No. _____

In The

Supreme Court of the United States

ADAM E. SCHULMAN,

Petitioner,

v.

LEXISNEXIS RISK AND INFORMATION ANALYTICS GROUP, INC., SEISINT, INC., and REED ELSEVIER, INC.,

Respondents,

(additional respondents listed on inside cover)

On Petition for Writ of Certiorari
To the United States Court of Appeals for the
Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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(additional parties, continued from the front cover)

GREGORY THOMAS BERRY; SUMMER DARBONNE, on behalf of herself and all others similarly situated; RICKEY MILLEN, on behalf of himself and all others similarly situated; SHAMOON SAEED, on behalf of himself and all others similarly situated; ARTHUR B. HERNANDEZ, on behalf of himself and all others similarly situated; ERIKA A. GODFREY, on behalf of herself and all others similarly situated; TIMOTHY OTTEN, on behalf of himself and all others similarly situated,

Respondents,

MEGAN CHRISTINA AARON and the Aaron Objectors,

Respondents,

and

SCOTT HARDWAY and the Hardway Objectors,

Respondents.

QUESTION PRESENTED

In a class action settlement providing injunctive relief not authorized by statute and releasing or impairing the money-damages claims of absent and objecting members, did class certification under Federal Rule of Civil Procedure 23(b)(2) and the denial of the right to opt out as to the damages claims violate Rule 23 or the Due Process Clause of the Fifth Amendment?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Adam E. Schulman was a plaintiff class member and an objector to the settlement in the district court and an appellant in the Fourth Circuit.

Respondent LexisNexis Risk and Information Analytics Group, Inc., Seisint, Inc., and Reed Elsevier, Inc., were defendants in the district court and appellees in the Fourth Circuit.

Respondents Gregory Thomas Berry, Summer Darbonne, on behalf of herself and all others similarly situated, Rickey Millen, on behalf of himself and all others similarly situated, Shamoon Saeed, on behalf of himself and all others similarly situated, Arthur B. Hernandez, on behalf of himself and all others similarly situated, Erika A. Godfrey, on behalf of herself and all others similarly situated, and Timothy Otten, on behalf of himself and all others similarly situated, were each named plaintiffs in the district court and appellees in the Fourth Circuit.

Respondent Megan Christina Aaron and the Aaron Objectors, were objecting class members in the district court and appellants in the Fourth Circuit.

Respondent Scott Hardway and the Hardway Objectors, were objecting class members in the district court and appellants in the Fourth Circuit.

Given the breadth of the nationwide class there is a likelihood that the Justices of this Court and their staff are class members. But as the Fourth Circuit explained, because "any interest [members of the Court] may have in this litigation is common to the general public, recusal is not required." App. A7 n. 2.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

This Court twice has expressly noted that Rule 23 and the Due Process Clause may require an opt-out right for damages claims. *Wal-Mart Stores, Inc* v. *Dukes*, 564 U.S. 338, 363 (2011); *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 121 (1994). It has twice granted certiorari to determine the due process question, but it dismissed the writ as improvidently granted each time. *Ticor*, 511 U.S. 117; *Adams* v. *Robertson*, 520 U.S. 83 (1997). In one instance, the Court dismissed because the case's posture did not permit deciding the Rule 23 question before reaching the constitutional question. *Ticor*, 511 U.S. at 121. In the other, it dismissed because the constitutional question had not been properly presented to the court below. *Adams*, 520 U.S. at 90. This Petition presents none of those problems. It thus provides the opportunity to resolve a long-standing conflict among the courts of appeals on whether Rule 23 provides damages claimants the right to opt out of class actions and, if not, whether the Due Process Clause guarantees that right.

OPINIONS BELOW

The Order of the District Court for the Eastern District of Virginia approving the class settlement is available at 2014 U.S. Dist. LEXIS 124415 and is attached at Appendix B1.

The Opinion of the Fourth Circuit affirming the district court is available at 807 F.3d 600; 2015 U.S. App. LEXIS 21062, and is attached at Appendix A1.

The Order of the Fourth Circuit denying rehearing and rehearing *en banc* is attached at Appendix C1.

JURISDICTION

The Fourth Circuit issued its opinion and order affirming the district court on December 4, 2015. The Fourth Circuit denied Petitioner's timely petition for rehearing and rehearing *en banc* on January 4, 2016. The Chief Justice granted Petitioner an extension of time to file this Petition to and including May 19, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULE, STATUTE, AND CONSTITUTIONAL PROVISION INVOLVED

Federal Rule of Civil Procedure 23 provides, in relevant part:

* * *

> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
>
> * * *
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * *

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including

individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

* * *

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

* * *

(4) Particular Issues. When appropriate, an action may be maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

* * * * *

The Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA") provides, in relevant part:

§ 1681*n*. Civil liability for willful noncompliance

(a) In general. Any person who willfully fails to comply with any requirement imposed under this title [15 USCS

§§ 1681 et seq.] with respect to any consumer is liable to that consumer in an amount equal to the sum of –

(1) (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $ 100 and not more than $ 1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $ 1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

* * *

§ 1681*o*. Civil liability for negligent noncompliance

(a) In general. Any person who is negligent in failing to comply with any requirement imposed under this title [15 USCS §§ 1681 et seq.] with respect to any consumer is liable to that consumer in an amount equal to the sum of –

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

* * *

The Due Process Clause of the Fifth Amendment provides in relevant part: "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

STATEMENT OF THE CASE

1. This case involves a class-action settlement in which the putative class was denied the opportunity to opt out despite the elimination of their statutory damages claims for no money at all. The complaint in this case sought only damages on behalf of the class for violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, *et seq.*, and hence was subject to the requirements of Rule 23(b)(3), including the requirement that class members be allowed to opt out. The settlement, however, terminated such claims for the class and instead offered injunctive relief – not even authorized by the FCRA – and thus claimed coverage under Rule 23(b)(2) for a mandatory injunctive class. Petitioner, who objected to this scheme, argued that it violated both Rule 23 and the Due Process Clause by sacrificing absent class members' monetary claims without giving them the oppor-

tunity to opt out. The district court disagreed and the Fourth Circuit affirmed, placing itself in conflict with a number of its sister circuits.

Review by this Court is needed to resolve such conflicts and to protect the due process rights of literally hundreds of millions of absent class members in this and other cases.

2. The settlement at issue in this case comes from a putative class action alleging that Respondents LexisNexis Risk and Information Analytics Group, Inc., and affiliated companies (collectively "Lexis"), violated the FCRA by selling certain personal data reports to debt collectors without providing the protections required by that Act. App. A1-A2, A6. Data regarding over 200 million people was included in Lexis's database during the time relevant to this case. The complaint alleged that the violations were "willful" and thus sought statutory damages ranging from $100 to $1,000 per violation. 15 U.S.C. § 1681*n*(a); App. A4. The FCRA also provides for recovery of actual damages, 15 U.S.C. § 1681*o*(a), but it does not provide for injunctive relief. App. A4, A6, A14-A15.

Lexis denied that the reports it sold were "consumer reports" covered by the FCRA, and denied that any alleged violations were willful. App. A2, A4-A5.

3. Eventually the named parties struck a deal and agreed to settle the claims of two separate classes.

The first and largest class of roughly 200 million persons – the "(b)(2) Class" – would receive no money at all. App. A7-A8, B7, B14. Rather, it would receive the supposed benefit of certain injunctive relief whereby Lexis agreed to comply with the FCRA in connection with some, though not all, of its challenged reports in the fu-

ture. Class members, by contrast would release all of their claims to statutory or punitive damages. They also would be barred from using a class-action suit to seek actual damages, though they could seek such damages individually. *Id*. Nor will class members be able to challenge the legality under the FCRA of half of Lexis' new product line for reports issued before June, 2020. App. A8-A9.

As the name of the class indicates, the settlement proposed to certify the class under Federal Rule of Civil Procedure 23(b)(2). Rule 23(b)(2) permits certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). Rule 23(b)(2) is mandatory, unlike Rule 23(b)(3); it does not provide for class members to opt out of the class. *Wal-Mart*, 564 U.S. at 362.

Accordingly, members of this class, despite having released their statutory damages claims and their only practical means of pursuing any actual damages claims, would not be allowed to opt out.

Finally, the (b)(2) Class settlement provided named class representatives incentive payments of $5,000 each and attorney's fees of over $5 million. App. A10.

A second and far smaller class of approximately 31,000 persons – the so-called "(b)(3) Class" – would receive payments of approximately $300 per person in return for releasing all claims for actual or statutory damages. App. A6-A7. Members of this class were entitled to opt out if they so desired. This part of the settlement was not challenged on appeal and is not at issue in this Court.

4. Petitioner Schulman is a member of the much larger (b)(2) Class, and it is the settlement of the (b)(2) Class's claims that is the subject of this Petition. Along with many other class members, Petitioner filed objections in the district court, arguing that both Rule 23 and the Due Process Clause prohibited the court from certifying the class and approving the settlement on a non-opt-out basis.

5. On September 5, 2014, the district court rejected those challenges, certified the (b)(2) Class, and approved the settlement. App. B1, B28-B31.

6. Petitioner and other objectors timely appealed to the Fourth Circuit, arguing, *inter alia*, that the district court's certification of the mandatory (b)(2) Class, releasing and restricting their damages claims without allowing class members to opt out, violated Rule 23 and the Due Process Clause.

7. On December 4, 2015, the Fourth Circuit rejected those challenges. App. A2, A10-A21. Regarding the requirements of Rule 23, the court held that "mandatory Rule 23(b)(2) classes may be certified in some cases even when monetary relief is at issue," so long as such relief "is 'incidental' to injunctive or declaratory relief and does not 'predominate[].' " App. A12. The court further held that "claims for individualized monetary relief " would not be "incidental" for purposes of Rule 23(b)(2) certification, but more generic damages claims would be incidental and thus capable of inclusion in a mandatory Rule 23(b)(2) class. App. A12-14.

Applying that legal standard to the (b)(2) Class in this case, the court held that the injunctive relief provided by the settlement was sufficient to invoke Rule

23(b)(2) and the statutory damages claims released were not individualized and hence were merely " 'incidental' for purposes of Rule 23(b)(2)." App. A13-A14.[1]

The court further held that the damages aspects of the settlement were still "incidental" to the injunctive relief despite that the complaint did not seek, and the FCRA does not authorize, injunctive relief. App. A14.[2] The court concluded that judgment for such injunctive relief was authorized by the settlement agreement regardless of the narrower scope of the statute. App. A15. It sought to distinguish contrary cases barring Rule 23(b)(2) class certification where the statute in question does not provide for injunctive relief by arguing that a settlement class may be treated more permissively than a litigation class. App. A15 (discussing *Bolin* v. *Sears, Roebuck & Co.*, 231 F.3d 970, 977 n. 39 (5th Cir. 2000); *Christ* v. *Beneficial Corp.*, 547 F.3d 1292, 1298 (11th Cir. 2008)). The court recognized that, absent statutory authorization for injunctive relief, certification of a Rule 23(b)(2) litigation class "would be inappropriate because the plaintiffs would have no prospect of achieving injunctive relief." App. A16. But it nonetheless concluded that because Rule 23(b)(2) certification ap-

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[1] The court assumed, without deciding, that a "class settlement that *releases* damages claims is on precisely the same footing under Rule 23(b)(2) and the Due Process Clause as one that *provides* for damages." App. A13 n. 3.

[2] The court once again assumed, without deciding, that because the FCRA does not provide for a private right of action for injunctive relief, consumers would not be permitted to seek such relief. App. A14-A15.

plied to "final" injunctive relief, an injunction – and hence a (b)(2) class – could be based on the settlement alone, regardless whether such relief was sought in the complaint or authorized by the relevant statute. App. A16.

Regarding due process, the court recognized that this Court in *Wal-Mart*, 564 U.S. at 363, noted "the 'serious possibility' that due process requires opt-out rights (and concomitant notice) under Rule 23(b)(2) even 'where the monetary claims do not predominate.' " App. A17. But because this Court did not find it necessary to "go that far in" *Wal-Mart*, the Fourth Circuit "decline[d] to go where the Supreme Court has not." App. A18. Instead, it stuck to its own precedent allowing for non-opt-out Rule 23(b)(2) classes involving damages deemed "incidental" to injunctive relief. App. A18-19.

The court further held that denying absent class members the right to opt out was fair under the circumstances given the purported uniformity of the damages claims released, the preservation of individual damage claims (though not allowed via a class action), and the various other provisions of Rule 23 designed to protect the interests of absent members by requiring judicial determinations of fair and adequate representation and a fair, adequate, and reasonable settlement. App. A19-20. In light of such protections and an interest in encouraging settlements, the court concluded that due process does not require an opt-out rule where incidental damages claims are involved.

Accordingly, the court affirmed the district court's conclusion that absent (b)(2) Class members could be

denied their right to opt out of the settlement that released and restricted their damages claims.[3]

8. On January 4, 2016, the Fourth Circuit denied a petition for rehearing or rehearing *en banc*. App. C1. This Petition followed.

REASONS FOR GRANTING THE WRIT

This Court should grant the Petition for a writ of certiorari because the decision below takes sides in a multi-faceted split regarding whether and when opt-out rights are required by Rule 23(b) or by the Due Process Clause, and involves important issues affecting hundreds of millions of absent class members in this and similar cases. This Court has twice granted certiorari on the due process question, only to have problems with how the question was presented or preserved result in dismissal. This case presents no such concerns and will finally allow this Court to reach this important issue.

In *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-12 (1985), this Court held that due process prevents a court from binding an absent class member to a class-action judgment "concerning a claim for money damages" unless the class member is provided a right to opt out. This Court limited its holding to cases involving "claims wholly or predominately for money judgments" and "intimate[d] no view" concerning class actions "seeking equitable relief." *Id.* at 811 n. 3. Later, in *Oritz* v. *Fibreboard Corp.*, 527 U.S. 815, 847-48 (1999), this Court rejected a non-opt-out class settle-

[3] The court also disposed of a number of other objections that were raised below, App. A21-34, but that are no longer at issue in this Petition.

ment involving monetary relief certified under Rule 23(b)(1)(B), relying in part on its reasoning in *Shutts*.

Most recently, in *Wal-Mart*, 564 U.S. at 362, this Court unanimously rejected a Rule 23(b)(2) non-opt-out class certification of Title VII backpay claims, holding that, at the least, non-opt-out Rule 23(b)(2) certification of backpay claims is impermissible because those claims seek "individualized monetary" relief. This Court noted, however, that "[o]ne possible reading of [Rule 23(b)(2)] is that it applies only to requests for * * * injunctive or declaratory relief and does not authorize the class certification of monetary claims at all." *Id.* at 360. This Court also observed that although it has never held that due process requires that class members be provided a right to opt out where monetary claims do not predominate, "the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here." *Id.* at 363.

This Court has twice granted certiorari on the question whether "absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf." *Ticor*, 511 U.S. at 120-21; *Adams*, 520 U.S. at 85 (question whether "approval of the class action and the settlement agreement in this case, without affording all class members the right to exclude themselves from the class or the agreement, violated the Due Process Clause of the Fourteenth Amendment."). In each case, however, this Court dismissed the writ as improvidently granted after briefing and oral argument on the merits. *Ticor*, 511 U.S. at 121-22; *Adams*, 520 U.S. at 85.

In *Ticor*, the petition presented only the due process question, not the Rule 23 question, making resolution of the constitutional question potentially unnecessary and hypothetical in light of the "substantial possibility" that class actions asserting monetary claims may only be certified under Rule 23(b)(3), which itself guarantees absent class members the right to opt out. 511 U.S. at 121-22. And in *Adams*, petitioners failed to establish they had properly presented the due process issue to the Alabama Supreme Court. 520 U.S. at 86-87.

The current Petition presents both the Rule 23 and due process questions regarding whether the right to opt out is required for class certification of monetary claims, those issues were properly raised and decided below, and hence it is free of the problems that led this Court to dismiss *Ticor* and *Adams*. Here, the Court may decide the Rule 23 question first and reach the constitutional issue only if it determines that Rule 23 does not provide class members an opt-out right. It thus offers an excellent vehicle for addressing a substantial issue in which the Court has expressed "continuing interest," *Adams*, 520 U.S. at 92 n. 6, and on which the Court has twice previously granted review. It also presents the opportunity to resolve the conflict in approaches among the courts of appeals on issues of great importance.

I. The Decision Below Takes Sides in a Multi-faceted Split Over Whether and When Rule 23 or the Due Process Clause Requires Opt-Out Rights from a Mandatory Class Covering Claims for Money Damages.

As described above, at 12-13, this Court's decisions have established that opt-out rights are required under Rule 23 for class certification of at least certain types of damages claims – at a minimum, cases involving individual or non-incidental claims for damages – but left open the question whether such rights are required for class treatment of other, or even all, types of damages claims. *See, e.g.*, *Shutts*, 472 U.S. at 811-12 & n. 3; *Oritz*, 527 U.S. at 842, 844-45; *Wal-Mart*, 564 U.S. at 366; *see also Ticor*, 511 U.S. at 121 (noting the "substantial possibility" that, "in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not").

Given the limited holdings and broader suggestions in those cases, the courts of appeals have struggled with whether and when opt-out rights may be denied where class certification covers other types of monetary claims.

A. The Courts of Appeals Apply Conflicting Approaches to Whether Rule 23 or Due Process Requires the Right to Opt Out.

The Fourth Circuit below held that a mandatory Rule 23(b)(2) class may be certified, and opt-out rights denied, where the damages claims involved are non-individualized and "incidental" to injunctive or

declaratory relief. App. A12 (citing *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)). Joining the Fourth Circuit in this hostile approach to opting out are the Third, Fifth, Eighth, and Eleventh Circuits. *See, e.g.*, *Kyriazi* v. *Western Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981) (citing earlier circuit precedent that "refused to require notice and an opportunity to opt out for absent members in a (b)(2) action, even after the dominant relief sought no longer was principally injunctive, but instead solely monetary," and holding that Rule 23 "permits hybrid class actions involving claims for both classwide and individualized relief to proceed as Rule 23(b)(2) actions"); *Allison*, 151 F.3d at 411 & n. 3 (holding that "monetary relief may be obtained in a (b)(2) class action so long as the predominant relief sought is injunctive or declaratory"; recognizing that Supreme Court decision in *Ticor* "casts doubt on the proposition that class actions seeking money damages can be certified under Rule 23(b)(2)," noting it might reconsider the issue were it "writing on a clean slate," yet viewing itself bound by circuit precedent); *DeBoer* v. *Mellon Mortg. Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995) (regarding a Rule 23(b)(2) certification also involving claims for damages, rejecting contention that "that certification of any class should have been under section (b)(3) so that the class members could opt-out of the settlement" and holding that when "either subsection (b)(1) or (b)(2) is applicable, however, (b)(3) should not be used"), *cert. denied sub nom. Crehan* v. *DeBoer*, 517 U.S. 1156 (1996); *Murray* v. *Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) ("Monetary relief may be obtained in a Rule 23(b)(2) class action so long as the predominant relief sought is injunctive or

declaratory" and the monetary relief is "incidental" to the injunctive or declaratory relief).[4]

Those circuits with the most expansive application of mandatory class certification including damages claims likewise take a narrow view of the due process rights of class members. *See, e.g.*, *Grimes* v. *Vitalink Comm. Corp.*, 17 F.3d 1553, 1560 n. 8 (3d Cir. 1994) (concluding due process permits binding "absent class members who had sufficient minimum contacts with the forum" even in the absence of an opt-out provision), *cert. denied*, 513 U.S. 986 (1994); *DeBoer*, 64 F.3d at 1175 (rejecting due process objection to mandatory 23(b)(2) class covering incidental damages claims by viewing due process as solely concerned with personal jurisdiction and an opportunity to object, not an opportunity to opt out, and holding that "[w]hen an objector submits to the court's jurisdiction, however, the *Shutts* dilemma is avoided.")

Other courts adopt a more lenient "hybrid" approach to mixed cases involving injunctions and damages, allowing monetary claims to be certified separately under Rule 23(b)(3) and injunctive claims under Rule 23(b)(2), or selectively allowing opt-outs from a Rule 23(b)(1) or (b)(2) class where monetary claims are also involved. *See Eubanks* v. *Billington*, 110 F.3d 87, 95, 99 (D.C. Cir. 1997) ("when a (b)(2) class seeks monetary as well as injunctive or declaratory relief the district court may exercise discretion in at least two ways.[fn omitted] * * * [It] may adopt a 'hybrid' approach, certifying a (b)(2) class as to the

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[4] And even courts that employ an incidental-damages analysis conflict on how it should be conducted. *See infra* at 21.

claims for declaratory or injunctive relief, and a (b)(3) class as to the claims for monetary relief, effectively granting (b)(3) protections including the right to opt out to class members at the monetary relief stage[,] * * * [or it] may conclude that * * * opt-outs should be permitted on a selective basis"; applying a flexible "basic fairness" test for whether class members should be allowed to opt out of a properly certified 23(b)(2) settlement class); *Amara* v. *CIGNA Corp.*, 775 F.3d 510, 519-20 (2d Cir. 2014) (noting that while *Wal-Mart* narrowed the types of monetary relief previously allowed by the Second Circuit in *Robinson* to be included in a mandatory Rule 23(b)(2) class, it still allowed inclusion, with no opt-out rights, of claims for monetary relief incidental to injunctive relief); *Robinson* v. *Metro-North Commuter R.R.*, 267 F.3d 147, 164, 166-68 (2d Cir. 2001) (though narrowed as noted in *Amara* as to the type of damages includable in a (b)(2) class, still good as to allowing district courts to mitigate "any due process risk posed by (b)(2) class certification of a claim for non-incidental damages" by "simply affording notice and opt out rights to absent class members for those portions of the proceedings where the presumption of class cohesion falters" or by certifying the liability issues separately from the damages issues), *cert. denied*, 535 U.S. 951 (2002); *Ellis* v. *Costco Wholesale Corp.*, 657 F.3d 970, 986-87 (9th Cir. 2011) (applying due process concern in *Wal-Mart* expansively to vacate a non-opt-out class and remand for further consideration); *Molski* v. *Gleich*, 318 F.3d 937, 950-51 & n. 16 (9th Cir. 2003) (allowing certification of a Rule 23(b)(2) class but requiring notice and the right to opt out as to substantial statutory damage claims; noting that such rights could be

provided through a variety of methods including Rule 23(b)(3) certification, bifurcating the injunctive and damages claims, or allowing opt out under Rule 23(b)(2)).

Indeed, the Seventh Circuit favors opt-out rights as to damages claims whenever possible. *See Jefferson* v. *Ingersoll Int'l Inc.*, 195 F.3d 894, 897-98 (7th Cir. 1999) (holding that when "substantial damages have been sought, the most appropriate approach is that of Rule 23(b)(3), because it allows notice and an opportunity to opt out," that "the controlling authority today is *Ortiz*, which says in no uncertain terms that class members' right to notice and an opportunity to opt out should be preserved whenever possible"; raising the option of bifurcated certification of the injunctive and damages aspects of the case, and noting that even were the damages sought "incidental" and hence potentially includable under Rule 23(b)(2), it remains unclear "whether certification of a class under Rule 23(b)(2) ever is proper when the class seeks money *damages*").

Not surprisingly, the greater willingness to allow opt-outs or bifurcated class certification is coupled with a greater concern with the due process issues raised by involuntary inclusion in a suit involving damages. *See, e.g.*, *Ellis*, 657 F.3d at 986-88 (discussing *Wal-Mart* and the broader scope of due process protections where money damages are sought); *Johnson* v. *Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 369-71 (7th Cir. 2012) (recognizing due process concerns, still allowing (b)(2) certification under some circumstances, but setting forth potential procedures

for accommodating any due process rights where monetary damages are involved).

The variation in when opt-out rights are required when attempting to certify a Rule 23(b)(2) class that includes damages claims leaves potential class members subject to forum shopping by class counsel. Nationwide federal court class actions, such as the one in this case, should be subject to uniform standards governing when absent class members may be forced into suits affecting their property rights in claims for money damages. As evidenced by the above split, however, in practice such cases are treated differently depending on where the suit is brought.

This Court waded into the thicket in *Wal-Mart*, holding that no standard less protective than that of *Allison* would suffice. 564 U.S. at 365-66. But *Wal-Mart* still left unanswered the more fundamental question whether Rule 23 and the Due Process Clause permit the non-consensual waiver of any damages claims. The Fourth Circuit's application of *Allison* below (if correct) demonstrates how *Wal-Mart* did not go far enough in safeguarding class members' right to "decide *for themselves* whether to tie their fates to the class representatives' or go it alone." 564 U.S. at 364 (emphasis in original); *see also* Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 610-11 (2015) (noting a "troubling" "lingering uncertainty" in the wake of *Wal-Mart*). Thus, this Court should grant certiorari to reconcile the conflicting standards and finally reach the questions left open in its earlier cases.

B. The Courts of Appeals Disagree on How to Determine Whether Monetary Relief Is "Incidental" to Injunctive Relief.

In addition to the broader split regarding the standards for allowing class members to opt out, there is a more focused split regarding application of the *Allison* incidental-damages standard for allowing Rule 23(b)(2) certification. The court below held that damages claims may still be "incidental" and subject to Rule 23(b)(2) class certification even where the statute forming the basis for the suit does not permit private parties to seek injunctive relief, so long as a settlement agreement provides for such relief. App. A14-A17.

The court recognized that the Fifth and Eleventh Circuits hold that damages cannot be incidental to injunctive relief where the relevant statute does not allow injunctive relief. App. A15-A16; *Bolin* v. *Sears, Roebuck & Co.*, 231 F.3d at 977 n. 39 ("Of course, the unavailability of injunctive relief under a statute would automatically make (b)(2) certification an abuse of discretion."); *Christ* v. *Beneficial Corp.*, 547 F.3d at 1298 (non-opt-out Rule 23(b)(2) certification is "improper" where the statute under which plaintiffs sued did not authorize injunctive relief). But it sought to distinguish those cases as arising in the context of a litigation, rather than a settlement, class. App. A15-A16.

Even if the court's purported distinction between certification of litigation and settlement classes made policy sense, which it does not, it does not avoid creating a split with other courts of appeals that reject mandatory Rule 23(b)(2) classes in the settlement context as well.

See Hecht v. *United Collection Bureau*, 691 F.3d 218, 223-24 & n. 1 (2d Cir. 2012) (holding that a (b)(2) settlement certification, which did not provide for notice and the right to opt out, violated due process because injunctive relief was not available to all class members (and perhaps not available to any)); *Crawford* v. *Equifax Payment Services, Inc.*, 201 F.3d 877, 881-82 (7th Cir. 2000) (Easterbrook, J.) (holding Rule 23 and due process barred certification of a no-opt-out (b)(2) class because Rule 23(b)(2) could not be applied to an action under the Fair Debt Collection Practices Act, which provides only for damages, not injunctive relief; rejecting settlement that provided injunctive relief, no money to class members, and restricted use of future class actions to bring damages claims).

Where the statute provides only for damages, and not for injunctive relief, damages are necessarily more than incidental regardless whether class counsel and defendants devise extra-statutory agreements to trade away class rights to damages for otherwise unauthorized "injunctive relief."

Basing class certification on the terms of a settlement offering relief not authorized by the statute itself highlights the agency problems with self-appointed "champions" claiming to speak for, and enter into settlements on behalf of, millions of absent parties. The agreement provides class members so-called "relief" to which they are not legally entitled and never sought, and takes away and impairs their claims for monetary damages to which they are (or may be) entitled under the statute. Regardless whether the certifying court thinks the agreement represents a good deal or fair balance for such absent class members, inventing new

rights to brokered injunctive relief in exchange for existing, and future un-accrued, damages claims of millions of people without their agreement is not litigation, it is legislation.

The Fourth Circuit's failure to be more critical of settlement class certification and its endorsement of such a scheme between class counsel and defendants also conflicts with the rulings this Court and other circuits. Such courts hold that certification of a settlement-only class is subject to greater, not lesser, scrutiny under Rule 23 than is certification of a litigation class. *See, e.g., Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620-21 & n. 16 (1997) (provisions of Rule 23(a) and (b) are "designed to protect absentees by blocking unwarranted or overbroad class definitions" and "demand undiluted, even heightened, attention in the settlement context"); *Ortiz*, 527 U.S. at 857-59 (refusing to allow the interest in settlement to "swallow the preceding protective requirements of Rule 23"); *In re Telectronics Pacing Sys. Inc.*, 221 F.3d 870, 880 (6th Cir. 2000) (noting, in the context of a Rule 23(b)(1)(B) settlement that "bootstrapping * * * a Rule 23(b)(3) class into a [mandatory] class is impermissible and highlights the problem with defining and certifying class actions by reference to a proposed settlement").[5]

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[5] The Fourth Circuit's distinction between litigation and settlement classes also creates an unusual problem where a case is settled after it has been litigated for a period of time post-certification. Presumably such a later settlement could include injunctive relief not permitted as part of the claims being litigated, and accordingly a properly certified (b)(3) litigation class could then be converted into a (b)(2) class, effectively revoking any previous opt-out rights. Meanwhile, class members who

This further, subsidiary split over when damages are "incidental" in the settlement context provides an additional reason to grant certiorari even were the Court eventually to allow some damages claims to be covered by a mandatory Rule 23(b)(2) class.

II. The Issues in this Case Are Important and Affect Numerous Cases and Hundreds of Millions of Absent Class Members.

Whether and when Rule 23(b)(2) mandatory class certification may be applied to claims for money damages is a question of exceptional importance, and not merely for the 28,000 objectors in this case and the 200 million members of the class who did not receive actual or even the best practicable notice but who are nonetheless bound by the settlement. As this Court has repeatedly held, the right to opt out is an integral aspect of the due process protections owed absent class members when their damages claims are being compromised as part of a class action.

This Court in *Shutts* and *Ortiz* held that Rule 23 and potentially due process protect a class member's right to opt out with respect to their monetary claims, at least in many circumstances. In *Wal-Mart*, this Court indicated that Rule 23 and due process may well protect that right whenever monetary claims are at stake. 564 U.S. at 360, 363, 366; *see also Shutts*, 472 U.S. at 807 ("[P]etitioner correctly points out that a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs.").

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had either exercised or relied upon the future availability of such rights would thus have done so to their detriment when such rights later evaporate under the Fourth Circuit's rule.

Ortiz likewise expressed this Court's due process concerns, explaining that opt-out rights stem from "our deep-rooted historic tradition that everyone should have his own day in court," *Ortiz*, 527 U.S. at 846 (citing *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989) (internal marks omitted)). And it specifically noted that "[t]he inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class" where "[t]he legal rights of absent class members * * * are resolved regardless of either their consent, or, in a class with objectors, their express wish to the contrary." *Id.* at 846-47. The Court therefore adopted a limiting construction of Rule 23(b)(1)(B) and reversed the certification of a mandatory damages class under that rule in order to avoid "serious constitutional concerns" presented by more permissive certification. *Id.* at 842, 845, 864.

As discussed above, at 1, 13-14, this Court has twice granted certiorari on the question whether, despite the presence of settlements providing injunctive relief, "absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf." *Ticor*, 511 U.S. at 120-21 (quotation marks omitted); *Adams*, 520 U.S. at 85. This Court thus already has recognized the issue as important. But in both situations, case-specific impediments got in the way, and the Court dismissed the writs as improvidently granted after briefing and oral argument. *Ticor*, 511 U.S. at 121-22; *Adams*, 520 U.S. at 85.

Here, by contrast, Petitioner presents to this Court both the Rule 23 and due process questions, both of

which he raised below and both of which the Fourth Circuit definitively decided. This Petition is an excellent vehicle through which to finally reach such issues.

The issues in this case also are important because the Fourth Circuit's approach encourages manipulation of mandatory classes to terminate all effective damages claims. The Fourth Circuit's holding instructs class counsel, and settling defendants who seek to avoid potentially costly damages suits, that they can subvert (b)(3) opt-out rights and bind absent class members simply by settling a classic damages action for prospective injunctive relief. As a result, settling parties can lock thousands of people into class actions against their will, depriving them of the right to pursue their own claims, either individually or through a separate class proceeding, when they believe current class counsel fails to represents their interests. This result is antithetical to our "day-in-court ideal," and the fundamental constitutional right not to be deprived of property without due process. *Ortiz*, 527 U.S. at 846-47.

Indeed, it invites unscrupulous attorneys to forum-shop national class actions into Fourth Circuit courts in order to engage in the increasingly-common phenomenon of misusing mandatory (b)(2) settlement certifications to the benefit of the settling parties and to the detriment of absent class members across the country. *Richardson* v. *L'Oreal U.S.A., Inc.*, 991 F. Supp.2d 181, 189-90 (D.D.C. 2013) (settlement-only classes have "become increasingly common," and "require 'closer judicial scrutiny' " and " 'undiluted, even heightened' attention"; rejecting an attempted (b)(2) settlement barring any future class-wide dam-

ages claims even though preserving individual damages claims) (citations omitted). Indeed, as the District Court in *Richardson* observed, it "is not hard to imagine adventurous or avaricious counsel taking advantage of this novel settlement structure to the detriment of absent class members." *Id.* at 202. Indeed, the court observed, in connection with a settlement quite similar to the one here, that "releasing all damages claims in a (b)(2) settlement class would almost certainly be improper," and that problem is not cured by preserving individual damages claims, "the value of which is trivial, as in many consumer class actions," but releasing only "class-wide damages claims." Such a scenario results, as here, in the self-serving result that "[p]laintiffs get attorney's fees, defendant gets a near-bulletproof release, and class members get * * * an injunction." *Id.*

Many courts have recognized that, particularly in the context of settlement, the ordinary protections the adversarial process affords to absent class members may break down, leading class counsel and the named parties to commandeer any available monetary recovery for their own benefit. *See, e.g.*, *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717-18 (6th Cir. 2013) ("Hence – unlike in virtually every other kind of case – in class-action settlements the district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation – namely, the class. * * * And that means the courts must carefully scrutinize whether those fiduciary obligations have been met."); *Grok Lines, Inc.* v. *Paschall Truck Lines, Inc.,* 2015 U.S. Dist. LEXIS 124812, at *6-*7, *28-*29 (N.D. Ill. Sept. 18, 2015)

(noting the "unfortunate reality" that " 'the structure of class actions under Rule 23 * * * gives class action lawyers an incentive to negotiate settlements that enrich themselves but give scant reward to class members,' " that "courts must 'exercise the highest degree of vigilance' in their review of class-action settlements"; criticizing a (b)(3) settlement that was converted into a (b)(2) settlement with available funds being allocated primarily to class counsel) (citations omitted).

In a mandatory-class settlement such as the one in this case, a defendant effectively receives complete peace and class counsel can absorb the entirety of the monetary relief that the defendant is willing to provide. *See generally* Martin H. Redish, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 11 (2009) (discussing attorneys' incentives to argue for mandatory certification). After all, "an economically rational defendant will be indifferent to the allocation of dollars between class members and class counsel." *Pearson* v. *NBTY, Inc.,* 772 F.3d 778, 786 (7th Cir. 2014).

This case provides a useful and problem-free vehicle for addressing the Rule 23 and due process issues that have long captured this Court's attention and concern. It also provides an opportunity to put the brakes on some of the more manipulative class-action tactics that have been used to subvert, rather than facilitate, the recovery of monetary relief by large classes facing individually small but collectively meaningful damages claims.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

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