**No. 17-55550**

***In the***

# United States Court of Appeals

***for the***

# Ninth Circuit

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ALBERT L. MUNRO, DANIEL C. WHEELER, EDWARD E. VAYNMAN, JANE A. SINGLETON, SARAH GLEASON, REBECCA A. SNYDER, DION DICKMAN, COREY CLARK, and STEVEN L. OLSON,

*Plaintiffs-Appellees*,

– v. –

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

*Defendants-Appellants.*

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On appeal from the United States District Court for the Central District of California, Case No. 2:16-cv-6191-VAP, Hon. Virginia A. Phillips

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## BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING THE PETITION FOR REHEARING *EN BANC*

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STEVEN P. LEHOTSKY
*U.S. Chamber Litigation Center*
*1615 H Street, NW*
*Washington, DC 20062*
*(202) 463-5337*

ANDREW J. PINCUS
ARCHIS A. PARASHARAMI
BRIAN D. NETTER
MATTHEW A. WARING
*Mayer Brown LLP*
*1999 K Street, NW*
*Washington, DC 20006*
*(202) 263-3000*

*Counsel for the Chamber of Commerce of the United States of America*

## CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is not a subsidiary of any other corporation, and no publicly held corporation owns 10% or more of its stock.

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## INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and has an underlying membership of more than three million businesses and organizations of every size, in every industry, sector, and geographic region of the country. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases like this one that raise issues of concern to the nation's business community.

The Chamber routinely files *amicus* briefs in federal and state courts in cases involving the enforceability of arbitration agreements. This is one such case, and the Chamber already participated as an *amicus* before the panel. The panel's decision implicates the intersection of the Federal Arbitration Act ("FAA") and the Employee Retirement Income Security Act of 1974 ("ERISA") and involves issues of significant concern to the business community. Because the simplicity, informality, and expedition of arbitra-

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, and its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

tion depend on courts' consistent recognition and application of the principles embodied in the FAA, the Chamber and its members have a strong interest in this case.

## INTRODUCTION

When construing the scope of an arbitration agreement, binding Supreme Court precedent requires courts to resolve any doubts in favor of arbitration. This case called for application of that established rule: the parties' arbitration agreement, though it did not expressly refer to ERISA claims like plaintiffs', was clearly broad enough to do so, and should have been held to include these claims. But the panel chose not to acknowledge or to apply the rule favoring arbitration, holding instead that plaintiffs' claims were not covered by the arbitration agreement because they were brought on behalf of the plaintiffs' ERISA plan.

That holding cannot be squared with decades of Supreme Court precedent requiring that ambiguities in the scope of an arbitration agreement be resolved in favor of arbitration—or with this Court's numerous precedents applying that same rule. And it will undermine the expectations of employers and employees alike that ERISA claims would be resolved efficiently in arbitration, rather than in court. The conflict that the

panel's decision creates with both the Supreme Court's precedent and decisions of this Court warrant *en banc* review.

## ARGUMENT

### I. The Panel's Decision Contravenes Settled Supreme Court Precedent Requiring Arbitration Agreements To Be Interpreted To Favor Arbitration.

The Supreme Court has explained that 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). Under that "liberal" policy, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 24-25. This rule of interpretation is essential to vindicating Congress's determination that valid agreements to arbitrate be enforced whenever possible, and the Supreme Court has reaffirmed the rule on numerous occasions. *See, e.g.*, *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) ("[A]mbiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("[T]he parties' intentions control, but those intentions are generously construed as to issues of arbitrability."); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995).

This "thumb on the scale in favor of arbitration" (*Solvay Pharm., Inc. v. Duramed Pharm., Inc.*, 442 F.3d 471, 478 (6th Cir. 2006)) should have resolved this case. Plaintiffs each signed agreements requiring arbitration of "all claims . . . that [the employee] may have against" USC, including claims for "violation of any federal . . . law, statute, regulation, or ordinance." 2ER28, 30, 32, 34, 36, 38, 39, 41, 43. The text of these agreements—which broadly refers to "*all* claims" that an employee "*may have*"—is easily broad enough to encompass plaintiffs' claims under Section 502(a)(2) of ERISA.

The panel nonetheless concluded that plaintiffs' ERISA claims did not fall within the scope of the arbitration provision. It reasoned that a Section 502(a)(2) plaintiff is suing on behalf of the benefit plan, not on her own behalf, and thus stands in a similar position to a False Claims Act plaintiff—who, as the Court held in *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791, 796 (9th Cir. 2017), does not "have" a claim of her own that would be subject to an arbitration agreement she signed.

But the panel nowhere mentioned, let alone applied, the principle that any doubts in the scope of an arbitration agreement should be resolved in favor of arbitration.

That approach put the panel's ruling in conflict with numerous other decisions of this Court applying that well-established principle. *See, e.g.*, *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 938 (9th Cir. 2013) ("[k]eeping in mind that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration" and holding that plaintiffs' claims fell within scope of arbitration agreement) (internal quotation marks omitted); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) (noting that "all doubts are to be resolved in favor of arbitrability" and holding that plaintiff's claims were arbitrable).

That conflict necessitates *en banc* review. Congress in the FAA sought to ensure that private agreements to arbitrate are enforced according to their terms (*see, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018)), and that purpose is frustrated when the "substantive law of arbitrability" under the FAA (*Moses H. Cone*, 460 U.S. at 24) is not applied consistently within this Circuit.

*En banc* review is therefore warranted both to comply with Congress's mandate in the FAA that—as the Supreme Court has said again and again—requires that doubts about the scope of arbitration be resolved in favor of arbitration and to "maintain uniformity of the [C]ourt's decisions." Fed. R. App. P. 35(a)(1).

## II. The Question Presented Is Exceptionally Important Because The Panel's Decision Could Undermine The Availability Of Arbitration For Parties In ERISA Disputes.

The question presented is also one of "exceptional importance" and thus warrants *en banc* review on that basis as well. Fed. R. App. P. 35(a)(2). The panel's holding will disrupt the settled expectations of numerous contracting parties and undermine the benefits of employment-related arbitration.

### A. Arbitration Provides Significant Benefits to All Participants.

The Supreme Court has recognized that "[a]rbitration 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." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (emphasis added); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) ("[A]rbitration's advantages often would seem helpful to individuals . . . who need a less expensive alternative to litigation.").

Empirical analyses bear out that assessment. A leading study of employment arbitration in 2003 concluded that a claim must exceed $60,000—and perhaps $200,000—in order to attract a contingency-fee lawyer for litigation. See Elizabeth Hill, *AAA Employment Arbitration: A*

*Fair Forum at Low Cost*, 58-JUL Disp. Resol. J. 9, 10-11 (May-July 2003).[2] A small claim is more viable in arbitration because costs in arbitration are lower—and because in an arbitral forum, "it is feasible for employees to represent themselves or use the help of a fellow layperson or a totally inexperienced young lawyer." Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 15 (2017). In short, the empirical evidence shows that "a substantial number of nonunion employees, particularly those with small financial claims, have a realistic opportunity to pursue their rights through mandatory arbitration that otherwise would not exist." *Id.* at 16.

Moreover, the arbitral forum is just as fair to employees as litigation in court. As one commentator explains: "most employment arbitration cases are today conducted under rules like those of the American Arbitration Association, which mandate a fair procedure." Laura J. Cooper, *Employment Arbitration 2011: A Realist View*, 87 Ind. L.J. 317, 320 (2012). The AAA's employment arbitration rules (1) cap an employee's filing fee in a benefits case against an employer at $200 and require the employer to pay the other costs and expenses of arbitration; (2) establish a process for se-

[2] The figure is likely higher today: $60,000 in 2003 equates to nearly $80,000 in 2017. See Bureau of Labor Statistics, *CPI Inflation Calculator*, https://data.bls.gov/cgi-bin/cpicalc.pl.

lecting arbitrators mutually acceptable to both parties; (3) require arbitrators to disclose any circumstance that might raise doubt about their impartiality; and (4) ensure both sides discovery necessary to a full and fair exploration of the disputed issues. *See* Am. Arbitration Ass'n, *Employment Arbitration Rules and Mediation Procedures* 19-20, 33-35 (2016); *see also* Am. Arbitration Ass'n, *Employee Benefit Plan Claims Arbitration Rules* (2017).[3]

As a consequence, "there is no evidence that plaintiffs fare significantly better in litigation. In fact, the opposite may be true." David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1578 (2005); *see also*, *e.g.*, St. Antoine, *supra*, at 16 (endorsing this conclusion). For example, one study of employment arbitration in the securities industry found that employees who arbitrated were 12% more likely to win their disputes than were employees who litigated such claims in the Southern District of New York. 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). And

[3] Available at https://www.adr.org/sites/default/files/Employee Benefit Plan Claims Arbitration Rules.pdf.

the arbitral awards that the employees obtained were typically the same as, or larger than, the court awards. See *id.* (comparing median awards); *see also* Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896-904 (2010) (finding that consumers win relief 53.3% of the time in arbitration and approximately 50% of the time in litigation).

In addition, arbitration's benefits are superior to the outcomes of the overwhelming majority of class actions. As Congress found a decade ago, "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed." Class Action Fairness Act of 2005, Pub. L. No. 109-2 § 2(a)(3), 119 Stat. 4. The limited settlement data that is publicly available further confirms that very few putative class actions deliver tangible benefits to more than a small fraction of class members. A 2015 study by the Consumer Financial Protection Bureau examined over a hundred class action settlements and found that the "weighted average claims rate"—*i.e.*, the average rate at which class members in those settlements filed claims to receive a settlement payment, weighted by the size of each class—was just 4%. *See* Consumer Fin. Prot. Bureau, *Arbitration Study: Report to Congress 2015*, at § 8, p.30 (Mar. 2015), perma.cc/8AX5-AYWN. In short, the data supports this Court's admonition that "a costly

and time-consuming class action" is often "hardly the superior method for resolving [a] dispute." *In re Hotel Tel. Charges*, 500 F.2d 86, 91 (9th Cir. 1974).

Given its informality and its efficiency, arbitration is also less contentious than litigation, enabling employees to resolve disputes with less risk of permanently damaging their relationships with their employers and coworkers. If the panel's opinion, which could exempt a great many ERISA claims from valid arbitration agreements, is allowed to stand, these benefits of arbitration would frequently be lost.

### B. The Panel's Narrow View Of The Scope Of Arbitration Provisions Upsets Settled Expectations That ERISA Benefits Disputes Are Arbitrable.

The panel's decision not only threatens the availability of employment arbitration, but also threatens to upend parties' expectations that arbitration clauses would apply to ERISA claims like plaintiffs' here.

Every other court of appeals to address the question has held that ERISA claims are subject to arbitration. *See Bird v. Shearson Lehman/Am. Exp., 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). And although this Court "ha[s], 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 [more recent] opinions." *Comer v. Micor, Inc.*, 436 F.3d 1098, 1100 (9th Cir. 2006) (discussing *Amaro v. Cont'l Can Co.*, 724 F.2d 747 (9th Cir. 1984); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); and *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989)).[4] It is thus no surprise that courts—including district courts in this Circuit—routinely grant motions to compel arbitration in cases involving ERISA claims.[5]

Accordingly, the panel's holding, if allowed to stand, would disrupt the reasonable expectations of employers and employees that properly

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[4] Indeed, the panel here acknowledged that there is "considerable force" to the position that *Amaro*'s position on the arbitrability of ERISA claims has been undermined by subsequent Supreme Court precedents. Op. at 13 n.1.

[5] *See, e.g.*, *Sanzone-Ortiz v. Aetna Health of Cal., Inc.*, 2015 WL 9303993 (N.D. Cal. Dec. 22, 2015); *Johnson v. Ret. Plan of Gen. Mills, Inc.*, 2017 WL 1165546 (S.D. Ind. Mar. 29, 2017); *Huttsell v. Radcliffe Co., Inc.*, 2017 WL 938324 (W.D. Ky. Mar. 9, 2017); *Enkema v. FTI Consulting, Inc.*, 2016 WL 3866537 (D. Md. July 12, 2016); *Fusco v. Plastic Surgery Ctr., P.A.*, 2016 WL 845263 (D. Me. Mar. 4, 2016); *Prachun v. CBIZ Benefits & Ins. Servs., Inc.*, 2015 WL 5162522 (S.D. Ohio Sept. 3, 2015); *Merrick v. UnitedHealth Grp. Inc.*, 127 F. Supp. 3d 138 (S.D.N.Y. 2015); *see also* ER006-007 (collecting cases).

drafted arbitration clauses will cover employee claims that relate to ERISA benefit plans. Under the panel's approach, Section 502(a)(2) claims will not be subject to arbitration unless the applicable arbitration agreement specifically mentions claims on behalf of the plan—a "magic words" test that is particularly inappropriate under the FAA. *Cf. Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017) (holding that the FAA preempted a state-law rule requiring a clear statement before an agent could bind a principal to arbitration).

## CONCLUSION

The petition for rehearing *en banc* should be granted.

Respectfully submitted,

Dated: August 17, 2018

/s/ *Andrew J. Pincus*

ANDREW J. PINCUS
ARCHIS A. PARASHARAMI
BRIAN D. NETTER
MATTHEW A. WARING
*Mayer Brown LLP*
*1999 K Street, NW*
*Washington, DC 20006*
*(202) 263-3000*

STEVEN P. LEHOTSKY
*U.S. Chamber Litigation Center*
*1615 H Street, NW*
*Washington, DC 20062*
*(202) 463-5337*

*Counsel for the Chamber of Commerce of the United States of America*

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 32(g), the undersigned counsel for *amici curiae* certifies that this brief:

(i) complies with the word limitation of Circuit Rule 29-2(c)(2) because it contains 2,484 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: August 17, 2018 /s/ *Andrew J. Pincus*

## CERTIFICATE OF SERVICE

I hereby certify that that on August 17, 2018, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: August 17, 2018 /s/ *Andrew J. Pincus*