what are plan-wide breaches and remedies, not to mention plan-wide relief in the form of reformation or removal of fiduciaries, risk subjecting plan fiduciaries to conflicting standards and could effectively dispose of other participants' interests without any due process safeguard.

Those are issues for another case, however, a case in which the plan, plan fiduciaries, and participants in fact agreed to submit the plan's fiduciary breach claims to individualized arbitration. While the court below referred to the uncertainty of its prior answers to these questions, that was dictum. *Cf.* Pet. 21–22. The Court saw no need to address that uncertainty en banc.

In addition to the question of arbitrability of § 1132(a)(2) claims, Plaintiffs asserted other arguments against the application of their employment agreements to their claims that were not addressed by the court of appeals or the district court. Those issues would have to be addressed even if the Court found the Ninth Circuit's interpretation of "may have" to be erroneous. Addressing the question presented thus will not even resolve this case. And because of the fact-specific nature of the question presented, resolution of that question is not likely to have much effect beyond this case.

CONCLUSION

The Court should deny the University's petition.

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