THE HONORABLE ROBERT J. BRYAN

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

C. P., by and through his parents, Patricia Pritchard and Nolle Pritchard; and PATRICIA PRITCHARD,

Plaintiffs,

vs.

BLUE CROSS BLUE SHIELD OF ILLINOIS,

Defendant.

Case No. 3:20-cv-06145-RJB

DEFENDANT BLUE CROSS BLUE SHIELD OF ILLINOIS' MOTION TO STAY PENDING APPEAL

NOTE ON MOTION CALENDAR: JANUARY 5, 2024

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I. INTRODUCTION

Defendant Blue Cross Blue Shield of Illinois ("BCBSIL") moves this Court to stay the injunction and supplemental injunction orders entered on December 19, 2023 (Dkt. 207 and 208), pursuant to Federal Rule of Civil Procedure 62(d), while its appeal to the Ninth Circuit is pending.

The Court took a novel step in certifying the class, despite the fact that (1) binding authority prohibits ordering reprocessing on a classwide basis in cases where plan members seek relief pursuant to ERISA's enforcement scheme; (2) Rules 23(b)(1) and (b)(2) bar certification where the final relief sought by the class is monetary; and (3) there are serious questions concerning the adequacy and typicality of the class representatives.

Recognizing these important legal issues of first impression, the Ninth Circuit in *Wit v. United Behav. Health*, 79 F.4th 1068 (9th Cir. 2023), stayed the district court's claims reprocessing order pending appeal based on the factors set forth in *Nken v. Holder*, 556 U.S. 418, 434 (2009). Exhibit A and B. The Court should do the same here.

This case sits at the intersection of three federal statutes: ERISA, the nondiscrimination provisions of the Affordable Care Act ("Section 1557"), and the Religious Freedom Restoration Act ("RFRA"). This Court is the first in the nation to hold that a third-party administrator ("TPA") such as BCBSIL can be held liable under Section 1557 for plan exclusions included in the plan by the employer. No other court has so found. Regulations issued by the past three administrations clarify that TPAs are not liable for a plan's violation of the ACA or Title IX if, as here, the TPA did not design the plan. This Court's rulings are directly contrary to HHS's interpretations across two Democratic and one Republican administration that are dispositive of this case in Defendants' favor. In addition, the operative regulations, if followed, would establish that BCBSIL has not discriminated on the basis of sex because (1) as a TPA, BCBSIL does not receive federal financial assistance from the federal government, and (2) under the ACA, categorical exclusions do not discriminate on the basis of sex.

Here, an employer, CommonSpirit Health, formerly Catholic Health Initiatives ("CHI"), with clear sincerely-held religious beliefs protected by RFRA, excluded from its self-insured

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plan's coverage "gender reassignment surgery" and treatments leading to such surgery. The named Plaintiff C.P., who was formerly a member of the CHI Plan, tried to circumvent these RFRA protections by bringing this Section 1557 action not against CHI, which chose to exclude gender reassignment surgery from its plan's coverage, but against BCBSIL.

BCBSIL respectfully submits that the important task of determining whether these three statutes may be harmonized, and, if not, how to resolve any conflict among them, requires appellate review. The issues are novel and vexing, and as this Court recognized, this case "takes place in the midst of a sharply divided regulatory and litigation background." *See* Dkt. 207 at 11. And there is ample basis to believe that the Ninth Circuit may well chart a different path among these statutes and their policy goals.

The industry has been relying on existing regulations implementing Section 1557 that allow TPAs to administer self-funded plans with exclusions for transgender-related services. A stay is also necessary because this Court's order will dramatically distort the market for self-funded health plans. At present, BCBSIL is the *only* TPA that, by virtue of this Court's order, may not administer a plan with a gender reassignment procedure exclusion, even if the plan sponsor who included the exclusion has the right to do so.

Moreover, this case has been litigated without any urgency demanding immediate enforcement by the plaintiffs. They did not seek a preliminary injunction or expedite consideration of any issues.

II. FACTUAL BACKGROUND

The initial named Plaintiffs were C.P. and his mother, who was a member of an ERISA health plan designed and sponsored by CHI. Dkt. 94-1, Ex. K. Although it has now removed the exclusion, the CHI Plan's exclusion was different from all others. Plaintiffs concede that CHI itself added the exclusion because "coverage of such procedures was 'determined not to align with the teachings and doctrine of the Catholic Church.'" Am. Compl. ¶71, App. H at 4. The CHI Plan was unusual in that transgender-related services (and only these services) were reviewed by actual CHI employees, rather than BCBSIL, for a final coverage determination. *Id.*, Ex. E.

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On September 21, 2023, Plaintiffs informed the Court that named Plaintiff C.P. was no longer an adequate representative of a class seeking prospective injunctive relief and added two new named Plaintiffs, Emmett Jones and S.L. Dkt. 175. Jones's claims for gender-affirming care were not denied based on a plan exclusion. Dkt. 185 ¶2. He has not exhausted his available administrative appeals. Dkt. 177 ¶12. Jones' plan removed its exclusion effective July 1, 2023. Dkt. 195 ¶2.

S.L. is a member of a different health plan than Jones and C.P. Dkt. 176 ¶4. S.L.'s plan contains a different exclusion. Dkt. 88-1 at 120; Dkt. 104-1 at 259. Under S.L.'s plan, S.L. is eligible only if S.L. was diagnosed by a qualified medical health professional; professionals examined S.L.'s psychological and personal history and pubertal stage; and S.L. received an individualized assessment of health risks and sufficiently provided informed consent. Dkt. 88-1, Ex. K ¶7.

The class includes members of self-insured ERISA plans administered by BCBSIL that contain some form of exclusion for gender-affirming care. Dkt. 203 at 4. BCBSIL has at some point administered 398 ERISA self-funded plans with some form of a transgender-related exclusion, but the plans vary widely in the services excluded. Dkt. 94-1, Ex. C, Addendum A. Some employers offering plans with a transgender-related exclusion also offer employees an option without an exclusion. *Id*., Ex. C. In other words, some class members intentionally chose a plan with an exclusion to suit their individual circumstances. *Id*., Ex. A ¶27.

III. ARGUMENT

Rule 62(d) permits a stay pending appeal of a final judgment that grants injunctive relief. Fed. R. Civ. P. 62(d). The requesting party bears the burden of demonstrating that the case-specific circumstances justify a stay. *Nken v. Holder*, 556 U.S. at 433-34. Following the *Nken* four-factor test, the court looks first and foremost to whether BCBSIL has a "substantial case for relief on the merits." *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). BCBSIL is not required to show that it "is more likely than not that [it] will win on the merits"; instead, BCBSIL must only show that success is a "reasonable probability" or a "fair prospect," or that "serious legal questions

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are raised." *Id*. at 967-68. The other three factors are "(2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012). While "[t]he first two factors are the most critical," all four factors are considered under a flexible "sliding scale approach." *Nken*, 556 U.S. at 434. Here, all four factors favor staying the Injunction pending appeal.

A. BCBSIL's appeal will raise serious legal questions, and BCBSIL has a reasonable probability of prevailing.

1. BCBSIL has a reasonable probability of reversing class certification.

BCBSIL has a reasonable probability of prevailing on appeal because the recently amended class certification order (1) conflicts with the Ninth Circuit's decision in *Wit v. United Behavioral Health*, 79 F.4th 1068; (2) improperly certified Rule 23(b)(1) and 23(b)(2) classes even though plaintiffs seek monetary relief; and (3) failed to address the adequacy and typicality problems posed by the new named plaintiffs.

a. Class certification conflicts with *Wit*'s limits on the Court's power to issue classwide reprocessing.

Under the rule in *Wit*, a court cannot order reprocessing on a classwide basis unless the plaintiff can demonstrate "that all class members were denied a full and fair review of their claims." 79 F.4th at 1086. To make such a showing, the plaintiffs must show that each class member's "claim was denied based on the wrong standard *and* that [each class member] might be entitled to benefits under the proper standard." *Id.* at 1084 (emphasis original). Assuming that the exclusions constitute an improper standard, classwide reprocessing is permitted by *Wit* only if common proof could establish that *all* class members were or could be denied benefits solely because of the challenged exclusions.

There are serious legal questions as to whether plaintiffs met this standard. Particularly troubling is plaintiffs' failure to address the many class members with claims for which medical necessity is an independent bar to benefits. Am. Compl. at 22 (acknowledging that medical

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necessity is an independent bar to benefits). It is undisputed that even absent the various exclusions, many of the claims at issue here are not covered because they are not medically necessary. There are 398 separate plans incorporating different terms, varying coverage, and disparate exclusions. Plaintiffs cannot present classwide evidence that each class member "might be entitled to benefits under the proper standard." *Wit*, 79 F.4th at 108.

b. There are serious legal questions as to whether Rules 23(b)(1) and 23(b)(2) bar certification where plaintiffs seek monetary relief.

There are also serious legal questions about the Court's decision to certify classes under Rule 23(b)(1) and (b)(2) even though Plaintiffs seek monetary relief. Rules 23(b)(1) and (b)(2) permit only declaratory or injunctive relief and do not allow monetary relief. Dkt. 156 at 8-13. Monetary relief is allowed only under Rule 23(b)(3). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-61 (2011). Here, there is no dispute that Plaintiffs' "reprocessing" remedy seeks payment of money for each class member's claim. Plaintiffs themselves have conceded that they seek payment of claims. Dkt. 38 at 22 (claiming "coverage (payment) for all denied pre-authorizations and denied claims for coverage during the Class Period that were based solely upon exclusions for gender-affirming care").

Plaintiffs may not skirt the prohibition on monetary relief by claiming only reprocessing relief in the lawsuit. Reprocessing relief is prohibited for a Rule 23(b)(2) class because it "fail[s] to provide 'final relief' . . . and require[s] too many individualized determinations of eligibility and medical necessity." Dkt. 156 at 10; *Kartman v. State Farm Mut. Auto. Ins. Co*., 634 F.3d 883, 886 (7th Cir. 2011) (denying (b)(2) class certification because "the injunction envisioned by the plaintiffs would in no sense be a final remedy. A class-wide roof reinspection would only lay an evidentiary foundation for subsequent individual determinations of liability and damages.").

For each of these reasons, BCBSIL is likely to succeed on the merits of its argument that a Rule 23(b)(1) and (b)(2) reprocessing class should not have been certified.

c. There are serious legal questions as to whether any named plaintiff is adequate and typical of the class.

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The Court can maintain a class only if the named plaintiffs are adequate to serve as class representatives *and* are typical of the class. *Dukes*, 564 U.S. at 345; Fed. R. Civ. P. 23(a)(3)–(4). Plaintiffs admit that C.P. is an inadequate class representative for the prospective relief the class seeks, Dkt. 175, and there are serious legal questions to whether the new named plaintiffs are adequate and typical.

Emmett Jones is an inadequate and atypical class representative for three reasons. First, Mr. Jones's claims for gender-affirming care were not denied based on a plan exclusion. Livorsi Decl., Dkt. 185 ¶2. Thus, he is not even a member of the class and therefore by definition is not typical or adequate. Second, Jones concedes that he has not exhausted his administrative appeals. Dkt. 177 ¶12. Because Jones's plan requires exhaustion, Jones's claims are not yet ripe. *Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980). Finally, Jones' plan sponsor, CHI, removed its exclusion for gender-affirming care effective July 1, 2023. Dkt. 195 ¶ 2. Because the exclusion has been removed, Jones no longer has standing to seek prospective injunctive relief. *In re: First Am. Home Buyers*, 313 F.R.D. 578, 612 (S.D. Cal. 2016), *aff'd sub nom. Carrera v. First Am. Home Buyers*, 702 F. App'x 614 (9th Cir. 2017).

New class representative S.L. likewise failed to demonstrate her claims are typical or adequate. S.L. is a member of a different health plan than Mr. Jones and C.P. Dkt. 176 ¶4. S.L.'s plan contains a narrower exclusion than Jones' and C.P.'s plan did. Dkt. 88-1 at 120; Dkt. 104-1 at 259. S.L. has not made the showings that would entitle her to benefits even in the absence of the challenged exclusion required by her plan. Dkt. 88-1, Ex. K ¶7. If S.L.'s claim was denied for a reason other than the contractual exclusion, S.L. would lack standing and the claims would not be typical of the class.

2. There are serious legal questions as to whether BCBSIL violated Section 1557.

a. BCBSIL is not liable for alleged violations of Section 1557 because BCBSIL is not the source of the plan designs.

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BCBSIL did not violate Section 1557 because it did not design the ERISA self-funded plans at issue here. Plaintiffs acknowledge that BCBSIL is not responsible for the design of any ERISA self-funded plans. Dkt. 94-1, Ex. G; Dkt. 78 at 1.

The Department of Health and Human Services recently clarified its interpretation of Section 1557 in prior rulemakings and emphasized that TPAs are not liable for a plan's violation of the ACA or Title IX if, as here, the TPA did not design the plan. Nondiscrimination in Health and Health Education Programs or Activities, 87 Fed. Reg. 47,824, 47,876 (August 4, 2022) (the "2022 Proposed Rule"). HHS explained that "third party administrators [are] generally not responsible for the benefit designs of the self-insured group health plans they administer and that enforcing Section 1557 against a third party administrator for a group health plan with a discriminatory benefit design could result in holding a third party administrator liable for plan designs over which it had no control." *Id.* This allocation of responsibility makes practical sense because ERISA requires a TPA to strictly administer a self-insured health plan according to its terms. 29 U.S.C. § 1104(a)(1)(D). In ruling otherwise, this Court rejected an interpretation that HHS has consistently maintained across administrations of both parties. BCBSIL will argue that the regulations put forth by the Obama, Trump, and Biden administrations have had it right, or at least deserve deference, and that this Court's conclusions that ERISA must yield to Section 1557 rests on misinterpretations of both ERISA and the ACA. There is thus a reasonable prospect of reversal on this basis.

b. Section 1557 does not apply to BCBSIL because it does not receive any federal financial assistance for its TPA activities.

Section 1557 applies only to the portions of a TPA's operations that receive federal financial assistance. 2020 Rule, 85 Fed. Reg. at 37,244; *Religious Sisters*, 55 F.4th at 1136 ("With the 2020 Rule's arrival . . . health insurers now remain subject to Section 1557 only for the parts of their operations that receive federal funding."); *Washington v. United States Department of Health & Human Services*, 482 F. Supp. 3d 1104, 1111 (W.D. Wash. 2020) (same). And it is undisputed that BCBSIL does not receive federal financial assistance for serving as a TPA for any

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self-funded ERISA plans. Dkt. 88-1, Ex. I, ¶3. Moreover, the 2020 Rule clarified that the provision of health *insurance coverage* (whether as an insurer or as a TPA) is not "the business of providing *healthcare*," which is covered by Section 1557. 2020 Rule, 85 Fed. Reg. at 37,244-45. Thus, BCBSIL is not "principally engaged in the business of healthcare," and because BCBSIL does not receive federal funding for its TPA activities, Section 1557 does not apply.

c. BCBSIL's administration of plan exclusions does not discriminate on the basis of sex.

HHS's 2020 Rule implementing Section 1557, which is currently in effect,[1] establishes that BCBSIL's administration of plan exclusions does not discriminate on the basis of sex.

The 2020 Rule interpreted Section 1557 to mean that "categorical coverage exclusions" for gender-affirming care does not discriminate on the basis of sex in violation of Title IX. *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1, 114 (D.D.C. 2020), *appeal dismissed*, No. 20-5331, 2021 WL 5537747 (D.C. Cir. Nov. 19, 2021). HHS concluded that "no statutory authority existed for such a prohibition in the first place, and it pointed to evidence indicating division among the medical community 'on many issues related to gender identity, including the value of various 'gender-affirming' treatments for gender dysphoria.'" *Id.* (quoting 2020 Rule, 85 Fed. Reg. 37,198); *Doe v. Snyder*, 28 F.4th 103, 110–13 (9th Cir. 2022) (noting division in the medical community).

Whitman-Walker found that HHS "delivered a sufficiently reasoned explanation" and "consulted scientific studies, government reviews, and comments from a host of medical professionals regarding treatment for gender dysphoria" and concluded that "the medical community is divided on many issues related to gender identity." *Id.* at 47. Other cases addressing

[1] In a recent filing, HHS represented that it aspires to issue a new final rule on Section 1557 "no later than this forthcoming winter." *Christian Employers Alliance v. EEOC*, Case No. 1:21-cv-00195-DMT-CRH (Dkt. No. 72-1). For this independent reason, the Court should stay proceedings pending the finalization of HHS's Section 1557 2022 Rule because a stay would "conserve judicial resources," because the final rule will likely directly impact BCBSIL's arguments. *Johnson v. N. Dakota Guar. & Title Co.*, No. 1:17-cv-120, 2018 WL 6706672, at *2 (D.N.D. Dec. 20, 2018).

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categorical exclusions for gender-affirming care have reached the same conclusion. *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1130-31 (D.N.D. 2021), *aff'd in part, remanded in part sub nom. Religious Sisters of Mercy v. Becerra*, 55 F.4th 583 (8th Cir. 2022); *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 687 (N.D. Tex. 2016) (holding that the prior 2016 Rule's "expanded definition of sex discrimination exceeds the grounds incorporated by Section 1557").

The 2020 Rule's view that "categorical coverage exclusions" for gender-affirming care do not discriminate on the basis of sex is a reasonable interpretation of the statute. *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), is not to the contrary. Under *Bostock*, Section 1557 forbids "firing a person based on their transgender status." Dkt. 148 at 11. BCBSIL does not argue otherwise. The alleged "discrimination" here, however, is based on medical diagnosis, not sex or gender identity. Treating a medical condition differently is not intentional sex discrimination even if only one sex is susceptible to it. *Gen. Elec. Co. v. Gilberg*, 429 U.S. 125, 136 (1976) ("[A]n exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination," except where the exclusion "is a mere pretext designed to effect an invidious discrimination against members of one sex or the other") (cleaned up)). As in *Geduldig*, the exclusions at issue in this case do not create a coverage gap between men and women. 417 U.S. at 497 (finding no discrimination because "there is no risk from which women are protected and men are not."). By the same logic, treating gender dysphoria differently is not intentional sex discrimination even if only one gender identity is susceptible to the condition.

d. BCBSIL's administration on behalf of plan sponsors with sincerely held religious beliefs is protected by RFRA.

The Supreme Court has established that, even though TPAs are not religious institutions, they may legally administer plans with exclusions of coverage that RFRA exempts from the ACA's requirements. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020). The Supreme Court recognized an exception for both a plan sponsor with sincerely held religious beliefs and for the "plan, issuer, or third party administrator that provides or arranges such coverage or payments." *Id.* at 2395 (emphasis added). So too here.

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BCBSIL does not violate Section 1557 by administering plans for plan sponsors with sincerely held religious beliefs because RFRA protects the exclusions in those plans.

The fact that the government is not a party here does not alleviate the Court's obligation to harmonize RFRA and Section 1557. The Supreme Court has repeatedly stated that courts must consider RFRA's limitations when adjudicating Section 1557 claims. *Little Sisters*, 140 S. Ct. 2367 at 2383. There is substantial reason to believe that the Ninth Circuit will disagree with this Court's view that RFRA is not at issue here. In light of these strong legal arguments and conflicting authorities, BCBSIL has a "fair prospect" of prevailing on appeal on this argument as well.

B. BCBSIL Will Suffer Irreparable Injury Absent a Stay of the Injunction.

The second *Nken* factor considers whether BCBSIL will be irreparably injured without a stay. An irreparable injury is one that "cannot be easily undone should [the movant] prevail on appeal." *FTC v. Qualcomm Inc.*, 935 F.3d 752, 756 (9th Cir. 2019); *Softball v. Cayton*, No. 5:20-CV-01661-EJD, 2020 WL 4349848, at *3 (N.D. Cal. July 29, 2020). The irreparable harm inquiry asks the Court to "anticipate what would happen as a practical matter following the denial of a stay" and "focus[es] on the individualized nature of irreparable harm and not whether it is 'categorically irreparable.'" *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012). Economic harm is irreparable where the party will not be able to recover monetary losses. *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018).

An order requiring "fundamental business changes that . . . cannot be easily undone should [the appellant] prevail on appeal" meets the irreparable injury requirement. *Qualcomm*, 935 F.3d at 75. When, as here, the Court's ordered relief disrupts, rather than preserves, a settled status quo, "[t]he Court must consider the significance of the change from the status quo which would arise in the absence of a stay." *John Doe Co. v. Consumer Fin. Prot. Bureau*, 235 F. Supp. 3d 194, 206 (D.D.C. 2017).

First, the Injunction will disproportionately and irreparably harm BCBSIL while benefitting its competitors. BCBSIL is the only TPA subject to the Court's Injunction. Employers

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wishing to continue to include the exclusion in their plans could easily avoid any injunction by this Court by replacing BCBSIL with any of BCBSIL's many competitors. *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) ("Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm."); *Microsoft Corp. v. Motorola,* 871 F. Supp. 2d 1089, 1103 (W.D. Wash.), *aff'd*, 696 F.3d 872 (9th Cir. 2012) ("[L]oss of market share, customers, and access to potential customers demonstrated irreparable harm."); *Kartman*, 634 F.3d at 892 (rejecting a reprocessing injunction where "the hardships of the contemplated injunction would fall disproportionately" on the enjoined competitor). A stay pending appeal is therefore necessary.

Second, the Injunction requires BCBSIL to re-process, pay for, and reimburse its plan members for certain gender-affirming care services. Dkt. 207, pg. 21. The process of identifying, reprocessing, and paying hundreds of claims will take considerable time and expense. If the Ninth Circuit reverses, BCBSIL will be unable to recoup the substantial expenses associated with notifying the class, reprocessing the claims of any class members, or working with plan sponsors to pay class members for any claims. These unrecoverable expenses also constitute irreparable injury that necessitate a stay pending appeal. *FTC v. Amazon.com, Inc.*, C14-1038-JCC, 2017 WL 714115, at *2 (W.D. Wash. Feb. 23, 2017) (granting stay because if Amazon is forced to implement the notice-and-claims procedure and this Court is reversed on appeal, Amazon would undoubtedly suffer specific irreparable harm"); *Steiner v. Apple Computer, Inc.*, 2008 WL 1925197, at *5 (N.D. Cal. Apr. 29, 2008) (irreparable harm satisfied where defendant would "suffer lost time and money, were the Ninth Circuit to reverse").

Finally, the deprivation of free exercise rights "unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *Mr.Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). BCBSIL properly invoked RFRA on behalf of plan sponsors with religious objections. Without a stay, those conscience-based

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objections will be overridden before the Ninth Circuit has the opportunity to review their RFRA defense.

C. The Balance of Equities and Public Interest Favor a Stay.

The final two *Nken* factors consider whether issuance of the stay will substantially injure other parties and whether the stay will serve the public interest. BCBSIL's appeal will call on the Ninth Circuit to harmonize three conflicting statutory schemes: ERISA, RFRA, and Section 1557. Each of these laws serves important public values and affects a great number of citizens. The public therefore has a strong interest in allowing the Ninth Circuit to reconcile the three laws so that none tramples the other. Here, a stay would simply maintain the status quo while the Ninth Circuit considers the appeal.

Plaintiffs have offered no credible argument that the status quo imposes a countervailing and irreparable harm against them. This case has been pending for over three years, and Plaintiffs have never sought emergency relief.

Dated this 20th day of December, 2023.

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By*/s/ Gwendolyn C. Payton*

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I certify that this memorandum contains 4,195 words, in compliance with the Local Civil Rules.

CERTIFICATE OF SERVICE

I certify that on the date indicated below I caused a copy of the foregoing document, DEFENDANT BLUE CROSS BLUE SHIELD OF ILLINOIS' MOTION TO STAY PENDING APPEAL, to be filed with the Clerk of the Court via the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the following attorneys of record:

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DATED this 20th day of December, 2023.

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EXHIBIT A

dentious, but simply because that is by far the most natural word to use.

[3] For those reasons, FERC's administrative proceeding to assess a penalty is much more than merely a prosecutorial determination. And because it is indeed a "proceeding" subject to section 2462, FERC must initiate it by issuing the notice of proposed penalty within five years of any alleged wrongdoing.

[4] To be sure, the Federal Power Act does not fix the length of the administrative proceeding itself; the statute requires only that after the notice of proposed penalty issues and the respondent elects to proceed under section 823b(d)(3), "the Commission shall *promptly* assess such penalty, by order." (emphasis added). But FERC nevertheless has ample incentive to act promptly. For one thing, delay may impede FERC's ability to prove its case when a court conducts de novo review of the penalty assessment. For another, the Administrative Procedure Act authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). When an agency "fail[s] to take a discrete agency action that it is required to take"—such as assessing a penalty promptly—an aggrieved respondent can seek an order compelling it to act. *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 64, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004). In sum, FERC must commence any enforcement proceedings within five years, and it must assess a penalty promptly thereafter. Vitol is therefore without basis in arguing that our interpretation of the statute will give FERC "the choice to 'postpone indefinitely' its federal court action." (quoting *McMahon*, 342 U.S. at 27, 72 S.Ct. 17).

Vitol is correct to point out that FERC retains some ability to determine when the statute of limitations for an action in court begins to run. But given the "complexity of the subject matter and proceedings under FERC's charge," *Powhatan Energy*, 949 F.3d at 900, it is unsurprising that Congress designed the statute to give the agency the necessary time to "investigate and to uncover" violations of the Federal Power Act. *Id.* at 905. Depending on the nature of investigation, FERC's enforcement staff may need to await permission from the Commission before issuing subpoenas. And after the agency issues subpoenas, it may need to go to district court if a respondent refuses to comply. *See* 16 U.S.C. § 825f(b)–(c); 18 C.F.R. §§ 385.409, 385.411(a)(1). Had Congress limited FERC to five years in which to investigate, assess a penalty, *and* bring suit, respondents would have "considerable incentive to employ the available procedures to work delay." *Powhatan Energy*, 949 F.3d at 900 (quoting *Meyer*, 808 F.2d at 919).

AFFIRMED.

David WIT; Natasha Wit; Brian Muir; Brandt Pfeifer, on behalf of the Estate of his deceased wife, Lauralee Pfeifer; Lori Flanzraich, on behalf of her daughter Casey Flanzraich; Cecilia Holdnak, on behalf of herself, her daughter Emily Holdnak; Gary Alexander, on his own behalf and on behalf of his beneficiary son, Jordan Alexander; Corinna Klein; David Haffner, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees,

Linda Tillitt; Mary Jones, Intervenor-Plaintiffs-Appellees,

v.

UNITED BEHAVIORAL HEALTH, Defendant-Appellant.

Gary Alexander, on his own behalf and on behalf of his beneficiary son, Jordan Alexander; Corinna Klein; David Haffner, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees,

Michael Driscoll, Intervenor-Plaintiff-Appellee,

v.

United Behavioral Health, Defendant-Appellant.

No. 20-17363, No. 21-15193, No. 20-17364, No. 21-15194

United States Court of Appeals, Ninth Circuit.

Argued and Submitted August 11, 2021 San Francisco, California

Filed August 22, 2023

Background: Beneficiaries of ERISA-governed health benefit plans brought action against claims administrator, on behalf of three putative classes, for breach of fiduciary duty and improper denial of benefits, alleging that administrator improperly developed and relied on internal guidelines that were inconsistent with terms of class members' plans and with state-mandated criteria. Beneficiaries moved to certify classes. The United States District Court for the Northern District of California, Joseph C. Spero, United States Magistrate Judge, 317 F.R.D. 106, granted motion. Following bench trial, the District Court, 2019 WL 1033730, 2020 WL 4517283, 2020 WL 6479273, entered judgment for beneficiaries. Administrator appealed.

Holdings: On rehearing, the Court of Appeals, Michael M. Anello, District Judge, sitting by designation, held that:

(1) beneficiaries alleged that they suffered concrete injury which presented material risk of harm to their interest in their contractual benefits, as required to establish standing to bring action for breach of fiduciary duty;

(2) beneficiaries alleged that they suffered concrete injury, as required to establish standing to bring action for improper denial of benefits;

(3) beneficiaries alleged that they suffered particularized injury, as required to establish standing to bring both claims;

(4) beneficiaries' alleged injuries were fairly traceable to claims administrator's conduct, as required to establish standing to bring both claims;

(5) class certification was not warranted;

(6) reprocessing of beneficiaries' claims did not fall under ERISA's "catchall" remedy provision; and

(7) administrator for ERISA plans did not abuse its discretionary authority to interpret plans' terms by developing internal guidelines for use by administrator's clinicians in making coverage determinations.

Affirmed in part, reversed in part, and remanded.

Opinion, 58 F.4th 1080, vacated and superseded.

1. Labor and Employment ⇦403

Congress enacted ERISA to promote the interests of employees and their beneficiaries in employee benefit plans by setting out substantive regulatory requirements for employee benefit plans and to provide for appropriate remedies, sanctions, and ready access to the federal courts. Employee Retirement Income Se-

curity Act of 1974 §§ 2, 4, 29 U.S.C.A. §§ 1001(b), 1003(a).

2. Labor and Employment ⚿403

The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. Employee Retirement Income Security Act of 1974 § 2, 29 U.S.C.A. § 1001 et seq.

3. Labor and Employment ⚿411

ERISA does not require employers to establish employee benefits plans. Employee Retirement Income Security Act of 1974 § 2, 29 U.S.C.A. § 1001 et seq.

4. Labor and Employment ⚿411

ERISA does not mandate what kind of benefits employers must provide if they choose to have an employee benefits plan. Employee Retirement Income Security Act of 1974 § 2, 29 U.S.C.A. § 1001 et seq.

5. Labor and Employment ⚿403

ERISA ensures that employees will not be left empty-handed once employers have guaranteed them certain benefits. Employee Retirement Income Security Act of 1974 § 2, 29 U.S.C.A. § 1001 et seq.

6. Labor and Employment ⚿403

ERISA induces employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred. Employee Retirement Income Security Act of 1974 § 2, 29 U.S.C.A. § 1001 et seq.

7. Labor and Employment ⚿402

ERISA sets forth a comprehensive civil-enforcement scheme. Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C.A. § 1132(a).

8. Federal Courts ⚿3585(2)

An appellate court reviews de novo the district court's determination that a plaintiff has Article III standing. U.S. Const. art. 3, § 2, cl. 1.

9. Federal Civil Procedure ⚿103.2, 103.3

To establish standing under Article III, a plaintiff must show (1) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) that the injury was likely caused by the defendant; and (3) that the injury would likely be redressed by judicial relief. U.S. Const. art. 3, § 2, cl. 1.

10. Federal Civil Procedure ⚿103.3
Federal Courts ⚿2101

If the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve and the plaintiff lacks Article III standing. U.S. Const. art. 3, § 2, cl. 1.

11. Federal Civil Procedure ⚿103.2

To determine whether a statutory violation caused a concrete injury for purposes of Article III standing, a court asks: (1) whether the statutory provisions at issue were established to protect the plaintiff's concrete interests, as opposed to purely procedural rights, and if so, (2) whether the specific procedural violations alleged in the case actually harm, or present a material risk of harm to, such interests. U.S. Const. art. 3, § 2, cl. 1.

12. Labor and Employment ⚿646

ERISA plan beneficiaries alleged that they suffered concrete injury from claims administrator's purported violation of its fiduciary duty and that violation presented material risk of harm to their interest in their contractual benefits, as required to establish Article III standing to bring action for breach of fiduciary duty, where beneficiaries alleged that claims administrator administered their plans in its financial self-interest and in conflict with plan terms, presenting material risk of harm to beneficiaries' right to have their contractual benefits interpreted and administered in

their best interest and in accordance with their plan terms, and that there was risk that their claims would be administered under set of guidelines that impermissibly narrowed scope of their benefits. U.S. Const. art. 3, § 2, cl. 1; Employee Retirement Income Security Act of 1974 §§ 404, 502, 29 U.S.C.A. §§ 1104(a), 1132(a)(1)(B), 1132(a)(3)(A).

13. Labor and Employment ⚿403

ERISA's core function is to protect contractually defined benefits. Employee Retirement Income Security Act of 1974 § 2, 29 U.S.C.A. § 1001 et seq.

14. Labor and Employment ⚿678

ERISA plan beneficiaries alleged that they suffered concrete injury from claims administrator's denial of benefits, as required to establish Article III standing to bring action for improper denial of benefits, where beneficiaries alleged harm, specifically, arbitrary and capricious adjudication of benefits claims, that presented material risk to their interest in fair adjudication of their entitlement to their contractual benefits. U.S. Const. art. 3, § 2, cl. 1; Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C.A. §§ 1132(a)(1)(B), 1132(a)(3)(B).

15. Labor and Employment ⚿646, 678

ERISA plan beneficiaries alleged that they suffered particularized injury from claims administrator's denial of their claims, as required for beneficiaries to establish Article III standing to bring action for breach of fiduciary duty and improper denial of benefits, where internal guidelines used by administrator's clinicians in making coverage determinations, which guidelines were purportedly inconsistent with criteria explicitly mandated by state laws, applied to contractual benefits afforded to each individual beneficiary, and fact that beneficiaries did not ask court to determine whether they were individually entitled to benefits did not change fact that guidelines materially affected each beneficiary. U.S. Const. art. 3, § 2, cl. 1; Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C.A. §§ 1132(a)(1)(B), 1132(a)(3)(A), 1132(a)(3)(B).

16. Federal Civil Procedure ⚿103.2

For an injury to be "particularized" for purposes of Article III standing, it must affect the plaintiff in a personal and individual way. U.S. Const. art. 3, § 2, cl. 1.

See publication Words and Phrases for other judicial constructions and definitions.

17. Labor and Employment ⚿646, 678

ERISA plan beneficiaries' alleged injuries were fairly traceable to claims administrator's conduct, as required for beneficiaries to establish Article III standing to bring action for breach of fiduciary duty and improper denial of benefits, where beneficiaries' interest in proper interpretation of their contractual benefits, inability to know scope of coverage under their plans, and denial of coverage requests, were all connected to administrator's alleged conduct of improperly developing internal coverage guidelines in its own self-interest and using those improper guidelines in denying beneficiaries' coverage requests. U.S. Const. art. 3, § 2, cl. 1; Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C.A. §§ 1132(a)(1)(B), 1132(a)(3)(A), 1132(a)(3)(B).

18. Federal Civil Procedure ⚿103.3

An injury is "fairly traceable" for purposes of Article III standing where there is a causal connection between the injury and the defendant's challenged conduct. U.S. Const. art. 3, § 2, cl. 1.

See publication Words and Phrases for other judicial constructions and definitions.

19. Federal Courts ⚿3585(3)

A district court's class-certification decision is reviewed for an abuse of discretion.

20. Federal Civil Procedure ⚿162

A district court abuses its discretion when its class-certification ruling is based on an erroneous view of the law.

21. Federal Courts ⚿3629(3)

An appellate court reviews de novo the district court's interpretation of ERISA. Employee Retirement Income Security Act of 1974 § 2, 29 U.S.C.A. § 1001 et seq.

22. Federal Civil Procedure ⚿39

The Rules Enabling Act forbids interpreting the rule of civil procedure governing class actions to abridge, enlarge or modify any substantive right. 28 U.S.C.A. § 2072(b); Fed. R. Civ. P. 23.

23. Federal Civil Procedure ⚿184.5
Labor and Employment ⚿704

Whether proposed class of ERISA plan beneficiaries whose claims were denied based on claims administrator's application of internal guidelines that were allegedly inconsistent with the terms of the class members' plans and with state-mandated criteria were denied a full and fair review of their claims, such that they were entitled to have their claims remanded for reprocessing, could not be shown through evidence common to the class, and thus certification of class was not warranted; individual beneficiaries who demonstrated an error in the guidelines would not have been eligible for reprocessing without at least some showing that administrator employed an errant portion of the guidelines that related to his or her claims. 28 U.S.C.A. § 2072(b); Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C.A. § 1132(a)(1)(B); Fed. R. Civ. P. 23.

24. Federal Civil Procedure ⚿184.5

Proposed class of ERISA plan beneficiaries whose claims were denied based on claims administrator's application of internal guidelines that were allegedly inconsistent with the terms of the class members' plans and with state-mandated criteria was not ascertainable, and thus certification of class was not warranted; class was not limited to beneficiaries with claims that administrator denied under a specific guidelines provision or provisions challenged in the case that applied to beneficiary's own request for benefits, and some class members' claims could have been denied for reasons wholly independent of the guidelines even though the guidelines were referenced in their denial letters. 28 U.S.C.A. § 2072(b); Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C.A. § 1132(a)(1)(B); Fed. R. Civ. P. 23.

25. Federal Civil Procedure ⚿184.5
Labor and Employment ⚿644

Reprocessing of ERISA plan beneficiaries' claims, which beneficiaries alleged were wrongfully denied by claims administrator, was not an available remedy under ERISA's "catchall" remedy provision, where beneficiaries did show that a claim under ERISA section permitting a claimant to bring an action for provision of benefits or to enforce or clarify rights under the plan would not afford adequate relief or explain or refer to precedent showing how reprocessing constituted relief that was typically available in equity for infirm claims processing guidelines unrelated to beneficiaries' claim for benefits. 28 U.S.C.A. § 2072(b); Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C.A. §§ 1132(a)(1)(B), 1132(a)(3); Fed. R. Civ. P. 23.

26. Labor and Employment ⚿644

The section of ERISA permitting a plan participant or beneficiary to bring a civil action "to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or…to obtain other appropriate equitable relief…to redress such violations or…to enforce any provisions of [ERISA] or the terms of the plan" is a catchall provision to offer appropriate equitable relief for injuries that ERISA does not otherwise remedy. Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C.A. § 1132(a)(3).

27. Labor and Employment ⚿644

Where an alleged injury is improper denial of ERISA benefits, a claimant may not bring a claim for denial of benefits under ERISA's "catchall" remedy provision when a claim under the section permitting the claimant to bring an action for provision of benefits or to enforce or clarify rights under the plan will afford adequate relief. Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C.A. §§ 1132(a)(1)(B), 1132(a)(3).

28. Labor and Employment ⚿660

An individual bringing a claim under ERISA's "catchall" remedy provision may seek appropriate equitable relief, which refers to those categories of relief that, traditionally speaking, i.e., prior to the merger of law and equity, were typically available in equity. Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C.A. § 1132(a)(3).

29. Labor and Employment ⚿411

ERISA focuses on the written terms of the plan which, in short, are at the center of ERISA. Employee Retirement Income Security Act of 1974 § 2, 29 U.S.C.A. § 1001 et seq.

30. Labor and Employment ⚿688

Where an ERISA benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan, courts ordinarily review the plan administrator's decisions for an abuse of discretion. Employee Retirement Income Security Act of 1974 § 2, 29 U.S.C.A. § 1001 et seq.

31. Labor and Employment ⚿439

An ERISA plan administrator's interpretation of the terms of the plan is an abuse of discretion if the interpretation is unreasonable. Employee Retirement Income Security Act of 1974 § 2, 29 U.S.C.A. § 1001 et seq.

32. Labor and Employment ⚿439

Where an ERISA plan administrator or fiduciary has a conflict of interest, review of its interpretation of the terms of the plan will be informed by the nature, extent, and effect on the decision-making process of such conflict. Employee Retirement Income Security Act of 1974 § 2, 29 U.S.C.A. § 1001 et seq.

33. Federal Courts ⚿3629(3)

An appellate court reviews de novo a district court's choice and application of the standard of review to decisions by fiduciaries in ERISA cases. Employee Retirement Income Security Act of 1974 § 2, 29 U.S.C.A. § 1001 et seq.

34. Federal Courts ⚿3629(3)

An appellate court reviews a district court's findings of fact in an ERISA case for clear error. Employee Retirement Income Security Act of 1974 § 2, 29 U.S.C.A. § 1001 et seq.

35. Labor and Employment ⚿611

Claims administrator for ERISA plans did not abuse its discretionary authority to interpret plans' terms by developing internal guidelines for use by administrator's clinicians in making coverage determinations, although plans provided that precondition for coverage was that

treatment be consistent with generally accepted standards of care (GASC) and guidelines were purportedly more restrictive than GASC, where GASC precondition did not compel administrator to cover all treatment that was consistent with GASC, plans did not require administrator to develop guidelines that mirrored GASC, and while treatment consistent with GASC was precondition to coverage, there were other provisions excluding certain treatments even if they were consistent with GASC. Employee Retirement Income Security Act of 1974 § 2, 29 U.S.C.A. § 1001 et seq.

36. Labor and Employment ⚿612

Where an ERISA plan administrator has a dual role as plan administrator and plan insurer, there is a structural conflict of interest. Employee Retirement Income Security Act of 1974 § 2, 29 U.S.C.A. § 1001 et seq.

37. Labor and Employment ⚿688, 690

Abuse-of-discretion review applies to an ERISA discretion-granting plan even if the plan administrator has a conflict of interest; the conflict is weighed as a factor in determining whether the administrator abused its discretion. Employee Retirement Income Security Act of 1974 § 2, 29 U.S.C.A. § 1001 et seq.

38. Federal Courts ⚿3785

Remand to the district court was required so that it could consider in the first instance whether class of ERISA plan beneficiaries was required to comply with plan's administrative-exhaustion requirement before bringing action against plan administrator for breach of fiduciary duty and improper denial of benefits, and if so, whether that requirement was satisfied by the unnamed class members, where district court did not decide the issue below, and instead, assumed that the exhaustion requirement applied, but that the unnamed class members were excused from exhausting their claims because the named class members had exhausted their remedies. Employee Retirement Income Security Act of 1974 §§ 502, 503, 29 U.S.C.A. §§ 1132(a)(1)(B), 1132(a)(3)(A), 1132(a)(3)(B), 1133(2).

39. Labor and Employment ⚿650

Exhaustion of administrative remedies is required under ERISA if a plaintiff's statutory claim is a disguised claim for benefits. Employee Retirement Income Security Act of 1974 §§ 502, 503, 29 U.S.C.A. §§ 1132(a)(1)(B), 1132(a)(3)(A), 1132(a)(3)(B), 1133(2).

Appeal from the United States District Court for the Northern District of California, Joseph C. Spero, Magistrate Judge, Presiding, D.C. Nos. 3:14-cv-02346-JCS, 3:14-cv-05337-JCS

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Illinois; Kwame Raoul, Illinois Attorney General; Illinois Attorney General's Office, Chicago, Illinois; Aaron M. Frey, Maine Attorney General, Augusta, Maine; Ellen F. Rosenblum, Oregon Attorney General, Salem, Oregon; Charity R. Clark, Vermont Attorney General, Montpelier, Vermont; Robert W. Ferguson, Washington Attorney General, Olympia, Washington; Anthony G. Brown, Maryland Attorney General, Baltimore, Maryland; Dana Nessel, Michigan Attorney General, Lansing, Michigan; Aaron D. Ford, Nevada Attorney General, Carson City, Nevada; Matthew J. Platkin, New Jersey Attorney General, Trenton, New Jersey; Letitia James, New York Attorney General, New York, New York; for Amici Curiae Rhode Island, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Vermont, Washington, and the District of Columbia.

Before: Morgan Christen and Danielle J. Forrest, Circuit Judges, and Michael M. Anello,* District Judge.

Order;

Opinion by Judge Anello

ORDER

The opinion filed on January 26, 2023, is vacated, and replaced with the concurrently filed opinion. The pending petition for panel rehearing [128] is **GRANTED.** Because we grant the petition for panel rehearing, the petition for rehearing en banc is **DENIED** as moot. The amicus curiae motions [133, 134, & 140], and motion for leave to file a reply in support of the petition for rehearing [147] are also **DENIED** as moot. Subsequent petitions for rehearing or rehearing en banc, if any, are permissible.

OPINION

ANELLO, District Judge:

United Behavioral Health ("UBH") appeals from the district court's judgment finding it liable to classes of Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA") plaintiffs under 29 U.S.C. §§ 1132(a)(1)(B) and (a)(3), as well as several pre-and post-trial orders, including class certification, summary judgment, and a remedies order. UBH contends on appeal that Plaintiffs lack Article III standing, and that the district court erred at class certification and trial in several respects. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse in part.

I

UBH is one of the nation's largest managed healthcare organizations. It administers insurance benefits for mental health conditions and substance use disorders for various commercial health benefit plans. In this role, UBH processes coverage requests made by plan members to determine whether the treatment sought is covered under the respective plans. UBH retains discretion to make these coverage determinations "for specific treatment for specific members based on the coverage terms of the member's plan."

Individually named plaintiffs David and Natasha Wit, Brian Muir, Brandt Pfeifer, Lori Flanzraich, Cecilia Holdnak, Gary Alexander, Corinna Klein, David Haffner, Linda Tillitt, and Michael Driscoll (collectively, "Plaintiffs") are all beneficiaries of ERISA-governed health benefit plans for which UBH was the claims administrator. Plaintiffs all submitted coverage requests, which UBH denied.

* The Honorable Michael M. Anello, United States District Judge for the Southern District of California, sitting by designation.

Plaintiffs initiated this action on behalf of three putative classes, asserting, at issue here, two claims against UBH. The first is for breach of fiduciary duty pursuant to 29 U.S.C. § 1132(a)(1)(B) and "to the extent the injunctive relief Plaintiffs seek is unavailable under that section, they assert the claim under 29 U.S.C. § 1132(a)(3)(A)." Second, Plaintiffs brought an improper denial of benefits claim under 29 U.S.C. §§ 1132(a)(1)(B) and (a)(3)(B). Both of Plaintiffs' claims hinge on a theory that UBH improperly developed and relied on internal guidelines that were inconsistent with the terms of the class members' plans and with state-mandated criteria.[1]

Among the individually named Plaintiffs, there are ten different ERISA plans. Among the class members, there may be as many as 3,000 different plans. The Parties stipulated to a sample class of 106 members, from which they submitted a sample of health insurance plans (the "Plans"). Plaintiffs alleged that the Plans required, as a condition of coverage, that treatment be consistent with generally accepted standards of care ("GASC") or were governed by state laws specifying certain criteria for making coverage or medical necessity determinations. Some of the plans administered by UBH were fully insured plans where UBH served a dual role as a plan administrator and insurer, both authorized to determine the benefits owed and responsible for paying such benefits.

The Plans provide that a precondition for coverage is that treatment be consistent with GASC. The Plans contain additional conditions and exclusions, and Plaintiffs did "not dispute that a service that is consistent with [GASC] may, nonetheless, be excluded from coverage under a particular class member's plan." For example, some plans may exclude "[s]ervices that extend beyond the period necessary for evaluation, diagnosis, the application of evidence-based treatments, or crisis intervention to be effective." Some plans also may require that the service be the "least costly alternative." The Plans grant UBH discretion to interpret these various terms and determine whether a requested service is covered.

UBH employed two different processes to determine whether a requested service was covered. First, where the requested service was subject to a Plan exclusion, UBH issued an administrative denial. Administrative denials did not involve clinical reviews and are not at issue in this appeal. Second, for those claims not administratively denied, UBH conducted a clinical review, by which UBH Peer Reviewers made clinical coverage determinations. To assist with these clinical coverage determinations, UBH developed internal guidelines used by UBH's clinicians. These guidelines included the challenged Level of Care Guidelines and Coverage Determination Guidelines ("Guidelines"). The Level of Care Guidelines were used for all Plans that limited coverage to medically necessary services. The Coverage Determination Guidelines were used for all plans not containing a medical necessity requirement. The Guidelines applied across Plans and were not customized based on specific plan terms. For this reason, among others, Plaintiffs argue that the Guidelines implemented only the plan exclusion for coverage inconsistent with GASC, which appeared in all plans.

UBH issued new Level of Care Guidelines each year, which contained several parts. Following an introduction, the Level of Care Guidelines established "Common

1. Plaintiffs also alleged that UBH developed the Guidelines to benefit its self-serving financial interests in breach of its fiduciary duties.

Criteria" that applied to coverage at all levels of care. They also included sections devoted to each specific level of care, including residential treatment, intensive outpatient treatment, and outpatient treatment.[2] Applicable to both the Common Criteria and the level of care sections, the Level of Care Guidelines provided specific requirements governing patients' admittance to, continuation of, and discharge from care. For example, the 2014 Level of Care Guidelines Common Criteria provided that admission to any level of care is appropriate only where "[t]he member's current condition cannot be safely, efficiently, and effectively assessed and/or treated in a less intensive setting due to acute changes in the member's signs and symptoms and/or psychosocial and environmental factors." Another criteria for admission to any level of care was that the "[s]ervices are within the scope of the provider's professional training and licensure." Plaintiffs challenge the former as more restrictive than GASC, but they do not challenge the latter.

The Coverage Determination Guidelines were structured differently. Rather than focusing on level of care, most were organized by diagnosis. For instance, one set of Coverage Determination Guidelines addressed treatment of bulimia nervosa, while another addressed trauma-and stressor-related disorders. Each set of Coverage Determination Guidelines provided detailed information about the appropriate treatment for the specific diagnosis. Each set of Coverage Determination Guidelines also referred to the Level of Care Guidelines. Although the references to the Level of Care Guidelines took a variety of forms and some Coverage Determination Guidelines referred to Level of Care Guidelines only "as support in a specific paragraph or paragraphs," the district court concluded that each set of Coverage Determination Guidelines fully incorporated by reference the Level of Care Guidelines. With the exception of the Coverage Determination Guidelines for Custodial Care, Plaintiffs challenge the Coverage Determination Guidelines only to the extent that they incorporate the Level of Care Guidelines.

Plaintiffs alleged that many aspects of the Level of Care Guidelines were more restrictive than GASC and were also more restrictive than state-mandated criteria for making medical-necessity or coverage determinations. Plaintiffs further alleged that UBH breached its fiduciary duties to act solely in the interests of the participants and beneficiaries to develop coverage criteria consistent with GASC. UBH also allegedly breached its fiduciary duties by developing guidelines inconsistent with criteria explicitly mandated by state laws. Plaintiffs further contended that UBH breached its duties by promulgating self-serving, cost-cutting guidelines that are more restrictive than the Plans. As to their denial of benefits claim, Plaintiffs argued that UBH violated ERISA by improperly denying Plaintiffs benefits based on its Guidelines, which Plaintiffs allege are more restrictive than the Plans or criteria mandated by state laws.

Plaintiffs sought certification of three proposed classes as to both claims: (1) the *Wit* Guideline Class; (2) the *Wit* State Mandate Class; and (3) the *Alexander* Guideline Class. The *Wit* Guideline Class was defined as:

> Any member of a health benefit plan governed by ERISA whose request for coverage of residential treatment services for a mental illness or substance use disorder was denied by UBH, in

2. The Level of Care Guidelines included sections addressing several other levels of care, but those are not at issue in this appeal.

whole or in part, on or after May 22, 2011, based upon UBH's Level of Care Guidelines or UBH's Coverage Determination Guidelines.

The *Wit* Guideline Class excludes members of the *Wit* State Mandate Class, as defined below.

The *Wit* State Mandate Class was defined as:

> Any member of a fully-insured health benefit plan governed by both ERISA and the state law of Connecticut, Illinois, Rhode Island or Texas, whose request for coverage of residential treatment services for a substance use disorder was denied by UBH, in whole or in part, [within the Class period], based upon UBH's Level of Care Guidelines or UBH's Coverage Determination Guidelines and not upon the level-of-care criteria mandated by the applicable state law. . . .

The *Alexander* Guideline Class was defined as:

> Any member of a health benefit plan governed by ERISA whose request for coverage of outpatient or intensive outpatient services for a mental illness or substance use disorder was denied by UBH, in whole or in part, on or after May 22, 2011, based upon UBH's Level of Care Guidelines or UBH's Coverage Determination Guidelines.
>
> The *Alexander* Guideline Class excludes any member of a fully insured plan governed by both ERISA and the state law of Connecticut, Illinois, Rhode Island or Texas, whose request for coverage of intensive outpatient treatment or outpatient treatment related to a substance use disorder.

The classes differ in that the *Wit* State Mandate Class includes members whose denial of benefits was based on UBH's Guidelines and not on state-mandated level-of-care criteria. The Guideline classes include members whose denials were based on the Guidelines and not on the terms of the Plans. The *Wit* Guideline Class included members who requested coverage of residential treatment services, whereas the *Alexander* Guideline Class included members who requested coverage of outpatient or intensive outpatient services.

For their breach of fiduciary duties claim, Plaintiffs sought injunctive and declaratory relief. As to their denial of benefits claim, Plaintiffs sought reprocessing of their claims [3] and argued:

> Individual circumstances are . . . irrelevant to [this claim]. Plaintiffs are ***not*** asking this Court to determine whether Class members were owed benefits or whether UBH should be ordered to cause its plans to pay such benefits. Rather, Plaintiffs seek a reprocessing remedy, which stems directly from their allegation that UBH used an arbitrary process, premised on fatally flawed Guidelines, to deny their requests for coverage. For that reason, Plaintiffs need not prove at trial that UBH reached the wrong outcome in every single one of its coverage determinations.

UBH disagreed, arguing that individualized inquiries were needed to adjudicate the class claims, and it submitted an expert report containing examples of potential class members whose claims were denied at the initially requested level of care but who ultimately accepted alternate care, or whose claim was denied both because the requested treatment was inconsistent with the Guidelines and for other unrelated reasons.

3. Plaintiffs relatedly sought a declaration that UBH's denial of benefits was improper and an order for UBH to apply the new guidelines in processing future claims.

At a class certification hearing, the district court stated: "The complaint asserts denial of benefit claims for a variety of reasons other than the restrictive guidelines theory, and the question is are those still in the case? It's transparent to me, I guess, that you're not seeking certification on those." Plaintiffs stipulated that "if the case is certified as a class case" then "additional theories" requiring "individualized inquiries as to why UBH's denials of the named Plaintiffs' claims for benefits were wrongful" would "not be part of this case." Plaintiffs also asserted at the class certification hearing that their denial of benefits claim was "a process claim," because the claim is "about the fact that UBH used criteria that were inconsistent with the terms of the member's plans."

On September 19, 2016, the district court granted Plaintiffs' motion to certify these classes.[4] In its order, the district court stated:

> Of particular significance is the fact that Plaintiffs do not ask the Court to make determinations as to whether class members were *actually* entitled to benefits (which would require the Court to consider a multitude of individualized circumstances relating to the medical necessity for coverage and the specific terms of the member's plan).

In this same order, the district court addressed whether the class would be ascertainable, and described a UBH database containing denial letters, which could identify any denial that "referenced," the Guidelines. Later, when the district court partially decertified the class, it explained:

> First and foremost, the injury that is the basis of Plaintiffs' claims was the adoption and use of flawed Guidelines in deciding whether Plaintiffs were entitled to coverage. As the Court explained on summary judgment, such an injury is cognizable under ERISA and consistent with existing case law, which does not require that Plaintiffs demonstrate that the flaws in UBH's Guidelines were the but-for cause of the denial of their benefits.

Beginning October 16, 2017, the district court held a ten-day bench trial. The district court, in its post-trial findings of fact and conclusions of law, relied upon Plaintiffs' representations that their denial of benefits claim was a "process claim" only, stating "Plaintiffs stipulated at the class certification stage of the case that they do not ask the Court to make determinations as to whether individual class members were actually entitled to benefits .... Rather, they assert only facial challenges to the Guidelines."

The district court entered judgment in Plaintiffs' favor, concluding that UBH breached its fiduciary duties and wrongfully denied benefits because the Guidelines impermissibly deviated from GASC and state-mandated criteria. The district court also found that financial incentives infected UBH's Guideline development process, particularly where the Guidelines "were riddled with requirements that provided for narrower coverage than is consistent with" GASC. Based on these findings, the district court concluded that UBH breached its fiduciary duty to comply with Plan terms and breached its duties of loyalty and care "by adopting Guidelines that are unreasonable and do not reflect" GASC. It also held that UBH improperly denied Plaintiffs benefits by relying on its restrictive Guidelines that were inconsistent with the Plan terms and state law.

4. The district court later issued an order partially decertifying the class to exclude class members who successfully appealed their coverage denials, members who were initially improperly included because of a "flaw in the method used to identify class members," and to modify the Illinois State Mandate Class period.

The parties had stipulated, and the district court found, that the Plans gave UBH discretionary authority to create tools, such as the Guidelines, to facilitate interpretation and administration of the Plans. But the district court viewed UBH's interpretation with "significant skepticism" because it found that UBH had a financial conflict of interest and a structural conflict of interest as a dual administrator and insurer for some plans. Ultimately, the district court held that UBH's interpretation embodied in the Guidelines was unreasonable and an abuse of discretion.

In its extensive Findings of Fact and Conclusions of Law, the district court excused any unnamed class members for failing to exhaust their administrative remedies under the Plans despite acknowledging evidence that "some class members who did not exhaust available administrative remedies were required under their Plans to exhaust those remedies before they could bring a legal action against UBH." The district court cited to one of the sample plans, which states: "You cannot bring any legal action against us to recover reimbursement until you have completed all the steps [described in the plan]." The district court further found that exhaustion would have been futile.

The district court issued declaratory and injunctive relief, directed the implementation of court-determined claims processing guidelines, ordered "reprocessing" of all class members' claims in accordance with the new guidelines, and appointed a special master to oversee compliance for ten years.

II

[1, 2] ERISA is a federal statute designed to regulate "employee benefit plan[s]." 29 U.S.C. § 1003(a). Congress enacted ERISA "to promote the interests of employees and their beneficiaries in employee benefit plans," *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), "by setting out substantive regulatory requirements for employee benefit plans and to 'provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts,' " *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004) (alteration in original) (quoting 29 U.S.C. § 1001(b)). "The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans." *Id.*

[3–6] ERISA does not "require[ ] employers to establish employee benefits plans." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996). "Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Id.* (first citing *Shaw*, 463 U.S. at 91, 103 S.Ct. 2890; and then citing *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981)). Rather, ERISA "ensure[s] that employees will not be left empty-handed once employers have guaranteed them certain benefits." *Id.* The Supreme Court has "recognized that ERISA represents a 'careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans.' " *Conkright v. Frommert*, 559 U.S. 506, 517, 130 S.Ct. 1640, 176 L.Ed.2d 469 (2010) (quoting *Aetna Health*, 542 U.S. at 215, 124 S.Ct. 2488). "Congress sought 'to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.' " *Id.* (alterations in original) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996)). "ERISA 'induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial

orders and awards when a violation has occurred.' " *Id.* (alteration in original) (quoting *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379, 122 S.Ct. 2151, 153 L.Ed.2d 375 (2002), *overruled in part on other grounds by Ky. Ass'n of Health Plans v. Miller*, 538 U.S. 329, 123 S.Ct. 1471, 155 L.Ed.2d 468 (2003)).

[7] Accordingly, 29 U.S.C. § 1132(a) "set[s] forth a comprehensive civil enforcement scheme." *Aetna Health*, 542 U.S. at 208, 124 S.Ct. 2488 (2004) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987), *overruled in part on other grounds by Miller*, 538 U.S. 329, 123 S.Ct. 1471).

III

[8] UBH argues that Plaintiffs lacked Article III standing to bring their claims because: (1) Plaintiffs did not suffer concrete injuries; and (2) Plaintiffs did not show proof of benefits denied, and so they cannot show any damages traceable to UBH's Guidelines. We disagree. We review de novo the district court's determination that Plaintiffs have Article III standing. *See Spinedex Physical Therapy USA Inc. v. United Healthcare of Ariz., Inc.*, 770 F.3d 1282, 1288 (9th Cir. 2014).

[9, 10] To establish standing under Article III, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, —— U.S. ——, 141 S. Ct. 2190, 2203, 210 L.Ed.2d 568 (2021) (citing *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). "If 'the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve.' " *Id.* (quoting *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 333 (7th Cir. 2019)).

[11] To determine whether a statutory violation caused a concrete injury, we ask: "(1) whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests." *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1270–71 (9th Cir. 2019) (alteration in original) (quoting *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1113 (9th Cir. 2017)).

A

[12, 13] We find Plaintiffs sufficiently alleged a concrete injury as to their fiduciary duty claim. ERISA's core function is to "protect contractually defined benefits," *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 100, 133 S.Ct. 1537, 185 L.Ed.2d 654 (2013) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985)), and UBH's alleged fiduciary violation presents a material risk of harm to Plaintiffs' interest in their contractual benefits, *see Ziegler v. Conn. Gen. Life Ins. Co.*, 916 F.2d 548, 551 (9th Cir. 1990) ("Congress intended to make fiduciaries culpable for certain ERISA violations even in the absence of actual injury to a plan or participant."). Under the fiduciary duties section of ERISA, a fiduciary has a duty to administer plans "solely in the interest of the participants and beneficiaries . . . with . . . care, skill, prudence, and diligence," and "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a). Plaintiffs alleged that UBH administered their Plans in UBH's financial self-interest and in conflict with Plan terms. This presents a material risk of harm to Plaintiffs' ERISA-defined right to have their contractual ben-

efits interpreted and administered in their best interest and in accordance with their Plan terms. Their alleged harm further includes the risk that their claims will be administered under a set of Guidelines that impermissibly narrows the scope of their benefits and also includes the present harm of not knowing the scope of the coverage their Plans provide. The latter implicates Plaintiffs' ability to make informed decisions about the need to purchase alternative coverage and the ability to know whether they are paying for unnecessary coverage.

[14] We also find Plaintiffs alleged a concrete injury as to the denial of benefits claim. As explained, ERISA protects contractually defined benefits, *see McCutchen*, 569 U.S. at 100, 133 S.Ct. 1537. Plaintiffs alleged a harm—the arbitrary and capricious adjudication of benefits claims—that presents a material risk to their interest in fair adjudication of their entitlement to their contractual benefits. Plaintiffs need not have demonstrated that they were, or will be, entitled to benefits to allege a concrete injury. *See CIGNA Corp. v. Amara*, 563 U.S. 421, 424–25, 131 S.Ct. 1866, 179 L.Ed.2d 843 (2011); *cf. Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993) ("When the government erects a barrier that makes it more difficult for" someone "to obtain a benefit" a plaintiff challenging "the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing").

B

[15, 16] We also find that Plaintiffs alleged a particularized injury as to both claims. "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.' " *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016) (citation omitted), *as revised* (May 24, 2016). Plaintiffs' alleged injuries are particularized because the Guidelines are applied to the contractual benefits afforded to each individual class member. The fact that Plaintiffs did not ask the court to determine whether they were individually entitled to benefits does not change the fact that the Guidelines materially affected each Plaintiff. *Cf. Thole v. U.S. Bank N.A.*, —— U.S. ——, 140 S. Ct. 1615, 207 L.Ed.2d 85 (2020) (holding no injury where alleged ERISA violations had no effect on plaintiffs' *defined benefit plan*).

[17, 18] Finally, Plaintiffs' alleged injuries are "fairly traceable" to UBH's conduct. An injury is "fairly traceable" where there is a causal connection between the injury and the defendant's challenged conduct. *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. Plaintiffs' alleged injuries are fairly traceable to UBH's conduct because their interest in the proper interpretation of their contractual benefits, inability to know the scope of coverage under their Plans, and denial of coverage requests, are all connected to UBH's alleged conduct of improperly developing Guidelines in its own self-interest and using those improper Guidelines in denying Plaintiffs' coverage requests.

IV

[19–21] UBH also appeals from the district court's class certification order. The district court's class certification decision is reviewed for an abuse of discretion. *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 984 (9th Cir. 2015). A district court abuses its discretion when its ruling is based "on an erroneous view of the law." *Id.* (citation omitted). We review de novo the district court's interpretation of ERISA. *See Shaver v. Operating Eng'rs Loc. 428 Pension Tr. Fund*, 332 F.3d 1198, 1201 (9th Cir. 2003). UBH argues that the

district court erred in certifying the three classes based on Plaintiffs' "novel reprocessing theory" because Rule 23 of the Rules of Civil Procedure and the Rules Enabling Act, 28 U.S.C. § 2072(b), forbid using the class action procedure to expand or modify substantive rights. As to Plaintiffs' denial of benefits claim, we agree.[5]

[22] "[T]he Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) (quoting 28 U.S.C. § 2072(b)). We must therefore begin with the ERISA statute to determine Plaintiffs' substantive rights.

As discussed above, the purpose of ERISA is to "provide a uniform regulatory regime over employee benefit plans." *Aetna Health*, 542 U.S. at 208, 124 S.Ct. 2488. Accordingly, 29 U.S.C. § 1132(a) "set[s] forth a comprehensive civil enforcement scheme" for accomplishing the overall purposes of ERISA. *Id.* (quoting *Dedeaux*, 481 U.S. at 54, 107 S.Ct. 1549). Two provisions are particularly relevant: § 1132(a)(1)(B) and § 1132(a)(3). Under § 1132(a)(1)(B), "[i]f a participant or beneficiary believes that benefits promised to him under the terms of the plan are not provided, he can bring suit seeking provision of those benefits. A participant or beneficiary can also bring suit generically to 'enforce his rights' under the plan, or to clarify any of his rights to future benefits." *Id.* at 210, 124 S.Ct. 2488 (quoting 29 U.S.C. § 1132(a)(1)(B)).

[23] Plaintiffs argue that under ERISA, beneficiaries have a right to a "full and fair review" under the correct standard, *Buffonge v. Prudential Ins. Co. Of Am.*, 426 F.3d 20, 30 (1st Cir. 2005), and that where an administrator applies the wrong standard, remand is the appropriate remedy to enforce the right to full and fair review under the plan. While remand may be an appropriate remedy in some cases where an administrator has applied an incorrect standard, we conclude that the district court erred in granting class certification here based on its determination that the class members were entitled to have their claims reprocessed regardless of the individual circumstances at issue in their claims.

We have ordered remand for claim reprocessing where a plaintiff has shown that his or her claim was denied based on the wrong standard *and* that he or she might be entitled to benefits under the proper standard. *See, e.g.*, *Saffle v. Sierra Pac. Power Co. Bargaining Unit Long Term Disability Income Plan*, 85 F.3d 455, 458, 460–61 (9th Cir. 1996); *Patterson v. Hughes Aircraft Co.*, 11 F.3d 948, 949–51 (9th Cir. 1993). We have never held that a plaintiff is entitled to reprocessing without a showing that application of the wrong standard could have prejudiced the claimant. In fact, we have declined to remand for reevaluation where it would be a "useless formality" because the administrator's alleged error did not prejudice the claimant or it was clear that the claimant was ineligible for benefits. *See Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1095–96 (9th Cir. 1985) (concluding a remand was an unnecessary and would be a "useless formality" where plaintiff was ineligible for benefits), *abrogated on other grounds by Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1527 (9th Cir. 1993); *see also*

5. UBH's Rule 23 argument in its Opening Brief disputed class certification only on the grounds that Plaintiffs facially challenged the Guidelines and have asserted a "novel reprocessing theory" to advance their denial of benefits claim on a class-wide basis. This argument does not implicate a Rules Enabling Act issue as to the fiduciary duty claim. Thus, we deem any challenge to certification of the breach of fiduciary duty claim forfeited, and our analysis leaves class certification as to that claim intact.

Hancock v. Montgomery Ward Long Term Disability Tr., 787 F.2d 1302, 1308 (9th Cir. 1986) (declining to remand where plaintiff did not establish she was prejudiced by alleged procedural defect). Other circuits have similarly declined to remand for claim reevaluation or reprocessing where it would be futile. *See, e.g.*, *Judge v. Metro. Life Ins. Co.*, 710 F.3d 651, 659–60 (6th Cir. 2013) (concluding that "even if [defendant] were found to have applied an incorrect definition of [the relevant plan term], a remand to [defendant] for reconsideration under the correct definition would be unavailing" where the defendant "would undoubtedly reach the same conclusion"); *Giordano v. Thomson*, 564 F.3d 163, 168 n.3 (2d Cir. 2009) (declining to reach claim that plaintiff was denied a "full and fair review" because "[r]emand would be futile").

[24] Plaintiffs further argue that class certification was proper because the Guidelines "were 'riddled' with errors, [and] the District Court found that every Guidelines-based denial *necessarily* implicated one or more of the many defects the District Court found." Plaintiffs are correct that the district court reasoned that because the Guidelines were "significantly and pervasively more restrictive than" GASC in eight specific ways, "every adverse benefit determination made by UBH based in whole or in part on any of the Guidelines . . . was wrongful and made in violation of plan terms and ERISA." But this conclusion is not supported by the record.

Plaintiffs defined their proposed classes such that every class member's claim was denied, at least in part, based on UBH's application of the Guidelines. The district court found that the Level of Care Guidelines represented UBH's interpretation of GASC. It then made detailed findings illustrating that many provisions of the Level of Care Guidelines were more restrictive than GASC. These factual findings are not challenged on appeal. But there are also many provisions of the Level of Care Guidelines that Plaintiffs did not challenge and that the district court did not find to be overly restrictive. Plaintiffs do not show that claimants who were denied coverage solely based on unchallenged provisions of these Guidelines were denied a full and fair review, yet those claimants are included in the certified classes.

The flaw in class certification is even more apparent with regard to the Coverage Determination Guidelines. The district court found that the Coverage Determination Guidelines incorporated the Level of Care Guidelines, but the incorporation of flawed Level of Care Guidelines does not demonstrate that class members whose claims were denied under the Coverage Determination Guidelines were necessarily denied a full and fair review. The Coverage Determination Guidelines included many unchallenged provisions, and some Coverage Determination Guidelines incorporated the Level of Care Guidelines only "as support in a specific paragraph or paragraphs." There is no indication that a claimant whose claim was denied under one of the many unchallenged provisions in the Coverage Determination Guidelines failed to receive a full and fair review of his or her claim. Nonetheless, such claimants were included in the classes.

Also fatal to Plaintiffs' argument is that the classes were defined as members whose claims were denied *in part* based on the Guidelines. And the district court determined such classes were ascertainable based on a UBH database that could identify denials that merely referenced the Guidelines. UBH pointed to at least some evidence that some class members' claims may have been denied for reasons wholly independent of the Guidelines even though the Guidelines were referenced in their

denial letters. For such class members, remand for reevaluation may be a "useless formality," *Ellenburg*, 763 F.2d at 1096, if UBH's alleged error in utilizing the Guidelines did not prejudice them.

In sum, on this record Plaintiffs have fallen short of demonstrating that all class members were denied a full and fair review of their claims or that such a common showing is possible. An individual plaintiff who demonstrated an error in the Guidelines would not be eligible for reprocessing without at least some showing that UBH employed an errant portion of the Guidelines that related to his or her claim. Because the classes were not limited to those claimants whose claims were denied based only on the challenged provisions of the Guidelines, Rule 23 was applied in a way that enlarged or modified Plaintiffs' substantive rights in violation of the Rules Enabling Act. *See Dukes*, 564 U.S. at 367, 131 S.Ct. 2541.

[25–27] The district court also abused its discretion by concluding that the reprocessing remedy could arise under § 1132(a)(3). Section 1132(a)(3) is a "catch-all" provision that allows appropriate equitable relief for injuries that § 1132 does not otherwise remedy. *Varity*, 516 U.S. at 511–12, 515, 116 S.Ct. 1065; *see also Moyle v. Liberty Mut. Ret. Benefit Plan*, 823 F.3d 948, 959 (9th Cir. 2016), *as amended on denial of reh'g and reh'g en banc* (Aug. 18, 2016). Where the alleged injury is improper denial of benefits, "a claimant may not bring a claim for denial of benefits under § 1132(a)(3) when a claim under § 1132(a)(1)(B) will afford adequate relief." *Castillo v. Metro. Life Ins. Co.*, 970 F.3d 1224, 1229 (9th Cir. 2020). Here, the type of relief that Plaintiffs seek is not available under § 1132(a)(3) where they declined to make the showing necessary to seek relief under § 1132(a)(1)(B).

[28] Further, "[a]n individual bringing a claim under § 1132(a)(3) may seek 'appropriate equitable relief,' which refers to 'those categories of relief that, traditionally speaking (*i.e.*, prior to the merger of law and equity) were typically available in equity.' " *Castillo*, 970 F.3d at 1229 (quoting *CIGNA Corp. v. Amara*, 563 U.S. 421, 439, 131 S.Ct. 1866, 179 L.Ed.2d 843 (2011)). Plaintiffs and the district court did not explain or refer to precedent showing how reprocessing constitutes relief that was typically available in equity for infirm Guidelines unrelated to Plaintiffs' claim for benefits. Consequently, the district court erred in concluding that reprocessing was an available remedy under 29 U.S.C. § 1132(a)(3).

The district court abused its discretion in certifying Plaintiffs' denial of benefits claims as class actions. Therefore, we reverse this part of the district court's class certification order.

V

Turning to the merits of Plaintiffs' claims, we begin by noting that the same errors present in the district court's denial of benefits class certification order also infected its merits and remedy determinations. Rather than determining whether UBH denied Plaintiffs' claims under a flawed provision of the Guidelines, the district court determined that remand was appropriate anytime UBH referenced any portion of the Guidelines in denying the claims.

UBH further argues that the district court erred by concluding that the Guidelines improperly deviated from GASC, and by failing to apply an appropriate level of deference to UBH's interpretation of the Plans. As an initial matter, UBH did not appeal the portions of the district court's judgment finding the Guidelines were impermissibly inconsistent with state-mandated criteria. This portion of the district court's decision therefore remains intact.

[29] As discussed above, ERISA does not "mandate what kind of benefits employers must provide." *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003) (quoting *Lockheed*, 517 U.S. at 887, 116 S.Ct. 1783). ERISA "focus[es] on the written terms of the plan" which "in short, [are] at the center of ERISA." *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 108, 134 S.Ct. 604, 187 L.Ed.2d 529 (2013). The question then is not whether ERISA mandates consistency with GASC—it does not—but whether UBH properly administered the Plans pursuant to the Plan terms. *See id.*

[30–34] "Where the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan, we ordinarily review the plan administrator's decisions for an abuse of discretion." *Schikore v. BankAmerica Suppl. Ret. Plan*, 269 F.3d 956, 960 (9th Cir. 2001); *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). The administrator's interpretation is an abuse of discretion if the interpretation is unreasonable. *Moyle*, 823 F.3d at 958. Where the administrator or fiduciary has a conflict of interest, review of its interpretation will be "informed by the nature, extent, and effect on the decision-making process" of such conflict. *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 967 (9th Cir. 2006). "We review de novo a district court's choice and application of the standard of review to decisions by fiduciaries in ERISA cases." *Williby v. Aetna Life Ins. Co.*, 867 F.3d 1129, 1133 (9th Cir. 2017) (quoting *Estate of Barton v. ADT Sec. Servs. Pension Plan*, 820 F.3d 1060, 1065 (9th Cir. 2016)). We review findings of fact for clear error. *Abatie*, 458 F.3d at 962.

[35] It is undisputed that the Plans in this case confer UBH with discretionary authority to interpret the Plan terms. The parties stipulated, and the district court found as a matter of fact, that this includes the discretion to create interpretive tools, such as the Guidelines. This finding was not clearly erroneous. Accordingly, UBH's interpretation of the Plans via its Guidelines is reviewed for an abuse of discretion. *Schikore*, 269 F.3d at 960. And the district court correctly identified this standard of review.

[36] But the district court also found that UBH had a significant conflict of interest and therefore gave little weight to UBH's interpretation of the Plans. Where an administrator has a dual role as plan administrator and plan insurer, there is a structural conflict of interest. *See Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 929 (9th Cir. 2012). UBH served such a dual role as Plan administrator and insurer (authorized to determine the benefits owed and responsible for paying such benefits) for at least some of the Plans. The district court found, in addition to this structural conflict of interest, that UBH also had a financial conflict because it was incentivized to keep benefit expenses down. Again, the district court's factual findings are not clearly erroneous.

[37] However, the district court's findings did not excuse it from applying the abuse of discretion standard. "Abuse of discretion review applies to a discretion-granting plan *even if* the administrator has a conflict of interest." *Abatie*, 458 F.3d at 965 (emphasis added). The conflict is weighed as a factor in determining whether the administrator abused its discretion. *Stephan*, 697 F.3d at 929; *see also Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115–17, 128 S.Ct. 2343, 171 L.Ed.2d 299 (2008). The district court purported to apply an abuse of discretion standard tempered by high skepticism of UBH's interpretation given UBH's conflict of interest. UBH ar-

gues that even under a tempered abuse of discretion standard, the district court improperly substituted its own interpretation of the Plans' terms by construing them to require coverage for all care consistent with GASC. Plaintiffs respond that the district court made no such mistake. Instead, they argue, the district court understood the Guidelines were specifically developed and employed to implement *only* the Plans' requirement that all care must be consistent with GASC in order to be covered.

To the extent the district court concluded that the challenged portions of the Guidelines represented UBH's *implementation* of the GASC requirement, we find no clear error. But to the extent the district court interpreted the Plans to require coverage for all care consistent with GASC, the court erred. Even assuming the conflicts of interest found by the district court warrant heavy skepticism against UBH's interpretation, UBH's interpretation that the Plans do not require coverage for all care consistent with GASC does not conflict with the plain language of the Plans. To the contrary, it gives effect to all the Plan provisions because the Plans exclude coverage for treatment *inconsistent* with GASC or otherwise condition treatment on consistency with GASC.[6] In short, while the Plans mandated that a treatment be consistent with GASC, they did not compel UBH to cover *all* treatment that was consistent with GASC.

The district court's statements on this issue are conflicting. In several places throughout its orders, the district court made clear its understanding that consistency with GASC was just one requirement for coverage, and that some plans excluded coverage for care that was consistent with GASC. But there are other places in the record where the district court stated the opposite. For instance, in its partial decertification order, the court described class members as those "covered by insurance plans that *require coverage consistent with generally accepted standards of care* but were denied coverage by UBH under [the] Guidelines." And the district court's final judgment directed that on remand, UBH must "re-evaluate only whether the proposed treatment at the requested level of care was consistent with generally accepted standards of care," even where the denial letter provided independent reasons for the denial of coverage. If the treatment was consistent with GASC, the court ordered UBH to pay the claims within 30 days.

We reverse the district court's judgment that UBH wrongfully denied benefits to the named Plaintiffs to the extent the district court concluded the Plans require coverage for all care consistent with GASC.[7]

VI

[38] Finally, UBH contends that the district court erred when it excused un-

6. UBH also argues that it did not abuse its discretion because substantial evidence supports the challenged portions of UBH's Guidelines. We hold that it was not error for the district court to rule that UBH abused its discretion because the challenged portions of the Guidelines did not *accurately* reflect GASC.

7. The district court's judgment on Plaintiffs' breach of fiduciary duty claim also relied heavily on its conclusion that the Guidelines impermissibly deviated from GASC. But this was not the only finding relevant to the district court's judgment on the breach of fiduciary duties claim. The district court also found, among other things, that financial incentives infected UBH's Guideline development process and that UBH developed the Guidelines with a view toward its own interests. Our decision does not disturb these findings to the extent they were not intertwined with an incorrect interpretation of the Plans.

named class members from demonstrating compliance with the Plans' administrative exhaustion requirement. We remand for the district court to determine in the first instance the threshold issue of whether the exhaustion requirement applies to the fiduciary claim and, if so, whether that requirement was satisfied by the unnamed class members or should otherwise be excused in light of our decision.

[39] Because we conclude that the district court erred in certifying Plaintiffs' denial of benefits claim, the only remaining class claim is for breach of fiduciary duty. Plaintiffs argue that exhaustion is not required for this statutory claim. We have held that exhaustion is not required for statutory breach of fiduciary duty claims. *See Spinedex*, 770 F.3d at 1294 (citing *Horan v. Kaiser Steel Ret. Plan*, 947 F.2d 1412, 1416 n. 1 (9th Cir.1991), *overruled on other grounds as recognized by Pac. Shores Hosp. v. United Behav. Health*, 764 F.3d 1030, 1041 (9th Cir. 2014)); *see also Guenther v. Lockheed Martin Corp.*, 972 F.3d 1043, 1052 (9th Cir. 2020). But exhaustion *is* required if a plaintiff's statutory claim is a disguised claim for benefits. *See Spinedex*, 770 F.3d at 1294; *see also Diaz v. United Agr. Emp. Welfare Ben. Plan & Tr.*, 50 F.3d 1478, 1484 (9th Cir. 1995). UBH argued below and argues on appeal that Plaintiffs' breach of fiduciary duty claim is such a "disguised benefit claim." The district court did not decide this issue, and instead assumed without deciding that the exhaustion requirement applies to Plaintiffs' breach of fiduciary duty claim. Based on that assumption, the district court held that the class members were excused from exhausting their claims because the named Plaintiffs exhausted their remedies, which put UBH on notice of the class members' facial challenges to the Guidelines, "thus fulfilling the purposes of UBH's internal grievance procedure." The district court further held that "in any event, exhaustion is not required because it would have been futile."

We decline to reach the merits of whether the district court erred in holding that the class members were excused from exhausting their claims. Instead, we remand for the district court to determine the threshold question of whether Plaintiffs' breach of fiduciary duty claim is a "disguised claim for benefits," subject to the exhaustion requirement. *See Spinedex*, 770 F.3d at 1294. If the district court determines that the exhaustion requirement does apply, it must then determine if that requirement was satisfied or otherwise excused in light of our resolution of the issues presented in this appeal.

VII

In sum, Plaintiffs have Article III standing to bring their breach of fiduciary duty and improper denial of benefits claims pursuant to 29 U.S.C. §§ 112(a)(1)(B) and (a)(3). And the district court did not err in certifying three classes to pursue the fiduciary duty claim. However, by certifying the denial of benefits classes without limiting the classes to those with claims that UBH denied under a specific Guidelines provision(s) challenged in this litigation that applied to the claimant's own request for benefits, the certification order improperly enlarged or modified Plaintiffs' substantive rights in violation of the Rules Enabling Act. Accordingly, we reverse the district court's certification of the denial of benefits classes.

On the merits, the district court erred to the extent it determined that the Plans require the Guidelines to be coextensive with GASC. Therefore, the judgment on Plaintiffs' denial of benefits claim is reversed, and to the extent the judgment on Plaintiffs' breach of fiduciary duty claim is based on the district court's erroneous interpretation of the Plans, it is also re-

versed. And we remand for the district court to answer the threshold question of whether Plaintiffs' fiduciary duty claim is subject to the exhaustion requirement.

AFFIRMED in part, REVERSED in part, and REMANDED FOR FURTHER PROCEEDINGS. Each party to bear its own costs.

Darrell Wayne FREDERICK, Petitioner - Appellant,

v.

Christe QUICK, Warden, Oklahoma State Penitentiary, Respondent - Appellee.[1]

No. 20-6131

United States Court of Appeals, Tenth Circuit.

FILED August 14, 2023

Background: After defendant's state-court convictions for first-degree murder, attempted assault with a dangerous weapon, and domestic abuse, and his death sentence, were affirmed on direct appeal, 400 P.3d 786, and after his state-court application for post-conviction relief was denied after an evidentiary hearing and the denial was affirmed on appeal, defendant filed a federal habeas petition. The United States District Court for the Western District of Oklahoma, Scott L. Palk, J., 2020 WL 4352749, denied the petition. Defendant obtained a certificate of appealability from the Court of Appeals on his claims of ineffective assistance by appellate counsel and of cumulative error.

Holdings: The Court of Appeals, Matheson, Circuit Judge, held that:

(1) state appellate court's affirmation of denial of postconviction relief based on argument that appellate counsel was ineffective for not asserting that trial counsel was ineffective for failing to present medical expert on cause of victim's injuries was based on a reasonable conclusion of no prejudice and on a reasonable determination of the facts;

(2) state appellate court's affirmation of denial of postconviction relief based on argument that appellate counsel was ineffective for not asserting that trial counsel was ineffective in cross-examining medical examiner was based on a reasonable conclusion of no prejudice and on a reasonable determination of the facts;

(3) state appellate court's affirmation of denial of postconviction relief based on argument that appellate counsel was ineffective for not asserting that trial counsel was ineffective in failing to object to statements by prosecutor in closing argument about medical examiner's testimony was based on a reasonable conclusion of no prejudice;

(4) state appellate court's affirmation of denial of postconviction relief based on argument that appellate counsel was ineffective for not asserting that trial counsel was ineffective for failing to present testimony about defendant's family and troubled childhood in trial's penalty phase was based on a reasonable conclusion of no prejudice and on a reasonable determination of the facts;

(5) state appellate court's affirmation of denial of postconviction relief based on argument that appellate counsel was ineffective for not asserting that trial

1. Christe Quick became warden of the Oklahoma State Penitentiary on July 3, 2023. We substitute her for her predecessor, Jim Farris, as Respondent under Fed. R. App. P. 43(c)(2).

EXHIBIT B

in keeping with the statute's text than is the Court's "revenue-saving" purpose. And this purpose—that is, the purpose of enabling the United States to meet its obligations under the Algiers Accords—is not in the least frustrated by permitting Elahi to attach the Cubic Judgment, a property that, as the Court concedes, is not subject to the Algiers Accords.

III

The facts of this case show the injustice of the Court's interpretation. The Court today puts an end to Elahi's decade-long quest to hold Iran to account for murdering his brother Cyrus. In 2000, Elahi won a wrongful-death lawsuit against Iran and was awarded some $6 million in compensatory damages. See *Elahi v. Islamic Republic of Iran*, 124 F.Supp.2d 97(DC). In April 2003, Elahi took what he must have considered a further step toward his goal when he accepted $2.3 million from the U.S. Government under the VTVPA.

After today's ruling, what once appeared Elahi's gain of $2.3 million now seems to be a loss of $500,000. By taking the VTVPA's $2.3 million, the Court holds, Elahi relinquished his right to the $2.8 million Cubic Judgment he had already attached. The practical effect of the Court's ruling is to turn the purpose of the VTVPA on its head. Rather than further Elahi's effort to obtain compensation for the murder of his brother, the Act has instead set him back half a million dollars. For the reasons given above, this result was not what Congress intended when it passed the VTVPA.

IV

Congress passed the Victims of Trafficking and Violence Protection Act and the Terrorism Risk Insurance Act to compensate victims of terrorism. Congress expressed this purpose both in the text of the principal provision interpreted here and in accompanying sections of the statute. By stripping Elahi of his right to attach the valid judgment against Cubic rendered by the District Court—a judgment not before the Claims Tribunal in any sense—the Court fails to give the statute its intended effect. These reasons explain my respectful dissent.

Jean Marc NKEN, Petitioner,

v.

Eric H. HOLDER, Jr., Attorney General.

No. 08–681.

April 22, 2009.

Argued Jan. 21, 2009.

Decided April 22, 2009.

Background: Petitioner, a native and citizen of Cameroon, petitioned for review of the Board of Immigration Appeals' (BIA) removal order in the Court of Appeals for the Fourth Circuit. The petition was denied. Petitioner then filed a second and third motion to reopen, which were also denied. The Court of Appeals for the Fourth Circuit denied petition for review. Petitioner then applied to the Supreme Court for a stay of removal pending adjudication of his petition for review, and asked in the alternative that certiorari be granted. The Supreme Court, —— U.S. ——, 129 S.Ct. 622, 172 L.Ed.2d 474, granted certiorari, and stayed petitioner's removal pending further order of the Court.

Holding: The Supreme Court, Chief Justice Roberts, held that traditional stay fac-

tors governed a court of appeals' authority to stay an alien's removal pending judicial review, as opposed to the more demanding standard of the Immigration and Nationality Act (INA).

Vacated and remanded,

Justice Kennedy, with whom Justice Scalia joined, concurred and filed opinion.

Justice Alito, with whom Justice Thomas joined, dissented and filed opinion.

1. Federal Courts ⚿684.1

As part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal.

2. Federal Courts ⚿684.1

A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it.

3. Aliens, Immigration, and Citizenship ⚿390

Traditional stay factors governed a court of appeals' authority to stay an alien's removal pending judicial review, as opposed to the more demanding standard of the Immigration and Nationality Act (INA), providing that a court may not enjoin the removal of an alien subject to a final removal order, unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law. Immigration and Nationality Act, §§ 101, 242, 242(a)(2), (b)(3)(C), (b)(9), (f), 8 U.S.C.A. §§ 1101, 1252, 1252(a)(2), (b)(3)(C), (b)(9), (f).

4. Federal Courts ⚿684.1

Under the traditional standard for a stay pending judicial review, a court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

5. Federal Courts ⚿684.1

An appellate court's power to hold an order in abeyance while it assesses the legality of the order has been described as inherent, preserved in the grant of authority to federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. 28 U.S.C.A. § 1651(a).

6. Federal Courts ⚿684.1

A reviewing court may not resolve a conflict between considered review and effective relief by reflexively holding a final order in abeyance pending review.

7. Federal Courts ⚿684.1

A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant.

8. Injunction ⚿1, 215

When a court employs the extraordinary remedy of injunction, it directs the conduct of a party, and does so with the backing of its full coercive powers.

9. Injunction ⚿1

It is true that in a general sense, every order of a court which commands or forbids is an injunction; but in its accepted legal sense, an injunction is a judicial process or mandate operating in personam.

10. Federal Courts ⚿684.1

By contrast to an injunction, instead of directing the conduct of a particular actor, a stay operates upon the judicial proceeding itself, and it does so either by halting or postponing some portion of the

proceeding, or by temporarily divesting an order of enforceability.

11. Federal Courts ⇨684.1

A stay simply suspends judicial alteration of the status quo, while injunctive relief grants judicial intervention that has been withheld by lower courts.

12. Federal Courts ⇨684.1

A "stay" is not a matter of right, even if irreparable injury might otherwise result; it is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case.

See publication Words and Phrases for other judicial constructions and definitions.

13. Federal Courts ⇨684.1

The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.

Syllabus *

Petitioner Nken sought an order from the Fourth Circuit staying his removal to Cameroon while his petition for review of a Board of Immigration Appeals order denying his motion to reopen removal proceedings was pending. Nken acknowledged that Circuit precedent required an alien seeking such a stay to satisfy 8 U.S.C. § 1252(f)(2), which sharply restricts the availability of injunctions blocking the removal of an alien from this country, but argued that a court's authority to stay a removal order should instead be controlled by the traditional criteria governing stays. The Court of Appeals denied the stay motion without comment.

Held: Traditional stay factors, not the demanding § 1252(f)(2) standard, govern a court of appeals' authority to stay an alien's removal pending judicial review. Pp. 1754 – 1762.

(a) This question stems from changes made in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which "repealed the old judicial-review scheme set forth in [8 U.S.C.] § 1105a [(1994 ed.),] and instituted a new (and significantly more restrictive) one in . . . § 1252," *Reno v. American–Arab Anti–Discrimination Comm.*, 525 U.S. 471, 475, 119 S.Ct. 936, 142 L.Ed.2d 940 (*AAADC*). Because courts of appeals lacked jurisdiction before IIRIRA to review the removal order of an alien who had already left the United States, see § 1105a(c), most aliens who appealed such a decision were given an automatic stay of the removal order pending judicial review, see § 1105a(a)(3). Three changes IIRIRA made are of particular importance here. First, the repeal of § 1105a allows courts to adjudicate a petition for review even if the alien is removed while the petition is pending. Second, the presumption of an automatic stay was repealed and replaced with a provision stating that "[s]ervice of the petition . . . does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." § 1252(b)(3)(B). Finally, IIRIRA provided that "no court shall enjoin the removal of any alien . . . unless [he] shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." § 1252(f)(2). Pp. 1754 – 1756.

(b) The parties dispute what standard a court should apply when determining whether to grant a stay. Petitioner argues that the "traditional" stay standard should apply, meaning a court should con-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

sider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether [he] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties . . .; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724. The Government argues that § 1252(f) should govern, meaning an alien must show "by clear and convincing evidence that the entry or execution of [the removal] order is prohibited as a matter of law." Pp. 1755 – 1756.

(c) An appellate court's power to hold an order in abeyance while it assesses the order's legality has been described as inherent, and part of a court's "traditional equipment for the administration of justice." *Scripps–Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9–10, 62 S.Ct. 875, 86 L.Ed. 1229. That power allows a court to act responsibly, by ensuring that the time the court takes to bring considered judgment to bear on the matter before it does not result in irreparable injury to the party aggrieved by the order under review. But a stay "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Virginian R. Co. v. United States*, 272 U.S. 658, 672, 47 S.Ct. 222, 71 L.Ed. 463. The parties and the public, while entitled to both careful review and a meaningful decision, are also entitled to the prompt execution of orders that the legislature has made final. Pp. 1756 – 1757.

(d) Section 1252(f) does not refer to "stays," but rather to authority to "enjoin the removal of any alien." An injunction and a stay serve different purposes. The former is the means by which a court tells someone what to do or not to do. While in a general sense many orders may be considered injunctions, the term is typically used to refer to orders that operate *in personam*. By contrast, a stay operates upon the judicial proceeding itself, either by halting or postponing some portion of it, or by temporarily divesting an order of enforceability. An alien seeking a stay of removal pending adjudication of a petition for review does not ask for a coercive order against the government, but instead asks to temporarily set aside the removal order. That kind of stay, "relat[ing] only to the conduct or progress of litigation before th[e] court[,] ordinarily is not considered an injunction." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279, 108 S.Ct. 1133, 99 L.Ed.2d 296. That § 1252(f)(2) does not comfortably cover stays is evident in Congress's use of the word "stay" in subsection (b)(3)(B) but not subsection (f)(2), particularly since those subsections were enacted as part of a unified overhaul of judicial review. The statute's structure also clearly supports petitioner's reading: Because subsection (b)(3)(B) changed the basic rules covering stays of removal, the natural place to locate an amendment to the standard governing stays would have been subsection (b)(3)(B), not a provision four subsections later that makes no mention of stays. Pp. 1757 – 1760.

(e) Subsection (f)(2)'s application would not fulfill the historic office of a stay, which is to hold the matter under review in abeyance to allow the appellate court sufficient time to decide the merits. Under subsection (f)(2), a stay would only be granted after the court in effect *decides* the merits, in an expedited manner. The court would have to do so under a "clear and convincing evidence" standard that does not so much preserve the availability of subsequent review as render it redundant. Nor would subsection (f)(2) allow courts "to prevent irreparable injury to the parties or to the public" pending review, *Scripps–Howard*, 316 U.S., at 9, 62 S.Ct. 875; the subsection on its face does not

permit any consideration of harm, irreparable or otherwise. In short, applying § 1252(f)(2) in the stay context would result in something that does not remotely look like a stay. As in *Scripps–Howard*, the Court is loath to conclude that Congress would, "without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review." *Id.*, at 11, 62 S.Ct. 875. The Court is not convinced Congress did so in § 1252(f)(2). Pp. 1759 – 1760.

(f) The parties dispute what the traditional four-factor standard entails. A stay is not a matter of right, and its issuance depends on the circumstances of a particular case. The first factor, a strong showing of a likelihood of success on the merits, requires more than a mere possibility that relief will be granted. Similarly, simply showing some possibility of irreparable injury fails to satisfy the second factor. See *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. ——, ——, 129 S.Ct. 365, ——, 172 L.Ed.2d 249. Although removal is a serious burden for many aliens, that burden alone cannot constitute the requisite irreparable injury. An alien who has been removed may continue to pursue a petition for review, and those aliens who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal. The third and fourth factors, harm to the opposing party and the public interest, merge when the Government is the opposing party. In considering them, courts must be mindful that the Government's role as the respondent in every removal proceeding does not make its interest in each one negligible. There is always a public interest in prompt execution of removal orders, see *AAADC, supra*, at 490, 119 S.Ct. 936, and that interest may be heightened by circumstances such as a particularly dangerous alien, or an alien who has substantially prolonged his stay by abusing the processes provided to him. A court asked to stay removal cannot simply assume that the balance of hardships will weigh heavily in the applicant's favor. Pp. 1760 – 1762.

Vacated and remanded.

ROBERTS, C.J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion, in which SCALIA, J., joined. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Lindsay C. Harrison, Washington, DC, for petitioner.

General Edwin S. Kneedler, Acting Solicitor General, for respondent.

Stephen I. Vladeck, Washington, DC, Lindsay C. Harrison, Counsel of Record, Donald B. Verrilli, Jr., Ian Heath Gershengorn, Jared O. Freedman, Julia K. Martinez, Adam G. Unikowsky, supervised by principals of the firm, Jenner & Block LLP, Washington, DC, for petitioner.

Gregory G. Garre, Solicitor General, Counsel of Record, Gregory G. Katsas, Assistant Attorney General, Edwin S. Kneedler, Deputy Solicitor General, Thomas H. Dupree, Jr., Principal Deputy Assistant Attorney General, Nicole A. Saharsky, Assistant to the Solicitor General, Donald Keener, Melissa Neiman-Kelting, Song E. Park, Saul Greenstein, Andrew C. MacLachlan, Attorneys, Department of Justice, Washington, D.C., for respondent.

For U.S. Supreme Court Briefs, see:

2008 WL 5369549 (Pet.Brief)

2009 WL 45980 (Resp.Brief)

2009 WL 106651 (Reply.Brief)

Chief Justice ROBERTS delivered the opinion of the Court.

[1, 2] It takes time to decide a case on appeal. Sometimes a little; sometimes a lot. "No court can make time stand still" while it considers an appeal, *Scripps–Howard Radio, Inc. v. FCC,* 316 U.S. 4, 9, 62 S.Ct. 875, 86 L.Ed. 1229 (1942), and if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review. That is why it "has always been held, . . . that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." *Id.,* at 9–10, 62 S.Ct. 875 (footnote omitted). A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it.

This case involves a statutory provision that sharply restricts the circumstances under which a court may issue an injunction blocking the removal of an alien from this country. The Court of Appeals concluded, and the Government contends, that this provision applies to the granting of a stay by a court of appeals while it considers the legality of a removal order. Petitioner disagrees, and maintains that the authority of a court of appeals to stay an order of removal under the traditional criteria governing stays remains fully intact, and is not affected by the statutory provision governing injunctions. We agree with petitioner, and vacate and remand for application of the traditional criteria.

I

Jean Marc Nken, a citizen of Cameroon, entered the United States on a transit visa in April 2001. In December 2001, he applied for asylum under 8 U.S.C. § 1158, withholding of removal under § 1231(b)(3), and deferral of removal under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 3, S. Treaty Doc. No. 100–20, p. 20, 1465 U.N.T.S. 85, see 8 CFR § 208.17 (2008). In his application, Nken claimed he had been persecuted in the past for participation in protests against the Cameroonian Government, and would be subject to further persecution if he returns to Cameroon.

An Immigration Judge denied Nken relief after concluding that he was not credible. The Board of Immigration Appeals (BIA) affirmed, and also declined to remand for consideration of Nken's application for adjustment of status based on his marriage to an American citizen. After the BIA denied a motion to reopen, Nken filed a petition for review of the BIA's removal order in the Court of Appeals for the Fourth Circuit. His petition was denied. Nken then filed a second motion to reopen, which was also denied, followed by a second petition for review, which was denied as well.

Nken filed a third motion to reopen, this time alleging that changed circumstances in Cameroon made his persecution more likely. The BIA denied the motion, finding that Nken had not presented sufficient facts or evidence of changed country conditions. Nken again sought review in the Court of Appeals, and also moved to stay his deportation pending resolution of his appeal. In his motion, Nken recognized that Fourth Circuit precedent required an alien seeking to stay a removal order to show by "clear and convincing evidence" that the order was "prohibited as a matter of law," 8 U.S.C. § 1252(f)(2). See *Teshome–Gebreegziabher v. Mukasey,* 528 F.3d 330 (C.A.4 2008). Nken argued, however, that this standard did not govern. The Court of Appeals denied Nken's motion without comment. App. 74.

Nken then applied to this Court for a stay of removal pending adjudication of his petition for review, and asked in the alternative that we grant certiorari to resolve a split among the Courts of Appeals on what standard governs a request for such a stay. Compare *Teshome–Gebreegziabher, supra,* at 335, and *Weng v. U.S. Attorney General,* 287 F.3d 1335 (C.A.11 2002), with *Arevalo v. Ashcroft,* 344 F.3d 1 (C.A.1 2003), *Mohammed v. Reno,* 309 F.3d 95 (C.A.2 2002), *Douglas v. Ashcroft,* 374 F.3d 230 (C.A.3 2004), *Tesfamichael v. Gonzales,* 411 F.3d 169 (C.A.5 2005), *Bejjani v. INS,* 271 F.3d 670 (C.A.6 2001), *Hor v. Gonzales,* 400 F.3d 482 (C.A.7 2005), and *Andreiu v. Ashcroft,* 253 F.3d 477 (C.A.9 2001) (en banc). We granted certiorari, and stayed petitioner's removal pending further order of this Court. *Nken v. Mukasey,* 555 U.S. ——, 129 S.Ct. 622, 172 L.Ed.2d 474 (2008).

II

[3] The question we agreed to resolve stems from changes in judicial review of immigration procedures brought on by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–546, which substantially amended the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.* When Congress passed IIRIRA, it "repealed the old judicial-review scheme set forth in [8 U.S.C.] § 1105a and instituted a new (and significantly more restrictive) one in 8 U.S.C. § 1252." *Reno v. American–Arab Anti–Discrimination Comm.,* 525 U.S. 471, 475, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) (*AAADC*). The new review system substantially limited the availability of judicial review and streamlined all challenges to a removal order into a single proceeding: the petition for review. See, *e.g.,* 8 U.S.C. § 1252(a)(2) (barring review of certain removal orders and exercises of executive discretion); § 1252(b)(3)(C) (establishing strict filing and briefing deadlines for review proceedings); § 1252(b)(9) (consolidating challenges into petition for review). Three changes effected by IIRIRA are of particular importance to this case.

Before IIRIRA, courts of appeals lacked jurisdiction to review the deportation order of an alien who had already left the United States. See § 1105a(c) (1994 ed.) ("An order of deportation or of exclusion shall not be reviewed by any court . . . if [the alien] has departed from the United States after the issuance of the order"). Accordingly, an alien who appealed a decision of the BIA was typically entitled to remain in the United States for the duration of judicial review. This was achieved through a provision providing most aliens with an automatic stay of their removal order while judicial review was pending. See § 1105a(a)(3) ("The service of the petition for review . . . shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs").

IIRIRA inverted these provisions to allow for more prompt removal. First, Congress lifted the ban on adjudication of a petition for review once an alien has departed. See IIRIRA § 306(b), 110 Stat. 3009–612 (repealing § 1105a). Second, because courts were no longer prohibited from proceeding with review once an alien departed, see *Dada v. Mukasey,* 554 U.S. 1, ——, 128 S.Ct. 2307, 2320, 171 L.Ed.2d 178 (2008), Congress repealed the presumption of an automatic stay, and replaced it with the following: "Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." 8 U.S.C. § 1252(b)(3)(B) (2006 ed.).

Finally, IIRIRA restricted the availability of injunctive relief:

> "Limit on injunctive relief
>
> "(1) In general
>
> "Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by [IIRIRA], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.
>
> "(2) Particular cases
>
> "Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." § 1252(f).

This provision, particularly subsection (f)(2), is the source of the parties' disagreement.

III

[4] The parties agree that courts of appeals considering a petition for review of a removal order may prevent that order from taking effect and therefore block removal while adjudicating the petition. They disagree over the standard a court should apply in deciding whether to do so. Nken argues that the "traditional" standard for a stay applies. Under that standard, a court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987).

The Government disagrees, arguing that a stay is simply a form of injunction, or alternatively that the relief petitioner seeks is more accurately characterized as injunctive, and therefore that the limits on injunctive relief set forth in subsection (f)(2) apply. Under that provision, a court may not "enjoin" the removal of an alien subject to a final removal order, "unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." 8 U.S.C. § 1252(f)(2). Mindful that statutory interpretation turns on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997), we conclude that the traditional stay factors—not § 1252(f)(2)—govern a request for a stay pending judicial review.

A

[5] An appellate court's power to hold an order in abeyance while it assesses the legality of the order has been described as "inherent," preserved in the grant of authority to federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," All Writs Act, 28 U.S.C. § 1651(a). See *In re McKenzie*, 180 U.S. 536, 551, 21 S.Ct. 468, 45 L.Ed. 657 (1901). The Court highlighted the historic pedigree and importance of the power in *Scripps–Howard*, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229, holding in that case that Congress's failure expressly to confer the authority in a statute allowing appellate review should not be taken as an implicit denial of that power.

The Court in *Scripps–Howard* did not decide what "criteria ... should govern the Court in exercising th[e] power" to grant a stay. *Id.*, at 17, 62 S.Ct. 875. Nor did the Court consider under what circumstances Congress could deny that authority. See *ibid.* The power to grant a stay pending review, however, was described as part of a court's "traditional equipment for the administration of justice." *Id.*, at 9–10, 62 S.Ct. 875. That authority was "firmly imbedded in our judicial system," "consonant with the historic procedures of federal appellate courts," and "a power as old as the judicial system of the nation." *Id.*, at 13, 17, 62 S.Ct. 875.

The authority to hold an order in abeyance pending review allows an appellate court to act responsibly. A reviewing court must bring considered judgment to bear on the matter before it, but that cannot always be done quickly enough to afford relief to the party aggrieved by the order under review. The choice for a reviewing court should not be between justice on the fly or participation in what may be an "idle ceremony." *Id.*, at 10, 62 S.Ct. 875. The ability to grant interim relief is accordingly not simply "[a]n historic procedure for preserving rights during the pendency of an appeal," *id.*, at 15, 62 S.Ct. 875, but also a means of ensuring that appellate courts can responsibly fulfill their role in the judicial process.

[6, 7] At the same time, a reviewing court may not resolve a conflict between considered review and effective relief by reflexively holding a final order in abeyance pending review. A stay is an "intrusion into the ordinary processes of administration and judicial review," *Virginia Petroleum Jobbers Assn. v. Federal Power Comm'n*, 259 F.2d 921, 925 (C.A.D.C. 1958) (*per curiam*), and accordingly "is not a matter of right, even if irreparable injury might otherwise result to the appellant," *Virginian R. Co. v. United States*, 272 U.S. 658, 672, 47 S.Ct. 222, 71 L.Ed. 463 (1926). The parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders that the legislature has made final.

B

[8] Subsection (f)(2) does not by its terms refer to "stays" but instead to the authority to "enjoin the removal of any alien." The parties accordingly begin by disputing whether a stay is simply a type of injunction, covered by the term "enjoin," or a different form of relief. An injunction and a stay have typically been understood to serve different purposes. The former is a means by which a court tells someone what to do or not to do. When a court employs "the extraordinary remedy of injunction," *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982), it directs the conduct of a party, and does so with the backing of its full coercive powers. See Black's Law Dictionary 784 (6th ed.1990) (defining "injunction" as "[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury").

[9] It is true that "'[i]n a general sense, every order of a court which commands or forbids is an injunction; but in its accepted legal sense, an injunction is a judicial process or mandate operating *in personam.*'" *Id.*, at 800 (8th ed.2004) (quoting 1 H. Joyce, A Treatise on the Law Relating to Injunctions § 1, pp. 2–3 (1909)). This is so whether the injunction is preliminary or final; in both contexts, the order is directed at someone, and governs that party's conduct.

[10] By contrast, instead of directing the conduct of a particular actor, a stay operates upon the judicial proceeding itself. It does so either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability. See Black's, *supra*, at 1413 (6th ed.1990) (defining "stay" as "a suspension of the case or some designated proceedings within it").

[11] A stay pending appeal certainly has some functional overlap with an injunction, particularly a preliminary one. Both can have the practical effect of preventing some action before the legality of that action has been conclusively determined. But a stay achieves this result by temporarily suspending the source of authority to act—the order or judgment in question—not by directing an actor's conduct. A stay "simply suspend[s] judicial alteration of the status quo," while injunctive relief "grants judicial intervention that has been withheld by lower courts." *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313, 107 S.Ct. 682, 93 L.Ed.2d 692 (1986) (SCALIA, J., in chambers); see also *Brown v. Gilmore*, 533 U.S. 1301, 1303, 122 S.Ct. 1, 150 L.Ed.2d 782 (2001) (Rehnquist, C.J., in chambers) ("[A]pplicants are seeking not merely a stay of a lower court judgment, but an injunction against the enforcement of a presumptively valid state statute"); *Turner Broadcasting System, Inc. v. FCC*, 507 U.S. 1301, 1302, 113 S.Ct. 1806, 123 L.Ed.2d 642 (1993) (same) ("By seeking an injunction, applicants request that I issue an order *altering* the legal status quo").

An alien seeking a stay of removal pending adjudication of a petition for review does not ask for a coercive order against the Government, but rather for the temporary setting aside of the source of the Government's authority to remove. Although such a stay acts to "ba[r] Executive branch officials from removing [the applicant] from the country," *post*, at 1767 (ALITO, J., dissenting), it does so by returning to the status quo—the state of affairs before the removal order was entered.[1] That kind of stay, "relat[ing] only to the conduct or progress of litigation before th[e] court[,] ordinarily is not considered an injunction." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988); see Fed. Rule App. Proc. 8(a)(1)(A) (referring to interim relief from "the judgment or order of a district court pending appeal" as "a stay"). Whether such a stay might technically be called an injunction is

1. The dissent maintains that "[a]n order preventing an executive officer from [enforcing a removal order] does not 'simply suspend judicial alteration of the status quo,' " but instead "blocks executive officials from carrying out what they view as proper enforcement of the immigration laws." *Post*, at 1767 (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313, 107 S.Ct. 682, 93 L.Ed.2d 692 (1986) (SCALIA, J., in chambers)). But the relief sought here would simply suspend *administrative* alteration of the status quo, and we have long recognized that such temporary relief from an administrative order—just like temporary relief from a court order—is considered a stay. See *Scripps–Howard Radio, Inc. v. FCC*, 316 U.S. 4, 10–11, 62 S.Ct. 875, 86 L.Ed. 1229 (1942).

The dissent would distinguish *Scripps–Howard* on the ground that Nken does not really seek to stay a final order of removal, but instead seeks "to enjoin the Executive Branch from enforcing his removal order pending judicial review of an entirely separate order [denying a motion to reopen]." *Post*, at 1765, n. But a determination that the BIA should have granted Nken's motion to reopen would necessarily extinguish the finality of the removal order. See Tr. of Oral Arg. for Respondent 42 ("[I]f the motion to reopen is granted, that vacates the final order of removal and, therefore, there is no longer a final order of removal pursuant to which the alien could be removed"). The relief sought here is properly termed a "stay" because it suspends the effect of the removal order.

beside the point; that is not the label by which it is generally known. The sun may be a star, but "starry sky" does not refer to a bright summer day. The terminology of subsection (f)(2) does not comfortably cover stays.

This conclusion is reinforced by the fact that when Congress wanted to refer to a stay pending adjudication of a petition for review in § 1252, it used the word "stay." In subsection (b)(3)(B), under the heading "Stay of order," Congress provided that service of a petition for review "does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." 8 U.S.C. § 1252(b)(3)(B). By contrast, the language of subsection (f) says nothing about stays, but is instead titled "Limit on injunctive relief," and refers to the authority of courts to "enjoin the removal of any alien." § 1252(f)(2).

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS v. Cardoza–Fonseca*, 480 U.S. 421, 432, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (internal quotation marks omitted). This is particularly true here, where subsections (b)(3)(B) and (f)(2) were enacted as part of a unified overhaul of judicial review procedures.

Subsection (b)(3)(B) changed the basic rules covering stays of removal, and would have been the natural place to locate an amendment to the traditional standard governing the grant of stays. Under the Government's view, however, Congress placed such a provision four subsections later, in a subsection that makes no mention of stays, next to a provision prohibiting classwide injunctions against the operation of removal provisions. See 8 U.S.C. § 1252(f)(1) (permitting injunctions only "with respect to the application of such provisions to an individual alien"); *AAADC*, 525 U.S., at 481–482, 119 S.Ct. 936. Although the dissent "would not read too much into Congress' decision to locate such a provision in one subsection rather than in another," *post*, at 1767 – 1768, the Court frequently takes Congress's structural choices into consideration when interpreting statutory provisions. See, *e.g.*, *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. ——, ——, 128 S.Ct. 2326, 2336, 171 L.Ed.2d 203 (2008).

The Government counters that petitioner's view "fails to give any operative effect to Section 1252(f)(2)." Brief for Respondent 32. Initially, this argument undercuts the Government's textual reading. It is one thing to propose that "enjoin" in subsection (f)(2) covers a broad spectrum of court orders and relief, including both stays and more typical injunctions. It is quite another to suggest that Congress used "enjoin" to refer *exclusively* to stays, so that a failure to include stays in subsection (f)(2) would render the provision superfluous. If nothing else, the terms are by no means synonymous.

Leaving that aside, there is something to the Government's point; the exact role of subsection (f)(2) under petitioner's view is not easy to explain. Congress may have been concerned about the possibility that courts would enjoin application of particular provisions of the INA, see 8 U.S.C. § 1252(f)(1) (prohibiting injunctions "other than with respect to the application of [Section IV of the INA] to an individual alien"), or about injunctions that might be available under the limited habeas provisions of subsection (e). Or perhaps subsection (f)(2) was simply included as a catchall provision raising the bar on any availability (even unforeseeable availability) of "the extraordinary remedy of injunction." *Weinberger*, 456 U.S., at 312, 102

S.Ct. 1798. In any event, the Government's point is not enough to outweigh the strong indications that subsection (f)(2) is not reasonably understood to be directed at stays.

C

Applying the subsection (f)(2) standard to stays pending appeal would not fulfill the historic office of such a stay. The whole idea is to hold the matter under review in abeyance because the appellate court lacks sufficient time to decide the merits. Under the subsection (f)(2) standard, however, a stay would only be granted after the court in effect *decides* the merits, in an expedited manner. The court would have to do so under a standard—"clear and convincing evidence"—that does not so much preserve the availability of subsequent review as render it redundant. Subsection (f)(2), in short, would invert the customary role of a stay, requiring a definitive merits decision earlier rather than later.

The authority to grant stays has historically been justified by the perceived need "to prevent irreparable injury to the parties or to the public" pending review. *Scripps–Howard*, 316 U.S., at 9, 62 S.Ct. 875. Subsection (f)(2) on its face, however, does not allow any consideration of harm, irreparable or otherwise, even harm that may deprive the movant of his right to petition for review of the removal order. Subsection (f)(2) does not resolve the dilemma stays historically addressed: what to do when there is insufficient time to resolve the merits and irreparable harm may result from delay. The provision instead requires deciding the merits under a higher standard, without regard to the prospect of irreparable harm.

In short, applying the subsection (f)(2) standard in the stay context results in something that does not remotely look like a stay. Just like the Court in *Scripps–Howard*, we are loath to conclude that Congress would, "without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review." *Id.*, at 11, 62 S.Ct. 875. Subsection (f)(2) would certainly deprive courts of their "customary" stay power. Our review does not convince us that Congress did that in subsection (f)(2). The four-factor test is the "traditional" one, *Hilton*, 481 U.S., at 777, 107 S.Ct. 2113, and the Government has not overcome the "presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 96 L.Ed. 1294 (1952). We agree with petitioner that an alien need not satisfy the demanding standard of § 1252(f)(2) when asking a court of appeals to stay removal pending judicial review.

IV

So what standard does govern? The question presented, as noted, offers the alternative of " 'the traditional test for stays,' " 555 U.S., at ——, 129 S.Ct. 622, but the parties dispute what that test is. See Brief for Respondent 46 ("[T]he four-part standard requires a more demanding showing than petitioner suggests"); Reply Brief for Petitioner 26 ("The Government argues . . . that the [stay] test should be reformulated").

[12, 13] "A stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian R. Co.*, 272 U.S., at 672, 47 S.Ct. 222. It is instead "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id.*, at 672–673, 47 S.Ct. 222; see *Hilton*, *supra*, at 777, 107 S.Ct. 2113 ("[T]he traditional stay factors contemplate individual-

ized judgments in each case"). The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. See, *e.g., Clinton v. Jones,* 520 U.S. 681, 708, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997); *Landis v. North American Co.,* 299 U.S. 248, 255, 57 S.Ct. 163, 81 L.Ed. 153 (1936).

The fact that the issuance of a stay is left to the court's discretion "does not mean that no legal standard governs that discretion .... '[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.' " *Martin v. Franklin Capital Corp.,* 546 U.S. 132, 139, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005) (quoting *United States v. Burr,* 25 F.Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C.J.)). As noted earlier, those legal principles have been distilled into consideration of four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton, supra,* at 776, 107 S.Ct. 2113. There is substantial overlap between these and the factors governing preliminary injunctions, see *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. ——, ——, 129 S.Ct. 365, 376–77, 172 L.Ed.2d 249 (2008); not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.

The first two factors of the traditional standard are the most critical. It is not enough that the chance of success on the merits be "better than negligible." *Sofinet v. INS,* 188 F.3d 703, 707 (C.A.7 1999) (internal quotation marks omitted). Even petitioner acknowledges that "[m]ore than a mere 'possibility' of relief is required." Reply Brief for Petitioner 21 (quoting Brief for Respondent 47). By the same token, simply showing some "possibility of irreparable injury," *Abbassi v. INS,* 143 F.3d 513, 514 (C.A.9 1998), fails to satisfy the second factor. As the Court pointed out earlier this Term, the " 'possibility' standard is too lenient." *Winter, supra,* at ——, 129 S.Ct., at 375.

Although removal is a serious burden for many aliens, it is not categorically irreparable, as some courts have said. See, *e.g., Ofosu v. McElroy,* 98 F.3d 694, 699 (C.A.2 1996) ("[O]rdinarily, when a party seeks [a stay] pending appeal, it is deemed that exclusion is an irreparable harm"); see also Petitioner's Emergency Motion for a Stay 12 ("[T]he equities particularly favor the alien facing deportation in immigration cases where failure to grant the stay would result in deportation before the alien has been able to obtain judicial review").

The automatic stay prior to IIRIRA reflected a recognition of the irreparable nature of harm from removal before decision on a petition for review, given that the petition abated upon removal. Congress's decision in IIRIRA to allow continued prosecution of a petition after removal eliminated the reason for categorical stays, as reflected in the repeal of the automatic stay in subsection (b)(3)(B). It is accordingly plain that the burden of removal alone cannot constitute the requisite irreparable injury. Aliens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal. See Brief for Respondent 44.

Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party. In considering them, courts must be mindful that the Government's role as the respondent in every removal proceeding does not make the public interest in each individual one negligible, as some courts have concluded. See, *e.g.*, *Mohammed*, 309 F.3d, at 102 (Government harm is nothing more than "one alien [being] permitted to remain while an appeal is decided"); *Ofosu*, *supra*, at 699 (the Government "suffers no offsetting injury" in removal cases).

Of course there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm. But that is no basis for the blithe assertion of an "absence of any injury to the public interest" when a stay is granted. Petitioner's Emergency Motion for a Stay 13. There is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and "permit[s] and prolong[s] a continuing violation of United States law." *AAADC*, 525 U.S., at 490, 119 S.Ct. 936. The interest in prompt removal may be heightened by the circumstances as well—if, for example, the alien is particularly dangerous, or has substantially prolonged his stay by abusing the processes provided to him. See *ibid.* ("Postponing justifiable deportation (in the hope that the alien's status will change—by, for example, marriage to an American citizen—or simply with the object of extending the alien's unlawful stay) is often the principal object of resistance to a deportation proceeding"). A court asked to stay removal cannot simply assume that "[o]rdinarily, the balance of hardships will weigh heavily in the applicant's favor." *Andreiu*, 253 F.3d, at 484.

* * *

The Court of Appeals did not indicate what standard it applied in denying Nken a stay, but Circuit precedent required the application of § 1252(f)(2). Because we have concluded that § 1252(f)(2) does not govern, we vacate the judgment of the Court of Appeals and remand for consideration of Nken's motion for a stay under the standards set forth in this opinion.

It is so ordered.

Justice KENNEDY, with whom Justice SCALIA joins, concurring.

I join the Court's opinion and agree that the traditional four-part standard governs an application to stay the removal of an alien pending judicial review. This is the less stringent of the two standards at issue. See *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1303–1305, 123 S.Ct. 1386, 155 L.Ed.2d 301 (2003) (KENNEDY, J., in chambers).

It seems appropriate to underscore that in most cases the debate about which standard should apply will have little practical effect provided the court considering the stay application adheres to the demanding standard set forth. A stay of removal is an extraordinary remedy that should not be granted in the ordinary case, much less awarded as of right. *Virginian R. Co. v. United States*, 272 U.S. 658, 672–673, 47 S.Ct. 222, 71 L.Ed. 463 (1926); see also *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. ——, ——, 129 S.Ct. 365, 376–77, 172 L.Ed.2d 249 (2008).

No party has provided the Court with empirical data on the number of stays granted, the correlation between stays granted and ultimate success on the merits, or similar matters. The statistics

would be helpful so that experience can demonstrate whether this decision yields a fair and effective result. Then, too, Congress can evaluate whether its policy objectives are being realized by the legislation it has enacted. Based on the Government's representations at oral argument, however, there are grounds for concern. See Tr. of Oral Arg. 35 ("[W]e do not have empirical data, . . . but [stays of removal] are—in the Ninth Circuit in our experience—. . . granted quite frequently"). This concern is of particular importance in those Circuits with States on our international borders. The Court of Appeals for Ninth Circuit, for example, considers over half of all immigration petitions filed nationwide, and immigration cases compose nearly half of the Ninth Circuit's docket. See Catterson, Symposium, Ninth Circuit Conference: Changes in Appellate Caseload and Its Processing, 48 Ariz. L.Rev. 287, 297 (2006).

Under either standard, even the less stringent standard the Court adopts today, courts should not grant stays of removal on a routine basis. The passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–546, reinforces this point. Before IIRIRA, aliens who left the United States no longer had the ability to seek review of their removal orders, see 8 U.S.C. § 1105a(c) (1994 ed.) (repealed 1996), so they could more easily have established irreparable harm due to their removal. It is perhaps for this reason Congress decided to "stay the deportation of [an] alien pending determination of the petition by the court, unless the court otherwise direct[ed]." § 1105a(a)(3) (same). IIRIRA, however, removed that prohibition (as well as the automatic stay provision), and courts may now review petitions after aliens have been removed. See Brief for Respondent 44; *ante,* at 1755, 1761; *post,* at 1766, 1768 (ALITO, J., dissenting).

This change should mean that obtaining a stay of removal is more difficult. Under the Court's four-part standard, the alien must show both irreparable injury and a likelihood of success on the merits, in addition to establishing that the interests of the parties and the public weigh in his or her favor. *Ante,* at 1760 – 1761. As the Court explains, because aliens may continue to seek review and obtain relief after removal, "the burden of removal alone cannot constitute the requisite irreparable injury." *Ante,* at 1761. As a result of IIRIRA there must be a particularized, irreparable harm beyond mere removal to justify a stay.

That is not to say that demonstration of irreparable harm, without more, is sufficient to justify a stay of removal. The Court has held that "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian R. Co., supra,* at 672, 47 S.Ct. 222. When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other. This is evident in the decisions of Justices of the Court applying the traditional factors. See, *e.g., Curry v. Baker,* 479 U.S. 1301, 1302, 107 S.Ct. 5, 93 L.Ed.2d 1 (1986) (Powell, J., in chambers) ("It is no doubt true that, absent [a stay], the applicant here will suffer irreparable injury. This fact alone is not sufficient to justify a stay"); *Ruckelshaus v. Monsanto Co.,* 463 U.S. 1315, 1317, 104 S.Ct. 3, 77 L.Ed.2d 1417 (1983) (Blackmun, J., in chambers) ("[L]ikelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury from the denial of the stay"). As those decisions make clear, " 'the applicant must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the

applicant will suffer irreparable injury if the judgment is not stayed pending his appeal.' " *Williams v. Zbaraz,* 442 U.S. 1309, 1311, 99 S.Ct. 2095, 60 L.Ed.2d 1033 (1979) (STEVENS, J., in chambers) (quoting *Whalen v. Roe,* 423 U.S. 1313, 1316, 96 S.Ct. 164, 46 L.Ed.2d 18 (1975) (Marshall, J., in chambers)).

Justice ALITO, with whom Justice THOMAS joins, dissenting.

The Court's decision nullifies an important statutory provision that Congress enacted when it reformed the immigration laws in 1996. I would give effect to that provision, and I therefore respectfully dissent.

I

When an alien is charged with being removable from the United States, an Immigration Judge (IJ) conducts a hearing, receives and considers evidence, and determines whether the alien is removable. See 8 U.S.C. § 1229a(a); 8 CFR §§ 1240.1(a)(1)(i), (c) (2008). If the IJ enters an order of removal, that order becomes final when the alien's appeal to the Board of Immigration Appeals (Board) is unsuccessful or the alien declines to appeal to the Board. See 8 U.S.C. § 1101(47)(B); 8 CFR §§ 1241.1, 1241.31. Once an order of removal has become final, it may be executed at any time. See 8 U.S.C. §§ 1231(a)(1)(B)(i), 1252(b)(8)(C); 8 CFR § 1241.33. Removal orders "are self-executing orders, not dependent upon judicial enforcement." *Stone v. INS,* 514 U.S. 386, 398, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995).

After the removal order is final and enforceable, the alien may file a motion to reopen before the IJ, see 8 U.S.C. § 1229a(c)(7), or a petition for review before the appropriate court of appeals, see § 1252(a)(1). While either challenge is pending, the alien may ask the Executive Branch to stay its own hand. See 8 CFR §§ 241.6(a)-(b), 1241.6(a)-(b). If, however, the alien wants *a court* to restrain the Executive from executing a final and enforceable removal order, the alien must seek an injunction to do so. See 8 U.S.C. § 1252(a)(1) (making a final order of removal subject to 28 U.S.C. § 2349(b), which provides that an "interlocutory injunction" can "restrain" the "execution of" a final order). The plain text of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Div. C, 110 Stat. 3009–546, provides the relevant legal standard for granting such relief: "Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." 8 U.S.C. § 1252(f)(2).

II

In my view, petitioner's request for an order preventing his removal pending disposition of his current petition for review was governed by 8 U.S.C. § 1252(f)(2). Petitioner is "remova[ble] . . . pursuant to a final order," and he sought a court order to "enjoin" the Executive Branch's execution of that removal.

A

There is no dispute that petitioner is "remova[ble] . . . pursuant to a final order." *Ibid.* On March 4, 2005, the IJ determined that petitioner was removable under § 1227(a)(1)(B) and denied his claims for asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85. See App.

32–43. Petitioner appealed to the Board, and on June 16, 2006, the Board affirmed. *Id.*, at 44–49. On that date, petitioner's order of removal became administratively final, and the Executive Branch became legally entitled to remove him from the United States. See 8 U.S.C. § 1231(a)(1)(B)(i); 8 CFR § 1241.33(a).

B

The only remaining question, therefore, is whether the interim equitable relief that petitioner sought was an order "enjoin[ing]" his removal as that term is used in 8 U.S.C. § 1252(f)(2). I believe that it was.

In ordinary usage, the term "enjoin" means to "require," "command," or "direct" an action, or to "require a person . . . to perform, or to abstain or desist from, some act." Black's Law Dictionary 529 (6th ed.1990) (hereinafter Black's). See also Webster's Third New International Dictionary 754 (1993) (defining "enjoin" to mean "to direct, prescribe, or impose by order"; "to prohibit or restrain by a judicial order or decree"). When an alien subject to a final order of removal seeks to bar executive officials from acting upon that order pending judicial consideration of a petition for review, the alien is seeking to "enjoin" his or her removal. The alien is seeking an order "restrain[ing]" those officials and "requir[ing]" them to "abstain" from executing the order of removal.

The Court concludes that § 1252(f)(2) does not apply in this case because, in the Court's view, that provision applies only to requests for an injunction and not to requests for a stay. That conclusion is wrong for at least three reasons.

1

First, a stay is "a kind of injunction," Black's 1413, as even the Court grudgingly concedes, see *ante*, at 1758 – 1759 (an order blocking an alien's removal pending judicial review "might technically be called an injunction"). See also *Teshome–Gebreegziabher v. Mukasey*, 528 F.3d 330, 333 (C.A.4 2008) (the term "stay" "is a subset of the broader term 'enjoin,' "); *Kijowska v. Haines*, 463 F.3d 583, 589 (C.A.7 2006) (a stay "is a form of injunction"); *Weng v. United States Atty. Gen.*, 287 F.3d 1335, 1338 (C.A.11 2002) ("[T]he plain meaning of enjoin includes the grant of a stay").[1]

1. Thus, it is unremarkable that we have used the word "stay" to describe an injunction blocking an administrative order pending judicial review. See *Scripps–Howard Radio, Inc. v. FCC*, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229 (1942); *ante*, at 1758, n. Indeed, our decision in *Scripps–Howard*, *supra*, at 11, 62 S.Ct. 875—like the Court's decision today, *ante*, at 1757, 1760 – 1761—relied heavily on *Virginian R. Co. v. United States*, 272 U.S. 658, 47 S.Ct. 222, 71 L.Ed. 463 (1926), the latter of which referred to "stays" as a subset of "injunctions." See *id.*, at 669, 47 S.Ct. 222 (noting that the power to issue a "stay" "to preserve the *status quo* pending appeal" is "an incident" of the power "to enjoin" an administrative order); see also *id.*, at 671–672, 47 S.Ct. 222 (referring interchangeably to a three-judge district court's power to issue "injunctions" and "stays"). In any event, both *Scripps–Howard* and *Virginian* are inapposite because petitioner here did not seek to "stay" his removal order pending judicial review of that order; rather, he sought to enjoin the Executive Branch from enforcing his removal order pending judicial review of an entirely separate order. See *Stone v. INS*, 514 U.S. 386, 395, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995) (holding that the IJ's removal order and the Board's denial of a motion to reopen are "two separate final orders"); *Bak v. INS*, 682 F.2d 441, 442 (C.A.3 1982) *(per curiam)* ("The general rule is that a motion to reopen deportation proceedings is a new, independently reviewable order"); Brief for Respondent 51–52 (differentiating petitioner's challenge to the IJ's removal order, which "became final well over a year ago," from "petitioner's latest challenge[, which] is currently pending" before the Court of Appeals); *id.*, at 13–14, 36–37 (similar).

Both statutes and judicial decisions refer to orders that "stay" legal proceedings as injunctions. For example, the Anti–Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court." 28 U.S.C. § 2283. See also *Hill v. McDonough*, 547 U.S. 573, 578–580, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006) (habeas petitioner sought injunction to stay his execution); *McMillen v. Anderson*, 95 U.S. 37, 42, 23 L.Ed. 335 (1877) ("[Petitioner] can, if he is wrongfully taxed, stay the proceeding for its collection by process of injunction"); *Nivens v. Gilchrist*, 319 F.3d 151, 153 (C.A.4 2003) (denial of "injunction" to "stay [a] trial"); *Jove Eng., Inc. v. IRS*, 92 F.3d 1539, 1546 (C.A.11 1996) (automatic stay is "essentially a court-ordered injunction"). And it is revealing that the standard that the Court adopts for determining whether a stay should be ordered is the standard that is used in weighing an application for a preliminary injunction. *Ante*, at 1760 – 1761 (adopting preliminary injunction standard set out in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. ——, ——, 129 S.Ct. 365, 375, 172 L.Ed.2d 249 (2008)).

2

Second, the context surrounding IIRIRA's enactment suggests that § 1252(f)(2) was an important—not a superfluous—statutory provision. This Court should interpret it accordingly.

IIRIRA was designed to expedite removal and restrict the ability of aliens to remain in this country pending judicial review. Before IIRIRA, the filing of a petition for review automatically stayed removal unless the court of appeals directed otherwise. 8 U.S.C. § 1105a(a)(3) (1994 ed.) (repealed 1996). IIRIRA repealed this provision and, to drive home the point, specifically provided that "[s]ervice of the petition [for judicial review] . . . *does not* stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." § 1252(b)(3)(B) (2006 ed.) (emphasis added). In addition, "many provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts." *Reno v. American–Arab Anti–Discrimination Comm.*, 525 U.S. 471, 486, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) (emphasis deleted). Indeed, "protecting the Executive's discretion from the courts . . . can fairly be said to be the theme of the legislation." *Ibid.* Section 1252(f)(2), which provides that a court may not block removal during the judicial review process unless a heightened standard is met, fits perfectly within this scheme.

The Court's interpretation, by contrast, produces anomalous results. If § 1252(f)(2) does not provide the standard to be used by the courts in determining whether an alien should be permitted to remain in this country pending judicial review, then IIRIRA left the formulation of that standard entirely to the discretion of the courts. A Congress that sought to expedite removal and limit judicial discretion is unlikely to have taken that approach.

More important, if § 1252(f)(2) does not set the standard for blocking removal pending judicial review, then, as the Court concedes, "the exact role of subsection (f)(2) . . . is not easy to explain." *Ante*, at 1759 – 1760. "In construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). We should not lightly conclude that Congress enacted a provision that serves no function, and the Court's hyper-technical distinction between an injunction and a stay does not provide a sufficient justification for adopting an interpretation that renders

§ 1252(f)(2) meaningless. That result is particularly anomalous in the context of § 1252(f)(2), which Congress said should apply "[n]otwithstanding any other provision of law."

3

Third, if stays and injunctions really are two entirely distinct concepts, the order that petitioner sought here is best viewed as an injunction. Insofar as there is a difference between the two concepts, I agree with the Court that it boils down to this: "A stay 'simply suspend[s] judicial alteration of the status quo,' " whereas an injunction " 'grants judicial intervention that has been withheld by lower courts.' " *Ante,* at 1758 (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC,* 479 U.S. 1312, 1313, 107 S.Ct. 682, 93 L.Ed.2d 692 (1986) (SCALIA, J., in chambers)). See also Black's 1413 (defining a stay as an "act of arresting a judicial proceeding by the order of a court"). Here, petitioner did not seek an order "suspend[ing] judicial alteration of the status quo." Instead, he sought an order barring Executive branch officials from removing him from the country. Such an order is best viewed as an injunction. See *McCarthy v. Briscoe,* 429 U.S. 1317, 1317, n. 1, 97 S.Ct. 10, 50 L.Ed.2d 49 (1976) (Powell, J., in chambers) (although applicants claimed to seek a "stay," the court granted an "injunction" because "the applicants actually [sought] affirmative relief" against executive officials).

Even if petitioner had sought to block his removal pending judicial review of the order of removal, any interim order blocking his removal would best be termed an injunction. When the Board affirmed petitioner's final removal order in 2006, it gave the Executive Branch all of the legal authority it needed to remove petitioner from the United States immediately. An order preventing an executive officer from exercising that authority does not "simply suspend judicial alteration of the status quo." *Ohio Citizens for Responsible Energy, supra,* at 1313, 107 S.Ct. 682. Instead, such an order is most properly termed an injunction because it blocks executive officials from carrying out what they view as proper enforcement of the immigration laws. And in that regard, it is significant that the Hobbs Act—which governs judicial review under IIRIRA, see 8 U.S.C. § 1252(a)(1)—refers to an "application for an *interlocutory injunction* restraining or suspending the enforcement, operation, or execution of, or setting aside" a final administrative order. 28 U.S.C. § 2349(b) (emphasis added).

In the present case, however, petitioner did not seek to block his removal pending judicial review of his final order of removal. That review concluded long ago. What petitioner asked for was an order barring the Executive Branch from removing him pending judicial review of an entirely different order, the Board's order denying his third motion to reopen the proceedings. Petitioner's current petition for review does not contest the correctness of the removal order. Rather, he argues that the Board should have set aside that order due to alleged changes in conditions in his home country. A motion to reopen an administrative proceeding that is no longer subject to direct judicial review surely seeks " 'an order *altering* the status quo.' " *Ante,* at 1758 (quoting *Turner Broadcasting System, Inc. v. FCC,* 507 U.S. 1301, 1302, 113 S.Ct. 1806, 123 L.Ed.2d 642 (1993) (Rehnquist, C.J., in chambers)). Consequently, the relief that petitioner sought here is best categorized as an injunction.

III

In addition to its highly technical distinction between an injunction and a stay,

the Court advances several other justifications for its decision, but none is persuasive.

The Court argues that applying 8 U.S.C. § 1252(f)(2) would "deprive" us of our "'customary' stay power." *Ante,* at 1760. As noted above, however, restricting judicial discretion was "the theme" of IIRIRA, *American–Arab Anti–Discrimination Comm.*, 525 U.S., at 486, 119 S.Ct. 936. And Congress is free to regulate or eliminate the relief that federal courts may award, within constitutional limits that the Court does not invoke here. Cf. *INS v. St. Cyr,* 533 U.S. 289, 299–300, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).

The Court opines that subsection (b)(3)(B)—not subsection (f)(2)—is "the natural place to locate an amendment to the traditional standard governing the grant of stays." *Ante,* at 1759. But I would not read too much into Congress' decision to locate such a provision in one subsection rather than in another subsection of the same provision. In addition, there is also nothing "unnatural" about Congress' use of two separate subsections of § 1252 to address a common subject. For example, § 1252(a)(2)(A) lists several matters over which "no court shall have jurisdiction to review," while § 1252(g) lists another subject over which "no court shall have jurisdiction to hear any cause or claim." The fact that those provisions are separated by five subsections and framed in slightly different terms does not justify ignoring them, just as the space and difference in terminology between § 1252(b)(3)(B) and § 1252(f)(2) cannot justify the Court's result.

Noting that the term "stay" is used in § 1252(b)(3)(B) but not in § 1252(f)(2), the Court infers that Congress did not intend that the latter provision apply to stays. *Ante,* at 1758 – 1759. But the use of the term "stay" in subsection (b)(3)(B) is easy to explain. As noted above, prior to IIRIRA, the Immigration and Nationality Act provided for an automatic "stay" of deportation upon the filing of a petition for review unless the court of appeals directed otherwise. See 8 U.S.C. § 1105a(a)(3) (1994 ed.) (repealed 1996). The statute provided:

> "The service of the petition for review upon [the Attorney General's agents] shall *stay* the deportation of the alien pending determination of the petition by the court . . . unless the court otherwise directs . . . ." *Ibid.* (emphasis added).

In IIRIRA, Congress repealed that provision and, to make sure that the pre-IIRIRA practice would not be continued, enacted a new provision that explicitly inverted the prior rule:

> "Service of the petition on the officer or employee does not *stay* the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." § 1252(b)(3)(B) (2006 ed.) (emphasis added).

It is thus apparent that § 1252(b)(3)(B) uses the term "stay" because that is the term that was used in the provision that it replaced.

Finally, the Court worries that applying § 1252(f)(2) would create inequitable results by allowing removable aliens to remain in the United States only if they can prove the merits of their claims under a "higher standard" than the one they would otherwise have to satisfy. *Ante,* at 1760. But as the Court acknowledges, *ante,* at 1755, IIRIRA specifically contemplated that most aliens wishing to contest final orders of removal would be forced to pursue their appeals from abroad. See § 306(b), 110 Stat. 3009–612 (repealing 8 U.S.C. § 1105a (1994 ed.)). If such an alien seeks to remain in the United States pending judicial review, IIRIRA provides that the alien must make the heightened

showing required under § 1252(f)(2). Congress did not think that this scheme is inequitable, and we must heed what § 1252(f)(2) prescribes.

* * *

In my view, the Fourth Circuit was correct to apply § 1252(f)(2) and to deny petitioner's application for an order barring his removal pending judicial review. Therefore, I would affirm the judgment of the Court of Appeals.

Gary Bradford CONE, Petitioner,

v.

Ricky BELL, Warden.

No. 07–1114

Argued Dec. 9, 2008.

Decided April 28, 2009.

Background: After his Tennessee convictions for, inter alia, two counts of first-degree murder, and his death sentence, were affirmed on direct appeal, 665 S.W.2d 87, and the denials of his petitions for state postconviction relief were affirmed, 747 S.W.2d 353 and 927 S.W.2d 579, inmate petitioned for writ of habeas corpus. The United States District Court for the Western District of Tennessee, Jon Phipps McCalla, J., denied petition. Petitioner appealed. The United States Court of Appeals for the Sixth Circuit, 243 F.3d 961, granted relief. State appealed. The Supreme Court reversed, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914. On remand, the Court of Appeals, 359 F.3d 785, Ryan, Circuit Judge, again granted relief, and the Supreme Court reversed, 543 U.S. 447, 125 S.Ct. 847, 160 L.Ed.2d 881. On remand the Court of Appeals, 492 F.3d 743, Ryan, Circuit Judge, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Stevens, held that:

(1) habeas review of petitioner's *Brady* claim was not procedurally barred;

(2) Court of Appeals did not err in denying relief on ground that suppressed evidence was immaterial to the jury's guilt finding; but

(3) remand was required for a full review of the effect of improperly suppressed evidence regarding the seriousness of defendant's drug problem on his sentence.

Vacated and remanded.

Chief Justice Roberts filed opinion concurring in the judgment.

Justice Alito filed opinion concurring in part and dissenting in part.

Justice Thomas filed dissenting opinion, in which Justice Scalia joined.

1. Habeas Corpus ⚿422

Federal courts will not review questions of federal law presented in a habeas petition when the state court's decision rests upon a state-law ground that is independent of the federal question and adequate to support the judgment. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⚿422

The adequacy of state procedural bars to the assertion of federal questions in state cases on federal habeas review is not within a state's prerogative finally to decide; rather, adequacy is itself a federal question. 28 U.S.C.A. § 2254.

3. Habeas Corpus ⚿385, 422

Federal habeas review of petitioner's *Brady* claim was not procedurally barred,