No. 15-1420

In The
Supreme Court of the United States

ADAM E. SCHULMAN,

Petitioner,

v.

LEXISNEXIS RISK AND INFORMATION ANALYTICS GROUP, INC., SEISINT, INC., and REED ELSEVIER, INC.,

Respondents,

(additional respondents listed on inside cover)

On Petition for Writ of Certiorari
To the United States Court of Appeals for the
Fourth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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(additional parties, continued from the front cover)

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Respondents,

MEGAN CHRISTINA AARON and the Aaron Objectors,

Respondents,

and

SCOTT HARDWAY and the Hardway Objectors,

Respondents.

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This Court twice has noted the "serious" and "substantial" possibility that Rule 23 and the Due Process Clause require an opt-out right for any damages claims. *Wal-Mart Stores, Inc* v. *Dukes*, 564 U.S. 338, 363 (2011); *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 121 (1994). This case squarely presents this issue, on which this Court has twice granted certiorari, and twice dismissed due to vehicle problems. Although *Wal-Mart* resolved the Rule 23 question as to *non*-incidental damages, it left open, and continued to question, whether opt-out rights were required even for damages claims incidental to injunctive or declaratory relief.

The Fourth Circuit and others have treated *Wal-Mart* as giving them free rein to certify Rule 23(b)(2) classes covering "incidental" damages without allowing opt-out rights. Other circuits, while acknowledging that *Wal-Mart* did not reach (b)(2) classes that encompass incidental damages claims, nonetheless view opt-out rights as the favored course, wherever possible, rather than a mere hindrance to be avoided.

Furthermore, the circuits are divided on how "incidental" damages are defined – in particular whether damages claims ever can be "incidental" to injunctive relief not available for the underlying cause of action. The Fourth Circuit allows settling parties to manufacture their own injunctive relief as a Rule 23(b)(2) anchor, regardless of the underlying statute. Other courts require any "incidental" damages to stem from injunctive relief authorized by statute, and deny 23(b)(2) certification for both litigation and settlement classes where the statute does not provide for such predicate relief.

The Question Presented here is important. This case is a perfect example of how class members can be forced into a mandatory class and have their damages claims expropriated, while the only participants who genuinely benefit from the deal are the defendants, the class representatives, and class counsel. Class counsel released the statutory and punitive damages claims of roughly 200 million class members without giving them any choice in the matter. Class counsel, while repeatedly claiming to have preserved claims for actual damages, also gave away class members' only realistic means of seeking such damages – the right to bring a class action. And counsel abandoned the class's right to sue regarding certain future conduct by defendants for five years.

In return, class members received nothing more than the general public: a new business model from LexisNexis that theoretically mitigates potential FCRA violations. Anyone added to defendants' databases will receive precisely the same supposed benefits, but only class members will have had to "pay" for those benefits by releasing past damages claims, class action rights, and future rights to sue for violations caused by the new business practices.

Allowing such machinations to escape review will encourage abuse of nationwide class members in the future, contrary to Rule 23, the Due Process Clause, and the integrity of the judicial process.

REASONS FOR GRANTING THE WRIT

I. There Is a Multifaceted Split Over Whether and When Rule 23 or the Due Process Clause Requires Opt-Out Rights from a Mandatory Class Covering Claims for Money Damages.

A. Conflicting Approaches to Opt-Out for "Incidental" Damages Claims.

The Petition, 15-20, described the conflict between circuits favoring non-opt-out (b)(2) class certification where damages are deemed incidental to injunctive or declaratory relief, and those disfavoring such certification absent alternative means for providing opt-out rights for the damages claims.

Joining the Fourth Circuit in its hostile approach to opt-out rights regarding incidental damages claims are the Third, Fifth, Eighth, and Eleventh Circuits. Pet. 16-17. Applying a more consumer-friendly approach favoring various opt-out mechanisms for damages claims associated with injunctive remedies are the Second, Seventh, and D.C. Circuits. Pet. 17-19.

Respondents deny the existence of a conflict, arguing that *Wal-Mart* resolved prior disagreements and that no court has rejected the class-member-friendly hybrid approaches used in the Second, Seventh, and D.C. Circuits. Lexis BIO 20-21; Berry BIO 17-26.

While the Second Circuit, post-*Wal-Mart*, indeed allows 23(b)(2) certification involving incidental damages, Respondents ignore that court's pre-existing approach to allowing opt-out rights *regardless* whether the class is certified under (b)(2), or split into damages and injunctive subclasses. *Compare Amara* v.

CIGNA Corp., 775 F.3d 510, 519-20 (2d Cir. 2014), *with Robinson* v. *Metro-North Commuter R.R.*, 267 F.3d 147, 164, 166-68 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002). *Wal-Mart* eliminated the subjective "predominance" test *Robinson* applied in (b)(2) cases, but supports *Robinson*'s more solicitous approach to allowing opt-out rights.

The Seventh Circuit provides opt-out rights for "substantial" damages claims "whenever possible," regardless whether damages are incidental or the class is certified under Rule 23(b)(2). *Jefferson* v. *Ingersoll Int'l Inc.*, 195 F.3d 894, 898-99 (7th Cir. 1999). *Jefferson* expressly held that opt-out rights should be provided whenever possible for "substantial damage claims," and that even if the damages were "incidental," the district court should consider if it was possible and appropriate to provide opt-out rights. *Johnson* v. *Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 369-72 (7th Cir. 2012), continued to recognize the value of hybrid procedures providing opt-out rights and noted that non-opt-out certification would only work where the declaratory and injunctive relief would necessarily result in a "mechanical" and inevitable award of damages. Here, of course, there is no declaration of liability or injunctive relief (*e.g.*, Johnson's pension plan reformation) from which the damages would inevitably flow.

Eubanks v. *Billington*, 110 F.3d 87, 92, 95, 99 (D.C. Cir. 1997), held that, even where proper (b)(2) class certification was conceded, opt-out rights were still available and authorized the adoption of hybrid certifications allowing opt-out where damages claims are combined with injunctive claims.

Contrary to Respondents' suggestion that no circuit has rejected a hybrid approach, Lexis BIO 21, this case is one such example. The damages sought here were substantial. Under the hybrid approach, class members would have been entitled to opt-out from the release of statutory and punitive damages as well as from the restriction of their right to bring class actions seeking actual damages. Yet the Fourth Circuit denied the request for opt-out rights.[1]

Respondents, Lexis BIO 20, oddly complain that the conflict identified in the Petition is "divorced from the actual circumstances of this case" and is defined at a "high level of generality." Properly rephrased, however, that means the issue is not fact-bound and the legal question is a general one that would affect a variety of cases. Such characteristics *enhance* the value of Supreme Court review, not diminish it.

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[1] The claim that class members "are effectively 'opted-out already,'" Lexis BIO 21, is disingenuous. Class members lost their right to bring class actions for actual damages, to challenge in court much future conduct by Lexis, and to seek statutory and punitive damages. The settlement carve-out for the illusory category of economically untenable non-class claims for actual damages does not satisfy the opt-out rights required by *Shutts*. *Cf. Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 847 n. 23 (1999) (abridged back-end opt-out doesn't satisfy *Shutts*). While the rare case may be able to go it alone, Berry BIO 38, for the overwhelming majority of FCRA class members, "individual losses, if any, are likely to be small." *Murray* v. *GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006).

B. Conflict on How to Determine Whether Monetary Relief Is "Incidental."

After *Wal-Mart*, damages claims must be "incidental" to a claim for injunctive or declaratory relief to even *potentially* be included in a (b)(2) class. Respondents define incidental damages as those that "'flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief.'" Berry BIO 26-27 (quoting *Allison*).

Here, unlike the cases relied upon by Respondents, there are no "'claims forming the basis of the injunctive or declaratory relief.'" The only claims are for damages, no claim for injunctive relief was or could have been pled, and no declaratory relief was provided. It is impossible for the class damages claims to flow directly from liability on non-existent claims.

Respondents and the court below generally agree with the Fifth and Eleventh Circuits that, absent a cognizable claim for injunctive relief, claims for damages are not "incidental" to anything and hence not subject to (b)(2) certification. *Bolin* v. *Sears, Roebuck & Co.*, 231 F.3d 970, 977 n. 39 (5th Cir. 2000); *Christ* v. *Beneficial Corp.*, 547 F.3d 1292, 1298 (11th Cir. 2008)). The Fourth Circuit's sole distinction that a settlement agreement can provide an extra-statutory injunctive anchor for a (b)(2) class conflicts with contrary holdings in the Second and Seventh Circuits. *Hecht* v. *United Collection Bureau*, 691 F.3d 218, 223-24 & n. 1 (2d Cir. 2012) (settlement providing injunctive relief not otherwise available to some or all class members could not be certified under (b)(2)); *Crawford* v. *Equifax Payment Services, Inc.*, 201 F.3d 877, 881-82 (7th Cir. 2000) (Easterbrook, J.) (rejecting (b)(2) settlement class simi-

lar to that here because statute provides only damages, not injunctive relief).[2]

Respondents attempt, Lexis BIO 23-24, to distinguish *Hecht* by arguing that damages predominated because the settlement provided all members damages but not injunctive relief. That supposed distinction is irrelevant and, in any event, Respondents sorely misrepresent the settlement agreement in *Hecht* and quote the opinion out of context to distort its meaning. The settlement order in *Hecht* did not "provide[] that every class member would be entitled to *damages*"; rather, the complaint and later settlement "*defined the * * * class* to ensure that every member would be entitled to *damages* but not that every member would have standing to seek injunctive relief." *Compare* Lexis BIO 23, *with Hecht*, 691 F.3d at 224 (first emphasis added). In reality, the settlement in *Hecht* afforded class members no monetary damages, only prospective injunctive relief, and a *cy pres* payment to third parties. 691 F.3d at 221; *accord* Berry BIO 31 (describing *Hecht* accurately). The meaningful point of comparison in *Hecht* is that the class included persons who lacked standing to seek injunctive relief, and hence their damages claims could not have been incidental to such unavailable injunctive

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[2] Respondents frivolously suggest, Lexis BIO 22, that the split is not presented because the Fourth Circuit *assumed* injunctive remedies are unavailable. But precisely because of that assumption, that supposed "threshold issue" is not before this Court and cannot interfere with reaching the Question Presented. This Court does not reach out to decide issues not reached below; it decides the case on the same assumptions used below and remands for further proceedings on any remaining issues.

claims. With the case properly quoted, there is no "contrast" at all between *Hecht* and this case.

Respondents' attempt, Lexis BIO 24, to distinguish *Crawford* fares no better. *Crawford* rejected a settlement class that, as here, provided for a change in defendant's future behavior, awarded no money to the class, and denied class members the right to seek damages via a class action. 201 F.3d at 880 ("Rights of all class members * * * to seek damages are unaffected – they receive nothing in this case but are free to file their own suits, provided, however, that no other suit may proceed as a class action."). Judge Easterbrook noted that such class did not qualify for (b)(2) treatment because all actions under the Fair Debt Collections Act, like the FCRA here, are for damages, not injunctive relief. 201 F.3d at 881-82. The nature of the damages released was not relevant to that part of the opinion and it was unnecessary to discuss whether the damages at issue could be incidental – there being no anchor for the (b)(2) class in the first place.

Respondents, Lexis BIO 24-25, Berry BIO 30-31, purport to distinguish the heightened scrutiny of settlements called for in *Oritz* v. *Fibreboard Corp.*, 527 U.S. 815, 847-48 (1999), *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620-21 & n. 16 (1997), and *In re Telectronics Pacing Sys. Inc.*, 221 F.3d 870, 880 (6th Cir. 2000), as involving personal injury tort class actions rather than FCRA claims. It is a mystery, however, what the substance of the underlying action has to do with the level of Rule 23 scrutiny to be applied to certification of a settlement class. If anything, Respondents get it backwards: heightened scrutiny under Rule 23 applies to *all* settlement classes. The de-

gree of scrutiny applied to settlement classes is not fact-bound or cause-of-action specific: it is a function of Rule 23, due process concerns, Rules Enabling Act concerns, and the conflict of interests between class counsel and absent class members once the named parties and defendants decide to settle.

The Fourth Circuit acknowledged that it certified a settlement-only class that could not be certified as a litigation class under Rule 23(b)(2). The court thus did precisely what *Ortiz* and other cases forbid: it relied on the settlement to substitute for the failure of the class to otherwise satisfy Rule 23. *See Ortiz*, 527 U.S. at 858-59, 864 (rejecting 23(b)(1) certification where the predicate limited fund was solely a creature of the settlement). The Fourth Circuit thus contradicted the fundamental principle that settlement classes – because they can be collusive – are subject to greater, not lesser, scrutiny in the Rule 23 analysis. "[T]he requirements for certification are not the defendant's to waive; they are intended to protect absent class members." Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1506 (2013).

The split over whether damages ever can be incidental to unauthorized injunctive relief, regardless whether such relief is manufactured as an extra-statutory remedy via settlement, is squarely presented and warrants this Court's review. The Fourth Circuit failed to distinguish contrary settlement-class cases and compounded the split by lowering the scrutiny with which it reviews settlement classes. This

further, subsidiary split provides an additional reason to grant certiorari.[3]

II. The Issues Are Important and This Case Is a Good Vehicle.

Two prior grants by this Court, hundreds of millions affected in this case alone, and significant Rule 23 and Due Process Clause issues at stake all speak to the importance of the Question Presented.

Class actions are an important remedy for wrongdoing that is widespread but individually too small to justify the expense of a lawsuit. *Amchem*, 521 U.S. at 617. Non-opt-out classes applied to damages claims pervert that remedy into a tool for class counsel and defendants to negotiate for their own benefit by extinguishing, rather than pursuing, such claims.

Faulty (b)(2) settlement certifications of damages claims are a deleterious yet growing phenomenon. Pet. 26-29; *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, -- F.3d --, 2016 WL 3563719, (2d Cir. Jun. 30, 2016). Contrary to Respondents' protestations, Lexis BIO 32, Berry BIO 27, such cases often include the waiver of statutory damages. *Hecht*, 691 F.3d at 225 (forbidding mandatory release of statutory damages claims); *Carter* v. *City of Los Angeles*, 224 Cal. App.4th 808, 824 (Cal. Ct. App. 2014) (same). Similarly, waiving class members'

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[3] Respondents assert that because the settlement "releases" rather than "awards" damages, there is no need to ask if the damages are incidental. Lexis BIO 29. This alternative position is at odds with *Wal-Mart*'s concern that absent class members' monetary claims not be "*precluded* by litigation they had no power to hold themselves apart from." 564 U.S. at 364.

rights to bring future damages class actions is a recurring settlement term. *In re Dry Max Pampers Litigation*, 724 F.3d 713, 716 (6th Cir. 2013); *Crawford*, 201 F.3d at 879.

That both defendants and class counsel share a dim view of the merits of the statutory damages claim, Lexis BIO 34, Berry BIO 33, does not justify ignoring Rule 23 or due process. *Carter*, 224 Cal. App.4th at 826 ("Incidental" does not mean "of negligible value"). Indeed, it is a particularly pernicious resurrection of the "predominance" balancing test rejected by *Wal-Mart*, substituting a putative "fairness" inquiry for opt-out rights. Nor do the class's prospects for success on the merits have any bearing on this case as a vehicle for the Question Presented. It is for class members to decide whether they view their prospects as so dim that opting out would be pointless. That over 28,000 class members objected to the denial of opt-out rights and appealed to the Fourth Circuit suggests that some people, at least, view their case as stronger than Respondents jointly suggest.[4]

Regarding Respondents' attempted defense of the substance of the decision below, such arguments go to the merits of the case, not its cert.-worthiness. This Court has repeatedly stated that the legality of denying opt-out rights for any damages claims is troubling and uncertain. Whether Rule 23 allows the certification in this case, and whether it violates due process,

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[4] It is particularly ironic that defendants and class counsel are fighting so hard to preclude class members from opting out in pursuit of such supposedly worthless claims.

are both questions worthy of briefing. This case presents the very sort of questionable behavior that have caused courts considerable concern.

Contrary to Respondents' suggestion, Lexis BIO 34, Petitioner is a perfect party to litigate these issues. Only a class member that cared about such matters on principle would ever bother to continue fighting to this Court. Most individual class members would not litigate this issue to the Supreme Court for precisely the same reason they need the class remedy in the first place: their financial stake is too small to be worth it. Principled objectors like Petitioner are the only champions abused classes have left in such cases.[5]

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

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[5] Petitioner expresses no view on the ultimate merits of the class claim; whether to settle damages claims and on what terms should be subject to opt-out rights regardless. And certainly, the releases and other forward-looking waivers of rights imposed involuntarily.

Respectfully submitted,

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Dated: September 7, 2016