No. _____

In the Supreme Court of the United States

DAVID R. WATKINS AND THEODORE H. FRANK,
Petitioners,

v.

BRIAN SPECTOR, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After a data breach at Equifax disclosed nearly 150 million Americans' sensitive personal information, 300 class actions against Equifax were consolidated into one case. Nearly 70 claims in the master complaint survived a motion to dismiss, including some claims for one national class and distinct state-specific claims for dozens of proposed subclasses. The proposed settlement agreement, however, neither included subclasses nor allocated relief for state-specific claims. And every word in the 122-page final opinion approving the settlement—and awarding $77.5 million in class attorney's fees—was written by class counsel. Those lawyers sent that opinion to the district court *ex parte*. Then, with no notice to or comments from anyone else, the district court entered it on the docket as final without changing a word.

The two questions presented are:

1. Whether it violates due process for a district court to adopt *verbatim* a final opinion on discretionary matters ghostwritten entirely by a prevailing party's lawyers and submitted to the court *ex parte* with no notice to opposing parties or chance for them to respond.

2. Whether the class representatives of a settlement class adequately represent class members who hold unique state-specific statutory claims when they agree to a settlement that extinguishes all state-specific claims for no additional settlement value.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Petitioners are David R. Watkins and Theodore H. Frank. Petitioners were objectors in the district court and appellants in the court of appeals.

Shiyang Huang, Mikell West, George W. Cochran, Jr., and John W. Davis were objectors in the district court and appellants in the court of appeals but are not petitioners here.

Respondents are Brian F. Spector, James McGonigal, Randolph Jefferson Cary III, Robin D. Porter, and William R. Porter. Those Respondents were plaintiffs-appellees below. Additional Respondents are Equifax, Inc.; Does 1 through 50, inclusive; Equifax Information Services LLC; Equifax Information Solutions, LLC; and Does 1 through 10. Those respondents were defendants-appellees below.

The related proceedings below are:

United States District Court (N.D. Ga.):

In re: Equifax Inc. Customer Data Security Breach Litigation, MDL Docket No. 2800, No. 1:17-md-2800-TWT (Mar. 17, 2020) (amended opinion and order granting final settlement approval; certifying settlement class; and awarding attorney's fees, expenses, and service awards)

United States Court of Appeals (11th Cir.):

In re Equifax Inc. Customer Data Security Breach Litigation, Nos. 20-10249, 20-10609, 20-10610, 20-10611, 20-10612, 20-10613, 20-11470, 20-14095 (June 3, 2021) (opinion)

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Rachel Siegel, *'Did someone forget to do the math?' Consumers, advocates rail against lowered Equifax cash payouts*, Wash. Post (Aug. 1, 2019), wapo.st/3b8t9nH 9

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OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 999 F.3d 1247 and reproduced at App.1a-63a. The order entered by the district court certifying one national settlement class, approving a final class settlement, and awarding attorney's fees over Petitioners' objections is not reported but is available at 2020 WL 256132 and reproduced at App.64a-185a.

JURISDICTION

The Eleventh Circuit entered judgment on June 3, 2021, and denied Petitioners' petition for panel or en banc rehearing on July 29, 2021. App.196a-198a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, "No person shall … be deprived of life, liberty, or property, without due process of law."

Federal Rule of Civil Procedure 23(a)(4) provides that "One or more members of a class may sue or be sued as representative parties on behalf of all class members only if … the representative parties will fairly and adequately protect the interests of the class." Federal Rule of Civil Procedure 23 is reproduced in full at App.323a-333a.

INTRODUCTION

When judges task litigants with writing all or parts of a judicial opinion, they threaten the treasured

promise that "our system of law" strives "to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). District courts "probably shouldn't" adopt "proposed orders" written by a party because "[p]arties naturally draft proposed orders from an adversarial stance," which "all but guarantees that the resulting orders won't take the balanced, thoughtful approach that nuanced legal issues require." *Marcantel v. Michael & Sonja Saltman Fam. Tr.*, 993 F.3d 1212, 1239 (10th Cir. 2021). In fact, this Court itself has confirmed "the potential for overreaching and exaggeration on the part of attorneys preparing" draft findings "when they have already been informed that the judge has decided in their favor." *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985). But despite widespread condemnation, that practice persists based on precedent suggesting that ghostwritten orders or opinions do not violate due process if they "represent the judge's own considered conclusions." *Id.* at 573.

This case tests that principle's boundaries. At a fairness hearing on a proposed class settlement, the district judge orally rejected Petitioners' objections and asked class counsel to summarize his oral ruling in a draft opinion. The court's local rules required that draft opinion to be entered on the docket and shared with all parties. But class counsel sent the 122-page draft opinion to the district court *ex parte*, and the court then entered it as a final opinion without giving Petitioners (or anyone else) notice of the draft opinion or a chance to comment on it. That opinion, however, is in critical ways inconsistent with the court's oral

ruling and contains legal errors and factual inaccuracies that Petitioners never had a chance to object to. Even so, the Eleventh Circuit rejected Petitioners' due process challenges to the ghostwritten opinion, and separately rejected Petitioners' challenge to the class representatives under Rule 23(a)(4) of the Federal Rules of Civil Procedure.

The resulting decision below departs from this Court's cases and creates circuit splits on two due process questions related to ghostwritten opinions and one Rule 23(a)(4) adequacy-of-representation question. These questions implicate core judicial functions and the promise of fair procedures in a case implicating the substantive rights of nearly 150 million Americans whose sensitive personal data were stolen in one of the largest data breaches in history. Merely stating the questions confirms their self-evident importance, further justifying plenary review. The Court should grant the petition.

STATEMENT OF THE CASE

A. Due process, class actions, and data breaches.

Because the questions presented here implicate due process in a class action about one of the largest data breaches in history, Petitioners briefly sketch background principles on those subjects before discussing this case's procedural history.

1. Whatever else the "cryptic and abstract words of the Due Process Clause" might mean, "at a minimum they require that the deprivation of life, liberty or property by adjudication be *preceded by* notice and opportunity for hearing appropriate to the nature of

the case." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950) (emphasis added). Post-judgment notice "has little reality or worth" because by then affected parties cannot intelligently decide "whether to appear or default, acquiesce or contest." *Id.* 314. Thus "notice reasonably calculated to reach all interested parties and a *prior* opportunity to be heard," *Texaco, Inc. v. Short*, 454 U.S. 516, 534 (1982) (emphasis added), are an "elementary and fundamental requirement of due process in any proceeding which is to be accorded finality," *Mullane*, 339 U.S. at 314.

"[O]f course," due process requirements apply equally to "the class action procedure." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (internal quotation marks omitted). But additional "procedural safeguards"—found in Federal Rule of Civil Procedure 23, and "grounded in due process"—also govern class actions. *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). Among those, Rule 23(a)(4) requires "representative parties" to "fairly and adequately protect the interests of the class"—a requirement that itself flows directly from "the Due Process Clause." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940)). Class representatives must insist on "structural protections," *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857 (1999), to ensure that "the terms of the settlement" and "the structure of the negotiations" produce "fair and adequate representation for the diverse groups and individuals affected," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997). Evidence that class representatives have

done so often appears in how their "essential allocation decisions" split the settlement fund between groups of class members with materially different interests. *Id.*

2. Class-action cases arising from data breaches are becoming a mainstay of federal dockets because private consumer information is ubiquitous online. Indeed, "[s]hort of living in a remote hut while forsaking cellphones, the internet and credit cards, there is no longer any way that you, as an individual, can prevent marketers, governments or malicious actors from gathering and using comprehensive, personally identifying information about you." Christopher Mims, *Privacy Is Dead. Here's What Comes Next*, Wall St. J. (May 6, 2018), on.wsj.com/3aBayQY. Every piece of data, however seemingly innocuous, has value. Data aggregators "collect anything and everything they can about you: addresses, browsing habits, even estimated net worth." Geoffrey A. Fowler, *Your Data Is Way More Exposed Than You Realize*, Wall St. J. (May 24, 2017), on.wsj.com/3AHIC8G. They then "glue it all together" and sell it to companies to market their products to you. *Id.*

But marketers aren't the only ones after our data. Hackers and criminals also want it. If they can get the right kinds of personal data—names, birthdates, addresses, Social Security numbers, credit card numbers, etc.—hackers can steal a consumer's identity, open credit cards in a consumer's name, and ruin a consumer's credit. Those potential bounties incentivize hackers to aggressively try to breach electronic systems containing those sensitive data. Unfortunately, their frequent successes only fuel demand. *See*

e.g., *IBM Report: Cost of a Data Breach Hits Record High During Pandemic* (July 28, 2021), ibm.co/3veDp6U. In 2020 alone, one cyber-security company recovered "more that 4.6 billion pieces of personally identifiable information." David Endler, *How Much Data Was Leaked To Cybercriminals In 2020 — And What They're Doing With It*, Forbes (Apr. 20, 2021), bit.ly/3AEOC1J.

Given those facts, companies that gather and store sensitive personal or financial data should know that hackers are just aching to breach their systems. Credit bureaus fall under that heading. American credit bureaus—Experian, TransUnion, and Equifax—monitor consumers' financial transactions and compile consumer data such as names and addresses associated with a consumer's credit, bank account information, payment and balance history, and even current and past employers. *See* Kiah Treece & Jordan Tarver, *What Is A Credit Report?*, Forbes (May 25, 2021), bit.ly/2YPBZUh. When consumers apply for credit or for a loan, lenders use consumer-specific reports from the credit bureaus to "evaluate the creditworthiness of loan applicants" when deciding whether to lend them money. *Id.*

But regardless of the type of company whose system is breached, States exercising their consumer-protection powers have moved to the frontlines of regulating responses to data breaches. Indeed, "states have become—and foreseeably will remain—the primary venue for regulating cybersecurity and consumer privacy in the United States." Jonathan Mayer, *Data Protection Federalism*, Century Found. (Aug. 15, 2018), bit.ly/3FPd18Q. To that end, all 50

States have passed laws requiring companies to notify individuals of data breaches. *See* Nat'l Conf. of State Legis., *Security Breach Notification Laws* (Apr. 15, 2021), bit.ly/2XekHQz. Those state laws typically establish when and how a company must disclose that its systems have been breached, and often provide statutory damages to the State's citizens whose data the breach has compromised.

B. Equifax fails to properly secure nearly 150 million Americans' sensitive financial information, prompting one of the largest data-breach class-action cases ever.

Those concerns intersect here. In 2017, Equifax failed to properly secure its computer systems, allowing hackers to steal from them troves of highly sensitive personal data—names, addresses, birthdates, Social Security numbers—corresponding to nearly 150 million Americans. App.4a. The data breach started in May and continued until Equifax learned of it in July, but Equifax hid the breach from the public until September. *See In re Equifax, Inc., Customer Data Security Breach Litig.*, Dkt. 540 at 1, No. 1:17-md-2800-TWT (N.D. Ga. Jan. 28, 2019).

In the disclosure's wake, plaintiffs throughout the country sued Equifax in more than 300 class-action cases. App.4a. Eventually the Judicial Panel on Multidistrict Litigation consolidated those cases in the Northern District of Georgia. *Id.* Reflecting the sweeping geographic impact of Equifax's failure, the consolidated class complaint alleged 99 total counts on behalf of a national class, two national subclasses, and 53 state subclasses. Most of those claims survived

Equifax's motion to dismiss, including negligence claims under Georgia law for a nationwide class and dozens of state-specific statutory data-breach and consumer-protection claims. App.5a, 66a.

The subclasses' surviving state statutory claims sought different kinds of damages for distinct groups of plaintiffs than the nationwide class sought for its Georgia-law negligence claim. Some subclass plaintiffs sought actual damages under 30 different statutes. Others sought statutory damages under 17 statutes—and treble damages under 9 other statutes—for Equifax's alleged failure to implement and maintain reasonable security and privacy measures. Still others sought statutory damages under 2 statutes, and treble damages under 5 statutes, for Equifax's alleged failure to timely and accurately disclose the data breach. *See In re Equifax, Inc., Customer Data Security Breach Litig.*, Dkt. 374, ¶¶428-1403, No. 1:17-md-2800-TWT (N.D. Ga. May 14, 2018).

But after nearly 18 months of negotiations, holders of every one of those surviving state-specific statutory claims received from the class representatives and Equifax the same offer that Michael Corleone made to Senator Pat Geary. *See* The Godfather: Part II (Paramount Pictures 1974), bit.ly/3avYGzw ("My offer is this: Nothing."). Nothing in the proposed settlement provided additional relief or damages specifically corresponding to any one of the dozens of subclasses in the consolidated complaint.

In lieu of state-specific damages for any plaintiff, the proposed settlement provided uniform monetary relief to all class members from a $380.5 million settlement fund, App.6a—less than $3 per class member.

In addition, class members could make requests for credit monitoring, and Equifax would also provide identity-restoration services for class members who thought they'd been victims of identity theft. App.6a-8a. The settlement also proposed injunctive relief requiring Equifax to spend $1 billion on data security over the next five years. App.8a. The settlement drew support from some federal and state regulators, App.5a, but also pushback from some lawmakers and public-interest groups, *see, e.g.*, Pete Schroeder, *Equifax's $700 million data breach settlement spurs criticism, calls for new rules*, Reuters (July 22, 2019), reut.rs/3BfieTP; Emily Birnbaum & Maggie Miller, *Equifax breach settlement sparks criticism*, The Hill (July 22, 2019); bit.ly/2XFZuPw; Rachel Siegel, *'Did someone forget to do the math?' Consumers, advocates rail against lowered Equifax cash payouts*, Wash. Post (Aug. 1, 2019), wapo.st/3b8t9nH.

C. In a brief oral ruling, the district court overruled Petitioners' objections to the proposed settlement's lack of subclasses.

Petitioners David Watkins and Theodore Frank hold state-specific statutory-damages claims from Utah and D.C. providing $2,000 and $1,500, respectively, to data-breach victims. Because the proposed settlement extirpated those claims—and all other statutory-damages claims—Watkins and Frank objected to the proposed settlement. Among other things, they contended that the lack of subclasses, and lack of separate lawyers for those (nonexistent) subclasses, meant that the proposed unitary class failed Rule 23(a)(4)'s adequacy requirement. *See In re Equifax, Inc., Customer Data Security Breach Litig.*,

Dkt. 876, No. 1:17-md-2800-TWT (N.D. Ga. Nov. 19, 2019); App.274a-276a. They also objected to a 72-page expert report by Professor Robert Klonoff that consisted of legal opinions and argument in support of the proposed settlement. *See In re Equifax, Inc., Customer Data Security Breach Litig.*, Dkt. 890, No. 1:17-md-2800-TWT (N.D. Ga. Dec. 2, 2019); App.277a.

Petitioners' attorney argued their objections at the fairness hearing. App.274a-277a. She also verbally asked the district court for a chance to respond in writing to hundreds of pages of declarations and exhibits that class counsel had filed the night before the fairness hearing, which accused Petitioners and other objectors of improprieties. *See In re Equifax, Inc., Customer Data Security Breach Litig.*, Dkt. 939, No. 1:17-md-2800-TWT (N.D. Ga. Dec. 18, 2019); App.276a-277a. That filing did not ask for any legal consequences from the allegations.

After Petitioners' attorney spoke, class counsel told the district court that they filed the prior evening's declarations and exhibits to support a new ruling they sought for the first time that day: a request that the court find some objectors, including Petitioner Frank, to be "serial objectors" participating here with "improper motives." App.283a-292a. Class counsel then made a variety of false accusations against Petitioner Frank. App.287a-291a; *see also* App.305a (class counsel "put[ting] Mr. Frank in" the category of "ideological" objectors "that, you know, just don't like Class actions," and calling "most" of the other objectors "mercenaries"). The district court rejected an objec-

tor's request to respond to those new allegations, effectively also preventing Petitioners' counsel from seeking rebuttal. App.310a.

The district court then overruled Petitioners' objections, finding them to be "without merit." App.318a. But the district court made no specific factual findings during the fairness hearing about Frank or his counsel. More specifically, it said nothing about whether any objector acted with an "improper purpose" or was a "serial objector." Truth be told, the district court said very little about its stated reasons for rejecting the objections: that portion of the fairness hearing spanned only six pages of the hearing's transcript. App.311a-314a, 318a. Those reasons consist mostly of conclusory statements, but the court also invoked Professor Klonoff's report. App.313a. As noted, Petitioners had objected to the prejudicial misuse of expert testimony to make legal argument, but the district judge called the report "meritorious and appropriate" and said he "agree[d] with" the reasons "Professor Klonoff states." *Id*. The district court then asked class counsel to "summarize[]" its ruling in a written order. App.319a.

D. Weeks later, the district court entered a 122-page final opinion written entirely by class counsel and sent to the court *ex parte*.

Petitioners waited for class counsel to file the proposed order on the docket—and to "provide[]" "[c]opies" to "each party"—as the district court's local rules require. N.D. Ga. Civ. L.R. 7.3; *see also id.* 5.1(A)(1). To their astonishment, the order that appeared on the docket less than a month after the fairness hearing was not a *proposed* order filed by *counsel*,

but the *final* order from *the district court itself*. That final order certified a nationwide settlement class (with no state-specific subclasses), approved the proposed settlement agreement, and awarded class counsel $77.5 million in attorney's fees. App.64a-185a. Two aspects of the final order bear emphasis here.

First, the final order far exceeds the scope of the district court's oral ruling rejecting Petitioners' objections. For one thing, the oral ruling comprises only six transcript pages and about 2,000 words, but the final opinion runs 122 pages—tens of thousands of words longer than the oral ruling it was supposed to "summarize[]." App.319a. What's more, the final opinion discusses in detail topics about which the district court said *nothing* during the hearing. Among others, it repeats and ultimately adopts class counsel's claims first raised at the fairness hearing (and to which Petitioner Frank had no chance to respond) that Frank was a "serial objector[]" who took "improper" actions and made objections "not motivated to serve the interests of the class," thus reducing the "'weight'" and "'credibility'" of his objections. App.172a-174a, 177a-178a. It also softens the district court's view of Professor Klonoff's legal opinion—what before the court "agree[d]" with as "meritorious an appropriate," App.313a, was relegated to something the court "found helpful" but "not" something on which the court's opinions were "dependent," App.102a.

Second, the final order stems from an obvious—and obviously substantive—*ex parte* communication. Class counsel alone had the district court's ear when shaping the final ruling on every issue the order mentions. Those issues were no mere procedural niceties.

They concern the rights of tens of millions of Americans to statutory damages that their state legislatures deemed appropriate for failures like Equifax's. And they award $77.5 million in attorney's fees to the very lawyers who wrote the order. Class counsel's *ex parte* communication deprived every other party of the chance to review, comment on, or object to how class counsel shaped those critical substantive answers.

To facilitate meaningful appellate review, Petitioners filed an unopposed motion asking the district court to include in the appellate record the proposed opinion that class counsel submitted *ex parte*. The district court initially granted that motion, *In re Equifax, Inc., Customer Data Security Breach Litig.*, Dkt. 1084, No. 1:17-md-2800-TWT (N.D. Ga. May 7, 2020), but later granted class counsel's motion to reconsider and held that the *ex parte* communication was not part of the record, *In re Equifax, Inc., Customer Data Security Breach Litig.*, Dkt. 1106, No. 1:17-md-2800-TWT (N.D. Ga. May 15, 2020). The district court later held it was "obvious" that Petitioners sought to supplement the record with the draft order "to obstruct and delay resolution of the appeal while they challenge the findings in the final approval order that were personal to them." *In re Equifax, Inc., Customer Data Security Breach Litig.*, Dkt. 1153, No. 1:17-md-2800-TWT (N.D. Ga. Aug. 7, 2020).

E. The Eleventh Circuit affirmed.

Petitioners nevertheless appealed from the final opinion and judgment. Yet even now, no one but class counsel and the district court has seen the draft opinion that class counsel prepared. For when Petitioners

again sought a copy of it before they filed their Eleventh Circuit brief, class counsel argued that the draft's precise contents were "simply irrelevant" because "[w]hether the district court adopted the findings verbatim from the proposed order does not matter." Aples.' Opp. Br. at 12, *Huang v. Spector*, No. 20-10249 (11th Cir. Aug. 24, 2020). Accordingly, the Eleventh Circuit resolved Petitioners' appeal "assum[ing]" that the district court's final opinion adopted "verbatim" every word in class counsel's 122-page proposed opinion. App.35a.

1. Even on that assumption, the court of appeals rejected Petitioners' contentions that entering the ghostwritten opinion with no notice or chance to respond to it violated due process. The court of appeals first reasoned that Petitioners had "ample opportunity" to present their positions before the court entered the ghostwritten opinion—they had "lodged detailed written objections to the settlement agreement" and "appeared through counsel at the final hearing and presented arguments." App.30a. And according to the court of appeals, Petitioners *did* "have an opportunity to respond to the order": they could have moved for reconsideration. *Id.* The court of appeals also thought that the district court's reasoning—confined to six pages of the hearing's transcript—evinced the court's "firm decision" precipitating the 122-page ghostwritten opinion. App.31a. And it faulted Petitioners for not "object[ing] to the process" at the fairness hearing or—despite local court rules requiring proposed orders to be filed on the docket and sent to all parties—"request[ing] the opportunity to review the proposed order or make objections to it." *Id.* So

"[j]udicial ghostwriting remains most unwelcome in" the Eleventh Circuit *generally*, but this *specific* instance of ghostwriting that resolved one of the largest data-breach class actions in history "was not fundamentally unfair." App.32a.

Next, the court of appeals rejected Petitioners' contention that that the ghostwritten opinion was an impermissible *ex parte* communication that violated Canon 3(A)(4) of the Code of Conduct for United States Judges. The court of appeals viewed the 122-page *ex parte* communication as at most harmless error for four reasons: (1) Petitioners were "privy to the exact communications"—the opinion itself, after it was entered on the docket—that "they claim were made ex parte"; (2) the district court "process was not fundamentally unfair," and Petitioners did not "object[]" to it; (3) the district court made "no errors," so the court of appeals could "not say any ex parte communications caused the court to err in a way that prejudiced" Petitioners; and (4) Petitioners could have moved for reconsideration. App.32a-34a.

2. The court of appeals also refused to review the ghostwritten opinion's findings about Petitioners' alleged improper purposes for objecting because, in its view, those findings "are largely unrelated to the merits of the appeal and may be dicta in any event." App.9a n.5.

In like manner, the court of appeals rejected Petitioners' challenge to the district court's reliance on Professor Klonoff's improper expert testimony. It did so based on the final opinion's statement—again, written by class counsel—that the decision was "'not dependent'" on the expert report. App.27a n.14.

3. The court of appeals then disagreed with Petitioners that the lack of subclasses for holders of state-specific statutory-damages claims evinced a fundamental conflict between the class representatives and the class that should have doomed certification under Rule 23(a)(4). The court agreed that only fundamental conflicts going to the specific issues in controversy can make class representatives inadequate and defeat class certification. But it held that Petitioners failed to show that the class members "have opposing interests" or that "the economic interests and objectives of named representatives differ significantly from the economic interests and objectives of unnamed class members." App.44a (cleaned up).

In the court of appeals' narrow view of those categories, the facts here didn't fit in them. It said all plaintiffs' "claims arise out of same unifying event"—the same data breach—and "all Plaintiffs seek redress for the same injury." *Id.* So even though "some class members had state law statutory damages claims while others did not," that wasn't a "fundamental conflict" because "all class members had negligence and negligence per se claims under Georgia law." App.45a (cleaned up). In any case, the court of appeals thought that Petitioners failed "to show that" that their Utah and D.C. statutory-damages claims "were valuable, as [they] demonstrate[d] nothing about how the claims were a sure bet." *Id.* Homing in on that purported flaw, the court of appeals thought Petitioners faced "significant barriers" to recovery because the D.C. law was enacted after the underlying breach here (though Petitioners based their argument on the statute in effect in 2017) and the Utah law required a showing of

privity that Petitioners "might not" make. *Id.* Given those purported hurdles, refusing to undo the settlement in these circumstances was, it thought, consistent "with the reasoned approach adopted by [district] courts in other data breach cases." App.46a.

The court of appeals viewed its decision as consistent with the subclassing and Rule 23(a)(4) adequacy holdings in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). First, "neither of" those cases "involved statutory damages claims." App.47a. Second, the class members in those asbestos cases had "diametrically different injuries within each class action"—some had current injuries; others faced only future harm—but all plaintiffs here "alleged that they face the same risk of identity theft and, among other things, sought the same compensatory damages for that injury." *Id.* That's why plaintiffs "all receive the same benefits to redress that shared injury." *Id.* And this case wasn't like *Ortiz*, where some class members had "more valuable claims than others," because Petitioners had allegedly "failed to show" how their statutory-damages claims "increased the value of certain Plaintiffs' cases." App.47a-48a. The court also thought its holding comported with *In re Literary Works in Electronic Databases Copyright Litigation*, 654 F.3d 242 (2d Cir. 2011), a case it read to require subclasses only to address a "risk" that "members of the class will have their ability to get settlement benefits reduced to zero because some other members got more relief from the settlement." App.48a.

4. The Eleventh Circuit denied Petitioners' request for panel or en banc rehearing on their due process and Rule 23(a)(4) issues. App.196a-198a.

REASONS FOR GRANTING THE PETITION

I. The decision below conflicts with this Court's cases and other circuits' precedent on crucial due process questions.

The decision below held that not one due process problem arises when one party writes every word of a 122-page opinion that's sent to the court *ex parte*, entered as a final order before any other party sees it, and brimming with new findings that other parties never had a chance to respond to. That holding squarely conflicts with cases from this Court and other circuits on two critical due process issues that cry out for plenary review.

A. Does it violate due process if a district court adopts a ghostwritten opinion as a final opinion without giving the opposing party notice or a chance to be heard?

The Eleventh Circuit "assume[d]" that class counsel—not the district court—wrote every word in the final opinion. App.35a. Yet it still found no due process problem in the district court's adopting the ghostwritten order verbatim without giving Petitioners notice of the order, and a chance to object to it, *before* entering it on the docket. *See* App.28a-34a. That conclusion creates two conflicts with decisions from this Court and from other circuits.

1. "[N]otice reasonably calculated to reach all interested parties and a *prior* opportunity to be heard,"

Texaco, 454 U.S. at 534 (emphasis added), are an "elementary and fundamental requirement of due process in any proceeding which is to be accorded finality," *Mullane*, 339 U.S. at 314. The Eleventh Circuit's principal response to Petitioners' due process objection based on their lack of prior notice about (or chance to comment on) the ghostwritten order was to fight the premise—the court thought that Petitioners "had ample opportunity to present their arguments" because they "lodged detailed written objections to the settlement agreement" and "appeared through counsel at the final hearing and presented arguments." App.30a.

But *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), confirms that due process requires pre-decisional notice of the ghostwritten opinion *itself*, and an opportunity to comment on it, before a court enters it. *Anderson* explained what "circumstances" courts should examine to confirm that party-drafted findings of fact "represent the judge's own considered conclusions." *Id.* at 573. Chief among those is whether the opposing party "was provided and availed itself of the opportunity to respond at length *to the proposed findings*." *Id.* at 572 (emphasis added). Due process cannot reasonably require less when the ghostwritten document is not just findings of fact but *the opinion itself*—the legal reasoning evidencing the court's exercise of discretion. *Cf. DiLeo v. Ernst & Young*, 901 F.2d 624, 626 (7th Cir. 1990) ("Judges should evaluate briefs and produce a neutral conclusion, not repeat an advocate's oratory."). The Eleventh Circuit's failure to con-

sider the effect of Petitioners' lack of notice and opportunity to object cannot be reconciled with *Anderson*, *Texaco*, and *Mullane* and warrants plenary review.

That break from this Court's precedent also results in a square split with two other circuits and generates tension with two others. More than 50 years ago, the Fourth Circuit found "no authority in the federal courts that countenances the preparation of the [final] opinion by the attorney for either side," and called ghostwritten opinions a "failure of the trial judge to perform his judicial function" that "amounts to a denial of due process" when "it occurs without notice to the opposing side." *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 724-25 (4th Cir. 1961). To be sure, the Fourth Circuit has since suggested that *Anderson* "limit[s]" *Chicopee*, but even after *Anderson* "a district court's near-verbatim adoption of an ex parte proposed order" passes muster in the Fourth Circuit only if "the opposing party had the opportunity to air its views fully and the court appeared to have to have exercised independent judgment." *Alig v. Quicken Loans, Inc.*, 990 F.3d 782, 790 n.8 (4th Cir. 2021) (citing *Aiken Cnty. v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 676-77 (4th Cir. 1989)). That flaw afflicts the decision below—class counsel sent the ghostwritten opinion to the district court *ex parte*, and the court adopted it before Petitioners had any chance to "air [their] views fully" by commenting or objecting.

The Third Circuit, in turn, refused to "condone" letting parties ghostwrite opinions because "[j]udicial opinions are the core work-product of *judges*." *Bright v. Westmoreland Cnty.*, 380 F.3d 729, 732 (3d Cir. 2004) (emphasis added). Particularly when a party

lacks "the opportunity to object or even respond to the submitted opinion and order before the District Court adopt[s] them as its own," adopting ghostwritten opinions evinces a "degree of impropriety, or even the appearance thereof," that "undermines [courts'] legitimacy and effectiveness." *Id.*; *accord In re Cmty. Bank of N. Va.*, 418 F.3d 277, 319 (3d Cir. 2005).

Had the underlying district-court proceedings here occurred in either the Third or Fourth Circuits, *Bright* and *Chicopee* would have mandated reversing the final ghostwritten opinion. The Eleventh Circuit's diametrically opposed conclusion warrants plenary review.

Decisions from the Sixth and Seventh Circuits create further tension on this point. The Sixth Circuit has disagreed that "it was improper for the District Court after it had advised counsel that it had decided all issues" to ask prevailing party's counsel "to assist in the preparation of the final memorandum." *Hill & Range Songs, Inc. v. Fred Rose Music, Inc.*, 570 F.2d 554, 558 (6th Cir. 1978). That could be read as consistent with the decision below, but *Hill & Range* also differs in critical ways—that district court "had previously prepared a draft of its Memorandum, which it furnished to" prevailing party's "counsel, together with various research notes." *Id.* That district court also "made extensive changes in the final draft prepared by" prevailing party's counsel. *Id.* Because none of that happened here, it's unclear whether the Sixth Circuit still would have found that the ghostwritten opinion worked "no prejudice" to Petitioners in this case. *Id.* Either way, this potential third approach to

handling objections to ghostwritten opinions compounds the problem and confirms that this question warrants plenary review.

The Seventh Circuit, in turn, has explained that for appellate courts to properly review a district court's discretionary decisions, district judges must write their own opinions giving judicial reasoning; they cannot rely on the briefs of the prevailing party. *DiLeo*, 901 F.2d at 626 (Easterbrook, J.). If it is improper for a court to "photocopy a lawyer's brief and issue it as an opinion," *id.*, it's doubtful that the Seventh Circuit would affirm on abuse-of-discretion review an opinion ghostwritten by a prevailing party and entered as final without notice to the opposing party.

2. The Eleventh Circuit also offered a second reason why it thought Petitioners *did* "have an opportunity to respond" to the ghostwritten order: They could have moved the district court for reconsideration. App.30a. That is no answer. A motion to reconsider can be filed after *all* decisions, so the supposedly limited exception swallows the rule. And an "opportunity to respond" to a decision *after* it occurs does not satisfy the due-process requirement of "notice and opportunity for hearing appropriate to the nature of the case" that "*precede[s]*" the decision. *Mullane*, 339 U.S. at 313 (emphasis added). The court of appeals' second proposed fix falls short of what *Mullane* demands.

Beyond that, the Eleventh Circuit's motion-for-reconsideration solution conflicts with holdings from the Fifth and Ninth Circuits. The Fifth Circuit concluded that a chance "to file a motion for reconsideration" of a bankruptcy court order stripping a creditor of its lien

on a secured asset "cannot substitute for the before-the-fact protections of creditors' interests embodied in the adversary rules." *In re Kinion*, 207 F.3d 751, 757 (5th Cir. 2000). And the Ninth Circuit held that a motion for reconsideration was an "inadequate" substitute for pre-decisional notice that a district court planned to *sua sponte* dismiss a prisoner's habeas petition. *Herbst v. Cook*, 260 F.3d 1039, 1043-44 (9th Cir. 2001). That was so, the Ninth Circuit reasoned, for at least three reasons: the legal standard "to succeed upon reconsideration is higher than pre-dismissal," the "denial of a motion for reconsideration is reviewed only for an abuse of discretion," and "an appeal from the denial of" a reconsideration "motion does not raise the merits of the underlying judgment." *Id.* at 1044.

Both the Fifth and the Ninth Circuits have thus rejected the Eleventh Circuit's just-move-for-reconsideration fix to deprivations of pre-decisional due process. This Court should grant the petition and resolve this conflict.

B. Can substantive *ex parte* communications ever be harmless error?

Class counsel sent a draft 122-page opinion to the district court *ex parte*. That draft resolved every substantive and procedural issue remaining in the case. Among others, those included issues that the district court never addressed at the fairness hearing, such as class counsel's attacks on Petitioners' character and motivations, App.177a-178a; and on which the district court putatively changed its mind after the hearing, such as the utility of Professor Klonoff's report, *compare* App.313a *with* App.102a. Even so, the Eleventh Circuit held that this *ex parte* communication was

harmless error, relying on precedent relating to non-substantive *ex parte* communications. App.32a-34a. The conclusion that this substantive *ex parte* communication is not at least presumptively reversible error conflicts with decisions from the Seventh, Ninth, and Federal Circuits.

Start with *Edgar v. K.L.*, 93 F.3d 256 (7th Cir. 1996) (per curiam). The district judge in that case met *ex parte* with a panel of experts investigating whether Illinois's mental health care system violated the Constitution. *Id.* at 257. As in this case, the judge blocked the parties' efforts to learn what happened during the *ex parte* meetings, but defendants still found out that during one of them the panel previewed its findings and tried to "persuad[e] the judge that the panel's methodology was sound." *Id.* The court of appeals granted defendants' mandamus petition and held that these facts required "[m]andatory disqualification under [28 U.S.C.] §455(b)(1)." *Id.* at 259. The *ex parte* meetings gave the judge disqualifying "personal knowledge of disputed evidentiary facts concerning the proceeding," §455(b)(1)—that is, information about Illinois's system that did not "enter[] the record" and thus could "be neither accurately stated nor fully tested," 93 F.3d at 259. Here, the ghostwritten final opinion did the same thing: it gave the district court class counsel's off-the-record views on Petitioners' character and motivation, and about how it should view Professor Klonoff's report—issues whose accuracy Petitioners never had a chance to test. In other words, off-the-record substantive communications that warranted mandatory disqualification in *Edgar* became mere harmless error below.

The decision below also squarely conflicts with *Guenther v. CIR*, 939 F.2d 758 (9th Cir. 1991). The tax judge in that case asked the Commissioner and the taxpayers in a redetermination proceeding to file with the tax court, and share with each other, trial memoranda outlining issues, witnesses, and the like. *Id.* at 759. The taxpayers complied, but the Commissioner's counsel sent his memorandum only to the judge. *Id.* The tax court denied the taxpayers' pre-trial motion to disclose the Commissioner's now-*ex parte* memorandum, meaning they did not get a copy of it until "long after trial." *Id.* The Ninth Circuit reversed the tax court's judgment against the taxpayers, holding they "were indeed prejudiced by the communication." *Id.* at 761. The *ex parte* memorandum contained "serious" allegations about the taxpayers "going both to the merits of the case and to the" taxpayers' "character generally," and the taxpayers did not have "an adequate opportunity to rebut the contentions effectively." *Id.* "The violation of" the taxpayers' "due process right entitles them to a new trial." *Id.* at 762. The same problems infected the proceedings below—the *ex parte* ghostwritten order presented serious allegations going to the merits and to Petitioners' character, and Petitioners never had an adequate opportunity to rebut those contentions. Had this case occurred in the Ninth Circuit, *Guenther* would have required reversing the judgment based on the *ex parte* communication.

Finally, consider Federal Circuit precedent governing "whether *ex parte* communications with a deciding official in the course of a public employee's removal proceeding violate the employee's due process

rights." *Ward v. U.S. Postal Serv.*, 634 F.3d 1274, 1279 (Fed. Cir. 2011). Under that precedent, "*ex parte* communications that introduce new and material information to the deciding official violate due process." *Id.* (internal quotation marks omitted). And "[g]iven the seriousness of a due process violation," any such *ex parte* communications are "not subject to the harmless error test." *Id.* (internal quotation marks omitted). The Eleventh Circuit's contrary view—that the ghostwritten *ex parte* communication was harmless error *even though* it introduced "new and material information" about Petitioners to the district court—cannot be reconciled with this Federal Circuit rule and warrants plenary review.

II. The decision below conflicts with this Court's decisions in *Amchem* and *Ortiz*, and creates a circuit split on subclassing under Rule 23(a)(4).

A. Rule 23(a)(4)'s constitutionally required adequacy requirement susses out "conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625; *see Phillips Petroleum*, 472 U.S. at 812. Conflicts of interest exist when named parties do not "suffer the same injury as the class members" or if "the interests of those within the single class are not aligned." *Amchem*, 521 U.S. at 626 (cleaned up). Evidence of conflicts often arises from the parties' "allocation decision" in settlement discussions, but those conflicts can be cured through "structural protections" such as subclasses represented by separate counsel. *Ortiz*, 527 U.S. at 857; *see Amchem*, 521 U.S. at 627.

The decision below concluded that the class representatives satisfied Rule 23(a)(4) though the settlement provided no relief specifically for class members with state-specific statutory-damages claims. Its main reason for that holding? The statutory-damages claims were not a "sure bet." App.45a.

On its face, the court of appeals' newfangled "sure bet" requirement conflicts with *Amchem* and *Ortiz*. The classes in both cases had members whose claims were less a "sure bet" than others—by definition, the claims for future damages for the exposure-only plaintiffs in both *Amchem* and *Ortiz* were less "sure" than the claims of the currently injured plaintiffs, as were the claims in *Ortiz* of class members exposed to asbestos after the defendant's indemnity policy expired. 521 U.S. at 626; 527 U.S. at 857. The conflicts crystalized because the settlements valued "*the more speculative claims* of those projected to have future injuries" the same as "the claims of the immediately injured"—"an allocation decision with results almost certainly different from the results that those with immediate injuries or claims of indemnified liability would have chosen." *Ortiz*, 527 U.S. at 857 (emphasis added). Thus, the disparities in claim strengths upon which the Eleventh Circuit excused subclassing were the precise "disparate interests" and "conflict[s]" that this Court held required those very "structural protection[s]." *Id.* The Eleventh Circuit's "sure bet" misfire so plainly "conflicts with relevant decisions of this Court" that it demands reversal. Sup. Ct. Rule 10(c).

The Eleventh Circuit's "sure bet" rule also squarely conflicts with *In re Literary Works in Electronic Databases Copyright Litigation*, 654 F.3d 242

(2d Cir. 2011). There, a class of authors sought damages from publishers who included their copyrighted works in online databases without permission. Their works fell into three categories—works registered in time to qualify for statutory damages (Category A), registered works that did not qualify for statutory damages (Category B), and unregistered works (Category C)—increasing in number but decreasing in value in the order listed. *See* 654 F.3d at 246. The proposed settlement's damages formula accordingly valued Category A claims higher than Category B claims, and those higher than Category C; but also provided that if the total settlement value exceeded $18 million, payments for Category C claims would be reduced *pro rata* to zero before any reductions to Category A and B claims would occur. *See id.*

The Second Circuit held that those "essential allocation decisions" between Category A, B, and C claims "produc[ed] disparate interests within the class" and created a fundamental conflict between authors who held only Category C claims and authors who held claims in all three categories. *Id.* at 251 (cleaned up). The problem was not that the settlement assigned lower values to Category C claims—they were, after all, "indisputably worth less" and "would face a substantial litigation risk if the case went forward"—but that the court had "no basis for assessing whether the discount applied to Category C's recovery appropriately reflects that weakness." *Id.* at 253. Nor could the court "know this, in the absence of independent representation." *Id.* Or, to put it in the Eleventh Circuit's terms, the very fact that a fair settlement value for Category C claims was not a sure bet was exactly why

a Category C subclass needed "independent counsel pressing its most compelling case." *Id.* In short, Petitioners' state statutory-damages claims here would have required a separately represented subclass had this case been litigated in the Second Circuit.

B. Additionally, the opinion below conflicts with *Amchem*, *Ortiz*, and *In re Literary Works* by concluding that the class representatives were adequate in part because the settlement was fair. According to the Eleventh Circuit, all members of the class "face the same risk of identity theft," "receive the same benefits to redress that shared injury," and "are entitled to the same class benefits"—an outcome purportedly fair and equal across the board. App.47a-48a.

That reasoning inverts the Rule 23 analysis. "The possible fairness of a settlement cannot eclipse the Rule 23(a) and (b) precertification requirements." *In re Literary Works*, 654 F.3d at 254. "Thus, the adequacy of representation cannot be determined solely by finding that the settlement meets the aggregate interests of the class or 'fairly' compensates the different types of claims at issue." *Id.*; *see also Ortiz*, 527 U.S. at 858 ("Here, just as in [*Amchem*], the proponents of the settlement are trying to rewrite Rule 23; each ignores the fact that Rule 23 requires protections under subdivisions (a) and (b) against inequity and potential inequity at the precertification stage, quite independently of the required determination at postcertification fairness review under subdivision (e) that any settlement is fair in an overriding sense.").

III. This case is an excellent vehicle to resolve these critical due-process and class-action splits.

It's hard to imagine a better vehicle for this Court to reemphasize a judge's indispensable adjudicatory role and Rule 23(a)(4)'s critical rights-preserving purpose. First, no jurisdictional concerns impede reaching the merits. Second, all the issues are cleanly preserved and squarely presented. On the due process questions, no one disputes that class counsel ghostwrote every word of the final order. In fact, the court of appeals expressly based its due process holdings on that assumption. App.35a. Nor does anyone dispute that the district court entered the ghostwritten order on the docket without notifying Petitioners—or anyone else—that class counsel had submitted it *ex parte*, and without giving Petitioners or anyone else a prior chance to review, comment on, or object to the ghostwritten order. The adequate-representation question is likewise front and center: Petitioners objected because the settlement abandoned all relief for all state-specific statutory-damages claims, and the court of appeals shrugged its shoulders since it thought those claims weren't a "sure bet." App.45a. Reviewing and reversing those issues will change the outcome below.

Third, these issues are surpassingly important. If "our system of law" really "has always endeavored to prevent even the probability of unfairness," *Murchison*, 349 U.S. at 136, the limits on judges' ability to farm out the entirety of the final opinion-writing process to a prevailing party demands the closest scrutiny. Nor does the size or scope of the settlement below preclude merits review. Even accepting the Eleventh

Circuit's mathematically false view of this settlement as "'the largest and most comprehensive recovery in a data breach case in U.S. history by several orders of magnitude,'" App.2a, that no more makes it immune from this Court's plenary review than was the most "sprawling" "settlement class" ever previously reviewed, *Amchem*, 521 U.S. at 624, or its follow-on co-traveler among the "elephantine mass of asbestos cases," *Ortiz*, 527 U.S. at 821. In fact, the nationwide breadth and scope of the claims that created the class conflicts justifying review in *Amchem* and *Ortiz* exist here and justify the Court's intervention for the same reasons.

Fourth, the decision below is wrong on every issue raised here. The United States Reports are filled with assurances that "justice must satisfy the appearance of justice." *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 825 (1986) (internal quotation marks omitted). Enlisting party counsel to write the final opinion itself, and adopting that opinion word for word without first giving the opposing party a chance to respond and object, constitutes "the failure of the trial judge to perform his judicial function," *Chicopee Mfg. Corp.*, 288 F.2d at 724-25, "vitiates the vital purposes served by judicial opinions," *Bright*, 380 F.3d at 732, and deprives the opposing party of the pre-decisional notice and an opportunity to comment that has been due process's baseline for centuries, *Mullane*, 339 U.S. at 313-14. When that happens, it actualizes "the potential for overreaching and exaggeration on the part of attorneys" when "they have already been informed that the judge has decided in their favor." *Anderson*, 470 U.S. at 572.

The Eleventh Circuit's "sure-bet" rationale recommits the same Rule 23(a)(4) error corrected in *Amchem* and *Ortiz*. Those cases reject the Eleventh Circuit's insistence that subclasses are unnecessary for novel causes of action or because their settlement value is uncertain. On the contrary, as a matter of law, the uncertainty about an appropriate settlement value for novel or uncertain claims is the very reason that Rule 23(a)(4) requires the "structural protections" of separately represented subclasses for class members with those claims. *Ortiz*, 527 U.S. at 857. "Novel" claims have settled for hundreds of millions of dollars. *E.g.*, *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1102 (D. Kan. 2018) ($1.5B); *Ark. Tchr. Ret. Sys. v. State St. Bank & Tr. Co.*, 2018 U.S. Dist. LEXIS 111409, *203 (D. Mass May 14, 2018) ($300M). Indeed, the parties settled the national class's Georgia-law claims for millions despite dispositive precedent holding that defendants had no duty here—as the district court opinion itself recognized elsewhere. App.81a (citing *Ga. Dep't of Labor v. McConnell*, 828 S.E.2d 352 (Ga. 2019)). The Eleventh Circuit's view that novel claims, or claims not a "sure bet," have zero settlement value as a matter of law—even when they survive a motion to dismiss—nullifies the protections of Rule 23(a)(4).

And implementing those structural protections in this case would not have required different subclasses with separate lawyers for residents of every State with a remaining statutory-damages claim. *Contra* App.122a. State-specific claims with "materially identical legal standards" can "be sorted into a small num-

ber of groups," reducing the required number of subclasses. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1262 (11th Cir. 2004), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). Here, the remaining claims (besides the Georgia negligence claim) provide at least three materially different legal remedies—damages for failing to adequately safeguard consumers' data, for failing to disclose the data breach in a timely manner, and for breaching contracts with Equifax—suggesting that the class could have been appropriately certified with as few as three subclasses. What *Amchem* and *Ortiz* forbid, however, is a settlement with *no* subclasses when class members have materially different claims—exactly what happened here.

Those kinds of material differences will continue to arise in this context. In the laboratories of democracy, "the diverse policy judgments of lawmakers in 50 States" have provided statutory remedies to their citizens for data breaches that differ materially from common-law remedies. *BMW v. Gore*, 517 U.S. 559, 570 (1996). "Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court"; the single-national-class settlement here does "violence not only to Rule 23 but also to principles of federalism." *In re Bridgestone/Firestone Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (Easterbrook, J.) (Rule 23(a) commonality).

* * * * *

Attorneys acting as scriveners and drafting a ministerial order for a court repeating what a judge has

said in an oral ruling is one thing. But when a ghostwritten opinion approves a settlement awarding hundreds of millions of dollars to the opinion author's clients, and gives nearly $80 million in attorney's fees to the *authors themselves*—and does so *ex parte*, in an order entered as final with no notice or prior chance for any other party to comment—due process alarm bells should ring so furiously their clappers melt. When that same ghostwritten opinion destroys state-specific statutory damages claims for tens of millions of absent Americans—specifically at the class representatives' insistence—it also eliminates any defensible claim that Rule 23(a)(4) is satisfied. The Court should grant plenary review and bring the Eleventh Circuit's contrary conclusions on both questions back into line with this Court's precedent and the circuits' majority positions.

CONCLUSION

This Court should grant the petition and reverse the decision below.

Respectfully submitted,

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