Update Memo—July 2023
Class Actions and Other Multi-Party Litigation
Cases and Materials (4th ed.)

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This memorandum discusses important developments since the casebook went to press in May 2017.

Professor Klonoff is currently working with Professor Maria Glover (Georgetown), Professor Teddy Rave (Texas) and Elizabeth Cabraser (Lieff Cabraser) on a new and complete revamped version of this casebook. The authors anticipate that the text will be ready for courses in spring 2025.

CHAPTER 1

Page 1, add the following as a new paragraph after the second paragraph:

Fallout from the coronavirus pandemic illustrates the power of the class action device to seek group remedies. Almost immediately after the pandemic hit the United States, myriad class actions were filed. These include, among others:

- Class actions seeking refunds or reimbursements against airlines, cruise lines, universities, gyms, ticketing companies, music festivals, and many other businesses.

- Business interruption insurance class actions by restaurants, clubs, and other businesses against insurance companies for losses resulting from closures.

- Class actions under the Paycheck Protection Program forgivable loan program alleging that lenders violated state consumer protection laws or unfair competition statutes.

- Privacy class actions against video conferencing companies.

- Class actions by students against colleges and universities for tuition, fees, and housing costs because of campus closures resulting from the pandemic.

- Class actions by prisoners against prisons for failing to protect their health and safety, *e.g.,* not allowing prisoners to adhere to social distancing measures and not providing adequate protective equipment.

- False advertising class actions, such as suits by consumers against hand sanitizer companies for overstating the protection offered by their products.

- Class actions against cruise lines by passengers alleging that the companies failed to protect their health and safety.

- Consumer class actions claiming that companies selling products such as hand sanitizer, toilet paper, masks, and other products engaged in unlawful price gouging.

- Class actions by employees against employers, alleging unlawful terminations, failure to provide sick leave, and other employment-related claims.

- Class actions against the Government of China by a wide variety of plaintiffs alleging that the Chinese government improperly covered up the seriousness and scope of the coronavirus.

- Securities fraud class actions by investors claiming that various companies misled them about the business risks arising from the coronavirus or that pharmaceutical companies overstated the prospects of a cure or vaccine, thus resulting in inflated stock prices.

Many of these suits involve overarching issues of liability and would be too costly to litigate as individual claims.

Page 29, Strike Proposed Changes in Heading d, Substitute 2018 Amendments, and insert the following in place of the existing text in d:

The 2018 amendments (discussed in detail in this Update Memo) added provisions to deter professional objectors, added detailed criteria for evaluating the fairness of settlements, broadened options for notice to include electronic notice, and expanded the time limits for certain parties to seek interlocutory review under Rule 23(f).

Page 29, substitute the following for current Heading e:

e. Congressional proposals

Various bills were proposed a number of years ago to severely restrict the ability to bring class actions, but they did not lead to new laws. *See, e.g.,* the Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. (2017).

CHAPTER 2

Page 58, add the following in the introductory paragraph of Section 3 before sentence that begins with "In addition . . . ":

But see, e.g., Nielsen v. Preap, 139 S. Ct. 954, 963 (2019) (the "fact that the named plaintiffs obtained some relief before class certification [did] not moot their claims").

Page 69, add the following new note 4, and renumber existing note 4 as note 5:

4. In 2017, the Seventh Circuit held that a defendant's settlement offer, accompanied by a deposit of the offered funds with the court, did not moot the class representative's individual claims. *Fulton Dental, LLC v. Bisco, Inc.*, 860 F.3d 541 (7th Cir. 2017). The court concluded that "an unaccepted offer to settle a case, accompanied by a payment intended to provide full compensation into the registry of the court . . . is no different in principle from an offer of settlement made under Rule 68." *Id*. at 547.

Page 72, add the following new case before "b. Legislative Efforts":

At the very end of the 2020 Term, the Supreme Court issued a major new opinion on standing.

TRANSUNION LLC V. RAMIREZ

Supreme Court of the United States, 2021.

141 S. Ct. 2190.

JUSTICE KAVANAUGH delivered the opinion of the Court.

To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. No concrete harm, no standing. Central to assessing concreteness is whether the asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340–41 (2016).

In this case, a class of 8,185 individuals sued TransUnion, a credit reporting agency, in federal court under the Fair Credit Reporting Act. The plaintiffs claimed that TransUnion failed to use reasonable procedures to ensure the accuracy of their credit files, as maintained internally by TransUnion. For 1,853 of the class members, TransUnion provided misleading credit reports to third-party businesses. We conclude that those 1,853 class members have demonstrated concrete reputational harm and thus have Article III standing to sue on the reasonable-procedures claim. The internal credit files of the other 6,332 class members were *not* provided

to third-party businesses during the relevant time period. We conclude that those 6,332 class members have not demonstrated concrete harm and thus lack Article III standing to sue on the reasonable-procedures claim.

In two other claims, all 8,185 class members complained about formatting defects in certain mailings sent to them by TransUnion. But the class members other than the named plaintiff Sergio Ramirez have not demonstrated that the alleged formatting errors caused them any concrete harm. Therefore, except for Ramirez, the class members do not have standing as to those two claims.

* * * [T]he Ninth Circuit ruled that all 8,185 class members have standing as to all three claims. * * * In light of our conclusion[s] * * *, we reverse the judgment of the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

I.

In 1970, Congress passed and President Nixon signed the Fair Credit Reporting Act. 84 Stat. 1127, as amended, 15 U.S.C. § 1681 *et seq*. The Act seeks to promote "fair and accurate credit reporting" and to protect consumer privacy. § 1681(a). * * *

The Act "imposes a host of requirements concerning the creation and use of consumer reports." Three of the Act's requirements are relevant to this case. *First*, the Act requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" in consumer reports. § 1681e(b). *Second*, the Act provides that consumer reporting agencies must, upon request, disclose to the consumer "[a]ll information in the consumer's file at the time of the request." § 1681g(a)(1). *Third*, the Act compels consumer reporting agencies to "provide to a consumer, with each written disclosure by the agency to the consumer," a "summary of rights" prepared by the Consumer Financial Protection Bureau. § 1681g(c)(2).

The Act creates a cause of action for consumers to sue and recover damages for certain violations. The Act provides: "Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer" for actual damages or for statutory damages not less than $100 and not more than $1,000, as well as for punitive damages and attorney's fees. § 1681n(a).

TransUnion is one of the "Big Three" credit reporting agencies, along with Equifax and Experian. As a credit reporting agency, TransUnion compiles personal and financial information about individual consumers to create consumer reports. TransUnion then sells those consumer reports for use by entities such as banks, landlords, and car dealerships that request information about the creditworthiness of individual consumers.

Beginning in 2002, TransUnion introduced an add-on product called OFAC Name Screen Alert. OFAC is the U.S. Treasury Department's Office of Foreign Assets Control. OFAC maintains a list of "specially designated nationals" who threaten America's national security. Individuals on the

OFAC list are terrorists, drug traffickers, or other serious criminals. It is generally unlawful to transact business with any person on the list. TransUnion created the OFAC Name Screen Alert to help businesses avoid transacting with individuals on OFAC's list.

When this litigation arose, Name Screen worked in the following way: When a business opted into the Name Screen service, TransUnion would conduct its ordinary credit check of the consumer, and it would also use third-party software to compare the consumer's name against the OFAC list. If the consumer's first and last name matched the first and last name of an individual on OFAC's list, then TransUnion would place an alert on the credit report indicating that the consumer's name was a "potential match" to a name on the OFAC list. TransUnion did not compare any data other than first and last names. Unsurprisingly, TransUnion's Name Screen product generated many false positives. Thousands of law-abiding Americans happen to share a first and last name with one of the terrorists, drug traffickers, or serious criminals on OFAC's list of specially designated nationals.

Sergio Ramirez learned the hard way that he is one such individual. On February 27, 2011, Ramirez visited a Nissan dealership in Dublin, California, seeking to buy a Nissan Maxima. Ramirez was accompanied by his wife and his father-in-law. After Ramirez and his wife selected a color and negotiated a price, the dealership ran a credit check on both Ramirez and his wife. Ramirez's credit report, produced by TransUnion, contained the following alert: "***OFAC ADVISOR ALERT - INPUT NAME MATCHES NAME ON THE OFAC DATABASE." A Nissan salesman told Ramirez that Nissan would not sell the car to him because his name was on a "'terrorist list.'" Ramirez's wife had to purchase the car in her own name.

The next day, Ramirez called TransUnion and requested a copy of his credit file. TransUnion sent Ramirez a mailing that same day that included his credit file and the statutorily required summary of rights prepared by the CFPB. The mailing did not mention the OFAC alert in Ramirez's file. The following day, TransUnion sent Ramirez a second mailing—a letter alerting him that his name was considered a potential match to names on the OFAC list. The second mailing did not include an additional copy of the summary of rights. Concerned about the mailings, Ramirez consulted a lawyer and ultimately canceled a planned trip to Mexico. TransUnion eventually removed the OFAC alert from Ramirez's file.

In February 2012, Ramirez sued TransUnion and alleged three violations of the Fair Credit Reporting Act. *First*, he alleged that TransUnion, by using the Name Screen product, failed to follow reasonable procedures to ensure the accuracy of information in his credit file. See § 1681e(b). *Second*, he claimed that TransUnion failed to provide him with *all* the information in his credit file upon his request. In particular, TransUnion's first mailing did not include the fact that Ramirez's name was a potential match for a name on the OFAC list. See § 1681g(a)(1). *Third*, Ramirez asserted that TransUnion violated its obligation to provide

him with a summary of his rights "with each written disclosure," because TransUnion's second mailing did not contain a summary of Ramirez's rights. § 1681g(c)(2). Ramirez requested statutory and punitive damages.

Ramirez also sought to certify a class of all people in the United States to whom TransUnion sent a mailing during the period from January 1, 2011, to July 26, 2011, that was similar in form to the second mailing that Ramirez received. TransUnion opposed certification. The U.S. District Court for the Northern District of California rejected TransUnion's argument and certified the class.

Before trial, the parties stipulated that the class contained 8,185 members, including Ramirez. The parties also stipulated that only 1,853 members of the class (including Ramirez) had their credit reports disseminated by TransUnion to potential creditors during the period from January 1, 2011, to July 26, 2011. The District Court ruled that all 8,185 class members had Article III standing.

At trial, Ramirez testified about his experience at the Nissan dealership. But Ramirez did not present evidence about the experiences of other members of the class.

After six days of trial, the jury returned a verdict for the plaintiffs. The jury awarded each class member $984.22 in statutory damages and $6,353.08 in punitive damages for a total award of more than $60 million. The District Court rejected all of TransUnion's post-trial motions.

[A divided panel of the] Ninth Circuit affirmed in relevant part. The [majority] held that all members of the class had Article III standing to recover damages for all three claims. * * *

* * *

We granted certiorari.

II.

The question in this case is whether the 8,185 class members have Article III standing as to their three claims. * * *

A.

The "law of Art. III standing is built on a single basic idea—the idea of separation of powers." * * *

Therefore, we start with the text of the Constitution. Article III confines the federal judicial power to the resolution of "Cases" and "Controversies." For there to be a case or controversy under Article III, the plaintiff must have a "'personal stake'" in the case—in other words, standing. * * *

To answer that question in a way sufficient to establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief. * * *

* * *

B.

The question in this case focuses on the Article III requirement that the plaintiff 's injury in fact be "concrete"—that is, "real, and not abstract."

What makes a harm concrete for purposes of Article III? * * * [T]his Court's opinion in *Spokeo v. Robins* indicated that courts should assess whether the alleged injury to the plaintiff has a "close relationship" to a harm "traditionally" recognized as providing a basis for a lawsuit in American courts. That inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury. *Spokeo* does not require an exact duplicate in American history and tradition. But *Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts.

As *Spokeo* explained, certain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as physical harms and monetary harms. If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.

Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion. * * *

In determining whether a harm is sufficiently concrete to qualify as an injury in fact, the Court in *Spokeo* said that Congress's views may be "instructive." * * * But even though "Congress may 'elevate' harms that 'exist' in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is."

Importantly, this Court has rejected the proposition that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." * * *

Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III any more than, for example, Congress's enactment of a law regulating speech relieves courts of their responsibility to independently decide whether the law violates the First Amendment. * * *

* * * [U]nder Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court. * * *

To appreciate how the Article III "concrete harm" principle operates in practice, consider two different hypothetical plaintiffs. Suppose first that a Maine citizen's land is polluted by a nearby factory. She sues the company, alleging that it violated a federal environmental law and damaged her property. Suppose also that a second plaintiff in Hawaii files a federal lawsuit alleging that the same company in Maine violated that same environmental law by polluting land in Maine. The violation did not personally harm the plaintiff in Hawaii.

Even if Congress affords both hypothetical plaintiffs a cause of action (with statutory damages available) to sue over the defendant's legal violation, Article III standing doctrine sharply distinguishes between those two scenarios. The first lawsuit may of course proceed in federal court because the plaintiff has suffered concrete harm to her property. But the second lawsuit may not proceed because that plaintiff has not suffered any physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts. * * *

* * *

A regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority. We accept the "displacement of the democratically elected branches when necessary to decide an actual case." But otherwise, the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys). * * *

* * *

III.

We now apply those fundamental standing principles to this lawsuit. We must determine whether the 8,185 class members have standing to sue TransUnion for its alleged violations of the Fair Credit Reporting Act. * * *

Some preliminaries: As the party invoking federal jurisdiction, the

plaintiffs bear the burden of demonstrating that they have standing. Every class member must have Article III standing in order to recover individual damages. * * *

A.

We first address the plaintiffs' claim that TransUnion failed to "follow reasonable procedures to assure maximum possible accuracy" of the plaintiffs' credit files maintained by TransUnion. 15 U.S.C. § 1681e(b). In particular, the plaintiffs argue that TransUnion did not do enough to ensure that OFAC alerts labeling them as potential terrorists were not included in their credit files.

Assuming that the plaintiffs are correct that TransUnion violated its obligations under the Fair Credit Reporting Act to use reasonable procedures in internally maintaining the credit files, we must determine whether the 8,185 class members suffered concrete harm from TransUnion's failure to employ reasonable procedures.[5]

1.

Start with the 1,853 class members (including the named plaintiff Ramirez) whose reports were disseminated to third-party businesses. The plaintiffs argue that the publication to a third party of a credit report bearing a misleading OFAC alert injures the subject of the report. The plaintiffs contend that this injury bears a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts—namely, the reputational harm associated with the tort of defamation.

We agree with the plaintiffs. Under longstanding American law, a person is injured when a defamatory statement "that would subject him to hatred, contempt, or ridicule" is published to a third party. TransUnion provided third parties with credit reports containing OFAC alerts that labeled the class members as potential terrorists, drug traffickers, or serious criminals. The 1,853 class members therefore suffered a harm with a "close relationship" to the harm associated with the tort of defamation. We have no trouble concluding that the 1,853 class members suffered a concrete harm that qualifies as an injury in fact.

* * *

2.

The remaining 6,332 class members are a different story. To be sure, their credit files, which were maintained by TransUnion, contained

[5] For purposes of this case, the parties have assumed that TransUnion violated the statute even with respect to those plaintiffs whose OFAC alerts were never disseminated to third-party businesses. * * *

misleading OFAC alerts. But the parties stipulated that TransUnion did not provide those plaintiffs' credit information to any potential creditors during the class period from January 2011 to July 2011. Given the absence of dissemination, we must determine whether the 6,332 class members suffered some other concrete harm for purposes of Article III.

* * *

* * * [We hold that the] mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm. In cases such as these where allegedly inaccurate or misleading information sits in a company database, the plaintiffs' harm is roughly the same, legally speaking, as if someone wrote a defamatory letter and then stored it in her desk drawer. A letter that is not sent does not harm anyone, no matter how insulting the letter is. So too here.[6]

Because the plaintiffs cannot demonstrate that the misleading information in the internal credit files itself constitutes a concrete harm, the plaintiffs advance a separate argument based on an asserted *risk of future harm*. They say that the 6,332 class members suffered a concrete injury for Article III purposes because the existence of misleading OFAC alerts in their internal credit files exposed them to a material risk that the information would be disseminated in the future to third parties and thereby cause them harm. The plaintiffs rely on language from *Spokeo* where the Court said that "the risk of real harm" (or as the Court otherwise stated, a "material risk of harm") can sometimes "satisfy the requirement of concreteness."

* * * As this Court has recognized, a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial.

But a plaintiff must "demonstrate standing separately for each form of relief sought." * * *

TransUnion advances a persuasive argument that in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm

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[6] For the first time in this Court, the plaintiffs also argue that TransUnion "published" the class members' information internally—for example, to employees within TransUnion and to the vendors that printed and sent the mailings that the class members received. That new argument is forfeited. In any event, it is unavailing. Many American courts did not traditionally recognize intra-company disclosures as actionable publications for purposes of the tort of defamation. Nor have they necessarily recognized disclosures to printing vendors as actionable publications. Moreover, even the plaintiffs' cited cases require evidence that the defendant actually "brought an idea to the perception of another," and thus generally require evidence that the document was actually read and not merely processed. That evidence is lacking here. In short, the plaintiffs' internal publication theory circumvents a fundamental requirement of an ordinary defamation claim—publication—and does not bear a sufficiently "close relationship" to the traditional defamation tort to qualify for Article III standing.

itself causes a *separate* concrete harm. TransUnion contends that if an individual is exposed to a risk of future harm, time will eventually reveal whether the risk materializes in the form of actual harm. If the risk of future harm materializes and the individual suffers a concrete harm, then the harm itself, and not the pre-existing risk, will constitute a basis for the person's injury and for damages. If the risk of future harm does *not* materialize, then the individual cannot establish a concrete harm sufficient for standing, according to TransUnion.

Consider an example. Suppose that a woman drives home from work a quarter mile ahead of a reckless driver who is dangerously swerving across lanes. The reckless driver has exposed the woman to a risk of future harm, but the risk does not materialize and the woman makes it home safely. * * * [T]hat would ordinarily be cause for celebration, not a lawsuit. But if the reckless driver crashes into the woman's car, the situation would be different, and (assuming a cause of action) the woman could sue the driver for damages.

* * *

Here, the 6,332 plaintiffs did not demonstrate that the risk of future harm materialized—that is, that the inaccurate OFAC alerts in their internal TransUnion credit files were ever provided to third parties or caused a denial of credit. Nor did those plaintiffs present evidence that the class members were independently harmed by their exposure to the risk itself—that is, that they suffered some other injury (such as an emotional injury) from the mere risk that their credit reports would be provided to third-party businesses. Therefore, the 6,332 plaintiffs' argument for standing for their damages claims based on an asserted risk of future harm is unavailing.

Even apart from that fundamental problem with their argument based on the risk of future harm, the plaintiffs did not factually establish a sufficient risk of future harm to support Article III standing. * * * The plaintiffs claimed that TransUnion could have divulged their misleading credit information to a third party at any moment. But the plaintiffs did not demonstrate a sufficient likelihood that their individual credit information would be requested by third-party businesses and provided by TransUnion during the relevant time period. Nor did the plaintiffs demonstrate that there was a sufficient likelihood that TransUnion would otherwise intentionally or accidentally release their information to third parties. * * *

Moreover, the plaintiffs did not present any evidence that the 6,332 class members even *knew* that there were OFAC alerts in their internal TransUnion credit files. * * *

Finally, the plaintiffs advance one last argument for why the 6,332 class members are similarly situated to the other 1,853 class members and thus should have standing. The 6,332 plaintiffs note that they sought

damages for the entire 46-month period permitted by the statute of limitations, whereas the stipulation regarding dissemination covered only 7 of those months. They argue that the credit reports of many of those 6,332 class members were likely also sent to third parties outside of the period covered by the stipulation because all of the class members requested copies of their reports, and consumers usually do not request copies unless they are contemplating a transaction that would trigger a credit check.

That is a serious argument, but * * * we conclude that it fails to support standing for the 6,332 class members. The plaintiffs had the burden to prove at trial that their reports were actually sent to third-party businesses. The inferences on which the argument rests are too weak to demonstrate that the reports of any particular number of the 6,332 class members were sent to third-party businesses. * * *

In sum, the 6,332 class members whose internal TransUnion credit files were not disseminated to third-party businesses did not suffer a concrete harm. By contrast, the 1,853 class members (including Ramirez) whose credit reports were disseminated to third-party businesses during the class period suffered a concrete harm.

B.

We next address the plaintiffs' standing to recover damages for two other claims in the complaint: the disclosure claim and the summary-of-rights claim. Those two claims are intertwined.

In the disclosure claim, the plaintiffs alleged that TransUnion breached its obligation to provide them with their complete credit files upon request. According to the plaintiffs, TransUnion sent the plaintiffs copies of their credit files that omitted the OFAC information, and then in a second mailing sent the OFAC information. *See* § 1681g(a)(1). In the summary-of-rights claim, the plaintiffs further asserted that TransUnion should have included another summary of rights in that second mailing—the mailing that included the OFAC information. *See* § 1681g(c)(2). As the plaintiffs note, the disclosure and summary-of-rights requirements are designed to protect consumers' interests in learning of any inaccuracies in their credit files so that they can promptly correct the files before they are disseminated to third parties.

* * * [T]he plaintiffs thus contend that the TransUnion mailings were formatted incorrectly and deprived them of their right to receive information in the format required by statute. But the plaintiffs have not demonstrated that the format of TransUnion's mailings caused them a harm with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts. In fact, they do not demonstrate that they suffered any harm *at all* from the formatting violations. The plaintiffs presented no evidence that, other than Ramirez, "a single other class member so much as *opened* the dual mailings," "nor that they were confused, distressed, or relied on the information in any

way." The plaintiffs put forth no evidence, moreover, that the plaintiffs would have tried to correct their credit files—and thereby prevented dissemination of a misleading report—had they been sent the information in the proper format. Without any evidence of harm caused by the format of the mailings, these are "bare procedural violation[s], divorced from any concrete harm." That does not suffice for Article III standing.

The plaintiffs separately argue that TransUnion's formatting violations created a risk of future harm. Specifically, the plaintiffs contend that consumers who received the information in this dual-mailing format were at risk of not learning about the OFAC alert in their credit files. They say that they were thus at risk of not being able to correct their credit files before TransUnion disseminated credit reports containing the misleading information to third-party businesses. As noted above, the risk of future harm on its own does not support Article III standing for the plaintiffs' damages claim. In any event, the plaintiffs made no effort here to explain how the formatting error prevented them from contacting TransUnion to correct any errors before misleading credit reports were disseminated to third-party businesses. * * *

For its part, the United States as *amicus curiae*, but not the plaintiffs, separately asserts that the plaintiffs suffered a concrete "informational injury" under several of this Court's precedents. * * * We disagree. The plaintiffs did not allege that they failed to receive any required information. They argued only that they received it *in the wrong format*. * * *

* * *

No concrete harm, no standing. The 1,853 class members whose credit reports were provided to third-party businesses suffered a concrete harm and thus have standing as to the reasonable-procedures claim. The 6,332 class members whose credit reports were not provided to third-party businesses did not suffer a concrete harm and thus do not have standing as to the reasonable-procedures claim. As for the claims pertaining to the format of TransUnion's mailings, none of the 8,185 class members other than the named plaintiff Ramirez suffered a concrete harm.

* * *

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

TransUnion generated credit reports that erroneously flagged many law-abiding people as potential terrorists and drug traffickers. In doing so, TransUnion violated several provisions of the Fair Credit Reporting Act (FCRA) that entitle consumers to accuracy in credit-reporting procedures; to receive information in their credit files; and to receive a summary of their rights. Yet despite Congress' judgment that such misdeeds deserve redress, the majority decides that TransUnion's actions are so insignificant that the Constitution prohibits consumers from vindicating their rights in federal court. The Constitution does no such thing.

I.

[Discussion of procedural background omitted].

II.

A.

* * * When a federal court has jurisdiction over a case or controversy, it has a "virtually unflagging obligation" to exercise it.

* * *

Key to the scope of the judicial power * * * is whether an individual asserts his or her own rights. At the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty owed broadly to the community. See *Spokeo, Inc. v. Robins*, 578 U.S. 330, 344–46 (2016) (Thomas, J., concurring). Where an individual sought to sue someone for a violation of his private rights, such as trespass on his land, the plaintiff needed only to allege the violation. Courts typically did not require any showing of actual damage. But where an individual sued based on the violation of a duty owed broadly to the whole community, such as the overgrazing of public lands, courts required "not only *injuria* [legal injury] but also *damnum* [damage]."

* * *

The principle that the violation of an individual right gives rise to an actionable harm was widespread at the founding, in early American history, and in many modern cases. * * * And this understanding accords proper respect for the power of Congress and other legislatures to define legal rights. * * *

B.

Here, each class member established a violation of his or her private rights. The jury found that TransUnion violated three separate duties created by statute. All three of those duties are owed to individuals, not to the community writ large. Take § 1681e(b), which requires a consumer reporting agency to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." This statute creates a duty: to use reasonable procedures to assure maximum possible accuracy. And that duty is particularized to an individual: the subject of the report. Section 1681g does the same. It requires an agency to "clearly and accurately disclose" to a consumer, upon his request, "[a]ll information in the consumer's file at the time of the request" and to include a written "summary of rights" with that "written disclosure." §§ 1681g(a), (c)(2). Those directives likewise create duties: provide all information in the consumer's file and accompany the disclosure with a summary of rights. And these too are owed to a single person: the consumer who requests the information.

Were there any doubt that consumer reporting agencies owe these duties to specific individuals—and not to the larger community—Congress created a cause of action providing that "[a]ny person who willfully fails to comply" with an FCRA requirement "with respect to any *consumer* is liable to *that consumer*." § 1681n(a) (emphasis added). If a consumer reporting agency breaches any FCRA duty owed to a specific consumer, then that individual (not all consumers) may sue the agency. No one disputes that each class member possesses this cause of action. And no one disputes that the jury found that TransUnion violated each class member's individual rights. The plaintiffs thus have a sufficient injury to sue in federal court.

C.

The Court chooses a different approach. Rejecting this history, the majority holds that the mere violation of a personal legal right is *not*—and never can be—an injury sufficient to establish standing. What matters for the Court is only that the "injury in fact be 'concrete.'" *Ante,* at 8. "No concrete harm, no standing."

That may be a pithy catchphrase, but it is worth pausing to ask why "concrete" injury in fact should be the sole inquiry. After all, it was not until 1970—"180 years after the ratification of Article III"—that this Court even introduced the "injury in fact" (as opposed to injury in law) concept of standing. And the concept then was not even about constitutional standing; it concerned a *statutory* cause of action under the Administrative Procedure Act. * * *

The Court later took this statutory requirement and began to graft it onto its constitutional standing analysis. * * *

In the context of public rights, the Court continued to require more than just a legal violation. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), for example, the Court concluded that several environmental organizations lacked standing to challenge a regulation about interagency communications, even though the organizations invoked a citizen-suit provision allowing "'any person [to] commence a civil suit . . . to enjoin any person . . . who is alleged to be in violation of'" the law. * * * Echoing the historical distinction between duties owed to individuals and those owed to the community, the Court explained that a plaintiff must do more than raise "a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws." *Id.* at 573. * * *

* * *

In *Spokeo*, the Court * * * concluded that a plaintiff does not automatically "satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." 578 U.S. at 341. But the Court made clear that "Congress is well positioned to identify intangible harms that meet minimum Article III requirements" and explained that "the violation of a procedural right granted by statute *can be* sufficient in some circumstances to constitute injury in fact." *Id.* at 341–42 (emphasis added).

Reconciling these statements has proved to be a challenge. * * * [In Justice Thomas's view, a] statute that creates a public right plus a citizen-suit cause of action is insufficient by itself to establish standing. A statute that creates a private right and a cause of action, however, *does* gives plaintiffs an adequate interest in vindicating their private rights in federal court. * * *

The majority today, however, takes the road less traveled[.] * * * No matter if the right is personal or if the legislature deems the right worthy of legal protection, legislatures are constitutionally unable to offer the protection of the federal courts for anything other than money, bodily integrity, and anything else that this Court thinks looks close enough to rights existing at common law. The 1970s injury-in-fact theory has now displaced the traditional gateway into federal courts.

This approach is remarkable in both its novelty and effects. Never before has this Court declared that legal injury is *inherently* insufficient to support standing. And never before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots. * * *

III.

Even assuming that this Court should be in the business of second-guessing private rights, this is a rather odd case to say that Congress went too far. TransUnion's misconduct here is exactly the sort of thing that has long merited legal redress.

As an initial matter, this Court has recognized that the unlawful withholding of requested information causes "a sufficiently distinct injury to provide standing to sue." Here, TransUnion unlawfully withheld from each class member the OFAC version of his or her credit report that the class member requested. And TransUnion unlawfully failed to send a summary of rights. The majority's response is to contend that the plaintiffs actually did not allege that they failed to receive any required information; they alleged only that they received it in the "*wrong format*."

That reframing finds little support in the complaint, which alleged that TransUnion "fail[ed] to include the OFAC alerts . . . in the consumer's own files which consumers, as of right, may request and obtain," and that TransUnion did "not advise consumers that they may dispute inaccurate OFAC alerts." It also finds no footing in the record. Neither the mailed credit report nor separate letter provide any indication that a person's report is marked with an OFAC alert.

Were there any doubt about the facts below, we have the helpful benefit of a jury verdict. The jury found that "Defendant TransUnion, LLC willfully fail[ed] to clearly and accurately disclose OFAC information in the written disclosures it sent to members of the class." And the jury found that "Defendant TransUnion, LLC willfully fail[ed] to provide class members a summary of their FCRA rights with each written disclosure made to them." I would not be so quick as to recharacterize these jury findings as mere "formatting" errors. * * *

Moreover, to the extent this Court privileges concrete, *financial* injury for standing purposes, recall that TransUnion charged its clients extra to receive credit reports with the OFAC designation. According to TransUnion, these special OFAC credit reports are valuable. Even the majority must admit that withholding something of value from another person—that is, "monetary harm"—falls in the heartland of tangible injury in fact. Recognizing as much, TransUnion admits that its clients would have standing to sue if they, like the class members, did not receive the OFAC credit reports they had requested.

And then there is the standalone harm caused by the rather extreme errors in the credit reports. The majority (rightly) decides that having one's identity falsely and publicly associated with terrorism and drug trafficking is itself a concrete harm. For good reason. This case is a particularly grave example of the harm this Court identified as central to the FCRA: "curb[ing] the dissemination of false information." *Spokeo*, 578 U.S. at 342. And it aligns closely with a "harm that has traditionally been regarded as providing a basis for a lawsuit." *Id.* at 341. Historically, "[o]ne who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other,"

even though "no special harm or loss of reputation results therefrom."

The question this Court has identified as key, then, is whether a plaintiff established "a degree of risk" that is "sufficient to meet the concreteness requirement." *Id.* at 343. Here, in a 7-month period, it is undisputed that nearly 25 percent of the class had false OFAC-flags sent to potential creditors. Twenty-five percent over just a 7-month period seems, to me, "a degree of risk sufficient to meet the concreteness requirement." If 25 percent is insufficient, then, pray tell, what percentage is?

The majority deflects this line of analysis by all but eliminating the risk-of-harm analysis. * * * But [its] reworking of *Spokeo* fails for two reasons. First, it ignores what *Spokeo* said: "[Our opinion] does not mean . . . that the risk of real harm cannot satisfy the requirement of concreteness." Second, it ignores what *Spokeo* did. The Court in *Spokeo* remanded the respondent's claims for statutory damages to the Ninth Circuit to consider "whether the . . . violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." The theory that risk of harm matters only for injunctive relief is thus squarely foreclosed by *Spokeo* itself.

But even if risk of harm is out, the Ninth Circuit indicated that every class member may have had an OFAC alert disclosed. According to the court below, TransUnion not only published this information to creditors for a quarter of the class but also "communicated about the database information and OFAC matches" with a third party. * * * Respondent adds to this by pointing out that TransUnion published this information to vendors that printed and sent the mailings. * * * In the historical context of libel, publication to even a single other party could be enough to give rise to suit. This was true, even where the third party was a telegraph company, an attorney, or a stenographer who merely writes the information down. Surely with a harm so closely paralleling a common-law harm, this is an instance where a plaintiff "need not allege any additional harm beyond the one Congress has identified." *Id.* at 342.

But even setting aside everything already mentioned—the Constitution's text, history, precedent, financial harm, libel, the risk of publication, and actual disclosure to a third party—one need only tap into common sense to know that receiving a letter identifying you as a potential drug trafficker or terrorist is harmful. All the more so when the information comes in the context of a credit report, the entire purpose of which is to demonstrate that a person can be trusted.

And if this sort of confusing and frustrating communication is insufficient to establish a real injury, one wonders what could rise to that level. If, instead of falsely identifying Ramirez as a potential drug trafficker or terrorist, TransUnion had flagged him as a "potential" child molester, would that alone still be insufficient to open the courthouse doors? What about falsely labeling a person a racist? Including a slur on the report? Or what about openly reducing a person's credit score by several points

because of his race? If none of these constitutes an injury in fact, how can that possibly square with our past cases [involving purely aesthetic interests] * * * ?

And if some of these examples do cause sufficiently "concrete" and "real"—though "intangible"—harms, how do *we* go about picking and choosing which ones do and which do not? * * * Weighing the harms caused by specific facts and choosing remedies seems to me like a much better fit for legislatures and juries than for this Court.

Finally, it is not just the harm that is reminiscent of a constitutional case or controversy. So too is the remedy. Although statutory damages are not necessarily a proxy for unjust enrichment, they have a similar flavor in this case. TransUnion violated consumers' rights in order to create and sell a product to its clients. Reckless handling of consumer information and bungled responses to requests for information served a means to an end. And the end was financial gain. "TransUnion could not confirm that a single OFAC alert sold to its customers was accurate." Yet thanks to this Court, it may well be in a position to keep much of its ill-gotten gains.[9]

* * *

Ultimately, the majority seems to pose to the reader a single rhetorical question: Who could possibly think that a person is harmed when he requests and is sent an incomplete credit report, or is sent a suspicious notice informing him that he may be a designated drug trafficker or terrorist, or is *not* sent anything informing him of how to remove this inaccurate red flag? The answer is, of course, legion: Congress, the President, the jury, the District Court, the Ninth Circuit, and four Members of this Court.

I respectfully dissent.

JUSTICE KAGAN, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

* * *

I differ with Justice Thomas on just one matter, unlikely to make much difference in practice. In his view, any "violation of an individual right" created by Congress gives rise to Article III standing. But in *Spokeo*, this Court held that "Article III requires a concrete injury even in the context of a statutory violation." 578 U.S. at 341. I continue to adhere to that view,

[9] Today's decision might actually be a pyrrhic victory for TransUnion. The Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases. That combination may leave state courts—which "are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989)—as the sole forum for such cases, with defendants unable to seek removal to federal court. See also Bennett, *The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims*, 105 MINN. L. REV. 1211 (2021). By declaring that federal courts lack jurisdiction, the Court has thus ensured that state courts will exercise exclusive jurisdiction over these sorts of class actions.

but think it should lead to the same result as Justice Thomas's approach in all but highly unusual cases. As *Spokeo* recognized, "Congress is well positioned to identify [both tangible and] intangible harms" meeting Article III standards. Article III requires for concreteness only a "real harm" (that is, a harm that "actually exist[s]") or a "risk of real harm." *Id.* And as today's decision definitively proves, Congress is better suited than courts to determine when something causes a harm or risk of harm in the real world. For that reason, courts should give deference to those congressional judgments. Overriding an authorization to sue is appropriate when but only when Congress could not reasonably have thought that a suit will contribute to compensating or preventing the harm at issue. Subject to that qualification, I join Justice Thomas's dissent in full.

NOTES AND QUESTIONS

1. Which approach is more persuasive, that of the majority or that of the dissenting opinions? Commentators have been highly critical of the decision. *See, e.g.,* Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. Rev. Online 269, 291 (Oct. 2021), https://www.nyulawreview.org/wpcontent/uploads/2021/10/Chemerinsky-fin-1.pdf ("In light of reliance interests in the statutory rights which have originated entire lines of jurisprudence, and of the separation of powers concerns in having the judiciary limit the power of Congress * * * the Court should abandon the path it began in *Spokeo* and embraced in *TransUnion*"); *Article III Standing—Separation of Powers—Class Actions*—TransUnion v. Ramirez, 135 HARV. L. REV. 333, 339 (2021) ("[T]he conclusions reached in *TransUnion* fail to serve the[] broader purposes of standing doctrine. The claims Ramirez brought on behalf of himself and the class * * * were specific, private, and concrete causes of action authorized by Congress"); Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* TransUnion v. Ramirez, 101 B.U. L. Rev. 62, 71 (2021) ("Let's call *TransUnion* for what it is: an activist decision that nullifies Congress's power to protect consumers and that enables courts to rewrite privacy laws to alter how they are enforced").

2. Decisions following *Ramirez* have been cautious about extending *Ramirez* and have frequently rejected arguments by defendants to apply the case in very different circumstances. *See, e.g., Ewing v. MED-1 Solutions, LLC,* 24 F.4th 1146, 1153 (4th Cir. 2022) (where debt collectors were required to report disputes with debtors to credit reporting agencies and falsely communicated that reports of debts were not disputed, such "third-party dissemination" constituted Article III injury under *TransUnion*); *Jibril v. Mayorkas,* 20 F.4th 804 (D.C. Cir. 2021) (based on intrusive security screenings of a family of U.S. citizens, family seeking prospective relief to avoid such conduct in the future had standing because of "the reasonable inference that the family will again be subjected to many of the alleged illegalities they challenge in this action"); *Laufer v. Arpan LLC*, No. 20-14846, 2022 WL 906511, at *1 (11th Cir. Mar. 29, 2022) (three separate concurrences but all judges agreeing that the plaintiff claiming disability discrimination against a hotel because its website "omitted accessibility-related information" had standing even though the plaintiff never intended to visit the hotel).

In some instances, panels have been sharply divided on how to apply *TransUnion*. For instance, in *Pierre v. Midland Credit Mgmt., Inc.*, Nos. 19-2993 & 1903109, 2022 WL 986441 (7th Cir. Apr. 1, 2022), the majority vacated a jury award and dismissed a class of people who received debt collection letters in violation of Fair Debt Collection Practices Act because the class representative "didn't make a payment, promise to do so, or otherwise act to her detriment[.]" *Id.* at *4. The court held that under *Transunion*, the plaintiff's worry, confusion, and fear of being sued to collect the debt was not a sufficiently concrete injury to establish Article III standing). That ruling provoked a vigorous dissent by Judge Hamilton. He argued that the majority's dismissal "for lack of standing is mistaken" because "if we follow the teachings of *Spokeo* and *TransUnion*—if we give 'due respect' for Congress's judgment and recognize that [the Plaintiff]'s statutory claim and intangible injuries fit closely in legal history and tradition—then we should affirm." *Id.* at *4, *13.

In still other instances, courts have unanimously found a lack of standing based on *TransUnion*. *See, e.g., James v. Willis,* No. 21-501, 2022 WL 481812, at *1 (2d Cir. Feb. 17, 2022) (inmates at a prison in which a correction officer "vandalized the mosque room" lacked standing to sue for damages based on their fear that there would be further such incidents; court relied on *TransUnion*'s language that "in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm"); *Laufer v. Looper*, 22 F.4th 871, 878 (10th Cir. 2022) (affirming dismissal for lack of standing based on facts nearly identical to *Arpan* (discussed above) involving the same plaintiff stating that the plaintiff "has no concrete plans to visit [defendant's hotel]. She therefore has not alleged any concrete harm resulting from the [defendants]' alleged violation of the ORS Regulation.")

3. Going forward, *TransUnion* will almost certainly impact certain kinds of cases. *See, e.g.,* Andrea Vittorio, *Supreme Court's TransUnion Ruling Curbs Consumer Privacy Claims*, Bloomberg L. (June 28, 2021, 2:00 AM), https://news.bloomberglaw.com/us-law-week/supreme-courts-transunion-ruling-curbs-consumer-privacy-claims (according to a defense attorney, "Simply alleging a violation of a data protecting law won't be enough for consumers to sue and seek damages * * *. Consumers bringing lawsuits also won't be able to rely on the risk of future harms, like the eventual disclosure or use of data that was subject to a security breach."); Eve A. Cann, Jonathan E. Green & Kristine L. Roberts, *The Impact of the* TransUnion *Decision on Future Class Actions*, Baker Donelson (June 30, 2021), https://www.bakerdonelson.com/the-impact-of-the-transunion-decision-on-future-class-actions (*TransUnion* "will have far-reaching implications for litigants in cases involving consumer claims, privacy disputes, and data breaches, particularly in the class context"); Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. Rev. Online 269, 270 (2021), https://www.nyulawreview.org/wpcontent/uploads/2021/10/Chemerinsky-fin-1.pdf ("[*TransUnion's*] approach to standing significantly changes the law and places in doubt the ability to sue to enforce countless federal laws, ranging from the Freedom of Information Act to civil rights statutes, to environmental laws, to even the prohibitions of child labor in the Fair Labor Standards Act.").

4. Why does Justice Thomas find it ironic (footnote 9) that the majority's opinion in *TransUnion* will encourage state court lawsuits? Is he correct? A number of commentators have echoed his view. *See, e.g.,* Eve A. Cann, Jonathan E. Green & Kristine L. Roberts, *The Impact of the* TransUnion *Decision on Future Class Actions*, Baker Donelson (June 30, 2021), https://www.bakerdonelson.com/the-impact-of-the-transunion-decision-on-future-class-actions ("Plaintiffs may file class actions in state court instead of federal court, because many states' standing doctrines differ from—and are looser than—the federal standard"); *Article III Standing—Separation of Powers—Class Actions*—TransUnion v. Ramirez, 135 Harv. L. Rev. 333, 341 (2021) (noting that "*TransUnion* may push more class actions into state courts, contravening congressional efforts to the contrary" in enacting the Class Action Fairness Act).

Page 84, add to the beginning of note 13:

In recent years, courts have made clear that the focus of numerosity should go well beyond a consideration of the number of class members. For instance, in *A.B. v. Haw. State Dep't of Educ.,* 30 F.4th 828 (9th Cir. 2022), the court reversed a district court decision finding that a class exceeding 300 members failed the numerosity requirement. The lawsuit sought injunctive relief relating to alleged violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a) by James Campbell [Public] High School in its athletic programs. Specifically, the suit alleged that the school failed to provide equal treatment and benefits for male and female students. Initially, the court found that "the district court failed to give appropriate weight to the very large size of the proposed class." *Id.* at 836. The court went on, however, to assess whether there were any "countervailing case-specific considerations indicating that, despite the large class size, joinder of all class members [was] nonetheless practicable." *Id.* at 837. First, the court noted that "joinder of all class members * * * would impose very substantial logistical burdens for little, if any, benefit." *Id*. Second, the district erred in "fail[ing] adequately to consider the fact that the class, as defined, included 'future' Campbell female student athletes." *Id.* at 837-8.

Page 115, add the following note 9:

3. In *Ramirez*, the Court granted review on both standing and typicality issues. The Court's standing opinion is reproduced above. The typicality concern raised by TransUnion was that Ramirez, unlike other class members, actually had his credit report disclosed to a car dealership while trying to purchase a vehicle. According to TransUnion, his claim was stronger than those of other class members (who were not denied credit) and thus he was atypical. Although the majority did not reach the issue, Justice Thomas's dissent, on behalf of four justices, noted that "[i]n my view, the District Court did not abuse its discretion in certifying the class given the similarities among the claims and defenses at issue." 141 S. Ct. at 2216 n.1.

CHAPTER 3

Page 207, add the following before subsection 3:

9. In *Berni v. Barilla S.p.A*, 964 F.3d 141 (2d Cir. 2020), the Second Circuit restricted the reach of Rule 23(b)(2). In *Berni*, a putative class of past purchasers of defendant's pasta claimed that defendant deliberately misrepresented the quantity of pasta in its packages. Under a class settlement, defendant agreed to an injunction requiring defendant to include a minimum "fill line" on all packages, to specify the weight of pasta contained in the package, and to provide language that the product is sold by weight, not volume. That was the sole relief provided to the class, although defendant also agreed to pay fees to plaintiffs' counsel and the incentive payments to class representatives. The Second Circuit overturned the settlement, holding that class members had "at most, alleged a past harm," and that they were "not likely to encounter future harm of the kind that makes injunctive relief appropriate," given that most members of the class were unlikely to buy the product in the future. 964 F.3d at 147. And those who purchased the product again would do so with the information that they claimed to have lacked. Thus, the proper remedy in such a case is damages under Rule 23(b)(3), not injunctive relief. The lack of harm did not prevent the class member who objected to the settlement from doing so, because any class member "automatically has standing to object" to a class settlement. *Id.* at 145.

Page 219, add new note 4:

For a comprehensive and insightful analysis of predominance in the context of competing expert testimony in an antitrust case, *see Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC,* 31 F.4th 651 (9th Cir. 2022) (en banc).

Page 228, add the following new note 10:

10. In *Custom Hair Designs by Sandy v. Central Payment Co., LLC*, 984 F.3d 595 (8th Cir. 2020), the Eighth Circuit reviewed the certification of a class of more than 160,000 small retailers against a credit card processor, Central Payment Co., LLC ("CPAY"), alleging injury as a result of CPAY's alleged misrepresentation of fees, breach of contract, and fraudulent concealment. The court affirmed class certification, rejecting defendant's predominance argument because "all claims deal with either a common scheme of fraud or a term common to all contracts with CPAY." *Id.* at 601. The court rejected the argument that CPAY's "representations to each class member must be examined" individually, given that "plaintiffs focus[ed] on CPAY's intent to defraud by concealing their overall plan to raise prices illegitimately." *Id.* at 603.

Page 269, add the following new note 4 before section b:

4. For a recent example of a court granting a defendant's motion to strike class action allegations, *see Salvador v. Allstate Property and Casualty Insurance Co.*, No. CV 19-2754, slip op. (D.D.C. Nov. 30, 2020) (dismissing class action allegations because the putative action failed the predominance requirement).

CHAPTER 4

Page 300, add the following to note 2:

The Sixth Circuit has also rejected the *Castano* approach. *Martin v. Behr Dayton Thermal Products, LLC*, 896 F.3d 405 (6th Cir. 2018). In doing so, the court stated:

> * * * Rule 23(c)(4) contemplates using issue certification to retain a case's class character where common questions predominate within certain issues and where class treatment of those issues is the superior method of resolution. A requirement that predominance must first be satisfied for the entire cause of action would undercut the purpose of Rule 23(c)(4) and nullify its intended benefits. The broad approach is the proper reading of Rule 23, in light of the goals of that rule.

Id. at 413 (internal citations omitted).

Page 300, add the following to note 3:

Accord Martin, 896 F.3d at 412 (noting, after studying the Fifth Circuit's case law, "that any potency the [*Castano*] view once held there has dwindled"). Most recently, the Third Circuit has also rejected the *Castano* approach. *Russell v. Educ. Comm'n for Foreign Med. Graduates,* 15 F.4th 259 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 2706 (2022). Although the *Russell* court reversed the district court's certification of an issues class, it nonetheless endorsed the concept, articulating several factors that the district court should consider in deciding whether an issue class is appropriate. *Id.* at 267-72. The three factors a court should consider are: (1) if the proposed issue class satisfy Rule 23(a)'s requirements; (2) if the proposed issue class fits within one of Rule 23(b)'s categories; and (3) if the proposed issue class does both those things, is it "appropriate" to certify these issues as a class. *Id.* at 270.

Page 302, add a new note 6 and change the current note 6 to note 7:

In June 2023, the Tenth Circuit issued a comprehensive opinion on issue classes under Rule 23(c)(4). *Black, et al. v. Occidental Petroleum Corp.,* 69 F.4th 1161 (10th Cir. 2023). In that case, the Tenth Circuit upheld the district court's decision to certify liability issues in an antitrust case, despite the fact that damages were individualized. The appellate court explained that every circuit to rule on the question had found that an issue class could be certified even if predominance for the case as a whole could not be satisfied. The court noted that *Castano* was not good law even

in the Fifth Circuit. According to the Tenth Circuit, to certify an issue class, plaintiffs must satisfy the requirements of Rule 23(a). Also, in a damages class, plaintiffs must satisfy "predominance" and "superiority," but the predominance analysis focuses on the particular issue certified (common versus individualized issues within the resolution of the issue). The superiority requirement focuses on whether resolution of the issue would "materially advance the disposition of the litigation as a whole." *Id.* at 1188.

Page 338, add the following as a new paragraph at the end of note 3:

In 2019, the Sixth Circuit endorsed the Ninth Circuit's approach in *Schwarzschild* and cited several other cases for that approach as well. *Faber v. Ciox Health, LLC*, 944 F.3d 593, 602 (2019) ("When the defendant moves for and obtains summary judgment before the class has been properly notified, the defendant waives the right to have notice sent to the class, and the district court's decision binds only the named plaintiffs.").

CHAPTER 5

Page 371, replace (B) with the following:

(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

Page 376, replace note 6 with the following:

Amended Rule 23(c)(2)(B) provides that notice in (b)(3) class actions "may be by United States mail, *electronic means, or other appropriate means*." (emphasis added). This amendment clarifies that, contrary to the pre-Internet *Eisen* decision, electronic notice may in some circumstances be the most effective form of notice. To reinforce the purpose of the amendment, the Advisory Committee Notes to the amended rule state: "Instead of preferring any one means of notice, . . . the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court. The court should exercise its discretion to select appropriate means of giving notice."

CHAPTER 6

Page 414, add the following new note 5, and renumber all existing subsequent notes:

5. In 2017, the Supreme Court rendered an important opinion on personal jurisdiction that could impact class actions. *Bristol–Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017). Following a

series of cases beginning with *Daimler AG v. Bauman*, 571 U.S. 117 (2014) (addressing general jurisdiction), the Court took a narrow view of specific jurisdiction in the context of a mass action. The case involved a suit in California state court by more than 600 plaintiffs (most of whom were not California residents) against Bristol–Myers Squibb Company (BMS), asserting state law claims based on injuries allegedly caused by BMS's blood-thinning drug, Plavix. BMS is incorporated in Delaware and has its headquarters in New York, but conducts substantial business in California. BMS did not develop the drug or create a marketing strategy for it in California, and California sales of the drug were just over one percent of BMS's nationwide sales revenue. BMS argued lack of personal jurisdiction, but the California courts rejected that argument. The California Supreme Court applied a "'sliding scale'" approach, stating that "'the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claims.'" 137 S. Ct. at 1778–79. The United States Supreme Court reversed in an 8–1 decision, with only Justice Sotomayor dissenting. The Court found that there was no basis for specific jurisdiction: "What is needed—and what is missing here [for the non-California plaintiffs]—is a connection between the forum and the specific claims at issue." *Id.* at 1781. The Court noted that "[t]he relevant plaintiffs are not California residents and do not claim to have suffered harm in that State." *Id.* at 1782. Moreover, "all of the conduct giving rise to the nonresidents' claims occurred elsewhere." *Id.*

The Court indicated that *Shutts* was not to the contrary:

> The Kansas court [in *Shutts*] exercised personal jurisdiction over the claims of nonresident class members, and the defendant, Phillips Petroleum, argued that this violated the due process rights of these class members because they lacked minimum contacts with the State. According to the defendant, the out-of-state class members should not have been kept in the case unless they affirmatively opted in, instead of merely failing to opt out after receiving notice.
>
> Holding that there had been no due process violation, the Court explained that the authority of a State to entertain the claims of nonresident class members is entirely different from its authority to exercise jurisdiction over an out-of-state defendant. Since *Shutts* concerned the due process rights of *plaintiffs*, it has no bearing on the question presented here.
>
> * * * Indeed, the Court stated specifically that its "discussion of personal jurisdiction [did not] address class actions where the jurisdiction is asserted against a *defendant* class." *Shutts*, 472 U.S. at 812 n.3.

Bristol–Myers, 137 S. Ct. at 1782–83 (emphases and second alteration in original).

In finding for the defendant, the majority rejected what it called plaintiffs' "parade of horribles," *id.* at 1783, noting:

> Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the

> States that have general jurisdiction over BMS. BMS concedes that such suits could be brought in either New York or Delaware. * * * Alternatively, the plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States. In addition, since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court. *See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987).

Bristol–Myers, 137 S. Ct. at 1783–84.

Justice Sotomayor dissented. She had previously taken issue with the Court's approach to general jurisdiction in (among other cases) *Daimler AG*, which limited general jurisdiction over a corporation to states where the defendant was "at home," 571 U.S. at 122, generally its state of incorporation and the state where it has its principal place of business.

In *Bristol–Myers*, Justice Sotomayor stated that "the Court takes its first step toward a similar contraction of specific jurisdiction by holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum state." 137 S. Ct. at 1784 (Sotomayor, J., dissenting). She noted that the company's "advertising and distribution efforts were national in scope," that the company contracted with a California-based distributor, that the company's conduct was the same as to all plaintiffs, and that the exercise of jurisdiction over BMS was "reasonable." *Id*. She further noted that the case was likely to have significant consequences with respect to the ability to litigate mass actions:

> First, and most prominently, the Court's opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action. The holding of today's opinion is that such an action cannot be brought in a State in which only some plaintiffs were injured. Not to worry, says the majority: The plaintiffs here could have sued Bristol–Myers in New York or Delaware; could "probably" have subdivided their separate claims into 34 lawsuits in the States in which they were injured; and might have been able to bring a single suit in federal court (an "open . . . question"). Even setting aside the majority's caveats, what is the purpose of such limitations? What interests are served by preventing the consolidation of claims and limiting the forums in which they can be consolidated? The effect of the Court's opinion today is to eliminate nationwide mass actions in any State other than those in which a defendant is "'essentially at home.'" *See Daimler AG*, 571 U.S. at 127. Such a rule hands one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions.

> Second, the Court's opinion today may make it impossible to bring certain mass actions at all. After this case, it is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States. There will be no State where both defendants are "at home," and so no State in which the suit can proceed. What about a nationwide mass action brought against a defendant not headquartered or incorporated in the United States? Such a defendant is not "at home" in any State. Especially in a world in which defendants are subject to general jurisdiction in only a handful of States, the effect of today's opinion will be to curtail—and in some cases eliminate—plaintiffs' ability to hold corporations fully accountable for their nationwide conduct.
>
> The majority chides [plaintiffs] for conjuring a "parade of horribles," but says nothing about how suits like those described here will survive its opinion in this case. The answer is simple: They will not.

Bristol–Myers, 137 S. Ct. at 1789 (Sotomayor, J., dissenting).

Justice Sotomayor recognized that the case involved a lawsuit brought by hundreds of individual plaintiffs, as opposed to a class action brought by representative plaintiffs:

> The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there. *Cf. Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2002) ("Nonnamed class members . . . may be parties for some purposes and not for others"); *see also* Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 Ind. L. J. 597, 616–17 (1987).

Bristol–Myers, 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting).

When applied alongside *Daimler AG*, *Bristol–Myers* is likely to have a significant impact on plaintiffs' ability to bring a mass action in their chosen forum when the suit involves claimants from multiple states. To assert general jurisdiction, the defendant must be "at home" in the forum. To assert specific jurisdiction, plaintiffs will have to demonstrate a substantial connection between the defendant and the forum (in *Bristol–Myers*, the Court found no connection between California and the claims of the non-Californians). In a pharmaceutical case, for example, minimum contacts might be demonstrated if significant clinical trials and testing occurred in the forum state. And as the Supreme Court recently held in a case involving defective tire tread on an automobile, specific jurisdiction will exist when a defendant has "advertised, sold, and serviced" in the state the kinds of vehicles at issue, even though the vehicles were not originally sold in the forum state. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1028 (2021).

The *Bristol–Myers* majority left open the possibility that the result could be different in federal court because the applicable due process standard is the Fifth Amendment rather than the Fourteenth Amendment

(citing *Omni Capital*). But the Fifth Amendment inquiry focuses on whether Congress has authorized nationwide service of process, *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1555–56 (2017), something that is not common.

The question whether *Bristol–Myers* applies in the class action context was squarely addressed by the Seventh Circuit in *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020). In *Mussat*, the plaintiff received unsolicited faxes from the defendant and brought a nationwide putative class action alleging violations of the Telephone Consumer Protection Act (TCPA). Defendant sought dismissal, arguing that the district court lacked personal jurisdiction over non-Illinois members of the proposed nationwide class. The district court granted dismissal, but the Seventh Circuit reversed, holding that *Bristol–Myers* "[did] not apply to the case of a nationwide class action filed in a federal court under a federal statute." *Id*. at 443. The court pointed out that *Bristol–Myers* itself did not involve a class action and that, indeed, "the Supreme Court * * * expressly reserved whether its holding extended to the federal courts at all." *Id.* at 448. In examining the issue, the court noted that both subject matter jurisdiction and venue focus only on the named representatives, and that there was "no reason why personal jurisdiction should be treated any differently[.]" *Id.* at 447. The court further noted that "[t]he rules for class certification support a focus on the named representative for purposes of personal jurisdiction." *Id.* at 448. Thus, the court held that "there is no need to locate each and every one of them (the nonparties) and conduct a separate personal-jurisdiction analysis of their claims" in this case. *Id*.

Page 426, add the following to note 1 as a new second sentence:

Most recently, in *Hale v. Emerson Electric Company*, 942 F.3d 401 (2019), the Eighth Circuit reviewed the certification of a nationwide class of consumers alleging deceptive advertising by vacuum manufacturer Emerson Electric. The court concluded that, since "every part of the challenged transaction took place in a class member's home state," the laws of each consumer's home state would apply, and nationwide class certification was thus improper. *Id*. at 403.

Page 426, after the above insert, add Hale *as follows*:

If the approaches set forth in *Rhone-Poulenc*, *Castano*, *Johnson*, and *Hale* . . . .

Page 430, add the following new note 11:

11. In 2019, the Ninth Circuit, in an *en banc* decision, reversed a Ninth Circuit three judge panel, which had in turn reversed the certification of a settlement class in *In re Hyundai & Kia Fuel Economy Litig*., 881 F.3d 679 (2018). *In re Hyundai & Kia Fuel Economy Litig.*, 926 F.3d 539 (9th Cir. 2019). The case was a nationwide putative class action

regarding misstatements about the fuel economy of vehicles. Before certifying the class, the federal district court stated that it would need to conduct an "extensive choice of law analysis" if the case were going to trial, but that "those issues do not prevent the Court from certifying the class for settlement purposes." The three-judge panel disagreed, stating that the "district court's reasoning that the settlement context relieved it of its obligation to undertake a choice of law analysis . . . is wrong as a matter of law." The court indicated that "[b]ecause the district court made clear that it would be unlikely to certify the same class for litigation purposes," class counsel "could not use the threat of litigation" to get the best outcome for the plaintiffs. Judge Nguyen dissented, arguing that the decision "deals a major blow to multistate actions" and goes against precedent by placing "the burden of proving whether foreign law governs class claims from the foreign law proponent—here, the objectors—to the district court or class counsel." Both plaintiffs and defendants petitioned for rehearing *en banc*.

In an 8-3 decision, the *en banc* court reversed the panel. It noted that with regard to certifying a settlement class, "subject to constitutional limitations and the forum state's choice-of-law rules, a court adjudicating a multistate class action is free to apply the substantive law of a single state to the entire class." Accordingly, the court found that "California courts apply California law 'unless a party litigant timely invokes the law of a foreign state,' in which case it is 'the foreign law proponent' who must 'shoulder the burden of demonstrating that foreign law, rather than California law, should apply to class claims.'" To meet this burden, the objectors were required to show "(1) the law of the foreign state 'materially differs from the law of California,' meaning that the law differs 'with regard to the particular issue in question'; (2) a 'true conflict exists,' meaning that each state has an interest in the application of its own law to 'the circumstances of the particular case'; and (3) the foreign state's interest would be 'more impaired' than California's interest if California law were applied."

The *en banc* court noted that "no objector presented an adequate choice-of-law analysis or explained how, under the facts of this case, the * * * three elements were met." The court added that "no objector argued that differences between the consumer protection laws of all fifty states precluded certification of a settlement class." Accordingly, the *en banc* court affirmed the district court's approval of the settlement.

CHAPTER 7

Page 441, add the following new note 10 before the Problem:

10. On June 26, 2017, the Supreme Court resolved a conflict among the circuits as to whether *American Pipe* applies to statutes of repose in federal securities class actions. The case, *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017), involved section 11 of the Securities Act of 1933 (the 1933 Act), which gives securities purchasers a cause of action against issuers or designated individuals (including underwriters) for material misstatements or omissions in registration statements. 15 U.S.C. § 77k(a). Section 13 of the 1933 Act sets forth two time limits for bringing an action under section 11:

one tied to the discovery of the error or omission, and the other, which was applicable in *ANZ Securities*, within three years after the security was offered to the public. The securities in question were offered to the public in 2007 and 2008. A putative class action under section 11 was filed against respondents in September 2008. Petitioner, the California Public Employees' Retirement System (CalPERS), filed an individual lawsuit in February 2011, more than three years after the securities were offered to the public. The question before the Supreme Court was whether the class action complaint tolled the time for CalPERS to file its own action.

The majority held that *American Pipe* tolling did not apply. It ruled that section 13 was a statute of repose, which is designed "to give more explicit and certain protection to defendants," 137 S. Ct. at 2049, and not a statute of limitations, which is designed "to encourage plaintiffs 'to pursue diligent prosecution of known claims.'" *Id.* (citation omitted). The Court found this distinction critical because it viewed *American Pipe* as a principle grounded in equity. According to the Court, "the object of a statute of repose [is] to grant complete peace to defendants"; thus, such a statute "supersedes the application of a tolling rule based in equity." *Id*. at 2052.

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented. The dissent reasoned that the class action complaint served the purpose of section 13 by giving respondents "notice of their potential liability within a fixed time window," *Id*. at 2056 (Ginsburg, J., dissenting), and under *American Pipe* "'commence[d] the action for all members of the class.'" *Id.* (Ginsburg, J. dissenting) (quoting *American Pipe*, 414 U.S. at 550). The dissent explained that in future cases, as part of the class notice, class counsel will need to inform putative class members of "the consequences of failing to file a timely protective claim." *Id*. at 2058 (Ginsburg, J., dissenting).

Page 441, add the following new case before Problem:

In 2018, the Supreme Court handed down an important new opinion on *American Pipe* tolling:

CHINA AGRITECH, INC. V. RESH

Supreme Court of the United States, 2018.

138 S. Ct. 1800.

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the tolling rule first stated in *American Pipe & Constr. Co. v. Utah,* 414 U.S. 538 (1974). The Court held in *American Pipe* that the timely filing of a class action tolls the applicable statute of limitations for all persons encompassed by the class complaint. Where class-action status has been denied, the Court further ruled, members of the failed class could timely intervene as individual plaintiffs in the still-pending action, shorn of its class character. Later, in *Crown, Cork & Seal Co. v. Parker,* 462 U.S. 345 (1983), the Court clarified *American Pipe* 's tolling rule: The rule is not dependent on intervening in or joining an existing suit; it applies as well to putative class members who, after denial

of class certification, "prefer to bring an individual suit rather than intervene . . . once the economies of a class action [are] no longer available."

The question presented in the case now before us: Upon denial of class certification, may a putative class member, in lieu of promptly joining an existing suit or promptly filing an individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations? Our answer is no. *American Pipe* tolls the statute of limitations during the pendency of a putative class action, allowing unnamed class members to join the action individually or file individual claims if the class fails. But *American Pipe* does not permit the maintenance of a follow-on class action past expiration of the statute of limitations.

I.

The instant suit is the third class action brought on behalf of purchasers of petitioner China Agritech's common stock, alleging violations of the Securities Exchange Act of 1934. In short, the successive complaints each make materially identical allegations that China Agritech engaged in fraud and misleading business practices, causing the company's stock price to plummet when several reports brought the misconduct to light. The Exchange Act has a two-year statute of limitations that begins to run upon discovery of the facts constituting the violation. The Act also has a five-year statute of repose.[10] The parties agree that the accrual date for purposes of the two-year limitation period is February 3, 2011, and for the five-year repose period, November 12, 2009.

Theodore Dean, a China Agritech shareholder, filed the first class-action complaint on February 11, 2011, at the start of the two-year limitation period. * * * On May 3, 2012, * * * the District Court denied class certification. The plaintiffs, the District Court determined, had failed to establish that China Agritech stock traded on an efficient market—a necessity for proving reliance on a classwide basis. Dean's counsel then published a notice informing shareholders of the certification denial and advising: "You must act yourself to protect your rights. You may protect your rights by joining in the current Action as a plaintiff or by filing your own action against China Agritech." The *Dean* action settled in September 2012, occasioning dismissal of the suit. * * *

On October 4, 2012—within the two-year statute of limitations—Dean's counsel filed a new complaint (*Smyth*) with a new set of plaintiffs and new efficient-market evidence. * * * The District Court again denied class certification, this time on typicality and adequacy grounds. Thereafter, the *Smyth* plaintiffs settled their individual claims with the defendants and voluntarily dismissed their suit. Because the *Smyth* litigation was timely commenced, putative class members who promptly initiated *individual* suits in the wake of the class-action denial would have encountered no statute of limitations bar.

[10] A statute of limitations "begin[s] to run when the cause of action accrues—that is, when the plaintiff can file suit and obtain relief." A statute of repose, by contrast, "begin[s] to run on the date of the last culpable act or omission of the defendant."

Respondent Michael Resh * * * filed the present suit on June 30, 2014, styling it a class action—a year and a half after the statute of limitations expired. * * * The District Court dismissed the class complaint as untimely, holding that the *Dean* and *Smyth* actions did not toll the time to initiate class claims.

The * * * Ninth Circuit reversed: "[P]ermitting future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling," the court reasoned, "would advance the policy objectives that led the Supreme Court to permit tolling in the first place." Applying *American Pipe* tolling to successive class actions, the Ninth Circuit added, would cause no unfair surprise to defendants and would promote economy of litigation by reducing incentives for filing protective class suits during the pendency of an initial certification motion.

We granted certiorari * * *.

II.

A.

American Pipe established that "the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." * * * In *Crown, Cork,* the Court further elaborated: Failure to extend the *American Pipe* rule "to class members filing separate actions," in addition to those who move to intervene, would result in "a needless multiplicity of actions" filed by class members preserving their individual claims—"precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid."

American Pipe and *Crown, Cork* addressed only putative class members who wish to sue individually after a class-certification denial. * * *

What about a putative class representative * * * who brings his claims as a new class action after the statute of limitations has expired? Neither decision so much as hints that tolling extends to otherwise time-barred class claims. We hold that *American Pipe* does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action. * * *

American Pipe tolls the limitation period for individual claims because economy of litigation favors delaying those claims until after a class-certification denial. If certification is granted, the claims will proceed as a class and there would be no need for the assertion of any claim individually. If certification is denied, only then would it be necessary to pursue claims individually.

With class claims, on the other hand, efficiency favors early assertion of competing class representative claims. If class treatment is appropriate, and all would-be representatives have come forward, the district court can select the best plaintiff with knowledge of the full array of potential class representatives and class counsel.

Rule 23 evinces a preference for preclusion of untimely successive class actions by instructing that class certification should be resolved early on. *See* Fed. Rule Civ. Proc. 23(c)(1)(A). Indeed, Rule 23(c) was amended in 2003 to permit district courts to take account of multiple class-representative filings. Before the amendment, Rule 23(c) encouraged district courts to issue certification rulings "as soon as practicable." The amendment changed the recommended timing target to "an early practicable time." The alteration was made to allow greater leeway, more time for class discovery, and additional time to "explore designation of class counsel" and consider "additional [class counsel] applications rather than deny class certification," thus "afford[ing] the best possible representation for the class." Advisory Committee's 2003 Note on subds. (c)(1)(A) and (g)(2)(A) of Fed. Rule Civ. Proc. 23 * * *.

* * *

Ordinarily, to benefit from equitable tolling, plaintiffs must demonstrate that they have been diligent in pursuit of their claims. Even *American Pipe,* which did not analyze "criteria of the formal doctrine of equitable tolling in any direct manner," observed that tolling was permissible in the circumstances because plaintiffs who later intervened to pursue individual claims had not slept on their rights. Those plaintiffs reasonably relied on the class representative, who sued timely, to protect their interests in their individual claims. A would-be class representative who commences suit after expiration of the limitation period, however, can hardly qualify as diligent in asserting claims and pursuing relief. Her interest in representing the class * * * therefore, would not be preserved by the prior plaintiff's timely filed class suit.

Respondents' proposed reading would allow the statute of limitations to be extended time and again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation. * * * This prospect points up a further distinction between the individual-claim tolling established by *American Pipe* and tolling for successive class actions. The time to file individual actions once a class action ends is finite, extended only by the time the class suit was pending; the time for filing successive class suits, if tolling were allowed, could be limitless. Respondents' claims happen to be governed by 28 U.S.C. § 1658(b)(2)'s five-year statute of repose, so the time to file complaints has a finite end. Statutes of repose, however, are not ubiquitous. Most statutory schemes provide for a single limitation period without any outer limit to safeguard against serial relitigation. Endless tolling of a statute of limitations is not a result envisioned by *American Pipe*.

B.

* * *

Today's clarification of *American Pipe* 's reach does not run afoul of the Rules Enabling Act by causing a plaintiff's attempted recourse to Rule 23 to abridge or modify a substantive right. Plaintiffs have no substantive right to bring their claims outside the statute of limitations. That they may do so, in limited circumstances, is due to a judicially crafted tolling rule that itself does not abridge, enlarge, or modify any substantive right. * * *

Respondents urge that *American Pipe*'s logic in fact supports their position because declining to toll the limitation period for successive class suits will lead to a "needless multiplicity" of protective class-action filings. * * * But there is little reason to think that protective class filings will substantially increase. Several Courts of Appeals have already declined to read *American Pipe* to permit a successive class action filed outside the limitation period. * * *

* * *

Nor do the incentives of class-action practice suggest that many more plaintiffs will file protective class claims as a result of our holding. Any plaintiff whose individual claim is worth litigating on its own rests secure in the knowledge that she can avail herself of *American Pipe* tolling if certification is denied to a first putative class. The plaintiff who seeks to preserve the ability to lead the class * * * has every reason to file a class action early, and little reason to wait in the wings, giving another plaintiff first shot at representation.

In any event, * * * a multiplicity of class-action filings is not necessarily "needless." Indeed, multiple filings may aid a district court in determining, early on, whether class treatment is warranted, and if so, which of the contenders would be the best representative. * * * But district courts have ample tools at their disposal to manage the suits, including the ability to stay, consolidate, or transfer proceedings. District courts are increasingly familiar with overseeing such complex cases, given the surge in multidistrict litigation. * * * The Federal Rules provide a range of mechanisms to aid courts in this endeavor. What the Rules do not offer is a reason to permit plaintiffs to exhume failed class actions by filing new, untimely class claims.

* * *

The watchwords of *American Pipe* are efficiency and economy of litigation, a principal purpose of Rule 23 as well. Extending *American Pipe* tolling to successive class actions does not serve that purpose. * * *

Accordingly, the judgment of the * * * Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[The opinion by JUSTICE SOTOMAYOR concurring in the judgment is omitted]

NOTES AND QUESTIONS

1. The *China Agritech* opinion was written by Justice Ginsburg, who was generally viewed as a liberal Justice who was favorably disposed to class actions. Is her opinion in *China Agritech* consistent with a pro-class action perspective?

2. Given the Court's ruling, what, if anything, is left of *American Pipe* tolling? Does it make sense to allow tolling only for subsequent individual actions but not for subsequent class actions? In drawing that distinction, what were the Court's concerns?

Page 458, add the following subheading after "iv. Securities and Internal Corporate Affairs":

v. Third-Party Defendants

In 2019, the Supreme Court held that neither the general removal statute, 28 U.S.C § 1441(a), nor the removal provision of the Class Action Fairness Act, 28 U.S.C § 1453(b), permits third-party counterclaim defendants to remove a case to federal court. *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 (2019). In that case, CitiBank brought a debt collection action against defendant Jackson alleging that Jackson was liable for charges made on a Home Depot credit card. Jackson then brought a third-party class action against Home Depot and another company, alleging unlawful referral sales, and deceptive and unfair trade practices in violation of state law. Home Depot removed the case to federal court and Jackson moved to remand. The district court granted the remand motion, and the Fourth Circuit affirmed. The Supreme Court affirmed, holding that "[b]ecause in the context of these removal provisions the term 'defendant' refers only to the party sued by the original plaintiff, we conclude that neither provision allows such a third party to remove." *Id.* at 1746.

CHAPTER 8

Page 600, add new notes 11 and 12:

11. In *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2021), the Eleventh Circuit reviewed a district court's approval of a class action settlement against NPAS Solutions, LLC, for violating the Telephone Consumer Protection Act by using an automatic dialing system to call class members without "prior express consent." *Id.* at 1249. Among other issues, the Eleventh Circuit addressed the district court's award of an "incentive payment" to the class representative. The district court had approved a $6,000 incentive payment, which the Eleventh Circuit found to be "part salary and part bounty." *Id.* at 1255, 1258. In rejecting the payment, the court relied upon two Supreme Court cases from the late 1800s that "seem to have been largely overlooked in modern class-action practice[.]" *Id.* at 1256 (citations omitted). Both cases articulated the principle that, while attorneys' fees may be paid from a common fund, "personal services and private expenses" may not. *Id.* at 1257 (citations omitted). The Eleventh Circuit acknowledged "that such awards are commonplace in modern class-action litigation, [but] that doesn't make them lawful." *Id.* at 1260. Finding that the incentive payment "compensate[d] a class representative for his time and reward[ed] him for bringing a lawsuit," the court reversed the $6,000 award. *Id.* at 1260–61. At the time this supplement went to press, a petition for rehearing en banc was pending.

12. In *In re Equifax Inc. Consumer Data Security Breach Litigation*, 999 F.3d 1247 (11th Cir. 2021), *cert. denied,* 142 S. Ct. 431 (2021), and 142 S. Ct. 765 (2022), the Eleventh Circuit considered the district court's order certifying a class action and approving the settlement, despite the fact that the order was "ghostwritten" by plaintiffs' counsel. "Judicial ghostwriting remains most unwelcome in this Circuit," cautioned the court, but

"[b]ecause the process by which the District Court adopted its order was not fundamentally unfair," the Eleventh Circuit did not vacate the order. *Id.* at 1270. The court then affirmed the settlement approval in substantial part, reversing only the district court's approval of an incentive award for class representatives, following *NPAS Solutions*. The court also approved the award of $77.6 million in attorneys' fees.

Page 608, replace Section 8 with the following:

8. RULE CHANGES DEALING WITH SETTLEMENT

On December 1, 2018, various amendments to Rule 23 were adopted relating to class settlements.

1. Under new subsection Rule 23(e)(1)(A), the parties are required to provide the court with "information sufficient to enable it to determine" whether to approve sending notice to the class. And new Rule 23(e)(1)(B) provides that notice may be ordered only if it is "justified by the parties' showing that the court will likely be able" to ultimately grant final approval and certify a class.

2. Amended Rule 23 contains detailed criteria for a court to consider in reviewing the fairness of a settlement. Prior to the 2018 amendments, Rule 23 contained no specific guidance on how courts should assess the fairness of class action settlements, although the Advisory Committee Notes referred to *In re Prudential Insurance Co. America Sales Practices Litigation Agent Actions*, 148 F.3d 283 (3d Cir. 1998), and to the *Manual for Complex Litigation (4th)*. These authorities provide several factors that the court should consider, including: (1) the nature of the claims and possible defenses; (2) whether the proposed settlement was fairly and honestly negotiated; (3) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (4) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; (5) whether the parties believe that the settlement is fair and reasonable; (6) the defendant's financial viability; (7) the number and objective merit of any objections received from the class members; (8) the risks in establishing damages; (9) the complexity, length, and expense of continued litigation; and (10) the stage of the proceedings.

Each circuit ultimately ended up formulating its own criteria for reviewing the fairness of settlements. While there was overlap, there was also a lack of consistency—for instance, some courts applied nine factors while others applied only four. *See Principles of the Law of Aggregate Litigation* § 3.05(a), at 205–07, 210 (discussing the variety of approaches).

In focusing on amendments to Rule 23, the Advisory Committee noted the wide variety of approaches taken by the circuits with respect to the governing fairness criteria. The Committee determined that it would be useful to identify a limited number of core criteria that courts should consider in reviewing any class settlement. New Rule 23(e)(2) directs courts to consider whether:

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

It is important to note that these criteria do not displace the current circuit-specific criteria. Instead, they augment those criteria to ensure that district courts consider the critical issues. Over time, however, these Rule 23-based criteria are likely to lead to greater consistency among the circuits.

The amended rule also addresses objectors to settlements. *See* note 4, *infra.*

3. In *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021), the Ninth Circuit reversed the district court's approval of a class action settlement in which the plaintiffs alleged that defendant improperly labeled its cooking oil product as 100% natural. Summing up the case as "How to Lose a Class Action Settlement in 10 Ways," the Ninth Circuit stated that the settlement agreement raised many red flags. *Id.* at 1019. The court held that Rule 23(e)(2) (added in 2018) requires courts to assess the possibility of collusion when scrutinizing settlements, including post-class certification settlements. The court explained that Rule 23(e)(2)(C) requires district courts to consider "the terms of any proposed award of attorney's fees[.]" *Id.* at 1024. Furthermore, previous Ninth Circuit precedent has established "an independent obligation to ensure that any attorney's fee award * * * is reasonable[.]" *Id.* at 1022 (citing *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011)). Because "[n]othing in the Rule's text suggests that this requirement applies only to pre-certification settlements," the court held "that courts must apply *Bluetooth*'s heightened scrutiny to post-class certification settlements in assessing whether the division of funds between the class members and their counsel is fair and 'adequate.'" Applying the *Bluetooth* factors to the settlement at issue, the court identified three indicators of collusion: "[plaintiffs'] counsel receive[d] a disproportionate distribution of the settlement," "the parties agreed to a clear sailing agreement [*i.e.*, defendant does not oppose attorneys' fees up to a certain amount]," and "the agreement contain[ed] a kicker or reverter clause" allowing defendant to keep money that it agreed to pay as attorneys' fees if the court awarded a lower amount of fees. *Id.* at 1023, 1026 (internal citation and quotation marks omitted). Because the district court approved the settlement without scrutinizing the possibility of collusion, the settlement approval was reversed and the case was remanded for further proceedings.

4. The 2018 amendments require that objections be stated with specificity and make clear whether they apply only to the objector, to a subset of the class, or to the entire class. These provisions were designed in part to address professional objectors. One of the attractions of seeking

side payments prior to 2018 was that objectors could pursue that approach with little or no effort to advance a plausible argument. These rule changes now put some burden on objectors to provide more than mere conclusory objections.

The centerpiece of the December 1, 2018 amendments, however, is a new provision that requires court approval of any payment in connection with the dismissal of any objection, either at the trial level or on appeal. It adopts the process of Federal Rule of Civil Procedure 62.1, which deals with the situation in which a case is on appeal but the court wishes to obtain the views of the trial court. Thus, the amendment addresses a major shortcoming of the prior rule: the requirement of disclosure of side agreements to the district court could be circumvented once the objector filed an appeal from the approval of the settlement.

Early signs are that the amendment is having some impact. In *In re Foreign Exchange Benchmark Rates Antitrust Litigation,* 334 F.R.D. 62, 63 (S.D.N.Y. 2019), the court was asked to approve a payment to an objector by class counsel of $300,000 (to be paid from counsel's attorneys' fees) in exchange for the objector's dismissal of an appeal raising the objection. While recognizing that legitimate objectors can perform a valuable service, the court noted that the objection at issue "does little more than benefit Objector's counsel and 'perpetuate[] a system that can encourage objections advanced for improper purposes.'" (quoting the Advisory Committee Note to the 2018 amendments). The court further noted that "the amount of the award had nothing to do with the Objector's objection." *Id*. at 64. And it noted that approval of such a request "would serve only to encourage objectors or their attorneys to extract this type of payment, and 'make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements." *Id*. Thus, the court declined to approve the requested payment.

In *Rougvie v. Ascena Retail Group, Inc.*, No. CV 15-724, 2019 WL 944811 (E.D. Pa. Feb. 21, 2019), although the court found that the 2018 amendments to Rule 23 did not apply to settlements approved in 2017, it expressed optimism about the amended Rule: "This amendment should prove to facilitate objections by good-faith objectors often not represented by counsel while discouraging bad-faith or professional objectors represented by counsel seeking fees." *Id*. at *17.

It is too soon to know whether the amended rule will substantially deter objectors who improperly seek side payments to drop their objections. Obviously, the rule depends on all counsel acting with integrity. Nothing can be done if unethical counsel are willing to state (falsely) that no side payments were made for dismissal of an objection when in fact payments were made "under the table." Moreover, when the parties comply with the rule and seek approval of a side payment, courts must be vigilant in rejecting side payments absent a showing that the objections resulted in actual benefits to the class.

For an in-depth treatment of objectors in the 2018 amendments, *see* Klonoff, *Class Action Objectors: The Good, the Bad, and the Ugly*, 89 FORDHAM L. REV. 475 (2020).

NOTES AND QUESTIONS

1. What purposes are served by the rule changes discussed above? Do the changes adequately address the issues of concern?

2. Why did the Federal Civil Rules Advisory Committee focus so heavily on settlement as opposed to other aspects of class action practice?

3. The problem of serial objectors filing baseless objections to extort payments from class counsel has been the subject of several articles and court decisions. *See, e.g.*, Robert Klonoff, *Class Action Objectors: The Good, the Bad, and the Ugly*, 89 FORDHAM L. REV. 475 (2020); Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1632–35 (2016) (summarizing recent cases challenging the unethical conduct of serial objectors); Elizabeth Cabraser & Adam Steinman, *What is a Fair Price for Objector Blackmail? Class Actions, Objectors, and the 2018 Amendments to Rule 23*, 24 LEWIS & CLARK L. REV. 549 (reviewing amendments to Rule 23 governing professional objectors); John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to Do About Them?*, 39 FLA. ST. U. L. REV. 865 (2012) (noting that professional objectors can hold up class settlements for years by making "insubstantial objections" that are tantamount to "extortion" because the objector "threaten[s] to appeal the judgment approving the settlement unless paid to desist"); *Dennis v. Kellogg Co.*, 2013 WL 6055326, at *4 n.2 (S.D. Cal. 2013) (noting that attorney Darrell Palmer "has been widely and repeatedly criticized as a serial, professional, or otherwise vexatious objector"); *Dennings v. Clearwire Corp.*, 928 F. Supp. 2d 1270 (W.D. Wash. 2013) (imposing an appeal bond after finding that objecting class members had not read the settlement and had prior affiliations with serial objector Christopher Bandas), *settlement aff'd in* No. 13-35038 (9th Cir. Apr. 22, 2013); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 281 F.R.D. 531, 533 (N.D. Cal. 2012) (compelling discovery of the objectors in another case involving attorney Christopher Bandas, and noting that "Bandas routinely represents objectors purporting to challenge class action settlements * * * for his own personal financial gain").

Page 632, add the following case after note 4:

In 2019, the Supreme Court did not reach the *cy pres* issue in *Frank v. Gaos*, but instead remanded the case on standing grounds. Justice Thomas believed that there *was* standing and thus reached the *cy pres* issue.

FRANK V. GAOS

Supreme Court of the United States, 2019.

139 S. Ct. 1041.

[Per Curiam opinion, which vacated the Ninth Circuit's judgment and ordered the court to address standing, is omitted.]

JUSTICE THOMAS, dissenting.

[Justice Thomas believed that standing existed and thus reached the merits.]

* * *

As to the class-certification and class-settlement orders, I would reverse. The named plaintiffs here sought to simultaneously certify and settle a class action under Federal Rules of Civil Procedure 23(b)(3) and (e). Yet the settlement agreement provided members of the class no damages and no other form of meaningful relief.* Most of the settlement fund was devoted to *cy pres* payments to nonprofit organizations that are not parties to the litigation; the rest, to plaintiffs' lawyers, administrative costs, and incentive payments for the named plaintiffs. The District Court and the Court of Appeals approved this arrangement on the view that the *cy pres* payments provided an "indirect" benefit to the class.

Whatever role *cy pres* may permissibly play in disposing of unclaimed or undistributable class funds, *cy pres* payments are not a form of relief to the absent class members and should not be treated as such (including when calculating attorney's fees). And the settlement agreement here provided no other form of meaningful relief to the class. This *cy pres*-only arrangement failed several requirements of Rule 23. First, the fact that class counsel and the named plaintiffs were willing to settle the class claims without obtaining any relief for the class—while securing significant benefits for themselves—strongly suggests that the interests of the class were not adequately represented. Fed. Rules Civ. Proc. 23(a)(4), (g)(4); *see Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619–620 (1997) (settlement terms can inform adequacy of representation). Second, the lack of any benefit for the class rendered the settlement unfair and unreasonable under Rule 23(e)(2). Further, I question whether a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy" when it serves only as a vehicle through which to extinguish the absent class members' claims without providing them any relief. Fed. Rule Civ. Proc. 23(b)(3); *see* Rule 23(b)(3)(A) (courts must consider "the class members' interests in individually controlling the prosecution . . . of separate actions").

In short, because the class members here received no settlement fund, no meaningful injunctive relief, and no other benefit whatsoever in exchange for the settlement of their claims, I would hold that the class action should not have been certified, and the settlement should not have been approved.

NOTES AND QUESTIONS

1. What are Justice Thomas's arguments against the settlement?

2. What arguments can be made in opposition to Justice Thomas's points?

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* The settlement required that Google make additional disclosures on its website for the benefit of "future users." But no party argues that these disclosures were valuable enough on their own to independently support the settlement.

Page 649, add the following new notes 16 and 17:

16. For a case examining the intricacies of awarding attorneys' fees in "coupon" settlements under the Class Action Fairness Act, *see Chambers v. Whirlpool Corp.*, 980 F.3d 645 (9th Cir. 2020).

17. In addition to awarding attorneys' fees, courts have long viewed themselves as having authority to award incentive payments to class representatives. *See, e.g., Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.,* 888 F.3d 455, 468 (10th Cir. 2017) (stating that class representatives are "regularly give[n]" incentive awards for serving as class representatives. Among other things, class representatives are required to submit to discovery (including, frequently, depositions), monitor counsel, and attend trial and other crucial hearings. Especially in small claims cases, it would be difficult to find class representatives who are willing to devote significant time to class actions absent the prospect of incentive awards. Yet, in 2020, the Eleventh Circuit held, over a vigorous dissent, that such awards are improper. *Johnson v. NPAS Solutions, LLC,* 975 F.3d 1244 (11th Cir. 2020). The majority relied on two old Supreme Court cases, *see id.* at 1257-58, both predating Rule 23: *Trustees v. Greenough,* 105 U.S. 527 (1881), and *Central Railroad & Banking co. v. Pettus,* 113 U.S. 116 (1885). The dissent viewed those Supreme Court cases as being readily distinguishable. As of the date of submission of this update, plaintiffs' petition for rehearing en banc is pending.

Page 667, add the following new note 8:

8. The Advisory Committee on Civil Rules released a memo in 2018 that surveyed rules and laws that require the disclosure of third-party funding. This study uncovered that, as of November 2017, about half of all federal circuit courts and a quarter of all federal district courts require the disclosure of the identity of litigation funders for recusal purposes. *See* Patrick A. Tighe, Committee on Rules of Prac. and Proc., *Survey of Federal and State Disclosure Rules Regarding Litig. Funding* (Feb. 7, 2018) http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf.

Page 696, add the following after note 4:

In 2018, the Supreme Court addressed arbitration clauses in the employment context:

EPIC SYSTEMS CORP. V. LEWIS

Supreme Court of the United States, 2018.

138 S. Ct. 1612.

JUSTICE GORSUCH delivered the opinion of the Court.

Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?

As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. Nor can we agree with the employees' suggestion that the National Labor Relations Act (NLRA) offers a conflicting command. * * * The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. * * * Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful.

I.

The three cases before us differ in detail but not in substance. Take *Ernst & Young LLP v. Morris*. There Ernst & Young and one of its junior accountants, Stephen Morris, entered into an agreement providing that they would arbitrate any disputes that might arise between them. The agreement stated that the employee could choose the arbitration provider and that the arbitrator could "grant any relief that could be granted by . . . a court" in the relevant jurisdiction. The agreement also specified individualized arbitration, with claims "pertaining to different [e]mployees [to] be heard in separate proceedings."

After his employment ended, and despite having agreed to arbitrate claims against the firm, Mr. Morris sued Ernst & Young in federal court. He alleged that the firm had misclassified its junior accountants as professional employees and violated the federal Fair Labor Standards Act (FLSA) and California law by paying them salaries without overtime pay. Although the arbitration agreement provided for individualized proceedings, Mr. Morris sought to litigate the federal claim on behalf of a nationwide class under the FLSA's collective action provision, 29 U.S.C. § 216(b). He sought to pursue the state law claim as a class action under Federal Rule of Civil Procedure 23.

Ernst & Young replied with a motion to compel arbitration. The district court granted the request, but the Ninth Circuit reversed this judgment [with one judge dissenting]. * * *

II.

We begin with the Arbitration Act and the question of its saving clause.

Congress adopted the Arbitration Act in 1925 in response to a perception that courts were unduly hostile to arbitration. No doubt there was much to that perception. Before 1925, English and American common law courts routinely refused to enforce agreements to arbitrate disputes. But in Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often

cheaper resolutions for everyone involved. So Congress directed courts to * * * treat arbitration agreements as "valid, irrevocable, and enforceable." 9 U.S.C. § 2. The Act, this Court has said, establishes "a liberal federal policy favoring arbitration agreements."

Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures. * * * Indeed, we have often observed that the Arbitration Act requires courts "rigorously" to "enforce arbitration agreements according to their terms * * *."

On first blush, these emphatic directions would seem to resolve any argument under the Arbitration Act. The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. * * * You might wonder if the balance Congress struck in 1925 between arbitration and litigation should be revisited in light of more contemporary developments. You might even ask if the Act was good policy when enacted. But all the same you might find it difficult to see how to avoid the statute's application.

Still, the employees suggest the Arbitration Act's saving clause creates an exception for cases like theirs. By its terms, the saving clause allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." § 2. That provision applies here, the employees tell us, because the NLRA renders their particular class and collective action waivers illegal. In their view, illegality under the NLRA is a "ground" that "exists at law . . . for the revocation" of their arbitration agreements, at least to the extent those agreements prohibit class or collective action proceedings.

The problem with this line of argument is fundamental. Put to the side the question whether the saving clause was designed to save not only state law defenses but also defenses allegedly arising from federal statutes. Put to the side the question of what it takes to qualify as a ground for "revocation" of a contract. Put to the side for the moment, too, even the question whether the NLRA actually renders class and collective action waivers illegal. Assuming (but not granting) the employees could satisfactorily answer all those questions, the saving clause still can't save their cause.

It can't because the saving clause recognizes only defenses that apply to "any" contract. In this way the clause establishes a sort of "equal-treatment" rule for arbitration contracts. The clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" At the same time, the clause offers no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration."

This is where the employees' argument stumbles. They don't suggest that their arbitration agreements were extracted, say, by an act of fraud or duress or in some other unconscionable way that would

render *any* contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones. And by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes.

We know this much because of *Concepcion*. * * *

Of course, *Concepcion* has its limits. The Court recognized that parties remain free to alter arbitration procedures to suit their tastes, and in recent years some parties have sometimes chosen to arbitrate on a classwide basis. But *Concepcion*'s essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent.

The employees' efforts to distinguish *Concepcion* fall short. They note that their putative NLRA defense would render an agreement "illegal" as a matter of federal statutory law rather than "unconscionable" as a matter of state common law. But we don't see how that distinction makes any difference in light of *Concepcion*'s rationale and rule. Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable *just because it requires bilateral arbitration* is a different creature. A defense of that kind, *Concepcion* tells us, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability. * * *

III.

But that's not the end of it. Even if the Arbitration Act normally requires us to enforce arbitration agreements like theirs, the employees reply that the NLRA overrides that guidance in these cases and commands us to hold their agreements unlawful yet.

This argument faces a stout uphill climb. When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "'to give effect to both.'" A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "'a clearly expressed congressional intention'" that such a result should follow. * * *

* * *

Seeking to demonstrate an irreconcilable statutory conflict even in light of these demanding standards, the employees point to Section 7 of the NLRA. That provision guarantees workers

> "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

From this language, the employees ask us to infer a clear and manifest congressional command to displace the Arbitration Act and outlaw agreements like theirs.

But that much inference is more than this Court may make. Section 7 focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand.

Neither should any of this come as a surprise. The notion that Section 7 confers a right to class or collective actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935. Federal Rule of Civil Procedure 23 didn't create the modern class action until 1966; class arbitration didn't emerge until later still; and even the Fair Labor Standards Act's collective action provision postdated Section 7 by years. * * *

A close look at the employees' best evidence of a potential conflict turns out to reveal no conflict at all. The employees direct our attention to the term "other concerted activities for the purpose of . . . other mutual aid or protection." This catchall term, they say, can be read to include class and collective legal actions. But the term appears at the end of a detailed list of activities speaking of "self-organization," "form[ing], join[ing], or assist [ing] labor organizations," and "bargain[ing] collectively." 29 U.S.C. § 157. And where, as here, a more general term follows more specific terms in a list, the general term is usually understood to "'embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" All of which suggests that the term "other concerted activities" should, like the terms that precede it, serve to protect things employees "just do" for themselves in the course of exercising their right to free association in the workplace, rather than "the highly regulated, courtroom-bound 'activities' of class and joint litigation." None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors.

The NLRA's broader structure underscores the point. * * * [M]issing entirely from this careful regime is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Without * * * specific guidance, it's not at all obvious what procedures Section 7 might protect. Would opt-out class action procedures suffice? Or would opt-in procedures be necessary? What notice might be owed to absent class members? What standards would govern class certification? Should the same rules always apply or should they vary based on the nature of the suit? Nothing in the NLRA even whispers to us on any of these essential questions. * * *

Telling, too, is the fact that when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so. [The Court cites and quotes other statutes as examples.]

* * *

[T]he employees' theory runs afoul of the usual rule that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." * * *

* * * In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date (save one temporary exception since overruled) * * *. Throughout, we have made clear that even a statute's express provision for collective legal actions does not necessarily mean that it precludes "'individual attempts at conciliation'" through arbitration. * * * Given so much precedent pointing so strongly in one direction, we do not see how we might faithfully turn the other way here.

* * *

[The Court affirmed the case that enforced the arbitration clause and reversed the two cases that refused to enforce the arbitration clauses.]

[JUSTICE THOMAS'S concurring opinion is omitted].

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

The employees in these cases complain that their employers have underpaid them in violation of the wage and hours prescriptions of the Fair Labor Standards Act, and analogous state laws. Individually, their claims are small, scarcely of a size warranting the expense of seeking redress alone. But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced. To block such concerted action, their employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind. The question presented: Does the Federal Arbitration Act permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act, "to engage in . . . concerted activities" for their "mutual aid or protection"? The answer should be a resounding "No."

In the NLRA and its forerunner, the Norris–LaGuardia Act (NLGA), 29 U.S.C. § 101 *et seq.,* Congress acted on an acute awareness: For workers striving to gain from their employers decent terms and conditions of employment, there is strength in numbers. A single employee, Congress understood, is disarmed in dealing with an employer. * * * [T]he Court forgets the labor market imbalance that gave rise to the NLGA and the NLRA, and ignores the destructive consequences of diminishing the right of employees "to band together in confronting an employer." * * *

* * *

I.

* * *

The NLGA and the NLRA operate on [the] premise that employees must have the capacity to act collectively in order to match their employers' clout in setting terms and conditions of employment. For decades, the Court's decisions have reflected that understanding.

A.

The end of the 19th century and beginning of the 20th was a tumultuous era in the history of our Nation's labor relations. Under economic conditions then prevailing, workers often had to accept employment on whatever terms employers dictated. * * *

Employers * * * engaged in a variety of tactics to hinder workers' efforts to act in concert for their mutual benefit. Notable among such devices was the "yellow-dog contract." Such agreements, which employers required employees to sign as a condition of employment, typically commanded employees to abstain from joining labor unions. * * *

Early legislative efforts to protect workers' rights to band together were unavailing. * * *

In the 1930's, legislative efforts to safeguard vulnerable workers found more receptive audiences. As the Great Depression shifted political winds further in favor of worker-protective laws, Congress passed two statutes aimed at protecting employees' associational rights, [the NLGA and the NLRA]. * * *

* * *

* * * Relevant here, § 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*." Section 8(a)(1) safeguards those rights by making it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." To oversee the Act's guarantees, the Act established the National Labor Relations Board (Board or NLRB), an independent regulatory agency empowered to administer "labor policy for the Nation."

* * *

B.

Despite the NLRA's prohibitions, the employers in the cases now before the Court required their employees to sign contracts stipulating to submission of wage and hours claims to binding arbitration, and to do so only one-by-one. When employees subsequently filed wage and hours claims in federal court and sought to invoke the collective-litigation procedures provided for in the FLSA and Federal Rules of Civil Procedure, the employers moved to compel individual arbitration. * * *

In resisting enforcement of the group-action foreclosures, the employees * * * argue * * * that the NLRA prohibits their employers from denying them the right to pursue work-related claims in concert in any forum. If they may be stopped by employer-dictated terms from pursuing

collective procedures in court, they maintain, they must at least have access to similar procedures in an arbitral forum.

C

Although the NLRA safeguards, first and foremost, workers' rights to join unions and to engage in collective bargaining, the statute speaks more embracively. * * * [T]he Act protects employees' rights "to engage in *other* concerted activities for the purpose of . . . mutual aid or protection." * * *

Suits to enforce workplace rights collectively fit comfortably under the umbrella "concerted activities for the purpose of . . . mutual aid or protection." "Concerted" means "[p]lanned or accomplished together; combined." When employees meet the requirements for litigation of shared legal claims in joint, collective, and class proceedings, the litigation of their claims is undoubtedly "accomplished together." * * *

Recognizing employees' right to engage in collective employment litigation and shielding that right from employer blockage are firmly rooted in the NLRA's design. * * *

Since the Act's earliest days, the Board and federal courts have understood § 7's "concerted activities" clause to protect myriad ways in which employees may join together to advance their shared interests. * * *

Crucially important here, for over 75 years, the Board has held that the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment. For decades, federal courts have endorsed the Board's view, comprehending that "the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7." The Court pays scant heed to this longstanding line of decisions.

D

In face of the NLRA's text, history, purposes, and longstanding construction, the Court nevertheless concludes that collective proceedings do not fall within the scope of § 7. None of the Court's reasons for diminishing § 7 should carry the day.

1.

The Court relies principally on the *ejusdem generis* canon. Observing that § 7's "other concerted activities" clause "appears at the end of a detailed list of activities," the Court says the clause should be read to "embrace" only activities "similar in nature" to those set forth first in the list. * * * The Court concludes that § 7 should, therefore, be read to protect "things employees 'just do' for themselves." It is far from apparent why joining hands in litigation would not qualify as "things employees just do for themselves." In any event, there is no sound reason to employ the *ejusdem generis* canon to narrow § 7's protections in the manner the Court suggests.

* * * Courts must take care * * * not to deploy the [*ejusdem generis*] canon to undermine Congress' efforts to draft encompassing legislation. * * *

2.

In search of a statutory hook to support its application of the *ejusdem generis* canon, the Court turns to the NLRA's "structure." Citing a handful of provisions that touch upon unionization, collective bargaining, picketing, and strikes, the Court asserts that the NLRA "establish[es] a regulatory regime" governing each of the activities protected by § 7. * * *

[The Court's] argument [that none of the NLRA's provisions specifically regulates employees' resort to collective litigation] is conspicuously flawed. When Congress enacted the NLRA in 1935, the only § 7 activity Congress addressed with any specificity was employees' selection of collective-bargaining representatives. * * *

* * *

3.

In a related argument, the Court maintains that the NLRA does not "even whispe[r]" about the "rules [that] should govern the adjudication of class or collective actions in court or arbitration." * * * [But] [t]he FLSA and the Federal Rules on joinder and class actions provide the procedures pursuant to which the employees may ally to pursue shared legal claims. * * *

* * * [T]he Court ignores the reality that sparked the NLRA's passage: Forced to face their employers without company, employees ordinarily are no match for the enterprise that hires them. Employees gain strength, however, if they can deal with their employers in numbers. * * *

* * *

E.

Because I would hold that employees' § 7 rights include the right to pursue collective litigation regarding their wages and hours, I would further hold that the employer-dictated collective-litigation stoppers, *i.e.,* "waivers," are unlawful. * * * The law could hardly be otherwise: Employees' rights to band together to meet their employers' superior strength would be worth precious little if employers could condition employment on workers signing away those rights. * * *

II.

Today's decision rests largely on the Court's finding in the Arbitration Act "emphatic directions" to enforce arbitration agreements according to their terms, including collective-litigation prohibitions. Nothing in the FAA or this Court's case law, however, requires subordination of the NLRA's protections. * * *

A.

1.

Prior to 1925, American courts routinely declined to order specific performance of arbitration agreements.

The legislative hearings and debate leading up to the FAA's passage evidence Congress' aim to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes.

The FAA's legislative history also shows that Congress did not intend the statute to apply to arbitration provisions in employment contracts. * * *

2.

* * *

As I see it, in relatively recent years, the Court's Arbitration Act decisions have taken many wrong turns. Yet, even accepting the Court's decisions as they are, nothing compels the destructive result the Court reaches today.

B.

Through the Arbitration Act, Congress sought "to make arbitration agreements as enforceable as other contracts, but not more so." * * *

I would hold that the arbitration agreements' employer-dictated collective-litigation waivers are unlawful. By declining to enforce those adhesive waivers, courts would place them on the same footing as any other contract provision incompatible with controlling federal law. The FAA's saving clause can thus achieve harmonization of the FAA and the NLRA without undermining federal labor policy.

* * *

C.

Even assuming that the FAA and the NLRA were inharmonious, the NLRA should control. Enacted later in time, the NLRA should qualify as "an implied repeal" of the FAA, to the extent of any genuine conflict. Moreover, the NLRA should prevail as the more pinpointed, subject-matter specific legislation, given that it speaks directly to group action by employees to improve the terms and conditions of their employment.

III.

The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers.

* * *

I do not read the Court's opinion to place in jeopardy discrimination complaints asserting disparate-impact and pattern-or-practice claims that call for proof on a group-wide basis, which some courts have concluded cannot be maintained by solo complainants. It would be grossly exorbitant to read the FAA to devastate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* and other laws enacted to eliminate, root and branch, class-based employment discrimination. With fidelity to the Legislature's will, the Court could hardly hold otherwise.

I note, finally, that individual arbitration of employee complaints can give rise to anomalous results. Arbitration agreements often include provisions requiring that outcomes be kept confidential or barring arbitrators from giving prior proceedings precedential effect. As a result, arbitrators may render conflicting awards in cases involving similarly situated employees—even employees working for the same employer. Arbitrators may resolve differently such questions as whether certain jobs

are exempt from overtime laws. With confidentiality and no-precedential-value provisions operative, irreconcilable answers would remain unchecked.

* * *

If these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress. It is the result of take-it-or-leave-it labor contracts harking back to the type called "yellow dog," and of the readiness of this Court to enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their "mutual aid or protection." * * *

NOTES AND QUESTIONS

1. Was the Court's resolution compelled by *Concepcion?* The majority appeared to view the case as an easy one. How does Justice Ginsburg in dissent distinguish *Concepcion* from the context at issue? Which view is correct?

2. In a situation like *Evans,* is arbitration a realistic alternative? Why or why not? If a plaintiff is unlikely to pursue individual arbitration, does the Court's ruling give companies who violate labor laws a free pass?

3. Is Justice Ginsburg correct in assuming that the majority's opinion does not impact the ability to bring class actions under Title VIII or other civil rights statutes? Or is the majority poised to extend *Evans* to civil rights statutes as well?

In another arbitration decision, rendered in 2019, the Court addressed whether a court could compel arbitration on a classwide basis when the agreement is ambiguous on the issue.

LAMPS PLUS V. VARELA

Supreme Court of the United States, 2018.

139 S. Ct. 1407.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Federal Arbitration Act requires courts to enforce covered arbitration agreements according to their terms. See 9 U.S. C. §2. In *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), we held that a court may not compel arbitration on a classwide basis when an agreement is "silent" on the availability of such arbitration. * * * We now consider whether the FAA similarly bars an order requiring class arbitration when an agreement is not silent, but rather "ambiguous" about the availability of such arbitration.

I.

Petitioner Lamps Plus is a company that sells light fixtures and related products. In 2016, a hacker impersonating a company official

tricked a Lamps Plus employee into disclosing the tax information of approximately 1,300 other employees. Soon after, a fraudulent federal income tax return was filed in the name of Frank Varela, a Lamps Plus employee and respondent here.

Like most Lamps Plus employees, Varela had signed an arbitration agreement when he started work at the company. But after the data breach, he sued Lamps Plus in Federal District Court in California, bringing state and federal claims on behalf of a putative class of employees whose tax information had been compromised. Lamps Plus moved to compel arbitration on an individual rather than classwide basis, and to dismiss the lawsuit. In a single order, the District Court granted the motion to compel arbitration and dismissed Varela's claims without prejudice. But the court rejected Lamps Plus's request for individual arbitration, instead authorizing arbitration on a classwide basis. Lamps Plus appealed the order, arguing that the court erred by compelling class arbitration.

The Ninth Circuit affirmed. * * *

The Ninth Circuit * * * determined that the agreement was ambiguous on the issue of class arbitration. * * *

Lamps Plus petitioned for a writ of certiorari, arguing that the Ninth Circuit's decision contravened *Stolt-Nielsen* and created a conflict among the Courts of Appeals. * * *

II.

[The Court concluded that the district court order at issue was a final judgment and this appealable.]

III.

The Ninth Circuit applied California contract law to conclude that the parties' agreement was ambiguous on the availability of class arbitration. In California, an agreement is ambiguous "when it is capable of two or more constructions, both of which are reasonable." Following our normal practice, we defer to the Ninth Circuit's interpretation and application of state law and thus accept that the agreement should be regarded as ambiguous.

We therefore face the question whether, consistent with the FAA, an ambiguous agreement can provide the necessary "contractual basis" for compelling class arbitration. *Stolt-Nielsen*, 559 U.S. at 684. We hold that it cannot—a conclusion that follows directly from our decision in *Stolt-Nielsen*. Class arbitration is not only markedly different from the "traditional individualized arbitration" contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration. The statute therefore requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis.

A.

The FAA requires courts to "enforce arbitration agreements according to their terms." Although courts may ordinarily accomplish that end by relying on state contract principles, state law is preempted to the extent it "stands as an obstacle to the accomplishment and execution of the full

purposes and objectives" of the FAA, *Concepcion*. At issue in this case is the interaction between a state contract principle for addressing ambiguity and a "rule[] of fundamental importance" under the FAA, namely, that arbitration "is a matter of consent, not coercion." *Stolt-Nielsen*, 559 U.S. at 681.

"[T]he first principle that underscores all of our arbitration decisions" is that "[a]rbitration is strictly a matter of consent." * * *

Consent is essential under the FAA because arbitrators wield only the authority they are given. That is, they derive their "powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution." *Stolt-Nielsen*, 559 U.S. at 682. Parties may generally shape such agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes. Whatever they settle on, the task for courts and arbitrators at bottom remains the same: "to give effect to the intent of the parties."

In carrying out that responsibility, it is important to recognize the "fundamental" difference between class arbitration and the individualized form of arbitration envisioned by the FAA. In individual arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." Class arbitration lacks those benefits. It "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." * * * Class arbitration not only "introduce[s] new risks and costs for both sides," it also raises serious due process concerns by adjudicating the rights of absent members of the plaintiff class— again, with only limited judicial review.

Because of these "crucial differences" between individual and class arbitration, *Stolt-Nielsen* explained that there is "reason to doubt the parties' mutual consent to resolve disputes through classwide arbitration." And for that reason, we held that courts may not infer consent to participate in class arbitration absent an affirmative "contractual basis for concluding that the party *agreed* to do so." Silence is not enough; the "FAA requires more."

Our reasoning in *Stolt-Nielsen* controls the question we face today. Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to "sacrifice[] the principal advantage of arbitration."

This conclusion aligns with our refusal to infer consent when it comes to other fundamental arbitration questions.

For example, we presume that parties have *not* authorized arbitrators to resolve certain "gateway" questions, such as "whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." Although parties are free to authorize arbitrators to resolve such questions, we will not conclude that they have done so based on "silence *or* ambiguity" in their agreement, because "doing so might too often force unwilling parties to

arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." We relied on that same reasoning in *Stolt-Nielsen*, and it applies with equal force here. Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself.[4]

B.

The Ninth Circuit reached a contrary conclusion based on California's rule that ambiguity in a contract should be construed against the drafter, a doctrine known as *contra proferentem*. The rule applies "only as a last resort" when the meaning of a provision remains ambiguous after exhausting the ordinary methods of interpretation. * * * Although the rule enjoys a place in every hornbook and treatise on contracts, we noted in a recent FAA case that "the reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was." This case brings those limits into focus.

Unlike contract rules that help to interpret the meaning of a term, and thereby uncover the intent of the parties, *contra proferentem* is by definition triggered only after a court determines that it *cannot* discern the intent of the parties. When a contract is ambiguous, *contra proferentem* provides a default rule based on public policy considerations; "it can scarcely be said to be designed to ascertain the meanings attached by the parties." Like the contract rule preferring interpretations that favor the public interest, *contra proferentem* seeks ends other than the intent of the parties.

"[C]lass arbitration, to the extent it is manufactured by [state law] rather than consen[t], is inconsistent with the FAA." We recently reiterated that courts may not rely on state contract principles to "reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent." *Epic Systems*, 138 S. Ct. 1612, 1623 (2018). But that is precisely what the court below did, requiring class arbitration on the basis of a doctrine that "does not help to determine the meaning that the two parties gave to the words, or even the meaning that a reasonable person would have given to the language used." Such an approach is flatly inconsistent with "the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 559 U.S. at 684.

Varela and JUSTICE KAGAN defend application of the rule on the basis that it is nondiscriminatory. It does not conflict with the FAA, they argue, because it is a neutral rule that gives equal treatment to arbitration agreements and other contracts alike. We have explained, however, that such an equal treatment principle cannot save from preemption general rules "that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'" *Epic Systems*, 138 S. Ct. at 1616 (quoting *Concepcion*, 563 U.S. at 344).

That was the case in *Concepcion*. There, the Court considered the general contract defense of unconscionability, which had been interpreted

[4] This Court has not decided whether the availability of class arbitration is a so-called "question of arbitrability," which includes these gateway matters. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569, n.2 (2013). We have no occasion to address that question here because the parties agreed that a court, not an arbitrator, should resolve the question about class arbitration.

by the state court to bar class action waivers in consumer contracts, whether in the litigation or arbitration context. The general applicability of the rule did not save it from preemption under the FAA with respect to arbitration agreements, because it had the consequence of allowing any party to a consumer arbitration agreement to demand class proceedings "without the parties' consent." That, for the reasons we have explained, "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344. The same reasoning applies here: The general *contra proferentem* rule cannot be applied to impose class arbitration in the absence of the parties' consent.

Our opinion today is far from the watershed JUSTICE KAGAN claims it to be. Rather, it is consistent with a long line of cases holding that the FAA provides the default rule for resolving certain ambiguities in arbitration agreements. * * *

* * *

Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis. * * *

We reverse the judgment of the Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

[JUSTICE THOMAS'S concurring opinion is omitted.]

JUSTICE GINSBURG, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

* * *

Today's decision underscores the irony of invoking "the first principle" that "arbitration is strictly a matter of consent" to justify imposing individual arbitration on employees who surely would not choose to proceed solo. Respondent Frank Varela sought redress for negligence by his employer leading to a data breach affecting 1,300 employees. The widely experienced neglect he identified cries out for collective treatment. Blocking Varela's path to concerted action, the Court aims to ensure the authenticity of consent to class procedures in arbitration. Shut from the Court's sight is the "Hobson's choice" employees face: "accept arbitration on their employer's terms or give up their jobs."

Recent developments outside the judicial arena ameliorate some of the harm this Court's decisions have occasioned. Some companies have ceased requiring employees to arbitrate sexual harassment claims, or have extended their no-forced-arbitration policy to a broader range of claims. And some States have endeavored to safeguard employees' opportunities to bring sexual harassment suits in court. These developments are sanguine, for "[p]lainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights . . . to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts."

* * * The Court, paradoxically reciting the mantra that "[c]onsent is essential," has facilitated companies' efforts to deny employees and consumers the "important right" to sue in court, and to do so collectively, by inserting solo-arbitration-only clauses that parties lacking bargaining

clout cannot remove. When companies can "muffl[e] grievance[s] in the cloakroom of arbitration," the result is inevitable: curtailed enforcement of laws "designed to advance the well-being of [the] vulnerable." "Congressional correction of the Court's elevation of the FAA over" the rights of employees and consumers "to act in concert" remains "urgently in order."

[Dissenting opinion by JUSTICE BREYER is omitted.]

[Dissenting opinion by JUSTICE SOTOMAYOR is omitted.]

JUSTICE KAGAN, with whom JUSTICE GINSBURG and JUSTICE BREYER join, and with whom JUSTICE SOTOMAYOR joins as to Part II, dissenting.

* * * In my view, the arbitration agreement Lamps Plus wrote is best understood to authorize arbitration on a classwide basis. But even if the Court is right to view the agreement as ambiguous, a plain-vanilla rule of contract interpretation, applied in California as in every other State, requires reading it against the drafter—and so likewise permits a class proceeding here. * * *

I.

From its very beginning, the arbitration agreement between Lamps Plus and Frank Varela announces its comprehensive scope. The first sentence states: "[T]he parties agree that any and all disputes, claims or controversies arising out of or relating to[ ] the employment relationship between the parties[ ] shall be resolved by final and binding arbitration." The phrase "any and all disputes, claims, or controversies" encompasses both their individual and their class variants—just as any other general category (*e.g.,* any and all chairs) includes all particular types (*e.g.,* desk and reclining). So Varela's class action (which arose out of or related to his employment) was a "dispute, claim or controversy" that belonged in arbitration.

The next paragraph continues in the same vein, by describing what Varela gave up by signing the agreement. "[A]rbitration," the agreement says, "shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment." * * * That is the language of forum selection: Any and all actions (both individual and class) that I could once have brought in court, I am agreeing now to bring in arbitration. The provision carries no hint of consent to surrender altogether—in arbitration as well as court—the ability to bring a class proceeding.

Further on, the remedial and procedural terms of the agreement support reading it to authorize class arbitration. The arbitrator, according to the contract, may "award any remedy allowed by applicable law." That sweeping provision easily encompasses classwide relief when the "any and all disputes" that the contract's first sentence places in arbitration call for such remedies. And under the agreement, the arbitration shall be conducted "in accordance with" the rules of either of two designated arbitration providers—both of which furnish rules for arbitrators to conduct class proceedings.

Even the section Lamps Plus cites in arguing that the agreement bars class arbitration instead points to the opposite conclusion. In describing what the agreement covers, one provision states: "The Company and I

mutually consent to the resolution by arbitration of all claims or controversies ('claims'), past, present or future that I may have against the Company." Lamps Plus * * * highlights "th[e] repeated use of singular personal pronouns" there, contending that it is incompatible with a form of arbitration that also involves other parties' claims. But the use of the first person singular merely reflects that the agreement is bilateral in nature—between Varela and Lamps Plus. Those pronouns do not resolve whether one of those parties ("I") can bring to arbitration class disputes, as well as individual disputes, relating to his employment. The part of the quoted section addressing that question is instead the phrase "all claims or controversies." And that phrase supplies the same answer as the agreement's other provisions. For it too is broad enough to cover both individual and class actions—the ones Varela brings alone and the ones he shares with co-workers.

II.

Suppose, though, you think that my view of the agreement goes too far. Maybe you aren't sure whether the phrase "any and all disputes, claims or controversies" must be read to include *class* "disputes, claims or controversies." Or maybe you wonder whether the surrounding "I" and "my" references limit that phrase's scope, rather than merely referring to one of the contract's signatories. In short, you can see reasonable arguments on both sides of the interpretive dispute—for allowing, but also for barring, class arbitration. You are then in the majority's position, "accept[ing]" the arbitration agreement as "ambiguous." What should follow?

Under California law (which applies unless preempted) the answer is clear: The agreement must be read to authorize class arbitration. That is because California—like every other State in the country—applies a default rule construing "ambiguities" in contracts "against their drafters." This anti-drafter canon—which "applies with peculiar force" to form contracts like Lamps Plus's—promotes clarity in contracting by resolving ambiguities against the party who held the pen. And the rule makes quick work of interpreting the arbitration agreement here. Lamps Plus drafted the agreement. It therefore had the opportunity to insert language expressly barring class arbitration if that was what it wanted. It did not do so. It instead (at best) left an ambiguity about the availability of class arbitration. So California law holds that Lamps Plus cannot now claim the benefit of the doubt as to the agreement's meaning. Even the majority does not dispute that point.

And contrary to the rest of the majority's opinion, the FAA contemplates that such a state contract rule will control the interpretation of arbitration agreements.

Under the FAA, courts must "enforce arbitration agreements according to their terms." But the construction of those contractual terms (save for in limited circumstances, addressed below) is "a question of state law, which this Court does not sit to review." * * * Nothing in the FAA (as contrasted to today's majority opinion) "purports to alter background principles of state contract law regarding" the scope or content of agreements. * * *

Except when state contract law discriminates against arbitration agreements. * * * So any state rule treating arbitration agreements worse than other contracts "stand[s] as an obstacle" to achieving the Act's purposes—and is preempted. That means the FAA displaces any state rule discriminating on its face against arbitration. * * *

Here, California's anti-drafter rule is as even-handed as contract rules come. It does not apply only to arbitration contracts. * * * Instead, the anti-drafter rule, as even the majority admits, applies to every conceivable type of contract—and treats each identically to all others. And contrary to what the majority is left to insist, the rule does not "target arbitration" by "interfer[ing] with [one of its] fundamental attributes"—*i.e.,* its supposed individualized nature. The anti-drafter rule (again, quite unlike *Concepcion*'s ban on class-action waivers) takes no side—favors no outcome—as between class and individualized dispute resolution. All the anti-drafter rule asks about is who wrote the contract. So if, for example, Varela had drafted the agreement here, the rule would have prevented, rather than permitted, class arbitration.[5] * * *

So this case should come out Varela's way even if the agreement is ambiguous. * * *

Stolt-Nielsen offers the majority no excuse: Far from "control[ling]" this case, that decision addressed a different situation—and explicitly reserved decision of the question here. In *Stolt-Nielsen*, the contracting parties entered into a formal stipulation that "they had not reached any agreement on the issue of class arbitration." The case thus involved not the mere absence of express language about class arbitration, but a joint avowal that the parties had never resolved the issue. Facing that oddity, an arbitral panel compelled class arbitration based solely on its "own conception of sound policy." This Court rejected the panel's decision for that reason, holding that a party need not "submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." But the Court went no further. In particular, it did not resolve cases like this one, where a neutral interpretive rule (even if not an express term) enables an adjudicator to determine a contract's meaning. To the contrary, the Court disclaimed any view on that question. * * *

Indeed, parts of *Stolt-Nielsen*—as well as later decisions—indicate that applying the anti-drafter rule to ambiguous language provides a sufficient contractual basis for class arbitration. In *Stolt-Nielsen*, we faulted the arbitrators for failing to inquire whether the relevant law "contain[ed] a default rule" that would construe an arbitration clause "as allowing class arbitration in the absence of express consent." We thus implied that such a default rule—like the anti-drafter canon here—can operate to authorize class arbitration when an agreement's language is ambiguous. * * *

And nothing particular to the anti-drafter rule justifies a different conclusion * * *.

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[5] Similarly, if Lamps Plus, as the agreement's author, had wanted class arbitration (perhaps because that would resolve many related cases at once) and Varela had resisted it (perhaps because he thought his case better than the others), the anti-drafter rule would have prevented, rather than permitted, class arbitration.

* * * [T]he FAA does not empower a court to halt the operation of such a garden-variety principle of state law. Nothing in the Act's text requires the displacement of state contract rules, as the majority implicitly concedes. Nor do the Act's purposes, so long as the state rule (as is true here) extends to all contracts alike, without disfavoring arbitration. The idea that the FAA blocks a state rule satisfying that standard because (a court finds) the rule has too much "public policy" in it comes only from the majority's collective mind. That approach disrespects the preeminent role of the States in designing and enforcing contract rules. It discards a universally accepted principle of contract interpretation in favor of unsupported assertions about what the parties must have (or could not possibly have) consented to. It subordinates authoritative state law to (at most) the impalpable emanations of federal policy, impossible to see except in just the right light. For that reason, it would never have graced the pages of the U.S. Reports save that this case involves . . . class proceedings.

The heart of the majority's opinion lies in its cataloging of class arbitration's many sins. In that respect, the opinion comes from the same place as (though goes a step beyond) this Court's prior arbitration decisions. The opinion likewise has more than a little in common with this Court's efforts to pare back class litigation. *See*, *e.g., Comcast Corp. v. Behrend*, 569 U.S. 27 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348–360 (2011). In this case, the result is to disregard the actual contract the parties signed. And to dismiss the neutral and commonplace default rule that would construe that contract against the drafting party. No matter what either requires, the majority will prohibit class arbitration. * * * It should instead—as the FAA contemplates—have left the parties' agreement, as construed by state law, alone.

NOTES AND QUESTIONS

1. Which analysis is more persuasive—the majority's or those of the dissenting opinions set forth above?

2. Is the Court's opinion part of a larger effort to curtail class actions, as Justice Kagan argues?

3. How important is this case? Isn't the real problem *Concepcion*?

4. In a rare Supreme Court victory for plaintiffs in the class arbitration context, the Supreme Court unanimously held that the FAA's exclusion (in section one)—involving "contracts of employment of * ** seaman, railroad employees, or any other class of works engaged in foreign or interstate commerce"—applied to independent contractors as well as employees. *New Prime Inc. v. Oliveira,* 139 S. Ct. 532 (2019). The Court further held that the issue of whether section one applied was for court, not the arbitrator, to decide. The opinion is of limited scope, however, because it merely interprets a specific exclusion and does nothing to help the myriad plaintiffs who do not fall within the exclusion.

5. In June of 2023, the Court issued yet another arbitration ruling, *Coinbase, Inc. v. Bielski,* __ S. Ct. __, 2023 WL 4138983 (U.S. June 23, 2023). In that case, the Court held that when a party that unsuccessfully moves to compel arbitration and files an interlocutory appeal (as allowed under 9 U.S.C. § 16(a)), the district court is required to stay all proceedings in the district court pending the appellate court's ruling. The majority

opinion provoked a forceful dissent by Justice Jackson, joined by Justices Sotomayor, Kagan, and (in part) Thomas. Justice Jackson cited a popular children's book to support her argument: "* * * [T]he majority's analysis comes down to this: Because the pro-arbitration party gets an interlocutory appeal, it should also get an automatic stay." *See* L. Numeroff, If You Give a Mouse a Cookie (1985)." *Id.* at *13. (Jackson, J., dissenting).

CHAPTER 9

Page 709, replace the last sentence of note 7 with the following:

In 2018, Rule 23(f) was amended to codify the *NFL Concussion* decision. It now provides that Rule 23(f) does not authorize interlocutory appeals "from an order under Rule 23(e)(1)," *i.e.,* an order granting or denying preliminary approval.

Page 709, add the following new note 10:

10. During the 2018 Term, the Supreme Court addressed a circuit split regarding whether a motion for reconsideration tolls Fed. R. Civ. P. 23(f)'s 14-day deadline for interlocutory appellate review of class certification. In *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019), the Supreme Court held that Rule 23(f) is not subject to equitable tolling. Plaintiff Lambert brought suit against Nutraceutical Corporation on behalf of a class, alleging that Nutraceutical's marketing of a dietary supplement violated California law. The district court decertified the class. Ten days after the ruling, the plaintiff notified the court that he intended to file a motion for reconsideration. After ten more days, the motion was filed but ultimately denied. Then, within 14 days of the order denying reconsideration of the decertification of the class, the plaintiff filed a Rule 23(f) petition for appeal. The Ninth Circuit held that Rule 23(f)'s time limit is nonjurisdictional and is therefore subject to equitable tolling. Accordingly, the Ninth Circuit held that plaintiff's petition was timely because the deadline was tolled by the motion for reconsideration. In a unanimous decision, authored by Justice Sotomayor, the Supreme Court disagreed and reversed. The Court agreed with the Ninth Circuit that Rule 23(f) is "properly classified as a nonjurisdictional claim-processing rule." *Id.* at 714. Nonetheless, the Court noted that "[w]hether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility." *Id.* The Court noted that Rule 2 authorizes a court of appeals to "suspend any provision of these rules in a particular case," but that authorization is subject to a caveat: "except as otherwise provided by Rule 26(b)." Finding that Rule 26(b)(1) contains an explicit carveout that a court of appeals "may not extend the time to file . . . a petition for permission to appeal," the Court held that "'[t]he Rules thus express a clear intent to compel rigorous

enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist." *Id.* at 715.

Page 719, add the following as a new subheading 4:

4. APPEAL FROM A DENIAL OF CLASS CERTIFICATION WHEN A CLASS REPRESENTATIVE VOLUNTARILY DISMISSES HIS OR HER CLAIMS

In *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017), the Supreme Court held that a class representative could not voluntarily dismiss his or her case with prejudice after the denial of class certification and then appeal the class certification as a final judgment under 28 U.S.C. § 1291. In *Baker*, the class representatives employed that strategy after the Ninth Circuit denied Rule 23(f) review. The Court, in a decision by Justice Ginsburg, rejected the tactic, concluding that it would be an end-run around "Rule 23(f)'s careful calibration—as well as Congress's designation of rulemaking 'as the preferred means for determining whether and when prejudgment orders should be immediately appealable[.]" *Id.* at 1714 (citation omitted). The Court further noted that, "even more than the death-knell theory," plaintiffs' approach would "invite[] protracted litigation and piecemeal appeals." *Id.* at 1707. In the Court's view, plaintiffs cannot be allowed to "transform a tentative interlocutory order into a final judgment within the meaning of § 1291 simply by dismissing their claims with prejudice[.]" *Id.* at 1715 (citation omitted).

Justice Thomas, joined by Chief Justice Roberts and Justice Alito, concurred in the result. They agreed with plaintiffs that the dismissal made the judgment final under § 1291 but asserted that plaintiffs could not appeal because there was no case or controversy under Article III. In light of the dismissals with prejudice, plaintiffs' individual claims could not be revived even if plaintiffs achieved a favorable ruling on class certification.

CHAPTER 10

*Page 778, add the following new subsection "***c. Novel Negotiation Class***" after the Problem*:

In *In Re National Prescription Opiate Litigation*, 976 F.3d 664, 667 (6th Cir. 2020), a divided panel of the Sixth Circuit rejected plaintiffs' attempt to certify a novel "negotiation class." The federal multidistrict litigation, consisting of over 1,300 consolidated lawsuits, involves allegations that opioid manufacturers, distributors, and pharmacies misled medical professionals into prescribing opioids and led millions of Americans to become addicted. The district court certified a class "for purposes of negotiating a settlement between class members and [defendants]." *Id.* Various objectors appealed. The class would enable a supermajority of class members to bind the rest of the class (apart from

those who opted out of the negotiation class) to a later classwide settlement.

The Sixth Circuit reversed, rejecting plaintiffs' "negotiation class" as unsupported by both the text and structure of Rule 23(e), which does not mention a negotiation class or anything analogous. The court explained that, "[h]owever innovative and effective the addition of negotiation classes would be * * * we are not free to amend a rule outside the process Congress ordered." *Id.* at 676 (internal quotation marks omitted).

Page 827, add the following new note 3:

3. For a recent case discussing the differences between a Fair Labor Standards Act opt-in class and a Rule 23 opt-out class, *see Scott v. Chipotle Mexican Grill, Inc.,* 954 F.3d 502 (2d Cir. 2020).

Page 864, add a new second paragraph to note 1:

In 2020, despite significant disruptions from the COVID-19 pandemic, there were approximately 375 securities class actions filed in federal and state courts. *See* Jay B. Kasner, *et al*., *Despite Pandemic-Related Disruptions, Securities Class Action Filings Remain High With No Signs of Slowing* (Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates 2021), *available at* https://www.skadden.com/insights/publications/2021/01/2021-insights/litigation-controversy/despite-pandemic-related-disruptions. This followed several consecutive years of more than 400 such filings.

Page 857, add the following new note 17:

In *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement*, 141 S. Ct. 1951 (2021), the Supreme Court considered a securities-fraud class action filed by various pension funds against Goldman Sachs, in which plaintiffs alleged that Goldman Sachs "artificially inflated [its] stock price by making generic statements about its ability to manage conflicts[.]" *Id.* at 1957. The Second Circuit had affirmed the class certification under the presumption in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

The parties and the Court agreed that "the generic nature of a misrepresentation often is important evidence of a price impact that courts should consider at class certification," so the Court vacated and remanded for a proper consideration of the price impact determination. 141 S. Ct. at 1958.

The parties disputed which side bears the burden of persuasion with respect to price impact. The Court determined that "the best reading of [its] precedents assigns defendants the burden of persuasion to prove a lack of price impact by a preponderance of the evidence" at class certification. *Id.* at 1955.

Justice Sotomayor dissented in part, refusing to join the Court's decision "to vacate and remand because [she] believe[d] the Second Circuit 'properly considered the generic nature of Goldman's alleged misrepresentations.'" *Id.* at 1963–64 (internal citation omitted).

Justice Gorsuch, joined by Justice Thomas and Justice Alito, also dissented in part, rejecting the holding that defendants "bear the burden of persuasion on price impact." *Id.* at 1965 (citation and internal quotation marks omitted). Instead, Justice Gorsuch noted, "only a burden of *production* is involved." *Id.* at 1966 (emphasis added). Justice Gorsuch noted that "in the 30-plus years since *Basic* this Court has never (before) suggested that plaintiffs are relieved from carrying the burden of persuasion on any aspect of their own causes of action." *Id.* at 1968.

Page 888, add the following new note 5:

6. In 2018, the Supreme Court resolved a split among state and federal courts about whether the SLUSA gave federal courts exclusive jurisdiction over class actions alleging violations of the Securities Act of 1933 (1933 Act). In *Cyan, Inc. v. Beaver Co. Employees Retirement Fund*, the Court unanimously held that both state and federal courts had jurisdiction to adjudicate 1933 Act claims. 138 S. Ct. 1061 (2018). The Court reasoned that the 1933 Act itself so provided, and that SLUSA did not change that result. Thus, such claims (if filed in state court) cannot be removed to federal court.

CHAPTER 12

Page 953, add new paragraph immediately before part A:

The author has published a comprehensive book on Federal Multidistrict Litigation. Robert Klonoff, FEDERAL MULTIDISTRICT LITIGATION IN A NUTSHELL (West Academic 2020). It focuses on all aspects of federal multidistrict litigation (MDL), including statistics on MDL cases; comparisons with other aggregation devices (such as class actions); the decision of the Judicial Panel on Multidistrict Litigation (the Panel) to centralize cases (including the standards for centralization and the selection of the MDL district court and judge); appellate review of Panel decisions; tag-along cases; the role of the MDL transferee judge (including case management, designating lead lawyers and committees, deciding motions, conducting bellwether trials, overseeing settlements, and awarding attorneys' fees); choice-of-law issues in MDLs; personal jurisdiction and venue issues; remand of transferred cases; federal/state coordination (including state MDL statutes); and proposals for reform of MDL practice.

Page 976, add the following new note 4:

4. In recent years, some Circuits have used mandamus as a device to reign in orders of MDL judges that the appellate courts deem improper. This has occurred, most prominently, in the *National Prescription Opiate Litigation* MDL, overseen by Judge Dan Polster in Cleveland. *See, e.g.,* https://www.tortreform.com/news/sixth-circuit-again-reverses-judge-handling-massive-opioid-litigation/ In addition, the Sixth Circuit, in a sharply divided opinion, overturned Judge Polster's certification of a so-called negotiation class to help facilitate settlement. *See* https://www.freshfields.us/insights/knowledge/briefing/2020/10/sixth-circuit-rejects-creation-of-a-negotiation-class-in-national-opioid-litigation-4335/ The Sixth Circuit's negotiation class ruling arose in a Rule 23(f) appeal, not under mandamus.

Page 987, add the following new notes 8 and 9:

8. If a single case in a consolidated multidistrict litigation is dismissed by the court, can the dismissal of the case be immediately appealed? In *Gelboim v. Bank of America, Corp.*, 574 U.S. 405 (2015), the Supreme Court held that the dismissal of a case that was formerly consolidated in a MDL for pretrial proceedings is an immediately appealable final decision under 28 U.S.C. §1291. In *Gelboim*, the defendants moved to dismiss a single-claim complaint in the MDL on the ground that the plaintiffs had not suffered a cognizable injury. The district court granted the request and dismissed the single-claim case with prejudice, but other cases alleged separate claims that permitted them to continue in the MDL. Plaintiffs sought to appeal the decision, but the Second Circuit dismissed the appeal for lack of appellate jurisdiction, reasoning that the "order appealed from did not dispose of all claims in the consolidated action." *Id.* at 412. The Supreme Court unanimously reversed, holding that "[c]ases consolidated for MDL pretrial proceedings ordinarily retain their separate identities" and "the § 1407 consolidation . . . did not meld the [relevant] action and others in the MDL into a single unit." *Id.* at 414. The Court stated that requiring appellants to wait until the completion of the pre-trial consolidation would leave parties in a "quandary about the proper timing of their appeal" because a notice of appeal must be filed within "30 days after the entry of the judgment or order appealed from," and the conclusion of the MDL may not result in a judgment that would permit an appeal. *Id.* at 414-5.

9. In *Home Depot U.S.A., Inc. v. Lafarge N. Am., Inc.,* 59 F.4th 55 (3d Cir. 2023), the Third Circuit addressed whether the doctrines of law of the case and issue preclusion were fully applicable in the MDL context. With respect to law of the case, the court held that the doctrine applied only to the particular case and "cannot be applied across distinct actions in [a] multidistrict proceeding" because "different cases brought together in an MDL remain separate." *Id.* at 61-62. With respect to issue preclusion, the court held that Home Depot could not be bound by rulings made in cases in the MDL to which it was not a party. *Id.* at 64.

Page 1003, add the following before the problem:

Ninth Circuit Review. In 2018, the Ninth Circuit reviewed various class members' objections to the VW settlement. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.,* 895 F.3d 597 (9th Cir. f2018). Objectors claimed that the district court abused its discretion in certifying the class, approving the settlement, and denying one objector's motion to opt out after the deadline had passed. The court found all of the objections to be meritless. It concluded that the "settlement delivered tangible, substantial benefits to the class members, seemingly the equivalent of—or superior to—those obtainable after successful litigation." *Id.* at 617. The court wrote that the "district court more than discharged its duty in ensuring that the settlement was fair and adequate to the class." *Id.*

CHAPTER 13

Page 1082, add the following to the end of note 3:

In 2017, the Supreme Court resolved the conflict (discussed in *Mausolf*) over whether a party seeking to intervene must establish Article III standing independently, or whether the presence of a valid case or controversy between the named parties is sufficient. In a unanimous opinion, *Town of Chester, New York v. Laroe Estates*, 137 S. Ct. 1645 (2017), the Court held that an intervenor must establish standing independently *if* he or she seeks "relief that is different from that which is sought by a party with standing." *Id.* at 1651. This standing requirement, the Court noted, "includes cases in which both the plaintiff and the intervenor seek separate money judgments in their own names." *Id.*

Page 1147, add new subsection:

g. "Texas Two-Step" and Other Devices to Shift Mass Tort Cases Into Bankruptcy Court

In recent years, defendants faced with massive mass tort liabilities, especially in the context of mass tort MDLs, have attempted to shift the litigation into bankruptcy court. As one commentator has described the technique, "The 'Texas Two-Step' is a device made available under Texas state law that permits a company to divide into two or more entities—a divisive merger—and separate its assets and liabilities among the two entities. Then, the liability burdened new entity seeks chapter 11 protection that affords a channeling injunction and third-party releases for its related, asset holding entities under a plan of reorganization." George H. Singer, *Georgia-Pacific Ruling Furthers Texas Two-Step Challenges*, LAW360, *as reprinted in* HOLLAND & HART (July 5, 2023) https://www.hollandhart.com/georgia-pacific-ruling-furthers-texas-two-step-challenges. The technique is analyzed in a recent article by Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts,* 90 U. Chi. L. Rev. 973 (2023). Several recent cases have addressed the Texas Two-Step and related techniques, with conflicting results. *See, e.g., In RE LTL Mgmt., LLC,* 64 F.4th 84 (3d Cir. 2023) (dismissing bankruptcy proceeding for lack of good faith); *In re Bestwall LLC,* __ F.4th __, 2023 WL

4066848 (4th Cir. June 20, 2023) (upholding the technique over a vigorous dissent). *See also In re Purdue Pharma L.P.,* 69 F.4th 45 (2d Cir. 2023) (affirming a bankruptcy plan that included nonconsensual releases of third-party claims against non-debtors). Ultimately, the Supreme Court will need to resolve these issues.

APPENDIX A

Page 1157, substitute the following for the text of Appendix A (reflecting the 2018 amendments to Rule 23):

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) 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; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate

means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) maybe altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) Notice to the Class.

(A) Information That Parties Must Provide to the Court. The par ties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purpose of judgment on the proposal.

(2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) Identifying Agreements. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) New Opportunity to Be Excluded. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Class-Member Objections.

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) Court Approval Required for Payment in Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is

docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and (E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).