No. 15-1420

In The
Supreme Court of the United States

ADAM E. SCHULMAN,

Petitioner,

v.

LEXISNEXIS RISK AND INFORMATION ANALYTICS GROUP, INC., *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL A. CADDELL
Counsel of Record
CYNTHIA B. CHAPMAN
AMY E. TABOR
CADDELL & CHAPMAN
628 East 9th Street
Houston, TX 77007
(713) 751-0400
mac@caddellchapman.com

Counsel for Respondent
Gregory Thomas Berry

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The district court granted, and the Fourth Circuit affirmed, approval of a settlement that secured a comprehensive overhaul of LexisNexis's business practices to protect 200 million consumers' private information. The settlement preserved Class members' individualized actual damage claims and only released claims for non-individualized, incidental statutory damages.

Was the Class properly certified under Rule 23(b)(2) as a case in which "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole?"

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STATEMENT

A. Plaintiffs pursued this class action to secure FCRA rights for 200 million consumers.

This class settlement (the "Settlement") is the ultimate product of multiple class actions dating back to 2008.[1] The crux of the dispute is Plaintiffs' allegation that Defendant LexisNexis Risk and Information Analytics Group, Inc. ("LexisNexis"), a data broker, violated the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq.*, by selling certain Accurint-brand identity reports – containing detailed personal information bearing on creditworthiness – to debt collectors without treating the reports as "consumer reports" under the FCRA. Pet. App. B2. Because LexisNexis did not treat the reports as FCRA-governed, 200 million consumers were subject to the unlawful sale of their information to third parties and deprived of, *inter alia*, the rights to obtain a full copy of their reports and dispute (and have corrected) inaccuracies contained therein. *Id.* at A6, B2.

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[1] Prior to filing this action in November 2011, Class Counsel pursued *Adams v. LexisNexis Risk & Information Analytics Group, Inc.*, No. 08-4708 (D.N.J.) and *Graham v. LexisNexis Risk & Information Analytics Group, Inc.*, No. 3:09-CV-00655-JRS (E.D. Va.), both of which raised claims similar to Plaintiffs' claims here. Neither *Adams* nor *Graham* resulted in any class settlement or court-ordered relief. Pet. App. A4.

1. Plaintiffs were challenged in proving LexisNexis willfully violated the FCRA to secure statutory damages.

Throughout this litigation, Plaintiffs endeavored to prove not only that LexisNexis violated the FCRA, but also that it did so "willfully." This is because in addition to creating liability for actual damages sustained by an individual as a result of a violation, 15 U.S.C. § 1681o(a), the FCRA provides statutory damages of between $100 and $1000 for willful violations. Pet. App. A4-5. Willfulness, however, "is a high standard, requiring knowing or reckless disregard of the FCRA's requirements." *Id*. (citing *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 57 (2007)). "Unless Lexis was 'objectively unreasonable,' in concluding that its Accurint reports were not 'consumer reports' subject to the FCRA, then there would be no liability for statutory damages." Pet. App. A5.

Plaintiffs' efforts to prove LexisNexis was "objectively unreasonable" in not treating Accurint reports as "consumer reports" were undercut by the Supreme Court's guidepost from *Safeco*: "[w]here the statutory text and *relevant agency and court guidance* allow for more than one reasonable interpretation, a defendant that acts consistently with one of those interpretations cannot be held liable as a willful violator." Pet. App. B35 (emphasis added). Thus, while Plaintiffs held to the position (and still do today) that LexisNexis was objectively unreasonable in treating Accurint reports as outside the FCRA, they were compelled to acknowledge "relevant agency . . . guidance" stating

otherwise. C.A. App. 2115. Dating back to *Adams*, LexisNexis pointed to a 2008 opinion letter from the Federal Trade Commission ("FTC"), in which it stated that Accurint reports do not fall within the FCRA. Employing the *Safeco* standard, LexisNexis argued that it could not have been "objectively unreasonable" in following the view of the federal agency principally charged with enforcing the FCRA. Pet. App. A5, B35. Persuaded, the *Adams* court stated that unless discovery showed that the FTC had reversed its 2008 Opinion Letter position, the *Adams* plaintiffs, unable to prove willfulness, could expect summary judgment to be entered in LexisNexis' favor. Pet. App. A26; C.A. App. 2788-90.

2. The Rule 23(b)(2) Class Settlement guaranteed consumers FCRA protection through radical practice changes.

a. Extensive negotiations focused on securing substantial injunctive relief.

Cognizant of the challenge of proving willfulness, obtaining statutory damages – as opposed to using them to leverage other valuable relief – was not Plaintiffs' focus. C.A. App. 1696-98. Over a series of nine mediations overseen by two federal judges and a national mediator with significant FCRA experience, the parties negotiated detailed business practice changes. C.A. App. 1696-98. They delved painstakingly into each Accurint product, report by report, and in some instances, data field by data field. *Id*. Discussions focused

on radical modifications to LexisNexis' reporting business, including implementing certain FCRA-like rights for reports that would ordinarily not be protected. C.A. App. 1697.

Following extensive discovery spanning three lawsuits, the parties reached a settlement on behalf of two classes – (1) the Rule 23(b)(2) Class or the "Impermissible Use Class," which includes 200 million consumers who were listed in the Accurint Reports, and (2) the Rule 23(b)(3) Class or the "File Request" or "Dispute" Class, which includes 31,000 consumers who indicated they were impacted by LexisNexis' failure to comply with the FCRA by requesting a copy of their Accurint file and/or filing a dispute regarding reported inaccuracies. Pet. App. A6.[2]

b. The (b)(2) Settlement preserved actual damage claims and obtained significant FCRA protection in exchange for waiver of incidental, non-individualized statutory damages.

Regarding the (b)(2) Class Settlement, the parties determined that any claim for statutory damages – which carried the burden of proving willfulness – was incidental to the Class's interest in compelling changes to LexisNexis' data practices. Pet. App. B7-8. The parties therefore agreed to a "substantial nationwide

[2] No one appealed any issues regarding certification of the Rule 23(b)(3) Class or fairness of the Rule 23(b)(3) settlement.

program address[ing] the issues raised in the Complaint . . . and that will result in a significant shift from the currently accepted industry practices." Pet. App. A8, B8. In addition, unlike (b)(3) Class Members, who each received approximately $300 but were required to release *all claims* for monetary damages, (C.A. App. 1751, 1756), (b)(2) Class Members retain a de facto opt-out right – the right to seek actual damages individually under the FCRA while waiving only the right to bring claims for non-individualized, incidental statutory damages and class-wide claims. Pet. App. A20.

Pursuant to the Injunctive Relief Order, LexisNexis divided its Accurint database into two products. Pet. App. A8, B8. The first product, "Collections Decisioning," is now treated as falling within the FCRA's "consumer report" definition. Collections Decisioning reports can be used only for FCRA-authorized purposes and will be available only to buyers who complete a detailed credentialing process. *Id*. Consumers now also have the right to view the information in their reports, free of charge in certain circumstances, and to dispute inaccuracies, all as provided under the FCRA. *Id*.

The second suite of products and services, "Contact & Locate," is intended only for "finding and locating debtors or locating assets" and does "not involve the provision of 'consumer reports' under the FCRA." *Id*.; Pet. App. B10. While Contact & Locate is not FCRA-governed, consumers are still afforded certain FCRA-like protections, such as the right to receive free

copies of their reports and the right to submit statements regarding inaccuracies. *Id*. Contrary to Objector's representation that consumers will not be able to challenge the legality of Contact & Locate reports under the FCRA, (Pet. 8), the Settlement and Injunctive Relief Order allow Class members to file suit if LexisNexis prepares or sells Contact & Locate in a manner inconsistent with the Injunctive Relief Order. C.A. App. 121, 152, 2890, 2896.

The injunctive relief required LexisNexis to invest $6 million and at least 43,000 hours of human effort to design, implement, and operate the new suites of products and services. C.A. Supp. App. 3057. LexisNexis' efforts included engineering new products, preparing sales and operational teams for the launch, and developing the credentialing process and training programs. *Id*.

c. A leading privacy expert valued the injunctive relief in the billions.

These significant business changes have been described as a "shift" and "an earthquake in the market." C.A. App. 651. Professor Neil Richards, a renowned privacy expert (and former clerk to Chief Justice Rehnquist), valued the injunctive relief in the "billions of dollars." C.A. App. 587; Pet. App. A26. Quantifying just one component, Richards multiplied the number of Accurint reports sold in one year (20 million) by the amount ($8) consumers were previously charged for

reports, which are now available *free* under the Settlement. C.A. App. 587-88. The cost savings to consumers alone, not including the privacy benefits of having control over their personal information's accuracy, totals approximately $160 million per year. *Id.* at 587.

B. The district court approved an extensive nationwide notice program and found it satisfied due process.

The district court granted preliminary certification and approval on April 29, 2013. C.A. App. 624. Although notice is not mandatory under Rule 23(b)(2), the parties negotiated, and the district court approved, "an extensive and substantial nationwide notice plan" that circulated information to class members by five different methods, including national publications, a settlement website for each class, banner advertisements, search keywords and phrases on major search engines, and a toll-free number for each class with recorded information and access to live operators. Pet. App. B4-5. Ultimately, the paid media program, implemented by a leading notice provider, reached approximately 75.1% of potential 23(b)(2) Class members. *Id*. B5. The district court found that the notice program satisfied due process and constituted "the best notice practicable under the circumstances." C.A. App. 617.

C. The district court followed *Dukes* in granting final approval of the Rule 23(b)(2) Settlement.

On September 5, 2014, the district court granted final approval of the Settlement. Following *Dukes*, the court found that certification of the Rule 23(b)(2) Class was appropriate because "the injunctive relief sought is indivisible and applicable to all members of the Rule 23(b)(2) class." Pet. App. B27-28. The court dismissed claims by certain objectors – only one of whom, Objector Schulman, petitions for review here – that a lack of opt-out rights for the (b)(2) Class precluded certification. The court emphasized that, unlike *Dukes*, class members actually retained the right to sue for individualized relief in the form of actual damages and waived *only* non-individualized, incidental statutory damages, uniform to all class members. Pet. App. A9, B29.

In overruling the objections, the district court focused on the "relative strength" of the parties' claims and defenses. Given the 2008 FTC Opinion Letter deeming Accurint reports outside the FCRA's scope, the district court found that the objectors' prospects for recovering statutory damages were "speculative at best." Pet. App. B35. Release of those claims in exchange for substantial injunctive relief was thus demonstrably fair and adequate. *Id*. A25, B35.

The district court also rejected the argument that the (b)(2) Class should not be certified because several courts have held that the FCRA does not provide a private right of action for injunctive relief. Citing to courts

in its own district and elsewhere, the district court noted that the lack of a private right of action – assuming there is none under the FCRA, which is silent on private litigants' right to bring non-monetary claims – does not preclude including injunctive relief in a negotiated settlement. Pet. App. B30. The district court, citing Supreme Court authority, highlighted that "'it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all.'" *Id*.

D. The Fourth Circuit affirmed final approval consistent with *Dukes* and pre- and post-*Dukes* authority from other circuits.

On December 4, 2015, the Fourth Circuit issued its opinion "find[ing] no error in the release of the statutory damages claims as part of a Rule 23(b)(2) settlement, and no abuse of discretion in the district court's approval of the settlement agreement." Pet. App. A2.

The Fourth Circuit focused on the "most important factor in weighing the substantive reasonableness of [the Settlement]" – "the strength of plaintiffs' claims on the merits." *Id.* A25. The Fourth Circuit emphasized that the release of statutory damages in exchange for injunctive relief "depends critically on an assessment of the Plaintiffs' case that they are entitled to statutory damages in the first place." *Id*. While the district court assessed Plaintiffs' chances of a statutory damage recovery as "speculative at best," the Fourth Circuit went one step further, characterizing the district court's assessment as "generous." *Id*. Applying the Supreme

Court's *Safeco* "objectively unreasonable" test, the Fourth Circuit concluded that LexisNexis had acted reasonably: "[H]ere, with agency guidance expressly specifying that Accurint reports are *not* subject to the FCRA, *see* FTC Opinion Letter, it is hard to see how Lexis can be said to have acted unreasonably by adopting that reading." *Id*. at A25-26.

The Fourth Circuit then contrasted the "other side of the ledger" – which it described as "'substantial injunctive relief without the risk of litigation'" that "'will result in a significant shift' in industry practices" and pointed to a "finding by an information privacy law expert that the injunctive relief provided . . . consumers with benefits so substantial that their monetary value is in the billions of dollars." *Id*. A26. With that contrast, the Fourth Circuit concluded it could "find no reason to disturb the district court's assessment of the relative strength of the parties' legal positions or its fact-intensive analysis of the benefits provided [to] the (b)(2) Class by the parties' settlement." *Id*. A27.

Given *Safeco*'s standard, the FTC's opinion letter, and the sweeping injunctive relief that specifically addressed the issues raised in the Complaint, the Fourth Circuit characterized the objectors' focus on the absence of monetary relief as both "unsupported in the law" and "imprudent" given that "[t]here was no realistic prospect that Lexis could or would provide meaningful monetary relief to a class of 200 million people." *Id*. A26.

In rejecting objectors' challenge to Rule 23(b)(2) certification, the Fourth Circuit also stated that "this is a paradigmatic Rule 23(b)(2) case. The 'meaningful, valuable injunctive relief' afforded by the agreement is 'indivisible,' 'benefitting all [] members' of the (b)(2) class at once." *Id*. A13. It further elaborated that "the statutory damages claims released . . . are not the kind of individualized claims that threaten class cohesion and are prohibited by *Dukes*." *Id*. Regarding the statutory damages, the Fourth Circuit found that they are necessarily uniform because only the defendant's conduct matters:

> When it comes to statutory damages under the FCRA, what matters is the conduct of the *defendant*, Lexis – which, as the district court emphasized, "was uniform with respect to each of the class members." The availability of statutory damages in this case . . . is a simple function of Lexis's policies with respect to its Accurint reports, applicable to the entire (b)(2) Class. If Lexis unreasonably failed to treat Accurint reports as "consumer reports" subject to the FCRA, then every class member would be entitled uniformly to the same amount of statutory damages, set by rote calculation.

Id. A13-14. The Fourth Circuit concluded that the Settlement was "structured precisely to comply with *Dukes* and with Rule 23(b)(2)," given that the statutory damages released – in contrast to the individualized actual damages retained by (b)(2) Class members – "'flow directly from liability to the class *as a whole*' on

the same set of claims underlying the injunctive relief, making them non-individualized under *Dukes* and 'incidental' for purposes of Rule 23(b)(2)." *Id*. A14 (emphasis original).

Regarding the objectors' secondary argument – that the statutory damages cannot be deemed "incidental" to the injunctive relief since several courts have held that the FCRA does not allow private plaintiffs to compel injunctive relief and Plaintiffs did not demand it in their original prayer – the Fourth Circuit regarded the argument as "beside the point" given that "'it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all.'" *Id*. A15. Not only is "Lexis [] free to agree to a settlement enforcing a contractual obligation that could not be imposed without its consent," but practically speaking, "many FCRA class action disputes are resolved in part though consent decrees." *Id*. In addition, the Fourth Circuit noted that Rule 23(b)(2), by its own terms and as supported in the Advisory Committee's Note, "applies so long as 'final injunctive relief . . . is appropriate respecting the class as a whole.'" *Id*. A16.

Alternatively, with no supporting precedent, the objectors argued that even if the statutory damages released are in fact incidental, due process precludes class certification without opt-out rights. The Fourth Circuit disagreed, emphasizing that *Dukes* held "only that claims for individualized monetary relief may not be certified under Rule 23(b)(2)." *Id*. A17-18. Moreover, the Fourth Circuit pointed out that both prior to and following *Dukes*, federal courts have *consistently*

"permitted certification of mandatory Rule 23(b)(2) classes involving monetary relief so long as that relief is 'incidental' to injunctive or declaratory relief," and that "in such circumstances, opt-out rights are not required because individualized adjudications are unnecessary." *Id*. A18.

The Fourth Circuit noted that its holding was in line with both of the two other federal courts of appeals that had considered Rule 23(b)(2) certification of a class seeking incidental damages in light of *Dukes*. Post-*Dukes*, both the Seventh Circuit and the Second Circuit had similarly concluded that Rule 23(b)(2) certification remains permissible "so long as the monetary relief is non-individualized and 'incidental' to injunctive or declaratory remedies." *Id*. A19.

Not only did the Fourth Circuit remain consistent with this consensus, but from a practical standpoint, the particular terms of the Settlement "make opt-out rights especially unnecessary." *Id*. A20. Unlike *Dukes*, where the plaintiffs had no option to "go it alone" in pursuit of their individualized claims, here "the right to 'go it alone' is built into the Agreement itself, under which any (b)(2) Class member may pursue actual damages resulting from individualized harm under the FCRA." *Id*. Thus, the Fourth Circuit concluded that "class members are 'opted out' already, by virtue of the settlement in question," "thereby preserving their due process rights." *Id*.

The Fourth Circuit therefore affirmed the district court's order granting final approval and overruling

the objectors' objections. Of these objectors, only Objector Schulman petitions for review here.

SUMMARY OF ARGUMENT

No circuit split exists regarding the question presented in this Petition. Consistently from the Fifth Circuit's opinion in *Allison v. Citgo Petroleum*, 151 F.3d 402 (5th Cir. 1998), the Courts of Appeals have agreed that claims for non-individualized damages incidental to injunctive relief may be certified under Rule 23(b)(2). *Allison*, 151 F.3d at 415. Since 2011, when this Court refused to disturb *Allison*'s incidental damages rule,[3] two more Courts of Appeals have joined this consensus. *Amara v. CIGNA Corp.*, 775 F.3d 510, 523-24 (2d Cir. 2014) (holding that class seeking damages incidental to injunctive or declaratory relief could be certified under Rule 23(b)(2)); *Johnson v. Meriter Health Servs. Employee Ret. Plan*, 702 F.3d 364, 369 (7th Cir. 2012) (same). In reaching the same result here, the Fourth Circuit explicitly noted that it was following the holdings of its "sister circuits," which "have affirmed the continued validity of Rule 23(b)(2) certification of monetary claims so long as the monetary relief

[3] *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2560 (2011) (citing *Allison* and noting that "we need not decide in this case whether there are any forms of 'incidental' monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause").

is non-individualized and 'incidental' to injunctive or declaratory remedies." Pet. App. A18-19.

This Court should therefore reject Objector's attempt to manufacture an inter-circuit conflict where none exists. Ignoring the crucial distinction between individualized damages, which require class-member-by-class-member findings from a trier of fact, and incidental damages, which focus only on the defendant's conduct and may be awarded class-wide based on uniform findings, Objector argues as if cases involving back pay, antitrust overcharges, and tort damages presented the same Rule 23 and due process issues as the non-individualized statutory damages released in this Settlement. Pet. 13-14; *see Dukes*, 131 S. Ct. 2560 (limiting its holding to cases where "the monetary relief is not incidental to the injunctive or declaratory relief"). This Court, however, has recognized that incidental damages are a separate issue. *Dukes*, 131 S. Ct. at 2558, 2560. Regarding incidental damages, all Circuits are in agreement, and no conflict exists for this Court to resolve. Pet. App. A18-19 (noting that Fourth Circuit's holding was consistent with "established precedent," including a consensus of authority from the Fifth, Seventh, and Second Circuits).

Nor does any inter-circuit conflict exist regarding whether statutory damages may be incidental to declaratory or injunctive relief. Several courts have recognized that statutory damages are exactly the kind of non-individualized, incidental damages the drafters contemplated when they specified that Rule 23(b)(2)

was not intended for cases where "appropriate final relief relates *exclusively or predominantly* to money damages." FED. R. CIV. P. 23 (Advisory Committee Notes); *see Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 977 (5th Cir. 2000); *Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002). Objector does not directly address these on-point cases, but instead attempts to rely on factually dissimilar cases where courts held that injunctive relief did not "predominate" over the damages sought, either because it was not available to private plaintiffs in a *contested* class certification context or because the injunctive relief achieved offered little or zero benefit to class members. Pet. 21-24; *see* Section B, *infra*. Such cases are vastly different from this one, which involves a settlement, not a contested certification motion, and where the district court and Fourth Circuit both found that the settlement offered "meaningful, valuable injunctive relief," (Pet. App. A13), which predominated over the released statutory damages claims, whose value was "speculative at best." *Id.* A25. In light of these findings, the Fourth Circuit's decision affirming the Settlement was surely correct.

Finally, this case does not cleanly present any potential due process issues regarding incidental damage claims certified under Rule 23(b)(2), because the Settlement actually provided (b)(2) Class members both notice and a form of opt-out. Notice was provided by publication reaching approximately 75.1% of the Class, which the district court found was the "best notice practicable under the circumstances." C.A. App. 617.

And, as the Fourth Circuit observed, "(b)(2) Class members are 'opted out' already" in that their actual, individualized damage claims are preserved." Pet. App. A20. In addition, the fact that this case involves merely the release, rather than an actual award, of statutory damages, as well as the fact that the injunctive relief secured for the class is necessarily an all-or-nothing change to LexisNexis' enterprise-wide business practices, from which there is no practical means for Class members to exclude themselves on an individual basis, means that, even if this Court wanted to take up the *Allison* "incidental damages" issue, this settlement does not present the proper vehicle to do so. Objector's Petition should therefore be denied.

REASONS FOR DENYING THE PETITION

A. No circuit split exists regarding whether a class certified under Rule 23(b)(2) may recover or release incidental damages.

In 1998, the Fifth Circuit held that Rule 23(b)(2) certification was proper where monetary damage claims were "incidental to requested injunctive or declaratory relief." *Allison*, 151 F.3d at 415. Under *Allison*'s "incidental damages" rule, statutory damage claims, such as those released here, can be resolved in connection with an injunctive relief settlement. *See Bolin*, 231 F.3d at 977 (finding that statutory damages "require no individualized calculation, but are awarded to the class as a whole"); *see also* FED. R. CIV. P. 23 (Advisory Committee Note) (stating that Rule

23(b)(2) was intended for cases where the appropriate final relief does not relate "exclusively or predominantly to money damages").

Dukes rightly distinguished such "incidental" damages from the "individualized monetary claims" that this Court held belong in Rule 23(b)(3). *Dukes*, 131 S. Ct. at 2558. Cognizant that the predominance and superiority considerations that require Rule 23(b)(3) opt-out and notice procedures "with respect to each class member's *individualized* claim for money"[4] do not apply to class-wide relief incident to an injunction or declaration, *Dukes* explicitly left the *Allison* incidental damages rule intact. *Id.* at 2560.

Since *Dukes*, *Berry* is the third court of appeals to consider the incidental damages issue. *All* have reached the same result, holding that incidental damages may be awarded to or released by a Rule 23(b)(2) Class consistent with due process. *Amara*, 775 F.3d at 523-24; *Johnson*, 702 F.3d at 369. Because the Fourth Circuit's *Berry* opinion is entirely consistent with all Circuits that have considered non-individualized incidental damages in the certification of a Rule 23(b)(2) class, the issue does not require this Court's review.

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[4] *Dukes*, 131 S. Ct. at 2558 (emphasis added).

1. The Fourth Circuit's opinion agreed with the Fifth Circuit, the Second Circuit, and the Seventh Circuit that a class seeking money damages incidental to injunctive relief can be certified under Rule 23(b)(2).

The *Berry* settlement does not release any individualized actual damage claims. Pet. App. A20. Instead, the released statutory damages "'flow directly from liability to the class *as a whole*' on the same set of claims underlying the injunctive relief, making them non-individualized under *Dukes* and 'incidental' for purposes of Rule 23(b)(2)." *Id.* A14 (quoting *Dukes*, 131 S. Ct. at 2560 (quoting *Allison*, 151 F.3d at 451)) (emphasis original). Negating any due process concern regarding possible individualized damage claims, *the settlement preserves all individual actual damage claims.* Pet. App. A20.

The Fourth Circuit expressly noted that no intercircuit conflict exists here and that its holding that incidental, class-wide statutory damages could be released in connection with a Rule 23(b)(2) settlement was consistent with the Second and Seventh Circuit's holdings in *Amara* and *Johnson*:

> Two other federal courts of appeals have considered whether, in light of *Dukes*, Rule 23(b)(2) certification remains permissible when monetary damages are involved. And both have affirmed the continued validity of Rule 23(b)(2) certification of monetary claims so long as the monetary relief is

> non-individualized and "incidental" to injunctive or declaratory remedies.

Pet. App. A18-19.

The *Amara* district court awarded equitable relief under ERISA § 502(a)(1)(B). Defendant CIGNA had converted its employee pension plan from a defined-benefit plan to a cash-balance plan, leaving employees worse off in multiple ways. *Amara*, 775 F.3d at 513. The court reformed the benefit plan, preserving the full benefits owed to the class under both the old plan and the new plan. *Amara*, 775 F.3d at 513. Rejecting Objector's argument here that money damages may never be awarded to and/or released by a Rule 23(b)(2) class, the district court denied the defendant's motion to decertify the class. *Id.* at 514. The Second Circuit affirmed, holding that "[c]ertification of a class under Rule 23(b)(2) is appropriate where the remedy sought is 'an indivisible injunction' that applies to all class members 'at once.'" *Id.* at 519 (citing *Dukes*, 131 S. Ct. at 2558). Following its "sister circuits'" holdings in *Allison* and *Johnson*, the Second Circuit agreed that incidental monetary relief may be awarded to 23(b)(2) class members "where it 'flow[s] directly from liability to the class as a whole' from 'claims forming the basis of . . . injunctive or declaratory relief.'" *Id*. at 519 (citing *Allison*, 151 F.3d at 415).

Similarly in *Johnson*, the class consisted of employees whose ERISA plans had been changed, making their retirement benefits less valuable. *Johnson*, 702

F.3d at 367-68. The district court certified the class under Rule 23(b)(2), and the Seventh Circuit granted interlocutory review. *Id.* at 365. The Seventh Circuit noted that, were the district court to reform the ERISA plan, class members would be entitled to monetary benefits as an "automatic consequence of a judicial order." *Id.* at 369. Distinguishing such incidental damages from the "individualized award of money damages" at issue in *Dukes*, the Seventh Circuit affirmed certification under Rule 23(b)(2). *Id.* at 372.

Because the Fourth Circuit in *Berry* agreed with the Seventh, Second, and Fifth Circuits that non-individualized, incidental damages may be awarded or released in connection with 23(b)(2) certification, there is no circuit split justifying this Court's intervention.

2. *Dukes* resolved the question raised in *Ticor* and *Adams* regarding individualized actual damages in Rule 23(b)(2) cases.

Objector attempts to muddy the Circuits' unanimous consistency by dredging up pre-*Dukes* cases having no relevance to the incidental damages question at issue here. Pet. 13-20. Objector argues that this Court's dismissal of petitions for certiorari in *Ticor Title Insurance Co. v. Brown*[5] and *Adams v. Robertson*[6] as improvidently granted deprived this Court of an opportunity to resolve the question presented in *Berry.* Pet. 13-14. *Ticor* and *Adams*, however, concerned individualized,

[5] 511 U.S. 117 (1994).

[6] 520 U.S. 83 (1997).

actual economic damages – the very type of damages explicitly preserved for 23(b)(2) Class members here. This Court's *Dukes* decision conclusively dispatched that issue, holding that individualized damage claims must be certified under Rule 23(b)(3). *Dukes*, 131 S. Ct. at 2558. The question raised in *Ticor*, *Adams*, and the other pre-*Dukes* cases Objector attempts to resuscitate has thus been answered, and the narrower, germane issue here that *Dukes* reserved regarding incidental damages is one on which all circuits agree.

The plaintiff class in *Ticor* brought antitrust claims, seeking treble damages against title insurance companies alleged to have fixed prices in 13 States. *Ticor*, 511 U.S. at 118. To award such damages, a court would have had to determine, individually for each class member, the overcharge class members paid because of the conspiracy. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1434 (2013). Similarly, *Adams* was a fraud case. *Adams*, 520 U.S. at 85 (explaining that the proposed settlement "precluded class members from individually suing [the defendant] for fraud"). Thus, the damage claims released in *Ticor* and *Adams* were exactly the kind of "individualized claim for money," *Dukes*, 131 S. Ct. at 2558, that this Court has already settled should be certified under Rule 23(b)(3). *See Dukes*, 131 S. Ct. at 2557-58.

Even in the pre-*Dukes* world, Objector Schulman exaggerates the extent of disagreement that existed among the lower courts, which was confined to cases involving actual, individualized damages and never extended to questioning whether class-wide damages

involving no individualized calculation could be awarded under Rule 23(b)(2). For example, he cites *Murray v. Auslander*,[7] as supposedly advocating a "hostile approach to opting out." Pet. 16. In fact, the *Murray* court found that because the damages sought were *individualized* and required "an inquiry into each class member's individual circumstances," the district court should consider Rule 23(b)(3) certification on remand. *Murray*, 244 F.3d at 813. The language Objector cites from *Murray* simply agreed with *Allison* – consistent with the principles later followed in *Amara* and *Johnson* – that if the monetary relief had been class-wide and incidental to injunctive relief, 23(b)(2) certification would have been proper. *Murray*, 244 F.3d at 812 (citing *Allison* with approval). Neither did *DeBoer v. Mellon*[8] depart from the general view that incidental, and not predominant, individualized damages are appropriate to Rule 23(b)(2) certification. In *DeBoer*, the agreed relief was a class-wide injunction changing how the defendant bank would calculate mortgage borrowers' escrow balances and providing for refund of any excess, similar to the class-wide relief that is generally understood to be appropriate to 23(b)(2) certification. *DeBoer*, 64 F.3d at 1173-74.

Quite contrary to Objector's contention that a "multi-faceted split" survived *Dukes*, the pattern that emerges both pre- and post-*Dukes* (with the exception

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[7] 244 F.3d 807 (11th Cir. 2001).

[8] 64 F.3d 1171 (8th Cir. 1995).

of the *Ticor/Adams* minority view that *Dukes* overruled) shows remarkable consistency, reserving Rule 23(b)(2) for cases of class-wide injunctive relief, involving damages only when they are incidental to the class-wide relief and do not require individualized inquiries. *Amara*, 775 F.3d at 519-20; *Johnson*, 702 F.3d at 371; *DeBoer*, 64 F.3d at 1175; *Murray*, 244 F.3d at 812; *Allison*, 151 F.3d at 415.

3. Objector cites no lower-court opinion taking a conflicting position on whether non-individualized, incidental damages may be recovered or released in a Rule 23(b)(2) settlement.

Belying his assertion that a conflict exists, Objector does not cite a single case, either before or after *Dukes*, holding that a class seeking class-wide incidental damages, involving no individualized calculation, cannot be certified under Rule 23(b)(2). Pet. 15-20. Instead, the cases he attempts to fashion into a purportedly ongoing "multi-faceted split" were in large part just like *Dukes* – discrimination cases seeking actual, individualized damages. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 977 (9th Cir. 2011) (plaintiffs sought lost pay and compensatory damages for employment discrimination); *Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir. 2003) (consent decree in Americans with Disabilities Act case released actual and treble damages); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir. 2001) (employment discrimination plaintiffs sought back pay, front pay, and

compensatory damages); *Eubanks v. Billington*, 110 F.3d 87, 89 (D.C. Cir. 1997) (employment discrimination plaintiffs recovered front pay and back pay). Because *Dukes* has already decided that these kinds of actual, individualized damages must be brought under Rule 23(b)(3), any difference among the circuits on the individualized damages question has already been resolved. *See Ellis*, 657 F.3d at 987 (recognizing that *Dukes* overruled the Ninth Circuit's former test for awarding actual damages to a 23(b)(2) class and remanding for application of the *Dukes* standard).

Nor does the Seventh Circuit's suggestion that certain cases might benefit from a "hybrid" approach, certifying injunctive relief claims under Rule 23(b)(2) and individualized damage claims under Rule 23(b)(3), conflict with *Allison*'s incidental damage rule or with the settlement approved here. *See Johnson*, 702 F.3d at 371 (observing hybrid approach might be beneficial if facts underlying damages and declaratory relief claims did not significantly overlap); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999). Far from conflicting with the Seventh Circuit's "hybrid certification" suggestion, the settlement structure in this case achieves much the same result by preserving 23(b)(2) Class members' individual actual damage claims. Pet. App. A20 (observing that "any (b)(2) Class member may pursue actual damages resulting from individualized harm"). In any case, as shown above, the Seventh Circuit in *Johnson* agreed with *Allison* that Rule

23(b)(2) class members could recover damages incidental to declaratory or injunctive relief,[9] and *Johnson* did not suggest that hybrid certification would be necessary if damages proved merely incidental to declaratory or injunctive relief. *Johnson*, 702 F.3d at 371 (finding that the case could proceed as 23(b)(2) class action "[s]hould it appear that the calculation of monetary relief will be mechanical, formulaic, a task not for a trier of fact but for a computer program").

From the Fifth Circuit's decision in *Allison*, through the recent *Johnson*, *Amara*, and *Berry* decisions, courts have consistently recognized that a claim for non-individualized damages incidental to injunctive relief may be certified under Rule 23(b)(2). Aside from the dispute – now resolved by *Dukes* – over Rule 23(b)(2) classes seeking actual, individualized damages, the circuits are in agreement, and Objector's Petition should therefore be denied.

B. The cases from which Objector attempts to manufacture a conflict regarding when damages are incidental to injunctive or declaratory relief are distinguishable.

Nor do the Circuits conflict over the narrower question of how to determine whether monetary relief is incidental to injunctive or declaratory relief. Pet. 21-24. *Allison* held that incidental damages are those "flow[ing] directly from liability to the class as a whole

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[9] *See* Section A.1, *supra*.

on the claims forming the basis of the injunctive or declaratory relief." *Allison*, 151 F.3d at 415. The Fifth Circuit further explained that such damages "should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances." *Id.* Court after court has echoed this formulation. *Bolin*, 231 F.3d at 975 (holding that "incidental means that 'damages [] flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief' ") (quoting *Allison*, 151 F.3d at 415); *Amara*, 775 F.3d at 518 (same); *Johnson*, 702 F.3d at 372.

Consistent with these principles, courts have uniformly recognized that statutory damage claims, like those released here, can be incidental to "final injunctive relief or corresponding declaratory relief." FED. R. CIV. P. 23(b)(2); *Disabled Americans, Inc.*, 211 F.R.D. at 466 (holding that statutory damages "are incidental and do not render certification under Rule 23(b)(2) inappropriate where the class also seeks injunctive relief. . . ."); *Fresco v. Automotive Directions, Inc.*, No. 03-cv-61063, 2009 WL 9054828, at *3 (S.D. Fla. Jan. 20, 2009) ("Statutory damage claims may be incidental to injunctive relief and do not preclude certification under Rule 23(b)(2)."); *see also Bolin*, 231 F.3d at 977 (recognizing that statutory damages "are susceptible to objective, uniform computation"). *Berry* fits squarely within this consensus in holding that "the statutory damages claims released under the Agreement are not

the kind of individualized claims that threaten class cohesion and are prohibited by *Dukes*." Pet. App. A13.

Objector does not even address *Disabled Americans* or *Fresco* (both of which he is aware of given that Plaintiffs cited them below); nor does he cite any cases disagreeing with *Allison*'s definition of incidental damages; nor does he cite any cases finding that statutory damages may not be incidental to predominating injunctive relief. Instead, he stretches to argue that, following a line of authority that (as the *Berry* court assumed, without deciding) private plaintiffs may not recover injunctive relief under the FCRA in a *litigation context*,[10] it was improper to find that "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole,"[11] despite the fact that LexisNexis had agreed to provide final injunctive relief in this settlement context. *See* Pet. 21-23. It is common ground, however, that parties settling litigation may agree to relief as a matter of contract, whether or not the plaintiff could have won that relief at trial. *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 522 (1986) (holding that "it is the agreement of the parties,

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[10] While the FCRA does not expressly provide that private plaintiffs may seek injunctive relief, neither does it expressly foreclose them from doing so. *See Englebrecht v. Experian Info. Servs.*, No. 12-cv-01547 2012, WL 10425986, at *5 (C.D. Cal. Nov. 6, 2012) (holding that private plaintiffs may seek injunctive relief under the FCRA); *Harris v. Equifax Info. Servs*., No. 6:06-cv-01810, 2007 WL 1862826, at *3 (D.S.C. June 26, 2007) (denying motion for summary judgment on FCRA injunctive relief claims).

[11] FED. R. CIV. P. 23(b)(2).

rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree"). The Fourth Circuit properly looked to the parties' settlement agreement as showing that, regardless of what plaintiffs might have pleaded or won at trial, "*final* injunctive relief" was, in the settlement context, "appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2) (emphasis added); *see* Pet. App. A16.[12] Indeed, Objector explicitly conceded as much in his briefing at the Fourth Circuit. Doc. 27, at 15 ("a class settlement may include remedies not found in the statute giving rise to the claims").

As Objector acknowledges, the Fourth Circuit distinguished the cases on which he principally relies, *Bolin* and *Christ v. Beneficial Corp.*,[13] because they arose in the context of *contested* class certification motions, where the courts had held that the plaintiffs could not achieve injunctive relief. Pet. App. A15. As the Fourth Circuit correctly observed, "simply to describe those circumstances is to differentiate them from those before us now." *Id.* A16. "[I]n neither of those cases did the defendants agree to a settlement;

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[12] While, as observed in *Amara*, 775 F.3d at 524 n.9, "*Wal-Mart* did not direct courts to divine the plaintiffs' motivation for bringing a lawsuit," the district court also relied on an extensive record showing that plaintiffs had sought the injunctive relief achieved here consistently in a series of nine mediations over the course of three cases, culminating in the settlement achieved in *Berry*. C.A. App. 1664-65.

[13] 547 F.3d 1292 (11th Cir. 2008).

instead the defendants in both cases opposed certification." *Id.* A15. Of course cases in which plaintiffs "would have no prospect of achieving injunctive relief" are entirely different from this case, where plaintiffs have achieved substantial business practice changes, which the district court found to be "meaningful, valuable injunctive relief" on behalf of the class. *Id.* A13. As the Fourth Circuit observed, "many FCRA class action disputes are resolved in part through consent decrees." *Id*. A15.

Contrary to Objector's representation, the Fourth Circuit did not apply a lesser standard of Rule 23 scrutiny to this settlement class. *See* Pet. 23. In recognizing the importance of the fact that this case involves a settlement rather than a contested class certification motion for purposes of distinguishing *Bolin* and *Christ*, the courts below in no way relaxed the Rules' requirements of typicality, commonality, and adequacy of representation. To the contrary, they analyzed each Rule 23(a) factor in detail. Pet. App. A10-23, B24-32. They also rigorously applied Rule 23(b)(2), finding that because the final injunctive relief secured was indivisible and common to the entire class, "this is a paradigmatic Rule 23(b)(2) case." Pet. App. A13, B27. Thus, this case has nothing in common with *Amchem*,[14] *Ortiz*,[15] and *Telectronics*,[16] where proposed settlements would have

[14] 521 U.S. 591 (1997).

[15] 119 S. Ct. 2295 (1999).

[16] 221 F.3d 870 (6th Cir. 2000).

extinguished individualized tort damage claims without a right of opt-out. *See* Pet. 23. Here, where all actual, individualized damage claims are preserved, there can be no conflict with *Amchem* or *Ortiz*.

Neither is this case similar to *Hecht v. United Collection Bureau*, 691 F.3d 218 (2d Cir. 2012), or *Crawford v. Equifax Payment Services*, 201 F.3d 877 (7th Cir. 2000), both of which involved sham "injunctive relief" that those courts found would have no benefit for the class. In *Hecht*, the defendant debt collector had called class members without disclosing its identity, in violation of the Fair Debt Collection Practices Act ("FDCPA"). The plaintiffs sought damages, but obtained only $13,254 (all of which went to cy pres), as well as attorney's fees and costs, on behalf of a class of more than two million individuals. *Hecht*, 691 F.3d at 220. The injunctive relief consisted of no more than ordering the defendant to comply with the law in the future. *Id.* Despite this empty result, the court had approved the settlement, with no right to opt out, no preservation of individual damage claims, and only an ad in a single issue of *USA Today* as notice, under Rule 23(b)(2). *Id*. at 220. As the Second Circuit observed, the injunctive relief was exclusively forward-looking and would not benefit class members, who had no imminent prospect of receiving more debt-collection calls in the future. *Id.* at 223. Thus, the injunctive relief was not "predominant," but little more than an "insignificant or sham request." *Id.* at 223.

Similarly in *Crawford*, the proposed settlement would have bound class members (including two subclasses pursuing money damage claims separately in related class actions) without notice or a right to opt out, despite the fact that the requested injunction was no more than a promise to comply with the law going forward. *Crawford*, 201 F.3d at 882. The defendant also agreed to stop using form letters that allegedly violated the FDCPA. *Id.* As the Fourth Circuit found, "the change in form letters is useful to *class members* only if they again write bad checks that Equifax has verified." *Id.* (emphasis original). In this factual context, the *Crawford* court's cursory observation that "all private actions under the [FDCPA] are for damages," should not be taken to predict how the Seventh Circuit would view a case that, like this one, achieved "meaningful, valuable injunctive relief." Pet. App. A13.[17] The Seventh Circuit found the settlement "substantively troubling" in other ways also, noting that all money recovered would go to attorney's fees, service awards, and cy pres, with no relief for class members. *Crawford*, 201 F.3d at 882.

Objector contends – distorting the facts in an attempt to align this case with *Crawford* and *Hecht* – that the injunctive relief here is no more than an

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[17] Nor could it predict how the Seventh Circuit would view the availability of damages under the FCRA. *See Englebrecht*, 2012 WL 10425986, at *4 (distinguishing the FCRA from the FDCPA and holding that the FCRA, unlike the FDCPA, allows injunctive relief in part because "[t]he harm from which the statute aims to protect consumers is ongoing, and . . . monetary damages may not provide an adequate remedy").

agreement "to comply with the FCRA in connection with some, though not all, of its challenged reports in the future." Pet. 7-8. As shown above, however (*see supra* Sections B, A.2.c), the injunctive relief achieved here, in stark contrast to *Crawford* and *Hecht*, secured sweeping practice changes that internationally renowned privacy expert Neil Richards described as "provid[ing] consumers with benefits so substantial that their monetary value is in the billions of dollars." Pet. App. A26. Class members' data is still in LexisNexis' database, and Class members will all benefit from the right to review and, if necessary, correct the accuracy of this information. Indeed, as Professor Richards explained, the protections afforded by the agreed business practice changes extend even beyond the FCRA's legal requirements. C.A. App. 576.

While Objector feigns concern that the release of statutory damage claims "takes away and impairs [Class members'] claims for monetary damages to which they are (or may be) entitled under the statute," (Pet. 22), the district court here found that where Class members' statutory damage claims were "speculative at best," injunctive relief was the appropriate final relief. Pet. App. A25. The Fourth Circuit went even further, opining that the district court's evaluation of the strength of the 23(b)(2) Class's statutory damage claims was "generous." *Id.* Indeed (and ironically), Objector Schulman himself is on record at the Fourth Circuit as harboring no belief "that the claims underlying this litigation are meritorious." Doc. 54, at 3. The concern expressed in *Crawford* and *Hecht* that the (potentially valuable) released damage claims predominated

over the (worthless to the class) injunctive relief thus has no application to the facts as found by the district court and Fourth Circuit in this case.

Objector also falsely analogizes this case to *Crawford* and *Hecht* when he claims that the 23(b)(2) Class "did not receive actual or even the best practicable notice" of the settlement. Pet. 24. The publication notice here was nothing like the single USA Today ad that the *Hecht* court disparaged as a "mere gesture,"[18] but included a variety of advertisements in numerous "national newspaper supplements and consumer magazines" as well as internet banner, social media, and search advertisements. *Id.* As the district court and Fourth Circuit found, "[n]otice of the proposed settlement in this case reached 75.1 percent of the (b)(2) Class members." Pet. App. A34. Given the size of the class, and based on the detailed declaration of a respected notice expert, the district court found that this nationwide media campaign met "the requirements of [Rule] 23(c)(2)(B) and due process" and "constitute[d] the best notice practicable under the circumstances." C.A. App. 617.

In short, when the district court's findings based on a detailed record are properly credited, nothing in *Bolin*, *Christ*, *Hecht*, or *Crawford* indicates that those courts would have reached a different result if faced with the facts of this case. No legal conflict exists, and Objector's petition should be denied.

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[18] *Hecht*, 691 F.3d at 225.

C. The Fourth Circuit's decision is correct.

The Fourth Circuit correctly applied Rule 23 and due process standards in affirming certification of the 23(b)(2) Class. The Rules provide for certification if "final injunctive relief or corresponding declaratory relief is appropriate to the class as a whole." FED. R. CIV. P. 23(b)(2). Here, the injunctive relief "is indivisible and applicable to all members of the Rule 23(b)(2) class." C.A. App. 2887. Because of this Settlement, all Class members will have the right to see their personal information in LexisNexis' database and, if necessary, correct it. These sweeping practice changes will be implemented company-wide, benefiting all Class members. *Id*.

The Settlement only releases claims for statutory damages that "flow directly from liability to the class *as a whole*." *Dukes*, 131 S. Ct. at 2560 (citing *Allison*, 151 F.3d at 415). The Fourth Circuit recognized that "the statutory damage claims released under the Agreement are not the kind of individualized claims that threaten class cohesion and are prohibited by *Dukes*." Pet. App. A13. The Fourth Circuit was therefore correct in calling this a "paradigmatic Rule 23(b)(2) case." Pet. App. 25; *see Dukes*, 131 S. Ct. at 2557 (holding that 23(b)(2) certification is appropriate "when a single injunction or declaratory judgment would provide relief to each member of the class").

The Fourth Circuit also correctly held that this Settlement comports with due process. "[P]rocedural

due process is a 'flexible concept,' requiring varying degrees of protection 'depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur.' " Pet. App. A21 (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985)). Here, Rule 23(b)(2) Class members' interests were protected by adequate representation, as well as by a thorough fairness review. Pet. App. A19 ("[T]he premise behind certification of mandatory classes under Rule 23(b)(2) is that because the relief sought is uniform, so are the interests of class members, making class-wide representation possible and opt-out rights unnecessary.") (citing *Dukes*, 131 S. Ct. at 2558).

In addition, the parties implemented an extensive notice program estimated to reach 75.1% of Class members. C.A. App. 1960-66, 2248, 2861; *see* Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist & Plain Language Guide* 3 (2010) ("It is reasonable to reach between 70-90%."). The Fourth Circuit found that this notice, giving Class members an opportunity to object, further helped protect Class members' due process rights. Pet. App. A19-20; *see Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 507-08 (5th Cir. 1981).

Finally, as the Fourth Circuit observed, "the particular terms of this Agreement make opt-out rights especially unnecessary" because "(b)(2) Class members are 'opted out' already" in that they retain the right to pursue any actual damage claims separately. Pet. App. A20. Given all the procedural protections provided, the

Fourth Circuit found that due process did not require an additional right to opt-out to pursue "speculative at best" statutory damage claims. Pet. App. A19-21.

D. This case is not an appropriate vehicle for taking up any due process issues raised by incidental damage claims certified under Rule 23(b)(2).

As shown above, no conflict exists regarding whether claims for damages incidental to predominating injunctive relief are properly certified under Rule 23(b)(2), and the Petition should be denied for that reason alone. But even if this Court were inclined to take up the incidental damages issue, this case does not present the right vehicle for doing so for four independent reasons.

First, whether due process requires notice in a case releasing incidental damages under Rule 23(b)(2) is not cleanly presented because notice was in fact provided to the 23(b)(2) Class by extensive and effective publication, which the district court found was the "best notice practicable under the circumstances." C.A. App. 617. The due process issue is therefore inextricably bound up with the district court's factual findings.

Second, this case does not present any issues that may arise regarding whether incidental damages may be awarded, as opposed to merely released, under Rule 23(b)(2). The Fourth Circuit assumed, without deciding, that "a class settlement that *releases* damages is on precisely the same footing under Rule 23(b)(2) and

the Due Process Clause as one that *provides* for damages." Pet. App. A13 (emphasis original). The Court noted, however, that LexisNexis disputes this point. *Id.* To the extent that this distinction is relevant, any different issues that might arise in a case actually awarding damages are not presented here. *See Johnson*, 702 F.3d at 369; *Amara*, 775 F.3d at 519.

Third, whether due process requires a right to opt-out from even damage claims certified under Rule 23(b)(2) is not cleanly presented because, as the Fourth Circuit observed, this settlement's structure means that "(b)(2) Class members are 'opted out' already" in that their actual, individualized damage claims are preserved. Pet. App. A20. Objector attempts to downplay this preservation of individualized actual damage claims, proclaiming without any support that class litigation is the "only practical means of pursuing any actual damages claims." Pet. 8. To the contrary, individual FCRA litigation for actual damages is common, and recoveries regularly stretch into six figures, and even into seven figures. *See, e.g.*, *Bach v. First Union Nat. Bank*, 149 Fed. App'x 354, 356 (6th Cir. 2005) ("The jury found that [Defendant First Union] had willfully violated the FCRA and awarded Bach $400,000.00 in compensatory damages and $2,628,600.00 in punitive damages."); *Miller v. Equifax Info. Servs., LLC.*, No. 3:11-CV-01231-BR, 2014 WL 2123560, at *11 (D. Or. May 20, 2014) (reducing jury's punitive damages to $1,620,000 and awarding $180,000 actual damages).

Fourth and finally, the opt-out issue cannot be neatly applied to the agreed injunctive relief in this case, because there is simply no practical way for a class member to opt out of what is necessarily an all-or-nothing change in how LexisNexis does business. The agreed injunctive relief consists of practice changes that LexisNexis will implement across its operations, including, *inter alia*, changing how its databases are structured, changing the products it offers to the public, and changing its policies for handling consumer inquiries. *See* C.A. App. 582-86. LexisNexis cannot build one set of products and databases for the vast majority of its business records and a separate system for a handful of consumers who might choose not to benefit from the increased privacy protections afforded by this Settlement. This injunction thus presents a classic case in which "the relief sought must perforce affect the entire class at once." *Dukes*, 564 U.S. at 2558. As this Court recognized in *Dukes*, Rule 23(b)(2) "mandatory" classes are appropriate in such cases, because allowing class members to opt out would, as a practical matter, preclude the possibility of resolving the case. *Id.*; *see* Pet. App. A21 (explaining "[t]hat such a rule would discourage settlement seems undeniable; defendants like Lexis surely will not agree to settlements like this one if they cannot buy something approaching global peace").

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CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES A. FRANCIS
DAVID SEARLES
JOHN SOUMILAS
FRANCIS & MAILMAN, P.C.
Land Title Building
100 S. Broad St., 19th Floor
Philadelphia, PA 19110

MICHAEL A. CADDELL
Counsel of Record
CYNTHIA B. CHAPMAN
AMY E. TABOR
CADDELL & CHAPMAN
628 East 9th Street
Houston, TX 77007
(713) 751-0400
mac@caddellchapman.com

LEONARD A. BENNETT
MATTHEW J. ERAUSQUIN
CONSUMER LITIGATION
ASSOCIATES, P.C.
763 J. Clyde Morris Blvd.,
Suite 1A
Newport News, VA 23601

Counsel for Respondent
Gregory Thomas Berry

AUGUST 2016