No. 23-16224

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEANA FARLEY,

Plaintiff-Appellee,

v.

LINCOLN BENEFIT LIFE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of California
No. 20-cv-02485 (Mueller, J.)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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Dated: January 16, 2024

s/ Jaime A. Santos
Jaime A. Santos

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America 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 strong interest in promoting fair and predictable legal standards. Thousands of businesses across the country, including the Chamber's members, are or may become defendants in putative class actions. The Chamber thus has a keen interest in ensuring that courts rigorously and consistently analyze whether plaintiffs have satisfied all prerequisites—constitutional or otherwise—before a class is certified.

[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Deana Farley wants to represent a class of former life insurance policyholders who claim that Lincoln Benefit Life Company violated two distinct notice requirements under California law. Ms. Farley concedes that only one alleged violation affected her, and she disclaims any request for damages, instead electing to seek only the reinstatement of her policy. Yet she wants to represent a class of tens of thousands of individuals alleging violations of *both* notice requirements, including hundreds of class members who collectively seek $170 million in damages in the form of unpaid death benefits for insureds who have passed away. The district court certified that class with the full $170 million damages request in tow, and it did so under Rule 23(b)(2)—a provision that is expressly *not* designed for damages claims. The district court's decision circumvented critical limitations on class certification derived from the Constitution and Rule 23, and both errors require reversal.

It is bedrock law that a plaintiff cannot seek relief for an injury she has not suffered, and that is no less true in class actions. *E.g.*, *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Thus, a class plaintiff must establish standing "with respect to each form of relief sought, whether it be injunctive relief, damages or civil penalties." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). But Ms. Farley cannot meet that burden for much of the relief she seeks on behalf of the class: she

has *disclaimed* any damages of her own, and she *concedes* that, with respect to her policy, Lincoln complied with one of the two California provisions the class alleges Lincoln in some instances violated. She cannot seek damages for an injury she did not suffer or an injunction against a statutory violation that did not affect her.

The district court's decision also distorts Rule 23(b)(2) beyond recognition. Rule 23(b)(2) is designed for classes that seek uniform "injunctive" and "declaratory relief." It requires neither notice to class members nor the opportunity to opt out (and therefore avoid the *res judicata* effect of a final judgment) because in injunctive- and declaratory-relief cases, those protections are seen as unnecessary. Rule 23(b)(2) is not designed to be a fallback for "individualized monetary claims" that cannot satisfy the rigorous requirements of Rule 23(b)(3). *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011). But that is exactly how Ms. Farley sought to employ Rule 23(b)(2), and the district court endorsed that approach. The court *denied* Ms. Farley's motion to certify a damages subclass *under (b)(3)*, because Ms. Farley was not typical of class members pursuing damages claims, but rather than follow that decision to its logical conclusion—deny certification altogether or exclude those damages claims from the class—the court circumvented the Rule 23(a) typicality requirement *and* the additional rigorous requirements of Rule 23(b)(3) through the simple expedient of including all those damages claims in the Rule 23(b)(2) class. In the end, the district court's circumvention of Rule 23(b)(3)

harms both sides in this litigation: it deprives Lincoln of the protections Rule 23(b)(3) affords defendants and it deprives those class members with damages claims of critical due process rights that are afforded *only* members of (b)(3) classes.

If replicated, the district court's error risks sweeping harms on businesses throughout this circuit. The Supreme Court has repeatedly acknowledged the significant financial costs class action litigation imposes on business, as well as the immense pressure certification exerts on defendants—even those with meritorious defenses—to pay out enormous sums to avoid the risk of even greater (and potentially catastrophic) liability. *E.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). Those costs have real-world consequences for American businesses, reducing their ability to innovate and employ American workers. It is therefore essential that the Court rigorously enforce the limits imposed on class certification—both from Article III and Rule 23—to ensure that class adjudication remains the "exception." *Dukes*, 564 U.S. at 348 (citation omitted).

ARGUMENT

I. The certification decision violates Article III—Ms. Farley lacks standing to pursue damages she has disclaimed and injunctive relief for a violation of law she did not suffer.

The district court certified a single class under Rule 23(b)(2) consisting of individual life insurance policyholders who are asserting two different alleged violations of California law, and are seeking two forms of relief for those alleged violations: (1) injunctive and declaratory relief; and (2) for a subset of the class

where the insured is deceased, damages in the form of death benefits allegedly owed under those class members' plans. 1-ER-17. As explained in Lincoln's principal brief, the district court's decision ran roughshod over the commonality, typicality, and adequacy requirements for class certification in Rule 23(a) and can be reversed on any one of those grounds. *See* Principal Br. on Appeal (Dkt. 12) 15-37. But the district court's decision also suffers from a fundamental, constitutional defect—the sole named plaintiff lacks standing both to pursue damages and to assert claims for an alleged statutory violation that she readily concedes did not occur with respect to her policy. Because Ms. Farley is incapable of pursuing that relief *on her own behalf*, she cannot represent a class seeking to obtain that relief.

A. It is well established that at least one "class representative[] must have Article III standing, as the irreducible constitutional minimum of a case or controversy," *B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 966 (9th Cir. 2019), and this showing "must be satisfied prior to class certification," *Nelsen v. King Cnty.*, 895 F.2d 1248, 1249-50 (9th Cir. 1990) (citation omitted). If no named plaintiff has standing, the class may not be certified. *Gonzalez v. U.S. Immigr. & Customs Enf't*, 975 F.3d 788, 803 (9th Cir. 2020) ("[A] class of plaintiffs does not have standing to sue if the named plaintiff does not have standing" (citation omitted)).

A named plaintiff's standing to challenge *one* law or to pursue *one* form of relief does not establish her standing to challenge *another* law or to pursue *another*

form of relief. "[S]tanding is not dispensed in gross," *Lewis*, 518 U.S. at 358 n.6, but "must be shown with respect to *each form of relief sought*, whether it be injunctive relief, damages or civil penalties," *Bates*, 511 F.3d at 985 (emphasis added). In other words, "the injury that a plaintiff suffers defines the scope of the controversy that she is entitled to litigate." 1 Newberg and Rubenstein on Class Actions § 2:6 (6th ed. 2023) ("the scope of the harm defines the contours of a plaintiff's standing and hence of her claims"). As the Supreme Court recognized in *Lewis*, "even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" 518 U.S. at 357 (citation omitted).

B. The district court's certification decision transgresses these fundamental principles. Start with damages: As the court recognized, "around 400 putative class members" are seeking damages consisting of unpaid death benefits allegedly owed under their individual life insurance policies. 1-ER-14. But Ms. Farley is not among them—her insurance policy covered her son, *see* 3-ER-354, who is still very much alive. For that reason, at the class certification hearing, Ms. Farley stated she is "no longer seeking any money or monetary damages for any living insured, including herself." 2-ER-51; *see* 1-ER-14 ("plaintiff [has] confirmed she is not seeking monetary damages for herself"). That concession dooms her ability to

represent class members seeking that relief: having suffered no damages herself, Ms. Farley has no standing to pursue damages on behalf of those approximately 400 putative class members. *See Bates*, 511 F.3d at 985 (standing "must be shown with respect to each form of relief sought); *accord Moore v. Urquhart*, 899 F.3d 1094, 1099 (9th Cir. 2018) (recognizing that named plaintiffs lacked standing to pursue claims for damages when "at oral argument plaintiffs' counsel disclaimed any intent to pursue such damages").

The disconnect between Ms. Farley's claimed injury and that of the approximately 400 class members seeking monetary damages was not lost on the district court. It was precisely *because* Ms. Farley "is not seeking monetary relief" that the court concluded she could not satisfy the Rule 23(a) typicality requirement for a damages subclass under Rule 23(b)(3). 1-ER-16.

Nevertheless, the court lumped the damages claims in with the injunctive and declaratory relief and certified a single class under Rule 23(b)(2). *See* 1-ER-12-16. But Rule 23(b)(2) is not a fail-safe for damages claims that cannot win certification under Rule 23(b)(3). *See* pp. 10-18, *infra*. Nor is it excepted from the typicality requirement the district court found *was not satisfied* when it denied certification of a Rule 23(b)(3) subclass. And in any event, the atypical plaintiff who lacks standing to assert a damages claim presents a *jurisdictional* defect that prevents her from representing *any* class claiming damages, whether certified under Rule 23(b)(2) or

(b)(3).

The standing deficiency also bleeds into Ms. Farley's claims for injunctive relief. Recall that the district court certified a class consisting of policyholders allegedly harmed by *either* of two distinct provisions of California law—the first requires insurers to provide a minimum 60-day grace period for premium payment and to send notice of a lapse at least 30 days before the effective termination date, Cal. Ins. Code § 11013.71 ("Grace-Period Provision"); the second requires insurers to provide applicants with the opportunity to designate a third-party to receive notice of a lapse or termination, *id.* § 11013.72 ("Third-Party Designee Provision"); *see* 1-ER-17 (class definition). But by the time of class certification, Ms. Farley conceded that Lincoln had *complied* with the Grace-Period Provision with respect to her policy, which "contained a contractual *61-day* grace period and stated [Lincoln] would send a written notice '*at least 30 days* prior to the day coverage lapses.'" 1-ER-2 (emphases added). In other words, Ms. Farley *herself* asserts only a violation of the Third-Party Designee Provision (§ 11013.72)—but a plaintiff "who has been subject to injurious conduct of one kind" does not "possess by virtue of that injury the necessary stake in litigating conduct of another kind, *although similar*, to which he has not been subject." *Lewis*, 518 U.S. at 358 n.6 (citation omitted) (emphasis added). Ms. Farley therefore lacks standing to seek injunctive or declaratory relief targeted at remedying a violation of the Grace-Period Provision (§ 11013.71) that

she did not sustain herself. *See Villa v. Maricopa Cnty.*, 865 F.3d 1224, 1229 (9th Cir. 2017) ("Because Villa herself lacks Article III standing to pursue [injunctive] relief, she cannot represent a plaintiff class seeking such relief."). As the Supreme Court explained in *Lewis*:

> If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law.

518 U.S. at 358 n.6.

This Court's decision in *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023), further illustrates the point. There, several plaintiffs challenged multiple municipal ordinances as unconstitutional, winning class certification and summary judgment. *Id*. at 875-76. In assessing standing on appeal, this Court recognized that the only named plaintiff to have been injured by one of the ordinances had passed away. *Id*. at 883-84. The Court did not find it sufficient that *other* named plaintiffs had been injured by *other* ordinances—even closely related ordinances, *see id*. at 876, 884-885; rather, because there was no longer a named plaintiff with standing to challenge *that particular ordinance*, the court vacated the grant of summary judgment as to that ordinance. *Id*.

* * *

The district court's decision authorizes Ms. Farley to represent a class of

policyholders pursuing multiple forms of relief that Ms. Farley has no standing to pursue on her own. That decision thus runs headlong into fundamental limitations on the federal courts' power to adjudicate cases. But even if the Court were to conclude that Ms. Farley has standing, that would not cure the Rule 23(a) commonality, typicality, and adequacy errors that pervade the district court's opinion and independently require reversal. *See* Principal Br. on Appeal (Dkt. 12) 15-37. Regardless of how this Court resolves the standing question, the Court should take the opportunity to address those Rule 23(a) errors in the interest of judicial economy—to fully resolve all issues in this appeal and to provide district courts in this Circuit the guidance necessary to avoid repeats of the district court's decision below that will require further intervention by this Court.

II. The district court's inclusion of $170 million in damages in a Rule 23(b)(2) class distorts Rule 23 and circumvents the procedural protections of Rule 23(b)(3).

Standing and Rule 23(a) aside, the district court erred in certifying a Rule 23(b)(2) class that includes nearly 400 class members claiming $170 million in damages. The court acknowledged that Ms. Farley is unable to represent a damages subclass under Rule 23(b)(3) because she seeks no damages of her own and therefore cannot satisfy the threshold typicality requirement of Rule 23(a). 1-ER-16. Nonetheless, the court sought to obscure that typicality deficiency by lumping all $170 million worth of damages into a single class certified *under Rule 23(b)(2)*—a

provision designed solely for cases in which "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). In so doing, the district court did nothing to cure the typicality problem it had identified, but instead compounded that error by distorting the Rule 23(b)(2) class into a backstop for damages claims that cannot be certified under Rule 23(b)(3). And by including $170 million of damages claims in a Rule 23(b)(2) class, the court deprived both defendants and damages claimants of Rule 23(b)(3)'s important—and constitutionally required—procedural protections.

A. Rule 23(b)(2) does not authorize certification of individualized damages claims.

Rule 23(b)(2) allows class certification only if the defendant has acted "on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class is 'the *indivisible nature* of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Dukes*, 564 U.S. at 360 (emphasis added; citation omitted). Thus, Rule 23(b)(2) "does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Id*.

This requirement of indivisible relief also means that a (b)(2) class is not

allowed when each class member would be entitled to an "individualized award of *monetary damages*." *Dukes*, 564 U.S. at 360-61 (emphasis added). *Dukes* explained why. First, disallowing "individualized" monetary damages in a (b)(2) class is consistent with "the history of the Rule," which "stems from equity practice" predating its codification. *Id*. at 361 (citation omitted). Tellingly, in "none of the cases cited by the Advisory Committee as examples of (b)(2)'s antecedents did the plaintiffs combine any claim for individualized relief with their classwide injunction." *Id*. Second, allowing "individualized" monetary awards in a (b)(2) class is inconsistent with "the structure of Rule 23(b)." *Id*. Rule 23(b)(2) provides fewer safeguards for class members than Rule 23(b)(3)—(b)(2) class members are not entitled to "mandatory notice" of the class action, they have no "right to opt out" of the class, and there is no requirement that a judge find that common issues predominate. *Id*. at 362; *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 987 (9th Cir. 2011).

These differences, the Court explained, indicate that "individualized monetary claims belong in Rule 23(b)(3)." *Dukes*, 564 U.S. at 362. "When a class seeks an indivisible injunction"—the only kind authorized by (b)(2)—"there is no reason to undertake a case-specific inquiry into whether class issues predominate"; they self-evidently do. *Id*. at 362-64. Nor are notice or opt-out rights necessary when a class is mandatory. *Id*. Because uniform injunctive relief, when granted with respect to

a uniform class, would necessarily affect all class members whether they want to opt out or not, these procedural protections are essentially seen as unnecessary. *See id*. By contrast, due process may *require* notice and opt-out rights in the context of claims for money damages, and it is hardly "self-evident" that "class issues [will] predominate" when dealing with "individualized claim[s] for money." *Id*.

B. The district court flouted the limitations on Rule 23(b)(2) by including $170 million of individualized damages in a (b)(2) class.

The district court recognized there are "around 400 putative class members" seeking damages, 1-ER-14—with claims amounting to some $170 million. 2-ER-25, 27. It also acknowledged that those damages claims cannot be certified under Rule 23(b)(3) with Ms. Farley as the subclass representative, because she is not seeking monetary relief. 1-ER-16. That should have been the end of the matter—both as a matter of standing (*see* pp. 4-10, *supra*) and Rule 23. But rather than deny certification or exclude those damages claims from the class, the court simply funneled all $170 million into a Rule 23(b)(2) class, bypassing the rigorous requirements of Rule 23(b)(3).

That decision runs smack into *Dukes*. These damages claims are the paradigm of "individualized"—they consist of death benefits allegedly owed to approximately 400 distinct policyholders under distinct policies. 1-ER-14. Determining the amounts owed to each policyholder will necessarily require an assessment of each policies' terms, including factors such as "age adjustments, and outstanding

premiums." *See* Petition for Leave to Appeal at 17, No. 23-80037, Dkt. 1-3. For those reasons, at least one court in this circuit denied certification of the *exact same* class that was certified in this case. *See Nieves v. United of Omaha Life Ins. Co.*, 2023 WL 2705836 (S.D. Cal. Mar. 28, 2022). There, as here, the "Plaintiff's request for damages would require assessment of each class member's claim based on the terms of their policies, [the defendant's] compliance with the [California] Statutes with respect to their policies, the payment of any unearned premiums, and any policy devaluations." *Id*. at *7.

The district court here did not grapple with *Dukes*' limitation on Rule 23(b)(2) classes; indeed, it did not reference *Dukes* at all in the relevant portion of its opinion. *See* 1-ER-13-14. Instead, invoking pre-*Dukes* case law, the court justified certifying a (b)(2) class with $170 million of damages because "a mere 2 percent of the putative class" sought damages, and so "*the primary relief* [Ms. Farley] seeks on behalf of the putative class is declaratory and not monetary." 1-ER-14 (emphasis added); *see also* 1-ER-13-14 (citing *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001), and *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir. 1986)). But that "primary relief" rationale is little different than the "predominance" test this Court applied in its decision in *Dukes*, holding that monetary claims could exist in a (b)(2) class so long as they "are not superior in strength, influence, or authority to injunctive or declaratory relief.'" *Dukes v. Wal-Mart Stores, Inc.*, 603

F.3d 571, 616 (9th Cir. 2010) (alterations and quotation marks omitted), *rev'd*, 564 U.S. 338 (2011). The Supreme Court rejected that reasoning, holding that "[t]he mere 'predominance' of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)'s procedural protections" for those class members who claim damages—"[i]t neither establishes the superiority of *class* adjudication" for those claims, "nor cures the notice and opt-out problems." *Dukes*, 564 U.S. at 363-64.

So too here. The fact that "a mere 2 percent of the putative class," 1-ER-14, is seeking damages "does nothing to justify" the deprivation of the notice and opt-out rights *for those class members*. *Dukes*, 564 U.S. at 363-64. If the (b)(2) class is taken to judgment, those class members will be bound by that judgment—even if they had no notice of the litigation—and will thus be precluded from litigating their claims on their own. *Id*. at 364. In principle, this case is no different than *Dukes* itself and the result should be the same.

C. "Incidental damages" do not belong in a (b)(2) class and $170 million in death benefits are not "incidental" in any event.

The district court's certification decision cannot be saved on the theory that $170 million in damages is "incidental to [the] requested injunctive or declaratory relief.'" *Dukes*, 564 U.S. at 365. Although the Supreme Court in *Dukes* had no need to address whether "incidental" damages could be certified under Rule 23(b)(2), this Court has recognized that *Dukes* "called [that standard] into doubt." *Ellis*, 657 F.3d

at 986. And at a minimum, $170 million in individualized death benefits are not "incidental" under *Dukes*.

1. The plain text of Rule 23(b)(2) says nothing about monetary relief. It references only "final injunctive relief or corresponding declaratory relief." Fed. R. Civ. P. 23(b)(2). And, as noted earlier, none of the cases cited by the Advisory Committee as examples of (b)(2) classes included monetary relief. *See* p. 12, *supra*. For these reasons, the Supreme Court has already "expressed serious doubt[s] about whether claims for monetary relief may be certified" *at all* under Rule 23(b)(2). *See Dukes*, 564 U.S. at 360; *see Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121-22 (1994).

Those serious doubts are not alleviated simply because the damages claims are deemed "incidental." Whether incidental or not, the end result is the same: damages claimants are forced into a mandatory (b)(2) class without the critical notice and opt-out rights Rule 23(b)(3) provides and due process may well require. *See* pp. 12-13, 14-15, *supra*. These exact concerns led the Supreme Court to exclude *individualized* damages from (b)(2) classes, *see Dukes*, 564 U.S. at 362-63; the same logic requires excluding *all* monetary claims from (b)(2) classes.

2. At a minimum, the $170 million in damages claims sought by individual decedents that the district court certified in the (b)(2) class are not "incidental." *Dukes* explained exactly what "incidental" relief could look like:

"damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." 564 U.S. at 365-66 (citation omitted). This standard derived from the Fifth Circuit's decision in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), which also explicitly tied the "incidental" nature of monetary relief to its ability to be awarded on a classwide basis: "incidental damages will, by definition, be more in the nature of a *group remedy*, consistent with the forms of relief intended for (b)(2) class actions." *Id*. at 415 (emphasis added). As such, "incidental damages" will "not require additional hearings," nor "introduce new and substantial legal or factual issues, nor entail complex individualized determinations." *Dukes*, 564 U.S. at 366 (citation omitted).

The $170 million in death benefits in this case are plainly not "incidental" under this standard. By definition, damages that are recoverable only by "a mere 2 percent of the putative class," 1-ER-14, do not flow "to the class *as a whole*," *Dukes*, 564 U.S. at 366 (emphasis in original; citation omitted), and relief for such a narrow subgroup of class members is hardly "in the nature of a *group remedy*," *Allison*, 151 F.3d at 415 (emphasis added); *see Clemons v. Norton Healthcare Inc. Ret. Plan*, 890 F.3d 254, 281 (6th Cir. 2018) (reversing certification of a (b)(2) class in an ERISA case, where determining "the amount of any individual class member's award may vary wildly depending on their circumstances").

Moreover, determining each policyholder's damages will require exactly the

kind of additional, individualized proceedings not allowed of "incidental" damages—for example, an assessment of each policies' terms, including factors such as "age adjustments, and outstanding premiums." *See* pp. 13-14, *supra*. Those class-member specific considerations prohibit any monetary recovery flowing "to the class *as a whole*," *Dukes*, 564 U.S. at 366 (citation omitted)—especially as 98% of class members are not seeking *any* damages at all.

* * *

The district court's certification decision distorts the limited purpose of Rule 23(b)(2) classes, converting the (b)(2) class mechanism into a fallback for a class of individualized damages claims that cannot win certification under Rule 23(b)(3) and depriving those class members with damages claims of the procedural protections of Rule 23(b)(3) that were put in place for their protection. The Supreme Court has already firmly closed the door on such certification, and the Court should not permit it to be reopened here.

III. Courts must strictly adhere to Rule 23 to preserve fairness in class litigation and ensure that class actions remain the exception.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Dukes*, 564 U.S. at 348 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). To ensure that class actions remain the exception, the Supreme Court and this Court have repeatedly recognized that courts must engage in a "rigorous analysis" to determine that the

requirements of Rule 23(a) and one of the subsections of Rule 23(b) are satisfied. *See, e.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013) (citation omitted); *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 664 (9th Cir. 2022) ("Before it can certify a class, a district court must be satisfied, after a rigorous analysis, that the prerequisites of both Rule 23(a) and 23(b)(3) have been satisfied." (citation and quotation marks omitted)). And plainly, the analysis must be no less rigorous with respect to constitutional limitations.

Failing to adhere to this rigorous-analysis requirement—reserving class actions for cases truly appropriate for classwide relief—comes with significant costs for American businesses. The decision to certify any class has dramatic ramifications—"[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Concepcion*, 563 U.S. at 350; *see* Fed. R. Civ. P. 23(f) advisory committee's note (1998) ("An order granting certification … may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."). And those businesses that do not settle—those that choose to assert their "meritorious defense[s]," *Coopers*, 437 U.S. at 476—incur significant legal costs

litigating class action cases, which only increases the risk they will be compelled to reduce operations and capital investments, raise prices, lay off employees, or reduce employee benefits. In short, when courts fail to rigorously apply the requirements of Rules 23(a) and (b), everyone loses—except class lawyers, of course, who can siphon off a substantial portion of any settlement.

The risk of these harms is particularly acute where (as here) a district court certifies a *damages* class under Rule 23(b)(2). Rule 23(b)(3) classes carry the most risk of "devasting loss" for defendants, *Concepcion*, 563 U.S. at 350, because that is where damages claims belong, *see Dukes*, 564 U.S. at 361-62. But Rule 23(b) also mitigates that risk by limiting (b)(3) classes to those where common questions truly "predominate" and the "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Yet here, the district court circumvented those critical procedural protections altogether by channeling all $170 million of death-benefit claims into a (b)(2) class, which has no comparable safeguards. And the district court did so after having concluded that Ms. Farley *had not* satisfied even Rule 23(a)'s threshold requirements for a damages subclass, 1-ER-16—much less the rigorous requirements of Rule 23(b)(3). This Court should not endorse the district court's transformation of Rule 23(b)(2) into a fallback for failed (b)(3) classes.

CONCLUSION

The Court should reverse the district court's class certification decision.

Dated: January 16, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 4,922 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This document 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 document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 16, 2024. I certify that all participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

Dated: January 16, 2024

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