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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

Respondents seek to evade this Court's review by recasting the question presented as purportedly turning on the Ninth Circuit's "mundane interpretation of contractual language." Opp. 16. In reality, this case presents a question of surpassing importance to the continuing vitality of the "national policy favoring arbitration," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), as well as to countless ERISA plans and ERISA litigants, *see* SIFMA Br. 1–2: Whether courts deciding a motion to compel arbitration of an ERISA breach-of-fiduciary-duty claim must resolve any doubts concerning the agreement's scope in favor of arbitration or are instead free to disregard the broad language of a plan participant's arbitration agreement and deny arbitration because the claim is brought by a participant "on behalf of the Plan[ ]." Pet. App. 7a. This Court has time and again made clear that this question must be answered in favor of arbitration because "[a]n order to arbitrate [a] particular grievance should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960) (emphasis added). And most federal courts of appeals have faithfully applied this presumption of arbitrability where the parties disagree as to whether they intended to arbitrate a particular dispute. *See* Pet. 13–17 (collecting cases).

The Ninth Circuit, however, departed from this precedent, and thwarted the policies embodied in the Federal Arbitration Act ("FAA"), by holding that agreements providing for USC and its employees to arbitrate "all claims" they "may have" against each

other do not encompass respondents' claims under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), for breach of fiduciary duty in connection with their retirement benefits. Despite that expansive language, the Ninth Circuit refused to compel arbitration because ERISA breach-of-fiduciary-duty claims are "brought on behalf of the Plans" and thus supposedly are not "claims" that respondents "have." Pet. App. 7a.

But neither this Court nor any other court of appeals has ever suggested that the FAA's presumption of arbitrability is inapplicable to what respondents label "representative actions." Opp. 14. As in every other setting, the applicability of an arbitration agreement to a claim "brought on behalf" of another person must be determined by resolving "ambiguities as to the scope of the arbitration clause . . . in favor of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989). That presumption should have been dispositive here. Indeed, given the undisputed importance of retirement savings benefits as an element of employee compensation, it would undoubtedly come as a tremendous surprise to employees that an arbitration agreement covering their claims for "compensation" did not encompass claims regarding the management of their retirement plans. Pet. App. 16a. In any event, respondents' characterization of ERISA § 502(a)(2) claims as "representative actions" fails on its own terms because even the Ninth Circuit has recognized that "the cause of action *belong[s] to the individual plaintiff*." *Comer v. Micor, Inc.*, 436 F.3d 1098, 1103 (9th Cir. 2006) (emphasis added).

Ultimately, respondents—like the Ninth Circuit—espouse an artificially narrow, and unduly rigid, approach to arbitrability that would render ERISA

breach-of-fiduciary-duty claims effectively non-arbitrable. According to respondents, "[h]ad the University intended th[e] [arbitration] agreements to encompass the plans' § [502](a)(2) claims, *it would have specifically said so*." Opp. 16 (emphasis added). But that clear-statement rule would impose precisely the type of barriers to arbitration that the FAA was designed to eradicate.

Of course, this is not the first time that the Ninth Circuit—and the judge who authored the opinion below—have issued decisions incompatible with the FAA. *See* Pet. 3. As it has done on multiple prior occasions, this Court should again grant review to make clear that the "national policy favoring arbitration" truly applies nationwide—including in the Ninth Circuit.

I. THE DECISION BELOW DISREGARDS THE PRESUMPTION OF ARBITRABILITY APPLIED BY THIS COURT AND OTHER COURTS OF APPEALS.

The Ninth Circuit's decision in this case conflicts with settled precedent from this Court recognizing that there is a "liberal federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), that creates a "presumption of arbitrability" "where [a] contract contains an arbitration clause," *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). Other courts of appeals have followed those decisions, and given effect to that policy, by holding that "doubts in construction" of an arbitration agreement "are resolved against the resisting parties." *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 133 F.3d 225, 234 (3d Cir. 1998).

Respondents dispute the existence of this conflict by insisting that "[n]othing 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." Opp. 14. But there is no carve-out to the federal policy in favor of arbitration for claims brought "on behalf of" another person, and the courts "may not engraft [their] own exceptions onto the statutory text." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 17-1272, slip op. at 7 (Jan. 8, 2019). If there were, the presumption of arbitrability would be inapplicable to a vast range of cases in which one person is litigating on another's behalf, including wrongful-death actions brought on behalf of a decedent's estate and representative actions brought by a parent or guardian on behalf of minors. Those gaping exceptions would eviscerate the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1425 (2017) (reversing order denying motion to compel arbitration of claim brought by decedent's survivor).

Moreover, respondents' insistence that "ERISA fiduciary breach actions . . . are representative actions on behalf of a retirement plan" overlooks key elements of how ERISA and benefit plans operate. Opp. 1. While ERISA § 502(a)(2) "does not provide a remedy for individual injuries distinct from plan injuries," *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008), this hardly means that such claims are brought in a strictly representative capacity. Participants bring suit over "individual account plans" such as the plans here because they have allegedly suffered losses to their plan accounts; recoveries paid

to the plan benefit those participants because the plan holds those payments in trust for each participant in (to quote respondents) "her account." Opp. 2; *see also* 29 U.S.C. § 1103(a). And if respondents were correct that a Section 502(a)(2) claim is purely representative, it would not be necessary for participants to show injury to their individual account in order to establish standing to bring such a claim. *But see Taveras v. UBS AG*, 612 F. App'x 27, 29 (2d Cir. 2015) (rejecting the plaintiff's "attempt[ ] to demonstrate injury-in-fact by showing diminution in the value of [the plan's] assets generally" because "[i]t was possible that the [plan] lost value while Taveras's individual account did not"); *Wilcox v. Georgetown Univ.*, No. 18-cv-422, 2019 WL 132281, at *9 (D.D.C. Jan. 8, 2019) (concluding participants lacked standing to assert a fiduciary-breach claim "as to the Vanguard funds, which is an investment option neither Plaintiff selected"). The absence of Article III standing in such a suit by an uninjured plan participant lays bare the flaws in respondents' characterization of ERISA § 502(a)(2) claims as strictly "representative."

In reality, ERISA fiduciary-breach claims are at least partially individual in nature. The Ninth Circuit itself—in a decision cited repeatedly in the petition but entirely ignored by respondents—has made clear that, "[e]ven though money recovered on [an] ERISA [§ 502(a)(2)] claim would go to the plan, . . . the cause of action *belong[s] to the individual plaintiff*." *Comer*, 436 F.3d at 1103 (emphasis added).

Nor can respondents draw support for their characterization of ERISA § 502(a)(2) claims as "representative" by analogizing to the False Claims Act ("FCA"). Opp. 15. An ERISA plan participant has a much greater stake in a Section 502(a)(2) claim than

a *qui tam* relator has in an FCA claim. FCA claims are presumptively brought by the government; by contrast, respondents concede that "[a] plan cannot act on its own" under Section 502(a)(2). Opp. 4; *see also Bowles v. Reade*, 198 F.3d 752, 761 (9th Cir. 1999) ("ERISA plans[ ] are not fiduciaries entitled to sue under ERISA." (alteration in original)). An FCA claim seeks recovery of losses to the government, and the relator's only interest is in "the bounty he will receive if the suit is successful," *Vt. Agency of Nat'l Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000); ERISA plan participants sue for losses to their individual accounts, and any recovery is ultimately paid to participants when they become eligible to receive benefits, *see* Opp. 2 ("upon retirement the participant receives . . . what is in her account"). And yet, this Court has made clear that even *qui tam* relators "have" an FCA claim: "[T]he statute gives *the relator himself* an interest in the lawsuit" because the FCA "effect[s] a partial assignment of the Government's damages claim" to the relator, who will receive a portion of the government's recovery. *Vt. Agency of Nat'l Res.*, 529 U.S. at 772–73. It follows that an ERISA plan participant "has" a Section 502(a)(2) claim, as well.[1]

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[1] Respondents fault USC for not demonstrating in its petition that the Ninth Circuit's decision in *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791 (9th Cir. 2017)—which held that an FCA *qui tam* claim was non-arbitrable because it "belong[ed] to the government," *id.* at 800—was "incorrect" and in "conflict[ ] with any decision of this Court." Opp. 15. But USC seeks review of the Ninth Circuit's decision *in this case*, not *Welch*, and demonstrated at length in the petition that the Ninth Circuit's reasoning here is both flawed and at odds with the decisions of other circuits. By highlighting the

Ultimately, however, even if the respondents were correct that ERISA § 502(a)(2) claims are purely "representative actions," they would still be unable to reconcile the Ninth Circuit's decision with the FAA jurisprudence of this Court and other courts of appeals. Multiple aspects of the parties' arbitration agreements demonstrate that the parties intended those agreements to encompass Section 502(a)(2) claims. Not only do the agreements provide for arbitration of "[a]ny claim that otherwise would have been decidable in a court of law" and "claims for violation of any federal . . . statute," Pet. App. 15a, but they also expressly include "claims for wages or other compensation due," *id.* at 16a. Respondents' retirement savings plans are an important part of their overall compensation, with USC's generous double-matching representing the equivalent of 10% of employees' annual salary for those who take advantage of it.[2]

In light of these overlapping, broadly worded arbitration clauses, the supposedly "representative" nature of Section 502(a)(2) claims could, at most, create some ambiguity about whether such claims are encompassed by the parties' arbitration agreements. But "'to acknowledge the ambiguity is to resolve the issue, because all ambiguities must be resolved *in favor of arbitrability*.'" *Sanchez v. Nitro-Lift Techs., LLC*, 762 F.3d 1139, 1147 (10th Cir. 2014).

Ninth Circuit's reliance on *Welch*, respondents simply underscore that the Ninth Circuit's flawed approach to arbitrability is not confined to the ERISA setting.

[2] Respondents highlight that "there are five different iterations among the nine arbitration agreements signed by the plaintiffs," Opp. 8, but neither respondents nor the Ninth Circuit has suggested that these distinctions are somehow material to the arbitrability of respondents' claims.

The Ninth Circuit failed to adhere to this fundamental tenet of FAA jurisprudence. Instead, it resolved the ambiguity *against* arbitration, ruling that an employee's agreement to arbitrate all claims she "may have" does not embrace a "cause of action [that] belong[s] to" her, *Comer*, 436 F.3d at 1103, that may not be brought by the plan, and that concerns alleged losses to "her account," Opp. 2. In flipping the normal presumption regarding arbitration in this manner, the Ninth Circuit relegated the parties to costly and time-consuming litigation that they sought to avoid when they voluntarily agreed to arbitrate "all claims" they "may have" against each other. No other circuit would have endorsed such a departure from this Court's longstanding precedent, from the FAA's important congressional objectives, and from the parties' clearly expressed intentions. *See* Pet. 13–17.

Finally, respondents suggest that the Ninth Circuit's narrow reading of their arbitration agreements advances ERISA's purposes, including "'provid[ing] for appropriate remedies [and] sanctions'" and "develop[ing] Federal common law on the prudent administration of retirement plans." Opp. 6 (quoting 29 U.S.C. § 1001(b)). Of course, arbitration provides just as suitable a forum to vindicate these interests; for this reason, every federal court of appeals to consider the issue—*except for the Ninth Circuit*—has rejected the argument that ERISA claims are categorically non-arbitrable. *See* Pet. 9–10.

In fact, it is the decision below that will undermine ERISA by creating additional inefficiency and complexity for ERISA litigants. As respondents concede, "ERISA does allow individual participants to pursue personal actions in other circumstances," such as

when they sue for "personal benefits under a plan" under Section 502(a)(1)(B). Opp. 6–7. Those "personal actions" would be arbitrable under the Ninth Circuit's decision—assuming that the Ninth Circuit recedes from its earlier ruling that ERISA claims are *never* arbitrable. *See Amaro v. Cont'l Can Co.*, 724 F.2d 747 (9th Cir. 1984). But plaintiffs often combine multiple ERISA claims in a single action, pleading Section 502(a)(1) claims for benefits alongside Section 502(a)(2) fiduciary-breach claims arising from the same facts. *See*, *e.g.*, *Cotton v. Mass. Mut. Life Ins. Co.*, 402 F.3d 1267, 1273 (11th Cir. 2005); *Estate of Spinner v. Anthem Health Plans of Va., Inc.*, 388 F. App'x 275, 277 (4th Cir. 2010). The Ninth Circuit's decision would require splitting those ERISA cases into arbitrable and non-arbitrable portions, generating considerable burdens for courts and denying litigants the "lower costs" and "greater efficiency and speed" that are among the primary "benefits of private dispute resolution." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

II. THE DECISION BELOW HAS FAR-REACHING CONSEQUENCES.

Respondents' attempts to minimize the implications of the Ninth Circuit's decision are equally unpersuasive.

Respondents suggest that this case has limited importance because the decision involves "a mundane interpretation of contractual language" in the particular arbitration agreements at issue. Opp. 16. But the contractual language used by the parties here is standard language in employment arbitration agreements. *See* Pet. 23 n.2 (collecting cases). Under the Ninth Circuit's decision, none of those agreements will extend to ERISA § 502(a)(2) claims unless they

include language "*specifically* sa[ying] so." Opp. 16 (emphasis added). That clear-statement requirement has tremendous practical implications because an increasing number of ERISA fiduciary-breach claims has been filed in recent years. Respondents' counsel alone has filed more than fifteen fiduciary-breach actions in the past two-and-a-half years against leading educational institutions and major corporations that collectively employ hundreds of thousands of people.[3]

Nor are the implications of the Ninth Circuit's decision limited to the ERISA setting. *See* SIFMA Br. 15. As that court's earlier decision in *Welch* makes clear, its reasoning that plaintiffs do not "have" claims litigated "on behalf of" others extends to the FCA and other so-called "representative actions," and, outside of the "representative" setting, the broader hostility to arbitration exhibited by the Ninth Circuit in this case is certain to be manifested in future cases where, as it did here, the Ninth Circuit again casts aside the FAA's arbitration-promoting objectives in favor of a presumption *against* arbitration.

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[3] *See Lucas v. Duke Univ.*, No. 1:18-cv-00722 (M.D. N.C.); *Ramsey v. Philips N. Am. LLC*, No. 3:18-cv-01099 (S.D. Ill.); *Sacerdote v. NYU Langone Hosps.*, No. 1:17-cv-08834 (S.D.N.Y.); *Sacerdote v. New York Univ.*, No. 1:16-cv-06284 (S.D.N.Y.); *Clark v. Duke Univ.*, No. 1:16-cv-01044 (M.D. N.C.); *Cunningham v. Cornell Univ.*, 1:16-cv-06525 (S.D.N.Y.); *Divane v. Northwestern Univ.*, 1:16-cv-08157 (N.D. Ill.); *Cates v. Columbia Univ.*, No. 1:16-cv-06524 (S.D.N.Y.); *Henderson v. Emory Univ.*, No. 1:16-cv-02920 (N.D. Ga.); *Kelly v. The Johns Hopkins Univ.*, No. 1:16-cv-02835 (D. Md.); *Cassell v. Vanderbilt Univ.*, No. 3:16-cv-02086 (M.D. Tenn.); *Vellali v. Yale Univ.*, No. 3:16-cv-01345 (D. Conn.); *Sweda v. Univ. of Pennsylvania*, No. 2:16-cv-04329 (E.D. Pa.); *Tracey v. Mass. Inst. of Tech.*, No. 1:16-cv-11620 (D. Mass.); *White v. Chevron Corp.*, No. 3:16-cv-00793 (N.D. Cal.); *Marshall v. Northrop Grumman Corp.*, 2:16-cv-06794 (C.D. Cal.).

Respondents also argue that review is unwarranted because they "asserted *other* arguments against the application of their employment agreements to their claims." Opp. 17 (emphasis added). But as respondents concede, those other arguments "were not addressed by the court of appeals or the district court." *Id.* The question presented here, in contrast, was squarely addressed by the courts below, and the Ninth Circuit's flawed resolution of that question is now binding precedent in the Nation's largest circuit. The theoretical possibility that "other," unspecified "arguments" could provide a basis for respondents to avoid arbitration on remand is no reason to leave the Ninth Circuit's erroneous decision in place and to countenance the application of its anti-arbitration reasoning in future litigation.

CONCLUSION

The Ninth Circuit failed to apply the FAA's presumption of arbitrability and to resolve doubts concerning the scope of the parties' arbitration agreements in favor of arbitration. In so doing, it once again departed from the arbitration jurisprudence of this Court and other courts of appeals, and imperiled the important congressional objectives embodied in the FAA. The petition for a writ of certiorari should be granted to ensure that all ERISA litigants—including those in the Ninth Circuit—receive the benefits of the FAA's nationally uniform, pro-arbitration policies.

Respectfully submitted.

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