Docket No. 18-15281

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL F. DORMAN, individually as a participant in the SCHWAB PLAN RETIREMENT SAVINGS AND INVESTMENT PLAN and on behalf of a class of all those similarly situated,

Plaintiff-Appellee,

v.

THE CHARLES SCHWAB CORPORATION; CHARLES SCHWAB & CO., INC.; SCHWAB RETIREMENT PLAN SERVICES, INC.; CHARLES SCHWAB BANK; CHARLES SCHWAB INVESTMENT MANAGEMENT, INC.; JOHN DOES 1-50; and XYZ CORPORATIONS 1-5,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, OAKLAND IN CASE CASE NO. 4:17-CV-00285-CW CLAUDIA WILKEN, SENIOR DISTRICT JUDGE

BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING AND REHEARING *EN BANC*

William Alvarado Rivera*
Dean C. Graybill
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
(202) 434-2060
**Counsel of Record*
Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure:

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to § 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to § 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

Dated: September 20, 2019

/s/ William Alvarado Rivera
William Alvarado Rivera

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules and Regulations

Legislative History

Other Authorities

STATEMENT OF INTEREST[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and AARP Foundation seek to increase the availability, security, equity, and adequacy of public and private pensions and other employee benefit plans, including through participation as amici in state and federal courts.[2]

In this case, the panel has determined that employers, via retirement-plan arbitration contract, may strip older Americans' 401(k) accounts—totaling over four trillion dollars today—of the most critical safeguard prescribed by Congress to

---

[1] Amici certify that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and certifies that no person, other than amici, contributed money intended to prepare or submit this brief. FED. R. APP. P. 29(c)(5). Counsel for both parties have consented to the filing of this brief.

[2] *See, e.g.*, *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008); *Munro v. Univ. of S. Cal.*, 896 F.3d 1088 (9th Cir. 2018); *Standard Ins. Co. v. Morrison*, 584 F.3d 837 (9th Cir. 2009).

guard their financial integrity. That safeguard is plan-participant lawsuits for breach of fiduciary duty, brought on behalf of *all* plan members in federal court pursuant to §§ 502(a)(2) and 409(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. §§ 1132(a)(2), 1109(a). "Congress intended that private individuals would play an important role in enforcing ERISA's fiduciary duties—duties that have been described as 'the highest known to the law.'" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982)).

The panel's ruling that employers, in the case of 401(k) accounts, can substitute individual-only arbitration for such plan-wide lawsuits misconstrues *LaRue v. Wolff* [3] and contradicts Congress's clear intent. This departure from precedent also could not have come at a worse time. Today, millions of Americans face an uncertain financial future, and it is the very defined contribution plans at issue in this case, not old-style pensions, that now constitute older Americans' largest source of retirement income after Social Security. Congress's carefully crafted enforcement scheme—individual participants and beneficiaries bringing lawsuits for fiduciary breach, on par with the same suits by the government—is

[3] *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008). As Plaintiff-Appellee correctly observes, there is nothing in *LaRue v. DeWolff* indicating that claims of fiduciary breach brought on behalf of the plan are "inherently individualized" in the context of defined contribution plans. Pl.-Appellee's Pet. for Reh'g and Reh'g *En Banc* ("Petition for Rehearing"), 8-11.

needed now more than ever. Amici respectfully submit that the panel's decision poses issues of "exceptional importance" warranting consideration by the full Ninth Circuit. Fed. R. App. P. 35(a)(2).

ARGUMENT

I. Congress in ERISA Constructed an "Interlocking, Interrelated, and Interdependent Remedial Scheme" in Which Participant Lawsuits on Behalf of the Plan Serve an Indispensable Role

Congress, based on a record showing devastating examples of fiduciary malfeasance and loss of employee pensions, passed ERISA in 1974, "establishing standards of conduct, responsibility and obligation for fiduciaries [ ], and . . . providing appropriate remedies, sanctions and ready access to the Federal courts." 29 U.S.C. § 1001(b); *see Mertens v. Hewitt Assocs.*, 508 U.S. 248, 264 (1993) (White, J., dissenting); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004).

Congress intended §§ 502(a)(2) and 409(a) to serve as key civil enforcement tools to police fiduciary obligations.[4] Section 502(a)(2) provides that "the

[4] S. Rep. No. 93-127, at 35 (1973), *reprinted in* 1 SUBCOMM. ON LABOR OF THE S. COMM. ON LABOR AND PUB. WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 621 (1976) (describing Senate version of enforcement provisions as intended to "provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]"); H.R. Rep. No. 93-533, at 17 (1974), *reprinted* in 2 SUBCOMM. ON LABOR OF THE S. COMM. ON LABOR AND PUB. WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 2364 (describing House version in identical terms).

Secretary [of Labor] . . . *a participant, beneficiary* or fiduciary" may bring a "civil action" for "appropriate relief under section 1109 [i.e., ERISA § 409] of this title." 29 U.S.C. § 1132(a)(2) (emphasis added). ERISA Section 409, in turn, prescribes that this relief includes requiring fiduciaries to

> make good to [a] plan *any losses to the plan* resulting from each such breach, and *to restore to such plan any profits* of such fiduciary which have been made through use of assets of the plan by the fiduciary, and [the fiduciary] shall be subject to *such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary*.

29 U.S.C. § 1109(a) (emphasis added).

As the Supreme Court has recognized, Congress in these sections permitted single participants to recover *all* plan losses and to obtain injunctive relief because it was "abundantly clear" that the Congressional drafters of section 502 "were primarily concerned . . . with remedies that *would protect the entire plan*, rather than with the rights of an individual beneficiary." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-42 (1985) (emphasis added).

It was no accident that Congress chose individual participants to be among the monitors of the financial integrity of their own plans, given the "evident care" with which Congress crafted ERISA's remedial provisions. *See Russell*, 473 U.S. at 147. Both the House Education and Labor Committee and the Senate Labor and Public Welfare Committee elaborated on the aims of the statute's remedial provisions in virtually identical language:

> The enforcement provisions have been designed specifically to provide both the Secretary [of Labor] *and participants and beneficiaries* with broad remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants.

H.R. REP. NO. 93-533, at 17 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4655 (emphasis added); S. REP. NO. 93-127, at 35 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4871. "As part of [the] closely integrated regulatory system Congress included various safeguards to preclude abuse and 'to completely secure the rights and expectations brought into being by this landmark reform legislation.'" *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (quoting S. REP. NO. 93-127, at 36 (1973)). These statements "support the view that the creation of an adequate and, indeed, improved remedial scheme for the benefit of participants and beneficiaries was an important goal" under ERISA. *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 145 (2d Cir. 1999).

Congress placed individual-participant suits on par with those of the government. Why? – Because no one can police the financial integrity of retirement plans as effectively as its plan participants. The enormity of the task, versus the scarcity of government resources, is explanation enough. For example, the Employee Benefits Security Administration in the Department of Labor, as of

2018, was responsible for policing over "694,000 retirement plans, approximately 2.2 million health plans, and a similar number of other welfare benefit plans, such as those providing life or disability insurance."[5] DOL consistently has had inadequate resources to police the retirement system.[6]

Congress also recognized that the prospect of individual federal-court lawsuits requesting *plan-wide* relief provides critical deterrence value. "Fiduciary abuses may be deterred [by] . . . impos[ing] personal liability upon trustees for losses sustained by pension plans as a result of such abuses." *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985). Plan-wide relief such as disgorgement of *all* profits improperly earned by a breaching fiduciary—instead of mere make-whole relief for a single participant—serves as a powerful deterrent. *See Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861

[5] U.S. DEP'T OF LABOR, FACT SHEET, https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results.pdf (last visited Sept. 18, 2019). It closed 1,329 civil investigations in fiscal year 2018. *Id*.

[6] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-22, EMPLOYEE BENEFITS SECURITY ADMINISTRATION—ENFORCEMENT IMPROVEMENTS MADE BUT ADDITIONAL ACTIONS COULD FURTHER ENHANCE PENSION PLAN OVERSIGHT 2-4 (2007); U.S. GEN. ACCOUNTING OFFICE, GAO-02-232, PENSION AND WELFARE BENEFITS ADMINISTRATION—OPPORTUNITIES EXIST FOR IMPROVING MANAGEMENT OF THE ENFORCEMENT PROGRAM 2-3 (2002); U.S. DEP'T OF LABOR, PWBA, TASK FORCE ON ASSISTANCE TO THE PUBLIC (1992).

F.2d 1406, 1414 (9th Cir. 1988). The deterrent value of individualized-only arbitration pales by comparison.

Nor can private arbitrators hope to honor Congress's desire that participants also obtain "such other equitable or remedial relief as *the court* may deem appropriate, including removal of such fiduciary." 29 U.S.C. § 1109(a) (emphasis added). Arbitrators, for example, are simply not empowered to order or enforce injunctive relief, including the statutorily identified remedy of removing a fiduciary. As reflected in Congress's careful use of the words "the court," the judiciary has the power to do this, and more broadly to change how a plan is administered and managed. *See, e.g., CIGNA Corp. v. Amara*, 563 U.S. 421, 440 (2011) (noting district court ordered affirmative and negative injunctions to bring plan into compliance).[7]

[7] Another unique ERISA function that individualized arbitration cannot provide is judicial development of a national body of fiduciary doctrine keyed to Congress's purposes in enacting ERISA. While the common law of trusts provided a starting point for ERISA, Congress assumed that there was a need that "courts interpret the prudent man rule and other fiduciary standards bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by ERISA." H.R. REP. NO. 93-533, at 12 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4650; *see also Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) ("ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection."). This bears on the adequacy of arbitration for other ERISA protections as well, *e.g.*, § 501(a)(1) (individual claims).

In sum, "it is 'clear that Congress intended to provide the courts with broad remedies for redressing the interests of participants and beneficiaries when they have been adversely affected by breaches of a fiduciary duty.'" *Donovan*, 754 F.2d at 1056 (quoting *Eaves v. Penn*, 587 F.2d 453, 462 (10th Cir. 1978) (citing S. REP. 93-127, *as reprinted in* 1974-3 U.S.C.C.A.N. 4838, 4871)). The panel's determination that a fiduciary, through an arbitration contract, can strip ERISA plan participants of the right to pursue such derivative actions on behalf of the plan is at odds with established precedent and clear Congressional intent. The remedial scheme of §§ 502(a)(2) and 409 was drafted with "deliberate care," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987), and is "carefully integrated . . . interlocking, interrelated, and interdependent," *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). The courts should be "especially 'reluctant to tamper with the enforcement scheme embodied in [ERISA] . . .'" *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (quoting *Russell*, 473 U.S. at 147).

II. The Panel's Determination That Arbitration Clauses Can Strip Defined Contribution Plan Participants of Their Right to Pursue Section 502(a)(2) Actions Misinterprets *LaRue* and has Far-Reaching Consequences for the Financial Security of Older Americans

As Petitioner notes, the panel's interpretation of *LaRue v. DeWolff* is fundamentally wrong. The panel construes *LaRue* as holding that claims of fiduciary breach are "inherently individualized" in the case of 401(k) investments.

This conclusion, however, directly conflicts with the Ninth Circuit's holding in *Munro v. University of Southern California*, which stated that, even in the case of defined contribution plans, allegations of "fiduciary misconduct as to the plans in their entireties" are claims brought on behalf of the plan rather than on behalf of any individual participant. 896 F.3d 1088, 1093-94 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1239 (2019).

This issue is of "exceptional importance" because, in light of today's retirement investing landscape, the effective private policing of the financial integrity of 401(k) and other defined contribution plans[8]—with access to all the remedial tools Congress provided—is vital to the financial security of older Americans. Over a decade ago, the Supreme Court in *LaRue* recognized that defined contribution plans had become the primary vehicle for providing retirement income in America, next to Social Security. *See LaRue*, 552 U.S. at 255. By 2013, there were over 527,000 401(k) plans, with over 64.4 million participants and $4.179 trillion in assets. U.S. DEP'T OF LABOR, EMPLOYEE BENEFITS SEC. ADMIN., PRIVATE PENSION PLAN BULLETIN ABSTRACT OF 2013 FORM 5500 ANNUAL REPORTS 47 (2015),

[8] A "defined contribution" or "individual account" plan provides retirement benefits "based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses . . . which may be allocated to such participant's account." 20 U.S.C. § 1002(34).

https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2013.pdf.

Furthermore, the modern predominance of 401(k) plans constitutes a fundamental reallocation of investment risk in employer sponsored plans. *See, e.g.*, *LaRue*, 552 U.S. at 250 n.1 (describing the differences between defined benefit and defined contribution plans). Gone are the days when most retirees could count on a predictable life-time annuity funded solely by their employers. Today, income security in retirement depends primarily on (1) the level of employee and employer contributions to 401(k) plans, and (2) the quality and performance of the investment options in which those contributions are invested, including the amount of fees charged. *See, e.g.*, *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1826 (2015) (participants' retirement benefits are determined by the market performance of contributions less expenses, which can significantly reduce the account value). Significantly, unlike participants in defined benefit plans, 401(k) participants alone bear the risk if their investment choices perform poorly. *Tibble,* 135 S. Ct. at 1826 (stating that in a defined contribution plan, "participants' retirement benefits are limited to the value of their own individual investment accounts, which is determined by the market performance of employee and employer contributions, less expenses"). Thus, the fiduciary's duty to prudently select, monitor, and retain plan investment options is critical to the proper

functioning of retirement plans. *See Tibble*, 135 S. Ct. at 1828. The fact that most 401(k) accounts are modest in size—an average of $75,358 and median of $16,836 in 2016—amplifies the real-world impact when fiduciaries imprudently choose inappropriate investments.[9]

In sum, today Americans planning for retirement, more than ever, are forced to trust that fiduciaries will act solely in the best interests of retirement-plan participants and beneficiaries. *See* 29 U.S.C. § 1104(a)(1) (outlining how fiduciaries must discharge duties with respect to such plans). We respectfully submit that the panel's ruling that employers, via arbitration, may strip plan participants of the protections of §§ 502(a)(2) and 409(a) of ERISA will have far-reaching consequences if adopted by this Circuit and other courts, undermining the financial security of millions of Americans.

[9] *See* JACK VAN DERHEI ET AL., 401(K) PLAN ASSET ALLOCATION, ACCOUNT BALANCES, AND LOAN ACTIVITY IN 2016, EBRI ISSUE BRIEF, NO. 458 13 (2018), https://www.ebri.org/docs/default-source/ebri-issue-brief/ebriib458k-update-10sept18.pdf?sfvrsn=bca4302f_6.

CONCLUSION

For the foregoing reasons, amici respectfully urge that Plaintiff-Appellee's Petition for Rehearing and Rehearing *En Banc* be granted.

Dated: September 20, 2019

Respectfully submitted,

/s/ William Alvarado Rivera
William Alvarado Rivera*
warivera@aarp.org
Dean C. Graybill
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
(202) 434-2060
**Counsel of Record*

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Circuit Rule 29-2(1) because the brief contains 2,633 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

Dated: September 20, 2019

/s/ William Alvarado Rivera
William Alvarado Rivera*
warivera@aarp.org
Dean C. Graybill
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
(202) 434-2060
**Counsel of Record*

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2019, I filed the foregoing Brief of Amici Curiae AARP, AARP Foundation in Support of Plaintiff-Appellee's Petition for Rehearing and Rehearing *En Banc* with the Clerk of the United States Court of Appeals for the Ninth Circuit via the CM/ECF system, which will send notice of such filings to all registered CM/ECF users.

Dated: September 20, 2019

/s/ William Alvarado Rivera
William Alvarado Rivera*
warivera@aarp.org
Dean C. Graybill
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
(202) 434-2060
**Counsel of Record*

Counsel for Amici Curiae