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 AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

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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 tax-exempt organization incorporated in the District of Columbia. It 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, 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 could dismantle arrangements they negotiated for their individual plans—exposing the

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[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.

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 should forestall this attempt to abuse ERISA's civil enforcement scheme and ensure that the coercive force of this mammoth class action does not result in the disruption of thousands of plan arrangements.

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 again rests on a series of fundamental errors, warranting reversal.

First, plaintiffs' attempt to litigate the claims belonging to plans they do not participate in runs afoul of well-established standing doctrine. An individual who is

not a participant in an ERISA-governed employee benefit plan lacks constitutional standing to assert a claim challenging the plan's contractual arrangements with its service providers. Article III requires, at a minimum, that an individual pressing a claim have suffered an injury traceable to the complained-of conduct. An individual who has no relationship to a benefit plan cannot possibly articulate an injury deriving from that plan's service arrangements. The text of ERISA confirms this limitation, granting participants in a plan the authority to litigate on behalf of that plan alone. Standing requirements guard against the risk that participant-driven class litigation will upend service arrangements that have been negotiated by individual fiduciaries for their plans, in a proceeding that cuts out the very plans, fiduciaries, and participants with the interest in how those services are provided. The class representatives here have no stake in those other plans' arrangements, and no basis to fault the decision-making of the thousands of fiduciaries who approved the service provider agreements on behalf of their respective plans.

Second, the class claim certified by the district court seeks to singularly resolve the reasonableness of thousands of distinct—and distinctly negotiated—plan service arrangements. Such an undertaking could not be accomplished without either employing thousands of mini-trials, which would overwhelm the class proceeding, or sacrificing the due process rights of defendants and third-parties with a direct stake in this case to present evidence establishing the reasonableness of their

individual bargains. Moreover, class representatives who have no relationship to the other plans cannot fairly and adequately represent the interests of those plans when they are supplanting the considered judgments of the independent plan fiduciaries who negotiated and approved the service arrangements at issue, often with the aid of sophisticated brokers and consultants. Those fiduciaries are necessary parties to any proceeding that would invalidate their plan agreements and expose them to fiduciary liability, but they have no contemplated role in this case driven by a handful of participants in an unrelated plan.

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. For the same reasons, common issues of law and fact do not predominate over individualized considerations, making Rule 23(b)(3) a wholly inapposite device for resolving the questions presented by this litigation.

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 reverse.

ARGUMENT

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

The district court's decision permits individuals who do not participate in an ERISA-governed plan to challenge that plan's contractual arrangements. 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 or its participants. The class device should not be used to aggregate the claims of participants in plans in which they have no stake.

Individuals who have no relationship to a benefit plan cannot possibly articulate an injury deriving from that plan's service arrangements. Constitutional standing requires a plaintiff to show that he or she (1) has suffered an injury in fact that (2) is fairly traceable to the challenged conduct of the defendant and (3) is likely to be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Individuals do not share in the injury of a plan they do not participate in. Plaintiffs seek to challenge choices made by the fiduciaries of other

plans even though those choices had no impact on plaintiffs. Their claims on behalf of other plans do not satisfy the constitutional minimums of Article III.

Plaintiffs 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 derivatively 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.") at 20, ECF No. 186. The plans that participate in those trusts do not share a singular arrangement, a singular injury, or a singular claim, and plaintiffs are not challenging fiduciary decisions made at the trust level. Rather, plaintiffs are challenging terms—approved by each plan's own fiduciaries, who may have their own advisors—that are particular to each plan in the trust. Plaintiffs are bringing claims on behalf of the constituent plans, not on behalf of the trust. Plaintiffs lack constitutional standing to bring those plans' individual claims regarding their individual arrangements, as the above black-letter legal principles make clear.

The district court erred in relying on "class standing" decisions to overcome the constitutional standing problem. In cases like *Fallick v. Nationwide Mutual Insurance*, 162 F.3d 410 (6th Cir. 1998) (cited at Op. 20-23, 37), participants in multiple plans were subject to a shared fiduciary decision that caused them a common injury. *Id.* at 423. Although the participants did not have Article III standing to assert the claims of other plans, they could establish their suitability under Rule 23 to represent the members of other plans. *See id.* But Rule 23 cannot bridge the divide where, as here, the lawsuit purports to aggregate the claims of disparate plans that are subject to distinct terms that have been individually negotiated by their own fiduciaries. 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.

Standing limitations ensure that litigants have a stake in their actions and a factual basis to prosecute them. The district court permitted individuals with no connection to or understanding of the particulars of a plan to upend that plan's fiduciary-negotiated arrangements with service providers. That decision cannot be squared with the safeguards in Article III, ERISA's civil enforcement scheme, or Rule 23.

II. PARTICIPANT-LED MULTI-PLAN CLASSES CANNOT BE CERTIFIED UNDER RULE 23(b)(1)(B).

Even if a participant-led multi-plan class could satisfy the prerequisites of Rule 23(a), such a class could not be certified under Rule 23(b)(1)(B), as it was here. Op. at 51. The text and structure of Rule 23 reveal that classes certified under Rule 23(b)(1) must be cohesive, a requirement that a participant-led multi-plan class action cannot satisfy.

1. A Rule 23(b)(1) Class Must Be Cohesive.

For a class to be certified under Rule 23(b)(1)(B) it must be cohesive and homogenous, with few conflicting interests among its members. Rule 23(b)(1)(B) provides that a class action may be maintained when the prosecution of separate actions by individual class members would create "a risk of . . . 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). The adjudication of an individual's claims can only have this type of practical effect on the claims of others if there is cohesiveness within the class—that is, the individual claims of the class members are "so intertwined that adjudication of one will *necessarily* impinge on the other." 2 Newberg on Class Actions § 4:2 (5th ed.) (emphasis added). Variations in the relevant facts or the interests at stake would enable a court to adjudicate the claims of one individual without necessarily affecting others, and so eliminate the need for this class device.

That Rule 23(b)(1)(B) requires cohesiveness within a class is also supported by the structure of the Rule. Section (c)(2) of Rule 23 explains the level of notice required for different types of class actions. Although for (b)(3) classes it provides that "the court *must* direct to class members the best notice that is practicable under the circumstances, "[f]or (b)(1) or (b)(2) classes," the court "*may* direct appropriate

notice." Fed R. Civ. P. 23(c)(2)(A)-(B) (emphasis added). In other words, Rule 23(b)(1) and (b)(2) classes, unlike Rule 23(b)(3) classes, do not provide an absolute right to notice or opt-out. *Id.*; *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-48 (1999) (contrasting mandatory nature of (b)(1) classes with (b)(3) classes under which notice to all class members is required). The reason for that difference, the drafters explained, is the inherently cohesive nature of the 23(b)(1) and (b)(2) classes. *See* Fed. R. Civ. P. 23, supplementary note of advisory committee on 1966 Amendment ("In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum."). When a class is cohesive, "there is less reason to be concerned about each member of the class having an opportunity to be present" and so notice and an opportunity to opt out are not essential. *Juris v. Inamed Corp.*, 685 F.3d 1294, 1319 (11th Cir. 2012) (quoting 7AA Charles Alan Wright et al., *Federal Practice & Procedure* § 1786 (3d ed. 2005)).

This Court, and others, have applied that logic, explaining that "different presumptions with respect to the cohesiveness and homogeneity of interests among members of (b)(1), (b)(2), and (b)(3) classes are reflected in the different procedural safeguards provided for each potential class." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 412 (5th Cir. 1998). That the drafters did not provide absolute rights to "notice or to opt-out" for (b)(1) classes suggests they assumed those classes "to be

[] homogenous and cohesive group[s] with few conflicting interests among [their] members." *Id.* at 412-13. Cohesiveness, then, is key if members of a (b)(1) class will not necessarily be notified of the existence of the class action or provided the opportunity to opt-out of that action; in the end, cohesiveness is what enables "an adequate class representative . . . as a matter of due process, [to] bind all absent class members by a judgment." *Walsh v. Great Atl. & Pac. Tea Co*., 726 F.2d 956, 963 (3d Cir. 1983) (citing *Hansberry v. Lee*, 311 U.S. 32, 43 (1940)); *see also Casa Orlando Apartments, Ltd. v. Fed. Nat'l Mortg. Ass'n*, 624 F.3d 185, 199 (5th Cir. 2010) ("[P]rocedural safeguards" of "notice or opt-out" rights "are not required" when the "class is presumed to be homogenous in nature, with few conflicting interests among its members.").

2. The Requisite Cohesiveness Does Not Exist In A Participant-Led Multi-Plan Class.

Participant-led multi-plan classes challenging disparate third-party service arrangements, like the class at issue here, do not have the necessary cohesiveness to permit certification under Rule 23(b)(1). The service arrangements of each ERISA plan are individually negotiated by a fiduciary that owes its plan a duty of loyalty and prudence. *See* ERISA § 404(a), 29 U.S.C. § 1104(a). It follows that those arrangements will vary depending on the fiduciaries' choices, judgment, and negotiations. Given this variety, the plan-level questions raised by each individual claim will far outnumber any questions that might be resolved uniformly across

plans and the claims of class members will not be so "intertwined that adjudication of one will necessarily impinge on the other." 2 Newberg on Class Actions § 4:2 (5th ed.); *see Bazemore v. Friday*, 478 U.S. 385, 406-07 (1986) (concluding that certification under Rule 23(b)(1)(B) was improper where each claim depended on whether an individual county acted in an intentionally discriminatory manner). A court could easily grant relief with respect to an individual plan without drawing in the arrangements of stranger plans, rendering the class vehicle unnecessary for the protection of interests of absent class members.

Indeed, unitary classwide adjudication of these claims would frustrate, not advance, the purposes of the class vehicle. Allowing a participant in one plan to represent the interests of participants in thousands of different plans will allow that individual—who has no connection whatsoever to the plans of which he is not a member—to displace the preferences, interests, and considered judgments of the fiduciaries who negotiated service arrangements for those plans. Far from protecting the interests of absent class members, certification of a participant-led multi-plan class under Rule 23(b)(1)(B) needlessly implicates those class members in and then displaces their interests and preferences (along with the judgments of their individual plan fiduciaries), without affording them (or their plans) an opportunity to opt out.

To be sure, "[c]ourts considering whether to certify ERISA breach of fiduciary duty claims have consistently . . . conclud[ed] that subsection 23(b)(1)(B) is the most

appropriate basis for class certification." *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 142 (S.D.N.Y. 2010). But those courts have done so primarily when confronted with a class of participants in the *same* benefit plan. *See id.* (certifying a class of beneficiaries of one company's 401(k) plan); *Krueger v. Ameriprise Fin., Inc.*, 304 F.R.D. 559, 563 (D. Minn. 2014) (certifying a class of participants in one company's 401(k) plan). In those cases, the relief sought as a result of the fiduciary breach of duty claim—generally restoration to the plan of any losses resulting from the fiduciary's breach or an accounting for profits—inures to the benefit of *the plan as a whole* and so necessarily impacts the interests of the other members of *that plan*. *See McCluskey v. Trs. of Red Dot Corp. Emp. Stock Ownership Plan & Tr.*, 268 F.R.D. 670, 677–78 (W.D. Wash. 2010) ("Where, as here, the primary relief is to the Plan as a whole, then adjudications with respect to any individual member of the class would, as a practical matter, alter the interests of other members of the class.").

But that reasoning has no application here. This proposed class comprises of thousands of *different* benefit plans—all of which have different service arrangements. The variety in those arrangements means that courts could easily enforce injunctive relief with respect to, and even alter the structure of, one plan arrangement without necessarily drawing in the agreements of all stranger plans. Subsuming the claims of those plans in a single class action would needlessly

subordinate the determinations of those plans' fiduciaries, without achieving any of the goals associated with the class vehicle.

The Supreme Court has cautioned "against adventurous application of Rule 23(b)(1)(B)" because these "mandatory class actions . . . implicate the due process principle . . . that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Ortiz*, 527 U.S. at 845-46 (quotation omitted). Participant-led multi-plan class actions, which lack the requisite cohesiveness or homogeneity of interests, do not qualify for Rule 23(b)(1)(B)'s limited exception to that general rule.

III. QUESTIONS OF LAW AND FACT DO NOT PREDOMINATE OVER INDIVIDUAL ONES, MAKING CERTIFICATION UNDER RULE 23(b)(3) INAPPROPRIATE.

Class certification under Rule 23(b)(3) is appropriate only when common questions of law or fact predominate over questions unique to class members. Fed. R. Civ. P. 23(b)(3). "The predominance requirement of Rule 23(b)(3), though redolent of the commonality requirement of Rule 23(a), is 'far more demanding' because it 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Gene And Gene LLC v. BioPay LLC*, 541 F.3d 318, 326 (5th Cir. 2008) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (E.D. Pa. 1994)). "This, in turn, 'entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then

determining whether the issues are common to the class, a process that ultimately prevents the class from degenerating into a series of individual trials.'" *Id.* (quoting *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003)). The district court's certification order failed to adequately consider whether two features of this case satisfy Rule 23(b)(3)'s predominance requirement.

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. at 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 it 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"). Rule 23(b)(3) specifically requires courts "to consider how a trial on the merits would be conducted if a class were certified." *Maldonado v. Ochsner Clinic Found.*, 494 F.3d 521, 525 (5th Cir. 2007) (quoting *Bell Atl. Corp.*, 339 F.3d at 301-02).

Instead of common issues predominating, 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. If the court resolves those issues on purportedly common grounds, it will necessarily have legally erred in its application of ERISA's reasonableness standard. This Court should reverse and make clear that Rule 23(b)(3) may not be used to resolve the reasonableness of thousands of agreements that 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., 768 F.3d 284, 297 (3d Cir. 2014) *cert. denied sub nom. Santomenno v. John Hancock Life Ins. Co.*, 575 U.S. 963 (2015) (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.").

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 making this question inherently incapable of a classwide resolution. Op. at 26-28. That error warrants correction 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.

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. at 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* Appellants' Br. at 28-32. But even if the court's factual conclusion could be defended, 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 the issues that predominate with respect to class members' claims are individual ones. *See Gene And Gene LLC*, 541 F.3d at 329; *see also 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." (quotation 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 should be corrected.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's class certification decision.

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<u>/s/ Meaghan VerGow</u>

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August, 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
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 4,661 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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/s/ Meaghan VerGow
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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.

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