No. 22-50368

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HERIBERTO CHAVEZ; EVANGELINA ESCARCEGA, AS THE LEGAL REPRESENTATIVE OF HER SON JOSE ESCARCEGA; JORGE MORENO,

Plaintiffs - Appellees,

v.

PLAN BENEFIT SERVICES, INC.; FRINGE INSURANCE BENEFITS, INCORPORATED; FRINGE BENEFIT GROUP,

Defendants - Appellants

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
Civil Action No. 1:17-cv-659-LY

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITION FOR REHEARING *EN BANC*

JANET GALERIA
JENNIFER B. DICKEY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

BRIAN D. BOYLE
DEANNA M. RICE
ALEXANDER R. REED
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

No. 22-50368, *Chavez v. Plan Benefit Services.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amicus Curiae
The Chamber of Commerce of the United States of America

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Defendants-Appellants
Plan Benefit Services, Inc., Fringe Insurance Benefits, Inc., and Fringe Benefit Group

Plaintiffs-Appellees
Heriberto Chavez; Evangelina Escarcega, as the legal representative of her son Jose Escarcega; and Jorge Moreno

Counsel:
For Appellants

Al Holifield
Holifield & Janich, PLLC
11907 Kingston Pike, Suite 201
Knoxville, Tennessee 37934
[Tel.] (865) 566-0115
[Fax] (865) 566-0119
aholifield@holifieldlaw.com

Matt Dow
Jonathan Neerman
Joshua A. Romero
Peter C. Hansen
Jackson Walker LLP
100 Congress Ave., Suite 1100
Austin, Texas 78701
[Tel.] (512) 236-2230
[Fax] (512) 236-2002
mdow@jw.com
jneerman@jw.com
jromero@jw.com
phansen@jw.com

For Appellees

Nina Wasow
Catha Worthman
Feinberg, Jackson, Worthman & Wasow, LLP
2030 Addison Street, Suite 500
Berkeley, California 94704
[Tel.] (510) 269-7998
[Fax] (510) 269-7994
nina@feinbergjackson.com
catha@feinbergjackson.com

Danielle Leonard
Eileen Goldsmith
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, California 94108
[Tel.] (415) 421-7151
[Fax] (415) 362-8064
dleonard@altshulerberzon.com
egoldsmith@altshulerberzon.com

Richard Burch
Bruckner Burch PLLC
8 Greenway Plaza, Suite 1500

Houston, Texas 77046
[Tel.] (713) 877-8788
[Fax] (713) 877-8065
rburch@brucknerburch.com

For *Amicus Curiae*

Meaghan VerGow
Brian D. Boyle
Deanna M. Rice
Alexander R. Reed
O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
[Tel.] (202) 383-5300
[Fax] (202) 383-5414
mvergow@omm.com
bboyle@omm.com
derice@omm.com
areed@omm.com

Janet Galeria
Jennifer B. Dickey
U.S. Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062
[Tel.] (202) 463-5337
JGaleria@USChamber.com
JDickey@USChamber.com

/s/ Brian D. Boyle
Brian D. Boyle

Attorney of record for Amicus Curiae

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE PANEL ERRED IN AFFIRMING CLASS CERTIFICATION 3

A. A Participant-Led Class Encompassing Thousands of Plans Directed by Distinct, Unrelated Fiduciaries Cannot Be Certified Under Rule 23(b)(1)(B) 3

B. The Panel's Application of Rule 23(b)(3) Fails to Grapple With the Formidable Plan-Level Inquiries That Adjudication of Plaintiffs' Claims Would Require 6

II. CERTIFICATION OF THIS PARTICIPANT-LED MULTI-PLAN CLASS IMPLICATES ISSUES OF EXCEPTIONAL IMPORTANCE REGARDING ERISA SERVICE PROVIDER ARRANGEMENTS 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Allison v. Citgo Petroleum Corp.,
151 F.3d 402 (5th Cir. 1998) 4

Baker v. Wash Mut. Fin. Grp., LLC,
193 F. App'x 294 (5th Cir. 2006) 4

Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.,
472 U.S. 559 (1985) 10

Chavez v. Plan Benefit Servs., Inc.,
No. 1:17-CV-659-LY, 2022 WL 1493605 (W.D. Tex. Mar. 29, 2022) 8, 9

Hecker v. Deere & Co.,
556 F.3d 575 (7th Cir. 2009) 7

Leimkuehler v. Am. United Life Ins. Co.,
713 F.3d 905 (7th Cir. 2013) 6

M.D. ex rel. Stukenberg v. Perry,
675 F.3d 832 (5th Cir. 2012) 6

McCaffree Fin. Corp. v. Principal Life Ins. Co.,
811 F.3d 998 (8th Cir. 2016) 7

Ortiz v. Fireboard Corp.,
527 U.S. 815 (1999) 6

Pegram v. Herdrich,
530 U.S. 211 (2000) 7

Rozo v. Principal Life Ins. Co.,
949 F.3d 1071 (8th Cir. 2020) 7

Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co. (U.S.A.),
768 F.3d 284 (3d Cir. 2014) 7

TABLE OF AUTHORITIES
(continued)

Page(s)

Santomenno v. Transamerica Life Ins. Co.,
883 F.3d 833 (9th Cir. 2018) 7

Schmitt v. Nationwide Life Ins. Co.,
No. 2:17-cv-558, 2018 WL 4051835 (S.D. Ohio Aug. 24, 2018) 11

Singh v. RadioShack Corp.,
882 F.3d 137 (5th Cir. 2018) 3

Tejas Power Corp. v. F.E.R.C.,
908 F.2d 998 (D.C. Cir. 1990) 9

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 5

Statutes

28 U.S.C. § 2072(b) 5

29 U.S.C. § 1104(a)(1) 10

Other Authorities

2 Newberg on Class Actions § 4:2 (5th ed.) 4

Rules

Fed. R. App. P. 29(a)(4)(E) 1

Fed. R. App. P. 29(b)(4) 1

Fed. R. Civ. P. 23(b)(1)(B) 4

Fed. R. Civ. P. 23(b)(3) 6

5th Cir. R. 29.2 1

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 offer employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), as well as companies that provide services to such plans. The panel opinion implicates the interests of both groups by affirming certification of a multi-thousand-plan class proceeding under the leadership of a handful of participants in just two plans sponsored by a single employer. The panel's decision cuts plan fiduciaries out of litigation that could dismantle service arrangements they made

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E), (b)(4); 5th Cir. R. 29.2.

for their plans, leaving them voiceless in the face of plaintiffs' contention that fees they negotiated were unlawfully excessive. Meanwhile, the plan service providers sued in this litigation will be compelled to defend the reasonableness of thousands of distinct fee negotiations in a proceeding where individuating considerations (such as the fee offers the plans received from other vendors) will either overwhelm the factfinding process or, worse, be ignored. The panel opinion risks massive disruption to the individually negotiated arrangements of thousands of benefit plans overseen by their own fiduciaries and invites copycat litigation against the most popular service providers that would subvert considered fiduciary choices.

Rehearing *en banc* is warranted to forestall such abuse of ERISA's civil enforcement scheme and ensure that the coercive force of this mammoth class action does not upend thousands of plan service arrangements without any review of their individual terms or the participation of the fiduciaries that negotiated them.

SUMMARY OF ARGUMENT

The panel affirmed certification of a class of over 290,000 participants in 3,000 employee benefit plans in a challenge to multifaceted service arrangements that were individually negotiated and executed by those plans' distinct, independent fiduciaries. Rehearing *en banc* is warranted because the certification of that class rests on a series of fundamental errors, and the decision implicates

important issues regarding Article III standing and Rule 23's requirements.[2] A class proceeding cannot legally or practically resolve the reasonableness of thousands of plans' disparate bargains in one fell swoop. Common evidence will not establish whether a service provider assumed fiduciary control over its compensation for all contracts with all plans, or whether a service provider's compensation was reasonable in light of the particular context and circumstances relevant to each plan. And these issues certainly cannot be resolved in a proceeding brought by participants who are complete strangers to nearly all of the plans whose service agreements they seek to unwind.

The Court should grant the petition.

ARGUMENT

I. THE PANEL ERRED IN AFFIRMING CLASS CERTIFICATION

A. A Participant-Led Class Encompassing Thousands of Plans Directed by Distinct, Unrelated Fiduciaries Cannot Be Certified Under Rule 23(b)(1)(B)

A Rule 23(b)(1)(B) class must be cohesive and homogenous, such that

---

[2] While this brief focuses on Rule 23, the Chamber agrees with defendants-appellants that the "standing approach" is the proper way to analyze a plaintiff's Article III standing to bring claims on behalf of absent class members, and that the panel erred in its application of that approach here. Pet. for Rehearing *En Banc*, at 5–10. At a minimum, *en banc* review is warranted on this issue given the acknowledged circuit split (Op. at 10) and apparent conflict with prior Fifth Circuit standing jurisprudence, *see, e.g.*, *Singh v. RadioShack Corp.*, 882 F.3d 137, 150–51 (5th Cir. 2018).

separate actions would risk "adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of" absent class members "or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B).[3] The class that the district court certified includes hundreds of thousands of participants and beneficiaries of thousands of different plans sponsored by different companies. Those plans are overseen by distinct sets of fiduciaries, each of which separately selected defendants' services over others in the market and negotiated fees for those services, sometimes through a third-party broker or consultant. A hypothetical finding that one plan's agreement violated ERISA would have no bearing on whether the others did, let alone preclusive effect on that point.

Most class actions certified under Rule 23(b)(1)(B) are "limited fund" cases, in which claims by numerous persons are aggregated against a single fund insufficient to satisfy all claims. *Baker v. Wash Mut. Fin. Grp., LLC*, 193 F. App'x 294, 297 (5th Cir. 2006). Here, by contrast, the stakeholders on plaintiffs' theories are thousands of independently governed plans, and the presence (and amount) of

[3] *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 412–13 (5th Cir. 1998) (explaining Rule 23(b)(1) class is presumed cohesive given absence of absolute right to notice or opt-out); 2 Newberg on Class Actions § 4:2 (5th ed.) (class is cohesive where claims are "so intertwined that adjudication of one will necessarily impinge on the other").

losses under those theories may differ from plan to plan. The variety of plan-specific arrangements plainly permits the district court to enforce injunctive relief as to one plan without any impact on another.[4] Indeed, plan-specific litigation is the far superior route, as it avoids displacing the considered judgments of the fiduciaries who executed plan-specific agreements and robbing those fiduciaries of any voice during that process.

Plaintiffs' proposal to stage litigation not only on behalf of their own plan, as ERISA § 502 allows, but also on behalf of thousands of other plans in which they do not participate, improperly uses the class device to enlarge substantive rights under ERISA. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) ("[T]he Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge, or modify any substantive right'" (quoting 28 U.S.C. § 2072(b))). The panel's ruling permitting plaintiffs to use their membership in one plan to take over the fiduciary compliance structures of thousands of other plans is akin to a derivative action brought by a shareholder in one corporation against the boards of all corporations registered in the same state for allegedly similar misconduct. That

[4] There is no basis to conclude a cohesive class exists as to any of plaintiffs' excessive fee claims, but the lack of cohesion is particularly evident as to alleged "undisclosed" fees, which the complaint fails to specify but on their face appear to be plan- or participant-specific. Am. Compl. ¶¶ 8, 24 n.1. The same logic forecloses certification of the "undisclosed fee" claims under Rule 23(b)(3). *See infra* at 7–8.

is precisely the type of "adventurous application of Rule 23(b)(1)(B)" that the Supreme Court has cautioned against. *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 845–46 (1999).

B. The Panel's Application of Rule 23(b)(3) Fails to Grapple With the Formidable Plan-Level Inquiries That Adjudication of Plaintiffs' Claims Would Require

A Rule 23(b)(3) class is appropriate only where common questions of law and fact predominate. Fed. R. Civ. P. 23(b)(3). Neither of the questions central to excessive fee claims brought against a third-party service provider—the provider's status as a fiduciary with respect to the fees negotiated with each plan, and the reasonableness of that compensation—can be resolved in "one stroke" for participants in thousands of distinct plans sponsored by different companies. *See M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 843 (5th Cir. 2012). Answering those questions requires a careful analysis of plan-specific facts and circumstances, precluding certification under Rule 23(b)(3).

Plaintiffs' claim of fiduciary breach in this case is about defendants' fees. Yet most of plaintiffs' purported examples of "common" facts demonstrating fiduciary status (such as directing disbursement of trust assets and choosing other plan service providers) have nothing to do with their theory of breach (collecting excessive fees for defendants' own account). *See Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 913–914 (7th Cir. 2013). This supposedly "common"

evidence is thus irrelevant, because a provider does not become a fiduciary for all purposes—including its own compensation—merely by providing services to an ERISA plan, even when those services include inherently fiduciary tasks like trusteeship. *See, e.g.*, *Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co. (U.S.A.)*, 768 F.3d 284, 296–97 (3d Cir. 2014). A service provider engaged in a fiduciary capacity does not act as a fiduciary when negotiating its own fees with a counterpart plan fiduciary. *Id.* at 293–94; *see Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833, 838 (9th Cir. 2018); *McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998, 1003 (8th Cir. 2016); *Hecker v. Deere & Co.*, 556 F.3d 575, 583–84 (7th Cir. 2009). Only when the service contract confers on the provider discretion to determine its own fee (or leaves the provider free to collect unauthorized fees) does the provider take on fiduciary responsibility for its own compensation. *See, e.g.*, *Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071, 1074 (8th Cir. 2020). The "threshold question" is not whether defendants are fiduciaries of the thousands of plans at issue for *some* purpose, but whether defendants act as fiduciaries to those plans with respect to their own compensation—*i.e.*, "when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000).

To be sure, plaintiffs' theory that defendants acted as fiduciaries by taking "undisclosed" fees from certain plans' assets could, if factually founded, confer on

defendants fiduciary status as to those fees alone. But determining whether a provider took fees that were not approved by nor disclosed to the independent plan fiduciaries who retained its services is an inherently plan-specific endeavor. The complaint concedes as much, alleging the disclosure issue depends on defendants' individual "contracts with *employers*," Am. Compl. ¶ 8 (emphasis added), and not on the Master Trust Agreement the panel held permits a common answer to the crucial fiduciary status question. *See* Op. at 28. There is no common means of answering the complaint's allegations regarding defendants' supposed receipt of excessive, undisclosed "indirect compensation."

The fiduciary status inquiry is not the sole critical question that can be answered only through plan-specific evidence. The reasonableness of a service provider's compensation "depends on the particular facts and circumstances" under which the plan obtained the services, 29 C.F.R. § 2550.408c-2(b)(1), and it is axiomatic that fee reasonableness must be analyzed relative to the "services rendered," *Chavez v. Plan Benefit Servs., Inc.*, No. 1:17-CV-659-LY, 2022 WL 1493605, at *15 (W.D. Tex. Mar. 29, 2022). Based on these principles, determining whether a service provider's compensation is reasonable requires a holistic review of the context surrounding the relevant service arrangement, including any alternatives the plan's fiduciaries considered, the terms of the arrangement and the contracting parties' compliance therewith, and any

predecessor or successor arrangements between the plan and other vendors—which might tend to reveal how the arrangement with defendants compared to the "market." *See Tejas Power Corp. v. F.E.R.C.*, 908 F.2d 998, 1004 (D.C. Cir. 1990) ("In a competitive market, where neither buyer nor seller has a significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable…."). That is the case even if the amount of the service provider's fees can be determined by reference to a common "pricing grid," as the district court concluded here. *Chavez*, 2022 WL 1493605, at *14. An attempted class-wide ruling on the reasonableness of a service provider's fees, without individualized analysis of the distinct agreements under which those fees were collected and the circumstances resulting in their execution, would stretch Rule 23 beyond the breaking point.

II. CERTIFICATION OF THIS PARTICIPANT-LED MULTI-PLAN CLASS IMPLICATES ISSUES OF EXCEPTIONAL IMPORTANCE REGARDING ERISA SERVICE PROVIDER ARRANGEMENTS

This case merits the *en banc* Court's attention because the approach endorsed by the panel presents a serious threat to ERISA's carefully crafted fiduciary compliance structure. ERISA requires plan fiduciaries to act solely in the interests of plan participants and beneficiaries, for the exclusive purpose of providing them benefits and defraying plan expenses, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent

man would employ in similar circumstances. 29 U.S.C. § 1104(a)(1). Congress derived these duties from the common law of trusts, under which trustees were "understood to have all such powers as are necessary or appropriate for carrying out the purposes of the trust." *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985) (quotation omitted).

The participant-led multi-plan class certified here ignores—and indeed undermines—this core statutory framework. A handful of participants in one plan cannot adequately stand in the shoes of the thousands of fiduciaries of different plans sponsored by different entities that negotiated different fees, sometimes with the help of a broker or consultant (though even if they could, resolving their claims would still require analyzing facts and circumstances unique to each of those plans, *see supra* at 6–9). Only the *fiduciaries* have full visibility into the plan-specific factors that led to *their* decision to retain a particular service provider under particular terms—including their views of the prior arrangement, any alternative providers, arrangements, or fee structures they or their brokers or consultants considered, and the specific goals or issues their decision aimed to further or resolve. The certification of this massive multi-plan class endorses an assessment of fee reasonableness based on a single sheet of paper—a "pricing grid." Even assuming the pricing grid exhaustively covered all potential fee permutations across the 3,000-plus plans in the Trust, that document reveals nothing about the

alternatives the plans' fiduciaries considered in real-time when agreeing to terms drawn from that grid.

Through this lawsuit, plaintiffs have called into question thousands of plan-level agreements. Certification not only effectively deprives the fiduciaries who executed those agreements of their statutory decisionmaking responsibility, it also places them directly in the crosshairs. A class-wide judgment invalidating or altering those agreements in a single stroke, without hearing from the fiduciaries who negotiated them and who may themselves face legal exposure as a consequence of any determination that the fees were unreasonable, would violate fundamental principles of due process. At a minimum, the thousands of fiduciaries who retained defendants' services on behalf of each of the plans are necessary parties to any proceeding that stands to divest them of responsibility to determine the fee arrangements best-suited for their respective participant bases. *See, e.g.*, *Schmitt v. Nationwide Life Ins. Co.*, No. 2:17-cv-558, 2018 WL 4051835, at *4 (S.D. Ohio Aug. 24, 2018). And while allowing plan fiduciaries to exclude their plans from this proceeding might answer some of these concerns, the class here consists of *participants*, not fiduciaries, and, in any event, the certification ordered by the district court below was mandatory.

CONCLUSION

This Court should grant defendants-appellants' petition for rehearing *en banc*.

DATED: September 18, 2023

Respectfully submitted,

/s/ Brian D. Boyle

JANET GALERIA
JENNIFER B. DICKEY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

BRIAN D. BOYLE
DEANNA M. RICE
ALEXANDER R. REED
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of September, 2023, a true and correct copy of the foregoing was filed electronically using the CM/ ECF system which served counsel for the parties.

/s/ Brian D. Boyle
Brian D. Boyle

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 2,586 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in font size 14 Times New Roman.

/s/ Brian D. Boyle
Brian D. Boyle

CERTIFICATIONS UNDER ECF FILING STANDARDS

Pursuant to paragraph A(6) of this Court's ECF Filing Standards, I hereby certify that (1) any required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Brian D. Boyle
Brian D. Boyle