Case No. 23-55737

In the United States Court of Appeals
for the Ninth Circuit

ROBERT PLATT, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

SODEXO, S.A., and SODEXO, INC.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Central District of California
Hon. David O. Carter
No. 8:22-cv-02211-DOC-ADC

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* PUBLIC JUSTICE IN SUPPORT OF PLAINTIFF-APPELLEE

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Pursuant to Federal Rule of Appellate Procedure 29(a)(3), Public Justice moves for leave to file a brief as *amicus curiae* in support of Plaintiff-Appellee. Public Justice has consulted with counsel for the parties. Plaintiff-Appellee has consented to Public Justice filing a brief. Defendants-Appellants do not consent. A copy of the proposed brief accompanies this Motion.

1. Public Justice's Interest

As described in the accompanying brief, Public Justice is a national public interest advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting to preserve access to justice for victims of corporate and governmental misconduct and preserving the civil justice system as an effective tool for holding the powerful accountable. To further its goal of defending access to justice for workers, consumers, and others harmed by corporate wrongdoing, Public Justice has long conducted a special project devoted to fighting abuses of mandatory arbitration. Public Justice has defended the rights of workers in several high-profile ERISA cases, including at the rehearing stage in *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510 (9th Cir. 2019) (*Dorman II*). Public Justice also participated as amicus in two other recent appellate cases addressing issues nearly identical those presented here. *See Harrison v. Envision Mgmt. Holding Bd. of Dir.*, 59 F.4th 1090, 1104, 1107 (10th Cir. 2023), *cert. denied*, 144 S. Ct. 280 (2023); *Smith v. Bd. of Dir. of Triad Mfg., Inc.*, 13 F.4th 613, 621 (7th

Cir. 2021). This case is of particular interest to Public Justice both because it involves the enforcement of a forced arbitration provision imposed without the consent of the individual worker and because it concerns the remedies available to workers in vindicating their federal statutory rights.

2. *Desirability and Relevance*

Here, the question presented is whether Employee Retirement Income Security Act (ERISA) claims brought as representative claims on behalf of the plan for plan-wide relief can be compelled to individual arbitration. The proposed brief addresses several relevant issues not directly addressed by the Appellee's brief. First, the brief explains why this Court's unpublished decision in *Dorman II*, relied on heavily by Appellants in their brief, was wrongly decided. Second, Public Justice's brief explains that ERISA plans are not contracts under state law, and are therefore any arbitration clauses contained within ERISA plans are not enforceable under the Federal Arbitration Act.

As demonstrated by its work, Public Justice has interest and expertise not only in ensuring that mandatory arbitration is not abused generally, but specifically in ensuring that it is not used to deny workers the right to bring representative claims for plan-wide relief. Given this interest and expertise, Public Justice respectfully submits that its proposed brief will be useful to the Court in its consideration of the issues on appeal.

CONCLUSION

For the foregoing reasons, the motion for leave to file the proposed *amicus curiae* brief should be granted.

February 29, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 29, 2024, the foregoing document was served on all parties or their counsel of record through CM/ECF system.

February 29, 2024

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Public Justice does not issue stock and has no parent corporations.

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STATEMENT OF INTEREST

Public Justice is a national public interest advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting to preserve access to justice for victims of corporate and governmental misconduct and preserving the civil justice system as an effective tool for holding the powerful accountable. To further its goal of defending access to justice for workers, consumers, and others harmed by corporate wrongdoing, Public Justice has long conducted a special project devoted to fighting abuses of mandatory arbitration.

Public Justice has also defended the rights of workers in several high-profile ERISA cases, including at the rehearing stage in *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510 (9th Cir. 2019). This case is of particular interest to Public Justice both because it involves the enforcement of a forced arbitration provision imposed without the consent of the individual worker and because it concerns the remedies available to workers in vindicating their federal statutory rights.[1]

[1] No party's counsel authored this brief in whole or in part, nor did a party, its counsel, or any other person contribute money to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4). Appellee has consented to the filing of this brief. Appellants have not consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Employee Retirement Income Security Act (ERISA), to, in part, combat the problem of employers mismanaging the funds intended for employees' pensions, threatening workers' retirement income. That mismanagement included not only incompetence and neglect, but also intentional self-dealing. To fix that problem, Congress set up an employee-benefit structure modeled on trust law, requiring the appointment of fiduciaries who must act in the best interests of the welfare plans set up by employers for their employees or risk personal liability. Indeed, ERISA provides that plan fiduciaries are "personally liable to make good to such plan any losses to the plan" resulting from the breach of their duties. 29 U.S.C. § 1109(a). Further, fiduciaries must transfer any profits the fiduciary made from their misuse of plan funds back to the plan. *Id.* Courts may also remove the fiduciary. *Id.* Crucially, Congress provided plan participants with a cause of action to bring a representative action on behalf of a plan for breach of fiduciary duty claims seeking the plan-wide relief available under § 409.

But employers like Appellants (collectively Sodexo) here, are increasingly inserting provisions in their plans requiring plan participants to individually arbitrate breach of fiduciary duty claims, taking away the plan-wide remedies Congress provided to combat widespread abuses. This directly denies employees the specific relief gauranteed to them under ERISA. As the Supreme Court has long recognized,

arbitration can't be used to strip plaintiffs of their statutory remedies. And every federal appellate court to have considered the question—except this one—has held that plan provisions requiring individual arbitration of plan-wide ERISA breach of fiduciary duty claims are unenforceable.

I. The sole outlier is this Court's unpublished decision in *Dorman v. Charles Schwab Corp.* (*Dorman II*), relied on heavily by Sodexo its in briefing. There, though the plaintiff brought a representative action on behalf of the plan seeking plan-wide relief under § 409, this Court compelled individual arbitration of the plaintiff's claims—cutting off the remedies Congress provided in ERISA. Not only should this Court decline to follow *Dorman II*, it should make clear that its holding here, in the context of defined benefit plans, applies equally to cases involving defined contribution plans like the one at issue in *Dorman II*.

Dorman II was wrongly decided. *Dorman II*'s reasoning cannot be justified by the Supreme Court's decision in *LaRue v. DeWolff, Boberg & Assocs., Inc.* and is contrary to this Court's holding in *Munro v. University of Southern California*—both cited by the panel in *Dorman II*. *LaRue* held, for the first time, that it was possible for a plan participant in a defined contribution plan—a plan with individual accounts, such as 401(k) plans—to bring a breach of fiduciary duty claim seeking relief for losses to an individual account. Following *LaRue*, every federal court of appeal to have addressed the question, including this one in *Munro*, rejected the

argument that *LaRue* means a participant in a defined-contribution plan may *only* bring individual claims for losses to his or her individual account. Thus *Dorman II* was wrong to reason that *LaRue* means that all representative claims for plan-wide relief must be converted to individual claims in the context of defined contribution plans and that, therefore, the plaintiff's claims could be compelled to individual arbitration.

Dorman II was also wrongly decided because compelling individual arbitration of representative ERISA claims seeking plan-wide relief impermissibly deprives plaintiffs of federal statutory rights and remedies. *Dorman II*—and Sodexo here—nevertheless reason that because class-action waivers in arbitration agreements are generally enforceable, so too should be waivers of the right to bring a representative action. But that line of reasoning was expressly rejected by the Supreme Court in *Viking River Cruises, Inc. v. Moriana*, which explained that *representative* claims are inherently different from *class* claims, and the reasons why class-action waivers in arbitration clauses are generally enforceable do not map on to representative claims provided for by statute.

Further, provisions requiring individual arbitration of plan-wide ERISA claims and remedies, like the one in *Dorman II* and the one here, are void for public policy. One of the bedrock principles of ERISA, codified in the implementing regulations, is that all plan participants are treated consistently. Subjecting plan

participants to variable outcomes in individual proceedings—especially when the claims are plan-wide—violates that principle.

II. Sodexo relies on the Federal Arbitration Act (FAA) to argue that the arbitration provision in its plan is enforceable, but the FAA cannot compel arbitration here because ERISA plans are not state-law contracts. For the FAA to require enforcement, there must be a contract to arbitrate formed and enforceable under general principles of state law.

ERISA plans are akin to trusts, not contracts. Congress intentionally sought to replicate trust-law principles in creating the ERISA regime. An intent to mirror trust law animated Congress' codification of both a duty of fiduciaries to the plan and the availability of plan-wide claims against fiduciaries. And even claims about whether benefits are available under the plan—the type of claim most akin to a breach of contract claim—is subject to a trust-based fiduciary model. Consistent with that approach, ERISA generally preempts state-law breach of contract claims.

Indeed, as Sodexo explains in its brief—like a trust, and unlike a contract under state law—an employer can unilaterally amend an ERISA plan, usually without advance notice to the plan participants. If one party can unilaterally change the terms without timely notice, that is not a contract under state law, and the FAA does not provide for enforcement of arbitration clauses in ERISA plans.

That plan participants and employers are bound by ERISA plans—and that plans are sometimes called contracts for that reason—is of no moment. The basis for binding employers and plan participants to the terms of the plan is federal ERISA law, not state contract law. Indeed, no contract was formed here as a matter of California law. If state law were the basis for binding the employer and the participant, neither would be bound by the plan at all, which would defeat the purpose of ERISA entirely.

This Court should affirm the district court's denial of Sodexo's motion to compel individual arbitration.

ARGUMENT

I. *Dorman II*'s holding that an ERISA plan can foreclose representative actions and plan-wide relief was wrong.

In an unpublished decision, *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510 (9th Cir. 2019) (*Dorman II*), a panel of this Court opined that representative claims brought on behalf of a plan seeking plan-wide relief could be compelled to individual arbitration. That conclusion is contrary to ERISA's text and wreaks havoc on ERISA's requirement that plan participants be treated uniformly. While *Dorman II* is not controlling here both because it is unpublished and because it arose in the context of a defined contribution plan—where each plan participant has an individual account, often a retirement account—and the claims here do not, it is wrong for the same reasons that permitting individual arbitration would be wrong

here: ERISA gives plan participants the right to bring representative actions for plan-wide relief, full stop. If this Court affirms the district court's denial of the motion to compel individual arbitration here—as it should—it should make clear that its holding applies equally to defined contribution plans, lest *Dorman II* continue to justify arguments for stripping plan participants of their ERISA rights.

A. *Dorman II*'s holding was not compelled by the Supreme Court's decision in *LaRue* and was foreclosed by this Court's decision in *Munro*.

Dorman II held that the plaintiff's representative ERISA claims could be compelled to individual arbitration based on a fundamental misunderstanding of the import of the Supreme Court's decision in *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008). The Court interpreted *LaRue* to mean that claims "brought in the context of a defined contribution plan" were "inherently individualized," and thus could be compelled to individual arbitration. *Dorman II*, 780 F. App'x at 514. But *LaRue* reaffirmed that even claims based on losses in an individual account were representative claims brought on behalf of a plan for injuries to the plan and said nothing to indicate that representative actions seeking plan-wide relief could be curtailed. 552 U.S. at 256.

Prior to *LaRue*, it was unclear whether ERISA permitted *any* claims for breach of fiduciary duty seeking relief for losses to individual accounts in the context of defined contribution plans, which are plans, like 401(k) plans, with individual

accounts. The express text of ERISA authorizes plan participants to bring breach claims only as representative suits on behalf of the plan for relief to the plan. *See* 29 U.S.C. §§ 1109, 1132(a)(2). Among other things, § 409 of ERISA provides that the fiduciary "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach" of their fiduciary duties. 29 U.S.C. § 1109(a). In turn, § 502(a)(2) permits plan participants to bring suits for breach of fiduciary duty for relief provided in § 409. 29 U.S.C. § 1132(a)(2).

The Supreme Court had previously held—in a case involving defined benefit plans, which do not have individual accounts—that ERISA provides no cause of action for plan participants to bring individual breach claims. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985). In *Russell*, the plaintiff brought a § 502(a)(2) claim seeking consequential damages caused by the plan's delay in processing her disability claims. *Id.* at 136-37. In rejecting those claims, the Supreme Court explained that "recovery for a violation of § 409 inures to the benefit of the plan as a whole," *id.* at 140, and concluded that "the entire text of § 409 persuades us that Congress did not intend that section to authorize any relief except for the plan itself," *id.* at 144. Like *Russell*, this case involves a defined benefit plan, and so, like

Russell, the only option for plan participants bringing a § 502(a)(2) claim is to bring a representative action for plan-wide relief.[2]

LaRue, in contrast, dealt with a defined contribution plan, meaning that plan participants have individual accounts—there, a 401(k) retirement plan. The *LaRue* plaintiff contended that the plan breached its fiduciary duties by failing to carry out his instructions with regard to changes to the investments in his account, causing his account, but only his account, to lose money. *LaRue*, 552 U.S. at 250-51. The Supreme Court held that it was consistent with the purpose of ERISA to permit plan participants to bring § 409 claims seeking "recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account." *Id.* at 256. But *LaRue* made clear that, despite permitting the recovery of individual-account losses, "§ 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries." *Id.* In other words, *LaRue* did not purport to alter the representative nature of participant enforcement under § 502(a)(2)—it simply held that, if the breach of fiduciary duty impacted only one participant, that participant could still bring a representative claim for the loss to their individual account.

In the wake of *LaRue*, seven circuit courts of appeal, including this one, have addressed and rejected the argument that *LaRue* means a participant in a defined-

[2] Other subsections of § 502(a) permit participants to bring other types of claims, including claims to recover benefits they are personally entitled to under the plan. 29 U.S.C. § 1132(a)(1)(B).

contribution plan may *only* bring claims for losses to his or her individual account. *See Munro v. Univ. of S. Cal.*, 896 F.3d 1088, 1094 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1239 (2019). Those cases confirm that, whether a claim is for individual losses as in *LaRue* or plan-wide losses as here, it is still a representative claim brought on behalf of the plan, and participants are still entitled to bring representative claims seeking plan-wide relief.[3]

Indeed, the *Dorman II* panel's conclusion that defined contribution plan claims seeking plan-wide relief are "individualized" and thus can be compelled to

[3] *See Harrison v. Envision Mgmt. Holding Bd. of Dir.*, 59 F.4th 1090, 1104, 1107 (10th Cir. 2023), *cert. denied*, 144 S. Ct. 280 (2023) (allowing claims for plan-wide relief in context of defined contribution plan to go forward under *LaRue*); *Hawkins v. Cintas Corp.*, 32 F.4th 625, 632-33 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 564 (2023) (following *Munro*); *L.I. Head Start Child Dev. Servs. v. Econ. Opportunity Comm'n of Nassau Cty.*, 710 F.3d 57, 65 (2d Cir. 2013) ("[C]laims [pursuant to § 409(a)] may not be made for individual relief, but instead are 'brought in a representative capacity on behalf of the plan.'") (quoting *Russell*, 473 U.S. at 142 n.9); *Smith v. Med. Benefit Administrators Grp.*, 639 F.3d 277, 283 (7th Cir. 2011) ("*LaRue* simply holds that in the context of a defined contribution pension plan . . . malfeasance by a plan fiduciary that adversely affects the value of the assets held in such an account will support a suit under sections 409 and 502(a)(2) regardless of whether the wrongdoing affects one account or all accounts in the plan."); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 593 (8th Cir. 2009) ("It is well settled, moreover, that suit under § 1132(a)(2) is 'brought in a representative capacity on behalf of the plan as a whole' and that remedies under § 1109 'protect the entire plan.'") (quoting *Russell*, 473 U.S. at 142 & n.9, and citing *LaRue*); *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 595 & n.9 (3d Cir. 2009) ("Defined contribution ERISA plan claims are no different in this regard from defined benefit ERISA plan claims. In both cases, the ERISA § 502(a)(2) claim is brought on behalf of the plan . . . . Contrary to defendants' argument, [*LaRue*] does not suggest otherwise.").

individual arbitration is directly contrary to this Court's decision in *Munro*. There, this Court explained that *LaRue* "made clear that it had not reconsidered its longstanding recognition that it is the plan, and not the individual beneficiaries and participants, that benefit[s] from a winning claim for breach of fiduciary duty, even when the plan is a defined contribution plan." *Munro*, 896 F.3d at 1093. *Munro* went on to explain that even if *LaRue* had indicated that claims seeking recovery for an individual account were not representative claims, such a holding would not apply to *Munro*, which involved claims brought by plan participants in their representative capacity on behalf of the plan and seeking plan-wide relief. *Id.* at 1094. *Munro* concluded that the claims at issue belonged to the plan, not the individual plaintiffs, and were not within the scope of an arbitration clause covering claims an "Employee may have." *Id.*

Dorman II cannot be reconciled with that holding in *Munro*. Michael Dorman brought claims under §§ 409(a) and 502(a)(2) alleging that his employer, Charles Schwab, breached its fiduciary duty to the retirement plan by causing the plan to heavily invest in investment funds managed by Charles Schwab, for which it received excessive and unreasonable compensation. *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107, 1109 (9th Cir. 2019) (*Dorman I*). As in *Munro*, Dorman's claims arose in the context of a defined benefit plan with individual accounts, but Dorman's claims were brought as a representative of the plan and sought only plan-

wide relief. Unlike *LaRue*, Dorman brought no claims with regard to his individual account. *See id.* at 1110.

Charles Schwab nevertheless moved to compel *individual* arbitration of Dorman's *plan-wide* representative claims, based on the arbitration provision in the plan requiring any disputes arising out of the plan to be settled by individual, not representative arbitration. *Id.* Dorman argued—as the plaintiff does here—that compelling individual arbitration interfered with the right under ERISA to bring a representative claim for class-wide relief.

This Court issued two decisions. The published decision, *Dorman I*, reversed the longstanding Ninth Circuit rule that ERISA claims are generally not arbitrable, overruling *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984). *Dorman I*, 934 F.3d at 1109. The unpublished decision, *Dorman II*, held that Dorman's claims were subject to individual arbitration under the provisions in the plan. *Dorman II*, 780 F. App'x at 514. The decision relied in part on the Supreme Court's caselaw holding that no party can be compelled to arbitrate claims on a class-wide basis that has not agreed to do so. *Id.* (citing *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) and *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013)). And despite citing *Munro*, the panel relied on *LaRue*, concluding that Dorman's claims, brought in a representative capacity on behalf of the Plan, "are inherently individualized when

brought in the context of a defined contribution plan" and that Dorman's claims must be arbitrated on an individual basis. *Id.*

But *Munro* unequivocally rejected the position that the Court took in *Dorman II* by making clear that allegations regarding plan-wide mismanagement brought on behalf of the plan are *not* individualized. *Munro*, 896 F.3d at 1093-94. *Dorman II* made no attempt to reconcile its decision with *Munro*. *See Dorman II*, 780 F. App'x at 514.

Prior to *Dorman II*, the circuits had unanimously held that *LaRue* did not eliminate plan-wide claims for defined-contribution plans and did not eliminate representative actions. Rather, where a fiduciary breach affected only an individual's account, *LaRue* held those claims may *also* go forward. As *Munro* shows, even within the context of defined contribution plans, *Dorman II*'s holding that representative actions for plan-wide relief must be converted into individual claims and can therefore be compelled to individual arbitration is just plain wrong.

B. *Dorman II* is contrary to the text and purpose of ERISA, which expressly provides for representative actions seeking plan-wide relief and requires that plan participants be treated uniformly.

Dorman II was also wrongly decided because compelling individual arbitration of representative ERISA claims seeking plan-wide relief impermissibly deprives plaintiffs of federal statutory rights, whether the plan at issue is a defined contribution plan or a defined benefit plan like the one here. Indeed, every federal

court of appeals to have addressed the question has held that employers cannot force ERISA representative claims for plan-wide relief to be arbitrated on an individual basis. *See* Platt Br. 48-51 (collecting cases). And *Dorman II* was wrong to rely on cases about *class-action* incompatibility with arbitration to justify enforcing a waiver of *representative* actions. Not only does the text of ERISA support the right to bring representative actions, but, as a practical matter, requiring participants to adjudicate plan-wide problems on an individual basis threatens to upend the ERISA framework, which depends on plan participants being treated similarly. As such, provisions requiring individual adjudication of representative claims are void as against public policy.

1. First off, contrary to *Dorman II* and Sodexo's arguments here, Sodexo Br. 31-34, the FAA does not require enforcement of waivers of non-class representative claims. Indeed, the Supreme Court has since held that *representative* actions are distinct from *class* actions, and that the FAA does not require enforcement of a waiver of non-class representative actions because they do not present the same inherent procedural incompatibility with arbitration as class actions. *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 657-59 (2022). As the Supreme Court recognized, "[n]on-class representative actions in which a single agent litigates on behalf of a single principal are part of the basic architecture of much of substantive law." *Id.* at 657.

ERISA is just such a substantive law providing for representative claims. When enacting ERISA, Congress gave individual plan beneficiaries the right to hold fiduciaries liable for breaches of their fiduciary duties to the entire plan. *See* 29 U.S.C. §§ 1109(a), 1132(a)(2). In other words, ERISA expressly provides that an individual plan participant may bring a representative action on behalf of the plan for plan-wide relief.

In *Viking River*, the Supreme Court explained the relationship between such claims and the FAA. The FAA's mandate is only "to enforce '*arbitration agreements*.'" *Id.* at 653 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)). An arbitration agreement is "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Id.* (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)). Therefore, if a statutorily created claim does not require a "procedural mechanism at odds with arbitration's basic form," it is not inconsistent with the FAA, *id.* at 656, and the FAA does not mandate that courts enforce contractual waivers of such claims.

In addition, *Viking River* reiterated the longstanding rule that "the FAA does not require courts to enforce contractual waivers of substantive rights and remedies." *Id.* at 653. Because arbitration agreements as recognized by the FAA "do[] not alter

or abridge substantive rights," *id.*, contractual provisions that purport to do so are not entitled to the FAA's protection.

Viking River then considered whether non-class representative actions require a "procedural mechanism at odds with arbitration's basic form," in which case a legal rule preventing them from being waived would be preempted. *Id.* at 656. The petitioner argued that a proceeding is consistent with the arbitral form only if it is "conducted by and on behalf of the individual named parties only." *Id.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011)). Because the California statute at issue (the Private Attorneys General Act, or "PAGA") allowed a plaintiff to represent a separate entity, the petitioner argued, it "create[d] a form of class or collective proceeding" that was incompatible with traditional, bilateral arbitration. *Id.* at 651-52.

The Court disagreed, holding that "single-principal, single-agent representative actions" do not deviate from "traditional arbitral practice" because they "involve the rights of only the absent real party in interest and the defendant, and litigation need only be conducted by the agent plaintiff and the defendant." *Id.* at 657-58. Nothing in the FAA "render[s] all forms of representative standing waivable by contract." *Id.* at 657. Nor, "in enacting the FAA, [did] Congress intend to . . . reshape . . . agency law to ensure that parties will never have to arbitrate in a proceeding that deviates from 'bilateral arbitration' in the strictest sense." *Id.* at 659.

Because the FAA is indifferent to whether the parties are proceeding "on behalf of the individual named parties only" or as agents for a principal, it does not require enforcement of contractual provisions that purport to waive or limit non-class representative actions. *Id.* at 656. This is so even where the representative action "ha[s] something important in common with class actions" in that the principal has "a potentially vast number of claims at its disposal." *Id.* at 655-56.

Contractual provisions limiting a party's ability to bring a non-class representative claim thus fall entirely outside the FAA's aegis, because they are not "alien to traditional arbitral practice." *Id.* at 658. For this reason, the Supreme Court held, the FAA did not require enforcement of a contractual provision restricting a plaintiff's ability to bring such a claim in arbitration, and it did not supersede a legal requirement (there, a provision in PAGA) preventing such a waiver. *Id.* at 659.

Returning to ERISA, claims under § 502(a)(2) are exactly the type of representative actions described by the Court in *Viking River*. A § 502(a)(2) claim is "brought in a representative capacity on behalf of the plan as a whole." *Russell*, 473 U.S. at 142 n.9. Like a plaintiff suing under PAGA, a § 502(a)(2) plaintiff "represents a single principal": the plan. *Viking River*, 596 U.S. at 655. And like a proceeding under PAGA, a proceeding under § 502(a)(2) "involve[s] the rights of only the absent real party in interest and the defendant, and litigation need only be conducted by the agent-plaintiff and the defendant." *Id.* at 658. And like a suit under

PAGA, a § 502(a)(2) suit "exhibit[s] virtually none of the procedural characteristics of class actions." *Id.* at 655.

Contrary to *Viking River*, both *Dorman II* and Sodexo conflate class claims with non-class representative actions like the one here. To the extent *Dorman II* stands for the proposition that representative actions should be treated the same as class actions under the FAA, it has been abrogated by *Viking River*. Here, ignoring *Viking River* and relying heavily on *Dorman II*, Sodexo makes the same mistake as *Dorman II*, looking to the Supreme Court's decisions—now clearly inapposite under *Viking River*—addressing the incompatibility of class procedures with arbitration. Sodexo Br. 31-33. Indeed, Sodexo doesn't even cite *Viking River*, much less contend with its holding. Sodexo's invocation of *Dorman II* here is all the more reason this Court should make *Dorman II*'s holding was wrong when it was decided and even more clearly wrong after *Viking River*.

2. *Dorman II*'s conclusion was also in error because a provision purporting to waive the right to bring a representative action under ERISA prevents participants from vindicating their statutory right to do so and is therefore unenforceable. As Appellee explained at length in his brief, a decision in favor of Sodexo here would be wrong for the same reasons. *See* Platt Br. 42-57.

Dorman II's decision is flatly inconsistent with the Supreme Court's directive that the FAA does not permit enforcement of arbitration clauses that purport to

prospectively waive "a party's *right to pursue* statutory remedies." *American Express*, 570 U.S. at 235 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)) (emphasis added by *American Express*). As explained above, §§ 502(a)(2) and 409 create the right for plan participants to sue on behalf of the plan to recover losses suffered by the plan. An arbitration clause that prohibits representative actions, *i.e.*, actions brought on behalf of the plan, purports to prospectively waive that right. As such, under *American Express* and its predecessors, the FAA does not require enforcement of that aspect of the arbitration clause.

Viking River reaffirms this conclusion, reiterating the longstanding rule that "the FAA does not require courts to enforce contractual waivers of substantive rights and remedies." 596 U.S. at 653. Therefore, a prospective waiver of the right to pursue § 409 remedies is foreclosed. Unsurprisingly, every published federal court of appeals decision to have addressed the issue agrees. *See* Platt Br. 48-51 (collecting cases). *Dorman II* is the outlier.

3. Further, arbitration provisions that purport to waive representative ERISA claims alleging plan-wide harms are contrary to the explicit public policy codified in ERISA and are therefore void. *Dorman II* was wrong to enforce such a provision for that reason, too.

Courts "may not enforce a [contract] that is contrary to public policy." *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983). "If the contract as interpreted by [an arbitrator] violates some explicit public policy, [courts] are obliged to refrain from enforcing it." *Id.* "One of the exceptions to the requirement that courts defer to the awards of arbitrators is the now-settled rule that a court need not, in fact cannot, enforce an award which violates public policy." *Sea-Land Serv., Inc. (Pac. Div.) v. Int'l Longshoremen's & Warehousemen's Union, Locs. 13, 63, & 94*, 939 F.2d 866, 873 (9th Cir. 1991) (quoting *Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173, Int'l Ass'n of Machinists & Aerospace Workers*, 886 F.2d 1200, 1209 (9th Cir. 1989)).

One of ERISA's fundamental underpinnings is the consistent treatment of participants across a plan. *See Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 11 (1987); *Collier v. Lincoln Life Assurance Co. of Bos.*, 53 F.4th 1180, 1188 (9th Cir. 2022) (noting goal of "promot[ing] consistent treatment of claims"); H.R. Rep. No. 93-533, at 11 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4650 ("[A] fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ[.]"). ERISA's implementing regulations therefore require that "plan provisions [be] applied consistently with respect to similarly situated claimants." 29

C.F.R. § 2560.503-1(b)(5); *see, e.g.*, *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 936 (9th Cir. 2012); *Glista v. Unum Life Ins. Co. of Am.*, 378 F.3d 113, 123 & n.3 (1st Cir. 2004) (noting Department of Labor's "longstanding requirement of consistency"). A plan administrator "is required by law to ensure that the plan provisions are applied consistently." *Stephan*, 697 F.3d at 936 (quoting 29 C.F.R. § 2560.503-1(b)(5)).

Consistent treatment of trust beneficiaries is also a tenet of trust law, from which much of ERISA springs. *See Varity Corp. v. Howe*, 516 U.S. 489, 514 (1996) ("The common law of trusts . . . requires a trustee to take impartial account of the interests of all beneficiaries.") (citing Restatement (Second) of Trusts §§ 183, 232); *Gaither v. Aetna Life Ins. Co.*, 394 F.3d 792, 808 n.6 (10th Cir. 2004) ("[A] fiduciary must be impartial among the various beneficiaries[.]"); *Acosta v. Pac. Enters.*, 950 F.2d 611, 618 (9th Cir. 1991) ("[W]e agree that the common law of trusts informs the duties of an ERISA fiduciary.").

The provision enforced by *Dorman II*—like the provision at issue here—threatens to result in multiple, individualized arbitrations involving participants in the same plan, each resulting in a decision that binds the fiduciaries only with respect to the claims of a single claimant. With regard to the claims in *Dorman II*, some participants might win a judgment entitling them to recover the losses resulting from the breach of the fiduciaries' duties, but each judgment might yield wildly variable

rulings as to the amounts of those recoveries. And some might lose altogether, even if the claims all involved a common plan, common fiduciaries, common fiduciary breaches, common parties in interest, and common damages. Similarly, here, some plan participants might win a judgment awarding them the return of the disputed surcharge, others may not, and some may receive plan-wide equitable relief, which Sodexo insinuates, without explanation, is still possible despite the obvious problem of conflicting plan-wide injunctive remedies. Sodexo Br. 33-34 (distinguishing provision in Sodexo plan prohibiting representative actions from plan provisions prohibiting plan-wide relief altogether). In any case, participants would be treated inconsistently. Such conflicting outcomes are arbitrary and antithetical to fundamental ERISA requirements.

II. ERISA plans are not contracts under state law, and, therefore, their arbitration provisions are not enforceable under the FAA.

For the reasons outlined above, even under the framework of the FAA, provisions requiring individual arbitration of non-class representative ERISA claims are not enforceable. But the FAA cannot require enforcement of arbitration provisions in ERISA plans for another reason as well: The FAA's reach is limited to enforcement of *contracts* to arbitrate, and ERISA plans are not contracts for purposes of the FAA.

Section 2 of the FAA—the statute's core substantive provision—provides that a "written provision in any . . . contract evidencing a transaction involving commerce

to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. As such, this Court has long held that, because the FAA "only applies to 'contracts evidencing transactions in commerce,' courts must first make a threshold finding that the document at least purports to be such a contract." *Republic of Nicaragua v. Standard Fruit Co*., 937 F.2d 469, 476 (9th Cir. 1991). Indeed, under the FAA, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986). The determination as to whether a contract to arbitrate was, in fact, formed is made by applying "ordinary state-law principles that govern the formation of contracts." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

In other words, for the FAA to require enforcement, a contract containing an arbitration agreement must have been formed under state law. *See id.* For the reasons Appellee ably explains, here, no agreement for Platt to arbitrate his claims was formed as a matter of California contract-formation law. Platt Br. 30-40.

But regardless of the individual circumstances in any one case, ERISA plans, with or without arbitration provisions, are fundamentally not contracts under state law—rather, they are binding documents subject to the body of federal trust law that is ERISA law. That is, that plan participants and employers are bound by ERISA

plans—and that plans are sometimes called "contracts" for that reason—is irrelevant. The basis for binding employers and plan participants to the terms of the plan is federal ERISA law, which is grounded in trust law, not state contract law.

When Congress enacted ERISA, it grounded its provisions in trust law. ERISA was enacted in response to two problems with employer pension plans: (1) default, where an employer does not pay the promised pension because of insolvency or some more nefarious reason, and (2) administrative mismanagement, where those responsible for investing and paying out plan assets do the job incompetently or intentionally misuse the funds. *See* John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell*,* Mertens*, and* Great-West, 103 Colum. L. Rev. 1317, 1322-23 (2003). To combat the second problem—intentional or unintentional administrative mismanagement—Congress adapted "the long-familiar trust model as the regulatory regime, by subjecting ERISA-covered plans to a double dose of trust law": imposing a rule of mandatory trusteeship and extending the fiduciary duty beyond the plan's trustees. *Id.* at 1324.

Congress codified in ERISA the two principles of trust fiduciary law: loyalty and prudence. Section 404(a)(1)(A), modeled off the Restatement of Trusts' loyalty rule, requires a fiduciary to "discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying

reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A); *see* Langbein, *supra*, at 1325. Likewise, ERISA's prudence rule reflects trust law, including the Restatement, requiring the fiduciary to exercise "the care, skill, prudence, and diligence" of a "prudent man acting in a like capacity." 29 U.S.C. § 1104(a)(1)(B); *see* Langbein, *supra*, at 1326. "Congress invoked the common law of trusts to define the general scope of [a fiduciary's] authority and responsibility." *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.,* 472 U.S. 559, 570 (1985) (citing S. Rep. No. 127, at 29 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4865; H.R. Rep. No. 93-533, at 11 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4649). "The language of section 404(a) reflects this congressional intent that common law trust principles animate the fiduciary responsibility provisions of ERISA." *Acosta*, 950 F.2d at 618.

The reach of trust law into ERISA extends into the way the statute treats benefit determinations; determinations as to whether benefit claims are within the plan terms are also subjected "to the trust-based fiduciary model." Langbein, *supra*, at 1329. ERISA requires that review of claims denials be made "by the appropriate named fiduciary" subject to the duties of loyalty and prudence. 29 U.S.C. § 1133(2). And in deciding the standard of review for courts reviewing benefit determinations, the Supreme Court understood Congress intended for it to look to trust law, *not*

contract law, for guidance. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111-12 (1989).

Moreover, the legislative history is explicit that Congress intended to "apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries." H.R. Rep. No. 93-1280, at 295 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 5038, 5076; s*ee also* 120 Cong. Rec. 29,198, 29,200 (1974); 120 Cong. Rec. 29,928-29, 29,932 (1974). And under traditional trust law, trust beneficiaries are able to bring suit on behalf of themselves or on behalf of the trust. The traditional common-law trust remedies for suits brought on behalf of a trust, recovery for loss incurred, profits that the trustee made in breach of the trust, or gains that would have accrued but for the trust, are codified in § 409(a), the provision providing for plan-wide relief for breaches of fiduciary duty. *See* Langbein, *supra*, at 1333-35.

The structure of ERISA further reflects that Congress intended for plans to be governed by federal ERISA law, not state contract law. ERISA § 514(a) contains one of federal law's most sweeping preemption provisions and displaces "any and all State laws insofar as they . . . relate to an employee benefit plan." 29 U.S.C. § 1144(a). Thus, as a general matter, ERISA preempts state-law breach of contract claims, and parties are limited to the types of claims outlined the statute. This just

emphasizes that Congress did not see ERISA plans as state-law contracts under state law.

Further, the mechanics of plan amendment provided for in ERISA reflect that plans are fundamentally trusts, not contracts under state law. As Sodexo forcefully explains in its brief, an employer has a unilateral, unfettered right to amend an ERISA plan at any time, and the "potential beneficiary, though not consulted or consenting, ordinarily is bound nevertheless by the amendment." *Mathews v. Sears Pension Plan,* 144 F.3d 461, 465 (7th Cir. 1998); *see* Sodexo Br. 16-18. Indeed, to quote Sodexo, "[t]he power to establish and amend an ERISA plan unilaterally is a bedrock ERISA principle." Sodexo Br. 17 (citing *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 442-44 (1999)); *see also Alday v. Raytheon Co.*, 693 F.3d 772, 782 (9th Cir. 2012). Only in very limited circumstances does ERISA require an employer to notify participants in advance of an amendment to the plan, 29 U.S.C. § 1054(h), and plans need not disclose other types of amendments until long after the amendment has gone into effect, if at all. 29 C.F.R. § 2520.104b-3.

A document that the drafter has the unilateral right to amend without notice or consent of other parties involved is not a contract as a matter of state law. *See Asmus v. Pac. Bell*, 999 P.2d 71, 76-77 (Cal. 2000) (reasonable notice of unilateral modifications required for unilateral contracts to be enforceable). On the other hand, creators of trusts who retain an interest in the trust *do* have the presumptive ability

to amend the trust. Restatement (Third) of Trusts § 63. In other words, for the exact reasons Sodexo relies on, the ERISA plan is far more akin to a trust than to a state-law contract enforceable under the FAA. *See McArthur v. McArthur*, 168 Cal. Rptr. 3d 785, 793 (Cal. Ct. 2014) (refusing to "require that a trust beneficiary be bound by an arbitration clause in a trust instrument."); *cf. Schoneberger v. Oelze*, 96 P.3d 1078, 1082 (Ct. App. 2004), *superseded by statute*, Ariz. Rec. Stat. § 14-10205 (finding that an arbitration clause in a trust document did not meet the requirement under Arizona law for enforcement of "a provision in a written contract to submit to arbitration" because "as a matter of law, the trusts [] were not contracts").

That ERISA plans are not state-law contracts for purposes of the FAA does not mean participants are not bound by their terms or that federal courts adjudicating ERISA claims cannot rely on principles of contract law to interpret plans' language just as they would a trust document. *See, e.g.*, *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 98 (2013) (applying principles of equitable liens by agreement to an ERISA plan). After all, a plan administrator must act "in accordance with the documents and instruments governing the plan" insofar as the plan complies with the substantive provisions of ERISA. 29 U.S.C. § 1104(a)(1)(D). But the basis for binding employers and plan participants to the terms of the plan is *ERISA* law, not *state contract* law. Indeed, as Appellee explains in his brief, no contract was formed here

as a matter of California law. If state law were the basis for binding the employer and the participant, neither would be bound by the plan at all.

Without the FAA, whether any particular provision is enforceable becomes a question of whether it is permissible under ERISA. And, as already explained, because the arbitration clause here purports to prohibit the very representative actions expressly provided for by ERISA, it conflicts with ERISA and is not enforceable.

CONCLUSION

For these reasons and those given in Appellee's brief, this Court should affirm the district court's denial of Sodexo's motion to compel arbitration.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), Fed. R. App. P. 29(a)(5), and Ninth Circuit Rule 32-1(a) because this brief contains 6,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by Microsoft Word 2016. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a) because this brief has been prepared in proportionally spaced typeface using 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on February 29, 2024, the foregoing document was served on all parties or their counsel of record through CM/ECF system.

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