No. 22-90018

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Defendants-Petitioners,

v.

HERIBERTO CHAVEZ; EVANGELINA ESCARCEGA, AS THE LEGAL REPRESENTATIVE OF JOSE ESCARCEGA; AND JORGE MORENO, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

Plaintiffs-Respondents.

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 PETITION FOR PERMISSION TO APPEAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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

MEAGHAN VERGOW
SCOTT HARMAN-HEATH
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. 22-90018, *Plan Benefit Services v. Chavez.*

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 ten percent or more of its stock.

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

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

Counsel:
For Petitioners

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 Respondents

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
Scott Harman-Heath
O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
[Tel.] (202) 383-5300
[Fax] (202) 383-5414
mvergow@omm.com
sharman@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/ Meaghan VerGow
Meaghan VerGow
Attorney of record for Amicus Curiae

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. PLAINTIFFS CANNOT PROPERLY BRING CLAIMS BELONGING TO EMPLOYEE BENEFIT PLANS IN WHICH THEY ARE NOT PARTICIPANTS. 3

II. THE DISTRICT COURT'S CERTIFICATION ORDER RAISES IMPORTANT QUESTIONS ABOUT WHAT MAY PROPERLY BE ADJUDICATED IN PARTICIPANT-LED MULTI-PLAN ACTIONS 6

A. A Service Provider's Status As A Functional Fiduciary To Thousands Of Plans Cannot Be Determined With Common Proof. 8

B. The Reasonableness Of Thousands Of Plans' Fees Cannot Be Determined Using Classwide Proof 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases

Acosta v. Pac. Enters.,
950 F.2d 611 (9th Cir. 1991), *as amended on reh'g* (Jan. 23, 1992).....................5

Gen. Tel. Co. of Sw. v. Falcon,
457 U.S. 147 (1982) 6

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 4

M.D. ex rel. Stukenberg v. Perry,
675 F.3d 832 (5th Cir. 2012)...10

Pension Benefit Guar. Corp. ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.,
712 F.3d 705 (2d Cir. 2013) 10

Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co. (U.S.A.),
768 F.3d 284 (3d Cir. 2014) *cert. denied sub nom. Santomenno v. John Hancock Life Ins. Co.*, 573 U.S. 963 (2015) 8, 9

Teets v. Great-W. Life & Annuity Ins. Co.,
921 F.3d 1200 (10th Cir. 2019)...8

Statutes

29 U.S.C. § 1002(21)(A)...9

29 U.S.C. § 1002(7) 5

29 U.S.C. § 1002(8) 5

29 U.S.C. § 1132 4

29 U.S.C. § 1132(a)(2)..4

Regulations

29 C.F.R. § 2550.408c-2(b)(1)..7

INTEREST OF THE *AMICUS CURIAE*[1]

Founded in 1912, the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber 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, like this one, that raise issues of concern to the nation's business community.

The Chamber's members have a substantial interest in the issues presented here. Those members include many employers that offer employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA") and companies that provide services to such plans. The district court's decision implicates the interests of both: Under the participant-driven, multi-thousand-plan class proceeding it authorizes, plan fiduciaries will be cut out of litigation that

---

[1] All parties have consented to the filing of this brief. 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); 5th Cir. R. 29.2.

could dismantle arrangements they negotiated for their individual plans—exposing the fiduciaries to potential liability for arrangements labeled unreasonable by plaintiffs who have no relationship with the employer or plans. Meanwhile, the plan service providers included in this litigation will be compelled to defend the features of thousands of distinct negotiations and agreements in a proceeding in which those individuating considerations will either overwhelm the factfinding process or, worse, not be considered at all. The decision below risks massive disruption to the individually negotiated arrangements of thousands of benefit plans that are overseen by their own fiduciaries and invites further litigation against service providers to dismantle considered fiduciary choices. The Court's review is once again necessary to forestall such abuse of ERISA's civil enforcement scheme and to ensure that the coercive force of this mammoth class action does not result in a resolution that disrupts thousands of plan arrangements without the Court's review.

SUMMARY OF ARGUMENT

On remand from this Court, the district court certified a class of 290,000 participants in more than 3,000 different employee benefit plans in a challenge to multifaceted service arrangements that were individually negotiated and executed by the fiduciaries of those 3,000 plans. The district court's certification decision rests on a series of fundamental errors warranting the Court's attention again.

Contrary to the district court decision, a class proceeding of participants in multiple plans cannot legally or practically resolve the reasonableness of thousands of 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. And these issues cannot be resolved in a proceeding brought by non-participants in the plans whose service arrangements are at stake.

The district court's decision on remand did not remedy the deficiencies in the certification order this Court vacated. It just laid bare the inescapable reality that a multi-plan class proceeding cannot possibly fairly adjudicate whether each of those individual plans' service arrangements was reasonably agreed to by each plan's fiduciaries. The Court should grant the petition.

ARGUMENT

I. PLAINTIFFS CANNOT PROPERLY BRING CLAIMS BELONGING TO EMPLOYEE BENEFIT PLANS IN WHICH THEY ARE NOT PARTICIPANTS.

This case raises important questions about the application of standing doctrine and ERISA itself to the certification of participant-led ERISA class actions. The named plaintiffs here propose to substitute their own judgments for the considered, fact-based determinations of independent plan fiduciaries operating under fiduciary duties of loyalty and prudence. The district court's decision permits individuals who do not participate in an ERISA-governed plan to challenge

that plan's contractual arrangements, without the involvement of the plan's fiduciaries or even participants of that plan. But a plaintiff who is a "stranger" to a plan lacks constitutional standing to vindicate alleged injuries to that plan; and such a plaintiff is not authorized by ERISA's civil enforcement provision (29 U.S.C. § 1132, or ERISA § 502) to vindicate ERISA claims belonging to that plan and its participants. The class device should not be used to aggregate the claims of participants in plans in which they have no stake, in a proceeding that excludes the fiduciaries that approved the challenged arrangements.

Individuals who have no relationship to a benefit plan cannot possibly articulate an injury deriving from that plan's service arrangements. Constitutional standing requires, at a minimum, that an individual pressing a claim has suffered an injury traceable to the complained of conduct, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992), and an individual does not share in the injury of a plan they did not participate in. Such individuals likewise cannot demonstrate that they have a cause of action under ERISA—so-called statutory standing—to press claims on behalf of plans to which they have no connection. ERISA § 502(a)(2) permits an individual who is not a plan fiduciary or the Secretary of Labor to bring a claim for breach of fiduciary duty on behalf of a plan only if he is a "participant" in or "beneficiary" of that plan. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). A "participant" under ERISA is an "employee or former employee . . . who is or may

become eligible to receive a benefit" under the plan, and a "beneficiary" is a "person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." ERISA § 3(7), (8), 29 U.S.C. § 1002(7), (8). An individual advancing the claims of a stranger plan is neither. *See Acosta v. Pac. Enters.*, 950 F.2d 611, 617 (9th Cir. 1991), *as amended on reh'g* (Jan. 23, 1992) (concluding that plaintiff "lacks standing to challenge decisions affecting ERISA plans in which he does not participate."). Individuals who are participants in one plan cannot derivatively represent other plans any more than a shareholder in a single company can represent the interests of thousands of unrelated corporations.

The district court made a threshold error in its standing analysis by examining standing with reference to common trusts through which disparate services are provided to disparate plans. Class-Certification Order ("Op.") 20, ECF No. 186. The arrangements challenged by the lawsuit are not between the *trusts* and the service provider, however, but between each *plan* and the service provider. The named plaintiffs have neither Article III standing nor statutory standing to represent the other *plans* whose distinct arrangements they purport to challenge in this lawsuit, as the above black-letter legal principles make clear. More generally, the court's Rule 23 analysis at the (irrelevant) trust level shortchanged the rigorous scrutiny necessary to determine whether claims across

multiple plans can feasibly be aggregated into a single class proceeding. Individuals who did not participate in a plan are not adequate or typical representatives in an action challenging that plan's service provider arrangements. And their claims do not depend on the same facts or issues as the claims held by participants in other plans, whose arrangements were separately negotiated and are now monitored by their own fiduciaries. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) ("[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." (quotation omitted)). The Court concluded otherwise only by brushing past plan-level distinctions that cannot be ignored.

Constitutional and statutory standing limitations ensure that litigants have a stake in their actions and a factual basis to prosecute them. The district court's decision permits individuals with no connection to or understanding of the particulars of a plan to upend that plan's fiduciary-negotiated arrangements with service providers. Article III and ERISA's civil enforcement scheme guard against just that.

II. THE DISTRICT COURT'S CERTIFICATION ORDER RAISES IMPORTANT QUESTIONS ABOUT WHAT MAY PROPERLY BE ADJUDICATED IN PARTICIPANT-LED MULTI-PLAN ACTIONS

The district court's analysis also raises two substantive questions that merit this Court's attention before the case proceeds further.

First, the district court found that plan service providers' status as fiduciaries with respect to their negotiated fees could be determined on a classwide basis. Op. 25-28. But a provider's status as a fiduciary or non-fiduciary depends on the agreement negotiated with each individual plan and on the parties' conduct with respect to that agreement. Here, the service provider could exercise fiduciary discretion with respect to its compensation only if acted contrary to its agreements with individual plans approving its compensation—and whether that was the case for any given plan can be determined only with plan-specific evidence.

Second, the district court held that the reasonableness of the service provider's fees for all plans could be determined with reference to a fixed rate schedule for services rendered. But even assuming plan fees were in fact determined with reference to schedules—a conclusion the defendants here credibly dispute—determining their reasonableness would still require the court to consider plan-specific factors, including the context in which the plan obtained the services and the alternatives available to that plan at the time. 29 C.F.R. § 2550.408c-2(b)(1) (whether compensation is reasonable depends on "facts and circumstances of each case"). Instead of standing or falling on common proof, the contested issues in this proceeding would require thousands of mini-trials to analyze the reasonableness of thousands of distinct—and distinctly negotiated—plan service arrangements. And if the court resolves those issues on purportedly common

grounds, it will necessarily have legally erred in its application of ERISA's reasonableness standard. Either way, the Court's review now is warranted to ensure this case does not inappropriately disrupt the thousands of individually negotiated arrangements that thousands of plan-level fiduciaries concluded were reasonable, upon their own inquiry and judgment, for their own plans.

A. A Service Provider's Status As A Functional Fiduciary To Thousands Of Plans Cannot Be Determined With Common Proof

A service provider may become a fiduciary of an ERISA plan if it acts as a "functional fiduciary" by virtue of the authority it holds over plan assets. *Teets v. Great-W. Life & Annuity Ins. Co.*, 921 F.3d 1200, 1206 (10th Cir. 2019). When it comes to the fees the service provider receives for its services to plans, the provider is not a fiduciary so long as the compensation terms have been approved by an independent fiduciary. *See Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co. (U.S.A.)*, 768 F.3d 284, 297 (3d Cir. 2014) (administrator not fiduciary because, even though it had contractual right to change fees on advance notice, "ultimate authority still resided with the trustees, who had the choice whether to accept or reject [the administrator's] changes"), *cert. denied sub nom. Santomenno v. John Hancock Life Ins. Co.*, 573 U.S. 963 (2015).

A service provider whose compensation terms have been approved by a plan fiduciary could become a functional fiduciary with respect to that compensation only by *deviating* from the agreement. Accordingly, determining whether a service

provider is a functional fiduciary to any given plan depends at minimum on evaluating, at the individual plan level, the provider's agreements with its plan clients and the extent to which the parties have acted in accordance with those agreements. *See id.*; *see also* ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). The district court breezed past the plan-level factual inquiries that make this question inherently incapable of a classwide resolution. Op. 26-28. That error warrants correction simply because it risks exposing service providers to fiduciary liability contrary to ERISA. But in addition, by leaving the plan fiduciaries out of the proceeding, any class judgment in this case would cast doubt on the authority and ability of named fiduciaries to make decisions on behalf of their individual plans. That risk of disruption and confusion should be averted now.

B. The Reasonableness Of Thousands Of Plans' Fees Cannot Be Determined Using Classwide Proof

The district court concluded that it could consult the service provider's fee schedules for particular services to determine whether the fees paid by individual plans were reasonable. Op. 34. As the defendants explain, the court's analysis overlooks material differences in the fees paid by plans encompassed by the class for similar services to plans of similar size. *See* Defs.' Pet. For Permission to Appeal 3, 21-23. But even assuming the court's factual conclusion were correct, the determination whether the arrangements for the plans in the case were reasonable would still depend on a range of contextual factors, including the full

range of terms negotiated by each plan's fiduciaries based on each plan's individual needs; the plan terms; and the alternatives available to the plan in the marketplace at the time of the transaction. *See Pension Benefit Guar. Corp. ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013). That information resides with the very fiduciaries who are excluded from this proceeding—it is likely unknown to the defendant service providers selected to assist the plans, and it is certainly not in the hands of individuals who were not participants in the plans but now challenge the plan arrangements as unlawful.

The district court's methodology provides no avenue for grappling with plan-specific differences that are likely to arise, including the information and market options available to each plan at the time it selected this provider, how market forces bore on the reasonableness of the provider's compensation over time, and how the "pricing grid" featured by the district court translated into fees each plan actually paid. The individual variations among plans' fee arrangements only reinforce that claims across different plans will not stand or fall on common proof. *See M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 843 (5th Cir. 2012) ("[I]f the merits of each class member's . . . claim[] depend on an individualized inquiry . . . , then dissimilarities within the proposed class would appear to prevent the class claims from asserting a common question of law that will resolve an issue

that is central to the validity of each one of the claims in one stroke." (internal quotation marks omitted)).

The outcome of this proceeding threatens to invalidate the service arrangements individual fiduciaries determined, based on a full range of considerations, to be best for their plans. To fairly make the factual determinations necessary to resolve plaintiffs' claims would require a docket-busting proceeding that would surrender any advantages of the class device, and resolving them with shortcuts of proof would offend both ERISA and due process. However the factual determinations were made, this proceeding would displace the considered decisions of thousands of fiduciaries and disrupt the arrangements they negotiated for their plans, with which they were presumably entirely satisfied. That would frustrate ERISA's goals, not serve them. The class decision below is unprecedented and contrary to law, and warrants immediate review.

CONCLUSION

For the foregoing reasons, this Court should GRANT petitioner's request for an interlocutory appeal of the district court's class certification decision.

DATED: April 19, 2022

/s/ Meaghan VerGow

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

MEAGHAN VERGOW
SCOTT HARMAN-HEATH
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 2,548 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/ Meaghan VerGow
Meaghan VerGow

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/ Meaghan VerGow
Meaghan VerGow

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 2022, a true and correct copy of the foregoing was filed electronically using the CM/ ECF system which served counsel for the parties.

/s/ Meaghan VerGow
Meaghan VerGow