A166579

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

IN RE: ESSURE PRODUCT CASES, JCCP 4887

LHC GROUP, INC.,
Plaintiff and Appellant,

v.

BAYER CORPORATION,
Defendant and Respondent.

APPEAL FROM ALAMEDA COUNTY SUPERIOR COURT
HON. EVELIO M. GRILLO | CASE NO. RG16804878

APPLICATION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE AMICUS BRIEF AND AMICUS BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT

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APPLICATION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE AMICUS BRIEF

Under Rule 8.200(c) of the California Rules of Court, Washington Legal Foundation (WLF) requests leave to file the accompanying amicus brief in support of Defendant and Respondent Bayer Corporation. Under Rule 8.200(b) of the California Rules of Court, both this application and WLF's proposed brief are timely filed within 14 days of the filing of the final reply brief.

Founded in 1977, WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide, including many in California. WLF promotes free enterprise, individual rights, limited government, and the rule of law. To advance those aims, WLF often appears as an amicus curiae in California courts. (See, e.g., *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038; *T.H. v. Novartis Pharm. Corp.* (2017) 4 Cal.5th 145; *City of Hope Nat'l Med. Ctr. v. Genentech Inc.* (2008) 43 Cal.4th 375.)

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WLF believes the Court will benefit from amicus briefing on the importance of federal preemption in the ERISA context. As WLF's brief explains, Plaintiff LHC Group's unduly narrow approach to ERISA preemption, if successful on appeal, would disrupt the national uniformity Congress enacted ERISA to provide and likely increase costs for plans and participants well beyond this case. WLF's brief also explains why LHC's misjoinder of hundreds of disparate, unrelated claims into a single civil action is manifestly unfair to Defendant Bayer Corporation. WLF's brief can explore these issues in more depth than the parties' briefs.

WLF has no direct interest, financial or otherwise, in the outcome of this appeal. Lacking a direct interest, WLF can provide the Court with a perspective distinct from any party. No party's counsel authored any part of WLF's brief. No one, other than WLF or its counsel, contributed money to fund the preparation or submission of WLF's brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

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WLF asks the Court to grant this application to file the accompanying amicus brief.

September 19, 2023

Respectfully submitted,

/S/ ANDREW D. SILVERMAN

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WASHINGTON LEGAL FOUNDATION'S AMICUS BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT

INTRODUCTION

Some 140 million Americans depend on an employee benefit plan for healthcare insurance, retirement pensions, and other crucial benefits. Congress enacted the Employee Retirement Income Security Act (ERISA) to encourage formation of such plans by establishing a "uniform regulatory regime." (*Aetna Health v. Davila* (2004) 542 U.S. 200, 208.) ERISA's broad preemption provision serves that goal by preventing a hodgepodge of state-law burdens that would "complicate the administration of nationwide plans" and produce "inefficiencies that employers might offset with decreased benefits." (*FMC Corp. v. Holliday* (1990) 498 U.S. 52, 60.)

Under Section 514(a) of ERISA, a state-law tort claim "relates to" an ERISA plan, and is therefore preempted, "if it has a connection with or reference to such a plan." (*Shaw v. Delta Air Line, Inc.* (1983) 463 U.S. 85, 96–97.) Plaintiff LHC

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Group is the administrator of an ERISA plan. In its own name and as a subrogee, LHC sued Defendant Bayer Corporation for injuries allegedly caused by Bayer's Essure® birth control device. As the trial court rightly concluded in sustaining demurrer, LHC's state-law subrogation claims easily satisfy ERISA's "relate to" test for federal preemption.

First, LHC's claims have an inherent "connection with" an ERISA plan. Resolving LHC's claims would require the trial court to address the relationship between the plan and 231 of the plan's participants—a relationship regulated by ERISA. Second, LHC's claims make a forbidden "reference to" the plan. After all, LHC's right of subrogation springs from within the four corners of the plan itself. Resolving LHC's claims would require the court to interpret the plan document, including the scope of the plan's subrogation clause, in deciding whether LHC can seek to recover for personal injury claims by plan participants who could have sued individually. Both its "connection with" and "reference to" an ERISA plan are fatal to LHC's suit.

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Even if this Court disagrees that ERISA preempts LHC's suit, it should still affirm because LHC's attempt to combine the personal-injury claims of 231 plan participants into a single action is a classic case of misjoinder. The Code of Civil Procedure permits joinder of plaintiffs only when they seek relief "arising out of the same transaction, occurrence, or series of transactions or occurrences." (Civ. Proc. Code, § 378(a)(1).) Here, LHC's combined claims arise out of 231 manifestly distinct transactions or occurrences.

The merits of LHC's common-law claims turn on a host of individualized issues. Each plan participant suffered a distinct injury, at a distinct time, in a distinct place. Each woman's device was inserted by a different doctor, who provided warnings tailored to each woman's unique medical history. The proof in each case will require different evidence from different witnesses. That is why, relying on its May 27, 2020 Case Management Order, the trial court alternatively sustained the demurrer on misjoinder grounds. This was

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entirely within the trial court's broad discretion to manage complex litigation and to enforce its own orders.

Contrary to LHC's wishes, an ERISA plan—even one with a subrogation clause—cannot function as a *de facto* class action. Joinder rules requiring separate trials for unrelated actions are grounded in vital notions of fairness. The law does not allow civil plaintiffs to try a defendant by an avalanche of unrelated allegations. The danger is too great that evidence from each plaintiff's claims will bleed into the others, and that the jury will be unable to treat each plaintiff's case as a separate and distinct matter. Here, joining the unrelated claims of 231 women from multiple States with unique medical histories, alleged injuries, and damages into one lawsuit would unduly prejudice Bayer, who would be unable to assert individualized defenses.

The trial court's judgment should be affirmed.

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ARGUMENT

I. LHC'S STATE-LAW CLAIMS ARE PREEMPTED BECAUSE THEY INHERENTLY "RELATE TO" AN ERISA PLAN.

Section 514(a) of ERISA broadly preempts "any and all State laws" that "relate to any employee benefit plan." (29 U.S.C. § 1144(a).) This "deliberately expansive" preemption clause is "conspicuous for its breadth." (*Ingersoll-Rand Co. v. McClendon* (1990) 498 U.S. 133, 138, quoting *Pilot Life Ins. Co. v. Dedeaux* (1987) 481 U.S. 41, 54, and *Holliday*, *supra*, 498 U.S. at p. 58.)

A law "relates to" an ERISA plan "if it has a connection with or reference to such a plan." (*Shaw*, *supra*, 463 U.S. at pp. 96–97.) "Under this broad commonsense meaning, a state law may 'relate to' a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." (*Ingersoll-Rand Co.*, *supra*, 498 U.S. at p. 139.)

That simple test resolves this appeal. The trial court correctly held that ERISA preempts LHC's state-law

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subrogation claims because they have both "a connection with" and a "reference to" an ERISA plan.

A. LHC's claims have an impermissible "connection with" an ERISA plan.

Even a "law that does not refer to ERISA plans may yet be pre-empted if it has a 'connection with' ERISA plans." (*California Div. of Lab. Standards Enforcement v. Dillingham Constr., N.A., Inc.* (1997) 519 U.S. 316, 325.) For preemption purposes, a state-law claim has a connection with an ERISA plan if "it encroaches on the relationships regulated by ERISA." (*Gen. Am. Life Ins. Co. v. Castonguay* (9th Cir. 1993) 984 F.2d 1518, 1522.) These include "the relationship between plan and plan member, between plan and employer, [or] between employer and employee." (*Paulsen v. CNF Inc.* (9th Cir. 2009) 559 F.3d 1061, 1082.)

To satisfy this relationship test, a state law need not "regulat[e] the relationship directly." (*Castonguay*, *supra*, 984 F.2d at p. 1522.) Rather, state laws are fully preempted under Section 514(a) if they merely affect an ERISA-regulated relationship "indirectly." (*Id.*) For Section 514(a) to preempt

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LHC's state-law claims here, those claims need only "encroac[h]," "bea[r] on," or "affect" the relationship between the plan principals. (*Id.*; *Depot, Inc. v. Caring for Montanans, Inc.* (9th Cir. 2019) 915 F.3d 643, 666; *Cromwell v. Equicor-Equitable HCA Corp*. (6th Cir. 1991) 944 F.2d 1272, 1276.)

LHC's state-law claims here easily satisfy the relationship test. No one disputes that the LHC plan is an "employee welfare plan" within the meaning of ERISA. Indeed, LHC alleges that it is the "administrator" of an ERISA plan and sues as a "subrogee of its Injured Members for medical expenses actually paid." (1 JA 10.) Yet none of these 231 insureds chose to sue Bayer individually. Nor is there any way to know which, if any, of the 231 insureds were in fact injured by Bayer, whether LHC's suit advances their interests, or whether they would ultimately be harmed (from a plan perspective) by such a suit. Resolving LHC's claims would thus require the court "to address the relationship between the Plan and the Plan members, which is a matter of federal concern under ERISA." (2 JA 359.) This is precisely

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the sort of encroachment on the relationship among ERISA plan principals that Section 514(a) bars.

What's more, LHC's entire action hinges on its claimed right of subrogation within the four corners of the ERISA plan—a right that encroaches, bears on, and affects the relationship between the plan and its participants. "The lawsuit enmeshes the Plan Participant because the Plan Participant is the injured party, the essential witness, and the person with privacy interests in her medical history." (2 JA 360.)

LHC's claims thus have an inherent, impermissible "connection with" an ERISA plan. As the trial court rightly found, "LHC is alleging a claim that runs through the Plan because it necessarily relies on the subrogation provision in the Plan document." (2 JA 358.) LHC's claims are therefore preempted under Section 514(a).

ERISA preemption precedent supports this conclusion. In *Oregon Teamster Employers Trust v. Hillsboro Garbage Disposal, Inc.* (9th Cir. 2015) 800 F.3d 1151, a self-funded

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health plan sued the defendants (an employer and employees of a separate company with common ownership) under Oregon law for the unauthorized payment of benefits. Because "analysis of the terms of the ERISA plan [was] nonetheless required" to determine whether the benefits were authorized, the Ninth Circuit held that the plaintiff's breach of contract claims had a "connection with" an ERISA plan. (*Hillsboro Garbage*, *supra*, 800 F.3d at p. 1156.)

The Ninth Circuit emphasized that because the plaintiff's claims arose from the ERISA plan and "not separate agreements," the relationship between the claims and the plan easily triggered preemption under Section 514(a). (*Id.*) Here, LHC's entire suit depends on a provision in the ERISA plan itself, not a separate or unrelated agreement. LHC's action simply could not be brought without the ERISA plan. As in *Hillsboro Garbage*, this impermissible "connection with" an ERISA plan dooms LHC's entire state-law action.

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B. LHC's claims make a forbidden "reference to" an ERISA plan.

State-law claims that make "reference to" ERISA plans "relate to" those plans within the meaning of Section 514(a). "[T]he focus is on whether the claim is premised on the existence of an ERISA plan, and whether the existence of the plan is essential to the claim's survival." (*Hillsboro Garbage*, *supra*, 800 F.3d at p. 1155.)

To be sure, state-law claims that "reference" ERISA plans are preempted regardless of their actual effect on those plans. Indeed, Section 514(a)'s broad preemption provision "displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." (*Metro. Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 739.)

Here, LHC's claims relate to ERISA plans and are preempted because LHC's complaint impermissibly makes repeated "reference to" an ERISA plan. Again, LHC's right to press the claims of plan participants exists "only because the plan document assigns the right sue to LHC." (2 JA 357.) In

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other words, "[t]he existence of the plan is essential to the claim[s]." (*Id.*)

Nor do the references to the ERISA plan stop there. As the trial court aptly recognized, LHC's suit would require the court to "consider and interpret the plan document in determining whether LHC can bring the claims." (2 JA 357.) By the plan's own terms: "As a condition for receiving benefits under the Plan, each Covered Person agrees to and grants the Plan the right to subrogation, the right to reimbursement, and the right of recovery as set forth herein." (1 JA 10 [¶10]; 1 JA 80–81.) And because the plan's more than 200 insureds assigned their subrogation rights to LHC in exchange for benefits under the plan, LHC's subrogation action "relates not merely to pension benefits, but to the essence of the pension plan itself." (*Ingersoll-Rand*, *supra*, 498 U.S. at pp. 139–140.)

Ingersoll-Rand proves the point. There, the Supreme Court of Texas held that the plaintiff could bring a wrongful discharge claim alleging that his employer fired him before his pension vested to avoid making any further contributions.

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(*Ingersoll-Rand*, *supra*, 498 U.S. at pp. 135–136.) The U.S. Supreme Court held that "[b]ecause the court's inquiry must be directed to the plan," the plaintiff's claim "'relate[s] to' an ERISA plan." (*Id.* at p. 140.) Put differently, where "the existence of [an ERISA] plan is a critical factor in establishing liability" under a state-law cause of action, that state-law claim is preempted. (*Id.* at p. 136.) So too here, where the Court's inquiry must be directed to an ERISA plan whose existence is key to establishing liability.

The plan's subrogation provision changes nothing. In *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Health Special Risk, Inc.* (N.D. Tex 2013) 2013 WL 2656159, the Northern District of Texas found that Section 514(a) preempted an ERISA plan's subrogation claim against alleged third-party tortfeasors. The court reasoned that the plan's subrogation claim was "in reality an action to recoup previously paid ERISA plan benefits." (*Central States*, *supra*, at p. *2, citing *Arana v. Ochscner Health Plan* (5th Cir. 2003) 338 F.3d 433.) As the court explained, any such state-

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law claim "brought by a plan or plan fiduciary via subrogation would be transformed into one that addresses an area of exclusive federal concern—the right to receive plan benefits." (*Id.* at p. *4.) That same logic precludes LHC's suit here. A court cannot resolve LHC's state-law claims without first deciding the validity and extent of the plan beneficiaries' assignment of rights to LHC. But Section 514(a) of ERISA precludes that inquiry.

In sum, LHC's state-law action "makes specific reference to, and indeed is premised on, the existence of a[n ERISA] plan." (*Ingersoll-Rand*, *supra*, 498 U.S. at pp. 139–140.) Because of that forbidden reference, LHC's claims "relate to" the plan and are thus preempted. (29 U.S.C. § 1144(a).)

C. Reversing the decision below would severely undermine ERISA's core policy aims.

ERISA's core policy goal is "ensur[ing] that plans and plan sponsors would be subject to a uniform body of benefits law." (*Rutledge v. Pharmaceutical Care Mgmt. Ass'n* (2020) 141 S. Ct. 474, 480.) Reversing the trial court's preemption

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decision here would upend settled preemption principles and undermine Congress's strong interest in uniformity for employee-benefit plans.

ERISA combines comprehensive federal rules on fiduciary duty, reporting, and disclosure with a broad preemption provision—Section 514(a)—to free employers from having to tailor their plans and their conduct to the common-law duties and policy preferences of each jurisdiction in which they operate. "The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive." (*Pilot Life*, *supra*, 481 U.S. at p. 54.) ERISA preemption thus enables employers to administer uniform and comprehensive nationwide benefit plans.

Before ERISA's comprehensive federal regulation of employee-benefit plans, a thicket of state-law liability and local regulation forced employers to monitor and comply with

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a hodgepodge of incompatible rules. Congress recognized that without a uniform national standard, employers could be forced "to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others." (*Fort Halifax Packing Co. v. Coyne* (1987) 482 U.S. 1, 9.)

Congress also feared that multi-jurisdictional liability exposure and increased administrative costs for employers could "lead those employers with existing plans to reduce benefits." (*Id*. at p. 11.) So with the support of both employers and labor unions, Congress displaced such state and local liability by enacting "what may be the most expansive express pre-emption provision in any federal statute." (*Gobeille v. Liberty Mut. Ins. Co.* (2016) 577 U.S. 312, 327, (conc. opn. of Thomas, J.).)

In doing so, Congress broadly preempted state-law suits like LHC's because the possibility of state-law liability arising from an ERISA plan is likely to affect employer conduct and

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the content of ERISA plans. (*Ingersoll-Rand*, *supra*, 498 U.S. at p. 142.) ERISA's policy considerations are thus especially salient here, because LHC's subrogation action on behalf of individual plan participants is inextricably bound up with the ERISA plan itself. Indeed, the claims would not exist but for the ERISA plan.

Nor may state subrogation law be applied as a sword to overcome ERISA's preemptive reach. "Contractual provisions for subrogation and reimbursement 'relate to ... payments with respect to benefits' because subrogation and reimbursement rights yield just such payments." (*Coventry Health Care of Missouri, Inc. v. Nevils* (2017) 581 U.S. 87, 95.) So when a plan administrator exercises its right to subrogation, "it receives from either the beneficiary or a third party 'payment' respecting the benefits the [plan] had previously paid." (*Id.*) But it is the plan's "very provision of benefits [that] triggers the right to payment." (*Id.*) If state courts confronted with subrogation claims under ERISA plans could impose conflicting or different duties under the vagaries

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of state tort law, it would send a message of "Katy bar the door" to employers and ERISA fiduciaries alike.

Such concerns are not merely hypothetical. They threaten to disrupt the lives of millions of Americans who rely on ERISA plans. Indeed, studies show that "each one percent increase in . . . plans' costs . . . results in a potential loss of insurance coverage for about 315,000 individuals." (Health Economics Practice, Barents Group, LLC (1998) *Impacts of Four Legislative Provisions on Managed Care Consumers 1999-2003*, p. iii.)

Allowing state common law to encroach on or circumvent relationships regulated by ERISA, as LHC seeks to do here, threatens to subject both plans and participants to an erratic patchwork of common-law rules. The net effect of "[r]equiring ERISA administrators to master the relevant laws of 50 States" would be to increase, exponentially, the costs of maintaining and operating an ERISA plan. (*Egelhoff v. Egelhoff ex rel. Breiner* (2001) 532 U.S. 141, 149.) Such burdens are "ultimately borne by the beneficiaries" in the

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form of higher premiums or reduced benefits. (*Id*. at p. 150.) That is contrary to what Congress intended. This Court should affirm.

II. LHC'S MISJOINDER OF UNRELATED CLAIMS IS MANIFESTLY UNFAIR AND OFFERS AN INDEPENDENT GROUND FOR AFFIRMANCE.

Although LHC nominally sued as a single plaintiff, the complaint in fact seeks recovery for distinct personal injuries sustained by 231 plan participants. (2 JA 267; 2 JA 282–294.) Relying on its May 27, 2020 CMO, the trial court correctly held that "the joinder of the claims of the 231 injured women into a single case is misjoinder." (2 JA 362.) The trial court's misjoinder ruling offers this Court another sound basis for affirmance.

Judicial economy is never served by overburdening trial courts through joinder in cases that require different evidentiary proofs. Like the joinder rules in virtually every other State, the Code of Civil Procedure permits joinder of plaintiffs only when they seek relief "arising out of the same transaction, occurrence, or series of transactions or

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occurrences" *and* (2) "if any question of law or fact common to all these persons will arise." (Civ. Proc. Code, § 378(a)(1).) LHC's attempt to aggregate the personal-injury claims of 231 plan participants into one lawsuit does not come close to satisfying this test.

Here, LHC's combined claims arise out of 231 manifestly distinct transactions or occurrences. Each of the 231 plan participants suffered a distinct injury, at a distinct time, and in a distinct place. Each injury may or *may not* have resulted from an Essure® device. Each woman's device was inserted at a different appointment by a different doctor, who made separate representations and gave warnings tailored to each patient's unique medical history. The proof in each case will require different evidence from different witnesses.

LHC's common-law claims depend on a host of plaintiff-specific issues that the trial court simply could not ignore. Indeed, the questions of duty, breach, foreseeability, proximate cause, and damages all turn on facts unique to each injured plan participant. In other words, LHC's recovery for

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each plan participant "would depend on whether each plan participant had a meritorious claim against Bayer." (2 JA 361–362.) Those 231 individualized determinations cannot be tried jointly. (See *David v. Medtronic* (2015) 237 Cal.App.4th 734, 740–741; *Moe v. Anderson* (2012) 207 Cal.App.4th 826, 833.)

Apart from each plan participant's *prima facie* case, Bayer's affirmative defenses against those claims would also turn on facts unique to each plan member. As a subrogee standing in the shoes of its plan members, LHC "has no greater rights than the insured and is subject to the same defenses assertable against the insured." (*Travelers Property Cas. Co. of Am. v. Engel Insulation, Inc.* (2018) 29 Cal.App.5th 830, 835.) "Although courts enjoy great latitude in structuring trials . . . [including] the use of innovative procedures, any trial must allow for the litigation of affirmative defenses." (*Duran v. U.S. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1, 33.)

Rather than ignore these individualized issues, as LHC urged (and as it continues to do on appeal), the trial court

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managed them by requiring "a separate lawsuit on behalf of each of the 231 plan participants who was allegedly injured by the Essure product." (2 JA 361.) This was entirely within the trial court's "broad discretion" to both manage complex litigation and enforce its own orders. (Cal. Rules Ct., rule 3.504(c); *Rutherford v. Owens-Ill., Inc.* (1997) 16 Cal.4th 953, 967.)

Adhering to the requirements for joinder is no picayune formality. The misjoinder of plaintiffs whose claims do not arise from the same transaction or occurrence is manifestly unfair to defendants. Indeed, both state and federal rules of procedure militate *against* joint or consolidated trials because they rightly presume that joining two or more unrelated actions would unfairly prejudice the defendant. Similarly, state and federal rules of evidence uniformly exclude evidence of "other acts" when used to prove a person's character or that the person acted in accordance with that character. (See Evid. Code § 1101(a); Fed. Rules Evid., rule 404(b), 28 U.S.C.)

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These basic protections reflect the commonsense understanding that a mountain of accusations—even if weak or unsubstantiated when standing alone—would provoke a "where there's smoke, there's fire" response in the trier of fact. A defendant can be convicted (in the criminal context) or found liable (in civil cases) by the sheer volume of claims and claimants, even if no individual case would have merit standing alone.

This increased risk of liability by joining so many unrelated plaintiffs into a single suit also raises the chance that defendants will feel pressured to settle regardless of the merits of the suit. (See Report on the Advisory Committee on Civil Rules and the Working Group on Mass Torts (1999) 187 F.R.D. 293, 305 ["[A]ggregated plaintiffs may acquire power that dispersed individual plaintiffs would lack, enhancing—and perhaps exaggerating—their underlying substantive rights."].)

Nor is there any logical limit to LHC's untethered approach to joinder. If 231 far-flung plan participants with

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unique medical histories, injuries, and damages can all be tried jointly simply because they received the same medical device (though from different physicians, at different times, in different States), then *any* group of plaintiffs could demand a joint trial. In fact, under LHC's logic, every person in the United States injured by the same company's product—no matter how the injury occurred or who was to blame—could presumably pile into the same personal-injury suit in Alameda County so long as venue were proper.

But such a trial would be manifestly unjust. Although "[o]ne jury" can "hold the fate of an industry in the palm of its hand . . . in our system of civil justice" it "need not be tolerated when the alternative exists of submitting an issue to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers." (*In re Rhone-Poulenc Rorer, Inc.* (7th Cir. 1995) 51 F.3d 1293, 1300.)

In short, by giving each side a chance to press its best case without irrelevant outside influences, traditional joinder rules codify basic notions of fairness. That requires separate

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trials for separate actions. Because the trial court's demurrer ruling based on misjoinder secures that end, it offers this Court another persuasive ground for affirmance.

CONCLUSION

The Court should affirm the trial court's judgment.

September 19, 2023

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DECLARATION OF WORD COUNT
(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief contains 3,847 words.

Dated: September 19, 2023

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PROOF OF SERVICE

I am a citizen of the United States, over eighteen years old, and not a party to this action. My place of employment and business address is Orrick, Herrington & Sutcliffe LLP, 1152 15th Street, Washington, DC 20005. On September 19, 2023, I served the following document:

- **APPLICATION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE AMICUS BRIEF ANDAMICUS BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT**

by causing true copies of such document(s) to be delivered by Federal Express by depositing a true and correct copy thereof with Federal Express in Washington, DC, enclosed in a sealed envelope with fees thereon fully paid, addressed to the person(s) listed below:

Martin Bienstock BIENSTOCK PLLC 1629 K Street NW, Suite 300 Washington, DC 20006	Plaintiff and Appellant LHC Group, Inc.
Ilana H. Eisenstein DLA PIPER LLP (US) 1650 Market Street, #5000 Philadelphia, PA 19103	Defendant and Respondent Bayer Corporation

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 19, 2023 at Washington, DC.

Orrick, Herrington & Sutcliffe LLP

/s/ Michael S. Abrams
Michael S. Abrams

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