No. 20-16823, No. 20-16857

In the United States Court of Appeals
for the Ninth Circuit

RACHEL CONDRY; JANCE HOY; FELICITY BARBER; RACHEL CARROLL; CHRISTINE ENDICOTT; LAURA BISHOP, on behalf of themselves and all others similarly situated,

Plaintiffs- Appellees/Cross-Appellants,

TERESA HARRIS, on behalf of herself and all others similarly situated,

Intervenor Plaintiff- Cross-Appellant,

v.

UNITEDHEALTH GROUP, INC.; UNITEDHEALTHCARE, INC.; UNITED HEALTHCARE INSURANCE COMPANY; UNITED HEALTHCARE SERVICES, INC.; UMR, INC.,

Defendants- Cross-Appellants/Appellees.

On Appeal from the United States District Court for the Northern District of California, No. 3:17-cv-00183-VC (The Honorable Vince Chhabria)

PLAINTIFFS'-APPELLEES'/CROSS-APPELLANTS' REPLY BRIEF - THE FOURTH BRIEF ON CROSS APPEAL

Nicholas E. Chimicles
Kimberly Donaldson-Smith
Stephanie E. Saunders
CHIMICLES SCHWARTZ KRINER
& DONALDSON-SMITH LLP
361 W. Lancaster Avenue
Haverford, PA 19041
Telephone: (610) 642-8500
KMD@Chimicles.com

Nathan Zipperian
SHEPHERD, FINKELMAN,
MILLER AND SHAH, LLP
1625 N. Commerce Pkwy. #320
Ft. Lauderdale, FL 33326
Telephone: (954) 515-0123
nzipperian@sfmslaw.com

Counsel for Plaintiffs, Intervenor Plaintiff - Appellees/Cross-Appellants

April 19, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Other Authorities

I. INTRODUCTION

In its Third Brief on Appeal responding to Plaintiffs' cross-appeal, App. Dkt. 25 at pgs. 17-50, UHC relies on arguments that are contrary to: the Affordable Care Act's ("ACA") mandate that health plans provide "coverage" for preventive services, which includes coverage for comprehensive breastfeeding and lactation support services ("CLS"); the content and import of UHC's Preventive Care Services Coverage Determination Guideline (the "CDG"), which is the operative coverage document; and governing legal principles that require, first, certification of the action pursuant to Fed. R. Civ. P. 23, and second, that such classes can secure both retrospective relief (the reprocessing of CLS claims under a corrected standard) and prospective injunctive relief, as Plaintiffs have standing to bring and assert both categories of relief.

UHC is unable to save the portions of the orders on class certification (1-ER-13-22, 3-ER-536-539) summary judgment (1-ER-26), and intervention (1-SER-2-3), which are the subject of Plaintiffs' cross-appeal. UHC resorts to strained, circular, and unsupported factual and legal arguments, which shine a further spotlight on the district court's errors and abuses of discretion. Plaintiffs have demonstrated how those orders materially deviate from and disregard well-established, long-standing legal precedent and the facts. Plaintiffs and the thousands of women who were denied coverage for their CLS claims by UHC are entitled to have their claims for retrospective and prospective relief certified under Rule 23.

II. REPLY ARGUMENT

A. The District Court's Treatment of UHC's Coverage Determination Guidelines Constitutes Reversible Error

In an attempt to counter Plaintiffs' demonstration that the district court's treatment of UHC's CDG was erroneous for purposes of both class certification and summary judgment, without citation to any evidence, UHC states that it "follows the rule that in-network services are presumptively covered, but out-of-network services are not necessarily so." App. Dkt. 25 at 22, 37-39. That is incorrect.

First, the primary coverage requirements at issue derive from the ACA. Under the ACA, UHC "shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for…(4) with respect to women…preventive care and screenings…provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA]. . ."; HRSA specifies coverage for CLS. 42 U.S.C. § 300gg-13(a)(4); 45 CFR § 147.130(a)(iv); 5-SER-743-744. Thus, UHC's non-grandfathered, non-federal health benefit plans nationwide are required to comply coverage for CLS and to do so without cost-sharing.

Second, UHC's coverage policies with respect to CLS (and the ACA preventive care services generally) are contained in its CDG. 2-SER-151, 188; 2-SER-12. It is undisputed that the CDG applies to all UHC commercial plans, including Plaintiffs' plans. 4-SER-678-679 ¶ 6.

Third, UHC's CDG, on its face, fails to comply with the ACA in at least two

material respects:

(A) The CDG stated that "**Out-of-Network** preventive care services are not part of the [ACA] requirements." 2-SER-151; 2-SER-12 l.8-10. Reaffirming the CDG's express statement, and in contrast to UHC's representation in its appeal brief about its "rule", Plaintiffs directed the district court to several other class period-contemporaneous statements by and conduct of UHC, including: UHC's answers to interrogatories ("preventive services…will be eligible for coverage without cost-shares provided that such services are provided by a network provider…", 2-SER-14 l.13-15); UHC's 2014 "Preventive Care Services" "Snapshot" ("The health reform law does not require services outside of our network to be covered without cost-share." 3-SER-194); and, UHC call centers (informing insureds that only in-network benefits for CLS are covered, 3-SER-197).

(B) The CDG enumerated only a limited number of procedure and diagnoses codes that UHC deemed eligible to be covered as CLS without cost sharing. 2-SER-188; 2-SER-12. The CDG excluded codes that CLS providers, including lactation consultants, routinely used to reflect that CLS had been rendered to patients. 3-SER-374-378; 3-ER-530-531 (at fns. 2-3). Plaintiffs asserted that, as required by and grounded in HRSA' guidelines, CLS was expressly defined as comprehensive lactation support, counseling and education services provided during the antenatal, perinatal, and the postpartum period. 2-SER-72-73, 2-SER-76-77. Yet, the CDG's codes constituted coverage that was less, or more restrictive, than what was required by the ACA.

Further, Plaintiffs directed the district court to UHC's admissions and the parties' expert testimony: UHC admitted that its CDG excludes from ACA-eligible coverage "breastfeeding services", 2-SER-015-016[1]; and, the CDG excluded from coverage codes that indicated services provided by medical and non-medical providers related to breastfeeding and lactation support services (3-SER-374-378, 3-ER-530-531).[2] Thus, irrespective of whether the CLS provider was an in- or out-of-network provider, UHC's CDG provided coverage for its insureds which Plaintiffs asserted was less than the ACA required, which was the minimum required coverage for all and each of UHC's ACA-governed plans and members.

Incredulously, the district court erroneously held that Plaintiffs had no uniform standard or practice to challenge. 1-ER-15; 2-ER-55, 59. The commonality prerequisite looks to whether the "claims 'depend upon a common contention' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of

[1] In its Summary Judgment order (1-ER-24-25) the district court held that there is no diagnostic and preventive distinction for CLS, "[t]he statute requires coverage of lactation support regardless of whether a woman is receiving it in response to symptoms…" (*id.,* ¶ 2), a holding equally applicable to all of UHC's ACA-governed plans and members.

[2] UHC contends that it has discretion on how to implement the CLS benefit. *E.g.* App. Dkt. 25 at 21 (citing to 29 C.F.R. § 2590.715-2713(a)(4)). That is a merits argument, but it also demonstrates why the district court's certification orders were erroneous. Even if relevant, its resolution applies classwide; it goes to the illegality and content of UHC's CDG which is applicable to each class member. Substantively, the assertion is misleading. The ACA and HRSA require "coverage" and do state the frequency, method, treatment (*i.e.* comprehensive) for CLS; so, if any "reasonable medical management techniques" are permitted, it would only be to the extent that the treatment is "not specified in the relevant recommendation or guideline," (*id.*)

each claim in one stroke.'" *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). The proposed common questions must be such that they will "generate common *answers* apt to drive the resolution of the litigation." *Mazza*, 666 F.3d at 588 (quoting *Dukes*, *supra*, 564 U.S. at 350).

UHC's attempts to explain away the district court's errors are unpersuasive; it only offers strained interpretations and relies on non-sequiturs. *See, e.g.* App. Dkt. 25 at 39. Ultimately, UHC concedes that the district court addressed the merits of the CDG, which then portended its ultimate ruling. *Id.* at 39 (quoting the district court as stating that UHC "tracks 'the default rule under the [ACA]."') And, UHC cannot and does not explain away the district court's statement that: "I don't read [the policy] as a statement that's contradictory to the requirements of the ACA." 2-ER-55. There is only one conclusion: The district court erroneously ruled on the merits of UHC's policy.[3]

UHC's ineffective attempts to preserve the denial of class certification and grant of summary judgment extend to its response to Plaintiffs' extensive discussion of on-point, highly relevant and instructive cases from the Ninth Circuit and its district courts, and Plaintiffs' demonstration of why the district court's orders directly conflict with those decisions. *Compare* App. Dkt. 18 at 45-52 (Plaintiffs' Opening/Answering Brief))

[3] *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011) ("The district court is required to examine the merits of the underlying claim …only inasmuch as it must determine whether common questions exist; not to determine whether class members could actually prevail on the merits ...").

with App. Dkt. 25 at 40-45.

As to the district court's deviation from *Parsons* and *Wolins*[4], UHC only offers the conclusory and vague retort that the ACA differs from "the laws at issue in *Wolin* and *Parsons*" because "the ACA does not permit a classwide assessment of injury…" There is no basis for that statement. The sound holdings of *Wolin* and *Parsons* are applicable here and support reversal, because the district court did not certify the Claims Reprocessing Class based on the view that purportedly differing payments made to UHC insureds for their CLS claims was relevant. 1-ER-16-18; 3-ER-537-538. Any such individual manifestations stemming from UHC's defective CDG do not preclude certification under Ninth Circuit precedent.

Similarly unpersuasive is UHC's inadequate response to the litany of on-point and instructive decisions to which Plaintiffs cited from district courts in the Ninth Circuit, which support reversal, including *Trujillo, et al. v. UnitedHealth Group, Inc., et al.*, CV 17-2547, 2019 U.S. Dist. LEXIS 21927 (C.D. Cal. Feb. 4 2019), *app. petition dismissed,* No. 19-80017, 2020 U.S. App. LEXIS 364, at *1 (9th Cir. Jan. 7, 2020)); *Des Roches v. Cal. Physicians' Serv.*, 320 F.R.D. 486 (N.D. Cal. 2017); *Escalante v California Physicians Service dba Blue Shield of California,* 309 F.R.D. 612, 618 (C.D. Cal. 2015); *In re Conseco Life Ins. Co. LifeTrend Ins. Sales & Mktg. Litig.*, 270 F.R.D. 521, 529-30 (N.D. Cal. 2010); *Wit v. United Behavioral Health*, No. 14-cv-02346-JCS, 2020 U.S. Dist. LEXIS 205426, at *7

[4]*Parsons v. Ryan,* 754 F.3d 688 (9th Cir. 2014) and *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010), cited by Plaintiffs, App. Dkt. 18 at 45-46.

(N.D. Cal. Nov. 3, 2020), *appeal pending, Wit, et al. v. United Behavioral Health,* No. 21-15193 (9th Cir); and, *Hill v. UnitedhealthCare Ins. Co.*, 2017 U.S. Dist. LEXIS 218139, at *25-27 (C.D. Cal. Mar. 21, 2017), cited and discussed by Plaintiffs in App. Dkt. 18 at 47-52.[5]

UHC only responds that the cases are inapplicable because, adopting the district court's "rabbit in the hat" approach, there is no policy at issue. App. Dkt. 25 at 42-43. Of course, the problem for UHC (and, likewise, the fallacy of the district court's orders) is two-fold: the district court's premise and merits ruling about the CDG are erroneous; and, whether the CDG, which undisputedly contains UHC's CLS coverage policy for all UHC commercial plans, complies with the ACA is a fundamental question the resolution of which is equally applicable to all members of the proposed classes. The import is also two-fold: the district court's denial of certification was an abuse of discretion; and the existence of such claim precluded entry of judgment against Plaintiffs Condry and Barber. Plaintiffs have amply demonstrated why the district court's orders must be reversed.

[5] The two district court cases cited by UHC (App. Dkt. 25 at 43) are not analogous and inapplicable; the cases concern challenges to an insurer's medical necessity determinations as applied to each insured's behavioral health treatment claims. *Crosby v. Cal. Physicians' Serv.*, No. SACV 17-01970-CJC, 2020 U.S. Dist. LEXIS 210654, at *20-21 (C.D. Cal. Nov. 2, 2020); and, *Dennis F. v. Aetna Life Ins.*, No. 12-cv-02819-SC, 2013 U.S. Dist. LEXIS 137849, at *13 (N.D. Cal. Sep. 25, 2013).

B. The District Judge's Rulings on Standing and Intervention Constitute Reversible Error

This section of the brief addresses two separate, but related questions raised by this appeal: (a) can the original named Plaintiffs pursue prospective relief even though none of them may have been UHC plan participants when the class certification motions were decided; and (b) whether the named Plaintiffs, and the Intervenor Plaintiff, satisfied Article III standing requirements if they were not pregnant or breastfeeding, or were unable to provide evidence of needing lactation services in the future.

1. The Lower Court's Focus on the Named Plaintiffs' UHC Plan Membership as a Condition for Standing Was Misguided

This Action was filed in January 2017. There were six named Plaintiffs; they were all UHC plan participants at times relevant to their seeking lactation services and when the initial complaint was filed. 5-SER-745-747; 6-ER-1221-1222. Health plan membership with a particular carrier is rarely long-lasting as employers shift coverage driven by cost considerations. By the time the lower court heard argument on the parties' cross-motions for summary judgment on April 26, 2018, one named plaintiff, Ms. Barber, remained a UHC plan participant. FER-167. When the district judge questioned if any of the other named plaintiffs could seek injunctive relief, Plaintiffs' counsel appropriately cited to *Johnson v. Hartford Casualty Ins. Co.*, No. 15-cv-04138, 2017 U.S. Dist. LEXIS 77482, at *31-32 (N.D. Cal. May 22, 2017) as supporting the proposition that all named plaintiffs had standing to seek such relief. FER-167 l. 6-17.

The district judge summarily rejected *Johnson*, saying '[m]y gut reaction is that decision is wrong…" FER-168, l. 18-19. The lower court reprised that sentiment, without explanation, in its initial denial of class certification, at which point none of the named Plaintiffs were UHC plan participants, when it held that "[t]o the extent the plaintiffs assert that they may someday return to UHC, their speculative assertion is insufficient to confer standing to seek prospective relief" and that "[t]o the extent Johnson v. Hartford Casualty Insurance Company … stands for the contrary proposition, the Court disagrees with it." 3-ER-538-539.[6]

The lower court's rejection of *Johnson* ignored sound analysis by fellow Northern District Judge Orrick. Just as in *Johnson*, Plaintiffs here have "adequately demonstrated the prospect of future, repeated harm" and that unlike in certain consumer cases, "any consumer of [United's] insurance products would not be able to easily discern whether it was complying with the law."[7] *Id.* at *30. Moreover, Judge Orrick found unpersuasive

[6] The lower court's shunting aside the possibility of a named plaintiff's reverting to UHC plan participation was undercut by Plaintiff Condry's doing precisely that, unsurprisingly, given UHC's dominant market presence. *See* App. Dkt. 18 at 53.

[7] The lower court unqualifiedly concluded that Plaintiffs and absent class members had been harmed and that harm was likely to continue.

> "To be sure, there is overwhelming evidence that United Healthcare's efforts to ensure that participants would receive coverage for lactation services as required by the Affordable Care Act were woefully inadequate. The company seemingly made no effort to compile comprehensive lists of in-network lactation providers, thus making it difficult for plan participants to determine whether such services were available in-network. Moreover, United Healthcare sometimes miscommunicated with participants who called to inquire about coverage, telling them as a blanket matter that out-of-network services were not included. Several documents, such as the Coverage Determination Guide that United Healthcare

the fact that the plaintiff there no longer was a Hartford insured, noting "[w]hether he buys from Hartford again is his decision… he should be able to have confidence that Hartford will obey the law in the future if he shows it is violating it now." *Id.* at *31. Those observations are even more apt in the health insurance arena where it is predominately the employer, not the individual, that selects an insurance plan.

The lower court was also incorrect insisting that the named Plaintiffs were required to establish standing separately for each item of relief. F.R.C.P 54(c) states that a "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." As argued below (4-SER-639; 3-ER-510), not only did Plaintiffs here allege harm, their claims were meritorious as UHC even concedes, noting that four of the named plaintiffs "survived summary judgment

---

> prepared for providers to use when submitting claims, stated that there was no obligation to cover out-of-network lactation services, which was true in situations where in-network services were available to the participant but false in situations where in-network services were unavailable. United Healthcare appeared to be operating on the assumption that in-network lactation services would be available to participants in its plans without inquiring whether that was actually so, and without communicating adequately to plan participants about their right to coverage for out-of-network lactation services if in-network services were unavailable. Moreover, as the internal emails reflect, the company was aware of these problems yet chose not to address them in a meaningful way. As a result, United Healthcare undoubtedly caused a significant number of mothers and their newborn babies to lose out on coverage for lactation services that they should have received under the ACA. Indeed, this happened to some of the named plaintiffs in this case. ***United Healthcare's misconduct, which appears to be ongoing, would presumably support a classwide claim for prospective relief – specifically, an injunction requiring the company to adopt reforms to better ensure coverage for lactation services in the future."*** 1-ER-13-14 (emphasis added).

on their ACA claims." App. Dkt. 25 at 44. Thus, the named Plaintiffs had already established standing to pursue retrospective relief and, therefore, had standing to pursue the prospective relief that the lower court recognized was appropriate. *See supra* at n. 7.[8]

The district court's sole reliance on *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983) and *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006) in finding the named plaintiffs lacked standing to pursue prospective relief is misplaced. 1-SER-2-3; 1-ER-14; 3-ER-538. In *Lyons*, the plaintiff sought an injunction against the City of Los Angeles barring the use of "chokeholds." 461 U.S. at 97-98. The plaintiff alleged that the police officers stopped him for a traffic violation and the officers, without provocation, seized him and applied a chokehold. *Id.* The plaintiff further alleged that the city's officers regularly and routinely applied chokeholds in situations when they were not threatened with deadly force, that numerous persons had been injured as a result, and that the plaintiff and others were threatened with irreparable bodily injury. *Id.* The Supreme Court held that the plaintiff did not have standing to seek an injunction because the complaint did not establish that there was a real and immediate threat that the plaintiff would again be stopped and, without provocation, be subject to a chokehold. Finding the plaintiff's allegation of future injury speculative, the Court held that the objective "reality of the

[8] Plaintiffs have demonstrated that they have personally been injured and, therefore, have standing to pursue all relief on behalf of the class. *See Spokeo, Inc. v. Robin's*, 136 S. Ct. 1540, 1547 n.6 (2016).

threat of repeated injury," was beyond reasonable belief given the remote probability that Lyons would once again violate the law and incite an unjustifiable response by Los Angeles police.

Lyons stands for the unremarkable position that the likelihood of a future injury cannot be based solely on the defendant's conduct in the past. *Lyons* does not, however, create the sweeping proposition that past encounters with challenged conduct are completely irrelevant to the standing inquiry. As one well-respected treatise has summarized:

> An allegation of future injury based on a predicted repetition of random or unauthorized acts of a third party that caused injury in the past will probably be deemed too speculative to satisfy the injury-in fact requirement. In contrast, when the acts that caused the past injury were authorized by, or were part of a policy of, the defendant, it is significantly more likely that the actions, and thus the injury, will recur.

Gordon v. City of Moreno Valley, 687 F. Supp. 2d 930, 938 (C.D. Cal. 2009) (citing MOORE'S FEDERAL PRACTICE at 101-48 to 101-49 (3rd ed. 2009)).

Courts within the Ninth Circuit have recognized the limitations of *Lyons*, careful to not extend the holding beyond its limited scope. *See, e.g.*, *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 39 F. Supp. 2d 1235, 1241 (S.D. Cal. 1999) ("Even those courts issuing broad characterizations of the holding of *Lyons* do so in the limited context of plaintiffs seeking injunctive relief against governmental action."). The Ninth Circuit engaged in a thorough analysis of *Lyons* in *La Duke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985) in analyzing the plaintiffs' standing to bring a suit for injunctive relief under Article III.

The Court drew four fundamental distinctions between *Lyons* and that case, including the fact that the *Lyons* opinion expressly noted the absence of any written or oral pronouncements sanctioning the chokeholds and the lack of record evidence showing a pattern of behavior. *La Duke*, 762 F.2d at 1323. ("The Supreme Court has repeatedly upheld the appropriateness of federal injunctive relief to combat a 'pattern' of illicit law enforcement behavior."). Also, unlike *Lyons*, the Court reasoned, "the members of plaintiff class do not have to induce a police encounter before the possibility of injury can occur." *Id.* at 1326. Members of the class in *La Duke* had repeatedly suffered personal injuries in the past that could fairly be traced to the defendant's standard practices, and thus "face[d] a credible thread of recurring injury." *Id.* This Circuit concluded that, because "[c]lass members have been and will continue to be aggrieved by the defendants' unconstitutional pattern of conduct," …"[t]he equitable relief sought by the plaintiff class is both efficacious and responsive to the individual interests of class members." *Id. See also Nicacio v. United States Immigration & Naturalization Service*, 797 F.2d 700 (9th Cir. 1985) ("Moreover, as in *LaDuke*, we look not merely to the possibility of injury to one individual, but to the foreseeability of harm to members of an entire class.").

Courts have also distinguished *Lyons* on grounds that, there, future injury was contingent on future *criminal* activity on the part of the plaintiffs and thus *was avoidable*. *See, e.g.*, *Camacho v. United States*, No. 12-cv-956, 2013 U.S. Dist. LEXIS 203056 (S.D. Cal. Dec. 18, 2013) ("the principle [in Lyons] that 'standing is not appropriate where a

plaintiff can avoid injury by avoiding illegal conduct' does not preclude plaintiffs' standing here"); *Index Newspapers LLC v. City of Portland*, 474 F. Supp. 3d 1113 (D. Or. July 23, 2020) (distinguishing *Lyons* on the basis that it involved government action triggered by illegal conduct and, unlike *Lyons*, plaintiffs in the instant case were engaging in constitutionally protected activity and wished to avoid government force and interference); *Multi-Ethnic Immigrant Workers Org. Network v. City of Los Angeles*, 246 F.R.D. 621, (C.D. Cal. 2007) ("Plaintiffs need not establish that future harm is certain, or even probable. What they must establish is that recurrence is not 'conjectural' or 'hypothetical,' as it would be if future injury were contingent on multiple unlikely assumptions.") (citing *Lyons,* 461 U.S. at 105-08 (threat of future injury not sufficiently real and immediate to establish existing controversy where the claim of future injury rested on assumption that plaintiffs would engage in conduct leading to an encounter with police involving the use of a chokehold)).

Other courts have distinguished *Lyons* on the basis that the plaintiff there did not allege a pattern or practice of misconduct, but rather an isolated incident that was unlikely to recur. *See, e.g.*, *Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817 (9th Cir. 2020) (distinguishing *Lyons* on the grounds that plaintiffs' risk of future injury was not speculative, but rather stemmed from defendants' "ongoing, sustained pattern of conduct that resulted in numerous injuries to members of the press"); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001) ("unlike the chokehold in *Lyons*, use of the belt stems from the Sheriff's official written policy" and, unlike

Lyons, the plaintiff "was seeking injunctive relief on behalf of a class" … "it is not irrelevant that he sought to represent broader interest than his own"); *Rosenbaum v. City & County of San Francisco*, 8 Fed. Appx. 687, 690 (9th Cir. 2001) ("Unlike in Lyons, where the plaintiff 'was [not] likely to suffer future injury,' 461 U.S. at 105, in this case, for purposes of our standing inquiry, we conclude that it is likely that the plaintiffs will continue to be subject to efforts by the police to silence them."); *Comm. For Immigrant Rights v. County of Sonoma*, 644 F. Supp. 2d 1177, 1195 (N.D. Cal. 2009) ("in *Lyons*, unlike here, the plaintiffs did not allege a pattern and practice of unlawful racial profiling, among other things"); *Ibrahim v. Dep't of Homeland Sec.,* No. C 06-00545 WHA, 2009 U.S. Dist. LEXIS 64619, at *19-20 (N.D. Cal. July 27, 2009) (noting that, in contrast to the plaintiff in *Lyons*, plaintiff Ibrahim had an ongoing risk of future harm because she continued to have her name on a watch list, rather than because of just one past isolated incident); *see also Thomas v. Cnty. of Los Angeles*, 978 F.2d 504, 507 (9th Cir. 1992) ("the possibility of recurring injury ceases to be speculative when actual repeated incidents are documented"); *Gray v. County of Riverside*, No. 13-cv-00444, 2014 U.S. Dist. LEXIS 150884, at *107-108 (C.D. Cal. Sept. 2, 2014) (*Lyons* is "not applicable to the present action, where named Plaintiffs and class members continue to be subject to the Defendant's policies, and exposure in and of itself constitutes an injury").[9]

[9] Courts in this Circuit have also rejected the argument that *Lyons* holds that standing is required for each and every remedy sought by a plaintiff. As explained by the court in *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 39 F. Supp. 2d at 1241, "standing stems from the 'cases or controversies' language of Article III; standing is not inherently focused

Plaintiffs' injuries—denial of coverage of lactation services under the ACA—were concrete, actual, and continuing at the time they filed their Complaint; they were neither speculative nor hypothetical. Plaintiffs, therefore, do not need to show a real or immediate threat that they will be subjected to a deprivation of lactation coverage in the future. "Holding otherwise would drastically change the doctrine of standing." *Doe v. Wolf*, 424 F. Supp. 3d 1028, 1037 (S.D. Cal. Jan. 14, 2020) ("Unlike the plaintiffs in [ ] *Lyons*, Petitioners sought injunctive relief while being subjected to the practice they were challenging. … Petitioners' injury [ ] was concrete, actual, and continuing at the time they filed their Complaint…").

Likewise leading to an erroneous holding is the district court's reliance on *Gest,* in which the plaintiff signature collectors sought only prospective relief which was essentially mooted by the recent administrative law codification of "standards the Elections Division uses to evaluate circulator certifications." *Id.* at 1182. In the instant appeal, UHC's non-ACA compliant CDG and practices remain stubbornly in place. *See, e.g.,* App. Dkt. 18 at 14, n. 8 (Plaintiffs' Opening/Answering Brief)).

Accordingly, *Lyons* and *Gest* do not dictate a finding that the named Plaintiffs or

---

on the specific remedies a plaintiff seeks unless no remedy sought could redress a plaintiff's injuries." *Lyons* and its progeny "do not upset that usual proposition." *Id.* The court explained that the "narrow 5-4 decision in *Lyons* turned in great measure on the issue of police conduct, an unwillingness to assume that a governmental body would not comply with the law in the future, and more general separation of powers concerns." *Id.* Because this was "a case brought . . . to enforce specific legal obligations whose violation works a direct harm," the court found "*Lyons* and its progeny are not applicable." *Id.*

the Intervenor lack standing to pursue injunctive relief here.[10]

2. The Lower Court's Additional Criteria For Standing are Fundamentally Improper

The lower court did more than demand current UHC plan participation as a predicate to seek prospective relief. At the April 26, 2018 hearing on cross-summary judgment motions, the lower court demonstrated in comments with reference to Plaintiff Barber, the named plaintiff who remained a UHC plan participant, just how narrow (and untenable) was the court's view of what it would require in order for any plaintiff to have standing. The district judge expressed interest in this snapshot about Plaintiff Barber:

> **THE COURT**: Is she still breastfeeding?
> **MS. DONALDSON SMITH**: Ms. Barber is not currently breastfeeding, no.
> **THE COURT**: Does she have another baby on the way or anything?
> **MS. DONALDSON SMITH**: I do not know if she's pregnant today.
> **THE COURT**: But the part that you need, I think, to fall within that case is - - or the part that Ms. Barber needs is, I am going to accessing the… the lactation coverage in the future. And if there's no allegation or evidence that she is going to be needing the lactation coverage in the future, I wonder if she would have standing to get an injunction.

FER-169-170. In fact, Ms. Barber was pregnant at the time of the hearing, as Plaintiffs so informed the district court immediately thereafter. FSER-3-16.[11]

---

[10] *O'Shea v. Littleton*, 14 U.S. 488 (1974), cited by UHC (App. Dkt. 25 at 44-45), is inapposite, as the plaintiffs there did not allege past injury.

[11] "FSER-__" references Plaintiffs' Further Supplemental Excerpts of Record filed herewith.

Defendants cite to no authority that supports such myopic, and wholly unrealistic, standing criteria. Pregnancy and related medical conditions, including breastfeeding, are specially treated under federal standing requirements. Justice Blackmun discussed the implications of pregnancy on standing in the landmark decision of *Roe v. Wade*, 410 U.S. 113 (1973). There, in analyzing issues of "justiciability, standing, and abstention," Justice Blackmun reasoned that plaintiff Roe, who was pregnant as of the inception of her suit three years prior, maintained standing to undertake the litigation due to the unique and temporal scope of her pregnant state:

> when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.'

Id. at 125. Based upon the foregoing reasoning, the Court held that Roe presented a justiciable controversy and "the termination of her 1970 pregnancy ha[d] not rendered her case moot." In *Doe v. Bolton*, 410 U.S. 179 (1973) (Blackmun, J.), decided on the heels of *Roe*, the Court likewise accepted the plaintiff's pregnant state on the date of the filing of the complaint and thereupon held that the interim termination of her pregnancy had not rendered the case moot. *Doe*, 410 U.S. at 187 (citing *Roe*, 410 U.S. at 125).

In the wake of *Roe* and *Bolton*, courts have recognized that "cases involving pregnancy are subject to an exception to the typical standing and mootness requirements." *Doe v. McCauley*, 2017 U.S. Dist. LEXIS 101893, at *4 (S.D. Ind. June 30, 2017). That is because "[p]regnancy can happen at any time and is likely to come to term before a trial can be completed." *Id.* (citing *Roe*, 410 U.S. at 125); *see also McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1140 (D. Idaho 2013) ("Cases involving pregnancy present controversies of inherently limited duration."). "Pregnancy is the paradigmatic case of an ephemeral phenomenon that is 'capable of repetition yet evading review'; without the exception, cases based on pregnancy would [ ] regularly become moot before they could be evaluated." *Id.* at *5. That is why the Supreme Court has concluded "that pregnancy is a 'justification for a conclusion of nonmootness.'" *Id.*

The rationale behind this conclusion is sound. *Doe v. Poelker*, 497 F.2d 1063, 1067 (8th Cir. 1974) ("to require pregnancy to be established at the time of trial, would be to permit frustration of the logic announced by the Supreme Court. Through dilatory tactics opposing counsel could effectively preclude review of the challenge until abortion or birth terminated the pregnancy"); *Loertscher v. Schimel*, No. 14-cv-870-jdp, 2015 U.S. Dist. LEXIS 133200, at *27 (W.D. Wis. Sep. 30, 2015) (held that the plaintiff's challenge to a Washington statute's applicability to her fetus was not rendered moot by the fact that plaintiff had already had her baby, reasoning that "[p]articularly in cases concerning pregnancy and election law, courts have broadened their reoccurrence inquiries and considered whether there is a reasonable expectation that a member of

the public at large will experience the same injury." *Id.* at *27).[12]

3. The Motion to Intervene Should Have Been Granted

No motion to intervene should have been necessary if the lower court had applied proper standing requirements to the named Plaintiffs. Having developed its own hoops through which the named Plaintiffs needed to jump, the lower court predictably applied them to the intervenor in finding Ms. Harris lacked standing. Consistency renders those hoops no less improper. Given this fundamental error, UHC's effort to support the lower court's ruling by reference to notions of timeliness and unexplained delay ring hollow. And any claim of prejudice to UHC is a canard inasmuch as the intervenor satisfied without dispute the fact that she was a current UHC plan participant, had given birth to a baby in October 2016, and had needed and secured breastfeeding support services in January 2017 that UHC refused to cover in accordance with the ACA. 4-SER-462, 463, 504-506.

The lower court also found that no prejudice would befall Intervenor Harris "because she is free to file a separate suit against United Healthcare seeking both retrospective relief, and, if she can ultimately allege the facts necessary to establish

[12] The same misguided insistence that a plaintiff must be breastfeeding, pregnant or able to demonstrate likely need for lactation services, that the lower court applied to the named Plaintiffs, tainted its consideration of the motion to intervene. UHC acknowledged that the lower court viewed the named Plaintiffs and Intervenor Harris through the same lens: As to the named Plaintiffs: "…they presented no evidence on the extent to which they would seek coverage for lactation services in the future." (App. Dkt. 25 at 44). As to Ms. Harris, "she had not established that she would utilize the ACA benefit in the future." (*Id.* at 50).

standing, prospective relief." 1-SER-3 (emphasis supplied). Filing a new complaint in a separate proceeding would have been a waste of resources for the parties since the lower court misconstrued the law of standing in the context of this Action. Intervenor Harris had already alleged sufficient facts to support a claim for both retrospective and prospective relief. But for the lower court's grafting improper conditions on the standing requirements, Ms. Harris was entitled to pursue prospective relief.

Moreover, Intervenor Harris' being told to file another separate suit ignored the significant prejudice of needing to retrace the multi-year litigation that had witnessed extensive motion to dismiss briefing, thousands of pages of document production, eleven (11) experts, two rounds of expert discovery and more than a dozen depositions. Further, the lower court erred in denying intervention based on erroneous conjuring about what granting the intervention motion would trigger (1-SER-3): "one more motion to dismiss for lack of standing, which would need to be granted" (which apparently the court had already prejudged, incorrectly as a matter of law); "if Harris were able to cure the defects…, yet another discovery period would ensue" (which would be unnecessary if intervention were permitted); and, "presumably [] another motion for summary judgment, presumably followed by yet another motion for certification of a prospective relief class" (putting a class certification motion after summary judgment turned out to be an abundant waste of resources for the parties; it is unfathomable why the lower court was suggesting repeating a flawed procedure).

C. Certification is Consistent with the District Court's Summary Judgment Order

Contrary to the district court's class certification orders and UHC's arguments, Plaintiffs also demonstrated below (*e.g.,* 4-ER-709, 717-720; 4-SER-628-639; 3-ER-493-494) that certification of the Claims Reprocessing classes is consistent with the district court's summary judgment order (1-ER-23-25).

First, the district court declined to consider UHC's conduct at summary judgment. At UHC's insistence, over Plaintiffs' objection, the district court entered a scheduling order that provided for motions for summary judgment directed to the named plaintiffs to be filed, briefed, and a hearing held prior to the close of class fact and expert discovery; the district court's June 27, 2018 Summary Judgment Order was also issued prior to the close of discovery. 5-SER-963-964; 5-SER-996 at Dkt. No. 145. At summary judgment, the district court rejected the request (*e.g.* 6-ER-104; 4-SER-683-721;4-ER-736) to address whether UHC's coverage and its CDG were ACA-compliant. 1-ER-26. Collectively, the district courts' opinions and orders have erroneously marginalized, disregard or misapprehend that what is at issue is a federal health care coverage law, the ACA, that UHC is required to implement across all its non-federal, non-grandfathered plans, nationwide, and that such implementation is contained in and effected through the CDG. 1-ER-19, 20.

Second, merits and expert discovery continued through and after the pre-class certification summary judgment proceedings, and critical evidence was adduced and

presented to the district court at summary judgment that supported and required certification of Plaintiffs' claims. The district court's erroneous disregard at class certification for such facts and the applicable law was fueled by UHC's revisionist history and contrived "granular" and "fact-bound" analyses.

For example, UHC states that it "has *thousands of in-network providers of lactation services*, with OB/GYNs, pediatricians, and lactation specialists making up the majority of these providers. App. Dkt. 25 at 22 (emphasis added). That statement is incorrect. UHC's class period-contemporaneous recorded statements demonstrate the baselessness of that statement (3-SER-244, 3-SER-251), and it is something that has been further refuted through expert evidence. 3-SER-255; 2-SER-317. In fact, UHC *did not affirmatively determine* or survey its network providers to determine if they were able to and would deliver CLS. 3-SER-303-304; 2-SER-215 at 11402-06; 2-SER-239 at 109546.

Further, in response to Plaintiffs' discovery request seeking the identity of every lactation specialist and lactation specialist group in UHC's network since October 2012, UHC responded that "[s]uch providers are identifiable in Defendants' systems by the specialty [code] '380'". 3-SER-11. UHC's policy and procedure of identifying network providers was applicable to all UHC insureds (no variations based on geography, plan or otherwise).

Moreover, from UHC's records, dated as of August 2018, Plaintiffs' expert identified that UHC had only 122 unique in-network lactation specialists (and 22 unique

terminated) identifiable as "lactation specialists" throughout the class period. 4-SER-330. In addition, for 20 states, UHC's data reflected that it had no in-network providers identified during the Class Period as "lactation specialists". 4-SER-335.

Similarly unpersuasive is UHC's and the district court's adherence to the fantasy that members could identify in-network lactation specialists because UHC purportedly "directs members to network providers, including through United's provider directory which is available online…" App. Dkt. 25 at 23. In reality, UHC admitted that only the network providers it internally identified by the specialty code number "380" have been electronically searchable as "Lactation Specialists" in UHC's provider directory since March 2014. 2-SER-18-19. Thus, only the 122 unique lactation specialists were identifiable nationwide as such during the class period.

Further undercutting the district court's premise that whether an insured tried to identify an network provider through UHC presents individualized issues is that UHC's call center was telling members that only in-network CLS claims were eligible for coverage under the ACA mandate, and telling them to go contact their network providers, without making insureds aware of the identity of any network provider that in fact provided CLS. 3-SER-197. UHC acknowledged, however, that its providers ***are not*** "in-network" for any and all services (3-SER-275; 3-SER-296). UHC was responsible for providing coverage, it had to be the source of the information about its network providers, yet, as demonstrated, it did not have such information.

The district court's musings about the availability of the "Gap exception" and

purported preapproval processes (1-ER-21-22 (fn. 9)), and UHC's similar reliance on the "Gap exception" (App. Dkt. 25 at 23) as supportive of the district court's denial of class certification, suffer from the same faulty and erroneous factual presumption as aptly reflected in this class period-contemporaneous statement by a UHC employee: "What if the member is requesting a Gap exception stating there is no one in network to provide these services? ***We would not have a way to search for someone who can provide them."*** 3-SER-204-206 (emphasis added).

As Plaintiffs stated in the district court below (2-ER-188-189), there are no facts or differing standards or an availability construct applicable to adjudicating the claims of the class members. UHC did not: adjudicate each out-of-network lactation services claim by determining any in-network provider availability; inform the insured that its claim was denied because UHC identified an available in-network provider; or invite its insureds to demonstrate the negative, that is, that each insured did not have in-network lactation services available to them. *Id.*

The district court's denial of class certification based on a contrived notion that UHC could and was providing insureds with the identity of available, network lactation consultants[13] is erroneous and constitutes reversible error.

[13] These and similar arguments offered by UHC are disguised administrative feasibility arguments. Even if there was an ascertainability prerequisite applicable in a Rule 23(b)(1) and (2) case such as this, the proposed class definition could be modified based on Plaintiffs' experts' work. The Ninth Circuit follows those circuits that find no administrative feasibility requirement: "In sum, the language of Rule 23 does not impose a freestanding administrative feasibility prerequisite to class certification." *Briseno v. ConAgra Foods, Inc.*,

III. CONCLUSION

Plaintiffs respectfully request this Court (i) reverse the portions of the district court's (a) summary judgment order entering judgment against Plaintiffs Condry and Barber, (b) class certification orders denying certification of the Claims Reprocessing Class, and (c) order denying the motion to intervene; and (ii) affirm the district court's orders granting Plaintiffs summary judgment and the certification concerning the Denial Letter Class.

Respectfully submitted,

CHIMICLES SCHWARTZ KRINER & DONALDSON-SMITH LLP

By: */s/ Kimberly M. Donaldson-Smith*
Nicholas E. Chimicles (*pro hac vice*)
Kimberly M. Donaldson-Smith (*pro hac vice*)
Stephanie E. Saunders (*pro hac vice*)
361 W. Lancaster Avenue
Haverford, PA 19041
Telephone: (610) 642-8500
Facsimile: (610) 649-3633
nickchimicles@chimicles.com
kds@chimicles.com
ses@chimicles.com

844 F.3d 1121, 1126 (9th Cir. 2017). *See also, Kumar v. Salov N. Am. Corp.*, 2016 U.S. Dist. LEXIS 92374, at *6 (N.D. Cal. July 15, 2016) (finding class members ascertainable despite defendant's arguments that class members would have to self-identify and show "what they paid, where they purchased it, and how many times, plus whether they saw and were deceived" by a product's label).

Annick Marie Persinger
Sabita J. Soneji
TYCKO & ZAVAREEI LLP
The Tower Building
1970 Broadway, Suite 1070
Oakland, CA 94612
Telephone: (510) 254-6808
Facsimile: (202) 973-0950
apersinger@tzlegal.com
ssoneji@tzlegal.com

Marc A. Goldich (admitted *pro hac vice*)
Noah Axler (admitted *pro hac vice*)
AXLER GOLDICH LLC
1520 Locust Street
Suite 301
Philadelphia, PA 19102
Telephone: (267) 534-7400
Facsimile: (267) 534-7407
mgoldich@axgolaw.com
naxler@axgolaw.com

James E. Miller (CA Bar No. 262553)
Laurie Rubinow
SHEPHERD, FINKELMAN, MILLER & SHAH, LLP
65 Main Street
Chester, CT 06412
Telephone: (860) 526-1100
Facsimile: (866) 300-7367
jmiller@sfmslaw.com
lrubinow@sfmslaw.com

Nathan Zipperian (admitted *pro hac vice*)
SHEPHERD, FINKELMAN, MILLER & SHAH, LLP
1625 N. Commerce Pkwy. #320
Ft. Lauderdale, FL 33326
Telephone: (954) 515-0123
Facsimile: (866) 300-7367
nzipperian@sfmslaw.com

Kolin Tang (CA Bar No. 279834)
SHEPHERD, FINKELMAN, MILLER & SHAH, LLP
1401 Dove Street
Suite 510
Newport Beach, CA 92660
Telephone: (323) 510-4060
Facsimile: (866) 300-7367
ktang@sfmslaw.com

Counsel for Plaintiffs, Intervenor Plaintiff-Appellees/Cross-Appellants

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) No. 20-16823, No. 20-16857

I am the attorney or self-represented party.

This brief contains 6,969 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[X] is a cross-appeal brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an amicus brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a death penalty case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated September 24, 2020.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: ***/s/ Kimberly M. Donaldson-Smith*** **Date:** April 19, 2021

CERTIFICATE OF ELECTRONIC SERVICE

Rachel Condry, et al. v. UnitedHealth Group, Inc., et al.,
Ninth Circuit Nos. 20-16823, 20-16857
U.S. District Court for the Northern District of California, No. 3:17-cv-00183

I hereby certify that on April 19, 2021 I electronically filed the foregoing Plaintiffs'-Appellees'/Cross-Appellants' Reply Brief-The Fourth Brief on Cross Appeal with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system.

/s/ Kimberly M. Donaldson-Smith
Kimberly M. Donaldson-Smith