No. 14-123

IN THE

Supreme Court of the United States

BP EXPLORATION & PRODUCTION INC., BP AMERICA PRODUCTION CO., & BP PLC,

Petitioners,

v.

LAKE EUGENIE LAND & DEVELOPMENT, INC., *et al.*,

Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioners. Counsel for Petitioners lodged a letter with the Clerk of the Court consenting to the filing of this brief. Likewise, separate counsel for Respondents Lake Eugenie Land & Development, Inc., *et al.*, Cobb Real Estate, Inc., *et al.*, and Deepwater Horizon Court Supervised Settlement program, *et al.*, each lodged a letter with the Clerk of the Court consenting to the filing of this brief. Counsel for Earl Aaron, *et al.*, has also consented to the filing of this brief. To date, counsel for Ancelet's Marina, LLC, *et al.*, has not responded to WLF's request for consent. Accordingly, this motion for leave to file is necessary.

WLF is a non-profit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited, accountable government, and the rule of law. To that end, WLF regularly appears as *amicus curiae* before this and other federal courts to urge the judiciary to confine itself to deciding only true "cases or controversies" under Article III. *See, e.g., Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013); *Boumediene v. Bush*, 553 U.S. 723 (2008). WLF has also participated extensively in litigation to advance its view that federal courts should not certify cases as class actions unless the plaintiffs can demonstrate that they have satisfied every

requirement of Rule 23 of the Federal Rules of Civil Procedure. *See, e.g., Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

WLF agrees with Petitioners that the Fifth Circuit's opinions widen even further a circuit split on whether a class may be certified even though it contains members who suffered no injury caused by the defendant. WLF will not repeat those arguments in its brief. Rather, WLF writes separately to address the harm that will befall both absent class members and class-action defendants if the decisions below are allowed to stand.

WLF believes that the arguments set forth in its brief will assist the Court in resolving the issues presented by the petition. WLF has no direct interest, financial or otherwise, in the outcome of this case. Because of its lack of a direct interest, WLF believes that it can provide the Court with a perspective that is distinct and independent from that of the parties.

For the foregoing reasons, WLF respectfully requests that it be allowed to participate in this case.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Fifth Circuit erred in holding that a certified class can, consistent with Rule 23 and Article III, include numerous members who have not suffered any injury caused by the defendant.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES:

Page(s)

CONSTITUTIONAL PROVISIONS:

RULES:

OTHER AUTHORITIES:

Page(s)

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INTERESTS OF *AMICUS CURIAE*[1]

The interests of the Washington Legal Foundation (WLF) are more fully set forth in the accompanying motion for leave to file this brief. In short, WLF is a non-profit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited, accountable government, and the rule of law.

WLF is particularly concerned that the decisions below, if allowed to stand, will throw into question the fairness of class-action settlements and

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days before the due date, counsel for WLF provided counsel for Respondents with notice of intent to file this brief.

thus discourage litigants from entering such settlements in the first place. Moreover, WLF believes that the decisions below are terribly unfair to defendants in *all* certified class actions; they now face a Hobson's choice in which they either proceed to trial and face ruinous liability—or proceed to settlement and have that settlement essentially rewritten to require payouts to thousands of uninjured claimants. Even beyond the settlement context, the holdings below have significant implications for the continued viability of the class-action device.

STATEMENT OF THE CASE

Two years after the April 2010 explosion on the Deepwater Horizon and the resulting oil spill in the Gulf of Mexico, BP reached a proposed settlement of claims with a putative class of Gulf Coast residents and businesses injured by the spill. *See* Pet. App. 112a. In addition to certain geographic limitations, Section 1.3.1.2 of the settlement agreement explicitly limited class membership to only those individuals and entities who suffered "[l]oss of income, earnings, or profits . . . as a result of the Deepwater Horizon incident." Settlement Agreement § 1.3.1.2 (ROA.13-30315.4071). Following a fairness hearing, the U.S. District Court for the Eastern District of Louisiana certified the class, approved the settlement agreement, and appointed a Claims Administrator to implement the agreement (subject to ongoing judicial review). *See* Pet. App. 161a.

On appeal, two separate panels of the U.S. Court of Appeals for the Fifth Circuit were asked to

decide (1) whether the district court's certification satisfied the requirements of Rule 23, Federal Rules of Civil Procedure (the "Certification Panel") and (2) whether the district court properly interpreted and implemented the settlement agreement's business economic loss framework (the "BEL Panel").

While both of those appeals were still pending, the Claims Administrator issued a controlling interpretation of the settlement agreement's causation requirement that would permit awards to claimants who either had suffered no loss at all or had suffered losses that were not caused by the Deepwater Horizon spill. Specifically, the Claims Administrator announced that he would compensate claimants "without regard to whether such losses resulted or may have resulted from a cause other than the Deepwater Horizon oil spill." Pet. App. 64a-65a & n.5. Following this revelation, BP learned that the Claims Administrator had in fact awarded hundreds of millions of dollars to thousands of claimants who had never been harmed by the oil spill. *Id.* at 418a, 420a-44a. Accordingly, BP argued before both panels that unless the court rejected the Claims Administrator's post-hoc modification of the settlement agreement, class certification would no longer satisfy the requirements of Article III and Rule 23.

In a 2-1 decision, the Certification Panel upheld class certification. *See* Pet. App. 1a. The majority held that the settlement agreement as written satisfied Rule 23, and that the Claims Administrator's construing that agreement to encompass numerous claimants whose injuries were not caused by BP's conduct was "simply irrelevant"

at the Rule 23 certification stage. *Id.* at 26a. This decision left for the BEL Panel the question of whether the agreement contemplated making payments—thereby extending class membership to—claimants whose injuries were not caused by the Deepwater Horizon spill. Judge Garza dissented, insisting that both Supreme Court and circuit precedent required evaluation of the class as actually implemented, and that the class resulting from that implementation in this case could not survive scrutiny under Article III and Rule 23. *Id.* at 66a-73a.

In the wake of the Certification Panel's ruling, BP urged the BEL Panel to reject the Claims Administrator's implementation of the agreement and to construe the agreement in accordance with its plain terms, which—consistent with Article III and Rule 23—expressly limited class membership to only those claimants who incurred losses as "a result of" the spill. By a 2-1 vote, the BEL Panel refused to reinterpret the settlement agreement as imposing a causal-nexus requirement for class membership. *See* Pet. App. 78a. Concluding that a claimant's mere "attestation" of an injury caused by the spill could suffice to establish a causal nexus under the agreement, the panel majority held that implementation of the agreement fully satisfied the rigorous demands of Article III and Rule 23. *Id.* at 89a-92a. Judge Clement dissented, explaining at length how, as a result of both panel opinions, "[c]laimants whose losses had nothing to do with Deepwater Horizon or BP's conduct will recover." *Id.* 105a-107a.

BP petitioned the *en banc* court to rehear both decisions, but the court denied BP's petitions by an 8-5 vote. *See* Pet. App. 383a-84a, 394a-95a. Judge Clement, joined by Judges Jolly and Jones, filed strong dissents from denial in both appeals. *Id.* at 385a-91a, 396a-406a. Judge Clement emphasized that the district court's implementation of the settlement agreement contrary to its own terms was "irreconcilable" with the demands of Article III. She went on to warn that the court's *en banc* denials would effectively "funnel" windfall payments "into the pockets of undeserving non-victims," an absurd result. *Id.* at 388a-89a.

SUMMARY OF ARGUMENT

In the decisions below, the Fifth Circuit held that a certified class may satisfy Federal Rule of Civil Procedure 23 and Article III of the Constitution even though the class includes myriad members who suffered no injury caused by the defendant and, in some cases, no injury whatsoever. In so doing, the appeals court upheld an interpretation of the settlement agreement's causation requirement whereby the Claims Administrator would compensate claimants "without regard to whether such losses resulted or may have resulted from a cause other than the Deepwater Horizon oil spill."

That interpretation creates an irreconcilable conflict among members of the class, which now includes both injured claimants seeking recovery for actual losses and uninjured claimants seeking completely unjustified windfalls. As petitioners persuasively argue, this inherent conflict destroys commonality and typicality because the class

members no longer share the same theory of injury—indeed, many class members have no injury at all. But by their very nature, such intra-class conflicts *also* deprive class members of adequacy under Rule 23(a)(4) because the interests of those within the class are no longer aligned.

Although a useful litigation tool when class members are "united in interest," the class-action mechanism results in an unjust and costly windfall when it grants uninjured persons monetary relief to which they would not otherwise be entitled. The decisions below thus drive a wedge between competing class members, some of whom have legitimate claims arising from the oil spill, and others who suffered no such injury. But allowing claimants who were not injured by the defendants' conduct to collect from the settlement fund can potentially prevent those plaintiffs with legitimate claims from obtaining the maximum amount to which they may be entitled.

If allowed to stand, the Fifth Circuit's decisions place class-action defendants at a decided disadvantage. They face the prospect of paying out large settlements without any assurance that those payments will strictly be limited to injured claimants (as bargained for in the settlement agreement), or proceeding to trial to face ruinous liability. At the very least, one can expect the Fifth Circuit's decisions to discourage appreciably the settlement of class-action suits. Future defendants will have far less reason to commit significant sums of money to the settlement of such suits if they have no reasonable assurance that the settlement the parties agree to will be the settlement that is

ultimately implemented. In all events, the pernicious implications of the Fifth Circuit's holdings go well beyond settlements to threaten the continued viability of the entire class-action device itself.

REASONS FOR GRANTING THE PETITION

The Petition presents issues of exceptional importance to all class-action defendants. The holdings below deepen a circuit split as to whether Rule 23 and Article III permit a certified class to include numerous members who lack any injury caused by the defendant's conduct and, in some cases, any injury whatsoever. Because the Fifth Circuit's decisions concern a significant and recurring question regarding the permissible limits of class certification, this case offers the Court an excellent vehicle to decide those questions.

As the petition makes clear, the interests of fairness, predictability, and consistency were all injured in this case. Only this Court can now safeguard the settled expectations that traditionally have flowed from the class-action device. WLF joins with Petitioners in urging this Court to grant the petition for writ of certiorari.

I. REVIEW IS WARRANTED BECAUSE THE DECISIONS BELOW, IF ALLOWED TO STAND, WILL FOSTER INTRA-CLASS CONFLICTS AND HARM ABSENT CLASS MEMBERS

In *Phillips Petroleum Co. v. Shutts*, this Court recognized strict due process limitations on a court's ability to bind nonparties to a class action for money

damages. 472 U.S. 797, 811-12 (1985). Once a class has been certified, the Constitution permits a settlement to bind absent class members only if important procedural protections governing non-party preclusion—including the right to notice, an opportunity to be heard, and the right to opt out—were adhered to. *Id*. at 812.

Moreover, class representatives have a strict fiduciary duty to represent and protect the interests of all absent class members. *See, e.g., Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (holding that class representatives "whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, do[] not afford that protection to absent parties which due process requires"). For that reason, a class representative must "possess undivided loyalties to class members." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998). Under Rule 23(a)(4), a class may be certified only if "the representative parties will fairly and adequately protect the interest of the class." Fed. R. Civ. P. 23(a)(4).

One of the primary responsibilities of the class representative is to provide a healthy degree of independence from class counsel, so that when the interests of the class come into conflict with those of class counsel, the interests of the entire class will be preserved. *See, e.g., CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 724 (7th Cir. 2011) (holding that a class representative must be "able to ensure that class counsel act as faithful agents of the class"); *Kirkpatrick v. JC Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987) (finding putative class representatives inadequate because

"they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys").

In *Shutts*, this Court made clear that a class representative owes a fiduciary duty to absent class members "at all times" during the litigation. 472 U.S. at 812 ("[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members."). As the Court's phrase "at all times" indicates, class representatives owe a duty to absent class members when bargaining for a settlement of class claims (and subsequently when arguing for an interpretation of that settlement). *See, e.g., Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 189 n.19 (3d Cir. 2012)("The adequacy requirement provides *structural* protections during the process of bargaining for settlement.").

As this Court emphasized in *Amchem Prods. v. Windsor*, 521 U.S. 591, 625-26 (1997), "[a] class representative must be part of the class and possess the same interest . . . as the class members." The importance of adequate representation for absent class members is underscored by the ability of absent members who were not adequately represented to collaterally attack a class judgment and thereby escape its *res judicata* effect. *Dow Chemical Co. v. Stephenson*, 593 U.S. 111, 112 (2003).

In this case, the district court sustained—and the Fifth Circuit doubled down on—a class comprised of a potpourri of members including some entitled to compensation for harms actually suffered,

some who will receive windfall recoveries despite suffering no harm whatsoever, and some who will recover for injuries wholly unconnected to the Deepwater Horizon spill. Not only does this scenario fail to satisfy the commonality requirement of Rule 23 (as the Petition ably points out), it necessarily raises serious concerns that "the interests of those within the single class are not aligned." *Amchem*, 521 U.S. at 626.

After all, class members who have suffered no harm cannot possibly have the "same interest" as those genuinely harmed by the spill. Class members with legitimate injuries would desire a narrower settlement that increases the compensation for actual injuries suffered. In contrast, class members with no injuries would prefer a much broader settlement that provides a recovery for as many claims as possible, even if such a settlement dilutes compensation for legitimate claims.

By embracing an interpretation of the class settlement that benefits both those members who suffered actual losses *and* those members who suffered no losses whatsoever, the Fifth Circuit places injured members in a worse-off position than they otherwise might have been had non-injured members been properly excluded from the class in the first place. This structural failure violates Rule 23 even if the class members' interests in this case were not ultimately damaged. *See, e.g., Dewey*, 681 F.3d at 189 n.19 ("The fact that the stars aligned and the class members' interests were not actually damaged does not permit representative plaintiffs to bypass structural requirements."). And in many cases, legitimate class members could very well lose

out if class counsel decides to jeopardize the entire settlement for the sake of maximizing the breadth of the settlement class (because more claims yield more lodestar hours and thus more attorney fees) rather than pursuing a greater per-claimant recovery for fewer but legitimately injured class members.

Nor does the fact that the settlement in this case was largely uncapped eliminate the harm to absent class members. Such an argument was considered and explicitly rejected by this Court in *Amchem*. 521 U.S. at 626 ("The disparity between the currently injured and exposure-only categories of plaintiffs and the diversity within each category are not made insignificant by the District Court's finding that petitioners' assets suffice to pay claims under the settlement."). As the Court explained, "[a]lthough this is not a 'limited fund' case certified under Rule 23(b)(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability." *Id.* at 626-27.

The Fifth Circuit's decisions below thus harm absent class members by effectively nullifying Rule 23(a)(4)'s requirement of adequate representation. By extending class membership to claimants without any colorable claim of injury, the Fifth Circuit creates an intractable class conflict whereby class counsel is placed in the position of choosing between maximizing recovery only for those class members with legitimate claims versus maximizing the breadth of the settlement to include as many claims as possible, whether plausible or not. But "because absent class members are conclusively bound by the judgment in any class action brought on their behalf,

the court must be especially vigilant to ensure that the due process rights of all class members are safeguarded through adequate representation at all times." *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 480 (5th Cir. 2001).

The Court's discretionary review is thus necessary to protect the rights of absent class members and to guard against intra-class conflict.

II. REVIEW IS WARRANTED BECAUSE THE DECISIONS BELOW, IF ALLOWED TO STAND, ARE UNFAIR TO DEFENDANTS AND WILL UNNECESSARILY DISCOURAGE SETTLEMENT OF CLASS ACTIONS

Even aside from the demonstrable harm to absent class members, this Court's intervention is necessary to blunt the widespread uncertainty the decision below will cause for all class-action settlements. No longer can the parties to such settlements rest assured that the litigation has been mutually resolved on the terms actually agreed to by class counsel and defense counsel. This result is particularly unfair to class-action defendants who (as was true here) understandably would never agree to provide payment to claimants who were not actually injured by defendants in the first place.

It is commonly understood that "the vast majority of certified class actions settle, and that most soon after certification." Robert G. Bone & David E. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291-92 (2002) ("[E]mpirical studies . . . confirm what most

class action lawyers know to be true."); *see also* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U L. Rev. 97, 99 (2009)("With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial."); Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 647 (2006)("[A]lmost all certified class actions settle.").

The reasons that most class actions settle before trial are well-known and widely documented. Chief among them, of course, is that "[e]ven in the mine-run case, a class action can result in 'potentially ruinous liability.' A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims." *Shady Grove Orthopedic Assocs. v. Allstate Ins.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (quoting Fed. R. Civ. Pr. 23, advisory committee's note). Indeed, "when the central issue in a case is given class treatment" to be resolved "once-and-for-all" by a single trier of fact, "trial becomes a roll of the dice" such that "a single throw may determine the outcome of an immense number of separate claims," thereby imposing staggering liability. *Thorogood v. Sears Roebuck & Co.*, 624 F.3d 842, 849 (7th Cir. 2010). Because class actions threaten ruinous liability, the coercive pressures on a defendant to settle are overwhelming.

Apart from liability, the enormous pre-trial discovery costs involved in defending class-action litigation are often prohibitive. "One purpose of discovery—improper and rarely acknowledged but

pervasive—is: it makes one's opponent spend money." *Thorogood*, 624 F.3d at 849 (quotation marks omitted). And in most class action suits, "there is far more evidence that plaintiffs may be able to discover in defendants' records (including emails, the vast and ever-expanding volume of which has made the cost of discovery soar) than vice versa." *Id.* at 849-50. These "almost universally-voluminous files . . . allow plaintiffs to impose, at the very outset of the litigation, huge document production costs." Louis W. Hensler III, *Class Counsel, Self-Interest and Other People's Money*, 35 U. Mem. L. Rev. 53, 66 (2004). As a result, defendants in large class actions will often find it preferable to settle even questionable claims in order to avoid the burdensome costs imposed by discovery. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007)("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.").

Such settlements, which save parties both the time and expense of protracted litigation, often result in speedier compensation for injured class members. For that reason, settlements have long been favored by the federal courts as a matter of public policy. *See Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1040, 1050 (Fed. Cir. 1986)("The law . . . favors settlement of litigation which . . . mitigates the antagonism and hostility that protracted litigation leading to judgment may cause."). Of course, settlement agreements also help to reduce the enormous strain on limited judicial resources. *Reichenbach v. Smith*, 528 F.2d 1072, 1074 (5th Cir. 1976)("With today's burgeoning dockets and the absolute impossibility of Courts ever

beginning to think that they might even be able to hear every case, the cause of justice is advanced by settlement compromises.").

This strong interest in promoting settlement is completely upended by the Fifth Circuit's decisions in this case, which transform Rule 23 from a device designed to facilitate the efficient adjudication of similar claims into a one-sided procedure that places defendants at a decided disadvantage. Class-action defendants can no longer be assured that monies paid out pursuant to such settlements will be strictly limited to carefully defined members of the class, as stipulated by the parties.

Part of the reason defendants settle disputes is the certainty that such settlements provide. But a wide-open interpretation settlement agreements that extends compensation to uninjured claimants drastically undermines that certainty. Such defendants may very well find themselves in an untenable heads-I-win-tails-you-lose situation. If the defendant loses at trial, he will be expected to pay massive damages to all class members. But any perceived advantage offered by a class-wide settlement may turn out to pyrrhic if a federal judge can simply interpret the settlement to include numerous claimants who never suffered any injury caused by the defendant—in direct contravention of Article III and Rule 23.

At the end of the day, ruinous settlements are no better than ruinous verdicts. Defendants may be inclined to try their luck at trial if the alternative is wide-open liability in a settlement context. At the

very least, one can expect the Fifth Circuit's decisions to discourage appreciably the settlement of class-action suits. Defendants will have far less reason to commit significant sums of money to the settlement of such suits if they can have no reasonable assurance that the settlement the parties agree to will be the settlement that is ultimately implemented. Such a decrease in settlement rates will serve only to further clog our nation's courts and to delay the receipt of compensation by injured plaintiffs with valid claims.

The Court's discretionary review is thus necessary to protect the rights of class-action defendants and ensure the continued viability of not only future class-action settlements, but the class action device itself.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court grant the petition.

Respectfully submitted,

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