No. 24-____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETER TRAUERNICHT and ZACHARY WRIGHT, individually and as representatives of others similarly situated, on behalf of the GENWORTH FINANCIAL, INC. RETIREMENT AND SAVINGS PLAN,

Plaintiffs-Respondents,

v.

GENWORTH FINANCIAL, INC.,

Defendant-Petitioner.

On Petition For Permission To Appeal An Order Of
The United States District Court For The Eastern District Of Virginia
No. 3:22-cv-532 (Hon. Robert E. Payne)

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Petitioner Genworth Financial, Inc. discloses that it is publicly traded.

The following are parents, trusts, subsidiaries, and/or affiliates of Genworth Financial, Inc. that have issued shares or debt securities to the public or own more than ten percent of the stock of Genworth Financial, Inc.: Genworth Holdings, Inc. and Enact Holdings, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Constitutional Provisions

Statutes

Rules

TABLE OF AUTHORITIES
(*continued*)

Page(s)

INTRODUCTION

This case presents a compelling opportunity to resolve important and frequently disputed questions of law regarding certification of mandatory class actions for claims seeking individual monetary damages. Plaintiffs are two former employees who insist that defendant Genworth Financial, Inc. should have denied its retirement plan participants the option to invest in a popular and widely held set of funds, and should have offered certain alternative investments instead. They claim Genworth's retention of these funds breached its fiduciary duties under the Employee Retirement Income Security Act ("ERISA") and seek damages on behalf of a sweeping class of essentially all the plan's thousands of participants and beneficiaries. But many participants would have fared *worse* under Plaintiffs' preferred alternative investments, depending on different individuals' choices of when and how to invest; those putative class members stand to gain nothing from (and may even be harmed by) this suit.

The district court brushed these concerns aside, crafting an ERISA-specific rule to certify a *mandatory* class action under Rule 23(b)(1), without opt-out rights or even notice to the class—contrary to precedent

holding that "individualized monetary claims belong in Rule 23(b)(3)" because it offers those "greater procedural protections," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011). The court also held that ERISA fiduciary-duty claims "inherently" satisfy Rule 23(a)(2)'s commonality requirement, contrary to other courts' rulings.

These determinations by the court below are wrong—and worthy of immediate review. "There is no ERISA exception to" Rule 23, any more than there is to "Article III." *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 547 (2020). But the district court's reasoning, which expressly disagreed with other courts, would make mandatory class certification a *fait accompli* in virtually every ERISA fiduciary-breach case. That includes cases like this that are manifestly unfit for mandatory classes because they purport to resolve the rights of unharmed class members who will never even receive notice and the chance to opt out of the wasteful, attorney-driven litigation prosecuted in their names.

Rule 23(f) review is also warranted for another, independent reason: The district court erred when it refused to decide before certifying the class whether *any*, let alone all, of the thousands of absent class members have Article III standing. The Supreme Court and this

Court have held that "[e]very class member must have Article III standing in order to recover individual damages," but have not yet definitively decided *when* that inquiry must be made. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). Basic jurisprudential principles suggest the answer is "*before* a court certifies a class" because standing must be maintained "at all stages of litigation." *See id.* at 431 & n.4. But the district court answered *later*—only at the damages stage—and thus opened a split with other courts. This Court should take the opportunity to resolve this important and recurring question, which will continue to divide district judges absent the Court's guidance.

Rule 23(f) was meant for cases like this—cases involving large classes seeking significant damages, disputes over important questions of law, and manifest errors in addressing the requirements for class certification. The Court should grant Rule 23(f) review and reverse.

QUESTIONS PRESENTED

Did the district court err in:

(1) Certifying a mandatory Rule 23(b)(1) class for claims seeking individual monetary damages;

(2) Holding that ERISA claims for breach of fiduciary duty "inherently" satisfy Rule 23(a)(2)'s commonality requirement; and

(3) Refusing to decide before certification whether all class members have Article III standing to seek damages?

BACKGROUND

This case is one of 11 essentially identical lawsuits brought by the same lawyers against large employer-sponsored retirement plans. In each case, Plaintiffs' counsel alleged that plan fiduciaries violated their duties under ERISA by offering participants the option to invest in an award-winning suite of BlackRock "target-date" retirement funds that achieved somewhat lower—but still positive—performance when measured against Plaintiffs' hand-picked comparators during a narrow, arbitrarily selected period. Nearly all these cases have been dismissed for failure to state a claim, including two other cases in this Circuit.* This is the only one of the 11 that a court has certified as a class action.

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* *See Hall v. Cap. One Fin. Corp.*, 2023 WL 2333304 (E.D. Va. Mar. 1, 2023) (dismissing complaint with prejudice), *appeal dismissed*, 2023 WL 6388629 (4th Cir. May 12, 2023); *Tullgren v. Booz Allen Hamilton*, 2023 WL 2307615 (E.D. Va. Mar. 1, 2023) (same), *appeal dismissed*, 2023 WL 6458653 (4th Cir. May 12, 2023); *Luckett v. Wintrust Fin. Corp.*, 2024 WL 3823175 (N.D. Ill. Aug. 14, 2024) (same); *Beldock v. Microsoft Corp.*, 2023

A. Factual Background

Genworth is an insurance holding company. As part of its employee benefits package, it offers employees the opportunity to invest in the Genworth Retirement and Savings Plan, a 401(k) plan with over 4,000 participants. Dkt. 103 ¶¶ 1-4.

Genworth's Plan is an "individual account plan," also known as a "defined contribution plan." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 250 n.1 (2008). Unlike a "defined benefit" or guaranteed-pension plan, which promises every participant "a fixed level of retirement income," *id.*, an individual-account plan "limit[s]" participants' benefits to "the value of their own individual investment accounts," *Tibble v. Edison Int'l*, 575 U.S. 523, 525 (2015). Specifically,

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WL 3058016 (W.D. Wash. Apr. 24, 2023) (same); *Abel v. CMFG Life Ins. Co.*, 2024 WL 307489 (W.D. Wis. Jan. 26, 2024) (dismissing complaint, after which plaintiffs voluntarily dismissed case); *Antoine v. Marsh & McLennan Cos.*, 2023 WL 6386005 (S.D.N.Y. Sept. 30, 2023) (same); *Anderson v. Advance Publ'ns, Inc.*, 2023 WL 3976411 (S.D.N.Y. June 13, 2023) (partially dismissing complaint, after which plaintiffs voluntarily dismissed case); *Bracalente v. Cisco Sys., Inc.*, 2024 WL 2274523 (N.D. Cal. May 20, 2024) (dismissing complaint, after which plaintiffs amended and defendant again moved to dismiss); *Motz v. Citigroup Inc.*, No. 22-cv-965 (D. Conn.) (motion to dismiss pending); *Kistler v. Stanley Black & Decker, Inc.*, 2024 WL 3292543 (D. Conn. July 3, 2024) (denying motion to dismiss, after which defendants filed answer).

each participant in Genworth's Plan chooses how to "direct" investments in her individual account among "various investment options offered by the Plan," including domestic and international equity funds, fixed income funds, and Genworth common stock. Dkt. 103 ¶ 18. Although Genworth selects and monitors the performance of the investment options offered through the Plan, *see id.* ¶¶ 5, 12-13, the benefits each participant receives are "a function of the amounts contributed to that account"—as "direct[ed]" by each participant—and of "the investment performance of those contributions," *LaRue*, 552 U.S. at 250 & n.1.

Among the most popular investment options in Genworth's Plan are the BlackRock Target Date Funds ("TDFs"). *See* Dkt. 103 ¶¶ 33, 41. TDFs are long-term investments that gradually change their asset allocations as they approach a "target" retirement date. *Id.* ¶¶ 24-26. Each TDF has an array of sub-funds, or "vintages," invested in a different mix of assets calibrated to a particular retirement date. For example, the current asset allocation for someone planning to retire in 2025 is more conservative than the 2050 vintage, which is decades away from retirement. *See id.* ¶ 25. These different risk profiles mean that different

vintages of the same TDF may perform significantly differently under the same market conditions. *See* Dkt. 157 at 7.

Of the dozens of target-date retirement funds on the market, the BlackRock TDFs are the third most popular, accounting for nearly 9% of the market. Dkt. 103 ¶ 41. Morningstar, the leading source of analysis of the fund industry, has consistently given the BlackRock TDFs the highest possible "Gold" rating. *See* Dkt. 131-5 at 8.

B. Procedural History

Plaintiffs Peter Trauernicht and Zachary Wright are former Genworth employees and "former participant[s] in the Plan" who—in their complaint—claim Genworth breached its fiduciary duties by offering them the option to invest in the BlackRock TDFs, which Plaintiffs assert "were not a suitable and prudent option." Dkt. 103 ¶¶ 9-10, 30. Plaintiffs' suit contends that Genworth should have removed the BlackRock TDFs from the Plan in 2016 and replaced them with one of several proffered alternative investments. *Id.* ¶¶ 49, 52-53. (In deposition, both Plaintiffs actually disavowed the claim that the BlackRock funds necessarily should have been removed from the Plan. Dkt. 157 at 20-22.) Plaintiffs' suit alleges that Genworth's retention of

the BlackRock TDFs as an investment option breached its fiduciary duties under ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2), and sought damages and declaratory and injunctive relief on behalf of a putative class of all Plan participants. Dkt. 103 ¶¶ 17, 68-69 & p. 57.

Genworth moved to dismiss, but the district court permitted Plaintiffs to obtain discovery while the motion was pending and then to twice amend their complaint. *See* Dkt. 108 at 8. The court eventually granted Genworth's motion to dismiss Plaintiffs' injunctive claims for lack of standing, holding that as "former" Plan participants, Plaintiffs could not "benefit from any prospective relief." Dkt. 138 at 15. But the court declined to dismiss Plaintiffs' remaining claims, *id.* at 40, in a ruling contrary to the decisions of nearly all other courts to dismiss nearly identical complaints because they "ha[d] not pled meaningful benchmarks" to establish the BlackRock TDFs' supposed underperformance, *Hall*, 2023 WL 2333304, at *6-7; *see also*, *e.g.*, *Luckett*, 2024 WL 3823175, at *4 (dismissing sister complaint for its "textbook 'apples-to-oranges' comparison"). Plaintiffs in this case "currently present[] only claims for declaratory relief and monetary damages." Dkt. 311 ("Op.") at 9.

Plaintiffs moved to certify a class of "[a]ll participants" in the Plan from August 2016 through the date of judgment. Dkt. 144 at 6. In opposition, Genworth identified several reasons why class certification is inappropriate, including that the proposed class encompassed members who never invested in the BlackRock funds (and so suffered no possible injury). Dkt. 157 at 11. Genworth also explained that the putative class wrongly included many participants who would have fared *worse* under Plaintiffs' preferred alternative funds for various reasons, including the timing of their individual investments and the fact that several vintages of the BlackRock TDFs (accounting for as much as 42% of Plan TDF assets) performed *better* over the class period than the corresponding vintages in Plaintiffs' analogous comparator funds. *Id.* at 12-13.

The court heard argument on the motion and orally expressed concerns that Plaintiffs were "jeopardizing class members' rights" by certifying a mandatory class including "people who did not suffer loss," but did not immediately rule. Dkt. 194 at 7:14-8:19. In the meantime, discovery was completed and Genworth filed a motion for summary judgment, which remains pending. Dkt. 213. In opposing summary judgment, Plaintiffs submitted new expert reports that departed from the

theory of liability in their class-certification papers, including by abandoning most of the alternative investments that their certification papers identified as preferred replacements for the BlackRock TDFs. *See* Dkt. 217-3. Instead, Plaintiffs' summary-judgment papers relied solely on one purported alternative (the "American Funds") that other courts have rejected as an inapposite, apples-to-oranges comparator for the BlackRock TDFs. *See supra* at 8.

The district court granted Plaintiffs' motion for class certification, with one "modification[]." Op. 1. Although Plaintiffs had moved to certify a class of "[a]ll" Plan participants—including those who never invested a penny in the BlackRock TDFs—the district court "agree[d]" with Genworth that these participants "have not suffered the same injury (if any injury) or do not possess the same interests as Plaintiffs," necessitating their exclusion from the class. *Id.* at 24. But the court otherwise rejected all of Genworth's objections, including that the class still contained many members (like Plaintiff Trauernicht) who suffered no injury because their individual accounts would have fared *worse* had they instead invested in Plaintiffs' proffered replacement investments—and that Plaintiffs were inadequate class representatives because they

both gave sworn testimony disavowing their counsel's central theory that Genworth should have denied other participants the option to invest in the BlackRock TDFs. *See* Dkt. 157.

The district court held that Plaintiffs satisfied Rule 23(a)(2)'s commonality requirement because "ERISA § 502(a)(2) actions inherently present issues common to the class." Op. 21. The court also held that Plaintiffs satisfied Rule 23(b)(1), again relying on "[t]he derivative nature of § 502(a)(2) claims" to "distinguish them from individual claims for monetary relief," which "will normally not satisfy Rule 23(b)(1)'s requirements." *Id.* at 34, 40. In this decision, the district court effectively displaced the rationale for certification presented in Plaintiffs' motion with a new rationale fashioned by the court from evidence "subsequently filed" in opposition to Genworth's (still-pending) motion for summary judgment. *Id.* at 14.

RELIEF SOUGHT

The Court should grant Rule 23(f) review and reverse the certification order.

STANDARD OF REVIEW

In deciding a Rule 23(f) petition, this Court considers: "(1) whether the certification ruling is likely dispositive of the litigation; (2) whether the district court's certification decision contains a substantial weakness; (3) whether the appeal will permit the resolution of an unsettled legal question of general importance; (4) the nature and status of the litigation before the district court (such as the presence of outstanding dispositive motions and the status of discovery); and (5) the likelihood that future events will make appellate review more or less appropriate." *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144 (4th Cir. 2001).

REASONS FOR GRANTING REVIEW

I. The Court Should Grant Review to Decide Whether Claims for Individual Monetary Damages Belong in Mandatory Class Actions Under Rule 23(b)(1).

Plaintiffs seeking class certification must establish that they satisfy at least one prong of Rule 23(b), in addition to each Rule 23(a) factor. In this case, Plaintiffs sought to certify a class under Rule 23(b)(1), which authorizes certification only where individual adjudications would (A) create a risk of "incompatible standards of conduct" for the defendant, or (B) "substantially impair or impede" the ability of absent class

members to protect their interests. For example, (b)(1)(A) certification may be appropriate in a water-rights dispute between several up- and "downriver" landowners. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

But because Rule 23(b)(1) "does not provide for absent class members to receive notice and to exclude themselves from class membership," courts must guard against violations of absent class members' rights under the Due Process Clause and Seventh Amendment. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 n.13, 845-48 (1999). These "serious constitutional concerns" have led the Supreme Court to "counsel against adventurous application of" Rule 23(b)(1). *Id.* at 845.

In particular, the Supreme Court and this Court have made "clear that individualized monetary claims belong in Rule 23(b)(3)" because that provision requires "greater procedural protections" including "notice, and the right to opt out." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011); *see also Berry v. Schulman*, 807 F.3d 600, 609 (4th Cir. 2015) ("If a class action is more about individual monetary awards than it is about uniform injunctive or declaratory remedies, then the 'presumption of cohesiveness' breaks down and the procedural safeguard

of opt-out rights becomes necessary."). Thus, Rule 23(b)(1)'s prerequisites for class certification are "not normally posed by a request for money damages." *Zimmerman v. Bell*, 800 F.2d 386, 389 (4th Cir. 1986). And this limit on mandatory class actions is grounded in the Constitution, because "[i]n the context of a class action predominantly for money damages," the "absence of notice and opt out violates due process." *Dukes*, 564 U.S. at 363.

The Court should grant review in this case to reaffirm that "[t]here is no ERISA exception" to these bedrock constitutional and Rule 23 principles. *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 547 (2020). As the district court acknowledged, the "only" non-declaratory relief that Plaintiffs seek is "monetary damages," which will be paid (or not) into each class member's "individual accounts" depending on whether those individual members did or "did not suffer losses in their individual accounts" from Genworth's challenged conduct, which may vary with "the timing of their investments or for other reasons," such as which particular TDF "vintage" they invested in. Op. 9, 26; *see id.* at 25 & 26 n.6 (acknowledging that "uninjured" members will be "excluded from any recovery" when "it becomes necessary to allocate" damages to members'

"specific accounts"). Yet the district court nonetheless "certif[ied] a mandatory class under Rule 23(b)(1)," whose members will "not receive notice or opt-out rights," because it determined that "ERISA § 502(a)(2) claims are distinguishable" from other damages claims that, it acknowledged, would "not satisfy Rule 23(b)(1)'s requirements." *Id.* at 37, 40-41. This ERISA-only carve-out from the "normal[]" rules for mandatory class certification, *Zimmerman*, 800 F.2d at 389, finds no support in precedent or principle.

Although the district court acknowledged this Court's narrow reading of Rule 23(b)(1) in *Zimmerman*, it honored that precedent only in the breach—asserting that it was not "constrained" by "precedent" because *Zimmerman* merely addressed what Rule 23(b)(1) "'*normally*'" allows, unlike the "per se limitation" on damages classes imposed by the Ninth Circuit. Op. 41 (emphasis added by district court) (quoting *Zimmerman*, 800 F.2d at 389, and citing *In re Syncor ERISA Litig.*, 227 F.R.D. 338 (C.D. Cal. 2005); *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180 (9th Cir. 2001)). In addition to departing from another circuit's rule based on a misreading of this Court's precedent, the district court dismissed as "not applicable" the Supreme Court's "holding" in *Dukes*

that "'individualized monetary claims belong in Rule 23(b)(3).'" *Id.* Instead, the district court relied primarily on a handful of non-binding district-court decisions, *see id.* at 34-37, while dismissing the better-reasoned "cases that Genworth relies on," *id.* at 40-41.

The district court purported to justify its deviation from precedent by asserting that "[t]he derivative nature" of fiduciary-breach claims under ERISA Section 502(a)(2) "distinguish[es] them from individual claims for monetary relief." Op. 34. The court repeatedly relied on this supposedly "unique situation" of ERISA claims to conclude that "this is not a case for individualized monetary damages" because "in a § 502(a)(2) action, the recovery (monetary damages) inures *to the Plan as* [*a*] *whole* rather than to individual plaintiffs." *Id.* at 40-42 (emphasis added).

But the district court's reasoning ignores the critical distinction between individual-account, defined-contribution plans like Genworth's and traditional defined-benefit pension plans—a distinction of "decisive importance" in ERISA cases. *Thole*, 590 U.S. at 540; *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999) ("it is essential to recognize the difference between defined contribution plans and defined benefit plans"). The district court relied on inapposite cases involving

defined-benefit plans, *see* Op. 37-39 (citing *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985)), where the "[r]ecovery" will indeed "inure to the benefit of the plan *as a whole*, not to particular persons with rights under the plan," *LaRue*, 552 U.S. at 250 (quotation marks and alteration omitted) (citing *Russell*, 473 U.S. at 140). But "the opposite" is true for defined-*contribution* plans, where Section 502(a)(2) permits individual participants to sue for damages to their "particular individual accounts." *Id.* at 250, 256.

In other words, the "references to the 'entire plan' in *Russell*" and other cases on which the district court relied "are beside the point in the defined contribution context." *LaRue*, 552 U.S. at 256. In plans like Genworth's, "each participant has an individual account," so Plaintiffs seek individualized damages to redress alleged "losses to their individual accounts." Op. 2, 8 n.2; *see id.* at 25 (acknowledging that awarding damages will make it "necessary to allocate" funds to "specific accounts"). Accordingly, the district court's foundational assumption that "[a]ny" relief under ERISA Section 502(a)(2) "inures to the Plan as [a] whole," Op. 34, 41, is simply false in this case. Although ERISA fiduciary *duties* are owed to "a plan," 29 U.S.C. § 1109(a), the monetary *remedies* in a case

such as this are for "plan assets in the participant's individual account"—*not* for the "entire plan[]," *LaRue*, 552 U.S. at 250.

Indeed, the district court's own reasoning fatally contradicts the characterization of ERISA fiduciary-breach claims as inuring to the benefit of a single "Plan." In narrowing Plaintiffs' proposed class definition to exclude Plan participants who did not invest in the BlackRock TDFs at issue, the district court "agree[d]" with Genworth that these participants "have not suffered the same injury (if any injury) or do not possess the same interests as Plaintiffs." Op. 24. But if the court were really correct that "[e]ach § 502(a)(2) claim is essentially identical for each participant" because Plaintiffs seek "recovery to the Plan as a whole," *id.* at 23, 25, then there would be no need to exclude even these (obviously uninjured) participants—any more than the thousands of other participants who *did* invest in the BlackRock TDFs but "did not suffer losses in their individual accounts" and so were "uninjured" by that investment, yet who were still wrongly swept up in Plaintiffs' mandatory class, *id.* at 26 & n.6.

II. The Court Should Grant Review to Decide Whether ERISA Fiduciary-Duty Claims Inherently Satisfy Rule 23(a)(2)'s Commonality Requirement.

The district court compounded the error of its ERISA-specific application of Rule 23(b)(1) by fashioning a similar *per se* rule that ERISA fiduciary-duty claims "inherently" satisfy Rule 23(a)(2)'s requirement of commonality. Op. 21. Under Rule 23(a)(2), a class may be certified "only if . . . there are questions of law or fact common to the class." This requirement focuses not on "the raising of common questions—even in droves—but, rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (quotation marks omitted). Among other things, therefore, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same *injury*.'" *Id.* at 349-50 (emphasis added).

Other courts have properly recognized that the commonality requirement applies with full force to ERISA fiduciary-duty claims. For example, the district court in *Bond v. Marriott Int'l, Inc.*, 296 F.R.D. 403 (D. Md. 2014), denied certification of a putative ERISA class action for failure to establish commonality. As the court explained, commonality

requires "'more . . . than merely some common aspects among class members,'" and it is not satisfied where many plan participants "have no viable cause of action in this case" because they suffered no injury from the defendant's alleged conduct, giving rise to a "'conflict of interest'" that presents an insuperable "'obstacle to class treatment.'" *Id.* at 408 (citing *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 349 (4th Cir. 1998)).

In this case, the varied investment experience of different participants invested in different BlackRock "vintages" meant that—when compared to the comparators proffered in Plaintiffs' class-certification papers—class members did not "suffer[] the same injury." *Dukes*, 564 U.S. at 350. That is true even if the court credited the inapposite comparator on which Plaintiffs belatedly focused in their summary-judgment papers—the American Funds—because whether a given individual would have done better or worse utilizing that fund depends on each person's "timing and investment choices" regarding the BlackRock TDFs. Op. 25; *see supra* at 5-6, 9.

But the district court misapplied *Dukes*, ignored *Bond*, and held in a brief commonality discussion that "ERISA § 502(a)(2) actions

inherently present issues common to the class because liability arises out of the defendant's conduct with respect to the plan[,] which does not vary depending on which participant brings the action." Op. 21. But as *Bond* and this case well illustrate, that is false for many ERISA claims under which "some class members suffered no injury and some could be harmed by the requested relief." 296 F.R.D. at 409; *see supra* at 14-15.

The district court asserted that such uninjured class members "would not be harmed if Plaintiffs were to prevail" because they "would not have to pay back their gains" from Genworth's challenged investment, Op. 26-27—but it cited no binding precedent supporting that counterintuitive "heads I win, tails you lose" assumption, which conflicts with Plaintiffs' central theory of liability. Plaintiffs seek damages to put class members' individual accounts in the position they would have been if Genworth had prevented *any* participants from investing in the BlackRock TDFs—their claims do not support an outcome where participants would have chosen between the better performing of the BlackRock funds and Plaintiffs' preferred alternatives. *See supra* at 7. To be sure, Plaintiffs testified that the BlackRock funds should have been left in the Plan—a deficiency the district court brushed aside, Op. 31-

32—but that is not the theory on which Plaintiffs' lawyers framed this case. ERISA entitles participants only to "'*contractually defined* benefits'" under the terms of the plan, *Hayes v. Prudential Ins. Co.*, 60 F.4th 848, 854 (4th Cir. 2023), not to an award of *more* net benefits (with the advantage of hindsight) than participants would have received had Genworth followed Plaintiffs' preferred alternative course.

Regardless whether the district court could rely on this no-refund theory to paper over intra-class conflicts, class certification here still threatens other harms to class members that defeat commonality. In particular, as the Seventh Circuit reasoned in vacating certification of another ERISA class on commonality grounds, this class "risks depriving" absent class members of their "right to their own day in court" because a classwide judgment would impose "*res judicata* effect" on the entire class, "win or lose." *Spano v. Boeing Co.*, 633 F.3d 574, 584, 587 (7th Cir. 2011); *see also Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 654 (2022) ("class judgments bind absentees with respect to their individual claims for relief and are preclusive as to all claims the class could have brought"). Such considerations confirm that class

certification is "inappropriate" in ERISA cases raising individualized injuries. *Bond*, 296 F.R.D. at 409.

The sole case that the district court cited to support its contrary view that ERISA fiduciary claims "inherently" satisfy commonality, Op. 21-22, does not support that extreme proposition. In *DiFelice v. U.S. Airways, Inc.*, 235 F.R.D. 70 (E.D. Va. 2006), the district court did not state that ERISA claims inherently present common issues, but rather purported to apply standard commonality "principles" to the specific "class allegations" pleaded in that case, which raised only a "slight divergence" between plaintiffs' claims and class members' regarding how best to "maximiz[e]" the recovery for each." *Id.* at 78-79. That is a far cry from the stark circumstances of this case, where Plaintiffs' theory would have produced *worse* results for many participants. *See supra* at 9. In any event, the certification ruling in *DiFelice* predated the pivotal Supreme Court decision in *Dukes* and was "not challenged on appeal," *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 417 (4th Cir. 2007), so it presents at most an intra-Circuit conflict with *Bond* that this Court should resolve.

III. The Court Should Grant Review to Decide Whether Class Members' Standing to Seek Damages Must Be Established Before Class Certification.

The Supreme Court recently held that "[e]very class member must have Article III standing in order to recover individual damages," while expressly reserving the "distinct question whether every class member must demonstrate standing *before* a court certifies a class." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 & n.4 (2021). Courts in this Circuit and elsewhere have now divided on this important and recurring question, which this case directly tees up.

In *Davis v. Capital One, N.A.*, another judge in the Eastern District of Virginia applied *TransUnion* at the class-certification stage to hold that some putative class members lacked standing to seek "damages." 2023 WL 6964051, at *2 (E.D. Va. Oct. 20, 2023). Before reaching the merits of Rule 23, the court concluded that it must "first," as a "preliminary matter," "ascertain for itself that 'every class member . . . ha[s] Article III standing.'" *Id.* at *3 (quoting *Alig v. Rocket Mortg., LLC*, 52 F.4th 167, 168 (4th Cir. 2022) (per curiam), and *TransUnion*, 594 U.S. at 431). The *Davis* court accordingly narrowed the proposed class to exclude members who had not suffered "concrete injury sufficient to

establish Article III standing" (before ultimately denying certification on other grounds). *Id.* at *4-5. That approach accords with the basic principles that standing must be maintained "at all stages of litigation," *TransUnion*, 594 U.S. at 431, and that the procedural device of a class action cannot be abused to strip defendants of "defenses to individual claims," *Dukes*, 564 U.S. at 367.

The district court below, however, reached the opposite result in a footnote that did not acknowledge *Davis*. Op. 8 n.2. The court held that it was "incorrect" that plaintiffs must "establish standing for every putative class member prior to class certification," thus resolving the question reserved in *TransUnion*. *Id.* But the district court's footnote asserted that this Court had already "squarely held" the same (*id.*) in *Carolina Youth Action Project v. Wilson*, 60 F.4th 770 (4th Cir. 2023), which is not correct. *Carolina Youth* did not cite *TransUnion* and did not purport to address this question—indeed, the defendant did "not directly assert" that class members lacked standing, *id.* at 779, rendering the opinion's passing comments on that issue nonbinding *dicta*, *see United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (*dictum* on issue not "raised in briefs or argument" is "not a binding precedent").

Thus, as other courts have recognized both before and after *Carolina Youth*, "the Fourth Circuit has . . . declined to weigh in" on the question whether "every class member must" be shown to "have Article III standing *at the class certification stage*." *Baugh v. Fed. Sav. Bank*, 2023 WL 6142944, at *3 (D. Md. Sept. 20, 2023); *see also In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 341 F.R.D. 128, 141 (D. Md. 2022) (similar). That is presumably why Plaintiffs never argued below that *Carolina Youth* resolved this question, *see* Dkt. 164 at 3-7—and why *Davis*, issued several months after *Carolina Youth*, did not cite it, 2023 WL 6964051.

This Court should take this opportunity to clarify the important and unsettled question reserved in *TransUnion* but resolved by the court below as a necessary predicate to class certification. At minimum, the Court should open a new appeal in this case pending resolution of the 23(f) appeal it granted to review a similar issue in *Glover v. EQT Corp.*, No. 23-2204 (where defendants-appellants argue that "'no class may be certified that contains members lacking Article III standing,'" Dkt. 29 at 50 n.20). *See* Order, Dkt. 30, *Golden Peanut Co. v. D&M Farms*, No. 20-502 (4th Cir. Jan. 27, 2021) (in a similar posture, opening a new appeal

and ordering briefing while deferring ruling on a 23(f) petition raising issues similar to another pending appeal, No. 20-432).

* * *

The district court did not heed the important limits that the Constitution, Rule 23, and controlling precedent place on class actions—especially mandatory class actions with no notice or opt-out rights for absent class members. The district court contravened these limits and spurned other courts' reasoning by certifying a mandatory damages class that indisputably includes members who were uninjured by, and indeed affirmatively benefited from, the investments at issue. Review is warranted to address these "unsettled legal question[s] of general importance" and correct the district court's "manifestly erroneous class certification[]." *Lienhart*, 255 F.3d at 144.

CONCLUSION

The Court should grant review under Rule 23(f).

Dated: August 29, 2024

Respectfully submitted,

/s/ Eugene Scalia

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 5(c)(1) because it contains 5,198 words, excluding the parts of the petition exempted by Federal Rules of Appellate Procedure 5(c) and 32(f).

I hereby further certify that this petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface of 14 points in New Century Schoolbook font.

Dated: August 29, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2024, I (1) electronically filed the foregoing petition with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the Court's CM/ECF system, and (2) caused the petition to be served on this date by third-party commercial carrier for delivery within 3 calendar days on, and caused electronic copies to be sent by email to, the following counsel:

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