IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID and NATASHA WIT,	)	
	)	
Plaintiffs-Appellees	)	
	)	
v.	)	Nos. 20-17363, 20-17364,
	)	21-15193, 21-15194
UNITED BEHAVIORAL HEALTH,	)	
	)	
Defendant-Appellant	)	

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE ON BEHALF OF NATIONAL ASSOCIATION FOR BEHAVIORAL HEALTHCARE, AMIERICAN HOSITAL ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN ASSOCIATION FOR THE TREATMENT OF OPIOID DEPENDENCE, CALIFORNIA HOSPITAL ASSOCIATION, FEDERATION OF AMERICAN HOSPITALS, NATIONAL ASSOCIATION OF ADDICTION TREATMENT PROVIDERS, NATIONAL COUNCIL FOR MENTAL WELLBEING, and REDC CONSORTIUM IN SUPPORT OF REHEARING EN BANC

Movants, NATIONAL ASSOCIATION FOR BEHAVIORAL HEALTHCARE, AMIERICAN HOSITAL ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN ASSOCIATION FOR THE TREATMENT OF OPIOID DEPENDENCE, CALIFORNIA HOSPITAL ASSOCIATION, FEDERATION OF AMERICAN HOSPITALS, NATIONAL ASSOCIATION OF ADDICTION TREATMENT PROVIDERS, NATIONAL COUNCIL FOR MENTAL

WELLBEING, and REDC CONSORTIUM by their undersigned attorney, seek leave of Court to file a Brief on behalf of Amici Curiae In Support Of the Petition for Rehearing En Banc sought by Plaintiffs-Appellees (Dkt 128). In support thereof, movants state:

1. The *amici* all have significant interests in the outcome of this litigation as set forth in the proposed brief attached to and accompanying this motion due to the impact of this litigation on behavioral health treatment and mental illness in the United States.

2. Defendant-Appellant was contacted prior to the filing of this motion and has advised the undersigned that it takes no position as to the filing of the accompanying amicus brief in support of the pending Petition for Rehearing.

WHEREFORE, movants pray that the Court grant leave to file a Brief of Amici Curiae in support of the Petition for Rehearing filed by the Plaintiffs-Appellees.

/s/ Mark D. DeBofsky
Mark D. DeBofsky, Attorney for
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CERTIFICATE OF SERVICE

Mark D. DeBofsky, the attorney, certifies that he served the foregoing Motion for Leave to File Brief of Amici Curiae in Support of Petition for Rehearing upon all parties of record and entitled to receive notice via the CM/ECF system maintained by the Clerk of the U.S. Court of Appeals for the Ninth Circuit on March 17, 2023.

/s/ Mark D. DeBofsky
Mark D. DeBofsky

Nos. 20-17363, 20-17364, 21-15193, 21-15194

In The United States Court of Appeals For The Ninth Circuit

DAVID WIT, *et al.*,
Plaintiffs-Appellees
v.
UNITED BEHAVIORAL HEALTH,
Defendant-Appellant

Appeal from the United States District Court
For the Northern District of California
Case Nos. 3:14-cv-2346, 3:14-cv-5337
The Honorable Joseph C. Spero, Chief Magistrate Judge Presiding

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION FOR BEHAVIORAL HEALTHCARE, AMERICAN HOSPITAL ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN ASSOCIATION FOR THE TREATMENT OF OPIOID DEPENDENCE, CALIFORNIA HOSPITAL ASSOCIATION, FEDERATION OF AMERICAN HOSPITALS, NATIONAL ASSOCIATION OF ADDICTION TREATMENT PROVIDERS, NATIONAL COUNCIL FOR MENTAL WELLBEING, and REDC CONSORTIUM IN SUPPORT OF REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Appellate Court No.: Nos. 20-17363, 20-17364, 21-15192, 21-15194

Short Caption: *Wit v. United Behavioral Health*

The undersigned counsel of record for Amici, National Association for Behavioral Healthcare ("NABH"), American Hospital Association ("AHA"), American Psychological Association ("APA"), American Association for the Treatment of Opioid Dependence ("AATOD"), California Hospital Association ("CHA"), Federation of American Hospitals ("FAH"), National Association of Addiction Treatment Providers ("NAATP"), National Council for Mental Wellbeing ("NCMW"), and REDC Consortium certifies that AHA, APA, CHA, FAH, NAATP, NABH, NCMW, and the REDC Consortium are not subsidiaries of any other corporation and no publicly held corporation owns 10% or more of any *amicus curiae* organization's stock.

/s/ Mark D. DeBofsky
Mark D. DeBofsky

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INTEREST OF AMICI CURIAE

The National Association for Behavioral Healthcare ("NABH") is an organization that represents provider systems that treat children, adolescents, adults, and older adults with mental health and substance use disorders in inpatient behavioral healthcare hospitals and units, residential treatment facilities, partial hospitalization and intensive outpatient programs, medication assisted treatment centers, specialty outpatient behavioral healthcare programs, and recovery support services in 49 states and the District of Columbia. The association was founded in 1933.

NABH represents behavioral health provider systems committed to delivering responsive, accountable, and clinically effective prevention and treatment for children, adolescents, adults, and older adults with mental and substance use disorders.

The American Hospital Association ("AHA") represents nearly 5,000 hospitals, healthcare systems, and other healthcare organizations. AHA members are committed to improving the health of the communities they serve and to helping ensure that care is available to and affordable for all Americans. In particular, hospitals and health

systems provide essential behavioral health care services to millions of Americans every day. The AHA has a long-standing commitment to support member efforts to deliver high-quality, accessible behavioral health services.

The American Psychological Association (APA) is a scientific and educational organization dedicated to increasing and disseminating psychological knowledge. A non-profit scientific and professional organization, it has over 146,000 members and affiliates. The APA's major purposes include promoting the advancement, communication, and application of psychological science and knowledge to benefit society and improve lives.

The American Association for Treatment of Opioid Dependence ("AATOD") was founded in 1984 to enhance the quality of patient care in treatment programs by promoting the growth and development of comprehensive opioid treatment services throughout the United States.

The California Hospital Association (CHA) is a nonprofit membership corporation representing the interests of more than 400 hospital and health system members in California, including psychiatric hospitals. CHA's members furnish vital health care services,

including behavioral health care services, to millions of our state's citizens. CHA provides its members with state and federal representation in the legislative, judicial, and regulatory arenas, in an effort to: support and assist California hospitals in meeting their legal and fiduciary responsibilities; improve health care quality, access, and coverage; promote health care reform and integration of services; achieve adequate health care funding; improve and update laws and regulations; and maintain the public trust in healthcare. CHA's efforts regularly include participating as *amicus curiae* in cases of importance to hospitals and other health care providers, such as this one.

The Federation of American Hospitals ("FAH") is the national representative of more than 1,000 leading tax-paying community hospitals and health systems throughout the United States. FAH members provide patients and communities with access to high-quality, affordable care in both urban and rural areas across 46 states, plus Washington, DC and Puerto Rico. Its members include teaching, acute, inpatient rehabilitation, behavioral health, and long-term care hospitals and provide a wide range of inpatient, ambulatory, post-acute, emergency, children's, and cancer services. These tax-paying hospitals

account for nearly 20 percent of U.S. hospitals and serve their communities proudly while providing high-quality health care to their patients. Dedicated to a market-based philosophy, the Federation provides representation and advocacy on behalf of its members to Congress, the Executive Branch, the judiciary, media, academia, accrediting organizations, and the public.

The mission of the National Association of Addiction Treatment Providers ("NAATP") is to provide leadership, advocacy, training, and member support services to ensure the availability and highest quality of comprehensive research-driven evidence-based addiction treatment and care that addresses the medical, bio-psycho-social, and spiritual needs of individuals and families impacted by the disease of addiction.

The National Council for Mental Wellbeing ("NCMW") is a membership organization that drives policy and social change on behalf of nearly 3,200 mental health and substance use treatment organizations and the more than 10 million children, adults, and families they serve. NCMW advocates for policies to ensure equitable access to high-quality services, build the capacity of mental health and substance use treatment organizations and promote a greater

understanding of mental wellbeing as a core component of comprehensive health and health care.

The REDC Consortium is the national consortium representing eating disorders care focused on standards, policy, research, and best practices. The REDC, which was founded in 2011 as the Residential Eating Disorders Consortium, was expanded in 2020 to encompass higher levels of care for treating of eating disorders. The mission of REDC is to collaboratively address issues impacting access to and quality of eating disorder treatment programs across the US for individuals and their families. REDC works to continually refine and improve standards of care, partner in collaborative research, and actively support policy that ensures quality, accessible care for people with eating disorders.

Amici all have an interest in this matter because of their commitment to safe, effective, and comprehensive treatment for behavioral health conditions, including substance use and eating disorders.

This brief is being submitted in accordance with Fed. R. App. P. 29(b). Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for amici curiae

states that no counsel for a party authored the brief, in whole or in part, and no person other than *amici curiae,* their members, or their counsel made a monetary contribution to its preparation or submission.

Amici submit this brief to provide the Court with additional information and to reinforce the exceptional importance of the issues presented in this case with respect to access to care and treatment of behavioral health and substance use disorders consistent with each patient's individualized needs and medically necessary requirements.

INTRODUCTION

This case addresses an issue of exceptional importance – the availability of insurance coverage for treatment of behavioral health conditions. The district court's two lengthy opinions, both of which followed a 10-day bench trial and extensive briefing by the parties, were landmark rulings that resulted in an immediate and profound nationwide impact on coverage for treatment of behavioral health and substance use disorders. At the heart of the lower court's rulings were findings that the country's largest managed healthcare and health insurance company for behavioral health services, United Behavioral Health (UBH), routinely denied patients access to covered outpatient, intensive outpatient, and residential mental health and substance use disorder treatment based on the application of guidelines that were found inconsistent with generally accepted standards of care ("GASC").

The lower court's decisions should have been affirmed in view of their well-grounded evidentiary findings and legal analysis. Instead, the panel's opinion issued on January 26, 2023 (58 F.4th 1080) overturned the district court's findings of fact concerning UBH's conduct and deviated from established standards of appellate review of

rulings issued in accordance with Fed. R. Civ. P. 52 and ERISA principles. From *amici's'* perspective, though, the greatest fault in the panel's ruling is that the decision undermines access to safe and effective treatment for behavioral health and substance use disorders and sets a dangerous precedent for health insurance coverage.

The importance of such public health issues, especially as an increasing number of Americans struggle with behavioral health issues, is reason alone to grant *en banc* review.

ARGUMENT

THE PANEL'S DECISION WILL RESTRICT PATIENT ACCESS TO MEDICALLY NECESSARY CARE FOR BEHAVIORAL HEALTH CONDITIONS AND SUBSTANCE USE DISORDERS

According to the National Institute of Mental Health, nearly one in five American adults lives with a mental illness.[1] The data are scarcely better for America's children: one in six children between the ages of 6 and 17 experiences mental illness each year, which recently led the American Academy of Pediatrics to issue a "Declaration of National Emergency in Child and Adolescent Mental Health."[2]

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[1] "Mental Illness" at https://www.nimh.nih.gov/health/statistics/mental-illness

[2] "Mental Health By the Numbers," (National Alliance on Mental Illness); available at https://www.nami.org/mhstats; AAP-AACAP-CHA

Adolescent suicides are also at crisis levels and constitute the "second leading cause of death among people aged 10-14, 15-24, and 25-34."[3] Moreover, the demand for mental health treatment for both adults and children has been increasing; and the Covid-19 pandemic has significantly increased that demand,[4] including the growing need for substance use disorder treatment.[5]

Declaration of National Emergency in Child and Adolescent Mental Health, available at https://www.aap.org/en/advocacy/child-and-adolescent-healthy-mental-development/aap-aacap-cha-declaration-of-a-national-emergency-in-child-and-adolescent-mental-health/

[3] Centers for Disease Control and Prevention, National Center for Health Statistics, Health, United States, 2020-2021, "Suicide," available at https://www.cdc.gov/nchs/hus/topics/suicide.htm#:~:text=Suicide%20is%20a%20significant%20cause,Table%20LCODAge)%20(2).

[4] See, e.g., American Psychological Association, "Demand for mental health treatment continues to increase, say psychologists," at https://www.apa.org/news/press/releases/2021/10/mental-health-treatment-demand#:~:text=The%20number%20of%20psychologists%20who,the%20start%20of%20the%20pandemic.; "'Nobody Has Openings'" Mental Health Providers Struggle to meet Demand, *New York Times* February 17, 2021; updated September 14, 2021.

[5] Even before the pandemic increased the demand for those services, a 2019 Milliman Research Report found continuing problems with patient access to care despite the Mental Health Parity law, e.g., consumers were almost 5.5 times as likely to go out-of-network for mental health services/substance use as for medical/surgical primary care. "Addiction and mental health vs. physical health: Widening disparities in network use and provider reimbursement," available at https://assets.milliman.com/ektron/Addiction_and_mental_health_vs_ph

For the overwhelming majority of Americans, effective treatment requires comprehensive health insurance coverage. Advocating for more widely available health insurance to pay the burgeoning cost of needed healthcare, the National Academy of Sciences Institute of Medicine published a white paper in 2001 entitled "Coverage Matters: Insurance and Health Care."[6] The article explained the benefits of health insurance, which "pools the risks and resources of a large group of people so that each is protected from financially disruptive expenses resulting from an illness, accident or disability."

Even when a patient has insurance, though, the availability of coverage is only meaningful if provides coverage for appropriate and necessary care. According to a finding made by the district court based on expert witness trial testimony, "[r]esearch has demonstrated that patients with mental health and substance use disorders who receive treatment at a lower level of care than is clinically appropriate face worse outcomes than those who are treated at the appropriate level of

ysical_health_Widening_disparities_in_network_use_and_provider_reimbursement.pdf

[6] "Coverage Matters: Insurance and Health Care," Executive Summary available at https://www.ncbi.nlm.nih.gov/books/NBK223643/

care." 2-ER-265-66.

Inadequate mental health treatment places patients at greater risk of unemployment, homelessness, substance use, suicide, and incarceration, all of which impose "financial and social costs borne by [States] and [their] residents."[7] And coverage limited to emergency mental health treatment management is plainly insufficient, since, according to expert trial testimony quoted in the district court's initial ruling, such care results in "people going in and out of hospital, rotating back and forth between trying to make outpatient treatment work, failing in it, having chronic ongoing crises that need to be managed, winding up in an inpatient unit." 2-ER-262.

Despite the critical need for meaningful comprehensive behavioral health coverage, which is mandated to be provided in parity with coverage for physical illnesses and injuries by the Mental Health Parity and Addiction Equity Act, 29 U.S.C. § 1185a, access to adequate behavioral health treatment remains problematic for many insured Americans. For example, a survey conducted by the National Alliance

[7] Brief of the State of California as Amicus Curiae in Support of Plaintiffs-Appellees (Dkt Entry 56) at 16

on Mental Illness (NAMI) found patients seeking mental health care, as contrasted with patients seeking care for physical illnesses or injuries, were *twice as likely* to be denied care based on a claimed lack of "medical necessity."[8] Such barriers to care result in significant gaps in the continuum of care patients receive and thus exacerbate America's behavioral health crisis.

The higher rate of claim denials also raises *amici's* concern about the portion of the panel ruling addressing administrative exhaustion. While appellees' brief demonstrates why the panel's ruling on that issue was legally flawed, the exhaustion issue was also wrongly decided from a policy perspective. Two recent studies from the Kaiser Family Foundation (KFF) show that consumers appeal fewer than 0.2% of benefit denials.[9] Among the reasons why the appeal rate is so low,

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[8] National Alliance on Mental Illness (NAMI). (2015). A Long Road Ahead: Achieving True Parity in Mental Health and Substance Use Care. https://www.nami.org/About-NAMI/Publications-Reports/Public-Policy-Reports/A-Long-Road-Ahead/2015-ALongRoadAhead.pdf

[9] Karen Pollitz, Justin Lo, Rayna Wallace, and Salem Mengistu, *Claims Denials and Appeals in ACA Marketplace Plans in* 2021, Kaiser Family Foundation (Feb. 9, 2023), https://www.kff.org/private-insurance/issue-brief/claims-denials-and-appeals-in-aca-marketplace-plans/; Karen Pollitz, *Consumer Appeal in Private Health* Coverage, Kaiser Family Foundation (Dec. 10, 2021)("Consumer Claims"), https://www.kff.org/private-insurance/issue-brief/consumer-appeal-

according to KFF, is that consumers' illnesses may make them less able to appeal.[10] Members of the American Psychological Association have similarly reported that mental health patients rarely file appeals because their conditions impede their ability to participate in an appeals process that appears complex and daunting. If over 99% of consumers are barred from joining class actions because they have not exhausted appeals, that will foreclose one of their few viable avenues of redress against large insurance companies.

Thus, the recently issued opinion is as problematic as the withdrawn initial memorandum disposition. To be sure, the panel appropriately observed that not every treatment which is consistent with generally accepted standards of care ("GASC") falls within the scope of coverage offered by the plans at issue. However, the behavioral

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rights-in-private-health-coverage/. The data for both Kaiser Family Foundation studies is from Affordable Care Act (ACA) marketplace plans. The Consumer Claims article explains that, unlike employer-sponsored plans, marketplace plans required under the ACA to report data on denials and appeals. We have no reason to believe that appeal rates would be significantly different if that data *were* available for employer-sponsored ERISA plans that are at issue in this case.

[10] Consumer Claims, *supra* note 1.

health treatment at issue in this matter were all covered services.

Moreover, the panel's extreme deference to UBH's guidelines, especially in the face of UBH's glaring conflict of interest exposed by the district court, underscores a vital legal question: what is the point of even having insurance if the insurer can override recommendations for covered treatment that are based on expert consensus opinions and which are made by medical professionals who have first-hand knowledge of their patients' needs? The panel's ruling is even more troubling in that regard because it acknowledged state mandates that override the UBH Guidelines, yet the panel failed to recognize that "guidelines" are not plan rules and cannot substitute for medical judgments specific to each patient's needs and circumstances.

The panel opinion also failed to recognize that the GASC standards cited and discussed at length in the district court's decision were established (and are regularly updated) by well-respected, reputable professional associations of clinical experts in the fields of mental health and addiction treatment, such as the American Society of Addiction Medicine (ASAM), the American Academy of Child and Adolescent Psychiatry, and the American Association of Community

Psychiatrists. Since the district court made detailed findings of fact as to how the UBH Guidelines were infected by financial conflicts, it is startling that the panel disregarded the clear error standard of review and concluded that UBH's use of its guidelines was a matter of its discretionary authority and was not an abuse of discretion.

Patients will undoubtedly suffer if the panel opinion is upheld. Giving insurers virtually unfettered discretionary authority to disregard expert consensus treatment guidelines is inconsistent with *Metro. Life Ins. Co. v. Glenn,* 554 U.S. 105 (2008), which recognized insurers' conflicts of interest and directed that courts take such conflicts into consideration. Since so many people with behavioral illnesses *already* do not receive the care they need, the panel decision worsens those patients' prospects for achieving wellness. Statistics from 2016, the most recent year available, show that only 43 percent of the 44.7 million adults with mental health disorders received treatment, and only 11 percent of adults with a substance use disorder received treatment.[11] Put plainly, if insurers are permitted to deny treatment

[11] Substance Abuse and Mental Health Services Administration (SAMHSA). (2017). Key substance use and mental health indicators in the United States: Results from the 2016 National Survey on Drug Use

based on self-interested clinical standards rather than GASC, even fewer patients will receive adequate treatment and the mental health crisis will further worsen.

As plaintiffs and the other *amici* have explained, ERISA clearly states that the law was intended to protect benefits promised to plan participants and their beneficiaries. 29 U.S.C. § 1001(b). UBH's use of its treatment guidelines in place of GASC is fundamentally inconsistent with that Congressional purpose or with the Supreme Court's directive in *Glenn* recognizing the fiduciary obligations imposed on employee benefit plan administrators by 29 U.S.C. § 1104(a)(1) and asserting that "ERISA imposes higher-than-marketplace quality standards on insurers." 554 U.S. at 115.

UBH's use of internally developed guidelines in place of behavioral health treatment guidelines developed by authoritative medical experts is fundamentally inconsistent with such standards. In the circumstances at issue here, there can be no more heightened obligation to act "solely in the interest of the participants and

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and Health (HHS Publication No. SMA 17-5044, NSDUH Series H-52). https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2016/NSDUH-FFR1-2016.pdf

beneficiaries" than when the lives of the plans' participants and their beneficiaries are at stake.

By failing to recognize the UBH's conflicts and by disregarding the Supreme Court's guidance in *Glenn*, the panel made manifest legal errors. But the practical consequences heighten the exceptional importance of this case. Despite the issuance of a new opinion, the panel *still* failed to recognize that this is no ordinary case. Based on extensive fact-finding, the district court's decisions had a transformative impact on how behavioral health care is administered in ERISA-governed plans, which is how most Americans receive their health care coverage.[12] Leaving decision-making power over critical health care coverage to the nearly unlimited discretion of for-profit insurers such as UBH guarantees that necessary treatment will be denied with ensuing consequences. Neither law nor logic permits a regime that elevates an insurer's discretionary authority above the medically necessary needs of

[12] United States Census Bureau, "Health Insurance Coverage in the United States: 2020 (September 14, 2021); available at https://www.census.gov/library/publications/2021/demo/p60-274.html#:~:text=Highlights%201%20In%202020%2C%208.6%20percent%20of%20people%2C,and%2034.8%20percent%2C%20respectively.%20...%20More%20items...%20

individual patients. Consequently, rehearing *en banc* should be granted.

CONCLUSION

For the reasons presented above, *amici curiae*, respectfully request that rehearing *en banc* be granted and the district court decisions be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE FOR BRIEFS

Nos. 20-17363, 20-17364, 21-15193, 21-15194

I am the attorney or self-represented party.

This brief contains 2,964 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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

[ ] complies with the word limit of Cir. R. 32-1.
[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
[X] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
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[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Mark D. DeBofsky **Date** March 17, 2023

CERTIFICATE OF SERICE

Mark D. DeBofsky certifies that on March 17, 2023, I electronically filed the foregoing brief with the Clerk of the Court by using the CM/ECF system and that all counsel of record have been served electronically by CM/ECF delivery thereof.

Dated: March 17, 2023

/s/ Mark D. DeBofsky
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