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.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether certification of a mandatory settlement class under Rule 23(b)(2) of the Federal Rules of Civil Procedure comports with Rule 23(b)(2) and due process where (1) the settlement agreement provides the class valuable, indivisible injunctive relief that would be afforded to class members even if they were given an opt-out right, (2) the settlement releases only non-individualized statutory damages that—even if successfully pursued—would be uniform to the class as a whole, and (3) the settlement does not release class members' individualized claims for actual damages.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6, respondents LexisNexis Risk and Information Analytics Group Inc., Seisint, Inc., and Reed Elsevier Inc. (collectively referenced herein as "LexisNexis") state the following:

LexisNexis Risk and Analytics Group Inc. is now known as LN Risk Solutions FL Inc. Seisint Inc. is now known as LexisNexis Risk Data Management Inc. The parent companies of LN Risk Solutions FL Inc. are LexisNexis Risk Holdings Inc. and LexisNexis Risk Data Management Inc. The parent company of LexisNexis Risk Holdings Inc. and LexisNexis Risk Data Management Inc. is Reed Elsevier Inc. The following entities are parent companies of Reed Elsevier Inc.: Reed Elsevier U.S. Holdings Inc., Reed Elsevier Overseas BV, Reed Elsevier Holdings BV, Reed Elsevier (Holdings) Ltd., and Reed Elsevier Group plc. The parent companies of Reed Elsevier Group plc are publicly traded companies Reed Elsevier PLC (LSE: REL; NYSE: Ruk) and Reed Elsevier NV (Euronext: REN; NYSE: ENL).

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INTRODUCTION

The settlement agreement at issue here is the product of hard-fought negotiations spanning a series of three putative class actions brought against LexisNexis by the same class counsel—in each case, alleging that LexisNexis willfully violated the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, et seq., and seeking statutory and actual damages. To secure statutory damages, plaintiffs would have had to demonstrate that LexisNexis willfully failed to treat the reports at issue as consumer reports for purposes of the FCRA. Yet the Federal Trade Commission ("FTC") had definitively stated they were *not* consumer reports, thus fatally undermining the claim to statutory damages.

As a result of the FTC's finding, the district court deemed plaintiffs' claim for statutory damages "speculative at best," Pet. App. B35, and the court of appeals characterized that assessment as "generous," explaining that "it is hard to see" how plaintiffs would ever secure statutory damages. Pet. App. A25-A26. Nevertheless, in exchange for the class's agreement to release its claim to statutory damages, LexisNexis agreed to an injunction requiring groundbreaking, industry-leading protections. The court of appeals noted that those measures are worth *billions* of dollars to consumers—far more than a token payment to each class member would be (even assuming such a payment to such a large class would even be feasible). And, critically, class members *retain* the right to sue LexisNexis for actual damages.

The settlement class here fits well within the requirements of Rule 23(b)(2) of the Federal Rules of Civil Procedure. "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (internal quotation marks omitted). Here, it is uncontested that the injunctive relief is indivisible and would be extended to the class as a whole even if class members were given opt-out rights. Moreover, on these facts, the monetary relief released in the settlement—statutory damages—is not individualized: as the court of appeals concluded (and petitioner does not dispute), LexisNexis's conduct was uniform toward the class as a whole, and, under the circumstances of this case, any statutory damages ultimately awarded would also be uniform. The only individualized monetary relief—actual damages—is not included in the certified class. In other words, all individual claims to individualized relief are opted out by the very structure of the settlement agreement.

Petitioner presents this case as an opportunity to decide whether monetary relief can ever be included in a Rule 23(b)(2) class—an issue he says this Court has been unable to reach after two failed attempts. But this Court *already* decided the most substantial part of that question in *Wal-Mart*, holding that claims for individualized monetary relief cannot be certified under Rule 23(b)(2), and thus resolving the only conflict

within the courts of appeals. Since *Wal-Mart*, every court of appeals to have reached the question has agreed that claims for non-individualized, incidental monetary relief may be included in a Rule 23(b)(2) class. Petitioner grasps at straws to identify two other supposed divisions within the courts of appeals, but his efforts there fail too.

Most significantly, even if those conflicts existed, they would not implicate the decision below. The court of appeals' decision here was limited to unique facts: the existence of a settlement that provides for indivisible injunctive relief to the class as a whole, releases only statutory damages that would be uniform to the class members, and permits class members to pursue their individualized claims for actual damages. Petitioner has not identified a single decision that has addressed Rule 23(b)(2) or due process in these circumstances, much less a decision that disagrees with the decision below.

Finally, this would be an especially poor vehicle to decide whether monetary claims can be included in a mandatory Rule 23(b)(2) certification. Given that the court of appeals has already effectively held that the remedy of statutory damages released by the settlement agreement would be unavailable, providing the class with a right to pursue that remedy would be pointless. Indeed, petitioner—the only individual out of a 200 million-person class now objecting to the settlement—is on record stating that the class's original demand for statutory damages is meritless. He is thus

a remarkably unsuitable party to advocate for the class's right to pursue it.

The petition for a writ of certiorari should be denied.

STATEMENT

A. Legal Framework

The FCRA regulates the collection, dissemination, and use of consumer data by consumer reporting agencies—companies that "assembl[e] or evaluat[e] consumer credit information * * * for the purpose of furnishing consumer reports to third parties." 15 U.S.C. § 1681a(f). "Consumer reports" are "communication[s] of any information by a consumer reporting agency bearing on" any of seven specific consumer characteristics and prepared for use in determining a consumer's "eligibility for," among other things, credit. *Id.* § 1681a(d)(1).

The FCRA provides various consumer protections. None of the FCRA's protections applies, however, unless there is a consumer reporting agency issuing consumer reports. *Id.* §§ 1681b(a), 1681g(a), 1681i(a)(1)(A).

The FCRA provides two types of relief for a consumer reporting agency's noncompliance with the statute's requirements. First, the FCRA creates liability for "actual damages sustained by the consumer" as a result of the consumer reporting agency's violation, regardless of whether the violation was willful or negligent. *Id.* §§ 1681n(a), 1681o(a). Second, if the consumer reporting agency's violation was willful, the

FCRA also makes available statutory damages of between $100 and $1,000 (in lieu of actual damages), as well as punitive damages. *Id.* § 1681n(a).

To willfully violate the FCRA (and therefore be subject to statutory damages), a defendant must act either knowingly or in reckless disregard of its statutory obligations. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007). If a company fails to comply with a FCRA requirement because of its erroneous view of the law, there is no willful violation as long as the company's view was not "objectively unreasonable." *Id.* at 69. This Court has observed that the FCRA's "statutory text" is "less-than-pellucid." *Id.* at 70. Accordingly, it has held that, in the absence of "guidance from the courts of appeals or the [FTC] that might have warned [a defendant] away from the view it took," the defendant's conduct is not objectively unreasonable and therefore not willful. *Ibid*.

B. Factual Background

During the time period at issue in this case, LexisNexis used publicly available information to prepare and sell, under the Accurint® brand, a number of identity reports used to locate people and assets, authenticate identities, and verify credentials. Pet. App. A3. Accurint® reports were not sold for purposes that might have rendered them FCRA consumer reports. C.A. J.A. 52; *see* 15 U.S.C. § 1681a(d)(1). Because LexisNexis consistently maintained that its Accurint®

identity reports were not consumer reports, LexisNexis did not provide consumers all the rights that would be required under the FCRA if they were. *Ibid.*

In 2008, the Federal Trade Commission published a letter that had been unanimously approved by a vote of the Commission, stating that Accurint® reports were not consumer reports. Pet. App. A5; FTC Opinion Letter to Marc Rotenberg at 1 n.1, *In re Reed Elsevier Inc.*, File No. 052-3094, Docket No. C-4226 (FTC July 29, 2008).[1]

C. Proceedings Below

1. Proceedings in the district court

a. Plaintiffs' allegations

This was the third putative-class-action suit brought against LexisNexis by the same counsel. Pet. App. A4. (The plaintiffs in the first case dismissed the claims after LexisNexis moved to dismiss for lack of standing. *Ibid.* The parties in the second case reached an individual settlement. *Ibid.*) Like the previous plaintiffs, the named plaintiffs in this suit alleged that LexisNexis willfully violated the FCRA by selling Accurint® reports without providing consumer protections required under the FCRA. Pet. App. A4, A6. Plaintiffs requested both statutory and actual damages. Pet. App. A6. All of plaintiffs' allegations depended on proving that Accurint® reports were consumer reports. Pet. App. A3-A4.

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[1] http://www.ftc.gov/sites/default/files/documents/cases/2008/08/080801reedrotenbergletter.pdf.

b. The proposed settlement

Plaintiffs' counsel and LexisNexis's counsel engaged in a series of mediation conferences with the aid of three mediators, including active and retired U.S. magistrate judges. Pet. App. B3. Over the course of all three cases, plaintiffs' counsel and LexisNexis's counsel engaged in nine in-person mediation conferences and many more telephone conferences. Pet. App. A4.

Plaintiffs and LexisNexis ultimately reached a comprehensive settlement, which calls for the certification of two classes. Pet. App. A6.

The Rule 23(b)(3) class. The first class consists of the approximately 31,000 persons who actually attempted to invoke consumer rights they would have had under the FCRA if Accurint® reports were consumer reports. *Ibid.* The settlement agreement provides for LexisNexis to pay $13.5 million to the class members on a pro rata basis after deduction of attorney's fees—resulting in approximately $300 per class member. Pet. App. A6-A7, B15-B16. In return, the class releases all FCRA claims (and all associated remedies, including actual damages) against LexisNexis. Pet. App. A6.

Certification of that class under Rule 23(b)(3) and approval of the settlement as to that class were not challenged on appeal. Pet. App. A7.

The Rule 23(b)(2) class. The second class, certified under Rule 23(b)(2), consists of all persons in the United States about whom the Accurint® database

contained information during a defined period. *Ibid.* In accordance with Rule 23(b)(2), the members of this class do not have the right to opt out of the settlement. Pet. App. B14.

The settlement provides for injunctive relief that guarantees extensive, prospective changes affording the class members and consumers throughout the United States significant benefits. The court of appeals and the district court explained that the settlement effects "a fundamental change in the product suite that Lexis offers the debt-collection industry that 'will result in a significant shift from the currently accepted industry practices.'" Pet. App. A8 (quoting Pet. App. B8).

Under portions of the settlement agreement that have now been fully implemented, LexisNexis has overhauled its Accurint® product, splitting it into two new types of reports. Pet. App. A8. The first, called "Collections Decisioning," is recognized by LexisNexis as a FCRA consumer report. *Ibid.* LexisNexis thus restricts who can purchase Collections Decisioning reports and the purposes for which they may be used. *Ibid.* Consumers also are afforded the FCRA's rights, such as the right to view and dispute the information in their Collections Decisioning report. *Ibid.*

The second product, called "Contact & Locate," is not treated as a FCRA consumer report. Pet. App. A8-A9. Contact & Locate reports assist in finding debtors and assets for the purpose of repossession. Pet. App. B10. Only information that bears on a consumer's or

an asset's location appears on a Contact & Locate report. *Ibid*. Even though Contact & Locate is not a consumer report, LexisNexis nevertheless provides consumers valuable rights similar to those afforded under the FCRA for consumer reports, including an annual free copy of their reports and the ability to submit statements regarding information in their reports. Pet. App. A8-A9.

In consideration for these valuable reforms, the Rule 23(b)(2) class agreed to waive the incremental remedies associated with willful FCRA violations—i.e., statutory damages. Pet. App. A8. Class members retain the right, however, to seek individual actual damages for FCRA violations. *Ibid.*

c. Petitioner's objection to the settlement

An "extensive and substantial notice plan" was executed, under which approximately 75.1% of the approximately 200 million potential Rule 23(b)(2) class members were notified of the settlement. Pet. App. B3-B5. Nine objections were filed. Pet. App. B6. Seven objectors, including petitioner, were individual class members representing themselves pro se. Pet. App. B6. An eighth objector claimed to represent approximately 20,000 class members, and a ninth objector claimed to represent approximately 7,000 class members. Pet. App. B6-B7 (terming these groups the "Aaron Objectors" and the "Cochran Objectors," respectively).

Petitioner's objection was not based on any desire to opt out so that he could pursue statutory damages

from LexisNexis. On the contrary, petitioner has stated that the claims asserted against LexisNexis are baseless. He explained to the court of appeals that he "harbors no * * * affirmative belief" "that the claims underlying this litigation are meritorious." C.A. Dkt. No. 54 at 3.

Rather, petitioner is a "professional objector." He is an attorney with the Center for Class Action Fairness ("CCAF"), C.A. J.A. 664—an organization whose primary mission is objecting to class action settlements. *See* Publications: Class Action Fairness News Releases, https://cei.org/publications/issues/11175/523 (press releases announcing objections). In numerous cases, petitioner filed objections to class action settlements in his capacity as a CCAF attorney representing objectors.[2] In some cases, however, the "objectors" who

[2] *See* Objection of Barbara Comlish and Kathryn Artlip to Settlement Approval and to Request for Attorneys' Fees, *Rougvie v. Ascena Retail Grp., Inc.*, No. 2:15-cv-00724-MAK (E.D. Pa. April 14, 2016), ECF No. 103; Objection of Wei Cyrus Hung, *Jackson v. Wells Fargo Bank, N.A.*, No. 2:12-cv-01262-DSC (W.D. Pa. Jan. 29, 2015), ECF No. 95; Objection of Kevin Young and Renewal of Notice of Appearance, *McDonough v. Toys "R" Us, Inc.*, No. 2:06-cv-00242-NIQA (E.D. Pa. Aug. 22, 2014), ECF No. 871; Objection of the Buckeye Institute for Public Policy Solutions to American Express Class Action Settlement, *In re American Express Anti-Steering Rules Antitrust Litig. (II)*, No. 11-md-2221-NGG-RER (E.D.N.Y. June 6, 2014), ECF No. 414; Objection of Joshua Blackman, *Gascho v. Global Fitness Holdings, LLC*, No. 2:11-cv-436-GCS-NMK (S.D. Ohio Dec. 27, 2013), ECF No. 122; Notice of Appearance of Adam E. Schulman on Behalf of Objector Brian Perryman, *In re EasySaver Rewards Litig.*, No. 3:09-cv-2094-BAS-WVG (S.D. Cal. Dec. 21, 2012), ECF No. 260; Notice of Appearance,

petitioner represented were other attorneys with CCAF.[3] And in at least two cases (including this one), petitioner himself is an objector, either appearing pro se or represented by other attorneys at CCAF.[4]

d. Approval of the settlement

The district court overruled the objections, certified the classes, and approved the settlement. Pet. App. B1-B40.

The court explained that a "class may be certified pursuant to Rule 23(b)(2) when 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.'" Pet. App. B27 (quoting Fed. R. Civ. P. 23(b)(2)). The court concluded this test

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In re Dry Max Pampers Litig., No. 1:10-cv-00301-TSB (S.D. Ohio Sept. 19, 2011), ECF No.71.

[3] Theodore H. Frank's Objection to Proposed Settlement, *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, No. 2:13-md-02439-LA (E.D. Wis. Dec. 15, 2015), ECF No. 51; Objection to Class Settlement in *Poertner v. The Gillette Company, et al.* of Theodore Frank, *Poertner v. The Gillette Co.*, No. 6:12-cv-00803-GAP-DAB (M.D. Fla. Feb. 27, 2014), ECF No. 126; Objection of Melissa Holyoak, *Richardson v. L'Oreal USA, Inc.*, No. 1:13-cv-00508-JDB (D.D.C. Sept. 11, 2013), ECF No. 19; Second Objection of Theodore H. Frank, *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, No. 1:09-md-2023-BMC (E.D.N.Y. Mar. 14, 2013), ECF No. 225.

[4] *See* C.A. J.A. 664; Opening Brief of Appellants Amy Alkon, Theodore H. Frank, Melissa Holyoak, Nicholas S. Martin, and Adam Schulman, *Wilson v. BP Corp. N. Am., Inc.* (*In re Motor Fuel Temperature Sales Practices Litig.*), No. 15-3228 (10th Cir. Feb. 8, 2016).

was satisfied here "because the injunctive relief sought is indivisible and applicable to all members of the Rule 23(b)(2) class." Pet. App. B27-B28.

The court rejected the objectors' argument that certification of a mandatory Rule 23(b)(2) class was improper because monetary claims supposedly predominated over the injunctive relief awarded in the settlement. Pet. App. B28. The court explained that "the statutory damages at issue in this case are not individualized." Pet. App. B29. The court identified LexisNexis's "conduct, which was uniform with respect to each of the class members," as the "overarching issue" in the case. *Ibid.* (citation omitted). Accordingly, "the appropriate amount of statutory damages would also be uniform as to each of the class members, and is not 'individualized' because it is the product of rote calculation." *Ibid.* Moreover, the court emphasized that "the Settlement Agreement preserves Rule 23(b)(2) class members' rights to bring claims for actual damages, thereby preserving their due process rights." Pet. App. B30.

The district court also found that the settlement "is fair, reasonable, and adequate." Pet. App. B33. The court observed that "the fact that most clearly demonstrates the fairness, reasonableness, and adequacy of the Settlement Agreement is the relative strength of each Party's legal claim or defense." Pet. App. B34 (citing *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)). The court explained that the agreed-to injunctive relief would require LexisNexis to overhaul

its Accurint® reports even though "the ultimate merit of Plaintiff's claims is far from certain." Pet. App. B34.

Although "Plaintiffs' claims are predicated on Accurint® reports being deemed 'consumer reports' within the meaning of the FCRA," the court noted that "the FTC in 2008 voted unanimously that Accurint® for Collection reports do not fall within the FCRA." Pet. App. B35. Thus, "[a]bsent some authority to the contrary, the merit of Plaintiffs' claims—and, necessarily, the absent class members' theoretical future claims—is speculative at best." *Ibid.* Accordingly, "the benefit of substantial relief without the risk of litigation demonstrates the adequacy of the Settlement Agreement." *Ibid.*

2. Proceedings in the court of appeals

After petitioner (proceeding pro se), the Aaron Objectors, and the Cochran Objectors appealed, the court of appeals unanimously affirmed. Pet. App. A1-A34.

a. The court first rejected the objectors' argument that certification under Rule 23(b)(2) was improper because the settlement releases class members' claims for statutory damages under the FCRA. Pet. App. A12-A17.

At the outset, the court of appeals observed there was a disputed threshold question concerning whether "a class settlement that *releases* damages claims is on precisely the same footing under Rule 23(b)(2) and the Due Process Clause as one that *provides* for damages." Pet. App. A13 n.3. The court noted that "Lexis contests

that premise," but the court "d[id] not decide its validity." *Ibid*. Instead, the court "assume[d] for purposes of this opinion" that the analysis would be the same in both settings. *Ibid.*

The court explained that "where monetary relief is 'incidental' to injunctive or declaratory relief, Rule 23(b)(2) certification may be permissible," but "[w]here monetary relief predominates, Rule 23(b)(2) certification is inappropriate." Pet. App. A12. Relying on *Wal-Mart*, the court of appeals explained that "claims for *individualized* monetary relief * * * are not 'incidental' for purposes of Rule 23(b)(2) and may not be certified under that Rule." *Ibid.* (emphasis added) (quoting *Wal-Mart*, 564 U.S. at 360).

The court of appeals determined that "[t]he meaningful, valuable injunctive relief afforded by the Agreement is indivisible, benefitting all members of the (b)(2) Class at once," making this "a paradigmatic Rule 23(b)(2) case." Pet. App. A13 (quotation marks and brackets omitted). Moreover, the statutory damages released in the settlement are incidental, "not the kind of *individualized* claims that threaten class cohesion and are prohibited by *Dukes*." Pet. App. A13 (emphasis added). "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.'" *Ibid.* (quoting Pet. App. B29). Thus, "[i]f 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." Pet. App. A13-A14 (emphasis added).

Significant to the court of appeals' conclusion was the fact that the settlement agreement did not release the class members' claims for individualized relief: "[t]here are, to be sure, individualized monetary damages claims at issue here—those for actual damages under the FCRA—but those claims, as the district court emphasized, are *retained* by the (b)(2) Class members." Pet. App. A14.

The court of appeals also rejected the objectors' argument that the statutory damages released in the settlement cannot be deemed "incidental" to injunctive relief on the ground that injunctive relief is unavailable under the FCRA. *Ibid.* The court of appeals assumed without deciding that objectors were correct that the FCRA "does not permit consumers to seek injunctive remedies." Pet. App. A14-A15. The court explained, however, that this question of statutory authority was "beside the point" because in "the settlement context, it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all," and "Lexis is free to agree to a settlement enforcing a contractual obligation that could not be imposed without its consent." Pet. App. A15 (citing, inter alia, *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 522 (1986)) (quotation marks and brackets omitted).

b. The court of appeals also held that due process does not give objectors "a blanket right to opt out of a

Rule 23(b)(2) settlement that provides purely injunctive relief solely because non-individualized statutory damages claims are released, while individualized actual damages claims are retained." Pet. App. A20-A21. The court concluded that because the monetary relief released by the settlement is non-individualized, "individualized adjudications are unnecessary" and therefore "opt-out rights are not required." Pet. App. A18. Indeed, "the 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." Pet. App. A19.

The court emphasized that "the particular terms of this Agreement make opt-out rights especially unnecessary here." Pet. App. A20. The settlement agreement "preserves Rule 23(b)(2) class members' rights to bring claims for actual damages, thereby preserving their due process rights." *Ibid.* (quoting Pet. App. B30). "The *Dukes* Court was concerned about the 'need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives' or go it alone—a choice Rule 23(b)(2) does not ensure that they have." *Ibid.* (quoting *Wal-Mart*, 564 U.S. at 364 (emphasis in *Wal-Mart*)). "But 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." *Ibid.* "In this sense, (b)(2) Class members are 'opted out' already, by virtue of the settlement in question." *Ibid.*

The court also noted that class members' due process rights are protected by other procedural safeguards: fair and adequate representation by the named plaintiffs and class counsel, notice and an opportunity to object, and review of the settlement to ensure it is fair, adequate, and reasonable. Pet. App. A19-A20. And the court observed that its conclusion was consistent both with this Court's decision in *Wal-Mart* and with the post-*Wal-Mart* decisions of other courts of appeals, which "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. A19 (citing *Amara v. CIGNA Corp.*, 775 F.3d 510, 519-20 (2d Cir. 2014), and *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 369-71 (7th Cir. 2012)).

c. Finally, the court of appeals affirmed the district court's finding that the settlement as to the Rule 23(b)(2) class is fair, reasonable, and adequate. Pet. App. A23-A29. The court explained that "the fairness of a deal under which class members give up statutory damages in exchange for injunctive relief depends" on the strength of the plaintiffs' assertion "that they are entitled to statutory damages in the first place." Pet. App. A25. Here, the district court had deemed the strength of the plaintiffs' case "speculative at best," and the court of appeals thought that assessment "generous." *Ibid.* Applying this Court's decision in *Safeco* and expressly citing the FTC's 2008 opinion letter, the court of appeals explained that "with agency guidance

expressly specifying that Accurint reports are *not* subject to the FCRA, it is hard to see how Lexis can be said to have acted unreasonably by adopting that reading." Pet. App. A25-A26 (citation omitted). Yet, despite a weak case on the merits, class members will receive "benefits so substantial" that an information privacy law expert found "their monetary value is in the billions of dollars." Pet. App. A26.

* * *

The Aaron and Cochran objectors did not file petitions for writs of certiorari. Out of the approximately 200 million class members, petitioner is the only individual seeking review of the court of appeals' decision.

REASONS FOR DENYING THE PETITION

A. The Court Of Appeals' Decision Does Not Conflict With The Decisions Of Any Other Court

Petitioner states that this Court has twice been unable to reach the question of whether class members must be given the right to opt out of any class action that asserts monetary claims on their behalf. Pet. 13-14, 25. But since then, this Court decided the most substantial part of that question in *Wal-Mart*, and, in so doing, resolved the only conflict within the courts of appeals. Before *Wal-Mart*, courts disagreed over whether a mandatory Rule 23(b)(2) class could include claims for individualized, non-incidental monetary relief. *See Molski v. Gleich*, 318 F.3d 937, 949 (9th Cir. 2003). *Wal-Mart* answered that question: "claims for

individualized relief * * * do not satisfy" Rule 23(b)(2); rather, "individualized monetary claims belong in Rule 23(b)(3)." 564 U.S. at 360, 362. Since *Wal-Mart* there has been *no* further conflict within the courts of appeals.

Petitioner nonetheless strains to conjure up three different "split[s]" within the courts of appeals. But none of the supposed circuit conflicts actually exists, much less are they implicated by the unique circumstances of this case.

1. There is no conflict over whether non-individualized, incidental monetary relief may be included in a non-opt-out Rule 23(b)(2) class

The court of appeals here held that, in "the settlement context," where the settlement agreement releases "statutory damages claims" under which "every class member would be entitled uniformly to the same amount of statutory damages, set by rote calculation," the monetary relief is "non-individualized" and "incidental" and therefore may be certified under Rule 23(b)(2) with no opt-out rights. Pet. App. A13-A15. Petitioner fails entirely to identify any court of appeals that would disagree with that holding. In fact, none of the decisions petitioner invokes (Pet. 15-20) involves certification of a settlement class where the release was limited to uniform, non-individualized claims for statutory damages.

Instead, petitioner attempts to conjure a circuit conflict by defining a question at a high level of generality, divorced from the actual circumstances presented here. According to petitioner, the courts of appeals supposedly "apply conflicting approaches" to whether Rule 23 or due process requires opt-out rights when a claim for monetary relief is involved. Pet. 15. But even with the issue framed that broadly, the circuits still are in harmony.

The Fourth Circuit holds that "where monetary relief is 'incidental' to injunctive or declaratory relief, Rule 23(b)(2) certification may be permissible." Pet. App. A12 (citation omitted). Petitioner admits that that rule is in accord with the pre-*Wal-Mart* decisions of the Third, Fifth, Eighth, and Eleventh Circuits. Pet. 16. He suggests that the Second, Seventh, and Ninth Circuits take a somewhat different approach. Pet. 18-19. But the post-*Wal-Mart* decisions from those courts cited by petitioner show they are in agreement with the Fourth Circuit. *See Amara*, 775 F.3d at 519-20 (*Wal-Mart* "does not foreclose an award of monetary relief when that relief is incidental to a final injunctive or declaratory remedy."); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 987 (9th Cir. 2011) (district court "may consider whether punitive damages are an allowable 'form[] of "incidental" monetary relief' consistent with the Court's interpretation of 23(b)(2) because they do not require an individual determination" (quoting *Wal-Mart*, 564 U.S. at 366)); *Johnson*, 702 F.3d at 372 ("This is on the assumption that *Wal-Mart* left intact

the authority to provide purely incidental monetary relief in a (b)(2) class action, as we think it did * * * .").

Citing pre-*Wal-Mart* decisions, petitioner suggests that some courts have adopted "a more lenient 'hybrid' approach to mixed cases involving injunctions and damages." Pet. 17-19 (citing *Eubanks v. Billington*, 110 F.3d 87, 95, 99 (D.C. Cir. 1997); *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 164, 166-68 (2d Cir. 2001); *Molski*, 318 F.3d at 950-51 & n.16; *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897-98 (7th Cir. 1999)). For example, the Seventh Circuit in *Jefferson* suggested that in a suit for both injunctive relief and individualized compensatory damages, "[i]t is possible to certify the injunctive aspects of the suit under Rule 23(b)(2) and the [individualized] damages aspects under Rule 23(b)(3)," or to certify both under Rule 23(b)(2) but to allow "notice and an opportunity to opt out." 195 F.3d at 898.

But petitioner does not identify any court of appeals that has rejected the possibility of a "hybrid" approach, meaning there is no disagreement for this Court to resolve. More important, the question whether a court can adopt such an approach is not implicated here: the *only* monetary relief certified as to the Rule 23(b)(2) class was for non-individualized statutory damages. Pet. App. A14. The class members' individualized claims for actual damages are not certified at all. They "are *retained* by the (b)(2) Class members"; effectively, the "(b)(2) Class members are 'opted out' already." Pet. App. A14, A20. There is therefore no occasion here to consider a "hybrid" approach

that would provide opt-out rights for class members' individualized claims.

2. There is no disagreement over how to determine whether monetary relief is incidental

Petitioner next posits there is a "more focused split" concerning how to determine whether monetary relief is incidental to injunctive or declaratory relief. Pet. 21-23. This supposed conflict is also illusory.

Petitioner points to decisions from the Fifth and Eleventh Circuits, which noted that certification under Rule 23(b)(2) would be unavailable in the non-settlement context where the statute providing plaintiffs' cause of action did not permit injunctive relief. Pet. 21 (citing *Christ v. Beneficial Corp.*, 547 F.3d 1292, 1298 (11th Cir. 2008), and *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 977 n.39 (5th Cir. 2000)).

As an initial matter, this supposed split is not squarely presented here because the court of appeals merely "assume[d]," without deciding, that the FCRA "does not permit consumers to seek injunctive remedies." Pet. App. A14-A15. Petitioner makes no attempt to contend that this threshold question on the remedies available under the FCRA is worthy of this Court's review. And if the Court were to decide that the statute *does* permit injunctive relief, then the Court would not resolve the supposed split petitioner has identified.

In any event, there is no such split. The court of appeals aptly distinguished the decisions upon which

petitioner relies: "in neither of those cases did the defendants agree to a settlement; instead, the defendants in both cases opposed certification." Pet. App. A15. Far from creating a circuit split, the court of appeals here expressly "*agree*[*d*]" with the Fifth and Eleventh Circuits that "where the defendant is unwilling to settle and the relevant statute does not allow for injunctive relief, Rule 23(b)(2) certification would be inappropriate because the plaintiffs would have no prospect of achieving injunctive relief" and monetary relief could therefore not be incidental. Pet. App. A15-A16 (emphasis added).

But as the court of appeals explained, "simply to describe those circumstances is to differentiate them." Pet. App. A16. Even assuming that the FCRA does not provide for injunctive relief, LexisNexis was "free to agree to a settlement" that included that remedy as a matter of contract. Pet. App. A15; *see Local No. 93*, 478 U.S. at 522 ("[I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree."). Thus, because the (b)(2) Class members will achieve substantial injunctive relief by virtue of the parties' settlement, the remedy of statutory damages may be incidental to the injunctive relief. Pet. App. A16.

Petitioner points to two other decisions (Pet. 22), but both are also readily distinguishable. In *Hecht v. United Collection Bureau*, damages predominated over injunctive relief because the settlement order provided that "every member would be entitled to *damages*, but

not that every member would have standing to seek injunctive relief." 691 F.3d 218, 224 (2d Cir. 2012). Here, by contrast, "the only relief actually awarded to the (b)(2) Class is injunctive," and the injunctive relief "is indivisible, benefitting all members of the (b)(2) Class at once." Pet. App. A13, A17 (quotation marks and brackets omitted).

And in *Crawford v. Equifax Payment Services, Inc.*, the court concluded that class members were entitled to opt out where the settlement released class members' claims for "actual damages." 201 F.3d 877, 879, 881-82 (7th Cir. 2000). The Fourth Circuit's decision here is in accord. Pet. App. A12. Rule 23(b)(2) certification was permitted here because the only monetary relief released was non-individualized statutory damages; claims for actual damages were not released. Pet. App. A14.

3. There is no conflict over the level of scrutiny to apply to a settlement-only class certification

Finally, petitioner asserts that the "Fourth Circuit's failure to be more critical of settlement class certification * * * conflicts with the rulings [of] this Court and other circuits," which "hold that certification of a settlement-only class is subject to greater, not lesser, scrutiny." Pet. 23 (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857-59 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620-21 & n.16 (1997); *In re Telectronics Pacing Sys. Inc.*, 221 F.3d 870, 880 (6th Cir. 2000)).

But two of the cited decisions involved settlements that impaired class members' rights to bring tort claims for individualized monetary damages: the settlements attempted to establish "limited funds" under Rule 23(b)(1) to cap the class members' aggregate tort damages. *Ortiz*, 527 U.S. at 821, 827-30; *Telectronics*, 221 F.3d at 874-76. Here, as the court of appeals emphasized, there is no such impairment: class members remain free to sue LexisNexis for actual damages, and the settlement establishes no cap on those damages. Pet. App. A14.

And in *Amchem*, this Court cautioned that an inquiry into a proposed settlement's fairness under Rule 23(e) does not substitute for the certification requirements of Rule 23(a) and (b); those requirements still must be met with respect to a settlement-only class. 521 U.S. at 619-22. But here, consistent with *Amchem*, the court of appeals rigorously ensured that the proposed settlement class met the requirements of Rule 23(a) and (b)(2) for class certification before considering the settlement's fairness under Rule 23(e). Pet. App. A10-A23.

B. The Court Of Appeals' Decision Is Correct

1. Certification under Rule 23(b)(2) was appropriate

a. In affirming the certification of the mandatory Rule 23(b)(2) class here, the court of appeals faithfully followed this Court's decisions and correctly applied the language of Rule 23(b)(2).

By its terms, a class may be certified under Rule 23(b)(2) if the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Wal-Mart*, 564 U.S. at 360 (citation omitted). "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class," not "when each individual class member would be entitled to a *different* injunction." *Ibid.* "Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Id.* at 360-61.

Applying *Wal-Mart*, the court of appeals correctly concluded that "this is a paradigmatic Rule 23(b)(2) case." Pet. App. A13. As petitioner does not dispute, "[t]he meaningful, valuable injunctive relief' afforded by the Agreement is indivisible, benefitting all members of the (b)(2) Class at once." *Ibid.* (quotation marks and brackets omitted). The injunction requires LexisNexis to overhaul its Accurint® suite of products, to treat the new Collections Decisioning reports as FCRA consumer reports, and to provide FCRA-like protections for its new Contact & Locate product. Pet. App. A8-A9. Each class member will thus benefit from a single injunction fully and equally. Even if opting out

of the class were allowed, the injunction is such that it is impossible to opt out of the relief: opt-out class members would still secure the benefit of the negotiated settlement, *in addition to* the right to sue individually for more. Rule 23(b)(2) was created specifically to address this type of scenario.

Nor does the settlement involve any claims for individualized, non-incidental monetary relief. Following *Wal-Mart*, the court of appeals correctly recognized that "claims for individualized monetary relief * * * are not 'incidental' for purposes of Rule 23(b)(2) and may not be certified under that Rule." Pet. App. A12 (quoting *Wal-Mart*, 564 U.S. at 360). The court of appeals concluded 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. As petitioner does not dispute, "[w]hen it comes to statutory damages under the FCRA, what matters is the conduct of the *defendant*." *Ibid.* It also is undisputed that LexisNexis's conduct "was uniform with respect to each of the class members." *Ibid.* Thus, under the circumstances of this case, if LexisNexis "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," not to individualized damages tailored to each specific class member. Pet. App. A13-A14.

Petitioner does not grapple with the text of Rule 23(b)(2), nor does he make any effort to show that the statutory damages claims released in the settlement

are individualized or non-incidental. Instead, petitioner makes policy arguments that largely ignore the fact that the "individualized monetary damages claims at issue here—those for actual damages under the FCRA— * * * are *retained* by the (b)(2) Class members." Pet. App. A14. For example, petitioner suggests that as a result of the ruling below, "settling parties can lock thousands of people into class actions against their will, depriving them of the right to pursue their own claims." Pet. 26. He quotes a district court opinion for the proposition that "releasing *all* damages claims in a (b)(2) settlement class would almost certainly be improper." Pet. 27 (emphasis added; citation omitted). And he asserts that "[i]n a mandatory-class settlement such as the one in this case, a defendant effectively receives complete peace." Pet. 28.

Such policy arguments belong in a different certiorari petition because they are simply not implicated by the settlement at issue here or the court of appeals' decision upholding it. The settlement does not release all damages claims; class members remain free to pursue any and all individual claims for actual damages against LexisNexis; and LexisNexis therefore did not receive "complete peace." As the court of appeals put it, "(b)(2) Class members are 'opted out' already, by virtue of the settlement in question." Pet. App. A20.

b. The court of appeals noted, but did not reach, an alternative ground advanced by LexisNexis for concluding that Rule 23(b)(2) was satisfied. Pet. App. A13 n.3.

Because the settlement agreement *releases* rather than *awards* statutory damages, there is no need to determine whether statutory damages are incidental to the injunctive relief ultimately awarded or would otherwise be permissible. Although the class originally sought statutory damages, the class is no longer seeking such relief. That is significant because the text of Rule 23(b)(2) focuses on the "final" relief awarded. Fed R. Civ. P. 23(b)(2) ("final injunctive relief or corresponding declaratory relief"). The Advisory Committee's Note likewise emphasizes the "final relief." Fed. R. Civ. P. 23(b)(2) advisory committee's note. When the final relief that may be awarded contains both monetary and injunctive components, the court must determine whether that rule authorizes that combination of relief. *Wal-Mart*, 564 F.3d at 360-61.

But where, as here, the class members no longer seek any monetary relief in the settlement and instead the final relief is purely injunctive, the inquiry suggested by *Wal-Mart* is unnecessary. Because plaintiffs now seek only injunctive relief, this is a classic case for certification under Rule 23(b)(2).

2. Due process does not require opt-out rights here

The court of appeals also correctly concluded that due process does not require a "blanket right to opt out of a Rule 23(b)(2) settlement that provides purely injunctive relief solely because non-individualized statutory damages claims are released, while individualized actual damages claims are retained." Pet. App.

A20-A21. As the court of appeals explained, "procedural 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)). Petitioner's rigid, one-size-fits-all rule is incompatible with these principles.

The "traditional justification[] for class treatment" under Rule 23(b)(2) is that the relief to be awarded "must perforce affect the entire class at once." *Wal-Mart*, 564 U.S. at 361-62. "For that reason" it is "also [a] mandatory class[]: The Rule provides no opportunity for * * * (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action." *Id.* at 362. Here, the relief provided—fundamental changes to LexisNexis's products—is indivisible and would extend to class members even if they were permitted to opt out. Pet. App. A13. Because the relief necessarily extends to the entire class at once, it comports with due process for the class to be mandatory. *Wal-Mart*, 564 U.S. at 361-62. The Due Process Clause does not entitle objectors to demand double relief for their FCRA claims: i.e., relief via the injunction entered here *in addition to* the right to seek separate relief via statutory damages.

Moreover, the court of appeals correctly observed that "the particular terms of this Agreement make opt-out rights especially unnecessary here." Pet App. A20. Class members who believe they have sustained actual

damages resulting from individualized harm may still pursue their claims. *Ibid.*

Finally, Rule 23 protects class members' due-process rights via the class-certification and settlement-approval process, even without providing opt-out rights. Pet. App. A19-A20; *see Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 507-08 (5th Cir. 1981). The "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." Pet. App. A19 (citing *Wal-Mart*, 564 U.S. at 361-62); *see also Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413-14 (5th Cir. 1998). Due process is therefore assured by the requirements of fair and adequate representation by the named plaintiffs and class counsel, notice and an opportunity to object, and district court review of the settlement to ensure it is fair, adequate, and reasonable. Pet. App. A19-A20; *see Kincade*, 635 F.2d at 507-08. Once these protections are provided, the proposition that due process also guarantees objectors the right to "opt[] out of the class to pursue their claims individually * * * is without merit." *Kincade*, 635 F.2d at 506. That principle is especially applicable here, where the lower courts' thorough fairness reviews demonstrated that the only remedy the class gave up—statutory damages predicated on a finding of willfulness—would have been unavailable. Due process protects real rights and interests, not illusory ones.

C. The Unique Circumstances Of This Case Make It A Poor Vehicle For Review

Several aspects of this case make it an exceedingly poor vehicle for review of the questions presented by petitioner.

1. Petitioner fails to demonstrate that the question whether non-individualized, incidental monetary relief may be included in a class certified under Rule 23(b)(2) is a frequently recurring question that requires review. Indeed, in the run-of-the-mill class action seeking monetary relief (like *Wal-Mart*), the monetary relief is for actual harm caused to the class members. But *Wal-Mart* already addressed the appropriateness of a Rule 23(b)(2) class in those circumstances.

This is a rare case in which (1) there is a settlement that (2) provides for class-wide injunctive relief that would flow to class members even if they were able to opt out, (3) releases only uniform, non-individualized statutory damages, and (4) provides that individualized claims for actual damages be retained by class members. Each of these facts bears on the propriety of certification under Rule 23(b)(2). This Court's holding would therefore be limited to the narrow facts of this case and would provide little guidance for lower courts. Indeed, petitioner fails to cite any other case like this one.

2. As noted above, a threshold question may prevent this Court from deciding the propriety of awarding any form of damages to a class certified under Rule

23(b)(2). The court of appeals here "assume[d]" but "d[id] not decide" that "a class settlement that *releases* damages claims is on precisely the same footing under Rule 23(b)(2) and the Due Process Clause as one that *provides* for damages." Pet. App. A13 n.3. But the court observed that LexisNexis "contests that premise." *Ibid.* As discussed *supra*, pp. 28-29, LexisNexis contended that because the settlement agreement does not award monetary relief, then certification under Rule 23(b)(2) was plainly permissible. Were the Court to agree with that alternative ground for affirmance, it would not reach the Rule 23(b)(2) question reserved in *Wal-Mart*. The Court should therefore wait for a case, like *Wal-Mart*, in which monetary relief has been or may be awarded.

3. Finally, to the extent this Court wishes to take a case to determine whether statutory damages may be released as part of a Rule 23(b)(2) settlement, the Court should wait for a case in which there is a colorable argument that such damages might actually be available in the event they were pursued. This is not such a case.

Under *Safeco*, a plaintiff seeking statutory damages here would have to establish not only that the Accurint® reports were consumer reports under the FCRA but also that LexisNexis was objectively unreasonable in concluding they were not. Pet. App. A25; *Safeco*, 551 U.S. at 69-70. One way a plaintiff can try to establish objective reasonableness would be to show there was "authoritative guidance" from the FTC "warn[ing] [the defendant] away from the view it took."

Safeco, 551 U.S. at 70. But here, far from FTC guidance warning LexisNexis against its view, the FTC *confirmed* LexisNexis's interpretation, "expressly specifying that Accurint reports are *not* subject to the FCRA." Pet. App. A25. The court of appeals thus remarked that, while the district court deemed the statutory damages claim "speculative at best," "we think that is generous." The court determined that "it is hard to see how" the demand for statutory damages would be successful. Pet. App. A25-A26. The court of appeals thus all but held that any claim to statutory damages by members of the Rule 23(b)(2) class would fail as a matter of law.

Petitioner has not sought review of that portion of the court of appeals' judgment, and he makes no effort to rebut the court's conclusion that the statutory damages he purportedly wants class members to have a right to pursue would be unavailable. Nor could he. Petitioner himself told the court of appeals that he "harbors no * * * affirmative belief" "that the claims underlying this litigation are meritorious." C.A. Dkt. No. 54 at 3. This is therefore not a situation in which a class member is sincerely seeking the right to "go it alone" because he believes he could get statutory damages if he did. *Wal-Mart*, 564 U.S. at 364. Instead, petitioner appears to want to upend the settlement in this case just for the sake of doing so. If the Court wishes to take a case involving the release of statutory damages claims as part of a Rule 23(b)(2) class, it should await one in which such damages claims are

real and in which the party before it actually wishes to pursue them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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