No. 15-1420

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JEREMY L. KIDD
Mercer University
School of Law
1021 Georgia Ave.
Macon, GA 31210

ILYA SHAPIRO
Counsel of Record
JAYME WEBER
Cato Institute
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

JUNE 16, 2016

(*additional parties, continued from 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

Federal Rule of Civil Procedure 23(b)(2) allows a class to be maintained without an opt-out right if "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Here, the Fourth Circuit upheld approval of a settlement under that rule even though the class claims alleged violations of a statute that provided no right to injunctive relief. The court held that the settlement alone was sufficient to meet the rule's requirement of injunctive relief. The question presented is:

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 Rule 23(b)(2) and the denial of the right to opt out as to the damages claim violate that rule or the Fifth Amendment's Due Process Clause?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT: 2

WITHOUT THE RIGHT TO OPT OUT, CLASS MEMBERS ARE DEPRIVED OF THE RIGHT TO CONTROL THEIR OWN LEGAL CLAIMS WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FIFTH AMENDMENT................. 2

A. Present Opt-Out Mechanisms for Class Action Participation Provide Minimal Protection of Class Members' Due Process Rights.... 3

1. Opt-out rights protect class members' autonomy in determining the adequacy of any settlement 3

2. Opt-out rights help to preclude abuses by class counsel... 5

3. Rule 23(b)(2) provides, at most, a narrow exception to the opt-out requirement when injunctive or declaratory relief is the only relief available to class members... 9

B. Due Process Concerns Are Heightened When a Settlement's Injunctive-Like Remedies Are Allowed to Displace Class Members' Opt-Out Rights 11

C. The Court Should Require the Fourth Circuit to Abide by Its Rule 23 Obligations and Avoid Deprivations of Due Process 13

CONCLUSION.. 15

TABLE OF AUTHORITIES

Page(s)

Cases

Allison v. Citgo Petroleum Corp.,
151 F.3d 402 (5th Cir. 1998) 9

Arch v. Am. Tobacco Corp., Inc.,
175 F.R.D. 469 (E.D. Pa. 1997) 8

Berry v. Schulman,
807 F.3d 600 (4th Cir. 2015) 13

DeBoer v. Mellon Mortg. Co.,
64 F.3d 1171 (8th Cir. 1995) 10

Eubanks v. Billington,
110 F.3d 87 (D.C. Cir. 1997) 10

Fairchild v. AOL, LLC,
No. CV09-03568 CAS (PLAx) (C.D. Cal. 2009) 7

Feinstein v. Firestone Tire & Rubber Co.,
535 F. Supp. 595 (S.D.N.Y. 1982) 8

Hansberry v. Lee,
311 U.S. 32 (1940) 6

Jefferson v. Ingersoll Int'l Inc.,
195 F.3d 894 (7th Cir. 1999) 10

Kreuger v. Wyeth, Inc., No. 03-cv-2496,
2008 WL 481956 (S.D. Cal. Feb. 19, 2008). 8

Mirfasihi v. Fleet Mortg. Corp.,
356 F.3d 781 (7th Cir. 2004) 7

Molski v. Gleich,
318 F.3d 937 (9th Cir. 2003) 10

Murray v. Auslander,
244 F.3d 807 (11th Cir. 2001) 10

Pearl v. Allied Corp.,
102 F.R.D. 921 (E.D. Pa. 1984)............................... 8

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985).............................1–2, 3, 4, 7, 9

Richards v. Jefferson Cty., Ala.,
517 U.S. 793 (1996).. 4

Robinson v. Metro-North Commuter R.R.,
267 F.3d 147 (2d Cir. 2001) 10

S.E.C. v. Bear, Stearns & Co. Inc.,
626 F. Supp. 2d 402 (S.D.N.Y. 2009)................. 6, 8

Standard Fire Ins. Co. v. Knowles,
133 S.Ct. 1345 (2013).. 8

Ticor Title Ins. Co. v. Brown,
511 U.S. 117 (1994).. 11

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011)...................................2, 4, 8, 9

Constitutional Provisions

U.S. Const., amend. V.. 3

Statutes

Fed. R. Civ. P. 23(b)(2)... 9

Other Authorities

Ashley Roberts, *Law School Gets $5.1 Million to Fund New Center*, GW Hatchet (Dec. 3, 2007) 6

John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking*,
24 Miss. C. L. Rev. 323 (2005) 5

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. The present case concerns Cato because it involves a threat to the integrity of the adversarial legal system and thus to constitutional due process.

SUMMARY OF ARGUMENT

Depriving class members of their money-damages claims without an opportunity to opt out of the class violates the constitutional rights of absent class members. Specifically, the Fifth Amendment's Due Process Clause protects class members' right both to remove themselves from the class and pursue their legal claims against the defendant and to adequate representation.

The opt-out mechanism currently used to govern class action lawsuits provides the minimum due process protection demanded by the Constitution. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811

---

[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no party's counsel authored this brief in whole or in part and that no person or entity other than *amicus* funded its preparation or submission.

(1985). While the right to opt out of the class alone is insufficient to prevent self-dealing by—and collusion between—class counsel and defendants, it gives class members the final word on whether a settlement sufficiently compensates them for surrendering their legal claims.

Class counsel joined with defendant to deprive class members of both their money-damages claims and opt-out rights by seeking approval of a settlement that offered no monetary compensation under Rule 23(b)(2). By so doing, class counsel's actions fell short of the representation guaranteed by the Constitution. *See Shutts*, 472 U.S. at 812. Class members' rights are also implicated by the judiciary's complicity in this scheme; it's up to class members to determine whether they were adequately represented, not the court's. Moreover, approving this collusion would set the stage for even greater gamesmanship by class counsel and defendants, all at the expense of class members. Only the "rigorous analysis" required by Rule 23 can forestall a wholesale deprivation of class members' due process rights. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011).

ARGUMENT

WITHOUT THE RIGHT TO OPT OUT, CLASS MEMBERS ARE DEPRIVED OF THE RIGHT TO CONTROL THEIR OWN LEGAL CLAIMS WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FIFTH AMENDMENT

The Fifth Amendment's Due Process Clause protects the right of individuals to their liberty and property. Few forms of property are as crucial to a free society as the right to pursue legitimate legal claims, seeking to obtain a redress of wrongs. Simi-

larly, while there is no right to counsel in civil litigation, the Court has said that due process includes the right of litigants to have their claims adequately represented by whatever counsel is bringing claims on their behalf. U.S. Const., amend. V; *Shutts*, 472 U.S. at 812. With many incentives for class members' interests to be ignored, only the right to opt out of a class action stands between many individual class members and outright theft of their legal claims.

A. Present Opt-Out Mechanisms for Class Action Participation Provide Minimal Protection of Class Members' Due Process Rights

The evolution of class actions in U.S. courts has yielded a system where litigation is controlled by class counsel and defendants, bargaining over class certification and settlement. Named plaintiffs are likely allowed to offer token input, as required by class counsel's professional obligation, but the vast majority of class members have no way of making their voices heard. This result is not surprising, given the incentives faced by class counsel, but the lack of meaningful participation by absent class members borders on a violation of due process.

1. Opt-out rights protect class members' autonomy in determining the adequacy of any settlement

The Court has stated that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Shutts*, 472 U.S. at 812. This "minimal procedural due process protection"

safeguards an absent class member's right to dispose of his legal claims as he sees fit. *Id.* at 811–12.

When class counsel negotiate a settlement with the defendant, all class members are, in effect, offered a price at which class members' legal claims will be purchased (or "taken," to analogize to property law). That price must be fair—and courts are tasked by Rule 23(e) with engaging in a "rigorous analysis" to assure that it is. *Dukes*, 564 U.S. at 351. Competent class counsel will, of course, assert the settlement's fairness, but that assertion can only be presumed valid for the named plaintiffs, assuming that class counsel communicate with them. Class counsel will typically not know anything regarding the specific facts of absent class members' claims, their individual circumstances, or any idiosyncrasies.

By providing a right to opt out of the settlement, our system protects absent class members' right to measure the fairness of the settlement and choose for themselves whether to sell their claims to defendant. That right is a vital part of the due process guaranteed to class members. *Richards v. Jefferson Cty., Ala.*, 517 U.S. 793, 799 (1996) ("[T]he right to be heard ensured by the guarantee of due process has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."). Exercising that right is not free, of course, as class members must forgo any monetary award negotiated by class counsel and defendants. In effect, a dissenting class member must put his (prospective) money where his mouth is, but the right to opt out guarantees absent class members the opportunity to try to do better than class counsel by bringing the claims outside the class action context or in a competing

class action. In this way, an opt-out right protects the due process rights of all class members—even those who choose to accept the settlement.

2. Opt-out rights help to preclude abuses by class counsel

The dangers of collusion and self-dealing in the class action context has led many reformers to call for increased opt-out rights for absent class members as "some degree of protection against an unfair settlement." John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking*, 24 Miss. C. L. Rev. 323, 349 (2005). Opt-out rights do more than just protect the autonomy rights of class members—they also provide a check on self-dealing and collusion. Opting out is not the only protection afforded class members, at least theoretically, as other provisions in Rule 23 offer various levels of procedural protection, but opting out is the only tool that each class member can exert independently, without having to rely on the willingness of the court to be vigilant in policing bad behavior. By opting out, a class member is capable of punishing bad behavior by depriving class counsel of some justification for higher fee requests.

Given this fact, it is not surprising that previous attempts at reforming Rule 23(b)(2) to, among other things, expressly include opt-out rights, were thwarted by the strong opposition of the plaintiffs' bar, which has long championed depriving class members of their opt-out rights. *Id.* The concerns raised by reformers stand in stark contrast to the casual dismissal of class members' rights exhibited by the court below.

The class action process, in many ways, aligns the interests of class members, class counsel, and defendants in ways not consistent with the ideals of our adversarial system and the incentives and information asymmetries present in the system virtually guarantee bad behavior by the latter two. For example, class members and counsel would prefer inflated damages amounts, but class members often receive little-to-no actual money while counsel use large settlements to justify their fee requests. In fact, the increased use of *cy pres* awards shows that class counsel care little for whether class members actually receive any of the settlement. Defendants have even been successful in pushing *cy pres* awards in order to reap public relations benefits, *see S.E.C. v. Bear, Stearns & Co. Inc.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) ("In general, defendants reap goodwill from the donation of monies to a good cause.")—even to entities they control, *id.* ("[D]efendants may also channel money into causes and organizations in which they already have an interest.")—assuring that defendants will fare better than the class members they have allegedly harmed. Class counsel have also structured settlements to include self-serving *cy pres* awards, such as when counsel steered $5.1 million to the alma mater of the lead plaintiffs' lawyer. *See* Ashley Roberts, *Law School Gets $5.1 Million to Fund New Center*, GW Hatchet (Dec. 3, 2007).

The Court has previously stated that due process is violated when the named plaintiffs' interests are in line with those of the defendant, rather than the absent class members. *Hansberry v. Lee*, 311 U.S. 32, 45–46 (1940). Self-dealing by class counsel, especially in collusion with defendants, violates the due process rights of absent class members in just the same way.

The interests of defendants and class counsel align against those of class members in the area of class size, as well. Class counsel want to inflate the size of the class in order to maximize damages awards. Defendants want to inflate the size of the class so that a settlement will eliminate more potential legal claims at a discounted rate. Class counsel can agree to the discount and still increase their payoff due to the increased class size. *See Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) ("Would it be too cynical to speculate that what may be going on here is that class counsel wanted a settlement that would give them a generous fee and Fleet wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself?"). This collusion works well for defendants and for class counsel, but legitimate class members suffer because their injuries are compensated at a discounted rate—to say nothing of those outside the legitimate class, who suffer because their separate claims have been improperly categorized and settled.

Of course, the existence of incentives to engage in self-dealing and collusion does not mean that class counsel will act unethically, but there is plentiful evidence that class counsel in fact do engage in self-dealing. By so doing, class counsel fail to provide adequate representation to absent class members as required by due process, *Shutts*, 472 U.S. at 812, and may even actively seek to corrupt the process by engaging in a form of what public-choice economists would call "rent-seeking." In *Fairchild v. AOL, LLC*, No. CV09-03568 CAS (PLAx) (C.D. Cal. 2009) (class action settlement), for example, class counsel and defendants structured a settlement to include a *cy pres* award to the Legal Aid Foundation of Los Angeles, a

charity on whose board the trial judge's husband sat. Such an award might normally be a great benefit to society, but "the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety." *Bear Stearns*, 626 F. Supp. 2d at 415.

The self-dealing need not take such naked form before it violates class members' due process rights. In *Dukes*, the Court rejected an attempt to limit damages to back-pay claims in order to make the class action mandatory. 564 U.S. at 363–64. The Court rejected this self-interested attempt by class counsel because it would have precluded class members' individuated damages claim. *Id.* In *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348–49 (2013), class counsel attempted to stipulate to less than $5 million in damages, in order to avoid federal jurisdiction under the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005). While the Court decided the case on other grounds, it also acknowledged that the attempted stipulation would have reduced the value of class members' claims. *Knowles*, 133 S. Ct. at 1349. Lower courts have also rejected selective pleading, waiver, or abandonment of claims in order to achieve certification of the class, because doing so would impair class members' ability to raise abandoned claims at a later date. *See, e.g.*, *Arch v. Am. Tobacco Corp., Inc.*, 175 F.R.D. 469, 479–80 (E.D. Pa. 1997); *Pearl v. Allied Corp.*, 102 F.R.D. 921, 922–23 (E.D. Pa. 1984); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 602 (S.D.N.Y. 1982); *Kreuger v. Wyeth, Inc.*, No. 03-cv-2496, 2008 WL 481956, at *2–4 (S.D. Cal. Feb. 19, 2008).

All of these abuses are possible because our present class action system has only minimal protec-

tions against self-dealing and collusion by class counsel and defendants. Even with opt-out rights, these abuses will still have some likelihood of success because courts have shown themselves unwilling to police bad behavior, but the right to opt out provides a bare minimum protection against these due process violations, *Shutts*, 472 U.S. at 811, by providing class members with a tool that only they control.

3. Rule 23(b)(2) provides, at most, a narrow exception to the opt-out requirement when injunctive or declaratory relief is the only relief available to class members

Rule 23(b)(2) permits a class action when the defendant's actions or inactions have established a case for injunctive or declaratory relief. Fed. R. Civ. P. 23(b)(2). While nothing in the text of Rule 23 excludes an opt-out right for actions brought under 23(b)(1) and (b)(2), the language of those sections stands in contrast to that of 23(b)(3), which more clearly provides for an opt-out right. As a result, the Court has adopted a rule that 23(b)(2) cases are mandatory, with no opt-out rights afforded to class members. *Dukes*, 564 U.S. at 362.

Lower courts have struggled to resolve the apparent conflict that arises when a class has claims for injunctive relief, properly certified under Rule 23(b)(2), as well as money-damages claims, properly certified under Rule 23(b)(3). Given the lack of clear direction from the Court, it is understandable that the Circuits have diverged in their interpretation. See *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) (holding that money relief may be obtained in a Rule 23(b)(2) class action "so long as

the predominant relief sought is injunctive or declaratory"); *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995) (rejecting Rule 23(b)(3) certification for money damages claims when Rule 23(b)(2) classification was appropriate); *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 money relief is incidental). But see *Eubanks v. Billington*, 110 F.3d 87, 95, 99 (D.C. Cir. 1997) (allowing a district court to grant opt-out rights under Rule 23(b)(2) or certify money claims under Rule 23(b)(3) while maintaining certification for injunctive-relief claims under Rule 23(b)(2)); *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 164, 166–68 (2d Cir. 2001) (permitting district courts to grant opt-out rights under Rule 23(b)(2) certification); *Molski v. Gleich*, 318 F.3d 937, 950–51 (9th Cir. 2003) (requiring notice and opt-out rights for statutory damages claims); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897–98 (7th Cir. 1999) ("class members' right to notice and an opportunity to opt out should be preserved whenever possible"). Yet, this confusion should not exist, given the clear due process implications of the right to opt out described above, at 5–9, as well as the inherent differences between money-damages claims and those for injunctive or declaratory relief.

When the actions or inactions of the defendant have impacted class members in a way that can be remedied only through declaratory or injunctive relief, the due process concerns associated with mandatory class actions are significantly lessened. There are no money damages to be awarded, so any difference between class members will be irrelevant to the

objective value of the settlement: all that matters is whether the injunctive or declaratory relief is sufficient to induce or prevent action so that class members are protected from future harm.

As soon as money damages are introduced, however, the autonomy interest returns and the right to choose must be protected. Rule 23(b)(2), therefore, carves out a narrow exception, one in which due process protections are not provided simply because they are not needed. Unless the exception remains narrow, absent class members will be deprived of the minimal safeguard to due process that is embodied in the right to opt out. This is in keeping with the Court's declaration that there is a "substantial possibility" that actions seeking monetary damages should always be certified under Rule 23(b)(3) because it allows class members to opt out. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994).

B. Due Process Concerns Are Heightened When a Settlement's Injunctive-Like Remedies Are Allowed to Displace Class Members' Opt-Out Rights

Unless the petition is granted and the lower court reversed, there will be no effective barrier to self-dealing and collusion between class counsel and defendants. According to the Fourth Circuit, a settlement in which a defendant agrees to forever cease harmful actions is sufficient to meet the requirements of Rule 23(b)(2) and dispense with the opt-out right. Quite separate from the absurd legal reasoning engaged in by the Fourth Circuit—such as how the only statutory remedy available can ever be "incidental" to a remedy that appears only in the settlement—the lower court's decision will have profound-

ly negative consequences on absent class members nationwide.

To be perfectly clear, defendants and class counsel have colluded to turn class members' statutory claims for money damages into injunctive relief that is a product of nothing more than the consent of defendants and class counsel. When the courts sign off on such a blatant case of self-dealing, defendants will extinguish numerous claims without paying a dime to the class. Class counsel will receive millions in attorney fees even though they provided zero return on the potential value each class member previously possessed in the form of a claim for money damages. All of this will be accomplished without giving class members any opportunity to opt out and take up their own legal claims in an effort to improve upon the settlement.

If allowed to stand, this precedent will be a wink and a nod to class counsel and defendants everywhere that, if sufficient care is taken in crafting a settlement, they need not worry about what those pesky class members want. Settlements will be much easier to come by, to be sure—with marginally lower litigation costs—but they will be settlements that do little to provide the type of redress class members are entitled to under the law. Defendants will pay less, overall, since money damages will decrease or disappear. Class counsel can achieve a settlement—and the same legal fees—without expending as much effort, so their profits will increase, as well. Any remaining differential can be split between the colluders, increasing the profits of class counsel and defendants but, noticeably, not class members.

All of this is possible for defendants and class

counsel because no class members will be allowed to escape the settlement. All claims will be extinguished—even those with only dubious relation to the class—because defendants and class counsel will collude to inappropriately expand the class, as described *supra* at 7. Without an opt-out right, the class will be as large as needed to justify class counsel's fee request and limit defendant's future legal exposure. Every one of those class members will be deprived of his or her due process rights because they have no way to police those who now exercise largely unregulated power over class members' legal claims.

C. The Court Should Require the Fourth Circuit to Abide by Its Rule 23 Obligations and Avoid Deprivations of Due Process

The lower court, in its decision to uphold approval of the settlement agreement, acknowledged its responsibility to review the settlement agreement for fairness, including that it is achieved "without collusion." *Berry v. Schulman*, 807 F.3d 600, 614 (4th Cir. 2015). It did so, however, only after disposing of class members' opt-out rights, and then only to suggest that the court's duty was not a general duty to protect due process rights, but just to assure equality during the bargaining process. *Id.* (approving the district court's conclusion that the settlement was fair because it was reached "through arms-length negotiations by highly experienced counsel after full discovery was completed."). The analysis therefore fell short of that required by Rule 23, exhibiting a fundamental misunderstanding about the incentives

faced by class counsel and defendant.[2]

The Fourth Circuit's errors appear to derive from its refusal to acknowledge the due process risks of class actions generally, as well as the particular dangers associated with Rule 23(b)(2)'s depriving class members of their opt-out rights. The lower court also seemed willfully blind to the possibility of collusion between class counsel and defendants, collusion that would indicate that class counsel were not adequately representing class interests, thereby violating class members' due process rights. If allowed to remain as precedent, this decision will lead to greater levels of self-dealing by, and collusion among, class counsel and defendants.

These deprivations of due process will not be limited to those living in the Fourth Circuit, however, because class counsel nationwide will choose to file claims in whichever forum has exhibited the least desire to police self-dealing.

---

[2] In other words, whatever protections judicial review might provide are generally inadequate and courts often give minimal consideration to absent member interests. The right to opt out is thus needed for class members who might reasonably disagree with the district court's fairness analysis but have no real means of appealing that analysis given appellate courts' extreme deference on these issues. An individual judge's view of fairness cannot substitute for the right of class members to decide for themselves whether they're getting a good price.

CONCLUSION

The petition for a writ of certiorari should be granted and the Fourth Circuit ultimately reversed.

Respectfully submitted,

ILYA SHAPIRO
Counsel of Record
JAYME WEBER
Cato Institute
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

JEREMY L. KIDD
Mercer University
School of Law
1021 Georgia Ave.
Macon, GA 31210

JUNE 16, 2016