Nos. 20-17363, Nos. 20-17364, 21-15193, 21-15194

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID WIT, et al.,

Plaintiffs-Appellees,

v.

UNITED BEHAVIORAL HEALTH,

Defendant-Appellant.

GARY ALEXANDER, et al.,

Plaintiffs-Appellees,

v.

UNITED BEHAVIORAL HEALTH,

Defendant-Appellant.

On Appeal from the U.S. District Court for the Northern District of California, Nos. 3:14-cv-2346, 3:14-cv-5337 (Hon. Joseph C. Spero)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT UNITED BEHAVIORAL HEALTH

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The Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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INTEREST OF THE *AMICUS CURIAE*[1]

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

The Chamber's members include many employers that offer benefits plans governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, as well as companies that fund or administer those plans. The Chamber's members also frequently defend against putative class action lawsuits that involve

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[1] No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

ERISA claims. The Chamber regularly participates as *amicus curiae* in ERISA cases before this Court.[2]

The Chamber has a strong interest in this case, which implicates the Article III prerequisites for standing and the Rule 23 prerequisites for certifying a class. In particular, the failure of the district court in this case to adhere to those requirements yielded certification of, and judgment for, a sprawling class full of individuals whose denials of benefits lack proof of any connection to the challenged conduct—and who therefore suffered no injury cognizable under Article III. If the approach reflected in the judgment and class certification orders is permitted to stand, business will predictably be mired in meritless litigation brought by plaintiffs' counsel incentivized to seek the certification of enormous classes based on alleged procedural missteps unconnected to any concrete harm to class members.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

It is critically important for individuals who suffer from mental-health and substance-use disorders to receive effective treatment. When

[2] *See, e.g.*, *Sulyma v. Intel Corp. Inv. Pol'y Comm.*, 909 F.3d 1069 (9th Cir. 2018); *White v. Chevron Corp.*, 752 F. App'x 453 (9th Cir. 2018); *Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833, 834 (9th Cir. 2018).

such treatment is covered under an employee-sponsored health insurance plan, but denied in error, ERISA provides mechanisms for plan members to administratively appeal the adverse determination and, if necessary, to seek judicial review to recover benefits due. *See* 29 U.S.C. § 1132(a)(1)(B).

In a typical Section 1132 case seeking to recover "benefits due" under an ERISA plan, an individual plaintiff must show that the plan administrator's alleged violation of ERISA "*cause[d]* improper denial of benefits." *Spindex Physical Therapy USA Inc. v. United Healthcare of Ariz., Inc.*, 770 F.3d 1282, 1297 (9th Cir. 2014) (emphasis added); *see also Huntsinger v. Shaw Grp., Inc.*, 268 F. App'x 518, 520 (9th Cir. 2008). The plan administrator, in turn, is entitled to raise as a defense that the benefits were denied for independent reasons. These both are generally highly individualized and case-specific determinations; indeed, the district court acknowledged here that the denials of the class members' benefits claims were based on "a multitude of individualized circumstances." 1-ER-193.

Plaintiffs here expressly renounce injury based on the wrongful denial of benefits, because a class of plaintiffs asserting that injury

could not be certified—the need to take into account the individualized issues relevant to benefits denials would have precluded the necessary finding that common issues predominated. To circumvent that obstacle, plaintiffs creatively proposed, and the district court accepted, a novel theory that the entire class is entitled to a "reprocessing" of their benefits claims without ever showing a causal link between the challenged conduct and the denial of benefits—or even that the entire class could be entitled to benefits at all.

That was a fundamental error that infected the entire proceeding, and appellant United Behavioral Health (UBH) convincingly explains the numerous reasons why this Court should reverse the judgment below and decertify the classes. The Chamber focuses on two related aspects of the district court's analysis and explains why that analysis, if allowed to stand, would have a significant adverse impact on businesses, workers, and the courts.

First, plaintiffs' claim violates the basic requirements of Article III standing. They challenge the use of portions of guidelines for determining the scope of coverage for the treatment of mental health and substance use disorders; in particular, plaintiffs allege that some of

the guidelines' provisions were unduly narrow. Those guidelines were referenced (albeit through multiple steps of incorporation by reference in some instances) in the adverse coverage decisions of approximately 67,000 individuals who have thousands of different healthcare plans.

But it is undisputed that the claims of many of those individuals were denied for reasons ***wholly unrelated*** to the challenged portions of the guidelines. Thus, plaintiffs conceded that if this action sought to recover benefits due, causation problems would preclude certification of a class consisting of plan participants whose claims were denied for many different reasons.

Plaintiffs therefore recast their injury as the deprivation of an interest in having their claims considered under different guidelines. But the assertion of that bare procedural interest cannot manufacture standing. The application of guidelines that were purportedly faulty in part does not injure plan participants unless their benefits were denied as a result of those purportedly faulty provisions. Plaintiffs did not present any evidence to that effect, and in fact stipulated that they were not seeking to do so. Instead, plaintiffs alleged that each class member's "harm" was merely the damage to the claimed interest in having a

coverage request processed according to appropriate guidelines. That abstract interest falls far short of the concrete, or "real," injury necessary to invoke the authority of the federal courts.

Second, the district court's certification of a broad class of tens of thousands of ERISA plan participants violated Rule 23 and the Rules Enabling Act. As explained above, in an ordinary single-plaintiff case related to plan benefits, there is no doubt that the plaintiff would have to prove at trial that he or she was denied benefits as a result of the alleged ERISA violation. Due process would require that the defendant, in turn, be given an opportunity to challenge the plaintiff's evidentiary showing (for example, through evidence that the plaintiff's benefits were properly denied under the plan).

The district court cast aside these due process protections in order to certify a class—an approach that cannot be squared with the Supreme Court's repeated instruction that a Rule 23 class action is nothing more than the sum of the individual class members' claims. Courts may not negate defendants' due process rights by certifying a class "on the premise that [the defendant] will not be entitled to litigate

its * * * defenses to individual claims." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).

To do so, as the district court did here, violates the Rules Enabling Act, which embodies the due process principle that procedural rules, like Rule 23, cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). As the Supreme Court has repeatedly explained, the Rules Enabling Act bars courts from "giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1048 (2016).

Here, the only asserted uniform classwide experience is the purported reference to the guidelines in the coverage decisions of tens of thousands of plan members, including individuals whose claims were indisputably denied on grounds unrelated to the challenged portions of the guidelines. Notwithstanding the stark differences in the circumstances of the individual class members, however, UBH was denied a meaningful opportunity to introduce evidence in defense against those claims. The district court adopted plaintiffs' theory that they needed to bring only a "facial" challenge to the use of the

guidelines without any connection to the circumstances of any individual class member. That result should have been avoided through proper application of several of Rule 23's requirements, including typicality, commonality, and predominance.

The approach to Article III standing and Rule 23 embodied in the decision below is not only wrong as a matter of law, but, if permitted to stand, will carry significant consequences for businesses, workers, and the judicial system—both under ERISA and more broadly. An approach to standing that permits lawsuits challenging procedural errors that are not shown to have caused any real world harm would generate vast amounts of costly litigation without any corresponding practical benefit. And the hydraulic settlement pressure that class actions place on defendants—pushing them to settle claims regardless of the merits—will encourage enterprising lawyers to try to turn every dispute, no matter how individualized, into a class action. In the ERISA context in particular, requiring plan administrators and, ultimately, employers to defend against sprawling and unjustified class action litigation will inflate costs, lead to less generous health benefit plans, and discourage

employers from offering plan options that are attractive to many participants.

The judgment of the district court should therefore be reversed.

ARGUMENT

I. Plaintiffs' Theory Of Procedural Harm Is Insufficient To Establish Standing And Cannot Support Classwide Relief.

In a typical ERISA lawsuit to obtain benefits, a district court undertakes a fact-intensive investigation into whether benefits were improperly withheld under the terms of the applicable plan, based on an administrative record compiled by the plan administrator. Because that inquiry turns on the unique medical circumstances of the claimant and the specific terms of the plan, litigation for health benefits due under an ERISA plan is usually individualized and, therefore, generally ill-suited for class treatment. *See* Opening Br. 42 (collecting cases).[3]

To avoid those restrictions, plaintiffs proposed, and the district court accepted, a novel theory of harm. In plaintiffs' view, their injury is not the denial of benefits, but instead the presence of a procedural error

[3] In addition, Congress authorized awards of attorneys' fees for prevailing plaintiffs in ERISA benefits litigation, *see* 29 U.S.C. § 1132(g)(1), creating an incentive for the filing of meritorious individual claims.

during a benefits determination, regardless of whether that error had anything to do with the benefits denial. By permitting a class action lawsuit to proceed to final judgment on that flawed theory, the district court erred under both Article III and Rule 23.

A. Plaintiffs failed to demonstrate Article III standing for each class member.

To demonstrate standing, a plaintiff must establish three familiar elements—(1) an injury that is "concrete, particularized, and actual or imminent"; (2) a "fairly traceable" causal connection between the injury and "the challenged action"; and (3) a likelihood that the injury would be "redress[ed] by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)).

Plaintiffs were required to satisfy these requirements for "each member of [the] class" before the district court could award relief to that class member "at the final judgment stage." *Ramirez v. TransUnion*

LLC, 951 F.3d 1008, 1023 (9th Cir. 2020), *cert. granted*, --- S. Ct. ----, 2020 WL 7366280 (U.S. Dec. 16, 2020).[4]

1. Plaintiffs disclaimed tangible injury because of their inability to establish causation.

An injury is concrete when it is *de facto*—"real" rather than "abstract"—in other words, something that "actually exist[s]." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). In *Spokeo*, the Supreme Court recognized that a "concrete" injury is often—though not always—tangible, such as a loss of money or property. *Id.* at 1549. The loss of a benefit owed under a health plan undeniably meets that standard. Just last term the Supreme Court recognized that participants in pension plans covered by ERISA "of course have Article III standing to sue * * * to recover the benefits due to them." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1619 (2020).

Yet plaintiffs, in pursuing the certification of a class comprised of 67,000 members who were denied benefits for scores of distinct reasons, expressly disclaimed proof of that straightforward injury in fact. *See, e.g.*, Pls.' Opp'n to Mot. for Summ. J. at 17, 19, Dkt. No. 261.

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[4] In the Supreme Court, the *TransUnion* parties have not disputed that each class member needs to have standing to receive an award in his or her favor.

That disclaimer is not surprising, because the causation requirements of both Article III and Section 1132 of ERISA posed an insuperable obstacle to a class action based on the denial of benefits. *See* Opening Br. 24-41. As the district court correctly noted, "Plaintiffs' claims would fail for lack of causation" if they needed to show a link between the challenged guidelines and the denial of benefits, and plaintiffs therefore "stipulated that they d[id] not seek" to make that showing. 1-ER-77.

The district court's standing analysis was therefore limited to whether each class member's alleged interest in having a benefits claim processed without reference to the challenged guidelines constitutes an intangible injury that is sufficiently concrete to establish Article III injury in fact. *See* 1-ER-81-83. As we next explain, it is not.

2. Plaintiffs' alleged intangible injury is not sufficiently concrete.

Some "intangible" injuries, such as the violation of free speech or free exercise rights will satisfy Article III's concreteness requirement. *Spokeo*, 136 S. Ct. at 1549. In assessing whether an alleged intangible injury constitutes the required *de facto* harm, both history and congressional judgments are instructive, but not dispositive. *Id.*

Remarkably, the district court failed to mention the Supreme Court's recent decision in *Thole*, even though UBH brought the case to the district court's attention. Yet the theory of intangible harm that the district court accepted in this case is impossible to square with *Thole*.

To begin with, the Supreme Court made clear that "the fact that ERISA affords all participants * * * a cause of action to sue does not" in and of itself "satisfy the injury-in-fact requirement." *Thole*, 140 S. Ct. at 1616. Because that requirement "is a hard floor of Article III jurisdiction," *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009), a "plaintiff does not automatically satisfy [it] whenever a statute grants a right and purports to authorize a suit to vindicate it," *Thole*, 140 S. Ct. at 1620 (quoting *Spokeo*, 136 S. Ct. at 1543). And "[t]here is no ERISA exception to Article III." *Id.* at 1622. Under *Thole* and *Spokeo*, then, an ERISA plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement." *Spokeo*, 136 S. Ct. at 1549.

The three principal reasons that the district court relied upon to hold that the procedural injury asserted here was "concrete" are all misguided.

First, the district court attempted an analogy to trust law, reasoning that the plan administrator did not "adhere to its duties to plan members as a fiduciary." 1-ER-83. But that analogy is directly foreclosed by *Thole*. The ERISA plaintiffs in *Thole* similarly tried to demonstrate an injury in fact based on alleged fiduciary misconduct from mismanagement of a defined-benefit retirement plan. 140 S. Ct. at 1619-20. Rejecting that attempt, the Court held that the plaintiffs' "trust-law analogy * * * d[id] not support Article III standing," because unlike, for example, a 401(k) plan, the value of which may fluctuate based on the management of the plan, plans with defined benefits are "more in the nature of a contract" than a fiduciary relationship. *Id.* at 1620; *cf. Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) ("[T]he law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties."). And the Court therefore held that the plaintiffs' fiduciary-duty claim failed to allege a concrete injury for the "simple, commonsense reason" that "[w]inning or losing this suit would not change" their benefits payments. *Thole*, 140 S. Ct. at 1622.

Many of the class members here lack Article III standing for the same commonsense reason: invalidating the challenged provisions of the guidelines would not affect their entitlement to benefits. Thus, their abstract interest in the application of different guidelines by the plan administrator does not implicate a trust-law duty.

Second, the district court, with little explanation, concluded that the reference to the guidelines in the denial of benefit decisions created a "risk of real harm." 1-ER-83. But that makes no sense: a "risk of real harm" refers to potential harm that is imminent—that is, it is highly likely to happen in the near future. *Spokeo*, 136 S. Ct. at 1549 (citing *Clapper*, 568 U.S. 398). Specifically, as the Supreme Court explained in *Clapper*, the risk of future harm must be "substantial" and the harm "certainly impending" (*Clapper*, 568 U.S. at 414 n.5) to support Article III standing. *See also Thole*, 140 S. Ct. at 1622 (standing based on future harm requires the alleged violation to have "substantially increased the risk" of such harm); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 927-28 (11th Cir. 2020) (en banc) (noting that *Clapper* and subsequent decisions create a "high standard for the risk-of-harm analysis, and a robust judicial role in assessing that risk").

Here, the only "real" harm possibly alleged—the denial of benefits—already occurred. The denial of benefits surely amounts to an injury in fact, but for the reasons stated above, plaintiffs have not established that such injury is fairly traceable to the provisions of the guidelines they challenge. *See* Opening Br. 27-31. It is undisputed that many of those denials of benefits may be attributed to non-challenged provisions in the guidelines or supported by independent grounds.

For those claims, there is no causal link between the denial of benefits and the challenged provisions of the guidelines, and therefore no chance—much less a "substantial" risk—of suffering future harm as a result of the reference to the guidelines. In other words, the burdensome reprocessing of their claims ordered by the district court will almost surely yield the same result, while imposing extraordinary costs on UBH—costs that are likely to be passed along to policyholders in the form of higher premiums, less generous benefits, or both.

Third, the district court relied upon cases involving claims for the disclosure of plan information mandated by ERISA. 1-ER-83. But there is no cognizable informational injury here for the simple reason that plaintiffs have not sought any information. *See Thole*, 140 S. Ct. at 1621

n.1 ("To be clear, our decision today does not concern suits to obtain plan information.") (citing 29 U.S.C. § 1132(a)(1)(A)). Like the plaintiffs in *Thole*, plaintiffs here do not assert a Section 1132(a)(1)(A) claim seeking such information.[5]

At bottom, plaintiffs' complaint about allegedly unduly restrictive provisions in the guidelines does not, in the absence of evidence of real-world effects (such as a denial of benefits caused by those provisions), amount to a concrete harm.

[5] The "informational injury" cases cited in *Spokeo* involved plaintiffs' *inability* to obtain information that the government was required by statute to disclose—and the plaintiffs in those cases alleged "real world" harm resulting from the lack of the information. *See* 136 S. Ct. at 1549-50 (citing *Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998); *Public Citizen v. Dep't of Justice*, 491 U.S. 440 (1989)). For instance, the *Akins* Court stated that "the information [not provided] would help [plaintiffs] (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election." 524 U.S. at 21. And in *Public Citizen*, the deprivation was of information the interest groups needed to scrutinize the "workings" of government in order to "participate more effectively in the judicial selection process." 491 U.S. at 449.

B. The district court's lax approach to injury and causation led it to certify a class improperly.

The district court's acceptance of plaintiffs' flawed theory of harm also led to the improper certification of a 67,000-member class in violation of Rule 23 and the Rules Enabling Act.

1. The "fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Due process thus requires not only that a plaintiff prove every element of his claim, but also that a defendant be given "'an opportunity to present every available defense.'" *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); *see also*, *e.g.*, *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (recognizing that the "right to litigate the issues raised" in a case is "guaranteed * * * by the Due Process Clause").

These due process rights do not change when a lawsuit is brought as a class action rather than an individual one. The class action is merely a procedural device, "ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). As this Court recently put it, "[c]lass actions are merely a procedural tool aggregating claims," and "Rule 23 'leaves the parties' legal rights

and duties intact and the rules of decision unchanged.'" *Olean Wholesale Grocery Coop. v. Bumble Bee Foods*, --- F.3d ----, 2021 WL 1257845, at *6 (9th Cir. Apr. 6, 2021) (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion)).

Because due process precludes use of the class action mechanism to alter the substantive rights of the parties to the litigation, Rule 23's requirements must be interpreted to avoid that result. As the Supreme Court has put it, "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its * * * defenses to individual claims." *Dukes*, 564 U.S. at 367.

The Court further recognized in *Dukes* that a contrary approach to class certification would violate the Rules Enabling Act (*id.*), which embodies the due process principle that procedural rules cannot "abridge, enlarge or modify any substantive right" (28 U.S.C. § 2072(b)). The Rules Enabling Act's "pellucid instruction that use of the class device cannot abridge any substantive right" bars courts from "giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods*, 136 S.

Ct. at 1046, 1048 (quotation marks and alterations omitted); *see also* *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("[N]o reading of [Rule 23] can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.") (quotation marks omitted); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 613 (1997)) ("Rule 23's requirements must be interpreted in keeping with * * * the Rules Enabling Act."); *Olean Wholesale Grocery*, 2021 WL 1257845, at *6.

2. The district court's certification orders violate these principles. The district court excused plaintiffs and each class member from proving a causal link between the challenged guidelines and their denial of benefits because it recognized that requiring proof of causation—as would no doubt be required in a single-plaintiff ERISA case—would preclude certification of a class.[6]

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[6] The district court relied on this Court's remand of an individual ERISA claim to a claims administrator in *Saffle v. Sierra Pacific Power Co.*, 85 F.3d 455 (9th Cir. 1996). *See* 1-ER-79-80. But the remand in *Saffle* occurred only *after* the Court found that the plaintiff had proven causation and would be entitled to benefits if found to satisfy "the correct standard." 85 F.3d at 456-61; *see* Opening Br. 33-36. Here, by contrast, the district court misread *Saffle* to excuse class members from proving the elements of liability that would be required in a single-plaintiff ERISA case.

But the district court's apparent preference for class actions ignores the Supreme Court's repeated holding that class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 564 U.S. at 348 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). This Court recently reiterated those holdings in *Olean Wholesale Grocery*. 2021 WL 1257845, at *3 (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2012)).

Plaintiffs here failed to satisfy several of Rule 23's requirements. Even assuming for the sake of argument that the named plaintiffs could establish a causal connection between the denial of their *own* claims for benefits and the challenged provisions of the guidelines, they would not be typical of a class that is full of individuals who have not suffered any injury resulting from the challenged conduct—for instance, because their benefits were denied on independent grounds or the challenged provisions of the guidelines were not in fact applied. *See* Opening Br. 27-31. The Supreme Court has instructed that typicality requires the class representative to "possess the same interest and suffer the *same*

injury as the class members." *Dukes*, 564 U.S. at 348-49 (emphasis added; quotation marks omitted).[7]

For similar reasons, the mere presence in a benefits denial of a reference to the guidelines does not satisfy Rule 23(a)(2) commonality. The Supreme Court has cautioned that the commonality requirement "is easy to misread, since any competently crafted complaint literally raises common questions." *Dukes*, 564 U.S. at 349 (quotation marks and citation omitted). "What matters to class certification is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* at 350 (quotation marks and citation omitted).

Neither the denial of benefits nor the purported reference to the guidelines satisfies that standard. As noted above, the denial of benefits alone does not establish liability under ERISA; the plan member must also show that the denial was ***caused by*** the alleged ERISA violation. *See* page 3, *supra*. The requisite causal link is not demonstrated by the bare reference to the guidelines either. Not all of the provisions of the

[7] The Supreme Court may further elaborate on the typicality requirement this Term in *TransUnion*.

guidelines were challenged. Plaintiffs did not prove that the class members' benefits would have been approved using plaintiffs' preferred guidelines. And even the small sample of benefits denials that the court evaluated at trial revealed that the guidelines were not referenced in a uniform manner, and they were not applied at all in at least 18% of the samples. Opening Br. 27-31. Many of the sample denials were also independently supported by other grounds, precluding ERISA liability. *Id.* at 29-30.

For the same reasons, it follows *a fortiori* that plaintiffs failed to satisfy the "even more demanding" predominance requirement needed to certify a damages class under Rule 23(b)(3). *Comcast*, 569 U.S. at 34 (citing *Amchem*, 521 U.S. at 623-24).[8]

Indeed, the district court recognized that answering the question "whether individual class members were actually entitled to benefits" would turn on "a multitude of individualized circumstances relating to the medical necessity for coverage and the specific terms of the member's plan." 2-ER-239. Its solution—letting plaintiffs and absent

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[8] The district court ordered reprocessing under Rule 23(b)(3). 1-ER-135.

class members avoid answering the question altogether—finds no support in either ERISA or Rule 23.

To the contrary, the sample of benefits denials that the district court reviewed at trial should have made apparent that class treatment was inappropriate. As this Court recently held, while consideration of representative evidence is permissible, "it must be scrutinized with care and vigor." *Olean Wholesale Grocery*, 2021 WL 1257845, at *5. In particular, such evidence cannot be used to "mask individualized differences," and "a key factual determination courts must make is whether the plaintiffs' statistical evidence sweeps in uninjured class members." *Id.* at *10. Here, the sampling *confirmed*, rather than masked, both individualized issues and the presence of uninjured class members. *See* Opening Br. 27-31. And where, as here, "a substantial number of class members in fact suffered no injury," then the "need to identify those individuals will predominate" and preclude class treatment under Rule 23(b)(3). *Olean Wholesale Grocery*, 2021 WL 1257845, at *10 (quotation marks omitted).

This Court held in *Olean Wholesale Grocery* that a certified damages class can contain at most a "*de minimis*" number of uninjured

class members in order to satisfy the predominance requirement. *Id.* at *11 (declining to adopt a "numerical or bright-line rule," but recognizing that "5% to 6% constitutes the outer limits of a *de minimis* number" of uninjured class members) (quotation marks omitted). In light of that holding, "it's easy enough to tell" that the classes in this case were "out-of-bounds." *Id.*

II. The District Court's Lax Approach To Article III And Rule 23 Will Invite Wasteful And Abusive Litigation With No Corresponding Benefit To Class Members.

The district court's conclusion that a plan participant can maintain a class action lawsuit based on alleged procedural missteps unconnected to any concrete harm—*i.e.*, regardless of whether benefits are withheld as a result of the challenged conduct—does not just contravene the requirements of Article III standing and Rule 23. It would also open the floodgates to a host of baseless lawsuits.

1. The district court's approach threatens to multiply ERISA litigation exponentially, particularly given ERISA's attorney's-fee provision, 29 U.S.C. § 1132(g)(1). It would incentivize enterprising attorneys to comb coverage determinations in search of procedural errors, regardless of their actual impact on the denial of benefits. And

allowing plaintiffs to multiply their claims by suing based on coverage guidelines that did not impact them personally creates strong incentives for opportunistic, lawyer-driven lawsuits, virtually always brought as class actions in order to exert maximum settlement pressure.

This concern is far from hypothetical. Following the path marked below, a number of other courts in this Circuit have cited the district court's decisions here in certifying ERISA classes based on the same process-as-harm theory. *See* Order Granting Motion for Class Certification, *Jones v. United Behavioral Health*, No. 19-cv-6999 (N.D. Cal. Mar. 11, 2021), Dkt. No. 76; *Atzin v. Anthem, Inc.*, 2020 WL 2198031, at *5 (C.D. Cal. May 6, 2020); *D.T. by and through K.T v. NECA/IBEW Family Med. Care Plan*, 2019 WL 1354091, at *3 (W.D. Wash. Mar. 26, 2019); *Des Roches v. Cal. Physicians' Serv.*, 320 F.R.D. 486, 499 (N.D. Cal. 2017). Those courts have embraced the view that the "harm is one of process, not outcome," which has led them to conclude that "harm and causation can be resolved on a class-wide basis." *Des Roches*, 320 F.R.D. at 499 (quotation marks omitted). An affirmance here will lead to countless more lawsuits of this kind.

The district court's theory of harm also renders empty the requirement that a plaintiff avail himself of available administrative remedies before bringing an ERISA action seeking benefits. *See* Opening Br. 59-60 (collecting cases recognizing both contractual and prudential exhaustion requirements). This Court has explained that exhaustion serves "important policy considerations," such as promoting nonadversarial claims settlement, minimizing the cost of claims settlement, and relying on administrative expertise. *Diaz v. United Agr. Emp. Welfare Ben. Plan & Tr.*, 50 F.3d 1478, 1483 (9th Cir. 1995). Exhaustion also enables plan administrators to "assemble a factual record which will assist a court in reviewing [their] actions." *Makar v. Health Care Corp. of Mid-Atl.*, 872 F.2d 80, 83 (4th Cir. 1989). Yet that requirement is made effectively irrelevant by the district court's conclusion that a plaintiff can bring a "facial" challenge to coverage guidelines and pursue class-wide recovery regardless of the reasons why any individual class member was denied benefits.

Moreover, suits like the present case are especially wasteful. Alleged administrator impropriety that actually results in the wrongful denial of benefits is already subject to administrative and judicial

review. But requiring reprocessing of the claims of thousands of plan participants just because an initial decision referenced guidelines that contained some allegedly flawed provisions will result in the provision of no additional relief when the decisions rest on other grounds, the same result would be reached using different guidelines, or the plan participant never got the treatment. It will only prove a costly exercise for plan administrators and, ultimately, the employers that offer health benefits plans. And those costs may only increase when plaintiffs' lawyers seek fees under 29 U.S.C. § 1132(g)(1). But to plan participants whose claims were properly denied notwithstanding the challenged procedural error, this relief will make no real-world difference.

The Supreme Court has long recognized that ERISA embodies both the "public interest in encouraging the formation of employee benefit plans," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987), and Congress's desire for "a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place," *Varity Corp.*, 516 U.S. at 497; *accord Conkright v. Frommert*, 559 U.S. 506, 517 (2010).

Cases like this one are antithetical to those goals. As courts have recognized, the prospect of discovery in ERISA actions is "ominous," entailing "probing and costly inquiries" and the need to retain expensive fiduciary and financial experts. *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt., Inc.*, 712 F.3d 705, 719 (2d Cir. 2013).

Those costs are all the more onerous in a class action like this one. Requiring plan administrators and employers to defend against unjustified class action litigation will inflate costs, lead to less generous health benefit plans, and discourage employers from offering plan options that are attractive to many participants. *Cf. Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 907 (8th Cir. 2002) (participant rights "would if anything be adversely affected by subjecting the Plan and its fiduciaries to costly litigation brought by parties who have suffered no injury from a relatively modest but allegedly imprudent investment").

2. The district court's approach to Article III standing and class certification also has troubling implications outside of the ERISA context.

The district court's approach gives enterprising class-action plaintiffs' lawyers a clear roadmap: Find an alleged technical statutory violation and bring a "facial" challenge based on that violation on behalf of the broadest possible class, regardless of whether class members suffered any real-world harm. That approach inevitably will result in a flood of shakedown class actions.

Class-action litigation costs in the United States are huge. They totaled a staggering $2.64 billion in 2019, continuing a rising trend that started in 2015. *See 2020 Carlton Fields Class Action Survey*, at 4 (2020), available at https://ClassActionSurvey.com.

Moreover, defendants in class actions already face tremendous pressure to capitulate to what Judge Friendly termed "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). The Supreme Court has long recognized the power of class-action lawsuits to induce settlement. As the Court explained over 40 years ago, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see*

also AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail"); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("[A] class action can result in 'potentially ruinous liability.'") (quoting Advisory Committee's Notes on Fed. R. Civ. P. 23).

It therefore is not surprising that businesses often yield to the hydraulic pressure generated by class certification to settle even meritless claims. In 2019, companies reported settling 60.3 percent of class actions, and they settled an even higher 73 percent of class actions the year before. *See 2020 Carlton Fields Class Action Survey*, *supra*, at 35. And companies prevailed prior to trial in many of the remaining cases. *Id.*

The rare trial that occurred in this case only underscores why so many defendants choose to settle. At the end of the bench trial, the district court ordered UBH to reprocess each of the 67,000 benefits determinations at issue, which UBH estimates would cost over $30 million in administrative costs alone. *See* Opening Br. 20. And under the district court's judgment, UBH is obligated to reprocess these

benefits determinations even though many class members never obtained the requested treatment or were denied benefits for independent reasons. *Id.* If allowed to stand, that result will only ratchet up the coercive settlement pressure of future class actions.

Defending and settling lawsuits designed to extract lucrative settlements would require businesses to expend enormous resources. But the harmful consequences of this increase in costs would not be limited to businesses. Rather, the vast majority of the expenses likely would be passed along to innocent customers and employees in the form of higher prices and lower wages and benefits.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated on jurisdictional grounds or reversed on the merits.

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Respectfully submitted,

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 14, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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