No. _____

IN THE

Supreme Court of the United States

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., BCBSM, INC., BLUECROSS BLUESHIELD OF TENNESSEE, CAREFIRST, INC., FEDERAL MUTUAL INSURANCE COMPANY, HEALTH CARE SERVICE CORPORATION, AND MUTUAL OF OMAHA INSURANCE COMPANY,
Petitioners,

v.

ABBOTT LABORATORIES AND GENEVA PHARMACEUTICALS, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Six federal rules of procedure incorporate an "excusable neglect" standard that governs whether a missed deadline should be excused. In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), this Court held that "excusable neglect" requires a "flexible" and "elastic" approach to balancing the equities, *id.* at 389, 392, explaining that the factors to be considered include "[1] the danger of prejudice to the [nonmovant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." *Id.* at 395. The Court likewise made clear that a party seeking relief need not make a threshold showing of blamelessness, for that would read the word "excusable" out of the phrase "excusable neglect." *Id.* at 395 & n.14.

Although *Pioneer* resolved some of the confusion evinced by lower courts in applying the "excusable neglect" standard, mature and deep conflicts involving nearly all of the circuits have arisen as to two issues presented that are ripe for decision by this Court:

1. Whether a 5-3 circuit conflict (with an additional circuit on both sides) should be resolved as to whether prejudice may be shown merely because a party no longer has to litigate and thereby receives a windfall from the strict enforcement of a deadline without any diminution in its ability to defend the case on the merits.

2. Whether a 5-4 circuit conflict should be resolved as to whether a district court may decline to give any weight to reliance on the normal time for delivery of mail and instead place the risk of late delivery by the postal service entirely on the mailer.

PARTIES TO THE PROCEEDINGS

Petitioners Blue Cross and Blue Shield of Florida, Inc., BCBSM, Inc., BlueCross BlueShield of Tennessee, CareFirst, Inc., Federal Mutual Insurance Company, Health Care Service Corporation, and Mutual of Omaha Insurance Company were plaintiffs in the district court proceedings and appellants in the court of appeals proceedings.

Respondents Abbott Laboratories and Geneva Pharmaceuticals, Inc. were the defendants in the district court proceedings and the appellees in the court of appeals proceedings.

Respondents The Trustees of the Correction Officers Benevolent Association Security Benefits Fund-Retirees, Corrections Officers Benevolent Association Security Benefits Funds Active, Trustees of the Local 445 Freight Division Welfare Fund, Trustees of the Local 445 Construction Division Welfare Fund, and New York City Transit Authority were appellants in the court of appeals proceedings but were the plaintiffs in a separate action initiated in New York that, as part of a multi-district litigation case in Florida federal district court, was consolidated with, *inter alia*, the action initiated in Illinois by the petitioners in this case.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Blue Cross and Blue Shield of Florida, Inc., BCBSM, Inc., BlueCross BlueShield of Tennessee, CareFirst, Inc., Federal Mutual Insurance Company, Health Care Service Corporation, and Mutual of Omaha Insurance Company state the following:

Blue Cross and Blue Shield of Florida, Inc. is a Florida not-for-profit mutual insurance company, and its wholly owned subsidiary, Health Options, Inc., is a Florida corporation. Blue Cross and Blue Shield of Florida has no parent corporation and does not issue stock.

BCBSM, Inc., doing business as Blue Cross Blue Shield of Minnesota, is a Minnesota not-for-profit health services plan corporation. Its wholly owned subsidiaries are: Comprehensive Care Services, Inc., a Minnesota for-profit company; First Plan of Minnesota and HMO Minnesota, Minnesota not-for-profit corporations; and Atrium Health Plan, Inc., a now-dissolved Wisconsin not-for-profit corporation whose assets were sold in 2005, the same year it was dissolved (BCBSM, Inc. remains the successor-in-interest to Atrium Health Plan, Inc., however). Blue Cross Blue Shield of Minnesota is a subsidiary of Aware Integrated, Inc., and no publicly held corporation owns 10% or more of its stock.

The following entities are subsidiaries or affiliates of BCBSM, Inc.:

ADVANCE INSURANCE COMPANY OF KANSAS (AICK)

Affiliated Community Health Network, Inc. (ACHN)

Aware Dental Services, LLC.

AWARE INTEGRATED, INC. (AII)*

BCBSM, INC., dba Blue Cross and Blue Shield of Minnesota (BCBSM)*

BCBSM FOUNDATION, INC., dba Blue Cross and Blue Shield of Minnesota Foundation*

SupportSource, Inc.

Capital Asset Care, Inc., dba Capital Asset Care (CAC)

Care Delivery Management, Inc. (CDMI)*

Comprehensive Care Services, Inc. (CCS)*

Comprehensive Managed Care, Inc., dba Comprehensive Managed Care (CMC)

Employer Provider Network, Inc. (EPNI)

First Plan of Minnesota*

HMO MINNESOTA, dba Blue Plus*

MII, Inc.

MII LIFE, INCORPORATED**

MII Services, Inc., dba ClearConnect

Minnesota Institute of Public Health (MIPH)

Pharmacy Gold, Inc. (PGI)

Prime Therapeutics, Inc. (PTI)

Prime Therapeutics, LLC (Prime LLC)

River Bend Community Health Network, Inc., dba RiverPath Community Health Network*

* Licensee of the Blue Cross and Blue Shield Association.

** Licensee of the Blue Cross and Blue Shield Association (for life products only).

BlueCross BlueShield of Tennessee is a Tennessee not-for-profit corporation, and its wholly owned subsidiaries, Volunteer State Health Plan, Inc., is a Tennessee not-for-profit corporation. Blue Cross Blue Shield of Tennessee also wholly owned another subsidiary, Tennessee Health Care Network, during the spring 2004 opt-out timeframe. Tennessee Health Care Network was formerly a Tennessee not-for-profit corporation. It was dissolved later in 2004, however. Blue Cross Blue Shield of Tennessee has no parent corporation, and no publicly held corporation owns 10% or more its stock.

CareFirst, Inc. is a Maryland not-for-profit corporation, with the following wholly owned subsidiaries: CareFirst of Maryland, Inc. is a Maryland not-for-profit corpo-

ration; Willse & Associates, Inc. is a Maryland corporation; CFS Health Group, Inc. is a Maryland corporation; Patuxent Medical Group, Inc. is a Maryland corporation; Group Hospitalization and Medical Services, Inc. is a not-for-profit company created under federal charter; Capital Care, Inc. is a District of Columbia corporation; Capital Area Services, Inc. is a West Virginia corporation; and Blue Cross Blue Shield of Delaware, Inc. is a Delaware not-for-profit corporation. CareFirst, Inc. has no parent corporation, and no publicly held corporation owns 10% or more its stock.

Federated Mutual Insurance Company is a Minnesota corporation. Federated Mutual Insurance Company has several wholly owned subsidiaries, but none is a publicly traded company. Federated Mutual Insurance Company is a mutual company (it is owned by the policyholders) and has no publicly traded stock.

Health Care Service Corporation is an Illinois Mutual Legal Reserve Company, which includes its Illinois, New Mexico, and Texas Divisions. Health Care Service Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Mutual of Omaha Insurance Company is a Nebraska mutual company with the following wholly owned subsidiaries: United of Omaha Life Insurance Company, United World Life Insurance Company, Exclusive/Healthcare, Inc., Omaha Property and Casualty Company, and innowave, Inc. Mutual of Omaha Insurance Company has no parent corporation. Because Mutual of Omaha Insurance Company is a mutual company, it is owned by its policy owners. Accordingly, it has issued no capital stock and there are no shareholders. Consequently, there is no capital stock owned by any publicly held corporation or any other person.

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Petitioners Blue Cross and Blue Shield of Florida, Inc., BCBSM, Inc., BlueCross BlueShield of Tennessee, CareFirst, Inc., Federal Mutual Insurance Company, Health Care Service Corporation, and Mutual of Omaha Insurance Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's per curiam memorandum opinion (Pet. App. 1a-2a) is unreported (available at 2006 WL 1159646). The district court's order (Pet. App. 3a-15a) is unreported.

JURISDICTION

The judgment of the Eleventh Circuit was entered on May 3, 2006. A timely petition for rehearing was denied on June 7, 2006. *See* Pet. App. 16a. On August 28, 2006, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 5, 2006. *See id.* at 65a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

Federal Rule of Civil Procedure 6(b) is at Pet. App. 64a.

INTRODUCTION

This case raises issues of recurring significance to the fair and efficient administration of litigation in the federal courts: what factors must district courts consider in granting relief from a filing deemed to be tardy under the "excusable neglect" standard set forth in six federal rules of procedure. In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), this Court held that "excusable neglect" requires a "flexible" and "elastic" approach to balancing the equities. *Id.* at 389, 392. The factors to be considered include "[1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the

movant, and [4] whether the movant acted in good faith." *Id.* at 395.

Petitioners are seven large health insurers that sought to opt out of an insufficient class-action settlement reached between plaintiffs' class counsel and respondents Abbott Laboratories ("Abbott") and Geneva Pharmaceuticals, Inc. ("Geneva"). Class plaintiffs alleged antitrust violations from Abbott's written agreement to pay Geneva $4.5 million per month in exchange for Geneva's agreement not to market its FDA-approved generic drug in competition with Abbott's brand name drug. Petitioners were required to send their opt-out notices "by first-class mail in time to be received no later than April 11, 2005," Pet. App. 48a, thus precluding use of a more reliable delivery service and requiring opt-out notices to be sent in time to be received (as opposed to postmarked) by a date certain. Petitioners – which had already been litigating their own non-class claims against respondents in state court for nearly two years – mailed their opt-out notices four days before the due date, but they arrived a few days late. The district court refused to find excusable neglect, and the Eleventh Circuit summarily affirmed.

In applying *Pioneer*, the Eleventh Circuit deepened two substantial conflicts in the courts of appeals. The first concerns what constitutes prejudice to the non-movant by excusing strict compliance with a deadline. The court below found that mere exposure to litigation by petitioners was cognizable prejudice. According to the Eleventh Circuit and two others, loss of the potential windfall a party would have received had the deadline been enforced always constitutes significant prejudice. As five other circuits have held, however, the prejudice analysis properly focuses only on whether excusing compliance with the deadline will cause the non-movant to lose something it would have had if the filing were timely – for example, loss of evidence or access to witnesses, or missing an important deadline – but not facing the same litigation a defendant would have faced but for an untimely filing. The

current articulation of the meaning of prejudice in three circuits thus deviates substantially from the meaning given to that term by five other circuits. Courts regularly assess what constitutes prejudice under the "excusable neglect" standard, and this Court's guidance is needed on that important and recurring issue.

The second conflict concerns whether a district court may decline to give any weight to reliance on the fact that mail typically arrives in the normal course in approximately three days and instead place the risk of late delivery entirely on the mailer. The court below affirmed the district court's holding that petitioners had "assumed the risk" their notices would not arrive on time. Pet. App. 2a, 6a. While that holding is in accord with the law in four other circuits, another four circuits clearly hold that weight should be given to reliance on the fact that mail typically arrives in three days. Indeed, Federal Rule of Civil Procedure 6(e), which adds three days to the response period when a pleading is served by mail, incorporates that same assumption. Although the second question may seem mundane, that is precisely why it is important: reliance on the normal course of mail delivery has enormous practical significance to the day-to-day practice of law. More generally, the erection of a *per se* rule that always visits the vagaries of mail delivery on the mailer who relies on the normal time for delivery exhibits confusion in the lower courts over how to apply *Pioneer*, which plainly held that courts may not merely find "neglect," i.e., a lack of complete diligence, and then deny relief. Rather, even assuming the movant acted with some degree of "neglect" or carelessness, courts must nevertheless conduct a careful, equitable analysis to determine whether it is "excusable."

STATEMENT OF THE CASE

1. Petitioners are seven health insurers that purchased millions of dollars worth of Abbott's brand-name pioneer drug, Hytrin, at prices that were supracompetitive due to respondents' agreement not to compete with each other.

Hytrin's active ingredient is terazosin hydrochloride ("terazosin HCL"), which is used to treat high blood pressure and enlarged prostate – chronic conditions affecting senior citizens and others. Since its introduction in 1987, Hytrin has been one of Abbott's "most important products," a blockbuster drug generating $542 million in U.S. sales in 1998 alone – more than 20% of Abbott's net domestic pharmaceutical product revenues.[1]

Generic drug makers seeking to compete must certify to the Food and Drug Administration ("FDA") that the pioneer drug's (unexpired) patents are either invalid or will not be infringed by the generic. *See* 21 U.S.C. § 355(j). If the pioneer files suit alleging infringement within 45 days, however, then the FDA may not approve the generic for 30 months (unless the generic maker prevails in the litigation in less time). *See id.* The maker of a pioneer drug commonly seeks "add-on" patents, which can "be used as a blockade by the brand-name drug manufacturer to delay generic competition." *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 677 (S.D. Fla. 2004). Even after its primary patents on Hytrin had expired by late 1995, Abbott sought to maintain its patent monopoly through additional patents. *See id.*

Between 1993 and 1996, respondent Geneva filed multiple FDA applications to market generic versions of Hytrin, and Abbott filed multiple patent infringement suits against Geneva. On March 30, 1998, the FDA granted Geneva final approval to market a generic competitor to Hytrin, but Geneva agreed two days later not to compete with Abbott. The FTC investigated the deal and subsequently reached a consent decree with Abbott.[2]

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[1] *See* Compl. ¶ 14, *In re Abbott Labs. and Geneva Pharms., Inc.*, Docket No. C-3945 (FTC filed May 22, 2000) ("FTC Compl."), *available at* www.ftc.gov/os/2000/05/abbottgenevacomp.htm.

[2] *See* Decision and Order, *In re Abbott Labs.*, Docket No. C-3945 (FTC May 22, 2000), *available at* www.ftc.gov/os/2000/05/c3945.do.htm.

According to the FTC, Geneva contacted Abbott on the same day it received FDA approval and announced that it would begin competing against Hytrin unless Abbott paid it not to do so. *See* FTC Compl. ¶ 24. Abbott had a substantial economic incentive to agree, having "forecasted that entry of generic terazosin HCL on April 1, 1998 would have eliminated over $185 million in Hytrin sales in just six months." *Id.* Accordingly, while "Abbott estimated Geneva's revenues from launching generic terazosin HCL at $1 million to $1.5 million per month," Abbott "was willing to pay Geneva a 'premium' over that not to compete." *Id.* ¶ 25. That "premium" amounted to more than 300% of Geneva's expected revenues. Under respondents' April 1, 1998 agreement, Abbott agreed to pay $4.5 million per month for Geneva's agreement not to market its FDA-approved generic until either Geneva prevailed in Abbott's infringement suits or another generic Hytrin competitor entered the market. *See id.* ¶¶ 26-27.

For its part, Geneva entered the agreement despite the fact that, "[b]y early 1998, Geneva, including particularly its CEO, was confident that it ultimately would prevail in its patent infringement dispute with Abbott." *Id.* ¶ 20. (Geneva ultimately did prevail.[3]) "In the words of Geneva's CEO at the time the Agreement was signed, this Agreement represented to Geneva the 'best of all worlds,' because Geneva obtained a risk-free 'monetary settlement on an ongoing basis until the litigation was resolved' and still could market its product exclusively for 180 days after the litigation was over." *Id.* ¶ 29.[4]

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[3] *See Abbott Labs. v. Geneva Pharms., Inc.*, Nos. 96-C-3331 *et al.*, 1998 WL 566884 (N.D. Ill. Sept. 1, 1998) (Abbott patent held invalid), *aff'd*, 182 F.3d 1315 (Fed. Cir. 1999).

[4] The first successful generic applicant gets a 180-period of exclusivity during which the FDA may not approve another generic competitor to the pioneer drug. *See* FTC Compl. ¶ 9 (citing 21 U.S.C. § 355). But the 180-day period "does not begin to run until either the generic is commercially marketed or a court enters final judgment that the patents [on the pioneer drug] are invalid or not infringed." *Id.*

Although a "win-win" agreement for respondents, the FTC determined that Hytrin purchasers "were deprived of the benefits of new competition from Geneva and other generic competitors. Without this lower-priced generic competition, consumers, pharmacies, hospitals, insurers, wholesalers, government agencies, managed care organizations, and others were forced to purchase Abbott's more expensive Hytrin product." *Id.* ¶ 35. Furthermore, "[a] generic product can quickly and efficiently enter the marketplace at substantial discounts, generally leading to a significant erosion of the branded drug's sales within the first year," and "Abbott's forecasts projected that generic terazosin HCL would capture roughly 70% of Hytrin sales within the first six months alone." *Id.* ¶ 36. Respondents' agreement, however, precluded such fast-acting consumer benefits through competition from Geneva. In addition, another generic manufacturer that had satisfied the FDA's requirements for approval by February 1999 "was barred from entering the market because Geneva's 180-day Exclusivity Period had not begun to run." *Id.* ¶ 38. The FTC's investigation led Abbott and Geneva to terminate their agreement early, and Geneva entered the market in August 1999 (followed by others more than 180 days later). By April 2000, the "generic average wholesale price" was "less than 16% of Abbott's Hytrin price." *Terazosin*, 220 F.R.D. at 677-78.

2. Numerous antitrust class actions seeking damages from respondents were filed in (or removed to) the federal courts, which the Judicial Panel on Multidistrict Litigation consolidated in January 2000 in the district court below. The district court granted plaintiffs partial summary judgment in holding that the agreement was a *per se* violation of § 1 of the Sherman Act, but on appeal the Eleventh Circuit reversed and remanded for the district court to perform a more nuanced analysis of the agreement. *See Valley Drug Co. v. Geneva Pharms., Inc.*, 344 F.3d 1294, 1311 (11th Cir. 2003), *cert. denied*, 543 U.S. 939 (2004), *on remand*, *In re Terazosin Hydrochloride Anti-*

trust Litig., 352 F. Supp. 2d 1279 (S.D. Fla. 2005) (again finding *per se* violation of Sherman Act). The district court also certified direct purchaser classes, but the Eleventh Circuit reversed that decision due to apparent intra-class conflicts. *See Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181 (11th Cir. 2003).

Meanwhile, petitioners (together with eight other non-petitioner insurers, collectively referred to below as the "Illinois TPPs," meaning "third-party payers," *see* Pet. App. 4a) separately filed suit against respondents in Illinois state court, alleging violations of state antitrust and unjust enrichment laws. *See id.* at 4a-5a (citing *BCBSM, Inc., et al. v. Abbott Labs., et al.*, No. 03L-009743 (Cook Cty., Ill. Cir. Ct. filed Aug. 12, 2003)). Unlike federal antitrust law, those state laws permit antitrust actions by indirect purchasers like petitioners, which purchased Hytrin from intermediaries such as pharmacies.[5] Petitioners alleged both that respondents' April 1998 agreement was unlawful and that Abbott had delayed entry of generic competition from the market as early as 1996 by instituting sham patent suits. By mid-2005, the Illinois TPPs and respondents were preparing summary judgment briefs in state court. *See* Dist. Ct. 6/28/05 Tr. 51.

While petitioners' Illinois action was proceeding ahead, the district court in 2004 certified 17 state classes of indirect purchaser plaintiffs, which included petitioners and the eight other Illinois TPPs. *See Terazosin*, 220 F.R.D. at 675. Respondents appealed, claiming intra-class conflicts in that end users of Hytrin would prefer a finding that all damages were passed through to them via higher insurance premiums, while the insurers would prefer a finding

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[5] *Compare Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (no antitrust standing for indirect purchasers under federal antitrust laws), *with California v. ARC America Corp.*, 490 U.S. 93, 105-06 (1989) (no preemption of state indirect purchaser statutes by *Illinois Brick*).

that they passed on no such damages.[6] Petitioners' non-class action in Illinois, on the other hand, presented no such certification problems.

3. Faced with the possibility of a third court of appeals reversal, class counsel for plaintiffs reached a settlement with respondents covering the indirect purchaser classes, which the district court preliminarily approved on March 7, 2005. After deducting attorneys' fees, the allocation for all TPPs was less than $15 million – an amount representing less than one month's worth of Abbott's alleged illegal Hytrin profits. *See* Appellants' Br. 9-10 (Sept. 20, 2005). In contrast, petitioners' 1998-99 expenditures on Hytrin reflect recoverable damages in excess of $16 million, before trebling. *See id.* at 15 n.7. Thus, if petitioners were required to share in the proceeds of the class settlement, they would receive a tiny fraction of what they stood to gain in their ongoing Illinois litigation.[7]

Class-action settlements commonly incorporate a so-called "blow provision," which permits the settling defendants to rescind (or "blow") the settlement in the event that opt-out claims exceed a certain threshold. Blow provisions thus minimize the risk that settling defendants will be required both to pay the settlement monies yet nevertheless face substantial liabilities to opt-outs whose claims the negotiated settlement amount was intended to

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[6] Respondents also claimed that Illinois and New York law prohibit indirect purchaser class certifications. *See*, *e.g.*, 740 Ill. Comp. Stat. 10/7(2); *Asher v. Abbott Labs.*, 737 N.Y.S.2d 4, 4 (App. Div. 2002).

[7] Plaintiffs' expert opined that indirect purchaser class damages "could amount to as much as $141 million," while the gross settlement payable by respondents came to 19% of that amount, or $28.7 million. Indirect Purchaser Plaintiff Classes' Motion for Final Approval at 17-18 (June 15, 2006) ("IPP Final Approval Mot."). Plaintiffs' class counsel sought to justify the reduced amount of the settlement: "[I]f the IPP cases did not settle and the Eleventh Circuit reversed the Class Certification Order, the value of the IPP cases would have been greatly diminished." *Id.* at 16.

extinguish.[8] The settlement agreement here likewise included a blow provision (which was originally filed under seal but later unsealed while the case was on appeal) under which respondents could rescind the settlement if there were excessive opt-outs.

The blow provision here, however, expressly *excluded* any Illinois TPP opt-outs from counting toward the blow threshold, thus *precluding* respondents from rescinding the settlement based on petitioners' opt-outs.[9] Plainly, if the negotiated settlement amount had included monies allocated to the Illinois TPPs' "significant claims,"[10] then respondents would not have agreed to exclude those opt-outs from the blow threshold and risk paying the settlement monies allocated to those claims, yet still face liability on those same claims in the Illinois case. This point was made explicitly by plaintiffs' class counsel[11] and implicitly by Abbott's counsel.[12] Likewise, in urging the fil-

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[8] *See In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 164 F.R.D. 362, 365-66 (S.D.N.Y.), *aff'd*, Nos. 95-9209 *et al.*, 1996 WL 739258 (2d Cir. Dec. 27, 1996) (judgment noted at 107 F.3d 3).

[9] *See* Pet. App. 20a (opt-out threshold calculated by "excluding any TPP Opt-Out Payments attributable to any Illinois TPPs that opt out").

[10] IPP Final Approval Mot. at 25 ("[Illinois TPPs] are virtually the only TPP opt-outs with potentially significant claims.").

[11] *See* IPP Final Approval Mot. at 3 ("The anticipated exclusion of the Illinois Case TPPs . . . from the IPP classes was factored into the settlement negotiations, including the amount of the Proposed Settlement and the conditions for termination of the Proposed Settlement by Defendants."); *id.* at 25 ("The[] [Illinois TPPs'] exclusion from the settlement was anticipated by Class Counsel and was factored into the negotiations of the settlement amount."); *id.*, Ex. 3, Decl. of Class Counsel Geoffrey M. Horn ¶ 34 ("Another factor plaintiffs considered during settlement negotiations was the value of claims similar to the classes' claims brought by a group of individual TPPs in Illinois state court ('the Illinois TPPs'). I personally spent a great deal of time trying to determine the value of the absence of the Illinois Case TPPs from any potential settlement of [this] action.").

[12] Dist. Ct. 6/28/05 Tr. 188 (counsel for Abbott: "it was perfectly possible the [Illinois TPPs] were opting out" due to their "strong interest

ing of the settlement agreement, the district court voiced its expectation that the Illinois TPPs would opt out.[13]

4. Because the blow provision was filed under seal (as "Rider A") by respondents and plaintiffs' class counsel, petitioners did not know that their opt-outs would not count toward the blow provision threshold. The settlement agreement itself, however, stated that a blow provision existed and that the deadline for respondents to exercise any rights under it was May 9, 2005, or 28 days after petitioners' opt-out notices were due on April 11, 2005.[14]

The TPP opt-out form required that TPPs must "send it by first-class mail in time to be received no later than April 11, 2005." Pet. App. 48a.[15] Petitioners were thus required to send their opt-out notices via a specific mode of delivery (first-class mail) rather than a private mail carrier or overnight mail; and the deadline was not a postmark date but an instruction to "send it" enough in advance so that it could be "received no later than April 11, 2005," *id.* – possibly exposing would-be opt-outs to the vagaries of first-class mail delivery.

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in pushing ahead" in Illinois); Dist. Ct. 6/29/05 Tr. 97 (counsel for Abbott: "we agreed to have a settlement with these [indirect purchaser] classes and to see what happened with the opt-out, but we weren't requiring [the Illinois TPPs] to be a participant in the settlement").

[13] *See*, *e.g.*, Dist. Ct. 2/4/05 Tr. 35 ("so that [counsel for the Illinois TPPs] can exercise his opt out rights and proceed with his trial, we need to get the notice out").

[14] *See* Settlement Agreement at 19 ("To terminate this Settlement Agreement on the basis that the Third Party Payer Threshold Amount (as that term is defined in Rider A) has been exceeded, Defendants shall provide written notice (which may be by facsimile or electronic mail) to IPPs' Co-Lead Counsel by 5:00 p.m. Pacific time on May 9, 2005.") (attached as Exhibit 1 to Indirect Purchaser Plaintiff Classes' and Plaintiff States' Motion for Preliminary Approval of Settlement Agreement (Mar. 3, 2005)).

[15] By comparison, the "Proof of Claim" used to claim a distribution from the settlement fund only had to be "*postmarked* by July 15, 2005." Pet. App. 52a (emphasis added).

The TPP opt-out form also required a "separate notice of exclusion" for each TPP, along with that party's address and taxpayer identification number, or EIN. For petitioners, this meant compiling thousands of EINs, since each self-funded employer health plan organized under an insurer must have its own EIN. *See* Dist. Ct. 6/28/05 Tr. 14.

Finally, the opt-out form requested (though did not expressly require) that opt-outs submit a certified breakdown of the "Amounts paid in each of the 18 states for Hytrin® and/or generic terazosin hydrochloride during the period January 1, 1998 to December 31, 1999, based on records maintained by the Class Member." Pet. App. 50a (footnote omitted). The opt-out notice stated this was "for the parties to determine what effect, if any, the Opt-Out's exclusion has on the termination contingencies," i.e., the sealed Rider A blow provision. *Id.* at 46a. An opt-out that failed to provide those requested payment data risked subjecting the objector opting out of the settlement to "discovery via subpoena or other legal process." *Id.*

The opt-out form did *not*, however, reveal that respondents did not even need to know whether any of the Illinois TPPs had opted out in order to determine whether their blow threshold had been reached. Petitioners therefore provided the requested drug purchase data, sifting through millions of individual prescription transactions, all within the 35 days provided by the notice of settlement. *See* Dist. Ct. 6/28/05 Tr. 19.

After compiling the thousands of EINs required by the opt-out form, and the voluminous drug purchase data requested by the form, all 15 of the Illinois TPPs submitted their opt-out materials by first-class mail at the main Washington, D.C. post office at 11:06 p.m. on Thursday, April 7, 2005, four days before the April 11 deadline. Although the 15 packages were mailed together and destined for the same West Palm Beach, Florida post office box, they arrived in staggered fashion over the next four to eight days. Of the seven petitioner opt-outs, two arrived on April 13 (two days late, six days after mailing)

and five arrived on April 15 (four days late, eight days after mailing). Seven of the non-petitioner Illinois TPP opt-outs arrived a few hours after midnight on April 12.[16] The remaining opt-out arrived on time.

5. The district court denied petitioners' motion to excuse the late arrival of their opt-out notices pursuant to the "excusable neglect" standard in Federal Rule of Civil Procedure 6(b)(2), as interpreted by this Court in *Pioneer*. *See supra* pp. 1-2 (setting out *Pioneer* factors). First, the court found that petitioners had "assumed the risk" of a tardy submission by using "regular first class mail instead of an expedited service such as priority mail." Pet. App. 6a. The court rejected petitioners' reliance on the fact that mail typically arrives in the normal course in approximately three days. *See id.* at 7a & n.4.

Second, the court found that "the length of the delay was not substantial," *id.* at 7a-8a, thus necessarily finding that there was no impact at all on judicial administration of the proceedings before it. *See Pioneer*, 507 U.S. at 395 (courts should consider "the length of the delay and its potential impact on judicial proceedings"). Nevertheless, the court found that allowing the late-received opt-outs "would prejudice the Defendants in that they would be required to litigate against entities who inexcusably failed to submit timely opt-out[] forms." Pet. App. 7a-8a. The court thereby found that mere exposure to the ongoing Illinois state court litigation was cognizable prejudice under the excusable neglect standard. The court also found prejudice in that respondents "entered into the IPP settlement in order to achieve a full and complete resolution

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[16] Those seven opt-outs were originally marked timely by the claims administrator and are not at issue here. In fact, they arrived just hours late, at 4:11 a.m. on April 12. Although the claims administrator did not even pick up any mail delivered on April 11 until 6 a.m. the morning of April 12 (when he marked everything in the post office box as having been received the day before), the district court nevertheless refused to find excusable neglect. *See* Order at 2 (Feb. 28, 2006). That holding is now on appeal to the Eleventh Circuit.

of all IPP claims, and the parties are entitled to hold potential class members to the deadlines that were the product of vigorous negotiations." *Id.* at 8a. The court did not identify any prejudice other than having to continue litigating the nearly two-year-old Illinois case.

Finally, the district court adopted the supposition advanced by respondents, unsupported by any evidence, that "the Court could reasonably conclude that the Illinois TPPs waited until the last minute intentionally with the hopes of minimizing the chances that the Defendants might seek to terminate the IPP settlement on April 11, 2005, based on their exclusions." *Id.* The court offered no explanation for how transmitting petitioners' opt-outs to arrive on or about April 11 could have affected respondents' exercise of their blow rights by the settlement agreement's *May 9* deadline (even assuming the Illinois TPP opt-outs counted toward the blow threshold, which they did not).[17]

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[17] The district court's July 8, 2005 opinion also stated that "the Illinois TPPs have offered no evidence to support a finding that they acted in 'good faith.'" Pet. App. 8a. The opinion acknowledged the Illinois TPPs' counsel's argument that the voluminous and detailed opt-out forms were not sent until April 7, 2005, because of "the time and effort that it took to gather all of the documentation" required by the forms. *Id.* at 8a n.6. The opinion stated, however, that "there is no record evidence on that issue" and that, "[f]urther, it appears that much of the documentation that was being gathered was not even necessary for the Illinois TPPs to opt out." *Id.* To address the court's concerns, petitioners had filed a timely reply brief on June 30, 2005. Petitioners noted that "the detailed information requested in the Request for Exclusion, including drug purchase data broken down by year and then further broken down by each of eighteen states," "was the heart of the opt out process" so that respondents could know in time for the May 9 blow deadline whether the Illinois TPP opt-outs triggered the blow threshold. Reply Br. of Illinois Plaintiffs at 5-6 (June 30, 2005). Petitioners' affidavits showed that generating both the required EINs and the requested drug payment data together caused "the Illinois [TPPs] to expend over 1,090 hours of work (140 hours by their data experts and 950 by their counsel) assembling data, EIN's, and preparing the opt-out packages, running over 3,985 pages." *Id.* at 6-7.

6. Petitioners appealed. After briefing but before decision, petitioners learned from plaintiffs' class counsel that the blow provision in Rider A in fact excluded the value of the Illinois TPP opt-outs from the blow threshold. Petitioners sought supplemental briefing on the effect of the blow provision, which the court of appeals denied "without prejudice to [petitioners'] right to file a Fed.R.Civ.P. 60(b) motion in district court." Order (Dec. 29, 2005).[18]

The Eleventh Circuit affirmed the district court's order in a brief, unpublished opinion. After briefly reciting the procedural history of the case, the court stated: "We review the district court's decision for abuse of discretion. After considering the parties [*sic*] briefs and the relevant portions of the record, we find no such abuse." Pet. App. 2a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's summary affirmance of the district court's decision[19] both fundamentally misapprehends

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At the June 29, 2005 continuation of the fairness hearing, the district court (in the absence of counsel for petitioners) announced that it intended to deny petitioners' motion in a written order to follow. In its July 8, 2005 order, the court denied leave to file petitioners' reply brief "in light of the fact that the Court orally announced its ruling denying the Illinois TPPs' motion for leave to file a late opt-in at the fairness hearing, and the Illinois TPPs fail to provide any authorities or arguments justifying the reversal of the Court's ruling." Pet. App. 14a-15a. Thus, while the court denied leave to file the reply brief, it also actually considered and rejected petitioners' arguments and affidavits.

[18] The district court subsequently ordered the blow provision unsealed. *See* Dist. Ct. Docket Entry 1671 (Feb. 24, 2006).

[19] The court of appeals' summary affirmance of the district court's judgment is no bar to review. *See*, *e.g.*, *United States v. Flores-Montano*, 541 U.S. 149, 151 (2004) (reviewing summary affirmance); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 35 (1994) (same); *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 607 (1991) (same); *Miller v. Florida*, 482 U.S. 423, 428 (1987) (same). In that event, "one simply ascribes to the court of appeals the rationale employed by the district court." Robert L. Stern, *et al.*, *Supreme Court Practice* 240 (8th ed. 2002); *see id.* at 239-40 ("Of course, a district court decision may be cited and quoted for conflict purposes where the deci-

this Court's teaching in *Pioneer* and exposes conflicting views among the courts of appeals on two questions of law that are critical to judicial administration of six Federal Rules of Civil, Criminal, and Appellate Procedure and the Bankruptcy Rules that incorporate the "excusable neglect" standard.[20]

The first question is whether a settling party experiences any "prejudice" cognizable under the "excusable neglect" standard merely by having to continue to litigate a case that would have been snuffed out by strict application of the opt-out date. A clear majority of circuits has held that a non-movant's windfall from a missed deadline is not cognizable prejudice; rather, to constitute prejudice, the non-movant must be in a worse position if the deadline were excused than if it had been met.

The Eleventh Circuit also deepened a second conflict of recurring significance by holding that a litigant's reliance on the normal course of first-class mail delivery gets no weight in assessing excusable neglect under *Pioneer*'s equitable balancing test. In doing so, the court squarely contravened *Pioneer*'s teaching that the lower courts may not simply stop at a finding of neglect; if neglect were never excusable, then the "excusable neglect" standard would be meaningless. Both issues are of recurring significance to litigants.

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sion has been summarily affirmed, without opinion, by a court of appeals."). "A contrary approach would risk effectively immunizing summary dispositions by courts of appeals from our review." *Stutson v. United States*, 516 U.S. 193, 196 (1996) (per curiam).

[20] The "excusable neglect" standard is found in Federal Rules of Civil Procedure 6(b), 13(f), and 60(b); Federal Rule of Criminal Procedure 45(b); Federal Rule of Appellate Procedure 4(a) and (b); and Bankruptcy Rule 9006(b)(1). *See Pioneer*, 507 U.S. at 387 n.3; *see also Stutson*, 516 U.S. at 197-98 (holding that *Pioneer* applies to Federal Rule of Appellate Procedure 4(b)). The lower courts have consistently held that this Court's *Pioneer* analysis applies to all six. *See*, *e.g.*, *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 & n.6 (2d Cir. 2003); *Pratt v. Philbrook*, 109 F.3d 18, 19 & nn.1, 2, 3 (1st Cir. 1997).

I. THE ELEVENTH CIRCUIT DEEPENED AN EXISTING CONFLICT OVER WHETHER A DEFENDANT IS PREJUDICED MERELY BY HAVING TO LITIGATE CLAIMS IT WOULD HAVE FACED BUT FOR A MISSED DEADLINE

A. Respondents Suffer No Cognizable Prejudice From Litigating Claims They Would Have Faced But For A Missed Deadline

Because respondents were defending against claims by petitioners in Illinois state court, the strict enforcement of the opt-out deadline in this case had the effect of giving respondents a windfall: they could assert that, as non-opted-out members of the class, petitioners could not bring the Illinois action. The court below held that respondents therefore suffered "prejudice" under the excusable neglect standard by having to continue to litigate those Illinois claims. By holding that the risk of continuing litigation constitutes cognizable prejudice under the excusable neglect standard, the court applied an erroneous legal rule in conflict with numerous judicial decisions.

Under the expansive reasoning adopted by the Eleventh Circuit, prejudice exists in virtually every case. When a party misses a deadline and loses certain rights, the other parties receive a windfall. It is illogical to consider the loss of that windfall to be an injury, damage, or detriment constituting "prejudice" in any meaningful sense of that word. To "prejudice" another, however, means to cause them injury or detriment – not to remove a fortuitous benefit. *See American Heritage Dictionary* 1428 (3d ed. 1992) ("To affect injuriously or detrimentally by a judgment or an act."); *Webster's Third New International Dictionary* 1788 (2002) ("to injure or damage by some judgment or action"). Prejudice in this context must require that the defendant lost a right or option it would otherwise have had *if the deadline had been met*. For example, genuine prejudice might be found where the delay, if excused, would cause the non-movant to suffer a loss of evidence or access to witnesses, or to miss an important

deadline.[21] In those instances, the non-movant would not be in the same position than if the deadline had been met.

Here, on the other hand, the court identified no loss to respondents of any right they would have had but for the missed deadline, and there is none. Instead, respondents lost only the windfall of not having to defend against petitioners' Illinois claims. The court's unsupported statement that "the parties are entitled to hold potential class members to the deadlines that were the product of vigorous negotiations" adds nothing to its prejudice analysis. Pet. App. 8a. Respondents lost no rights under the settlement agreement that they would have had if petitioners' opt-outs had arrived on time, and neither respondents nor the court below identified any such prejudice.

The court's finding of prejudice here was particularly egregious given that the settlement amount was based, at least to some significant degree, on the expectation that petitioners (as well as the other Illinois TPPs) would opt out. Respondents thus receive a double windfall: not only are they freed of their potential liabilities to petitioners in the Illinois case, but they gain the additional benefit of having terminated the class claims without paying much if anything for the value of petitioners' claims. Other indirect purchaser class members will also suffer because their recovery will be diminished to the extent of petitioners' claims to the settlement fund.[22]

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[21] *See Donald v. Cook Cty. Sheriff's Dep't*, 95 F.3d 548, 557-58 (7th Cir. 1996) (finding prejudice where non-movant plaintiff lost the ability to correct defects in his choice of defendants within the statute of limitations due to defendant's long delay in answering the complaint).

[22] Regardless of what happens here, moreover, respondents will still have to litigate the same claims against the Illinois TPP whose opt-out form, mailed at the same time as petitioners' forms, arrived on time.

B. Federal Courts Are Deeply Divided On Whether Simple Exposure To Litigation Of A Claim Constitutes Cognizable Prejudice Under The Excusable Neglect Standard

1. The Third and Seventh Circuits (and arguably the D.C. Circuit, *see infra* p. 21) are aligned with the Eleventh Circuit's holding that exposure to litigation that a defendant would have faced but for a missed deadline constitutes prejudice under the excusable neglect standard. In *Chrysler Credit Corp. v. Macino*, 710 F.2d 363 (1983), the Seventh Circuit affirmed a district court's refusal to vacate a default judgment pursuant to Rule 60(b). The court reasoned that "reopening the entry of default would have prejudiced Chrysler Credit, the party without fault, by requiring it to devote time and money to additional litigation." *Id.* at 367. Thus, the Seventh Circuit's approach to the issue clearly contemplates that additional litigation, without more, constitutes cognizable prejudice under the excusable neglect standard.

The Third Circuit has also held that simple exposure to claims the non-movant would have faced but for a tardy filing constitutes cognizable prejudice within the meaning of *Pioneer*. In *In re Orthopedic Bone Screw Products Liability Litigation*, 246 F.3d 315 (2001), the court found no prejudice in allowing a late proof of claim because the defendant's total liability had been capped and would not be affected by the inclusion of additional class members. *See id.* at 323-24.[23] The court then explained, however, that a case involving "expansion of the plaintiff class" by permitting late-filed claims against an uncapped settlement fund "will be to the detriment of the defendant." *Id.* at 323.

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[23] *See also In re Cendant Corp. PRIDES Litig.*, 233 F.3d 188, 196 (3d Cir. 2000) (no prejudice from late proof of claim where defendant's total liability is capped regardless of the number of claimants); *In re O'Brien Envtl. Energy, Inc.*, 188 F.3d 116, 128 (3d Cir. 1999) (no prejudice from creditor's late-filed claim where bankrupt debtor had "already planned to pay" the claim under the express terms of the reorganization plan).

Subsequently, the Third Circuit applied that reasoning squarely to hold that prejudice follows from the loss of a windfall that would have been gained if the tardy filing were not excused. In *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 92 F. App'x 890 (2004), the settlement agreement permitted "initial" and "downstream" opt-outs, the difference being that only initial opt-outs could sue for punitive damages. *Id.* at 892. The court affirmed a finding of prejudice and declined to permit a late-filed initial opt-out because doing so would "subject [the defendants] to significantly greater potential damages" and cause them to "lose this benefit of the settlement agreement." *Id.* at 893-94.

Under the approach of the Third, Seventh, and Eleventh Circuits, therefore, mere exposure to litigation a defendant would have faced but for a missed deadline is prejudicial. Although those circuits mandate that prejudice be found in virtually all cases, a clear majority of circuits has rejected that rule.

2. The First, Fourth, Fifth, Ninth, and Tenth Circuits have each held that exposure to litigation and the possible payment of claims that the non-movant would have faced but for an untimely filing is not cognizable prejudice under the excusable neglect standard. In *Pratt v. Philbrook*, 109 F.3d 18 (1997), the First Circuit rejected a Rule 60(b) motion for relief from a default judgment, explaining: "Of course, it is always prejudicial for a party to have a case reopened after it has been closed advantageously by an opponent's default. But we do not think that is the sense in which the term 'prejudice' is used in *Pioneer*." *Id.* at 22. Rather, the type of prejudice cognizable under *Pioneer* must consist of a newly created difficulty in litigating the case "in the sense, for example, of lost evidence." *Id.*

In *Bateman v. United States Postal Service*, 231 F.3d 1220 (2000), the Ninth Circuit reversed the district court's finding that a Rule 60(b)(1) movant had failed to show "excusable neglect" within the meaning of *Pioneer* where

an overseas family emergency led to an untimely filed opposition to a summary judgment motion and entry of default. The *Bateman* court explained:

> The prejudice to the Postal Service was minimal. It would have lost a quick victory and, should it ultimately have lost the summary judgment motion on the merits, would have had to reschedule the trial date. But such prejudice is insufficient to justify denial of relief under Rule 60(b)(1).

Id. at 1224-25. *See also TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701 (9th Cir. 2001) ("It should be obvious why merely being forced to litigate on the merits cannot be considered prejudicial for purposes of lifting a default judgment. For had there been no default, the plaintiff would of course have had to litigate the merits of the case, incurring the costs of doing so. A default judgment gives the plaintiff something of a windfall by sparing her from litigating the merits of her claim[.]").

Finally, even before this Court's decision in *Pioneer*, the Fourth, Fifth, and Tenth Circuits made clear that simple exposure to additional litigation does not constitute prejudice in determining whether to grant relief from a tardy filing. *See Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 812 (4th Cir. 1988) (per curiam) ("[W]e perceive no disadvantage to Augusta beyond that suffered by any party which loses a quick victory."); *Hibernia Nat'l Bank v. Administracion Cent. Sociedad Anonima*, 776 F.2d 1277, 1280 (5th Cir. 1985) ("[T]he mere possibility of prejudice from delay, which is inherent in every case, is insufficient to require denial of a 60(b)(1) motion."); *In re Four Seasons Sec. Laws Litig.*, 493 F.2d 1288, 1289, 1291 (10th Cir. 1974) ("no prejudice suffered from the enlargement of time" to opt out in order that movant "could pursue potential individual claims in private litigation").

C. The Divergent Approaches Of The D.C. Circuit Underscores The Pervasive Confusion On The Meaning Of Prejudice Under *Pioneer*

Decisions of the D.C. Circuit both support and reject the majority approach to defining prejudice under the *Pioneer* standard, thus signaling that the confusion among the lower courts is real and in urgent need of this Court's clarification.[24] In *FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 447 F.3d 835 (2006), the D.C. Circuit reversed the district court's refusal to allow a late-filed Rule 60(b) motion seeking to quash a writ of execution against diplomatic residences owned by the Congo. The court stated that "[p]rejudice under Rule 60(b)(1) appears typically and properly to contemplate costs that reconsideration of the final judgment would inflict on the non-moving party *independent of the chance of reversal*." *Id.* at 840. The court thus declined to interpret *Pioneer*'s excusable neglect standard as "making simple exposure to adjudication a qualifying form of prejudice under Rule 60(b)(1)." *Id.* While the court distinguished *Pigford v. Johanns*, 416 F.3d 12 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1581 (2006), those "distinctions" underscore great confusion.

Pigford affirmed the district court's rejection of late-filed claims of African-American farmers against a settlement fund in a class action alleging discrimination by the United States Department of Agriculture. Applying the *Pioneer* factors, the court found that the prejudice to the government of allowing the late-filed claims militated against finding "excusable neglect" because the government would face increased liability if the opt-in claims were allowed. *See* 416 F.3d at 21-22. This "expansion" of liability, the court concluded, was significant prejudice within the meaning of the *Pioneer* standard. *Id.* at 22.

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[24] *See, e.g.*, *Scarborough v. United States*, 431 U.S. 563, 567 & n.4 (1977) (certiorari granted because of "split among the circuits," one circuit being noted as "ha[ving] an intra-Circuit conflict").

The creditors in *FG Hemisphere*, however, *also* faced increased liability in the event that the default was lifted – namely, that the Democratic Republic of the Congo would successfully quash the writs of execution sought against the contested properties. By glossing over the rationale of its earlier decision in *Pigford*, the court in *FG Hemisphere* did not explain how one could square its holding that exposure to liability flowing from the lifting of a default judgment is *not* cognizable prejudice under *Pioneer*, and its holding in *Pigford* that precisely such an "expansion of liability" *is* cognizable prejudice. Nor did the D.C. Circuit explain why the class-settlement context of *Pigford* implicated different concerns from the default judgment in *FG Hemisphere*, apart from its cursory explanation that the government was entitled to the "benefit" of its "bargain" but without identifying how the government would have lost any right under the agreement by excusing the late filing. The divergent approaches of the D.C. Circuit in *FG Hemisphere* and *Pigford* thus highlight the conflict among the circuits about the meaning of prejudice under *Pioneer*.

The time is ripe for the Court to provide clear guidance on this important and recurring question.

II. THE ELEVENTH CIRCUIT DEEPENED AN EXISTING CONFLICT OVER WHETHER RELIANCE ON A "NORMAL" OR "USUAL" TIMEFRAME FOR DELIVERY OF MAIL CAN CONSTITUTE EXCUSABLE NEGLECT

A. The Court Below Improperly Gave No Weight To The Fact That Petitioners Mailed Their Opt-Outs Within The Normal Timeframe For The Delivery Of Mail

The court below held that petitioners "assumed the risk" that their opt-outs would not make it from Washington, D.C. to West Palm Beach, Florida, within four days, based on its conclusion that there is no "legally cognizable rule assuming that mail will reach its destination within three mailing days." Pet. App. 6a-7a & n.4. Although the court acknowledged that "some case law has referred to a

general standard of three days for mailing," it found that "there is no set rule that insulates parties whose papers are not delivered within three days from suffering the consequences of their own actions." *Id.* at 7a n.4.[25]

The requirement of a "set rule that insulates" petitioners from the vagaries of first-class mail delivery in order for them to be eligible for relief makes clear that the court approached the issue merely as a matter of "neglect" and not "excusable" neglect. It gave no weight to the fact that petitioners mailed their opt-out notices four days before the deadline. Nor did the court consider that the opt-out notice did not plainly require the notice to be received by April 11, 2005, but that it be mailed "in time to be received no later than April 11, 2005." *Id.* at 48a. Four days was enough lead time in the normal course for the opt-outs to be received by the deadline. In any event, under *Pioneer*, the lower courts may not simply stop at a finding of neglect; if neglect were never excusable, then the "excusable neglect" standard would be meaningless.

The court faulted petitioners for "using regular first class mail instead of an expedited service such as priority mail," reasoning that Priority Mail is "designed to deliver mail in 2-3 days" and "is clearly identified in the U.S. Postal Service website as a subset of first class mail." *Id.* at 6a & n.2. The court thus necessarily held that, had petitioners sent their opt-out notices via a form of first-class mail that is normally delivered within 2-3 days, that fact would have been entitled to some weight in the excusable neglect analysis. The same website referred to by the court makes plain, however, that "First-Class Mail®" is

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[25] The district court characterized the four-day period as "two business days" (Pet. App. 6a-7a) because the April 7 mailing date was a Thursday and the April 11 due date was a Monday, but even in terms of "business days" it is common knowledge that mail is delivered on Saturdays. *See also* USPS Website ("Postal Business Days are Monday through Saturday (excluding Postal Holidays)."), *at* https://hdusps.esecurecare.net/cgi-bin/hdusps.cfg/php/enduser/std_alp.php?p_sid=Ql5KJBii&xssl=1 (FAQ No. 140 (Postal Business Days)).

also delivered in approximately "2-3-Days."[26] Likewise, Federal Rule of Civil Procedure 6(e) requires the addition of three days to the response time for a pleading where service is effected by mail, which demonstrates that the drafters of the Federal Rules, as approved by this Court, assumed that mail typically arrives within three days.

In *Pioneer*, this Court found a "dramatic ambiguity" in the fact that a notice of the bar date for claims against a debtor's estate – while crystal clear in and of itself ("Bar date is August 3, 1989.") – was in an "inconspicuous" place. 507 U.S. at 384, 398. Despite finding movants' counsel to be "remiss in failing to apprehend the notice," the Court found it would be an abuse of discretion *not* to find excusable neglect on the record before it, which was devoid of any prejudice to the non-movant or judicial administration, or bad faith by the movant. *Id.*

Analogously, in this case the settlement agreement drafted by respondents and plaintiffs' class counsel, and approved by the court, was specifically designed to expose petitioners to the vagaries of mail delivery. Neither overnight delivery nor a postmark due date was permitted. Petitioners mailed their opt-out notices four days before the deadline, and the Postal Service's own website states that the normal delivery time is 2-3 days. Although the district court has some discretion in balancing the various *Pioneer* factors, it may not simply decide to give no weight to a factor based solely on a finding of neglect.[27]

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[26] USPS Website, *at* http://www.usps.com/business/mailingtools/mailingproducts.htm?from=home&page=mailingproductsservices.

[27] Reversal here would mandate a finding of excusable neglect and thus make a remand unnecessary: there is no prejudice; petitioners' reliance on the mails should get considerable weight; and, as the district court acknowledged, there is no evidence that petitioners acted in bad faith. *See Pioneer*, 507 U.S. at 398-99 (no remand where it would be an abuse of discretion not to find excusable neglect). At a minimum, however, the court below would have to "perform again the balancing process." *United States v. Third Nat'l Bank*, 390 U.S. 171, 183-84 (1968); *id.* ("To weigh adequately one of these factors against the other

B. Federal Courts Are Deeply Divided As To Whether Some Weight Or No Weight Should Be Given To Reliance On The "Normal" Or "Usual" Timeframe For Delivery Of Mail

1. The Second, Third, Fifth, and Tenth Circuits hold that reliance on the normal course of mail delivery is to be given significant weight in assessing excusable neglect. In *Tarabishi v. McAlester Regional Hospital*, 951 F.2d 1558, 1563 n.3 (1991), the Tenth Circuit affirmed the district court's grant of relief from a tardy notice of appeal sent three days in advance of the filing deadline, where mail delivery generally took two days between the cities in question. *See also Maryland Cas. Co. v. Conner*, 382 F.2d 13, 16 (10th Cir. 1967) ("If a lawyer mails a notice of appeal two days ahead of the due date, when one day is ordinarily enough for the mail to be delivered, it would seem clearly unfair to bar the appeal because a storm or other unforeseen cause of delay delayed the delivery. This example is not hypothetical; it has happened.").

The Fifth Circuit in *Gibbs v. Town of Frisco City*, 626 F.2d 1218 (1980), reversed the district court and found that a three-day mailing period was sufficient, especially when "the published service standards of the United States Post Office reflect that mail from Selma to Mobile is delivered overnight" and the tardy filer had allowed "twice the normal time for delivery." *Id.* at 1220; *see also Sanchez v. Board of Regents*, 625 F.2d 521, 522 (5th Cir. 1980) ("[R]eliance on the normal course of delivery of mail is reasonable and may be the basis for a court to excuse [an] otherwise untimely filing."); *cf. In re Cendant Corp. PRIDES Litig.*, 233 F.3d at 197 (listing "misrouted mail" among excusable neglect circumstances that can constitute excusable neglect).

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requires a proper conclusion as to each. Having decided that the court below erred in assessing [one factor], we should remand, so that the District Court can perform again the balancing process mandated by the Act.").

In *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995), a tardy notice of appeal was sent four days (two business days) prior to the filing deadline. Explaining that "uncontrollable delays in mail delivery may be a basis for a finding of excusable neglect" under the equitable inquiry required by *Pioneer*, the court took judicial notice of a snowstorm as a possible explanation for the unusual five-day delivery time. *Id.* at 1180 & n.6 (internal quotation marks and emphasis omitted); *see also Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 525 (2d Cir. 1996) ("Normally it is assumed that a mailed document is received three days after its mailing.") (citing Fed. R. Civ. P. 6(e)).[28]

Finally, in *Ramseur v. Beyer*, 921 F.2d 504 (1990), the Third Circuit reversed a district court's refusal to grant relief where a notice of appeal was mailed six days early but arrived seven days late, despite traveling only five miles to the courthouse. Finding that counsel had "reasonably believed" that the notice had been timely mailed, the court held that excusable neglect had been shown. *Id.* at 506-07; *see also* 20 *Moore's Federal Practice* ¶ 304.14[2][a], at 304-54 (2006) ("If the notice of appeal is mailed in time so that in normal course it will arrive in time, but it does not, extensions have been upheld.").

2. In contrast, the Fourth, Sixth, Seventh, and Federal Circuits have all found that reliance on the normal course of mail delivery cannot form the basis for a finding of excusable neglect. Instead, as in the decision below, a litigant is held to assume the risk of delayed delivery. In

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[28] In *Zipperer v. School Board of Seminole County*, 111 F.3d 847 (1997), the Eleventh Circuit found excusable neglect where a tardy notice of appeal had been mailed six days before the required filing date. While the court could be read to have suggested that reliance on "the three days required for normal mail delivery" would be excusable, *id.* at 850, it held otherwise in this case. *See* Pet. App. 7a n.4 ("Although some case law has referred to a general standard of three days for mailing, *see Zipperer*, there is no set rule that insulates parties whose papers are not delivered within three days from suffering the consequences of their own actions.") (full citation omitted).

Thompson v. E.I. DuPont de Nemours & Co., 76 F.3d 530 (1996), the Fourth Circuit found that the district court "most assuredly did not abuse its discretion" in refusing to find excusable neglect. *Id.* at 534. In affirming the lower court's ruling, the court rejected any reliance on a three-day delivery period, holding that a "litigant who decides to rely on the vagaries of the mail must suffer the consequences if the notice of appeal fails to arrive within the applicable time period." *Id.*

The Federal Circuit likewise has embraced the view that unaccountable mail delays – or even the failure to deliver mail at all – should be given no weight by a district court in assessing excusable neglect. In that court's view, a litigant in electing "ordinary mail" has "assumed the risk that the motion would not be timely received." *Penrod Drilling Co. v. United States*, 925 F.2d 406, 408 (1991); *see also Howard v. United States*, No. 91-5111, 1991 WL 263712, at *1 (Fed. Cir. Dec. 16, 1991) (per curiam) (judgment noted at 951 F.2d 1267) (interpreting *Penrod* to mean that, "when a filing is made by ordinary mail, the risk of delay or non-delivery is on the filing party"). And the Sixth Circuit has bluntly held that "[m]ail delays . . . are not grounds for excusable neglect." *In re Crider*, No. 98-2376, 2000 WL 191823, at *3 n.3 (Feb. 10, 2000) (judgment noted at 205 F.3d 1339).

In *Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat*, 808 F.2d 1249 (1987), the Seventh Circuit found that a district court did not abuse its discretion in finding that a litigant who mailed his notice of appeal three days before the filing deadline could not rely during the holiday season on the "normal two to three days" required for mail delivery. *Id.* at 1253. And, in a conclusion that starkly conflicts with the Second Circuit's conclusion in *Sherlock*, 84 F.3d at 525, the Seventh Circuit has explicitly rejected a litigant's analogy to Federal Rule of Civil Procedure 6(e)'s allowance of an extra three days for documents served by mail, declaring the argument to be "specious." 808 F.2d at 1253.

C. The Eleventh Circuit's Approach Contravenes The Flexibility Required By *Pioneer*

The court's approach below exemplifies the inflexibility this Court rejected in *Pioneer*, which held that "excusable neglect" is an "elastic concept" demanding consideration of "all relevant circumstances surrounding the party's omission." 507 U.S. at 392, 395. Indeed, *Pioneer* specifically rejected the dissent's approach that would have required a party seeking relief to make a threshold showing of blamelessness *before* argument could be heard on the other prongs of the test. In rejecting that approach, *Pioneer* noted that it would "narrow[] the range of factors to be considered in making the 'excusable neglect' determination," *id.* at 395 n.14, and that incorporating such a "bright-line rule" would erect a "rigid barrier" against relief that was "irreconcilable with our cases assigning a more flexible meaning to 'excusable *neglect*,'" *id.*

But the ruling below – and those of four other circuits – have imposed a "rigid barrier" to relief by precluding reliance on the normal time for mail delivery. By concluding that any fault or lack of diligence by the movant in sending mail automatically makes a missed deadline, in effect, *per se* inexcusable, the lower court likewise failed to adhere to *Pioneer*'s teaching that even "omissions caused by carelessness" (*id.* at 388) can be excusable based on a proper balancing of all the equities.[29]

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[29] A recent en banc panel of the Ninth Circuit noted the general "disarray" and "confusion" in the courts of appeals about the degree of flexibility required by *Pioneer*. *Pincay v. Andrews*, 389 F.3d 853, 857 (2004) (en banc), *cert. denied*, 544 U.S. 961 (2005); *see id.* at 859 ("Any rationale suggesting that misinterpretation of an unambiguous rule can never be excusable neglect is, in our view, contrary to [*Pioneer*'s] instruction."); *id.* at 860 ("There should similarly be no rigid legal rule against late filings attributable to any particular type of negligence."); *see also In re Vitamins Antitrust Class Actions*, 327 F.3d 1207 (D.C. Cir. 2003) ("On appeal, UCB urges this court to adopt a *per se* rule that garden variety attorney inattention can never constitute excusable neglect. We decline and uphold the district court. The *Pioneer* standard precludes the adoption of any such *per se* rule.").

D. Restricting The Ability Of Class Members To Opt Out Of An Insufficient Settlement Negotiated By Others Implicates Due Process

Resolution of the circuit conflicts at issue here is also critically important to the fair and just administration of class-action litigation. This Court has voiced two core principles in its efforts to reconcile the "inherent tension" between class-action lawsuits and the "day-in-court ideal." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999).

First, constitutional due process – and not just the dictates of Rule 23 – demands that absent class members be given the opportunity to opt out of a class. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("[W]e hold 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."). This right to opt out as an absent class member in turn reflects the deep-rooted preference for a trial on the merits in which the plaintiff is the master of his own complaint.

Second, certification of class settlements requires "'heightened attention'" in order to ensure that class counsel faithfully guards the interests of the class. *Ortiz*, 527 U.S. at 848-49 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)) (alteration omitted). This latter principle grows out of this Court's observation that, in negotiating class settlements, class counsel and defendants often pursue interests that are, at best, only proximate to the interests of absent class members. *See id.* at 852 n.30 ([W]ith an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant."); *Amchem*, 521 U.S. at 627 (class settlements are as often made "to confine compensation and to limit defendants' liability" as to remedy the harms incurred).[30]

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[30] Commentators have exhaustively documented the reasons why class counsel may not always adequately represent the class members.

Here, plaintiffs' class counsel negotiated a reduced settlement after losing two appeals and facing a possible third reversal on class-certification issues not at issue in petitioners' non-class Illinois state-court action. The settlement amount was negotiated by class counsel and respondents, and overseen by the district court, with the awareness and expectation that petitioners would opt out. Moreover, as respondents and the district court knew at the time, the blow provision was carefully tailored to preclude the possibility that any of the Illinois TPP opt-outs could trigger respondents' blow rights.

The Eleventh Circuit's approach invites class counsel and class-action defendants to inject ever more burdensome opt-out requirements into class settlements in the hopes that a few would-be opt-outs will fail to meet those requirements.[31] By ensuring both that all non-movants will be able to show substantial prejudice in the event that relief from a tardy filing is granted, and that reliance on the normal course of mail delivery can never be excused, the court's approach below places additional barriers to absent class members' due process rights and substitutes a rigid and predetermined formula for the "flexible" and "elastic" balancing test devised by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

See, *e.g.*, Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 Notre Dame L. Rev. 1787, 1800-36 (2004); Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 Tex. L. Rev. 287, 335-41 (2003); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1367-84 (1995).

[31] *See*, *e.g.*, Richard A. Nagareda, *Closure in Damage Class Settlements: The Godfather Guide to Opt-Out Rights*, 2003 U. Chi. Legal F. 141, 142 (2003) (documenting "opt-out minimization" techniques deployed by "class settlement designers" to deter opt-outs).

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