No. 17-55550

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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.

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
No. 16-cv-6191-VAP (CFEx)

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that the Chamber of Commerce of the United States of America is not a subsidiary of any other corporation, and that no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1] 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—making it the principal voice of American business.

The Chamber regularly files *amicus* briefs in federal and state courts throughout the country in cases of national concern, including cases involving the enforceability of arbitration agreements. This is one such case. The decision below implicates the intersection of the Federal Arbitration Act ("FAA") and the Employee Retirement Income Security Act of 1974 ("ERISA"). The issues presented are of grave concern to the business community. Because the simplicity, informality, and expedition of arbitration depend on the courts' consistent recognition and ap-

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amicus* states that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or person or entity other than *amicus*, *amicus*'s members, and its counsel, contributed money intended to fund preparing or submitting this brief. The parties have consented to the filing of this brief.

plication of the principles underlying the FAA, the Chamber and its members have a strong interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs are current and former employees of the University of Southern California. They all participate in two defined-contribution retirement plans sponsored by USC. And they all entered into written contracts agreeing to arbitrate all claims they "may have against the University" that arise under any federal law. (2ER28, 30, 32, 34, 36, 38, 39, 41, 43.)

Plaintiffs nevertheless filed a putative class-action lawsuit against USC under ERISA. Their claims are plainly within the scope of the operative arbitration agreements. But rather than enforce the unambiguous terms of those agreements, the district court held that participants in a defined-contribution plan cannot agree to arbitrate ERISA claims without the consent of the Plan itself.

The district court's ruling not only contravenes the plain text of the FAA and ERISA but also reflects the very overt hostility to arbitration agreements—which the district court compared to a "fox …

guard[ing] a henhouse" (ER016)—that the U.S. Supreme Court has repeatedly held violative of the FAA.

It is now well established that the FAA embodies "a liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation marks omitted). That congressionally enacted policy is consistent with empirical evidence establishing that arbitration is simpler, faster, cheaper, and less adversarial than litigation—and that plaintiffs fare just as well in arbitration as they do in court. Given the unbroken line of precedent favoring the enforcement of arbitration agreements as well as the real-world efficacy of arbitration for employees, it is now common for ERISA disputes to be resolved via arbitration.

In holding that the claims at issue could not be arbitrated, the district court relied improperly on *Bowles v. Reade*, 198 F.3d 752 (9th Cir. 1999). That case held that a participant in a defined-***benefit*** plan could not ***release*** a pension plan's claims without authorization. But the district court invoked that holding to support a very different ruling: that a participant in a defined-***contribution*** plan could not agree to ***arbitrate*** her claims without the consent of the Plan.

The district court's reliance on *Bowles* was misguided for two reasons. *First*, the district court inappropriately extended *Bowles*'s reasoning from the defined-benefit context to the defined-contribution realm, even though it acknowledged the differences between the two types of retirement plans. As we explain below, those significant legal differences preclude application of *Bowles* in the defined-contribution context.

Second, the district court erred in analogizing *Bowles*'s discussion of a "release of claims," which extinguishes the party's right to file suit, to an arbitration agreement, which simply designates the forum in which a claim will be resolved. As the Supreme Court has explained, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The decision below failed to honor this principle.

ARGUMENT

I. Arbitration Is Beneficial To All Participants.

Plaintiffs' position in this case is inconsistent with both the governing statutory text and Congress's policy favoring arbitration. But

opponents of arbitration consistently advance the misguided policy argument that arbitration disadvantages plaintiffs.

Indeed, the court below expressed deep skepticism of the benefits of arbitration. It criticized arbitration agreements for including provisions "requiring confidentiality, expedited arbitration procedures, limited discovery, required splitting of arbitrators' fees, and mandatory payment of the prevailing party's attorneys' fees." ER016. As the district court saw it, "allowing such arbitration agreements to control participants' [ERISA] § 502(a)(2) claims would, in a sense, be allowing the fox to guard the henhouse." ER016.[2]

Such sentiments reflect "the longstanding judicial hostility to arbitration agreements" that the FAA was enacted to "reverse." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). The district court's reasoning ignores the "emphatic federal policy in favor of arbitral dispute reso-

[2] Contrary to the district court's insinuations, arbitration agreements that include unfair procedural rules or unfair processes for selecting arbitrators are subject to invalidation under generally applicable unconscionability principles. *See Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533-534 (2012); *see also, e.g.*, *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923 (9th Cir. 2013) (invalidating provision requiring employee to pay an unrecoverable portion of the arbitrator's fees "regardless of the merits of the claim"); *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (invalidating provision barring punitive damages).

lution" (*Mitsubishi Motors*, 473 U.S. at 631) and the Supreme Court's admonition that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Id.* at 626-27.

Although the district court's policy arguments provide no basis for disregarding Congress's enactment of a federal statute governing the enforcement of arbitration agreements, those policy arguments are also wrong: 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 employees whose in-

come or legal claim was less than $60,000 would not be able to afford litigation but would be able to proceed in arbitration. See Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58-JUL Disp. Resol. J. 9, 10-11 (May-July 2003).[3] 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.

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[3] 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.

Cooper, *Employment Arbitration 2011: A Realist's View*, 87 Ind. L.J. 317, 320 (2012). The AAA's employee-benefit-plan claim arbitration rules (1) cap an employee's filing fee in a benefits case against an employer at $175 and require the employer to pay the other costs and expenses of arbitration; (2) establish a process for selecting 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 generally* Am. Arbitration Ass'n, Employee Benefit Plan Claims Arbitration Rules and Mediation Procedures (2017).[4]

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

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

disputes than were employees who litigated 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 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 is superior to resolving disputes via class action. 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. In a study conducted at the request of the Chamber's Institute for Legal Reform, a team of lawyers (including

some of the authors of this brief) undertook an empirical analysis of 148 consumer and employee class actions filed in or removed to federal court in 2009. *See* Mayer Brown LLP, *Do Class Actions Benefit Class Members?: An Empirical Analysis of Class Actions* (Dec. 11, 2013), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/Class_Action_Study.pdf. Of the six cases in the data set for which settlement distribution data was public, "five delivered funds to only miniscule percentages of the class: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%." *Id.* at 2 (emphasis omitted).[5]

This data supports this Court's admonition that "[w]henever the principal, if not the only, beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute." *In re Hotel Telephone Charges*, 500 F.2d 86, 91 (9th Cir. 1974). And the Supreme Court has repeatedly made clear that courts cannot disregard arbitration agreements based on a policy pref-

[5] The sixth case was a highly unusual outlier involving the Bernie Madoff Ponzi scheme, where "each class member's individual claim was worth, on average, over $2.5 million," leading to a claims rate of almost 99%. *Id.* at 10-11 & n.20.

erence for class actions. *See, e.g.*, *Concepcion*, 563 U.S. at 339-41; *Am. Exp. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2308-09 (2013).

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. And because one of the hallmarks of arbitration is confidentiality, this alternative-dispute-resolution mechanism reduces the risk that potentially embarrassing information about an employee will become public—including even the very fact that the employee pursued a claim against the employer, which may benefit the employee if he or she applies for a job at another employer in the future.

If this Court were to hold that a participant in a defined-contribution plan could not agree to arbitrate her ERISA claims, these benefits of arbitration would be lost. And given the holdings of other courts of appeals on this question, *see infra* Section II, the enforceability of arbitration provisions for companies with a nationwide presence would vary depending on where the ERISA participant filed suit.

II. Arbitration Of Benefits Disputes Is Commonplace.

The district court's decision not only disregards clear precedent, but also threatens to upend a well-established and common component of ERISA plans, on which numerous parties have relied for decades. 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. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987); and *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989)); *see also* Appellants' Br.

12-15 (explaining this Court's evolving views on arbitration in ERISA cases).

It is thus no surprise that courts—including district courts in this Circuit—routinely grant motions to compel arbitration in cases involving ERISA claims. *See, e.g.*, *Sanzone-Ortiz v. Aetna Health of Cal., Inc.*, 2015 WL 9303993 (N.D. Cal. Dec. 22, 2015); *Johnson v. Retirement 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 Center, 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).

Indeed, "courts [that] have analyzed the purpose of both ERISA and the FAA … have uniformly held that ERISA claims are arbitrable." *Hornsby v. Macon Cnty. Greyhound Park, Inc.*, 2012 WL 2135470, at *5 (M.D. Ala. June 13, 2012) (internal quotation marks omitted).

The district court acknowledged this precedent in finding that "ERISA claims are arbitrable." ER007. But the district court erred in

holding that the arbitration agreements in this case were not binding because the retirement plans did not consent to arbitration. That holding, if affirmed by this Court, would upend the law on which numerous ERISA plans have (with good reason) relied in devising their plan provisions. Moreover, as explained below, the district court's decision rests on a misconception of both ERISA retirement plans and precedent.

III. Arbitration Of An ERISA Claim Asserted By A Participant In A Defined-Contribution Plan Does Not Require The Plan's Consent.

Some background on how retirement plans work is helpful to understanding why plaintiffs in this case are required to arbitrate their claims in accordance with their agreements.

A. ERISA Retirement Plans.

ERISA provides for two primary types of retirement plans: defined-*benefit* plans and defined-*contribution* plans.

A defined-benefit plan "consists of a general pool of assets," which "may be funded by employer or employee contributions, or a combination of both." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999). Upon retirement, a participant in a defined-benefit plan "is entitled to a fixed periodic payment." *Id.* But that participant does not have an individual claim to particular assets in the plan; rather, he shares, with all

other participants, an interest in ensuring that the plan as a whole contains sufficient assets to meet its present and future liabilities. If a defined-benefit plan is underfunded, the employer "must cover any underfunding as the result of a shortfall that may occur from the plan's investments." *Id.* To ensure that retirees receive their defined benefit, Congress "require[d] defined benefit plans (but not defined contribution plans) to satisfy complex minimum funding requirements, and to make premium payments to the Pension Benefit Guaranty Corporation for plan termination insurance." *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255 (2008).

In contrast, defined contribution plans—such as 401(k) plans and the Plans at issue here—provide participants with individual accounts in which they accrue "benefits based solely upon the amount contributed to the participant's account." 29 U.S.C. § 1002(34). Employers and/or employees make contributions to the participant's individual account. At retirement, the employee "receives whatever level of benefits the amount contributed on his behalf will provide." *Hughes Aircraft*, 525 U.S. at 439.

B. The District Court Misapplied *Bowles*, Which Cannot Be Extended To Defined Contribution Plans.

These important differences between defined-benefit and defined-contribution plans make clear why the district court erred when it relied on *Bowles* to hold that an individual plan participant could not agree to arbitrate her ERISA claims. *See* ER008-009.

Bowles held that a particular plan participant in a defined-***benefit*** pension plan could not grant a release of a claim for breach of fiduciary duty without the consent of her plan. 198 F.3d at 760. Setting aside (for the moment) that the release of a claim is not the same thing as agreeing to arbitrate a claim, the district court here overlooked that *Bowles* involved a defined-benefit plan.

That distinction matters. The holding in *Bowles* applies only to traditional, defined-*benefit* pensions, where—because there is one common pool of assets to fund the defined benefit—there is a single claim for any breach of fiduciary duty that undermines the plan's funding. *Bowles*' rationale does not extend to defined-*contribution* plans in which each participant has an individual account and, therefore, his or her own, separate claim for breach of duty.

The claimant in *Bowles* was a participant in a pension plan who filed a claim for breach of fiduciary duty against the executrix of the plan's original trustee, alleging that the late fiduciary had imperiled participants' pensions by paying excessive benefits to himself. After the plaintiff purported to settle her individual claim with the executrix, the executrix sought to be dismissed from the case entirely, asserting that the settlement operated as a complete release. The Ninth Circuit held that the executrix could not be dismissed "[b]ecause [the plaintiff's] claims are not truly individual." *Id.* That conclusion makes sense because a pensioner in a defined-benefit plan cannot pursue a claim for breach of fiduciary duty to receive an individual payment; she can only seek to have the plan made whole, which increases the chances that there will be money from which her benefits will be paid.

By emphasizing that an individual claim is not available under ERISA's fiduciary-breach provision, *Bowles* followed the Supreme Court's earlier holding in *Massachusetts Mutual Life Insurance Co. v. Russell* that "Congress did not intend [ERISA's fiduciary breach provision] to authorize any relief except for the plan itself." 473 U.S. 134, 144 (1985); *see Bowles*, 198 F.3d at 760 (similar).

Since *Bowles*, however, the Supreme Court has explained that *Russell*'s holding—that there is no such thing as an individual claim for breach of fiduciary duty in the ***defined-benefit*** context—does not extend to the ***defined-contribution*** context, and individual claims for breach of fiduciary duty ***are available*** in the ***defined-contribution*** context. In *LaRue v. DeWolff, Boberg & Assocs.*, the Court stated that *Russell*'s holding that only plan-wide relief is available for breach of ERISA's fiduciary duty "accurately reflect[s] the operation of [ERISA] § 409 in the defined benefit context, [but is] beside the point in the defined contribution context." 552 U.S. at 256. In the context of defined-contribution plans, ERISA authorizes claims for the injury to the individual—"recovery for fiduciary breaches that impair the value of plan assets in a participant's *individual* account." *Id.* (emphasis added).

Thus, whereas a defined-benefit plan participant can file a breach-of-fiduciary-duty action only on behalf of the plan as a whole (with any recovery going to the plan), a defined-*contribution* plan participant can file a breach-of-fiduciary-duty action that benefits only his individual account.

The distinction recognized in *LaRue* between an undifferentiated pension plan and an individual retirement account compels a different result here than in *Bowles*. When a participant in a defined-contribution plan files a lawsuit, she is seeking relief for her individual account. There is no reason, in that context, why she cannot control her individual claim—or why the involvement of the plan would be required: the claim is for the benefit only of the individual claimant, and will not benefit the plan as a whole or its other participants. *Bowles* therefore does not require the plan's participation when a claim is asserted by a participant in a defined-*contribution* plan.

That conclusion is further supported by the line of cases holding that a participant in a defined-contribution plan who alleges a breach-of-fiduciary-duty claim under ERISA must demonstrate that she—not the Plan—suffered a loss; that is, she must demonstrate a personalized injury sufficient to establish Article III standing.[6] The Article III stand-

[6] *See, e.g.*, *Piazza v. EBSCO Industries, Inc.*, 273 F.3d 1341 (11th Cir. 2001) (reversing an order certifying a class on a claim for breach of fiduciary duty because the plaintiff did not sustain a net loss under his theory of the case); *Brown v. Medtronic, Inc.*, 628 F.3d 451, 455 (8th Cir. 2010) (dismissing ERISA case for lack of standing when a comparison of the dates of a share-price change and the plaintiff's purchases and sales of shares revealed that he was "was a net beneficiary of … [his employ-

ing inquiry thus reinforces that a participant in a defined-contribution plan stands apart from the plan when bringing an ERISA suit—and that the claim seeks to remediate an injury to the particular participant.

To be sure, not all courts have recognized the relationship between *Bowles*, *Russell*, and *LaRue*. Although a number of courts have limited *Bowles* to defined-benefit plans,[7] some district courts have applied *Bowles* outside the defined-benefit context.[8] But the latter set of district court decisions is wrongly decided; *Bowles* must be limited to defined-benefit plans given the Supreme Court's holding in *LaRue* and the salient differences between the two types of plans. The district court thus erred in transplanting *Bowles* from its defined-benefit moorings into the defined-contribution realm.

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er's] actions or failures to act"); *see also Taylor v. KeyCorp*, 680 F.3d 609, 613 n.3 (6th Cir. 2012) (similar).

[7] *See, e.g.*, *Carr v. Int'l Game Tech.*, 2012 WL 909437, at *6 (D. Nev. Mar. 16, 2012); *Howell v. Motorola, Inc.*, 633 F.3d 552, 560 (7th Cir. 2011); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 313 (5th Cir. 2007); *Abbott v. Lockheed Martin Corp.*, 286 F.R.D. 388, 396 (S.D. Ill. 2012), *rev'd in part on other grounds*, 725 F.3d 803 (7th Cir. 2013).

[8] *See, e.g.*, *Cryer v. Franklin Templeton Res., Inc.*, 2017 WL 818788, at *3 (N.D. Cal. Jan. 17, 2017); *In re JDS Uniphase Corp. ERISA Litig.*, 2006 WL 2597995, at *1 (N.D. Cal. Sept. 11, 2006).

C. The District Court Erred In Equating A Release Of Claims To An Arbitration Agreement.

The district court also erred in assuming that agreeing to arbitrate should be treated as the equivalent of agreeing to release one's claims.

"An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974); *see also Rodriguez de Quijas*, 490 U.S. at 482-83 (reaffirming *Scherk*). Thus, as the Supreme Court explained decades ago, a party that signs an arbitration agreement "does not forgo the substantive rights afforded by the statute." *Mitsubishi Motors*, 473 U.S. at 628. Rather, "it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* And "the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the [arbitral] forum somehow inadequate" to vindicate statutory rights. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009). Parties that choose arbitration do not forego resolution of their disputes but merely "trade the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration." *Id.* (internal quotation marks and alteration omitted).

A release of claims, by contrast, extinguishes a party's right to seek redress in any forum. *See Stroman v. West Coast Grocery Co.*, 884 F.2d 458, 460-62 (9th Cir. 1989) (discussing release of Title VII claims). A party often agrees to a release of claims in exchange for a settlement offer. *See, e.g.*, *Mundy v. Household Finance Corp.*, 885 F.2d 542, 546 (9th Cir. 1989) (noting that defendant offered plaintiff $25,000 to sign a release of claims). And although settlement agreements, like arbitration agreements, "'conserve judicial time and limit expensive litigation,'" *Ahern v. Central Pacific Freight Lines*, 846 F.2d 47, 48 (9th Cir. 1988) (quoting *Speed Shore Corp. v. Denda,* 605 F.2d 469, 473 (9th Cir. 1979)), the two forms of agreements accomplish that same goal in materially different ways.

Given the clear differences between a release of claims (which waives a party's right to bring suit) and an arbitration agreement (which assigns the resolution of the party's claims to a non-judicial decision-maker) the district court improperly analogized the two agreements in holding that an ERISA plan participant could not agree to arbitration without the consent of the Plan.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing *Amicus* Brief:

1. Pursuant to Fed. R. App. P. 32(a) and Ninth Cir. R. 32-1, the undersigned hereby certifies that the brief is proportionally spaced, has a typeface of 14 points or more, and contains 4,380 words, exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B).

2. The brief has been prepared in proportionally-spaced typeface using Microsoft Word 2007 in 14-point Century Schoolbook font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word-count feature of this word-processing system in preparing this certificate.

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2017, I caused the *Amicus Curiae* Brief for the Chamber of Commerce of the United States of America to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system. I certify that service will be accomplished by the CM/ECF system, which will send notice to all users registered with CM/ECF.

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