No. 24-1880

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETER TRAUERNICHT, individually and as a representative of a class of similarly situated persons, on behalf of the Genworth Financial Inc. Retirement and Savings Plan; ZACHARY WRIGHT, individually and as a representative of a class of similarly situated persons, on behalf of Genworth Financial Inc. Retirement and Savings Plan,

Plaintiffs-Appellees,

v.

GENWORTH FINANCIAL INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia,
No. 3:22-cv-00532-REP (Hon. Robert E. Payne)

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Local Rules 26.1(a)(2)(A), 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.

In accordance with Local Rule 26.1(a)(2)(B), the Chamber certifies that it is unaware of any publicly held corporation or similarly situated legal entity, other than those listed in Appellant's corporate disclosure statement, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement.

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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 Chamber function 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, like this one, that raise issues of concern to the nation's business community.

The Chamber's members include many employers that sponsor employee-benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). They benefit from Congress's decision to create an employee-benefits "system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (brackets in original). Given how considerably class certification "magnifies the stakes of litigation"[2]—including the

[1] All parties consent to the filing of this brief. No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than *Amicus*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] *In re Nissan N. Am., Inc. Litig.*, 122 F.4th 239, 245 (6th Cir. 2024) (citation omitted).

potential litigation expenses—the Chamber has a keen interest in ensuring that courts rigorously analyze whether a plaintiff has satisfied the Rule 23 requirements before a class is certified.

INTRODUCTION AND SUMMARY OF ARGUMENT

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citation omitted). Under Rule 23, three (and only three) types of classes are permissible—mandatory classes under Rule 23(b)(1) and (b)(2), for which the Rule provides class members "no opportunity … to opt out, and does not even oblige the District Court to afford them notice of the action," and non-mandatory classes under Rule 23(b)(3), which typically applies to damages claims and requires both notice and the opportunity to opt out. *Id.* at 362.

This case involves an unusual (and erroneous) mixing of these categories. The district court certified a mandatory class under (b)(1) that covers thousands of participants and beneficiaries in Genworth Financial, Inc.'s retirement plan—even though the named plaintiffs are seeking money damages under the Employee Retirement Income Security Act ("ERISA"), alongside declaratory relief.[3] To distinguish the long line of Supreme Court cases holding that actions for money

[3] The class originally sought injunctive relief, too, but the district court dismissed the claim for an injunction for lack of standing.

damages cannot be certified as a mandatory class, the district court reasoned that those cases do not apply in "the unique situation presented in ERISA or other similar derivative actions where the recovery inures to a single entity." JA477. But participants who bring claims under ERISA for mismanaging defined-contribution plan investments do *not* simply stand in the plan's shoes. Moreover, the Genworth retirement plan is a defined-contribution plan, in which each participant or beneficiary has an individual account that grows or shrinks depending on the performance of the funds that individual selected. And the plan mismanagement they allege here pertains to purported investment losses in those individual participant accounts. If Plaintiffs prevail, each absent class member would be entitled to *individualized monetary recovery*.

In any event, regardless of how ERISA claims in the defined-contribution context are labeled, due process would remain a concern. There is no dispute that the monetary recovery sought by the class would ultimately inure to each absent class member's own pocket on an individualized basis. It makes little difference that the money would first be paid to the absent class member's personal plan account, where it is earmarked for that individual—the recovery is ultimately individualized. Each absent class member should thus be allowed their day in court rather than having their claims adjudicated by someone else with no chance to opt out. And ERISA defendants should be afforded the certainty that res judicata will

attach to absent class members after a Rule 23(b)(1) class action reaches final judgment.

Adopting the district court's reasoning would also harm retirement plans. All litigation generates some pressure, but when a large ERISA suit is certified as a class action, it becomes a different beast. Faced with enormous litigation expenses and potentially ruinous liability from an adverse judgment, many defendants are compelled to settle—on unfavorable terms and at huge cost—even if the claims are groundless. This dynamic is not only unfair, but it forces ERISA plans to incur greater insurance costs and to reduce the choice of benefits offered for fear of getting sued. The shadow of litigation is already forcing many plan sponsors to cut back on the services offered in their plans, so as to reduce costs and minimize the risk of a strike suit. Making class certification a matter of course in ERISA cases would effectively penalize employers for offering retirement benefits. That outcome would subvert Congress's design. This Court should reverse.[4]

ARGUMENT

I. Plaintiffs' ERISA claims relating to their individualized accounts in a defined-contribution plan do not belong in a Rule 23(b)(1) class.

The district court certified this action as a class action under Rule 23(b)(1). *See* JA480. But the Supreme Court has made "clear that individualized monetary

[4] The Chamber focuses its brief specifically on the first question presented, related to certification under Rule 23(b)(1).

claims belong in Rule 23(b)(3)," not in the "mandatory classes" of (b)(1) or (b)(2). *Dukes*, 564 U.S. at 361-363. There is no doubt, particularly after the Supreme Court's decision in *Thole v. U.S. Bank N.A.*, 590 U.S. 538 (2020), that Plaintiffs' claims for monetary relief inuring to their *individual accounts* in a defined-contribution plan under ERISA are exactly the kind of "individualized monetary claims" that do not belong in a (b)(1) class. This Court should reverse the district court's effort to circumvent this straightforward rule.

A. Rule 23 and the Due Process Clause prohibit *mandatory* class-wide adjudication of individualized claims for monetary damages.

A class certified under Rule 23(b)(1) or (b)(2) differs fundamentally from a class certified under Rule 23(b)(3). The former provisions establish "mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action." *Dukes*, 564 U.S. at 362. In contrast, Rule 23(b)(3) "allows class certification in a much wider set of circumstances but with greater procedural protections" because, "unlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory; class members are entitled to receive 'the best notice that is practicable under the circumstances' and to withdraw from the class at their option." *Id.* (quoting Fed. R. Civ. P. 23(c)(2)(B)). "Given that structure," the Supreme Court has explained, it is "clear that individualized monetary claims belong in Rule 23(b)(3)." *Id.*

This principle runs deeper than the Federal Rule. It is a basic due process obligation. There is an "inherent tension between representative suits" such as class actions and "our deep-rooted historic tradition that everyone should have his own day in court." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (quotation marks omitted)). That tension "is only magnified if applied to damages claims gathered in a mandatory class," such as a Rule 23(b)(1) class, in which "[t]he legal rights of absent class members . . . are resolved regardless of either their consent, or, in a class with objectors, their express wish to the contrary." *Id.* at 846-847.

Due process tolerates mandatory classes only where "individual adjudications would be impossible or unworkable, as in a (b)(1) class," or where "the relief sought must perforce affect the entire class at once, as in a (b)(2) class." *Dukes*, 564 U.S. at 361-362. With respect to Rule 23(b)(1), subsection (A) refers to cases where *seriatim* individual actions risk establishing "incompatible standards of conduct for the party opposing the class," while subsection (B) covers cases (like common-fund cases) in which individual actions would, "as a practical matter … be dispositive of the interests" of non-party class members "or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(A)-(B). In other words, given the nature of the claims or relief sought, it would be unfair not to aggregate the claims into a single action. Rule 23(b)(3), in contrast, is a more

"adventuresome innovation" that allows for class certification even where individual actions are workable but a class action is "superior." *Dukes*, 564 U.S. at 362 (citation omitted).

Therefore, while "depriving [absent class members] of their right to sue" for non-monetary claims may comply with due process, the opposite is true of monetary claims, at least where they are not inherently unworkable: in that context, the Supreme Court has "held that absence of notice and opt out violates due process." *Dukes*, 564 U.S. at 363 (citing *Phillips Petroleum Co. v. Shutts*, 472 U. S. 797, 812 (1985)); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 349 (2011) ("For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class.").

Courts have applied these principles, including in ERISA cases. *See e.g.*, *Chavez v. Plan Benefit Servs., Inc.*, 108 F.4th 297, 315-316 (5th Cir. 2024) (because the ERISA "class claims are primarily for damages" despite "[t]he inclusion of claims for injunctive and declaratory relief," "Rule 23(b)(3) certification, which permits class members to opt out, is the appropriate vehicle for such class actions"), *cert. denied*, No. 24-426, 2024 WL 5011734 (U.S. Dec. 9, 2024); *Healthcare Strategies, Inc. v. ING Life Ins. & Annuity Co.*, 2012 WL 10242276, at *11-12 (D.

Conn. Sept. 27, 2012) (because ERISA claims sought the relief of disgorgement of money that was not "merely incidental to [the] claims for injunctive or declaratory relief," certification under Rule 23(b)(1) was improper and, "if this class is to be certified, it should be under Rule 23(b)(3)").

B. Plaintiffs' ERISA claims seek individualized monetary damages.

The district court did not dispute any of those fundamental principles. Rather, the court reasoned that those principles do not apply in "the unique situation presented in ERISA or other similar derivative actions where the recovery inures to a single entity." JA477. Accordingly, the court held, "Rule 23(b)(1) certification is still appropriate where, in a § 502(a)(2) action, the recovery (monetary damages) inures to the Plan as whole rather than to individual plaintiffs." JA478. In other words, the district court acknowledged "that *individualized* monetary damages claims will normally not satisfy Rule 23(b)(1)'s requirements," yet it believed that "ERISA § 502(a)(2) claims are distinguishable . . . because 'damages flow to the class in bulk' rather than to individual claimants." JA477 (citation omitted).

This reasoning fundamentally ignores the relevant context—the plan in this case is a defined-contribution plan, not a defined-benefit plan—and cannot be squared with the Supreme Court's cases addressing defined-contribution plans and ERISA § 502(a)(2).

Unlike the classic defined-benefit pension-type plan that was common at ERISA's enactment, a defined-contribution (401(k)-type) plan is one that maintains *individual accounts* for *individual participants* who invest their employer and employee contributions individually:

> The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

29 U.S.C. § 1002(34). The Supreme Court has explained the difference between the two: "[I]n a defined-contribution plan, such as a 401(k) plan, the retirees' benefits are typically tied to the value of their accounts, and the benefits can turn on the plan fiduciaries' particular investment decisions." *Thole*, 590 U.S. at 540. In these plans, "each beneficiary is entitled to whatever assets are dedicated to his individual account." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999).

In contrast, a "defined benefit plan . . . consists of a general pool of assets rather than individual dedicated accounts." *Id.* "In a defined-benefit plan, retirees receive a fixed payment each month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions." *Thole*, 590 U.S. at 540. Instead, "the employer typically bears the entire

investment risk and . . . must cover any underfunding as the result of a shortfall that may occur from the plan's investments." *Hughes Aircraft*, 525 U.S. at 439.

On several occasions, the Supreme Court has addressed the ability of participants in these two kinds of plans to bring an action under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), for alleged breach of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109.[5] In *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), the Court held with respect to a *defined-benefit plan* that "§ 502(a)(2) authorizes a beneficiary to bring an action against a fiduciary who has violated § 409," but only when seeking "recovery for a violation of § 409 inures to the benefit of the plan as a whole." *Id.* at 140. That approach foreclosed a claim for injury to a *particular* beneficiary, such as "a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims." *Id.* at 148.

The Supreme Court qualified this holding in *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008). The Court noted that "the disability plan at issue in *Russell* did not have individual accounts; it paid a fixed benefit based on a percentage of the employee's salary." *Id.* at 255. "The 'entire plan' language in *Russell*," the Court explained, "speaks to the impact of § 409 on plans that pay defined benefits." *Id.* But defined-contribution plans work differently; as far as

[5] For a useful cross-reference guide, see https://benefitslink.com/erisa/cross-reference.html.

those plans are concerned, "fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive." *Id.* at 255-256. *LaRue* reaffirmed *Russell*'s holding that "§ 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries," but clarified that it "does authorize recovery for fiduciary breaches that impair the value of plan assets *in a participant's individual account*." *Id.* at 256 (emphasis added). After *LaRue*, then, it is settled that a participant in a defined-contribution plan can bring an action under § 502(a)(2) for injury to *their individual account*, provided that their individual injuries are "not … distinct from plan injuries." *Id.*

The upshot is that participants in both defined-contribution and defined-benefit plans can bring an action under § 502(a)(2). But those actions rest on different premises and produce different outcomes. A participant in a defined-contribution plan who proceeds under § 502(a)(2) is nominally suing for injuries to plan assets, but *not the entire plan's* assets—only those in their individual account, which are reserved for their personal use. Any recovery will ultimately go into their own pocket. When the participant is in a defined-benefit plan, however, recovery for a suit under § 502(a)(2) "inures to the benefit of the plan as a whole." *Russell*, 473 U.S. at 140.

This distinction matters, as the Supreme Court underscored in *Thole*. There, the Supreme Court held that plaintiffs in a defined-benefit plan who alleged

investment mismanagement by plan fiduciaries lacked standing under Article III when they "received all of their monthly pension benefits so far, and they will receive those same monthly payments for the rest of their lives." *Thole*, 590 U.S. at 542. The Court deemed it "[o]f decisive importance" that "the plaintiffs' retirement plan is a defined-benefit plan, not a defined-contribution plan," because any plan mismanagement in a defined-benefit plan would not injure particular plaintiffs who continued to receive their promised benefits—whereas participants in a defined-contribution plan would suffer injury if their investments performed poorly due to mismanagement. *Id.* at 540. Citing *LaRue* and *Hughes Aircraft*, the Court in *Thole* explained that "plan participants [in a defined-benefit plan] possess no equitable or property interest in the plan." *Id.* at 543.

Thole further rejected the argument advanced by the plaintiffs (and the dissent) that they had "standing as representatives of the plan itself," including because they were proceeding under ERISA § 502(a)(2). *Id.* at 543-544. Indeed, the dissenting Justices asserted that the plaintiffs in that case had standing to bring a "representational suit" because "Sections 1132(a)(2) and (a)(3) authorize participants and beneficiaries to sue 'in a representative capacity on behalf of the plan as a whole,' *Russell*, 473 U.S. at 142, n. 9, so that any 'recovery' arising from the action 'inures to the benefit of the plan as a whole,' *id.*, at 140." *Thole*, 590 U.S. at 565 (Sotomayor, J., dissenting). The majority disagreed, explaining that "[t]he

plaintiffs have not been legally or contractually appointed to represent the plan"—notwithstanding their cause of action under § 502(a)(2). *Id.* at 544.

Read together, *LaRue* and *Thole* establish that a participant in a defined-benefit plan who brings a § 502(a)(2) action for investment mismanagement seeks recovery that inures to the plan as a whole, whereas a participant in a defined-contribution plan who brings a similar action seeks recovery that inures to the plaintiff's own pocket via their individual plan account. In the latter case, the plaintiff seeks individualized monetary relief that is inappropriate for mandatory class certification.

C. Plaintiffs' individualized claims for monetary relief cannot be certified under Rule 23(b)(1).

As just discussed, Plaintiffs are participants in a defined-contribution plan and are bringing claims for monetary recovery inuring to their individual accounts. Therefore, such "individualized monetary claims belong in Rule 23(b)(3)"—*not* Rule 23(b)(1). *Dukes*, 564 U.S. at 362; *see* pp. 5-8, *supra*. As a leading treatise has explained, "the sounder view on (b)(1)(A)'s application to ERISA § 502(a)(2) claims is . . . that certification under (b)(1)(A) is inappropriate for claims, such as a § 502(a)(2) claim, in which the principal relief sought is monetary damages that would pass through the plan to individual participants." 1 McLaughlin on Class Actions § 5:5 (21st ed. Oct. 2024 update).

Moreover, unlike classes appropriately certified under Rule 23(b)(1), individual adjudications of § 502(a)(2) claims for monetary relief would *not* "be impossible or unworkable." *Dukes*, 564 U.S. at 361; *see* pp. 5-8, *supra*. Because *LaRue* permits individual participants to recover (or not recover) losses incurred by their individual account, those individual adjudications would not legally or practically affect anyone else's individual account.

To be sure, before *LaRue* "classes frequently were certified under Rule 23(b)(1)(B) in ERISA 'stock drop' cases under ERISA § 502(a)(2) … on the theory that any recovery under § 502(a)(2) inures to the plan as a whole, so that adjudications of one member's claim would necessarily affect the interests of other class members." 1 McLaughlin on Class Actions § 5:14 & n.11 (collecting cases). But by opening the door to individualized claims in defined-contribution cases, *LaRue* effectively recognized that such cases are unsusceptible to treatment as a class under Rule 23(b)(1)(B). Indeed, "*LaRue* cures any concern that the potential class members' claims would essentially be disposed of by this litigation. . . . Because the putative class members have an individual remedy, they can pursue relief on their own behalf." *In re First Am. Corp. ERISA Litig.*, 258 F.R.D. 610, 621-622 (C.D. Cal. 2009). Thus, "[p]ost-*LaRue*, certification is not appropriate under Rule 23(b)(1)(B) because there is no risk that individual adjudications would be

dispositive of the interests of absent members." 1 McLaughlin on Class Actions § 5:14.

Applying these principles, numerous courts in the years immediately following *LaRue* declined to certify a 23(b)(1) class of plaintiffs asserting claims under § 502(a)(2). *See, e.g., In re J.P. Morgan Stable Value Fund ERISA Litig.*, 2017 WL 1273963, at *13 (S.D.N.Y. Mar. 31, 2017) (denying certification under Rule 23(b)(1) and agreeing that *Dukes* "unequivocally concludes" that individual damages claims can be certified only under Rule 23(b)(3)); *Healthcare Strategies, Inc.*, 2012 WL 10242276, at *12 (same); *Bauer-Ramazani v. Tchrs. Ins. & Annuity Ass'n of Am.-Coll. Ret. & Equities Fund*, 290 F.R.D. 452, 457 (D. Vt. 2013) (holding that plaintiffs' reliance on prior courts' 23(b)(1) certification was misplaced post-*Dukes* and that certification thus "must be analyzed under Rule 23(b)(3)"); *Carr v. Int'l Game Tech.*, 2012 WL 909437, at *7 (D. Nev. Mar. 16, 2012) ("[C]ertification is not appropriate under Rule 23(b)(1)(B) because individual adjudications of the matter would not be dispositive of the interests of absent members in light of *LaRue*."); *In re First Am. Corp. ERISA Litig.*, 258 F.R.D. at 621-622 (same).

The contrary view taken by the district court here and by some other district courts—often without taking account of *LaRue or Thole*—is unpersuasive. Citing Justice Thomas's concurrence in *LaRue* rather than the majority opinion, the district court asserted that *LaRue* holds that "§ 502(a)(2) claims are derivative lawsuits

brought on behalf of the Plan" as a whole. JA475. But that reading of *LaRue* (and *Russell*) was championed by the *dissenters* in *Thole*. *See Thole*, 590 U.S. at 557-558, 565 (Sotomayor, J., dissenting). The *Thole* majority rejected that approach. *Id.* at 543-544; *see* pp. 12-13, *supra*. This Court should too.

The district court also reasoned that "nothing about Rule 23(b)(1) precludes certification for classes seeking primarily monetary damages so long as the rule's requirements are satisfied." JA477. The Supreme Court has repeatedly held precisely the opposite: "In the context of a class action predominantly for money damages we have held that absence of notice and opt out violates due process." *Dukes*, 564 U.S. at 363 (citing *Shutts*, 472 U.S. at 812). And the Supreme Court has refused to read Rule 23 to countenance such a due process violation. *See id.* Brushing aside these "due process concerns," the district court contended that they are "not applicable here because . . . this is not a case for individualized monetary damages." JA478-479. Rather, the district court claimed that this action "is a derivative lawsuit on behalf of the Plan for recovery to the Plan as a whole." JA479. As discussed above, however, the Supreme Court's decisions in *Thole* and *LaRue* establish that recovery for a § 502(a)(2) claim in a defined-contribution plan *is* an individualized claim for monetary damages. *See* pp. 8-13, *supra*.

True, recovery in a case like this nominally goes to the "plan"—but only before it is distributed to the individual accounts of participants who incurred losses.

The same was true in *Ortiz*, where the class award "establish[ed] a trust to process and pay class members' asbestos personal injury and death claims," and "[c]laimants seeking compensation would be required to try to settle with the trust." 527 U.S. at 827. That pit stop in the trust hardly diminished the Supreme Court's concerns about the due process rights of absent class members whose claims for monetary relief would be disposed of in a mandatory class adjudication, without ever receiving their day in court. *See id.* at 846-847. What matters is that, in a defined-contribution plan, the money is separately earmarked for each individual plan participant vis-à-vis their *individual* retirement plan account.

Even putting aside *Thole* and *LaRue*, the district court's approach is not responsive to the fundamental due process concerns that underlie the Supreme Court's reading of Rule 23(b). There is good reason why adjudicating the primarily monetary claims of absent class members via a mandatory class action is a violation of due process: it is incompatible with the "deep-rooted historic tradition that everyone should have his own day in court." *Ortiz*, 527 U.S. at 846 (citation omitted). This conflict cannot be papered over with a formalistic workaround—which is precisely why the fiction of a representative action under Rule 23 does not cure the due process problem. *Cf. Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (procedural due process requires that a trial is "a real one, not a sham or a pretense," and a violation of due process occurs when the necessary procedures were denied

"in truth, though not in form"); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) ("the fundamental conceptions of justice which lie at the base of our civil and political institutions" require trial procedures that cannot be satisfied through "pretense" or "contrivance"); *Farabee v. Clarke*, 967 F.3d 380, 392 (4th Cir. 2020) ("reject[ing] such a rigid understanding of due process rights" that would have permitted a defendant's suspended sentence to be revoked when he "did not receive actual notice of the charges against him," even though notice was sent to his counsel).

However a claim under ERISA § 502(a)(2) in the defined-contribution context is labeled, the due process problem remains: The participants in a defined-contribution plan who might otherwise want to bring such claims for injury to their *individual accounts* deserve an opportunity to have their day in court. And in the context of a class action, they deserve the right "to decide *for themselves* whether to tie their fates to the class representations' or go it alone"—something that is only possible in the context of a Rule 23(b)(3) class. *Dukes*, 564 U.S. at 364. It is beside the point whether the procedural vehicle available to such plan participants to redress their particular injuries is styled as an individual or representative suit. The Due Process Clause does not allow Rule 23 to prevent them even from opting out of a class that would dispose of their ability to seek monetary relief. The district court erred in certifying a class that does just that.

Plan participants are not the only ones for whom Rule 23(b)(1) certification raises problems. Given the due process concerns identified above, if cases like this proceed as a Rule 23(b)(1) class action, defendants could face situations in which a prior class judgment does not bind absent class members. *See Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 222 (2d Cir. 2012) ("Res judicata generally applies to judgments in class actions, but it does not bind class members 'where to do so would violate due process.'" (citation omitted)); *see also Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) ("The federal common law of preclusion is, of course, subject to due process limitations."). The same is true for defendants who resolve their claims through a settlement after a Rule 23(b)(1) class is certified. *See, e.g.*, *Hecht*, 691 F.3d at 222 (absent class member's damages claims not barred by res judicata because settlement class was certified under Rule 23(b)(2), without adequate notice and without opt-out rights); *In re Johns-Manville Corp.*, 600 F.3d 135, 158 (2d Cir. 2010) (absent class member not bound by prior settlement).

Given these potential dynamics and the uncertainty they create, certification under Rule 23(b)(1) is not only manifestly unfair to Genworth, but it could defeat "[t]he central purpose of each of the various forms of class action"—which "is to establish a judgment that will bind not only the representative parties but also all nonparticipating members of the class certified by the court." 18A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure § 4455

(3d ed. June 2024 update). That intolerable outcome is certainly not compelled by Rule 23.

II. The district court's reasoning encourages abusive lawsuits that aim to extort settlements, undermining both ERISA and Rule 23.

The consequences of the district court's approach are far-reaching. If ERISA claims for breach of fiduciary duty like these are easily certified as class actions, the pressure to settle skyrockets—which subverts Congress's goal in ERISA of encouraging employers to offer benefit plans and aggravates the due process concerns of class-action adjudication.

ERISA class-action litigation has exploded in the last 15 years. *See, e.g.*, George S. Mellman & Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?*, Ctr. for Ret. Rsch. at Bos. Coll. (May 2018), https://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf. While the precise number of complaints naturally varies from year to year, there has been an undeniable surge in these actions. "Regardless of plan type, plan size or jurisdiction, no retirement plan or plan fiduciary is immune." AIG, *Understanding the Rapid Rise in Excessive Fee Claims* 2, https://bit.ly/3k43kt8 (noting that the number of "claims has jumped to unprecedented levels").

"[C]lass certification 'magnifies the stakes of litigation' by resolving hundreds, if not thousands, of cases at one time." *In re Nissan N. Am., Inc. Litig.*, 122 F.4th 239, 245 (6th Cir. 2024) (citation omitted). As the Supreme Court has

recognized, certification of a class "can exert substantial pressure on a defendant 'to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.'" *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 474 (2013) (quoting Advisory Committee's 1998 Note on subd. (f) of Fed. R. Civ. P. 23). In other words, "class actions can entail a 'risk of "in terrorem" settlements.'" *Id.* (quoting *Concepcion*, 563 U.S. at 350). "It is no secret," the Fifth Circuit has observed in the ERISA context, "that [class] certification 'can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit.'" *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 547 (5th Cir. 2020) (quoting *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 723 (7th Cir. 2011) (Posner, J.)).

Unsurprisingly, then, these kinds of ERISA class actions often settle—for millions apiece. *See* Chubb, *Excessive Litigation Over Excessive Plan Fees In 2023*, 2-3 (Apr. 2023), https://bit.ly/433OJ6V. In 2023, for example, there were 36 settlements in ERISA class actions totaling more than $219 million. ERISA Litigation Update, Goodwin Procter (Jan. 18, 2024), https://bit.ly/3ZRXL70. The average settlement was $5.9 million. *Id.*

A class action is supposed to be "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 (citation omitted). But a rule that makes class certification a matter of

course in the ERISA context only ratchets up the already substantial pressure on ERISA plan sponsors to settle ERISA cases. *See Pension Benefit Guaranty Corp. ex rel. Saint Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013) (discussing the "ominous" burden of discovery in ERISA cases that "elevates the possibility that 'a plaintiff with a largely groundless claim'" could use discovery to add "an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence" (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005))).

It also harms defined-contribution plans themselves. When Congress enacted ERISA, it "did not require employers to establish benefit plans." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010). Rather, ERISA was crafted to encourage employers to offer benefit plans while also protecting the benefits promised to employees. *Id.* at 516-17. Congress knew that if it adopted a system that was too "complex," then "administrative costs, or litigation expenses, [would] unduly discourage employers from offering . . . benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). The system has largely allowed employers to experiment with and increase the availability of defined-contribution plans like those at issue in this case. But ballooning liability from class actions like this one would *undermine* employers' ability to do so. Moreover, it would force plan sponsors to incur "high insurance costs," which jeopardizes Congress's "goal of containing

pension costs." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262-263 (1993) (citation omitted). The recent surge in ERISA fiduciary litigation has already "[h]arden[ed]" and "[s]cramble[d]" the fiduciary-insurance industry.[6] The risks of litigation have pushed insurers "to raise insurance premiums, increase policyholder deductibles, and restrict exposure with reduced insurance limits."[7]

These consequences harm participants. If employers need to absorb the litigation risks and costs of higher insurance premiums, then many employers will inevitably offer less generous benefits. The shadow of litigation is already encouraging plan fiduciaries to limit the plan's service offerings to the barebones services required to run a plan at the lowest cost possible to minimize the litigation risk. "Before the increases in 401(k) plan litigation, some fiduciaries offered more asset class choice by including specialty assets, . . . options [that] could potentially enhance expected returns in well-managed and monitored portfolios." Mellman & Sanzenbacher, *supra*, at 5. Now, however, fiduciaries overwhelmingly choose purportedly "'safe' funds over those that could add greater value." *Id.*

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[6] Judy Greenwald, *Litigation Leads to Hardening Fiduciary Liability Market*, Business Insurance (Apr. 30, 2021), https://www.businessinsurance.com/litigation-leads-to-hardening-fiduciary-liability-market/; Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg L. (Oct. 18, 2021), https://bit.ly/307mOHg (discussing the "sea change" in the market for fiduciary insurance).

[7] Daniel Aronowitz, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans*, Euclid Specialty, at 4 (Dec. 2020), https://bit.ly/3hNXJaW.

Using Rule 23(b)(1) to supercharge the propensity of ERISA class actions to settle also heightens the due process deficit for the absent class members, who do not have a right to notice or to opt out. As the Supreme Court has observed, those due process concerns are at their zenith "in settlement-only class actions," where "the procedural protections built into the Rule to protect the rights of absent class members during litigation are never invoked in an adversarial setting." *Ortiz*, 527 U.S. at 847. This Court should not allow Rule 23(b)(1) to become a pipeline for converting ERISA cases into class-action settlements that deprive absent class members of their due process rights.

CONCLUSION

The district court's order certifying the class under Federal Rule of Civil Procedure 23(b)(1) should be reversed.

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This brief complies with the type volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5,668 words, excluding the parts exempted by Rule 32(f).

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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 Fourth Circuit by using the appellate CM/ECF system on March 14, 2025.

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