No. ______

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**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 ("ERISA") provides that a "civil action may be brought . . . by a participant" in an ERISA plan for breach of fiduciary duty. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). If liability is established in that action, the fiduciary is "personally liable to make good to such plan any losses to the plan," ERISA § 409(a), 29 U.S.C. § 1109(a), which, like all plan assets, are held in trust for the benefit of the plan's participants.

Respondents are participants in two ERISA plans sponsored by petitioner University of Southern California; they signed arbitration agreements in which they agreed to arbitrate "all claims . . . that [they] may have against" the University. Respondents thereafter filed ERISA breach-of-fiduciary-duty claims against the University. Although this Court has held that "where [a] contract contains an arbitration clause, there is a presumption of arbitrability," *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986), the Ninth Circuit reversed this presumption and held that respondents' claims "fall[ ] outside the scope of the [arbitration] agreements" because respondents' "claims are brought on behalf of the Plans," not "on their own behalf," and therefore are not "claims" that respondents "have" against the University.

The question presented is:

Whether an agreement to arbitrate "all claims" that an ERISA plan participant "may have" against a plan fiduciary encompasses a breach-of-fiduciary-duty claim under ERISA § 502(a)(2).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties listed in the caption, Daniel C. Wheeler, Edward E. Vaynman, Jane A. Singleton, Sarah Gleason, Rebecca A. Snyder, Dion Dickman, Corey Clark, and Steven L. Olson are respondents.

Pursuant to this Court's Rule 29.6, undersigned counsel state that University of Southern California is a nonprofit California corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners University of Southern California, USC Retirement Plan Oversight Committee, and Lisa Mazzocco (together, "USC") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit is published at 896 F.3d 1088. Pet. App. 1a–12a. The order denying USC's petition for rehearing or rehearing en banc is unpublished. *Id.* at 34a–35a. The opinion of the district court is unpublished but is available at 2017 WL 1654075. *Id.* at 13a–33a.

JURISDICTION

The court of appeals issued its opinion on July 24, 2018, and issued its order denying rehearing or rehearing en banc on August 31, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 409 and 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1109, 1132, and the entirety of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, are reproduced in the appendix to this petition. Pet. App. 36a–49a.

STATEMENT

The FAA embodies "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Consistent with that policy, this Court has repeatedly held that, where parties have entered into a valid arbitration agreement, "any doubts concerning the scope

of arbitrable issues should be resolved in favor of arbitration." *Id.* at 24–25.

In the decision below, the Ninth Circuit flipped this well-established rule on its head. Respondents agreed to arbitrate "all claims" they "may have" against USC, including "claims for violation of any federal . . . statute." Pet. App. 15a. The Ninth Circuit nevertheless held that respondents' claims for breach of fiduciary duty under ERISA are not arbitrable. The court reasoned that ERISA breach-of-fiduciary-duty claims are not "claims" that respondents "have"—even though "the cause[s] of action" admittedly "belong[ ] to the individual" respondents—because any recovery would be paid to the plans, which would hold the funds in trust for respondents, rather than paid to respondents directly. *Id.* at 10a (internal quotation marks omitted). In reaching that counterintuitive conclusion, the Ninth Circuit broke with the decisions of both this Court and other courts of appeals by ignoring the expansive language of the parties' arbitration agreements and disregarding the requirement that "ambiguities as to the scope of the arbitration clause[s]" be "resolved in favor of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475–76 (1989).

The Ninth Circuit's artificially narrow reading of the arbitration agreements in this case creates a presumption *against* arbitration that will have profound practical consequences. The Ninth Circuit has rendered ERISA breach-of-fiduciary-duty claims non-arbitrable in the absence of explicit contractual language affirming the arbitrability of those specific claims—which is likely to exist in few, if any, employment contracts. And it has done so despite the fact

that retirement benefits are among the most important components of employee compensation, and therefore are unquestionably contemplated by parties, like those here, that agree to arbitrate "all claims" regarding "remuneration," "wages or other compensation due." Pet. App. 15a–16a. The Ninth Circuit's decision eviscerates the legal certainty and national uniformity essential to ERISA plans, and deprives both ERISA litigants and ERISA plans of "the benefits of private dispute resolution." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

Unfortunately, this is not an isolated occurrence. On the contrary, the decision below is only the latest example of the Ninth Circuit's refusal to adhere to this Court's FAA jurisprudence (often in decisions authored by the same judge who authored the Ninth Circuit's decision in this case). *See*, *e.g.*, *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016) (Thomas, C.J.), *rev'd sub nom. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204 (9th Cir. 2010) (Thomas, J.), *rev'd*, 565 U.S. 95 (2012); *Jackson v. Rent-A-Center West, Inc.*, 581 F.3d 912 (9th Cir. 2009) (Thomas, J.), *rev'd*, 561 U.S. 63 (2010); *see also Varela v. Lamps Plus, Inc.*, 701 F. App'x 670 (9th Cir. 2017), *cert. granted* 138 S. Ct. 1697 (2018); *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom. AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

This Court should grant review to establish a uniform national rule regarding the arbitrability of ERISA breach-of-fiduciary-duty claims and to reject the Ninth Circuit's most recent challenge to "the federal policy in favor of arbitral dispute resolution."

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985).

1. USC offers a retirement savings program for eligible faculty and staff comprising two defined-contribution retirement savings plans: the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax-Deferred Annuity Plan (together, the "Plans"). First Amended Complaint ("FAC") ¶ 9. USC double-matches employees' contributions up to 5% of their eligible pay: it automatically contributes to each eligible employee's account an amount equal to 5% of that employee's salary, and it matches any employee contributions dollar-for-dollar up to an additional 5% of the employee's salary. *Id.* at ¶ 11. Nearly every eligible employee—from custodians to deans, from clerical staff to department heads—has an account in both Plans. *Id.* at ¶ 10. The Plans have experienced tremendous growth in recent years; between December 31, 2009, and December 31, 2014, for example, the Plans' assets grew by 70%, from $2.7 billion to more than $4.6 billion. *Id.* at ¶ 160.

Nevertheless, respondents—current and former employees of USC and participants in the Plans—filed this putative class action seeking to represent a class of "[a]ll participants and beneficiaries of the [Plans]." FAC ¶ 227. Like the plaintiffs in more than a dozen other actions contemporaneously filed against major universities, all represented by the same plaintiffs' counsel, respondents alleged that USC breached its fiduciary duties by, among other things, offering "such a high number of investment options [that it] causes participant confusion," *id.* at ¶ 263, and failing to "us[e] the Plans' bargaining power to reduce expenses," *id.* at ¶ 4.

Respondents asserted these claims under ERISA § 502(a)(2), which provides that "[a] civil action may be brought . . . by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). Section 1109, in turn, states that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries . . . shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." ERISA § 409(a), 29 U.S.C. § 1109(a).

USC moved to compel arbitration under arbitration agreements that respondents had signed upon commencing their employment with USC. While there are some variations among respondents' arbitration agreements, those variations are not material here because each agreement provides in relevant part:

> [T]he University and the faculty or staff member named below ("Employee") agree to 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* . . . ; and all claims that the University may have against Employee. *Any claim that otherwise would have been decidable in a court of law—whether under local, state or federal law—will instead be decided by arbitration*, except as specifically excluded by this Agreement. The claims covered by this Agreement include, but are not limited to, [claims for wages or other compensation due]; [assorted other claims]; . . . [and] claims for violation of

> *any federal, state or other governmental law, statute, regulation, or ordinance*.

Pet. App. 14a–15a (emphases added); *see also id.* at 4a ("[c]onsistent among the various agreements is an agreement to arbitrate all claims that either the Employee or USC has against the other party"). Such language is commonplace in employment arbitration agreements. *See infra* at 23 n.2.

2. The district court denied USC's motion to compel arbitration.

As an initial matter, the district court rejected respondents' position that ERISA claims are categorically non-arbitrable, reasoning that although "[t]he Ninth Circuit, 'in the past, expressed skepticism about the arbitrability of ERISA claims . . . [,] those doubts seem to have been put to rest by the Supreme Court's opinions.'" Pet. App. 18a. The district court concluded that "ERISA claims are subject to arbitration when the parties have executed a valid arbitration agreement." *Id.*

The district court nonetheless proceeded to hold that plan participants can never agree to arbitrate ERISA breach-of-fiduciary-duty claims "without the consent of [the] plan." Pet. App. 33a. Although ERISA § 502(a)(2) specifically vests plan participants with authority to bring a civil action for breach of fiduciary duty, and although respondents brought their claims in their own names—and as a putative class action, aggregating the individual claims of all other participants—the district court determined that Section 502(a)(2) claims in fact "belong to the *plan*" because any recovery would be paid into the plan rather than to respondents directly. *Id.* at 28a (emphasis added). The court therefore concluded that the claims

could not be arbitrated without plan consent. *Id.* at 33a.

The district court believed that this conclusion was "closely aligned with the goals of ERISA"—namely, "'protect[ing] pension plans from looting by unscrupulous employers and their agents.'" Pet. App. 29a. "If the Court were to hold participants' arbitration agreements controlled their § 502(a)(2) claims, fiduciaries could mitigate their ERISA obligations to their plans and erect barriers to ERISA enforcement on behalf of plans by requiring employees to sign arbitration agreements," which "would (1) guarantee fiduciaries would essentially never be held to account for their potential wrongdoings in court and (2) give fiduciaries many procedural advantages at the outset of any § 502(a)(2) action that they would not be entitled to in a court proceeding." *Id.* According to the district court, "allowing such arbitration agreements to control participants' § 502(a)(2) claims would, in a sense, be allowing the fox to guard the henhouse." *Id.*

3. The Ninth Circuit affirmed on different grounds. The court of appeals declined to endorse the district court's reasoning that arbitration of an ERISA § 502(a)(2) claim requires the plan's consent. But the court nevertheless concluded that respondents do not "have" ERISA breach-of-fiduciary-duty claims—and that their agreements to arbitrate "'all claims . . . that Employee may have against the University'" therefore "do[ ] not extend to" those claims—because the "claims are brought on behalf of the Plans." Pet. App. 7a–8a (ellipsis in original).

This particular argument was not even raised by respondents. Rather, the Ninth Circuit raised it *sua sponte* in a clerk's order, issued four days before oral argument, directing the parties "to prepare to discuss

the implications of *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 971 F.3d 791 (9th Cir. 2017)." *See Munro v. Univ. of S. Cal.*, No. 17-55550 (9th Cir.), Dkt. 45. In *Welch*, the Ninth Circuit concluded that an arbitration agreement with similarly broad language did not encompass a *qui tam* claim under the False Claims Act ("FCA"). "Because 'the underlying fraud claims asserted in a FCA case belong to the government and not to the relator,'" the court reasoned, "the claims were not claims that the employee *had* against the employer and therefore [were] not within the scope of the arbitration agreements." Pet. App. 8a (quoting *Welch*, 871 F.3d at 800 & n.3) (emphasis added).

The Ninth Circuit deemed *Welch* dispositive because "[t]here is no shortage of similarities between *qui tam* suits under the FCA and suits for breach of fiduciary duty under ERISA." Pet. App. 9a. Ultimately, however, the Ninth Circuit identified only two purported similarities—namely, that "both *qui tam* relators and ERISA § 502(a)(2) plaintiffs are not seeking relief for themselves" but rather for injury to a third party (the government and the plan, respectively); and "neither the *qui tam* relator nor the ERISA § 502(a)(2) plaintiff may alone settle a claim." *Id.* On those bases, the court concluded that "[b]ecause the parties consented only to arbitrate claims brought on their own behalf, and because the Employees' present claims are brought on behalf of the Plans, . . . the present dispute falls outside the scope of the agreements." *Id.* at 7a.

In so ruling, the Ninth Circuit recognized that, "in a breach-of-fiduciary duty suit under ERISA, 'the cause of action *belong[s] to the individual plaintiff*,'" Pet. App. 10a (quoting *Comer v. Micor, Inc.*, 436 F.3d

1098, 1103 (9th Cir. 2006) (emphasis added; alteration in original)), but it discounted this fact because "the same is true of a *qui tam* suit under the FCA where the government declines to intervene," *id.* And the court conceded that respondents' arbitration agreements sweep even more broadly than "all claims" that the employee "may have." In particular, immediately following that sentence, the arbitration agreements state that "*[a]ny* claim that otherwise would have been decidable in a court of law—whether under local, state or federal law—will instead be decided by arbitration, *except as specifically excluded by this Agreement*." *Id.* at 15a (emphases added). But the Ninth Circuit brushed aside this broad language in a single, conclusory sentence. *See id.* at 8a ("As in *Welch*, we cannot interpret the catch-all clause agreeing to arbitrate '[a]ny claim that otherwise would have been decidable in a court . . . for violation of any federal . . . statute' to cover claims belonging to other entities." (alterations in original)).

The Ninth Circuit also declined to endorse the district court's conclusion that, as a general matter, ERISA claims are arbitrable. As the court explained, Ninth Circuit precedent holds that "ERISA's mandated 'minimum standards [for] assuring the equitable character of [ERISA] plans' could not be satisfied in an arbitral proceeding." Pet. App. 12a n.1 (citing *Amaro v. Cont'l Can Co.* 724 F.2d 747 (9th Cir. 1984) (alterations in original)). The Ninth Circuit acknowledged that there is "considerable force to USC's position" that intervening precedent from this Court overruled that holding, but it "le[ft] the issue of *Amaro*'s viability for another day." *Id.* By leaving that decision intact, the Ninth Circuit reinforced a circuit split regarding the arbitrability of ERISA claims and declined to adopt the unanimous view of every other

court of appeals that has considered the question, all of which have held that ERISA claims are arbitrable. *See Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116, 122 (2d Cir. 1991); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1118 (3d Cir. 1993); *Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475, 479 (8th Cir. 1988); *Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000).

REASONS FOR GRANTING THE PETITION

This Court has repeatedly recognized, and granted certiorari to vindicate, the "liberal federal policy favoring arbitration" embodied in the FAA. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). That policy requires, among other things, that "ambiguities as to the scope of [an] arbitration clause" be "resolved in favor of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475–76 (1989). In accordance with the FAA's statutory objectives, federal courts of appeals apply a presumption in favor of arbitrability and compel arbitration unless it can be said with "'*positive assurance*'" that the dispute is not encompassed by the parties' agreement to arbitrate. *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 133 F.3d 225, 231 (3d Cir. 1998) (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (emphasis added)).

As the decision below makes clear, the Ninth Circuit has charted an entirely different course. It has transformed the FAA's policy in favor of arbitration into a presumption *against* arbitration. The court ruled that respondents' breach-of-fiduciary-duty claims under ERISA are not encompassed by their

agreements to arbitrate "all claims," including "claims for . . . compensation," they "may have" against USC—even though ERISA-governed retirement benefits are among the most important forms of compensation employees receive—because the "claims are brought on behalf of the Plans," Pet. App. 7a, 15a–16a, which would hold any recovery in trust for respondents. But under this Court's precedent and the approach followed by other circuits, the capacious language of these arbitration agreements, which is identical to countless other employment arbitration agreements, is more than adequately broad to encompass respondents' breach-of-fiduciary-duty claims because, as the Ninth Circuit conceded, those "cause[s] of action belong[ ] to the individual plaintiff[s]" themselves. *Id.* at 10a. It is therefore impossible to review that expansive language and conclude with "positive assurance" that the parties intended to exclude ERISA breach-of-fiduciary-duty claims from their otherwise-comprehensive arbitration agreements. In fact, if respondents had filed their claims anywhere other than in the Ninth Circuit, the claims would have been sent to arbitration.

This is not the first time the Ninth Circuit has issued a decision anathema to the FAA's statutory objectives. In the past decade, this Court has reviewed five decisions in which the Ninth Circuit has refused to enforce an arbitration agreement, and it has thus far reversed in four of them, with the remaining case under submission. *See supra* at 3 (collecting cases). In several of these cases, there was not even a clear circuit split. *See* Petition for Certiorari at 22–24, *AT&T Mobility LLC v. Concepcion*, No. 09-893 (Jan. 25, 2010), 2010 WL 6617833; Petition for Certiorari at 20 & n.5, *Lamps Plus, Inc. v. Varela*, No. 17-988 (July 9, 2018), 2018 WL 3374999. This Court's intervention

is once again required to ensure that the FAA's policy in favor of arbitration is enforced consistently in all circuits and that cost-effective and efficient arbitration procedures are fully available to resolve ERISA breach-of-fiduciary-duty claims.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT AND THE DECISIONS OF NUMEROUS FEDERAL COURTS OF APPEALS.

The Ninth Circuit's decision to carve out ERISA breach-of-fiduciary-duty claims from the plain language of the parties' broadly worded arbitration agreements squarely conflicts with decisions of this Court and other courts of appeals applying the congressionally mandated presumption in favor of arbitrability.

A. This Court's precedent makes clear that arbitration agreements must be liberally construed in favor of arbitration. Congress enacted the FAA specifically "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). That statute "embodies [a] national policy favoring arbitration and places arbitration agreements on an equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). In fact, this Court's "cases place it beyond dispute that the FAA was designed to *promote* arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011) (emphasis added).

In light of this "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), this Court has held that "where [a] contract

contains an arbitration clause, there is a *presumption of arbitrability*." *AT&T Techs.,* 475 U.S. at 650 (emphasis added). Accordingly, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25; *see also Volt Info. Scis., Inc.*, 489 U.S. at 475–76 ("[D]ue regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration."). The Court has emphasized that "an order to arbitrate the 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. Doubts should be resolved in favor of coverage.'" *AT&T Techs.*, 475 U.S. at 650 (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960)) (emphasis added).[1]

B. Most federal courts of appeals consistently adhere to this Court's instruction that arbitration agreements be liberally construed in favor of arbitration, and, in accordance with this Court's precedent, they refuse to compel arbitration *only* where there is no doubt that the parties meant to exclude the dispute from their arbitration agreement.

1. The First Circuit faithfully applied the FAA and this Court's arbitration precedent in *Dialysis Care Center, LLC v. RMS Lifeline, Inc.*, 638 F.3d 367 (1st Cir. 2011), where it compelled arbitration despite ambiguity regarding the scope of the arbitration

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[1] The Court has made clear that "the same rules of arbitrability that govern labor cases" also apply to the FAA and has therefore cited arbitrability cases from those two settings interchangeably. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 298 n.6 (2010).

agreement. There, the parties executed a management service agreement ("MSA") that contained an arbitration clause applicable to "any dispute that may arise under th[e MSA]." *Id.* at 371. The plaintiffs subsequently filed suit seeking, among other things, "a declaration that the MSA was null, allegedly because [the defendant] fraudulently induced [the plaintiffs] to enter into the MSA." *Id.* When the defendant moved to compel arbitration, the plaintiffs resisted on the ground that "the use of the language 'arising under' [the MSA] (as opposed to, e.g., 'arising under or relating to') presupposes a valid agreement" and therefore did not encompass a dispute over the validity of the MSA. *Id.* at 377.

The First Circuit found that "the terms of the Arbitration Clause [we]re not clear or specific and leave room for reasonable diverse interpretations on the issue of whether the parties agreed to arbitrate [the plaintiff's] fraudulent inducement claim and the resulting dispute over the validity of the MSA." *Dialysis Care Ctr., LLC*, 638 F.3d at 379. The court nevertheless concluded that, because "it cannot be said with positive assurance that the 'arising under' language used in the Arbitration Clause is not sufficient to encompass the current dispute . . . [,] [the plaintiffs] have not rebutted the presumption in favor of arbitrability." *Id.* at 381–82. The First Circuit therefore compelled the parties to arbitrate their dispute. *Id.* at 383–84.

2. The Third Circuit reached a similar result in *In re Prudential Insurance Co. of America Sales Practice Litigation*, 133 F.3d 225 (3d Cir. 1998), where the court applied an ambiguous arbitration agreement to compel arbitration of the plaintiffs' claims that their

employer retaliated against them for refusing to participate in an insurance fraud. *Id.* at 227. Upon commencing their employment, the plaintiffs each agreed to arbitrate "any dispute, claim, or controversy arising out of or in connection with the business of any member of the [National Association of Securities Dealers ('NASD')], or arising out of the employment or termination of employment of associated person(s) with any member, *with the exception of disputes involving the insurance business of any member which is also an insurance company*." *Id.* at 228 (emphasis added). As the court explained, the "question that is at the heart of this case" is "whether employment disputes that implicate a member's insurance business fall under the insurance business exception." *Id.* at 233.

The Third Circuit reasoned that "[o]n the one hand, it is clear . . . that employment disputes were unequivocally intended to be arbitrated," while "o[n] the other hand, the NASD has expressed a clear and unequivocal intent not to arbitrate 'insurance-only' or 'intrinsically insurance' claims." *In re Prudential*, 133 F.3d at 233. The court determined, however, that "[t]he contours of an 'insurance-only' or 'intrinsically insurance' claim [we]re too amorphous to define with precision in the present factual context, especially where it is the exception to a broad arbitration agreement." *Id.* The court therefore could not "say with positive assurance that the language [of the arbitration agreements] indicate[d] the parties' desire not to arbitrate employment disputes that require the resolution of an insurance business issue." *Id.* at 234. Accordingly, its "mandate [wa]s clear: a presumption in favor of arbitration applies and doubts in construction are resolved against the resisting parties." *Id.* As required by that presumption, the Third Circuit ordered the parties to arbitrate their dispute. *Id.*

3. The Tenth Circuit applies the same approach to questions of arbitrability. In *Sanchez v. Nitro-Lift Technologies, LLC*, 762 F.3d 1139 (10th Cir. 2014), the court compelled arbitration of the plaintiffs' wage-and-hour claims against their employer in the face of ambiguity regarding the reach of the arbitration agreement. *Id.* at 1141. The agreement stated that "*[a]ny dispute, difference or unresolved question* between Nitro-Lift and the Employee . . . shall be settled by arbitration by a single arbitrator mutually agreeable to the Disputing Parties in an arbitration proceeding." *Id.* at 1142 (emphasis in original). But this arbitration agreement appeared in a document entitled "Confidentiality/Non-Compete Agreement," which, with one immaterial exception, "contain[ed] no language dealing with wages, hours, overtime compensation, or other rights, duties, and responsibilities regarding wages generally found in an employment contract." *Id.* at 1141–42. The plaintiffs argued that the arbitration agreement's scope must be limited to disputes over the types of matters covered in the Confidentiality/Non-Compete Agreement and should not extend to wage-and-hour issues unaddressed by that document. *Id.* at 1143.

The Tenth Circuit agreed that it "cannot ignore the narrow context of the agreement in which the arbitration clause is found." *Sanchez*, 762 F.3d at 1147. Nevertheless, the court continued, "at best this contention makes the arbitration clause ambiguous" because "it is reasonably susceptible to at least two different constructions": "either the parties agreed to arbitrate all disputes arising between them, or they agreed to arbitrate all disputes concerning only those issues covered in the agreement." *Id.* (internal quotation marks omitted). The court concluded that it "need not decide this difficult question, for we have stated that 'to

acknowledge the ambiguity is to resolve the issue, because all ambiguities must be resolved *in favor* of arbitrability.'" *Id.* (emphasis in original). Because the Tenth Circuit could not "say the ambiguity created by the admittedly narrow contract containing the broad arbitration clause provides 'forceful evidence' to support the plaintiff's claim that their wage disputes do not fall within the scope of the arbitration clause," it compelled arbitration. *Id.* at 1148.

C. In the decision below, the Ninth Circuit applied an entirely different arbitrability standard that departed from both this Court's arbitration jurisprudence and the decisions of other courts of appeals correctly applying that precedent. The Ninth Circuit manufactured ambiguity in the broad terms of the parties' arbitration agreements by ignoring the plain language of those agreements and the parties' unmistakable intent to arbitrate any and all disputes. Worse still, it then construed that supposed ambiguity *against* arbitration—in direct contravention of the presumption in favor of arbitrability established by Congress and consistently applied by this Court and other circuits.

Any reasonable reading of the arbitration agreements here makes clear that they unambiguously reach respondents' breach-of-fiduciary-duty claims under ERISA § 502(a)(2) or, at the very minimum, are ambiguous on that point. Those agreements extend to "*all* claims . . . that Employee may have against the University." Pet. App. 8a (emphasis added). Notwithstanding that all-encompassing language, the Ninth Circuit concluded that the arbitration agreements do not reach respondents' breach-of-fiduciary-duty claims because the agreements do "not extend to

claims that other entities have against the University" and thus do not apply to ERISA § 502(a)(2) claims, which "are brought on behalf of the Plans." *Id.* at 8a. But a "claim" is simply a "cause of action," and the Ninth Circuit acknowledged that "in a breach-of-fiduciary duty suit under ERISA, 'the cause of action belong[s] to the individual plaintiff.'" *Id.* at 16a; *see also Black's Law Dictionary* 302 (10th ed. 2014) (defining "claims" as "[a]n interest or remedy recognized at law; the means by which a person can obtain a privilege, possession, or enjoyment of a right or thing; CAUSE OF ACTION"); *id.* at 266 (defining "cause of action" as "[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person; CLAIM"). Indeed, courts—including the Ninth Circuit—routinely refer to a Section 502(a)(2) claim as belonging to the participant who asserts it. *See*, *e.g.*, *Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 (9th Cir. 1103) (referring to the "plaintiff's claim" under ERISA § 502(a)(2) and "his ERISA claim"); *Ward v. Alternative Health Delivery Sys., Inc.*, 261 F.3d 624, 626 (6th Cir. 2001) ("Because plaintiff's [ERISA § 502(a)(2)] claims failed for lack of statutory standing, we find that plaintiff's claims were properly dismissed for lack of subject matter jurisdiction.").

The other provisions of the parties' arbitration agreements foreclose any possibility of concluding, with "positive assurance," that the agreements do not encompass ERISA § 502(a)(2) claims. *AT&T Techs.*, 475 U.S. at 650 (internal quotation marks omitted). The very next sentence after the broad "all claims" provision states that "*[a]ny claim* that otherwise would have been decidable in a court of law—whether under local, state or federal law—will instead be decided by arbitration, *except as specifically excluded by*

this Agreement." Pet. App. 15a (emphases added). This provision makes no reference to claims that the parties "have" against each other and is therefore unquestionably broad enough to reach claims that a plan participant is pursuing on behalf of an ERISA plan. Nor do the arbitration agreements include a specific exclusion explicitly deeming ERISA breach-of-fiduciary-duty claims non-arbitrable. *Id.*

In addition, the arbitration agreements confirm that the "claims covered . . . include, but are not limited to," claims for wages or other compensation due, and "claims for violation of any federal . . . statute." Pet. App. 15a–16a. Retirement benefits are one of the most important components of an employee's compensation. *See* ERISA § 1(a), 29 U.S.C. § 1001(a) (congressional findings that ERISA plans "have become an important factor affecting the stability of employment" and that "the continued well-being and security of millions of employees and their dependents are directly affected by these plans"). This is especially true here, where "[n]early every employee eligible to participate . . . has an individual account" in *both* Plans, FAC ¶ 10, which together manage an average of $76,313 per participant, *see id.* at ¶¶ 15, 19. Respondents' claims alleging a breach of fiduciary duty under ERISA § 502(a)(2) therefore bear directly on respondents' "compensation" and USC's alleged "violation of a[ ] federal . . . statute." *Id.* at 16a.

In light of this expansive language, the Ninth Circuit should have concluded that the arbitration agreements unambiguously encompass respondents' breach-of-fiduciary-duty claims. But even if the agreements' scope is not free from all doubt, the Ninth Circuit should have given effect to the "presumption

of arbitrability" established by Congress and recognized by this Court, *AT&T Techs.*, 475 U.S. at 650, by "resolv[ing]" "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25. Instead, the Ninth Circuit did not even mention this presumption when it explained why respondents' ERISA claims were not covered by their arbitration agreements.

That is directly contrary to what the First, Third, and Tenth Circuits have done in the past and would have done here. The Ninth Circuit stands alone in construing ambiguities *against* arbitration. In so doing, it has seriously impaired the strong federal policy in favor of arbitration as well as Congress's objectives of establishing uniform nationwide rules governing questions of arbitrability and the administration of employee pension plans. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001) (the "[u]niformity" that is "[o]ne of the principal goals of ERISA . . . is impossible . . . if plans are subject to different legal obligations in different States") (internal quotation marks omitted).

In the absence of review by this Court, an ERISA breach-of-fiduciary-duty claim will be arbitrable when employees who agreed to arbitrate "any claims" they have against their employer file suit in Boston, Philadelphia, or Denver, but non-arbitrable—despite the existence of a broad arbitration agreement—anywhere in the Ninth Circuit. The Court should grant review to restore a uniform approach to the arbitrability of ERISA § 502(a)(2) claims and once again vindicate the "national policy favoring arbitration." *Buckeye Check Cashing, Inc.*, 546 U.S. at 443.

II. THE DECISION BELOW HAS FAR-REACHING CONSEQUENCES FOR ERISA LITIGANTS AND ERISA PLANS.

The Ninth Circuit's refusal to follow the FAA and this Court's arbitration precedent effectively forecloses the arbitrability of ERISA breach-of-fiduciary-duty claims in a large part of the country, and deprives both ERISA litigants and ERISA plans of an efficient, cost-effective means of resolving fiduciary-breach claims. Given the prevalence of arbitration agreements that, like the ones here, require the arbitration of all claims that either party "may have," the Ninth Circuit's decision will upend the settled expectations of countless employers and employees.

A. The decision below renders ERISA fiduciary-breach claims effectively non-arbitrable in the Ninth Circuit.

As an initial matter, the Ninth Circuit not only perpetuated, but also reinforced, a 5-1 circuit split on the question whether ERISA claims can *ever* be arbitrated. *See supra* at 9–10. More than a decade ago, the Ninth Circuit acknowledged that it "ha[d], in the past, expressed skepticism about the arbitrability of ERISA claims." *Comer*, 436 F.3d at 1100 (citing *Amaro*, 724 F.2d at 750). Although it stated that "those doubts seem to have been put to rest by the Supreme Court's opinions in" more recent cases, the court did not resolve the issue conclusively. *Id.* Nevertheless, the district court here noted that "[r]ecent case law from within the Ninth Circuit now holds that ERISA claims are subject to arbitration when the parties have executed a valid arbitration agreement." Pet. App. 18a (collecting district court cases). But the decision below—despite conceding that "it [wa]s unnecessary to decide that question here," *id.* at 12a

n.1—went out of its way to state that "*Amaro* binds us" and "le[ft] the issue of *Amaro*'s viability for another day," *id.* In so doing, the Ninth Circuit threw into doubt the "[r]ecent case law" from district courts in the Ninth Circuit that hold, like every federal court of appeals to consider the issue (other than the Ninth Circuit), that ERISA claims can be arbitrated. *Id.* at 18a.

Moreover, even if ERISA fiduciary-breach claims are theoretically arbitrable in the Ninth Circuit, the decision below establishes virtually insurmountable obstacles to the arbitration of such claims. Given the Ninth Circuit's ruling that the parties' broad arbitration agreements do not reach ERISA § 502(a)(2) claims because plan participants do not "have" those claims, the only way for a plan participant and employer to make clear that they intend to arbitrate ERISA breach-of-fiduciary-duty claims in the Ninth Circuit is to identify those claims *by name* in their arbitration agreement. *Cf. First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944–45 (1995) (explaining that "clear and unmistakable" evidence is necessary to conclude that the parties intended questions of arbitrability to be resolved by an arbitrator but not to conclude that "'a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement'"). This clear-statement requirement will not only make it more difficult for parties to agree to arbitrate ERISA § 502(a)(2) claims prospectively, but will also retroactively narrow countless arbitration clauses already in effect. Indeed, the lan-

guage used by the parties here is commonplace in employment arbitration agreements.[2] Each and every one of these agreements now excludes ERISA § 502(a)(2) claims as a matter of law in the Ninth Circuit.

The impediments to the arbitration of Section 502(a)(2) claims in the Ninth Circuit are exacerbated by that court's earlier holding that arbitration agreements executed on behalf of ERISA plans by plan trustees cannot bind participants to arbitrate such claims because "the cause of action belong[s] to the individual" participant. *Comer*, 436 F.3d at 1103. But now a

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[2] *See*, *e.g.*, *Spikener v. Noble Food Grp. Inc.*, 2018 WL 4677680, at *1 (N.D. Cal. Sept. 27, 2018) ("This Agreement covers any claims that the Company may have against Employee, or that Employee may have against the Company."); *Gillian v. Cowabunga, Inc.*, 2018 WL 2431345, at *1 (N.D. Ala. May 30, 2018) ("Claims and disputes covered by this Agreement include all claims by Employee against Cowabunga, Inc. . . . and all claims that Cowabunga, Inc., may have against Employee."); *Simmons v. Rush Truck Ctrs. of Idaho, Inc.*, 2017 WL 2271123, at *3 (D. Idaho May 24, 2017) ("[A]ny claim, dispute, and/or controversy that Employee may have against Company . . . or Company may have against Employee, shall be submitted to and determined exclusively by binding arbitration."); *Brondyke v. Bridgepoint Educ., Inc.*, 985 F. Supp. 2d 1079, 1086 (S.D. Iowa 2013) ("Both the Company and employee agree that any claim, dispute, and/or controversy that either employee may have against the Company . . . or the Company may have against employee . . . shall be submitted to and determined exclusively by binding arbitration."); *Hoenig v. Karl Knauz Motors, Inc.*, 983 F. Supp. 2d 952, 958 (N.D. Ill. 2013) ("Both the Dealership and Employee agree that any claim, dispute, and/or controversy that either employee may have against the Dealership . . . or the Dealership may have against the Employee . . . shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act.").

plan *participant* cannot even agree to arbitrate a Section 502(a)(2) claim (unless the agreement includes magic words explicitly referring to that claim) because ERISA § 502(a)(2) claims "are brought on behalf of the Plans," Pet. App. 7a. These barriers to the arbitrability of ERISA breach-of-fiduciary-duty claims are utterly at odds with Congress's *pro-arbitration* objectives in enacting the FAA.

B. The Ninth Circuit's hostility to the arbitration of ERISA § 502(a)(2) claims will harm both ERISA litigants and ERISA plans.

This Court has long recognized "the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). These benefits are especially pronounced in Section 502(a)(2) litigation, where the value of each participant's claim is likely to be fairly low. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts."). One 2003 study found that litigating an employment-related claim in court is not cost-justified unless the value of the claim exceeds $60,000, whereas much smaller claims could proceed in arbitration. *See* Elizabeth Hill, 58-JUL Disp. Resol. J. 9, 10–12 (May-July 2003).

By making it more difficult to resolve Section 502(a)(2) claims in a cost-effective and efficient manner, the Ninth Circuit's decision will harm both plan participants and plan fiduciaries, who will be required to incur the expense and delay of litigation in

federal court to resolve breach-of-fiduciary-duty claims. The decision will have equally pernicious consequences for the ERISA plans on whose behalf Section 502(a)(2) claims are brought because it will postpone recoveries, divert larger portions of those recoveries to attorney's fees, and deter some plan participants from pursuing breach-of-fiduciary-duty claims at all.

Nor does arbitration disadvantage plan participants. In fact, numerous studies establish that employees have *higher* success rates in arbitration than in court—and when they succeed in arbitration, they recover *more*. *See* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58-JAN Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004).

These considerations have particular salience here given the central importance of ERISA plans to workers' financial security and, in turn, the stability of the economy more generally. As of 2015, 134.9 million Americans had more than $8.15 trillion in retirement savings managed by private pension plans, with workers contributing more than $543.2 billion to ERISA plans in 2015 alone. *Private Pension Plan Bulletin* 1 (Dept. of Labor Feb. 2018), https://www.dol.gov/sites/default/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2015.pdf. These pension plans have recently become a prominent target of litigation: "401(k) litigation . . . has surged again" in the past few years, with "over 100 new 401(k) complaints . . . filed in 2016-2017, the highest two-year total since 2008-2009." George S. Mellman & Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What Are the Causes and Consequences* 1–2

(Center for Retirement Research May 2018). By keeping these disputes in court—even where the parties expressed a clear intent to resolve their disputes through arbitration—the Ninth Circuit has saddled a critical part of the economy with costly and protracted litigation, to the detriment of ERISA litigants and plans alike.

CONCLUSION

In the FAA, Congress established a "*national* policy favoring arbitration." *Buckeye Check Cashing, Inc.*, 546 U.S. at 443 (emphasis added). Yet, the Ninth Circuit has repeatedly thwarted that policy by refusing to give effect to parties' contractual agreements to arbitrate and manifesting precisely the type of "judicial hostility to arbitration" that the FAA was designed to "reverse." *Gilmer*, 500 U.S. at 24. This Court should grant review to reaffirm that the FAA leaves no place for such outmoded judicial aversion to arbitration.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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