No. 14-20-cv

In the United States Court of Appeals for the Second Circuit

NEW YORK STATE PSYCHIATRIC ASSOCIATION, INC., in a representational capacity on behalf of its members and their patients; MICHAEL A. KAMINS, on his own behalf and behalf of his beneficiary son, and on behalf of all other similarly situated heath insurance subscribers; JONATHAN DENBO, on his own behalf and behalf of all other similarly situated heath insurance subscribers; BRAD SMITH; on his own behalf and on behalf of his beneficiary son, and on behalf of all other similarly situated heath insurance subscribers; SHELLY MENOLASCINO, M.D., on her own behalf and in a representational capacity on behalf of her beneficiary patients and on behalf of all other similarly situated providers and their patients,

Plaintiffs-Appellants,

v.

UNITEDHEALTH GROUP; UHC INSURANCE COMPANY; UNITED HEALTH-CARE INSURANCE COMPANY OF NEW YORK; UNITED BEHAVIORAL HEALTH,

Defendants-Appellees.

(*Caption continues on inside cover*)

On Appeal from the United States District Court
for the Southern District of New York, No. 1:13-cv-01599-CM

BRIEF OF PATRICK J. KENNEDY AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL

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(*Caption continued from cover)*

JORDAN OLIN, on his own behalf and on behalf of his beneficiary son, and on behalf of all other similarly situated health insurance subscribers; BRAD SMITH, on his own behalf and on behalf of his beneficiary son, and on behalf of all other similarly situated health insurance subscribers; and JULIE ANN ALLENDER, ED.D., on her own behalf and in a representational capacity on behalf of her beneficiary patients and on behalf of all other similarly situated providers and their patients,

Plaintiffs.

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INTEREST OF AMICUS CURIAE[1]

Amicus Patrick J. Kennedy is a former U.S. Representative from Rhode Island (1995-2011) and the co-author and lead sponsor of the Mental Health Parity and Addiction Equity Act of 2008, Pub. L. No. 110-343, § 512 (2008)—the key law at issue in this case. This law holds special importance to Mr. Kennedy because it advances a cause to which he has devoted, and continues to devote, much of his time and energy: eliminating discrimination against those who suffer from mental illness or addiction. Mr. Kennedy views parity in treatment as a basic civil right—as much a matter of fairness and dignity as medicine. And since leaving office he has co-founded a non-profit organization (One Mind for Research) and launched an annual forum (the Kennedy Forum) to champion the cause through education, advocacy, and efforts to ensure proper implementation of the Parity Act.

Mr. Kennedy files this brief because the decision below improperly restricts the Act's scope, weakens its protections, and thwarts its purpose. The decision holds that a fiduciary claims administrator that uses discriminatory standards to make health-insurance-benefits determinations—in violation of the Act—cannot be sued to stop those violations, on the theory that this is what Congress wanted. This brief explains why that theory is not just wrong, but backwards.

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[1] No party or counsel for a party—nor any person other than amicus curiae and his counsel—authored this brief in whole or in part or contributed any money intended to fund its preparation or submission.

INTRODUCTION

The district court found that the plaintiffs "pleaded facts that, if proven, demonstrate violations of the Parity Act." JA 228. And it found that, if proven, UnitedHealth Group "committed the violations" because its uniform policies discriminate against mental-health-benefits claims. *Id.* Yet the court dismissed the complaint—which seeks to have United conform its policies to the law—because the court believed that "Congress has decreed" that claims administrators like United cannot be held responsible for violating the Act, and thus cannot be forced to change their practices to comply with it. *Id.*

Congress "decreed" nothing of the sort. It enacted the Parity Act in 2008 to close loopholes left open by an earlier law. The Act aimed, once and for all, "to end the longstanding discrimination against persons with mental illness" and guarantee "true parity in the way that physical and mental health benefits are provided." 153 Cong. Rec. S1864 (Feb. 12, 2007); H.R. Rep. No. 110-374, pt. 2, at 12 (2007). As one co-author put it at the time: "No longer will a more restrictive standard be applied to mental health coverage and another more lenient standard be applied to medical and surgical coverage." 153 Cong. Rec. S11,682 (Sep. 18, 2007).

To accomplish this broad end, Congress chose broad means. It imposed a strong anti-discrimination mandate that focuses on *what* must be provided (parity in group health coverage), not *who* must provide it (plan administrators, insurers, or

claims administrators). The mandate's text says that the "coverage shall ensure" parity. 29 U.S.C. § 1185a(a)(3)(A). And Congress decided to enforce the mandate using the robust tools available in the Employee Retirement Income Security Act (ERISA)—a law that Congress understood imposes fiduciary duties on entities like United and permits injunctions against violations without limiting "the universe of possible defendants." *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 245 (2000). By doing these two things—prohibiting discriminatory *coverage* and using ERISA to enforce the prohibition—Congress ensured that individuals could root out unlawful discrimination wherever it occurs, no matter who is responsible.

The district court's decision erodes this fundamental protection. If allowed to stand, it would weaken the Parity Act's effectiveness and pave the way for continued violations, while offering no countervailing benefit. United, for example, could impose numerous unlawful barriers to mental-heath treatment—from stricter medical-necessity standards to heavier evidentiary burdens (both alleged here)—without fear of being held accountable by its victims. They would have to sue *other* parties and hope that this would somehow remedy the violations. And even then they would be powerless to eliminate the unlawful policy more broadly.

That is not what Congress intended. Congress did not enact an important civil-rights law only to tie the hands of the very people it sought to protect. Because the decision below misunderstands Congress's intent, it should be reversed.

BACKGROUND

United is a "claims administrator" that is delegated discretion to approve or deny health-insurance-benefits claims under various group health plans. The plaintiffs, patients and doctors, allege that United discriminates against mental-health claims, in violation of the Parity Act, by systematically imposing more restrictive limitations on those claims than on non-mental-health claims. These restrictions include the following:

(1) applying more restrictive "medical necessity" guidelines;
(2) imposing heavier evidentiary burdens;
(3) imposing stricter utilization review practices;
(4) applying less favorable reimbursement standards; and
(5) refusing to pay for treatment pending reviews, which are often delayed.

To redress these alleged violations, the plaintiffs seek, among other things, an order enjoining United from continuing to apply unlawfully discriminatory policies and directing it to reprocess claims through a non-discriminatory process.

The district court dismissed the complaint. The court reasoned that "[t]his is essentially a denial of benefits case," for which the plaintiffs must sue their plan administrators or insurers. JA 208. The court held that United—an ERISA fiduciary that "committed the [alleged] violations" here—"cannot be sued" for those violations because "Congress has decreed" that it is "not a party to which the Parity Act applies." JA 226-28.

ARGUMENT

I. Congress intended to impose liability on claims administrators whose policies violate the Parity Act.

A. Congress enacted the Parity Act for a simple but critical reason: "to ensure that mental illnesses are covered under similar terms as physical illnesses for the millions of Americans who currently receive health care through their employers." H.R. Rep. No. 110-374, pt. 1, at 13 (2007). Achieving parity in treatment was "an urgent matter" to Congress because "mental disorders are a leading cause of disability in the United States." S. Rep. No. 110-53, at 2 (2007). "More than 50 million adults, at least 22 percent of the U.S. population, suffer from mental disorders or substance abuse disorders on an annual basis." H.R. Rep. No. 110-374, pt. 3, at 12-13. Congress found that many of these disorders went untreated because discriminatory "obstacles within our health care system prevent many from getting the care they desperately need." H.R. Rep. No. 110-374, pt. 1, at 13. As one of the Act's lead sponsors explained, this discrimination is "especially cruel" because "the success rates for treatment [of mental illnesses] often equal or surpass those for physical conditions." 153 Cong. Rec. S11,681 (Sep. 18, 2007) (statement of Sen. Edward M. Kennedy).

Importantly, the Parity Act was not Congress's first attempt at eliminating discrimination against those with mental illnesses. Twelve years before, Congress passed the Mental Health Parity Act of 1996, Pub. L. No. 104-204, § 702, 110 Stat

2874 (1996). Although this law "represented an important milestone" because it largely achieved "parity in dollar limits for mental health coverage," the law did not eliminate discrimination in all its forms. H.R. Rep. No. 110-374, pt. 1, at 28. Far from it: Congress found that the "vast majority" of insurers simply "substituted new restrictions and limitations on mental health benefits, thereby evading" the spirit (if not the letter) of the law. *Id.* To take one example, many policies "limit[ed] the number of covered outpatient office visits for mental illness specifically to offset the parity they were required to provide in aggregate and lifetime limits." H.R. Rep. No. 110-374, pt. 3, at 13. As a result, "[p]eople with or at risk of behavioral-health disorders continue[d] to face arbitrary discrimination" in accessing care. H.R. Rep. No. 110-374, pt. 1, at 28.

The 2008 version was meant to "address these inequities." S. Rep. No. 110-53. It sought to close the "loopholes" of the earlier law—which allowed "insurance companies to deny mental health coverage to [those] most in need of it"—and guarantee "true parity in the way that physical and mental health benefits are provided." H.R. Rep. No. 110-374, pt. 1, at 28; H.R. Rep. No. 110-374, pt. 2, at 12. As amicus Patrick J. Kennedy summarized: "[I]nsurance companies don't treat [mental] illnesses the same for insurance purposes, and that is what we want to see end. We want to see the discrimination against mental illnesses end, and this is about ending that discrimination." 153 Cong. Rec. H15,450 (Dec. 13, 2007).

B. The Parity Act achieves its purpose by broadly outlawing discrimination against mental-health benefits. Among other things, the Act mandates that covered group health plans and "insurance coverage" provided in connection with them must ensure that the "financial requirements" and "treatment limitations" for mental-health benefits are "no more restrictive" than those for most "medical and surgical benefits covered by the plan (or coverage)." 29 U.S.C. § 1185a(a)(3)(A). Although Congress's chief motivation for imposing this mandate was ending discrimination at the hands of employers and insurers—who routinely "set higher deductibles, charge[d] higher copays, and cover[ed] fewer services for mental health care"—Congress did not intend to cover *only* those entities. 153 Cong. Rec. S11,683 (Sep. 18, 2007) (statement of Sen. Richard J. Durbin).

Congress wrote the mandate to focus on *acts*, not *actors*. Unlike other provisions of the Parity Act—like the duty to provide certain "plan information," which is imposed only on the "plan administrator" or "insurer," 29 U.S.C. § 1185a(a)(4)—the anti-discrimination mandate is not so restricted. It speaks in terms of what "health insurance coverage" must provide, not *who* must provide it. *Id.* § 1185a(a)(3)(A). The text is clear on this point: the "plan *or coverage* shall ensure" parity. *Id.* (emphasis added). Thus, if a plan or insurance policy is facially neutral with respect to mental health, but the claims administrator exercises discretion in a way that restricts coverage and violates the mandate (as alleged here), then the

claims administrator may be held liable for that violation and made to obey the law.

This conclusion is confirmed by Congress's decision to use ERISA as the mandate's enforcement mechanism. ERISA makes clear that plan administrators and insurers are not the only entities who must comply with its requirements. A claims administrator that is delegated discretion by a plan to approve or deny benefits claims, as United is here, has a fiduciary obligation to exercise that discretion consistent with the law. This means that it must heed the mandate. If it does not, then beneficiaries may seek an injunction forcing it to do so under ERISA § 502(a)(3), which allows "a participant, beneficiary, or fiduciary . . . to enjoin any act or practice which violates any provision of [ERISA Title I] or the terms of the plan." *Id.* § 1132(a)(3)(A).

As Congress was aware, the Supreme Court has interpreted this section broadly. In 2000, eight years before passage of the Parity Act, the Court held that "§ 502(a)(3) itself imposes certain duties" and "liability under that section does not depend on whether ERISA's substantive provisions impose a specific duty on the party being sued." *Harris Trust*, 530 U.S. at 245. The section "makes no mention at all of which parties may be proper defendants—the focus, instead, is on redressing the '*act or practice* which violates any provision of [ERISA Title I].'" *Id.* at 246. When Congress wrote the Parity Act several years later, it was "fully cognizant of

this interpretation of the statutory scheme." *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 135 (1990) (internal quotation marks omitted). So even if the Act's anti-discrimination mandate does not *expressly* impose a duty on claims administrators, Congress nevertheless intended that they comply with it. And the federal agencies that Congress delegated authority to interpret the Act have confirmed this intent, providing in their implementing regulations that "factors used in applying" "nonquantitative treatment limitations"—developed by claims administrators—must satisfy the mandate. 29 C.F.R. § 2590.712(c)(4)(i) & (ii)(F).[2]

II. The decision below undermines Congress's intent in enacting the Parity Act and, if left standing, would weaken its protections.

The district court reached a contrary conclusion based on flawed reasoning. First, the court concluded that "United is not a party to which the Parity Act applies." JA 226. As the court read the statute, the Act's mandate applies only to two kinds of actors—plan administrators and those who "offer" health-insurance coverage—no one else. JA 227. Although the court acknowledged that claims administrators have a fiduciary duty to comply with ERISA, it thought that this

[2] The agencies' interim rule (in effect until July 2014) is explicit: "[A]ssume a *claims administrator* has discretion to approve benefits for treatment based on medical necessity. If that discretion is routinely used to approve medical/surgical benefits while denying mental health or substance use disorder benefits and recognized clinically appropriate standards of care do not permit such a difference, the processes used in applying the medical necessity standard are considered to be applied more stringently to mental health or substance use disorder benefits. The use of discretion in this manner violates the parity requirements for nonquantitative treatment limitations." 75 Fed. Reg. 5410, 5416 (2010) (emphasis added).

duty does not include the Parity Act's anti-discrimination mandate. On the court's view, claims administrators may impose discriminatory policies with impunity, even those that sharply curtail the scope of coverage (for example, by imposing a heightened standard of "medical necessity" for mental-health treatment). But, as already discussed, the Parity Act's mandate is not limited to plan administrators and insurers; it enshrines a basic principle that *all* ERISA fiduciaries must live by. And if they don't, then § 502(a)(3) is there to bring them back in line.

This leads to the second part of the district court's reasoning. The court determined that § 502(a)(3) does not apply here because "[t]his is essentially a denial of benefits case" for which a different remedial section, § 502(a)(1)(B), is more appropriate. JA 208 That section allows "a participant or beneficiary" to bring an action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Because the court thought that this section would provide an adequate remedy, the court concluded that the plaintiffs may not avail themselves of § 502(a)(3)'s "catch-all" remedy.

That conclusion misunderstands the nature of the anti-discrimination mandate, as well as the nature of the alleged violations in this case. The mandate provides participants with the right to receive mental-health benefits on equal terms with physical-heath benefits; it does not provide them with any benefits on its

own. Consistent with this principle, the plaintiffs contend that United has violated (and continues to violate) the anti-discrimination mandate by exercising the discretion given to it by various group health plans to apply stricter standards in assessing claims for mental-health benefits.

The plaintiffs do *not*, however, seek primarily "to recover benefits [owed] under the terms of [their] plan[s]." *Id.* Rather, they "seek an order enjoining United from applying internal policies and procedures that violate the anti-discrimination mandate of the Parity Act and directing United to *reprocess claims* through an ERISA-complaint process." Appellants' Br. 4 (emphasis added). This relief might eventually lead to the provision of benefits; it might not. But the right to parity is "a valuable distinct right under ERISA that is separate from just the benefits decision," *Rawls v. Unum Life Ins. Co. of Am.*, 219 F. Supp. 2d 1063, 1066 (C.D. Cal. 2002), just as the right to compete in the college admissions process without unlawful discrimination is a distinct right under the Equal Protection Clause that is separate from the ultimate admissions decision, *see, e.g.*, *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978). A violation of the right to parity can therefore be remedied through § 502(a)(3) irrespective of whether benefits will ultimately be owed under the terms of the plan.

Finally, the district court's decision should be reversed for another reason: Even if the right to parity could theoretically be enforced here in separate cases

against numerous plan administrators under § 502(a)(1)(B), that is not what Congress intended. The Parity Act is a remedial statute that "should be liberally construed in favor of protecting the participants in employee benefits plans." *In re Citigroup ERISA Litig.*, 662 F.3d 128, 151 (2d Cir. 2011) (internal quotation marks omitted). It should be interpreted so that its "manifest purpose is furthered, not hindered." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012). The district court's view, however, would force people to bring suit against parties who didn't directly cause the unlawful discrimination—and who might not have even been aware of it—thereby making recovery dubious and enforcement difficult. Just as bad, the district court's view would strip individuals of their ability to strike at the heart of the discrimination—stopping it at its source—in favor of having them pursue a variety of indirect, possibly unsuccessful lawsuits against other parties who cannot eliminate the policy across the board.

And to what end? The district court gives no reason why Congress would have chosen such an ineffective, piecemeal, roundabout enforcement scheme. Nor does it explain what good that scheme would possibly do. Congress had something else in mind: It passed a "truly landmark piece of civil rights legislation"—with real teeth—so that no one "who buys health insurance [would] be discriminated against" simply because they suffer from mental rather than physical illness. 154 Cong. Rec. H1286-87 (Mar. 5, 2008) (statement of Rep. Kennedy).

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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April 22, 2014

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 2,964 words (in Baskerville 14-point typeface) in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

/s/ Deepak Gupta
Deepak Gupta

April 22, 2014

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2014, I electronically filed the foregoing Brief for Appellees with the Clerk of the Court of the U.S. Court of Appeals for the Second Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ Deepak Gupta
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