No. 18-703

IN THE

Supreme Court of the United States

UNIVERSITY OF SOUTHERN CALIFORNIA,
USC RETIREMENT PLAN OVERSIGHT COMMITTEE,
AND LISA MAZZOCCO,

Petitioners,

v.

ALLEN L. MUNRO, ET AL.,

Respondents.

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

BRIEF OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Securities Industry and Financial Markets Association (SIFMA) represents the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA supports a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building public trust and confidence in the financial markets. SIFMA members have over 800,000 employees throughout the United States. SIFMA regularly participates as *amicus curiae* in matters before the Court. *See, e.g., Wal-Mart Stores, Inc., v. Dukes, et al.*, No. 10-277 (Jan. 27, 2011); *Lawson and Zang v. FMR LLC, et al.*, No. 12-3 (Oct. 7, 2013); *Toshiba Corp. v. Automotive Industries Pension Trust Fund, et al.*, No. 18-486 (Dec. 6, 2018).

The outcome of this case will affect SIFMA and its members because companies in the financial sector, like employers nationwide, offer their employees the opportunity to invest their pre-tax earnings in 401(k) retirement savings plans. These plans offer a range of investment options to participants, who are permitted to allocate the funds in their accounts as they choose. Such "defined contribution plans" are common in this country, and they play a vital role in the retirement planning of millions of Americans. Recent years have seen a raft of breach-of-fiduciary-duty lawsuits

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[1] The parties have received timely notice of the intent to file this *amicus* brief and have consented to the filing. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amicus curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

against fiduciaries of such plans, based on alleged excessive administrative and investment costs and alleged unsatisfactory investment performance. Such plan fiduciaries are often, if not almost always, the employers (such as SIFMA's members and their officers or agents) of the employees who are participants in the plans.[2]

SIFMA and its members are concerned that the Ninth Circuit's decision could mean that parties can *never* effectively agree to arbitrate ERISA § 502(a)(2) claims, and thus that the arbitration agreements common between SIFMA members and their employees could not be enforced in such disputes. Section 502(a)(2) claims are expensive and time-consuming for employers to litigate.[3] They are thus precisely the type of claim that Congress had in mind when it enacted the Federal Arbitration Act (FAA).

SIFMA submits this brief to explain how the Ninth Circuit's decision, which effectively invalidates agreements to arbitrate § 502(a)(2) claims, conflicts

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[2] Since 2015, nearly two dozen financial services companies have been sued by their employees for including allegedly excessively expensive and imprudent investment options in their company 401(k) plans. *See* Jacklyn Wille, *Employee Benefit Class Settlements Gleaned Over $500m in 2017*, BNA (Jan. 22, 2018), https://tinyurl.com/yd3ayb5m.

[3] Such cases can proceed for more than a decade in the federal courts, involving multiple circuit court appeals and proceedings before this Court before being resolved. *See, e.g.*, *Tibble v. Edison Int'l*, No. 2:07-cv-05359 (C.D. Cal.), filed Aug. 16, 2007, judgment entered Oct. 25, 2018; *Tussey v. ABB, Inc.*, No. 2:06-cv-04305 (W.D. Mo.), filed Dec. 29, 2006, proceedings continuing as of Dec. 31, 2018.

with Supreme Court precedent and with the ERISA statute. SIFMA also seeks to emphasize that the Ninth Circuit's decision implicates a question of great practical importance. The arbitrability issue decided by the Ninth Circuit arises frequently, and the Ninth Circuit's decision imperils not only arbitration agreements covering ERISA claims, but also potentially agreements to arbitrate other types of claims brought by a plaintiff in a representative capacity.[4]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit implied that employers and employees can never agree to arbitrate ERISA § 502(a)(2) claims unless the plan as an entity is a party to the arbitration agreement. But an ERISA plan as an entity can only act through its fiduciaries, who will almost always include the employer of the plan's participants or the employer's agents and representatives. The Ninth Circuit's decision, therefore, contradicts this Court's precedent concerning arbitrability – including *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018). *Epic* held that arbitration agreements are always enforceable except in two narrow circumstances – grounds for the revocation of any contract or a clearly expressed congressional mandate overriding the FAA – neither of which is present here. *Id.* at 1622, 1626. The Ninth Circuit effectively creates a third exception to arbitrability in cases where a party

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[4] *See, e.g., Iskanian v. CLS Transp. Los Angeles, LLC,* 59 Cal. 4th 348 (2014), *cert. denied*, 135 S. Ct. 1155 (2015) (arbitration of representative claims under the California Private Attorney General Act).

to an arbitration agreement brings a claim in a representative capacity. *Epic*, however, does not allow for additional exceptions to the rule that courts must enforce arbitration agreements as they are written and resolve doubts over the scope of arbitrable issues in favor of arbitration.

The Ninth Circuit compounded its error by suggesting that an ERISA § 502(a)(2) claim brought by a participant in a defined contribution plan belongs to the plan, not the participant – a conclusion that contradicts this Court's decision in *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008).

Review is further warranted because the Ninth Circuit's decision implicates significant practical concerns. The Ninth Circuit's decision imperils arbitration agreements that SIFMA's members and many other companies rely on to limit the costs of offering their employees the opportunity to participate in a retirement plan. Under the Ninth Circuit's ruling, sponsors of employee retirement plans would be forced to defend against class action § 502(a) claims – and potentially other types of claims – in court despite having agreed to arbitration with their employees. Litigation of such claims is expensive and time-consuming for all parties. And the recurring nature of the questions raised in the petition is evident from the sheer volume of ERISA breach of fiduciary duty class actions brought in recent years.

ARGUMENT

I. The Ninth Circuit's Decision Conflicts With This Court's Precedent.

A. The decision conflicts with precedent requiring the enforcement of arbitration agreements.

Respondent Allen Munro signed "an agreement to arbitrate all claims that either the Employee or USC has against the other party to the agreement," which "expressly cover[ed] claims for violations of federal law." Pet. App. 4a.[5] Yet when Munro brought a claim against his employer under ERISA § 502(a)(2), the Ninth Circuit refused to order arbitration. In that court's view, Munro's agreement to arbitrate "all" of his claims against his employer did not encompass his ERISA § 502(a)(2) claims because such a claim is purportedly brought on behalf of a plan and thus essentially belongs to the plan, not the plaintiff who asserts it. In effect, the Ninth Circuit suggested that employers and employees can *never* agree to arbitrate claims brought by an employee under ERISA § 502(a)(2) without the plan's participation as an entity.[6] The

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[5] This brief focuses on the claim brought by Respondent Munro. The same analysis applies to the other Respondents.

[6] The question whether the ERISA breach of fiduciary duty claims can ever be arbitrated was not raised in the decision below. However, the Ninth Circuit did allow *Amaro v. Cont'l Can Co.*, 724 F.2d 747 (9th Cir. 1984), to survive, suggesting that ERISA breach of fiduciary duty claims are inherently non-arbitrable because arbitration provides deficient protection for the

Ninth Circuit further suggested that it likewise would not enforce agreements to arbitrate other types of claims brought in a representative capacity – including *qui tam* claims – because they, too, do not really belong to the plaintiff who asserts them.

The Ninth Circuit's ruling cannot be squared with applicable precedent of this Court. In *Epic*, the Court held that arbitration agreements must be enforced as written except for two narrow exceptions: (1) if the agreement is invalid on a ground that would render any contract unenforceable; or (2) Congress evinced a "clear and manifest" intent in another statute to preclude arbitration. *Epic*, 138 S. Ct. at 1621-24; *see also Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) ("arbitration is a matter of contract" and a court's job is to "'rigorously enforce' arbitration agreements according to their terms"). The Ninth Circuit has effectively created a third exception to the enforceability of arbitration agreements when a claim is brought in a representative capacity. In its view, even if a plaintiff has agreed to arbitrate "all" of the claims he "has," the agreement cannot be enforced when the plaintiff asserts a claim brought on a "derivative" basis. Such an exception has no footing in the FAA or any other statute, and it directly contradicts this Court's mandate that arbitration agreements be enforced except in the two narrow situations identified in *Epic*.

"equitable character" of ERISA plans – even while the court conceded that *Amaro* may irreconcilable with intervening Supreme Court case law. Pet. App. 12a n.1.

To be sure, the Ninth Circuit did not say that it was refusing to enforce Munro's arbitration agreement. Instead, it read the agreement narrowly to carve out claims brought by Munro in a representative capacity. But that is a distinction without a difference. By construing an agreement to arbitrate "all" claims to exclude ERISA § 502(a) claims (and potentially other claims, such as *qui tam* claims), the court declined to enforce Munro's agreement as written, in violation of *Epic* and related decisions from this Court.

B. The decision conflicts with precedent concerning ERISA.

The Ninth Circuit committed a second fundamental error by its effective assumption that Munro's § 502(a)(2) claim belongs to the plan, not Munro himself, and thus that his claim is only a "representative" claim. That holding creates a further conflict with governing law. Even if the Ninth Circuit were correct that Munro's arbitration agreement excludes claims brought on behalf of others, his § 502(a)(2) claim is an individualized claim that belongs to him under the applicable precedent of this Court.

By its terms, § 502(a)(2) authorizes a plan participant to bring a civil action for the relief listed in ERISA § 409. 29 U.S.C. § 1132(a)(2). Section 409, in turn, states that any fiduciary who breaches a duty shall be liable for any resulting losses suffered by the plan. 29 U.S.C. § 1109(a). Together, those provisions authorize an *individual plan participant* to sue so long as he seeks relief to cover losses of plan assets. A

plan itself is not its own fiduciary, and it is not authorized to bring a § 502(a)(2) claim under the statute. *Bowles v. Reade*, 198 F.3d 752, 761 (9th Cir. 1999) (explaining that an ERISA plan lacks "standing to sue under 29 U.S.C. § 1132(a), which limits eligibility for civil enforcement of ERISA to ERISA plan participants, beneficiaries, and fiduciaries, and the Secretary of Labor" (quoting *Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 917 (9th Cir. 1997)).

The Ninth Circuit's view that a § 502(a)(2) claim in effect belongs to the plan cannot be reconciled with this Court's decision in *LaRue*. There, this Court recognized a distinction between defined benefit ERISA plans (which used to be the prevalent form of retirement plan) and defined contribution ERISA plans, which "dominate the retirement plan scene today." *LaRue*, 552 U.S. at 255. In a defined benefit plan, participants receive fixed benefit payments from a single trust. *Id*. In that arrangement, the only way that plan fiduciaries can harm a participant is by taking actions that threaten the solvency of the entire trust, leaving it unable to make the required benefit payments. *Id*. That harm would necessarily be borne by every plan participant because if the trust becomes insolvent, no participant would receive his or her full benefits.

Defined contribution plans are distinctly different. In those plans, each participant holds plan assets in an individual account and invests those assets in different ways. *Id*. at 255-56; *see also* 29 U.S.C. § 1002(34) (defining "defined contribution plan"). In that arrangement, a breach of fiduciary duty typically causes individualized harm. *LaRue*, 552 U.S. at 255-

56. For instance, a fiduciary may breach a duty by including an imprudent investment fund in the menu of plan investment options. If only two participants allocate contributions to that fund, only those two participants would be harmed by that type of fiduciary breach. Other participants are not harmed because they did not invest in the fund at issue.[7] And the two participants would be harmed to different degrees depending on the amount of money they invested and lost in the fund.

Recognizing that defined contribution plans are different from defined benefit plans, *LaRue* held that a participant in a defined contribution plan need not demonstrate harm to the entire plan to bring an

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[7] For this reason, standing has become a significant issue in ERISA class action breach of fiduciary duty litigation against defined contribution plan fiduciaries, where the alleged injury is not plan-wide, but is confined to particular investment options that have excessive fees or poor performance. *See Spano v. The Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011) ("there must be a congruence between the investments held by the named plaintiff and those held by members of the class he or she wishes to represent"). As a result, plaintiffs and courts have tended to limit the scope of such class actions to plan participants invested in the same funds as the named plaintiffs. *See, e.g.*, *Sulyma v. Intel Corp. Inv. Policy Comm.*, No. 15-cv-04977, 2017 U.S. Dist. LEXIS 49788, *4 (N.D. Cal. Mar. 31, 2017), *reversed on other grounds*, No. 17-15864, 2018 U.S. App. LEXIS 33361 (9th Cir. Nov. 18, 2018) (plaintiff only attempted to represent participants who had invested in the same funds he had invested in); *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 15-civ-9936, 2017 U.S. Dist. LEXIS 143208, **29-30 (S.D.N.Y. Sept. 5, 2017) (given Article III standing concerns, proposed class definition was amended and limited to "all participants and beneficiaries of [the Plan in the relevant period] whose individual accounts suffered losses as a result of the conduct alleged … in the … Complaint").

ERISA § 502(a)(2) claim. 552 U.S. at 256. Instead, the participant need only show that the fiduciary breaches "impair the value of plan assets in a participant's individual account." *Id. LaRue* thus stands for the proposition that a defined contribution plan participant brings a § 502(a)(2) claim for individualized losses to his own account, not for losses that the plan as a whole may have sustained. *Id*. Indeed, *LaRue* was not a class action, and the plaintiff there sought relief for conduct that affected only him and his account – which demonstrates that, in a defined contribution plan, a § 502(a)(2) claim is individualized.

The Ninth Circuit's suggestion that Munro's § 502(a)(2) claim effectively belongs to the plan is at odds with *LaRue*. Like the plan in *LaRue*, the plan here is a defined contribution plan.[8] Moreover, like

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[8] The origins of the often-repeated adage that, in breach of fiduciary duty cases under ERISA, a plaintiff sues in a representative capacity on behalf of a plan, lie in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). *Russell* was not a retirement plan case, let alone an individual account, defined contribution plan case. It concerned a dispute over disability benefits from an employee welfare plan that was wholly funded by the employer, and the issue was whether a breach of fiduciary duty claim under 29 U.S.C. § 1132(a)(2) could support a claim for extra-contractual benefits (i.e., consequential damages to the plaintiff in addition to the benefits the plaintiff was due under the plan). The Court answered no, and, in the course of doing so, used the "on behalf of the plan" language. As the Seventh Circuit noted in *Spano*, 633 F.3d at 578-80, this construct may work well in a defined benefit plan context, where a common fund is managed by trustees for the guaranteed benefit of pensioners, but it is not easily adapted to the defined contribution context, where individual participants are in the position of choosing their own investments and what they are entitled to is only the balance in their own individual accounts. Moreover,

the plaintiff in *LaRue*, Munro seeks to recover losses for harm caused to his individual account balance – that is, "recovery for fiduciary breaches that impair the value of plan assets in [his] individual account." *LaRue*, 552 U.S. at 256. Accordingly, like the plaintiff in *LaRue*, Munro's claim belongs to him – not to the plan – because he is seeking compensation for losses that he allegedly suffered in his own individual account.[9]

Granted, Munro also seeks recovery for harm allegedly inflicted on the individualized accounts of other plan members. But that does not mean that he is seeking relief on behalf of the plan writ large, or that his claim "belongs" to the plan. To the contrary, Munro is seeking relief on his own behalf and as a

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the statute itself does not use the "representative basis" or "derivative action" language this contention relies on. All it says is that a fiduciary who commits a breach of fiduciary duty "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). Accordingly, as noted, courts have expressed concern about Article III standing issues, and they (or plaintiffs anticipating the problem) have tended to limit classes to those participants invested in and potentially harmed by the same investments in which the named plaintiffs have been invested.

[9] The Ninth Circuit incorrectly analogized Munro's § 502(a)(2) claim to a *qui tam* claim. Pet. App. 9a. In *qui tam* cases, however, the alleged loss is to the government, not to the individual bringing the claim. And there is no individually-owned account owned by the plaintiff in such a case. In defined contribution plans, by contrast, a § 502(a)(2) claim seeks restoration of losses to the plan account in which the individual bringing the claim is vested and which are non-forfeitable to the individual participant. 29 U.S.C. § 1053(a)(1).

representative of other plan participants whose individual accounts were allegedly harmed in the same way his was. In that manner, he is no differently situated from any Rule 23 named plaintiff who seeks to bring a claim on behalf of himself and as the representative of a Rule 23 class. In both cases, the plaintiff seeks relief for himself and a larger group of individuals who have also been harmed. It is well-settled that a putative Rule 23 class representative can agree to arbitrate the claim he asserts. *See, e.g., Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1074 (9th Cir. 2013 (enforcing arbitration agreement and vacating order certifying class action because the class representative signed an arbitration agreement that precluded class litigation). There is thus no principled reason why Munro, who brings a § 502(a)(2) claim on his own behalf and on behalf of a larger class of individual participants, should be relieved from his agreement to arbitrate all employment-related claims, which would include his § 502(a)(2) claim.

Other courts have recognized the parallels between a Rule 23 class representative and a participant in a defined contribution plan who seeks plan-wide relief under ERISA § 502(a)(2). In *Coan v. Kaufman*, for example, the Second Circuit held that a participant in a defined contribution plan bringing a § 502(a)(2) claim on behalf of himself and other participants needs to show that he adequately represents the interests of the other plan participants who have allegedly been harmed. 457 F.3d 250, 259 (2d Cir. 2006). Typically, a § 502(a)(2) plaintiff would satisfy that burden by establishing the elements of Rule 23 or by taking "adequate steps under the circumstances properly to act in a 'representative capacity on behalf

of the plan.'" *Id.* at 261 (quoting *Russell*, 473 U.S. at 142 n.9). Indeed, Munro himself recognizes that his claim is indistinguishable from a class action by alleging that he is a sufficient representative for other plan participants because he satisfies the Rule 23 requirements. He should therefore be treated as any other putative Rule 23 class representative; that is, his agreement to arbitrate his claim should be enforced.

In support of its decision, the Ninth Circuit relied on its opinion in *Bowles*, which holds that an individual plaintiff cannot settle an ERISA § 502(a)(2) claim without the plan's consent. 198 F.3d at 760. The Ninth Circuit reasoned that, if a plaintiff cannot settle a § 502(a)(2) claim, the claim must not belong to the plaintiff. Pet. App. 9a-10a. *Bowles* is inapposite for that point here, however, because it was not a class action, and it involved a *defined benefit plan*, and therefore the § 502(a)(2) claim by an individual there necessarily sought relief on behalf of the plan as a whole. Under those facts, where no individual accounts exist, it makes sense that a single plaintiff could not bind the plan by settling a claim for plan-wide relief. In a defined contribution plan, however, a plaintiff logically should be able to settle a § 502(a)(2) claim – as with any other class action – because the claim seeks individualized relief in which, for individuals properly in the class, each class member's individual account is affected.

At bottom, *LaRue* dictates that Munro's § 502(a)(2) claim belongs to him because it is a claim for individualized harm to his own plan account. Even if he seeks to act in a representative capacity for other plan participants, he is not precluded from agreeing

to arbitrate his § 502(a)(2) claim any more than a putative Rule 23 class representative is precluded from agreeing to arbitrate. His agreement to arbitrate "all" of his claims therefore must be enforced. The Ninth Circuit's failure to enforce his arbitration agreement thus runs directly contrary to this Court's precedent requiring the enforcement of arbitration agreements except in narrow circumstances not present here.

II. The Petition Concerns Matters Of Great Practical Importance.

Review is further warranted because the subject of this petition has significant practical repercussions. Although the Ninth Circuit's decision on its face purports merely to construe the terms of the arbitration agreement before it, the holding has far-reaching implications for ERISA plans and arbitrability generally. The assumption of the Ninth Circuit appears to be that, because a breach of fiduciary duty claim – even in the defined contribution context – essentially "belongs to the plan," such claims could only be arbitrated – if at all – if the plan involved were a party to the arbitration agreement. And this is assumed even though the plan fiduciaries – who are the only ones through whom the plan can act and the only ones who can restore diverted assets to the plan's participant accounts – will themselves be parties to the arbitration agreement and the ones being sued in such litigation. It is meritless under such circumstances to contend that the plan is not a party to the arbitration agreement *through* the participants' arbitration agreements with the plan's fiduciaries in ERISA breach of fiduciary duty litigation. As such, the plan

is present in the litigation, and its interests are protected through the normal standards applicable to settlement of class actions whether in court or in arbitration.

The Ninth's Circuit's decision, therefore, could effectively invalidate the vast majority of arbitration agreements with respect to § 502(a)(2) claims. Under the Ninth Circuit's view, it is possible that parties might *never* be able to agree to arbitrate § 502(a)(2) claims. But such arbitration agreements are critical both to ERISA plans and participants. Section 502(a)(2) claims constitute a significant percentage of ERISA litigation, and litigating those claims in court is expensive and time-consuming. The effect of the Ninth Circuit's ruling on SIFMA's members that sponsor ERISA plans is therefore significant because it could sweep into court claims that the parties agreed to arbitrate.

The Ninth Circuit's decision also raises important questions concerning arbitrability in general. In addition to suggesting that employers and employees cannot agree to arbitrate ERISA § 502(a)(2) claims without the plan's agreement to arbitration, the Ninth Circuit suggested that *qui tam* claims and other claims brought in a representative capacity likewise cannot be the subject of an agreement to arbitrate. By that logic, the Ninth Circuit's holding potentially limits the arbitrability of any claim brought in a representative capacity – including shareholder derivative suits, claims brought under California's Labor Code Private Attorney General Act (PAGA), and even Rule 23 class actions. The import of the Ninth Circuit's decision is thus not limited to ERISA

breach of fiduciary duty claims. It has significant implications for arbitration in general.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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