No. 15-765

IN THE

Supreme Court of the United States

THEODORE H. FRANK,

Petitioner,

v.

JOSHUA D. POERTNER, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, *et al.*,

Respondents.

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

BRIEF *AMICUS CURIAE* FOR TRUTH IN ADVERTISING, INC. SUPPORTING PETITIONER

LAURA SMITH
Legal Director
TRUTH IN ADVERTISING, INC.
115 Samson Rock Drive, Suite 2
Madison, CT 06443

DAVID T. GOLDBERG
Counsel of Record
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813
david@donahuegoldberg.com

Counsel for Amicus Curiae

263689

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

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Statement of Interest*

Truth In Advertising, Inc. ("TINA.org") is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat the systemic and individual harms caused by deceptive marketing.

At the center of TINA.org's efforts is its website, www.tina.org, which aims to re-boot the consumer movement for the twenty-first century. The website provides consumers with information about common deceptive advertising techniques and applicable consumer protection laws, and it broadcasts alerts about specific marketing campaigns, such as nationally-advertised "Simply American" products manufactured abroad and razor blades that last "up to a month"—provided a man shaves only three days per week. TINA.org is an interactive online community where members can share information and register complaints about particular practices, which TINA.org investigates. When these complaints are substantiated, TINA.org communicates concerns to the business itself and regulatory authorities; TINA.org posts these complaints and responses received on its website, along with reports on results achieved.

Another focus of TINA.org's work is ensuring that laws protecting consumers from deceptive advertising are effectively enforced. TINA.org monitors the activities (and inactions) of government regulators

* Pursuant to Rule 37.6, counsel certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus* or counsel made a monetary contribution to its preparation or submission. Counsel for all parties received timely notice, pursuant to Rule 37.2(a), of *amici*'s intent to file this brief and have consented to its filing.

and litigation brought by consumers acting as private attorneys general. Its website maintains an extensive database of pending and completed false advertising class actions, with relevant litigation and settlement documents posted.

Drawing on its accumulated expertise, TINA.org participates as *amicus curiae* in consumer class actions, commonly at the settlement approval stage. These submissions alert courts to proposed settlements that are not "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), with particular attention to injunctive relief provisions, which—notwithstanding their importance—often receive cursory consideration from parties, objectors, and courts more focused on monetary relief and fees.

These efforts, highlighting the value of effective equitable relief and identifying glaring deficiencies in proposed settlements, have prevented outcomes that would have harmed consumer "members" of putative settlement classes and improved the results obtained for them. In *Quinn v. Walgreen Co.* No. 12-cv-8187 (S.D.N.Y.), the parties, responding to TINA.org's concerns, renegotiated their settlement agreement to make injunctive relief broader and perpetual, rather than limited to 24 months; and in *Lerma v. Schiff Nutrition Int'l*, No. 3:11-CV-01056 (S.D. Cal.), plaintiffs, prompted by TINA.org's submission, sought to withdraw (and ultimately renegotiated) a settlement. *Id*. Dkt. 120, 141.

The issue presented in this case is of central importance to TINA.org's work and mission. While some courts are appropriately vigilant in applying the Rule 23(e) standards, others, including the Eleventh Circuit here, take an unduly narrow view of their responsibilities, ignoring warning signs and approving settlements that fail to provide meaningful relief and sometimes leaving those who deceive consumers better off than if they had never been sued.

Summary of Argument

False and deceptive advertising causes far-reaching harm to consumers, honest competitors, and the national economy, and class action litigation is an appropriate and necessary means of enforcing consumer protection laws and furthering their objectives. Settlements in such cases, *Amicus* recognizes, advance important public purposes; and the same policy reasons that make class action litigation socially beneficial require that counsel who take such cases be rewarded fairly for the skill, tenacity, and effort they devote (and for the risks they incur).

But as decisions of this Court have increasingly highlighted, proceedings relating to class action settlements are fundamentally different from ones courts typically adjudicate and pose unique challenges. The very features that make false advertising cases natural candidates for class treatment are the same ones that necessitate a vigilant judicial role in settlement review—personal stakes that are too small to warrant individual litigation are also too modest to monitor or influence the conduct of class litigation. The parties to the settlement contract—defendants and class counsel—are no longer adversaries, and both have interests that diverge from those of the class; and district courts charged with ensuring that these absent parties have received "reasonable" and "adequate" value must decide based on incomplete, often extremely limited information.

Settlements reached under these circumstances can dis-serve the interests of their ostensible beneficiaries and the broad consumer protection policies these suits are brought to vindicate. Defendants can obtain from class counsel comprehensive perpetual releases, in exchange for modest payments (almost all to counsel, with 99% of plaintiffs taking nothing) and "equitable" relief that leaves them free to engage in the deceptive practices that prompted the suit.

These dangers are not theoretical. Settlements in many of the cases in which TINA.org has participated include prospective relief provisions that are literally worthless or manifestly inadequate in view of what is released. At the very least, such provisions show that prospective relief, long the cornerstone of American consumer protection law, is treated as an afterthought by the settling parties; and some such provisions seem crafted to create the misimpression that some meaningful relief was obtained.

The likelihood that plainly deficient and unfair agreements will be approved depends on the governing understanding of district courts' Rule 23(e) responsibilities. There is a sharp and fundamental division among the courts of appeals on this question. Some courts, like the Eleventh Circuit here, take a narrow view of courts' responsibility, crediting claims of settlement benefits that are "somewhat illusory" and, absent proof of outright collusion, largely deferring to counsel's opinion that the resolution they negotiated is "fair, reasonable, and adequate."

Other courts of appeals have rejected that posture, admonishing district courts to review these settlements with a careful and skeptical eye (and subjecting Rule 23(e) approvals to searching appellate scrutiny). In making Rule 23(e) determinations, these courts instruct, district judges must be attentive to the actual and conflicting *interests* of the parties, both before the court and absent; to warning signs raised by features characteristic of inadequate or unreasonable settlements; and to the realities of what plaintiffs will actually obtain and give up through settlement, not on sums nominally available or "equitable" relief that fails to provide any substantive protection.

These latter decisions are right on the law. The responsibility conferred under Rule 23(e) is not limited to policing for outright collusion—a settlement may be reached through arm's length negotiation and still be "[in]adequate" or "[un]fair." Equally important, their approach, by properly aligning incentives and deterring unethical behavior, produces settlements that greater benefit class members and advance the public interests animating consumer protection laws.

There are further compelling reasons why the Court should not allow this division of authority to persist. Not only does the Eleventh Circuit's permissive approach yield unacceptable results for the consumers whose rights are adjudicated, but the practical effect of letting stand decisions like the one here will be to shrink the proportion of settlements reviewed under the proper, consumer-protective understanding of Rule 23(e). Consumer class actions like this one may be filed and settled in any of the 50 States, and parties will, for understandable reasons, direct cases to tribunals that are least likely to question their arrangements. Indeed, this incentive will be largest for settlements expected to receive close scrutiny or disapproval elsewhere. And courts in jurisdictions that accept exculpatory explanations for even the most problematic settlement features are likely to get the *least* complete information, as important public interest objections will not be voiced if doing so is recognized to be futile.

ARGUMENT

I. The Nation's Commitment to Combatting Deceptive Marketing Requires Searching Judicial Scrutiny of Class Action Settlements That Relinquish Consumers' Rights

A. False Advertising Continues to Inflict Broad and Serious Harm and Is Difficult to Eradicate

False and deceptive advertising remains remarkably widespread and inflicts far-reaching harm on American consumers and the Nation's economy. TINA.org's investigations have exposed brazen falsehoods not just by "fly by night" operations hawking obscure products but also in the marketing activities of the Nation's largest corporations. TINA.org uncovered that Wal-Mart's website was selling scores of products represented as "Made in the USA" that were not and has fought for honest labeling of "Vitaminwater," a Coca-Cola product formerly advertised with the tagline "Vitamins+water=all you need," notwithstanding that its primary ingredient (after water) is sugar, with six teaspoons in each 20-ounce bottle.

The harms these practices inflict go beyond their affront to norms of honesty and fair dealing. American consumers lose billions of dollars on products and services whose basic characteristics are misrepresented. As this Court's early opinions recognized and contemporary economic theory affirms, successful false advertising causes a misallocation of resources; inferior products obtain premium prices, while competitors that have developed and marketed "a better mousetrap" are denied sales. See *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493 (1922) ("when misbranded goods attract customers * * * , trade is diverted from the producer of truthfully marked goods"). Moreover, bad advertising can drive out good; there is always the risk that "honest manufacturers [will feel the need to] protect their trade by also resorting to decept[ion]," *id.*, and the more skeptical consumers become of factual claims made in advertising, the more difficult it becomes to provide them with truthful information. See J.L. Wehn, *An Act Prohibiting Fraudulent Advertising*, 61 Pitt. Leg. J. 221 (1913) ("Any advertisement which undermines the general credence given to published statements is detrimental to advertising as a whole, and injurious to the public").

The damage resulting from false advertising goes beyond these somewhat abstract welfare harms (and the sometimes trivial-sounding economic losses that give rise to cases like this one). As the Court has recognized, a consumer's interest in accurate commercial information can be "keener by far[] than his interest in the day's most urgent political debate." *Virginia Bd. Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976), and cases on TINA.org's class action docket involve deceptive practices that target vulnerable consumers and endanger well-being. Senior citizens will forego medically appropriate treatments in favor of falsely advertised fixes; businesses sell potentially harmful supplements to parents of children with speech delays; and families already in economic distress lose savings through deceptively marketed get-rich-quick schemes. Cf. *Va Bd. Pharm.*, 425 U.S. at 763-64 (noting that suppression of accurate prescription drug price advertising disproportionately burdens "the poor, the sick, and particularly the aged" and can prevent "the alleviation of physical pain").

B. Class Action Litigation Plays An Indispensable Role In Protecting Consumers From False and Deceptive Advertising

These harms continue because, put simply, false advertising pays. Notwithstanding the Nation's longstanding commitment to "insur[ing] that the stream of commercial information flow[s] cleanly as well as freely," 425 U.S. at 771-72, false advertising has proven an intractable social ill. Deceptive marketing is hard to detect and prove—businesses that misrepresent their products enjoy decisive informational and resource advantages over regulators, and available legal remedies have long been subject to restrictions that limit their efficacy in preventing and deterring misconduct.

The Federal Trade Commission has for much of its history been a slow-moving and under-funded agency, dependent on complaints from consumers who are not entitled to redress in their own right, and its remedial powers have been closely cabined. The Lanham Act's prohibitions on false advertising, 15 U.S.C. §1125(a)(1)(B), may be enforced only through suits by other businesses—and only by those able to show specific injury (not harm to the "trade generally") affording consumers no protection outside such situations.

Injured consumers historically had scant means of self-protection. The common law exhibited a "tenderness * * * toward trade practices of doubtful probity * * * reflected in the maxim *caveat emptor,*" *Developments in the Law—Deceptive Advertising*, 80 Harv. L. Rev. 1016, 1016-17 (1967), and avenues for redress remained littered with "[l]egal pitfalls and requirements of proof," *id.*

The inefficacy of these private remedies led States nationwide to enact modern consumer protection statutes in the 1960s and 1970s. These laws, typically based on the FTC Act or model legislation, dramatically relaxed or eliminated traditional barriers to relief. Most do not require proof of scienter or reliance and seek to overcome problems of under-enforcement by providing statutory or treble damages remedies, attorney's fees, and broad injunctive remedies. See generally *Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 Harv. L. Rev. 1621, 1640 (1983).

These innovations, however, failed to surmount the most significant barrier to effective enforcement: that even when statutory damages are available, few consumers—and fewer attorneys—will expend the time and effort required to sue for a small harm.

The principal mechanism for overcoming these difficulties is the modern class action typified by Federal Rule 23. The class action device, by spreading the costs of litigating across large groups suffering modest individual harms, ensures that "massive * * * fraud will [not] go unpunished." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 660-61 (7th Cir. 2004). Because "only a lunatic or a fanatic sues for $30," *id.*, "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits." *Id.* Accord Natl. Ass'n Consumer Advocates, *Standards & Guidelines for Litigating and*

Settling Consumer Class Actions (3d ed. 2014) ("NACA Standards") at 3 ("[R]ejecting class actions because [individual] recoveries are small encourages wrongful conduct and largely immunizes entities caught stealing millions of dollars in ten-dollar increments.")

Indeed, these cases are especially well-suited for class-treatment because the central issue—the truth or falsity of the marketing claim—is common to every consumer and because litigation burdens, including technical expertise necessary to battle well-resourced defendants, can be borne by the whole class. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 616-17 (1997) (noting the Advisory Committee "had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all'") (citation omitted).

C. Consumer Class Action *Settlements* Have Unique Potential to Harm Ostensible Beneficiaries

As with other litigation, settlement of class actions can provide significant private and public benefits. Negotiated resolution, by encouraging "a yielding of absolutes and an abandonment of highest hopes," *Ruiz v. McKaskle*, 724 F.2d 1149, 1152 (5th Cir. 1984), expands the range of outcomes litigation can produce, enabling consumers to obtain changes in marketing practices without the business's admitting wrongdoing. Settlement spares the parties and courts time and money, and the potential for settlement can make counsel more willing to take the financial risks that large-scale litigation entails.

But as this Court and scholars have recognized, structural features of class actions raise dangers not present when other forms of litigation are voluntarily resolved. In particular, the very characteristics that make aggregate litigation beneficial—the fact that the rights resolved belong to individuals who do not have the time, resources, or inclination to vindicate them—introduce perils, especially at the settlement stage.

> Class actions set the traditional model of adjudication on its head. The class action effectively herds absentee plaintiffs into a lawsuit without their consent and often without their knowledge * * * Class counsel fills the resulting power vacuum by proposing the parameters of the class, recruiting named representatives, and making every important decision, including whether to accept or reject proposed settlements. Class counsel are not required to attempt to identify or build majority support for a settlement or survey class members to determine their interests.

Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 Ind. L. Rev. 65, 75-76 (2003).[1]

In particular, the economic interests of the absent parties whose rights are in issue and those representing them are distinct and often divergent, and these tensions intensify when settlement is in the offing. "[T]he economic reality [is] that a settling

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[1] As Professor Lahav explains, the protections afforded by "the right to opt out [are] illusory." *Id.* See also *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (citing studies finding opt-out rate of 1/10 of 1%, explaining that "[v]irtually no one who receives notice that he is a member of a class in a class action suit opts out. He doesn't know what he could do as an opt-out. He's unlikely to hire a lawyer to litigate over a [defective] window").

defendant is concerned only with its total liability" and has "little or no interest" in "allocation between the class payment and the attorneys' fees." *In re Dry Max Pampers Litig.*,724 F.3d 713, 717 (6th Cir. 2013) (citation omitted). Thus, "[t]he more counsel gets in fees and expenses, the less will be available to class members in recovery." Macey & Miller, *Judicial Review of Class Action Settlements*, 1 J. Leg. Anal. 167, 197 (2009).

Defendants, who seek to minimize payments and obtain the broadest possible releases from liability, have considerable means of doing so. Because cases involving national products may be brought anywhere, and because courts certify nationwide classes and allow defendants to consent to certification for settlement purposes only, defendants can influence which one of multiple suits against them "will ultimately stan[d]." Lahav 37 Ind. L. Rev. at 77. Class counsel, understandably sensitive to the risk that their invested time and resources will be lost if they battle too aggressively, can be "pushe[d] * * * towards sub-optimal settlements." *Id.* (footnotes omitted).

Rule 23(e) puts courts in an unfamiliar and awkward position: information necessary to the proper exercise of approval authority—relating to likelihood of success or the value of releases—is within control of the parties who are jointly urging approval. See *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir.1996) (Easterbrook, J., dissenting from rehearing denial); *In re Oracle Sec. Litig.,* 136 F.R.D. 639, 645 (N.D. Cal. 1991) (jointly submitted application presents "a situation virtually designed to conceal any problems with the settlement not in the interests of the lawyers to disclose"). And courts that have reservations about the adequacy of a proposed settlement must contemplate prolonging litigation that the litigants have decided to bring to an end, with their only potential allies objectors, who typically have their own informational disadvantages and particular agendas. See Lahav, 37 Ind. L. Rev. at 128 ("For a Rule 23(e) hearing to be adversarial, it first requires adversaries").

The danger that settlements reached under such circumstances might go off the rails, further harming injured consumers and public interests the suits are brought to advance, are not theoretical. Opinions disapproving proposed settlements under Rule 23(e) often do so in scathing terms. These decisions typically train on disproportionate monetary benefits for class counsel, but many highlight other provisions that call into question claims of zealous representation. These include injunction provisions revealed to be "paper tigers"—fostering the appearance of impressive results for consumers, while in fact doing nothing to rein in defendants.

For example, the Sixth Circuit in *Vassalle v. Midland Funding LLC*, 708 F.3d 747 (6th Cir. 2013), described as "perfunctory at best" an injunction provision that "did not actually prohibit [defendant] from creating false affidavits * * * and only last[ed] one year, after which [defendant would be] free to resume its predatory practices." *Id.* at 756. And in *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), the settlement prohibited defendants from using certain words, but not others, in promoting their product and did so for a limited duration—even as class members were bound to sweeping "forever" releases. As Judge Posner suggested, an attorney adamant about the "fraudulent character" of product claims should not accept a "compromise" permitting the defendant to resume making those same claims within two years—indeed immediately, through resort to "purely cosmetic changes in wording." *Id.* at 785 (refusing to give "judicial imprimatur" to injunction that was "superfluous—or even adverse to consumers").

The settlement approved in this case shares a number of similarly troubling features. For example, the in-kind donation provision here—like the injunction in *Pearson*—played a subordinate role in obtaining approval, but it too seems calculated to deflect attention from the modest size and allocation of monetary relief. The impressive-sounding "six-million-dollar" "payment," Dkt. 113-1 ¶ 61, refers to a charitable donation, over *five years*, of *batteries* worth that amount *at retail*. *Id.* And there is still less to it: though presented as *adding to* defendants' existing charitable giving, the promise is only that these would be "separate and distinct from" merchandise Duracell was "*committed* to donate," *id.* (emphasis added), at the time of settlement—with no sign Duracell had such "commitments" extending five years forward.

That "obligation" is worlds apart from the payments to third parties that courts have held can confer a valuable deterrence benefit. See, *e.g.*, *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 678 (7th Cir. 2013). As petitioner points out (Pet. 9), Duracell, far from feeling the bite of this "relief," affirmatively touts donations to Toys For Tots in its marketing; and "first-responders"—the beneficiary listed first in provision—are the center of promotional efforts for defendants' new Quantum batteries. See *Advertising: Duracell Offers Praise, and Power, for Everyday Heroes*¸ N.Y. Times (Jul. 22, 2013).

As for the prospective relief provision, it appears, on first inspection, to avoid the literal "magic words" approach condemned in *Pearson*, with Defendants undertaking not just to cease marketing Ultra batteries as "Our Longest Lasting" or "Duracell's Longest Lasting" but also to refrain from using "*words to the effect* that the Ultra Batteries * * * last longer than Duracell CopperTop batteries." Dkt 113-1 ¶58 (emphasis added). But this relief turns out to be pyritic, not only because Duracell ceased marketing these batteries altogether, but also because the settlement expressly reserves the right to make precisely the same claims for "any present and future batteries that have different chemical formulations than the Ultra batteries." *Id.* Thus, defendants are free to make precisely the same claim for a battery that lasts exactly as long as the Ultra, so long as it has a new name or a "different chemical formulation"; indeed, defendants would not run afoul of the provision if they make the claim for a re-introduced "*Ultra*" so long as it has a "chemical formulation" that is "different," but not longevity-enhancing. Compare Dkt. 2 ¶22 (complaint alleging there was "no material difference" in longevity between premium-priced and standard batteries).

The emphasis by the parties and court below that the *litigation* had a causal role in the decision to stop marketing Ultra batteries misses the point. First, there was no suggestion that this was a benefit of *the settlement, i.e.*, that Ultra batteries would have been sold but for the plaintiffs' release. Second, while ceasing to sell a deceptively marketed product *can be* a benefit to injured consumers, whether it is depends on whether the business is permitted to market an immaterially different product with precisely the same claims.[2]

That this relief is insubstantial does not establish that injunctive relief cannot be meaningful in deceptive advertising cases. Many suits and settlements result in substantive limits on defendants' power to continue the practices that impelled plaintiffs to sue. Settlements can describe the substance of claims that defendants will not make, see *Bezdek v. Vibram USA, Inc.*, No. 1:12-cv-10513-DPW Dkt. 77 (D. Mass. 2014) at 14 (agreement to discontinue and refrain from claims that footwear was "effective in strengthening muscles or preventing injury"); prevent the use of words "to the same effect" as those which prompted suit and in connection with similar products, see, *e.g.*, *Quinn v. Walgreen Co.* No. 12-cv-8187, Dkt. 141-1 (S.D.N.Y. 2015) (agreement, renegotiated after TINA.org submission, prohibiting label "conveying the same message" or using words "synonymous with" challenged health claims); or require that they include corrective or clarifying language; or provide that objected-to claims may be made only with substantiation in hand, see *Pearson,* 772 F.2d at 785 (noting that parties could agree to permanent injunction, subject to modification if disputed health claims were proved); *Quinn* at 4 ¶13; see also *Kraft, Inc. v. FTC*, 970 F.2d 311, 325-26 (7th Cir. 1992) (upholding substantiation requirement for nutrient claims). As with orders in litigated cases, settlement provisions need not "confine [the] road

[2] Even as to monetary relief, the settlement raises questions: it is hard to see why consumers with proofs of purchase should be limited to $12 per household when the parties anticipated that $43 million of the $43.56 million "fund" would go unclaimed.

block to the narrow lane the transgressor has traveled, * * * [but should] effectively close all roads to the prohibited goal." *FTC v. Ruberoid Co.,* 343 U.S. 470, 473 (1952).

II. The Eleventh Circuit's Erroneous Understanding of Rule 23(e) Denies Consumers Important Protections

The conflict between the Eleventh Circuit's understanding of Rule 23(e) and that of other courts of appeals is stark and highly important. As petitioner shows (Pet. 23), the substance of the consumer relief sustained here is arguably more meager than in the settlement rejected in unsparing terms in *Pearson*. And the attributes that the Eleventh Circuit brushed aside here have been found by other courts to be highly suspect if not illegitimate per se. See *Pearson*, 772 F.3d at 786-87 (discussing defects of "clear sailing" and "kicker" clauses); *In re Bluetooth Headset Litig.*, 654 F.3d 935, 946-49 (9th Cir. 2011) (same).

The decision here firmly rejected (Pet. App. 15a) the very rule the Seventh Circuit (and others) have held fundamental to the Rule 23(e) analysis: that the actual monetary recovery for consumers, rather than "the potential" one, must be the focal point. See *Pearson*, 772 F.3d at 781.[3] And other courts have dismissed as "naïve" and "not realistic" considerations that the Eleventh Circuit views as important indicia

[3] The difference between the competing starting points is dramatic: In claims-paid cases like this one, where recoveries are, by respondent's admission, below 1%, the reference point differs by two orders of magnitude—or, in terms of share of total recovery, a "10%" fee in the Eleventh Circuit is, under Seventh Circuit law, 91%.

that a settlement is fair, reasonable, and adequate. Compare Pet. App. 24a, 25a (relying on "small number of exclusions and objections" and fact that fee agreement was arrived at "independently of the class settlement") with *Redman v. RadioShack*, 768 F.3d 622, 628 (7th Cir. 2014) (rejecting lower court's finding that "the fact that the vast majority of class members—over 99.99%—have not objected to the proposed settlement or opted out * * * suggest[ed] that the class generally approves of its terms and structure"); *Pearson*, 772 F.3d at 786 (contention that separate negotiation of class relief and fees obviates conflicts "is not realistic").

These doctrinal differences reflect a basic divide—one that drives the outcomes in cases where facially similar multi-factor "tests" ostensibly govern.[4] While district courts in the Eleventh Circuit regard their Rule 23(e) responsibilities as subject to general principles strongly favoring settlement generally—and for the same reasons, *i.e.*, "litigants should be encouraged to determine their respective rights between themselves," *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1379 (S.D. Fla. 2007); see Pet. App. 25a n.9 (attaching significance to "opinion of Class Counsel"), the Sixth, Seventh, and Ninth Circuits have concluded that "vigilant," *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012), and "intensive" scrutiny is warranted for class action settlements, especially in cases like this where individual claims

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[4] See Macey & Miller, 1 J. Leg. Anal. at 172 (noting Third Circuit's "19-factor test" and describing such tests as "commodious closets into which the residues of past cases can be deposited—closets that never need to be reorganized or cleaned out because the tests are suggestive only").

are small and agreement is reached prior to certification.

This heightened scrutiny is necessary, these courts explain, because "settlement of a class action" *is not*—as earlier decisions had assumed—"like settlement of any litigation." *Pearson*, 772 F.3d at 787 ("disapprov[ing]" prior Seventh Circuit language). The "trial judge's instinct to approve a settlement, trusting the parties to have negotiated to a just result as an alternative to bearing the risks and costs of litigation," should not control because, in these cases, "the settlement does not represent a contract between *the class and defendant* but between the *class counsel* a*nd defendant*." Lahav, 37 Ind. L. Rev. at 137 (emphasis added).

Thus, while Eleventh Circuit courts view the Rule 23(e) task as scanning for (presumably rare) instances of collusion or similarly blatant unethical behavior, these courts emphasize that discharge of Rule 23(e) responsibilities should be informed by recognition of this "built-in conflict of interest"—and the reality, understood by settlement negotiators, "that the higher the fees the less compensation will be received by the class members." *Redman*, 768 F.3d at 629.

The Eleventh Circuit's failure to recognize that "[c]ases are better decided on reality than on fiction," *Dry Max*, 724 F.3d at 721 (citation omitted), is especially consequential for the central disputed issue here: whether to look to actual (expected) consumer recovery or "funds available." The valuation method the decision below dismissed as "flawed," Pet. App. 15a, is the one that Congress enacted for coupon settlements, see 28 U.S.C. § 1712, and for securities litigation fees, see 15 U.S.C. § 78u–4(a)(6), and endorsed by respected consumer class action advocates. See NACA Standards at 55. Making the sum "available" the yardstick when assessing adequacy and fairness of settlement, needlessly *aggravates* real divergence of interests between class counsel and the consumers whose rights they alter through settlement. Even when class counsel does not actively collude with the defense to design notice or claims procedures aimed at minimizing claims, see *Pearson*, the Eleventh Circuit approach gives no incentive to press for measures that increase recovery and no reason for objecting when defense counsel argues that unconventional or aggressive means of identifying class members are impracticable. At the same time, the "available" fund concept rewards actions that do not necessarily benefit and may well do harm to consumer interests.[5]

In contrast, judicial focus on what consumers actually gained in exchange for broad releases better aligns counsel's interest with those of the class and better serves the remedial and preventative purposes of consumer protection laws. (Wrongdoers are deterred by sums they actually are required to pay.)

This scrutiny should extend, as it does in Seventh Circuit cases, to ensuring that injunctive relief

[5] Here, for example, the "fund" mushroomed when, for settlement purposes, a nationwide class was certified, rather than the two-State class plaintiffs had sought. This enlargement, which presumably required modest work from counsel (and required no additional risk), benefitted defendants, who obtained sweeping immunity from further litigation in 48 additional States, for roughly $200,000 in actual consumer payments and injunctive relief that was costless. See NACA Standards at 12, 14 (highlighting problems with "agree[ments] to expand the class at the settlement stage," including risk that claims of residents of States with stronger consumer remedies will be relinquished).

provisions are adequate. Vigilant Rule 23(e) scrutiny of injunctive relief provisions is necessary not only because such provisions are often included for *improper* purposes—to throw in "hard to value" elements that can deflect from clearly inadequate monetary relief—but especially because *proper* prospective relief is vitally important and often neglected by counsel, who expect fee awards to be based primarily on the monetary relief (however measured) the settlement provides. See *Blanchard v. Bergeron,* 489 U.S. 87, 95 (1989) (cautioning that "undesirable emphasis" on "the importance of the recovery of damages in civil rights litigation" might "shortchange efforts to seek effective injunctive or declaratory relief").

Forward-looking relief has been a cornerstone of modern consumer protection law from the inception. Such relief is—by definition—more directly effective in preventing deceptive practices than the deterrent of potential damages liability. And in cases like this one, *meaningful* injunctive relief would provide real and direct benefit to the large numbers in the class—7.20 million of the 7.26 million purchasers—who received no monetary benefit. The value of such rights is appreciated by *defendants*, who invariably insist on their release in any settlement. Indeed, when settlements are approved without injunctive relief (or with only illusory protections), defendants obtain—by dint of having been sued for deception—an entitlement to resume their objectionable practice and, in some cases, a perpetual immunity from private suit. Cf. *Carson v. American Brands, Inc.,* 450 U.S. 78, 88 n.14 (1981) (court should "judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount *and form* of the relief offered in the settlement") (emphasis added).[6]

The effect of this Court's rejecting the Eleventh Circuit's laissez-faire approach will be settlements that provide more meaningful relief to injured consumers and better advance the deterrent objectives of consumer protection law. The experience of TINA.org and other public interest organizations teaches that judicial disapproval based on objections like those raised here lead to settlements that are more fair, reasonable, and adequate. See *Pearson v. NBTY*, No. 1:11-cv-07972, Dkt. 213 (May 14, 2105) (new proposed settlement after remand); Pet. 33-34.

Moreover, *the expectation* that settlement provisions will be closely and realistically scrutinized, with an eye toward what is actually gained and surrendered—with special antipathy toward provisions that are "illusory"—will effectively stamp out the sort of unethical behavior with which the Eleventh Circuit is concerned, and it will give all parties, including settling defendants, reason to focus on providing the absent consumers meaningful relief in exchange for extinguishing their rights.

[6] Courts confronting illusory injunctive relief sometimes further suggest that prospective relief generally does not "compensate" the class, noting that prior purchasers will sometimes not buy the product again (or that new buyers will benefit). In many cases, and surely here, class members do benefit from truthful information going forward; class members will continue to need batteries, and the theory of the case was only that defendants' batteries were overpriced, based on false longevity claims. And because of broad releases, the only prospective protection class members *can* obtain is through the settlement.

III. Litigation Realities Heighten the Need For This Court's Intervention

Litigation realities make it especially important that the Court resolve this conflict of authority. First, this is not merely a matter of consumers in Eleventh Circuit cases being denied the benefit of protections rightfully accorded those in the Sixth or Seventh Circuits. See S. Ct. R. 10. As petitioners and commentators have explained, the nature of these cases, where attorneys select plaintiffs and advance nationwide claims, make forum-shopping pandemic, meaning that cases can and do migrate to those jurisdictions that afford litigants the greatest freedom of action. Such forums can be expected to be a special magnet for cases and settlements that would not survive scrutiny in (for example) the Seventh Circuit.

Indeed, the highly deferential approach makes it less likely that courts in those jurisdictions will have the means to identify settlements that are problematic even under forgiving standards. The valuable and impartial information that public interest objections bring to Rule 23(e) proceedings is unlikely to come to courts' attention in jurisdictions objection is understood to be futile. And the approval, under permissive standards, of an especially problematic settlement can have an "anchoring" effect, enabling other litigants to obtain approval on the theory that their settlement is no worse than one previously approved.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID T. GOLDBERG
Counsel of Record
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813
david@donahuegoldberg.com

LAURA SMITH
Legal Director
TRUTH IN ADVERTISING, INC.
115 Samson Rock Drive, Suite 2
Madison, CT 06443