No. 17-55635

In the United States Court of Appeals for the Ninth Circuit

SONNY LOW, et al.,
Plaintiffs-Appellees,

SHERRI B. SIMPSON,
Objector-Appellant

v.

TRUMP UNIVERSITY, LLC, AKA TRUMP ENTREPRENEUR INITIATIVE, a New York limited liability company, and DONALD J. TRUMP,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California

OBJECTOR-APPELLANT'S OPENING BRIEF

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June 12, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other authorities

INTRODUCTION

Trump University promised its students an "Ivy League quality" education in real estate. Donald Trump, the "most celebrated entrepreneur on earth," was "ready to share—with Americans like you—the Trump process for investing in today's once-in-a-lifetime real estate market."

Enticed, Sherri Simpson attended a free seminar at which Trump, via video, touted his "professors and adjunct professors"—all "handpicked" by him. "We are going to teach you better than the business schools are going to teach you," he boasted, "and I went to the best business school."

Dipping into her hard-earned savings, Simpson ended up spending roughly $19,000 for a three-day seminar and a year-long "Gold Elite Mentorship." But it didn't take long for her to realize that it was all a scam. Trump had never met his "handpicked" instructors. Simpson's vaunted "mentor" never returned her calls.

At first, Simpson was determined to sue Trump on her own. But, when she learned of a class action headed for trial, she decided to closely monitor that case and drop her own efforts. The class notice specifically reassured Simpson and her fellow class members that they would be notified of how to "ask to be excluded from any settlement." Simpson understood this to mean that, if she stayed in the class, she would be notified of any future settlement and be able to decide whether to opt out.

Simpson's understanding wasn't misguided. This notice language—adopted verbatim from models developed and tested by the Federal Judicial Center—is routinely understood to mean what it says: class members will have the opportunity to "ask to be excluded from any settlement."

But after the 2016 election, Trump (as he confirmed on Twitter), "settled the Trump University lawsuit for a small fraction of the potential award." This was unacceptable to Simpson. The settlement acknowledged no wrongdoing. And it really was "a small fraction." The compensation covered only 14% of what Trump would have had to pay after a successful RICO trial for treble damages: Simpson's claim was worth $66,310, but she'd recover at most $9,500 under the settlement.

But worst of all—and directly contradicting the earlier notice—the agreement expressly cut off Simpson's "opportunity to opt out" of the settlement. The question in this appeal is whether due process and Rule 23 permit approval of a settlement in a case where class members were previously informed that they would be able to opt out of "any settlement" and are then arbitrarily deprived of that opportunity. Because each class member "has a substantial stake in making individual decisions on whether and when to settle," *Amchem v. Prods., Inc. v. Windsor*, 521 U.S. 591, 616 (1997)—particularly in a case like this, involving valuable claims for money damages—due process demands much more. Accordingly, the district court's approval of the settlement should be reversed.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331, 1332, and 1332(d)(2). On March 31, 2017, the court entered an order granting final approval of the parties' proposed class-action settlement and issued separate final judgments in each of the two cases. Appellant Sherri Simpson timely filed notices of appeal from those final judgments under Federal Rule of Appellate Procedure 4(a)(1)(A). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Due Process and Rule 23. When this class action involving substantial money-damages claims was certified under Federal Rule of Civil Procedure Rule 23(b)(3), the notice informed class members that they would later be able to "ask to be excluded from any settlement." The subsequent class-action settlement, however, expressly foreclosed any opportunity for class members to exclude themselves from the settlement. Sherri Simpson sought to exclude herself and objected to the denial of her ability to so. Under these circumstances, did the district court's approval of the settlement violate due process and Rule 23?

2. Standing. The settlement notice established a deadline of March 6, 2017—both for filing a claim form and for making any objection to the settlement. Sherri Simpson did both, and did so by the deadline. She expressly indicated to the court in her timely papers that she sought to object and, in the alternative, to

preserve her claim to settlement funds in the event her objections were denied. The claim form states that claimants will be "bound by the terms of any judgment in these actions and may not bring a separate lawsuit." Did the district court err in construing this language as precluding Ms. Simpson from challenging the settlement and depriving her of Article III standing to object?

STATEMENT OF THE CASE

A. Sherri Simpson enrolls in Trump University.

In April 2010, Sherri Simpson signed up for a free Trump University seminar in Florida. ER 101. The promotional materials announced that Donald Trump, the "most celebrated entrepreneur on earth," was "ready to share—with Americans like you—the Trump process for investing in today's once-in-a-lifetime real estate market." ER 223. In a letter bearing his personal signature, Trump promised that "[m]y hand-picked instructors and mentors will show you how to use [my] real estate strategies." ER 33. Advertisements touted the chance to "learn from Donald Trump's hand-picked instructor a systematic method for investing in real estate that anyone can use effectively." ER 223.

The seminar that Ms. Simpson attended began with a promotional video in which Mr. Trump looks into the camera and promises students that "[w]e're going to have professors and adjunct professors that are absolutely terrific," adding that "these are all people that are *handpicked* by me." ER 34 (emphasis added). "If you

don't learn from them," Trump continues—referring to his "handpicked" "experts"—then "you're just not going to make [it] in terms of the world of success." *Id.* Trump was emphatic: "We are going to teach you better than the business schools are going to teach you and I went to the best business school." *Id.*

But "teach[ing]" was not the point of the free seminar. Instead, the "seminar was aimed entirely at inducing the attendees to sign up for the three-day seminar—a paid program that cost $1,495." ER 101. Trump University's internal "Marketing Guidelines" directed seminar leaders to use "Catch Phrases [and] Buzz Words" to get seminar-goers "[t]hinking of Trump University as a real university, with a real admissions process—*i.e.*, [where] not everyone who applies[] is accepted." ER 34. The instructors exhorted Simpson and others to invest in an "Ivy League quality" education at Trump's "university" and learn the "secrets" of Trump's real-estate investing success at the hands of his hand-selected "experts." ER 101.

Succumbing to this sales pitch, Simpson enrolled in the three-day $1,495 seminar, which she attended the following month. *Id.* And, once again, the focus was on upselling. Simpson was "told repeatedly at that program that, if [she] further enrolled in the Trump University Gold Elite mentorship program, the resources of Donald Trump and his real estate organization (which includes access to financing, counseling, information databases and numerous other resources)

would be made available to [her], to help [her] launch a career in real estate investing." *Id.*

The selling environment at the three-day seminar was intense. Instructors cajoled enrollees to increase their credit-card limits—ostensibly to improve their credit ratings, but really (and transparently) to enable them to sign up for the "Gold Elite Mentorship" program. ER 101. The Gold Elite mentorship had a very high price tag—$34,995—but it was hawked as a rare opportunity, and a surefire path to prosperity. ER 34; ER 101.[1] Simpson would receive "unlimited" "hands-on personal mentoring" for a year. ER 101; ER 34. She would obtain the ability to "[f]inance [her] deals creatively"—no small feat "in today's tight credit market!" ER 223. And, under the guidance of her dedicated mentor, she could expect to recoup the hefty tuition on her very first deal. As one testimonial, supposedly from a former student, proclaimed: "[t]he training and coaching I received from Trump U is priceless. I closed on my first investment property and earned $50,000." ER 223.

B. Ms. Simpson finds out that the program is a fraud.

Soon after she signed up for it, Simpson learned that "[t]he Gold Elite program was a scam." ER 101. "None of the promised resources were made

[1] Where necessary to make a sale, the Trump University staff would allow two students to share a mentor, and pay $17,500 apiece, rather than $34,995. Simpson herself shared a Gold Elite Mentorship with another enrollee, such that her total outlay was roughly $19,000 (i.e., $1,495 + $17,500).

available." *Id.* Among other things, there was no mentoring: the mentor assigned to Simpson "disappeared and never returned [her] calls or emails." *Id.* Neither did Trump University, when she called to complain, or when she wrote to demand a refund. *Id.* Simpson realized that she had been had. She consulted litigation counsel and began preparations to sue. *Id.* Then she learned that a class-action lawsuit had been filed in San Diego. *Id.*

Thousands of other victims, it turns out, had been swindled by Trump University nationwide, just as Simpson was. It turned out, for instance, that Donald Trump had never even met any of his supposedly "hand-picked" experts, the instructors and mentors. ER 246. Nor had he selected them in any way. *Id.* Still, Trump University provided the instructors with anecdotes to share about, for example, dinner conversations they purportedly had with Trump. ER 229–30. None were true. These "experts," moreover, were not familiar with any Trump "investing techniques" or real-estate "secrets." ER 246, 247 ¶¶ 11, 18. And they were not experts. The "instructors" at the seminars were in fact salespeople—independent contractors working on commission. ER 246 ¶ 11. Many had no real-estate expertise—no real-estate licenses or training whatsoever. The instructors and mentors were hired by Trump University President Michael Sexton, whose real-estate experience was limited to the purchase of his own home. ER 246 ¶ 10. And

many of the mentors simply disappeared, as Simpson's did, after perfunctory meetings.

C. The class action barrels toward trial.

After speaking with class counsel in July 2010, Ms. Simpson dropped her own efforts to bring a lawsuit and, instead, began to closely monitor the class action. ER 101. Between July 2010 and late 2016, Simpson spoke with class counsel dozens of times. ER 96 ¶ 3; ER 89 ¶ 2. And what she understood, all the while, was that the case, assigned to the Honorable Gonzalo P. Curiel, was barreling toward trial. In discovery, the class plaintiffs gathered an impressive storehouse of evidence, leading them to file a separate RICO class action, the *Cohen* action, in 2013. The district court certified the class in *Low* in February 2014, and certified the nationwide and overlapping class in *Cohen* eight months later. See *Low* Dkt. 298; *Cohen* Dkt. 53.[2] Defendant Trump, for his part, announced that he would not settle the class actions, even though—according to him—he "could have settled [the cases] very easily." ER 90.

[2] In *Low*, the Court declined to certify certain claims for class treatment, including claims for common-law fraud. *Low* Dkt. 298. And, after the class-certification decision, but before the class notice was distributed, the Court partially decertified the *Low* class, leaving all damages to be proven on an individual, non-class basis. *Low* Dkt. 418.

D. Ms. Simpson receives the class notice, which promises that she will be able to "ask to be excluded from any settlement."

The district court approved a class notice covering both class cases in September 2015. *Low* Dkt. 419. The notice advised Ms. Simpson and other class members that a class had been certified and that they may "ask to be excluded" from the class by making a written submission within 30 days. ER 111. In addition, the notice advised class members that, if the plaintiffs later settled the case out of court, the class member would likewise have the right to ask to be excluded at that point: "If you stay in, and the Plaintiffs obtain money or benefits, either as a result of the trial or a settlement, you will be notified about how to obtain a share (or how to *ask to be excluded from any settlement*)." *Id.* § 13 (emphasis added).

This text drew verbatim from a model notice developed by the Federal Judicial Center. *Compare* ER 106–112 *with* http://bit.ly/2rOgLTR (FJC model). The FJC model notice was the product of extensive research and testing, conducted by the FJC Research Division with input from linguists, plain-language experts, and focus groups. Federal Judicial Center, *Illustrative Forms of Class Action Notices: Detailed Discussion of Methodology*, http://bit.ly/2sQwfoY.

After the district court approved the notice, *Low* Dkt. 419, it was posted on the case website, trumpuniversitylitigation.com. In addition, the district court approved a short-form notice, or "mailer," that was circulated to class members.

ER 252. The mailer, less than two pages long, repeatedly directed the recipient to the case website, where he or she could access the full notice. *Id.*

Ms. Simpson received the mailer in November 2015 and visited the case website. ER 89 ¶¶ 3, 4. She then read the full notice on the case website and understood "that class members would have the opportunity to submit requests for exclusion from any settlement." ER 90 ¶ 4. To Simpson, the language was "unequivocal: It said that, if I stayed in the class, I would be notified in the future about 'how to ask to be excluded from any settlement.'" *Id.*

Simpson had no interest in opting out in response to the notice. ER 90 ¶ 7. With the case proceeding smoothly towards trial, she had no reason to opt out and commence separate litigation. *Id.* And, "[a]fter receiving the Class Notice and visiting the case website, it was [her] understanding and expectation that class members would receive the opportunity to opt out in the event there were a settlement." *Id.* ¶ 5.

E. Within days of the 2016 presidential election, the parties reach a nationwide class-action settlement.

Donald Trump was elected President of the United States on November 8, 2016. The next day, the court contacted the parties to propose a concerted effort to settle the litigation, and, the following day, Judge Curiel informed the parties that he had spoken with a fellow sitting district judge, who "offered to lend his services towards trying to settle the case." ER 221 (Tr. of Hearing at 11, Nov. 10 2016).

Settlement talks swiftly bore fruit. On November 19, President-Elect Trump tweeted: "I settled the Trump University lawsuit for a small fraction of the potential award." Donald J. Trump (@realdonaldtrump), Twitter (Nov. 19, 2016, 5:34 AM), http://bit.ly/2fRJmQj. A week later, Judge Curiel confirmed at a status conference that he had "received news" that "the parties have entered into a settlement agreement." ER 202 (Tr. of Hearing at 2, Nov. 18, 2016).

The judge then identified certain key elements of the settlement process—including allowing class members to submit requests for exclusion, as previously promised in the class notice. On the same day that he announced the settlement, the judge explicitly recognized this promised right: "The class members have to be given opportunity to object, to the extent that they have any objection, *and then issues regarding opt-outs has to be addressed by the Court*." ER 207 (emphasis added). None of the counsel in attendance purported to correct the court, or to seek clarification.

F. Contrary to the class notice, the settlement bans opt-outs.

Nevertheless, when the parties filed their joint motion for preliminary approval a few weeks later, it became clear that the parties did not intend to "notif[y] [class members] about . . . how to ask to be excluded from any settlement," as guaranteed by the original class notice. Instead, the new agreement *expressly foreclosed* any opt outs: "the Parties agree that no new opportunity to opt out will be provided as part of this Settlement." ER 143 § VII-1.

According to the parties' joint brief seeking preliminary approval, they banned requests to be excluded from the settlement because the 2015 notice had already given class members "ample opportunity to opt out." *Low* Dkt. 583 at 1, 6. The parties' joint submission did not mention the provision in that same 2015 notice specifying that class members would be given the right "to ask to be excluded from any settlement." ER 111.

The settlement agreement called for payments by defendants of $25 million, including $21 million to the class and $4 million to the New York Attorney General, who was conducting a parallel enforcement action. *Low* Dkt. 583 at 5. The settlement amount, the parties explained, represented half of the money paid by class members (implying that total receipts were roughly $50 million). *Id.* The agreement further reflected class counsel's agreement to waive all fees for the seven-year-long litigation, *id.,* and provided that "Defendants do not admit and there is no finding of wrongdoing, liability, or fault whatsoever." *Id.*; ER 145. The district court granted preliminary approval one day after the joint preliminary-approval motion was filed. *Low* Dkt. 584. The settlement administrator then distributed notice of the proposed settlement to class members and posted it online on January 4, 2017. *Low* Dkt. 589-1 at 2.

G. Ms. Simpson finds the settlement unacceptable in several respects.

Ms. Simpson read the settlement notice on the case website, ER 91, and was upset by a number of features. First, the absence of any acknowledgment of wrongdoing left the defendant free to tweet to his millions of followers that the plaintiffs' case was baseless. *See*, *e.g.*, Donald J. Trump (@realdonaldtrump), Twitter (Nov. 19, 2016, 5:39 AM), http://bit.ly/2sSbQQz ("The ONLY bad thing about winning the Presidency is that I did not have the time to go through a long but winning trial on Trump U. Too bad!").

Worse still, as Trump himself also confirmed via Twitter, the settlement afforded class members "a small fraction of the potential award." Donald J. Trump (@realdonaldtrump), Twitter (Nov. 19, 2016, 5:34 AM), http://bit.ly/2fRJmQj. The proposed payments to Simpson and her fellow class members represented only 14%, or one-seventh, of what Trump would have been required to pay if the plaintiffs had prevailed in a RICO trial, and substantially less than the treble damages plus prejudgment interest to which any given claimant would be entitled, following a trial win.[3] For Simpson, the disparity was stark: She had personally

[3] RICO damages include mandatory trebling plus prejudgment interest on the non-punitive component at the statutory rate of 7%. *Alexander v. Incway Corp.*, 2013 WL 5603932, at *21 (C.D. Cal. Oct. 11, 2013). Since the proceeds of the fraud equaled $50 million in the relevant period, the damage calculation is: ($50 million x 3) + ($50 million x 7% x 8 years) = $178 million, as compared to the $25 million settlement.

paid Trump $19,000 in 2010, and if she prevailed in a 2017 RICO trial she would be entitled to at least $66,310. Yet, under the proposed settlement, she would recover at most $9,500. Trump would keep his ill-gotten gains rather than paying the trebled amount intended to punish and deter fraud.[4]

Particularly in light of this disparity, Simpson was "unhappy and uncomfortable" with the settlement notice's provision informing her "that the class members had no right to seek exclusion from the Settlement." ER 91. This provision, as Simpson recognized, "contradicted what class members had been promised in the earlier Court-approved notice." *Id.* At the time, Simpson "did not know if there was a viable legal claim to be made that the proposed settlement should be rejected." ER 91. But she was "unhappy with the proposed settlement and with the fact that it did not allow requests for exclusion." *Id.*

Later that month, Simpson gave an interview to *People* magazine, for an article about class members who believed the settlement was unjust. ER 92. According to the article, published on January 18, "students who spoke to PEOPLE are upset that Trump was able to settle with no admission of guilt." Diane Herbst, *Trump University 'Alums' Talk Getting 'Scammed' as President-Elect Pays out*

[4] The preliminary-approval papers represented that class members would receive "50% of what they paid for the TU live events" in total. *Low* Dkt. 583 at 5. Thus, the presumed value of settlement was 50% x $19,000 = $9,500, whereas the value of a RICO trial win was $66,310—i.e., ($19,000 x 3) + ($19,000 x 7% x 7 years).

$25 Million in Fraud Settlement, People, Jan. 18, 2017, http://bit.ly/2rjA983. Simpson described to the reporter her broad-based dissatisfaction with the deal and her unhappiness with class counsel. ER 92. "Like fellow 'alums,'" the *People* article read, "Sherri Simpson isn't happy the lawsuits settled." Herbst, *Trump University 'Alums'*, *supra*.

H. Ms. Simpson timely objects and preserves her rights under the settlement.

Still, as Simpson was aware, the settlement notice established a deadline of March 6, 2017—both for filing a claim form and for making any objection to the settlement. By the time that deadline rolled around, she had done both.

In February 2017, after Simpson consulted an experienced class-action attorney, it "became clear to [her] that there was indeed a path for addressing the sources of the dissatisfaction that [she] felt, and had publicly expressed, with the settlement." ER 92. Accordingly, Simpson, through counsel, filed an objection with the district court. *Low* Dkt. 592–597.

Ms. Simpson's objection emphasized the promise in the original class notice that class members could "ask to be excluded from any settlement." In response, class counsel argued that the intent of that language was to enable class members to exclude themselves not from the settlement itself but from the "distribution" of money. Counsel argued that they had contemplated "the possibility of an automatic distribution for which no claim form would be necessary, and affirmative

action would be needed to be excluded from participating." Class Reply Br., *Low* Dkt. 612 at 6.[5] At the final approval hearing, class counsel doubled down on this account of the notice language, assuring the district court "that's what we wrote it for" and "what we intended to convey." ER 65. But class counsel failed to mention that it never "wrote" this notice language at all but instead employed the Federal Judicial Center form, which expressly contemplates that class members will receive a settlement-stage opportunity to submit requests for exclusion.

Simpson's objection—made "[b]efore the deadline for submission of Claim Forms and for objections," ER 92—further explained that she sought to object as well as to preserve her rights in the event that her objection ultimately proved unsuccessful:

> In the exercise of caution, Ms. Simpson has also submitted the claim form that was distributed along with the 2017 Class Notice. That Notice provides that persons who do not complete the claim form by March 6, 2017 will be deemed to have forfeited their interests in the settlement fund. In the event this objection were denied, Ms. Simpson does not wish to have forfeited her interests in the settlement funds.

ER 92, quoting *Low* Dkt. 593 at 10. "If I did not file a Claim Form by March 6, 2017," Simpson understood, "I would forfeit any right to receive any funds from

[5] Class counsel did not explain how it could possibly "push" funds to class members in an automatic distribution, given that Trump University had ceased operations back in 2010, ER 243, and the defendants could not possibly have had all the up-to-date banking information and mailing addresses required for a "push" settlement.

the Settlement." ER 91. And Simpson "did not wish to be deemed to have forfeited [her] share of the Settlement." *Id.*

Accordingly, before she retained counsel and formulated her objection, Ms. Simpson had filled out the claim form. On February 1, she had gone onto the case website, to the tab marked "File A Claim," and submitted a fillable form. *Id.* The online form had no space for any marginal notations, and it did not ask for comments on the settlement. *Id.* And the claim form contained the following block of boilerplate text:

> I affirm that I purchased one or more in-person seminar(s) or mentorship(s) from Trump University in the United States from 2007 through May 23, 2010, and have not yet received a full refund. I declare under penalty of perjury that the information I provided on this Form is true and correct to the best of my recollection. I understand that the Settlement Administrator may ask me to provide documentation of my purchase(s) in order to be eligible for a payment from the settlement. I understand that I am bound by the terms of any judgment in these actions and may not bring a separate lawsuit for these claims.

Claim Form, http://bit.ly/2sfDrgI.

I. The district court overrules Ms. Simpson's objection and approves the settlement.

On the day after the final approval hearing, the district court overruled Simpson's objection and granted final approval of the settlement. The court first held that Simpson lacked "standing" to object that the settlement wrongfully deprived her of an opportunity to opt out. ER 13. To establish standing, the court

reasoned, "[s]imply being a member of a class is not enough. One must be an aggrieved class member." *Id.* And Simpson, the court ruled, was not sufficiently "aggrieved" by the ban on opting out because the language in the claim form (block-quoted above) provides that claimants will be "bound by the terms of any judgment in these actions and may not bring a separate lawsuit." *Id.*

Further, the court held, "[e]ven assuming Simpson has standing, her due process objection lacks merit." ER 14. The court held that the promise in the class notice—that class members would be permitted "to ask to be excluded from any settlement"—does not mean that they may submit a request for exclusion at the settlement stage: "Any right to 'ask to be excluded' does not equate to a right to opt out." ER 17. According to the court, the right to "ask to be excluded" at the settlement stage simply "gives Simpson a right to ask the Court to exercise its discretion and exclude her from the Settlement and the Class." ER 19. The court did not identify any provision of the settlement notice that "notified [Simpson] about how to ask" the court to exercise any supposed discretion to exclude her from the Settlement, or the legal source of authority for the discretionary exclusion of an individual applicant from a settlement.

The district court took note of Simpson's "argument that the phrase 'ask to be excluded' must be read in light of parallel language" in the 2015 notice—specifically the provision that, in order to opt out at that pre-settlement juncture,

the class member must "ask to be excluded" before November 16, 2015. ER 18. The court reasoned, however, that "ask to be excluded" at the settlement stage referred to making a discretionary request, while "ask to be excluded" in the pre-November 16, 2015 context referred to exercising the right to opt out. *Id.*

Simpson filed timely notices of her intent to appeal the order approving the settlement. ER 49, 51. Two weeks later, the Court granted an unopposed request to expedite briefing. CA9 Dkt. 18. On May 24, class counsel filed a motion asking Judge Curiel to impose an appeal bond that would require Ms. Simpson to personally pay $220,833 for the privilege of pursuing her appeal.

STANDARD OF REVIEW

This Court "review[s] de novo whether notice of a proposed settlement satisfies due process." *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993). The same standard applies to the question whether notice satisfies Rule 23. *See DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 943 (10th Cir. 2005). In addition, courts "exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279–80 (7th Cir. 2002). The court acts as "a fiduciary of the class," subject to "the high duty of care that the law requires of fiduciaries." *Id.*; *see also Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1348 (9th Cir. 1980) ("Particularly

at the settlement stage, the Court must be keenly aware of its role as a fiduciary serving as a guardian of the rights of absent class members.").

SUMMARY OF ARGUMENT

I. The district court's settlement approval violates due process and Rule 23. It does so for three independent reasons, each of which constitutes reversible error.

A. First, the class notice promised Ms. Simpson that she would have the right "to ask to be excluded from any settlement," and yet she was never given that right. ER 111. The district court excused this failure by reading the phrase to confer only the ability "to *ask* the Court to exclude her from the Settlement." ER 17. But that reading is wrong. It contradicts the notice itself, which uses the phrase throughout as a synonym for the right to opt out. It also conflicts with precedent, from this Court and the Supreme Court, reading the phrase in the same way.

The district court's effort to explain why the same language would mean something different only in this context is unconvincing. The notice itself gives no indication of the supposed double meaning. And the court's explanation requires a chain of inferential reasoning that no reasonable class member would apply, and that misconstrues Rule 23 in any event. So it should come as no surprise that, when other courts have confronted class notices with the *exact* same phrase—"ask to be excluded from any settlement"—they have routinely ensured that absent class members have an opportunity to opt out of any subsequent settlement.

The failure to provide Ms. Simpson with the same opportunity violates due process and Rule 23. It does so in one of two ways: Either the settlement process failed to deliver a key protection that the class notice had promised, or else that notice was materially misleading. Either way, the settlement cannot stand. Due process and Rule 23(c)(2)(B) require the best practicable notice; they do not permit "bait-and-switch tactics." *Denney v. Deutsche Bank AG,* 443 F.3d 253, 271 (2d Cir. 2006). As a result, she must be given the chance to be excluded.

B. Second, due process would require that Ms. Simpson be given some opportunity to opt out even if the notice did not specifically promise her that right. Her claim is valuable, so she has a "substantial stake" in making her own decision "on whether and when to settle." *Amchem v. Prods., Inc. v. Windsor*, 521 U.S. 591, 616 (1997). The only way that decision can be informed and meaningful, as due process requires, is if class members may opt out after settlement terms are first known.

The district court held to the contrary by relying on a paragraph from this Court's 35-year-old decision in *Officers for Justice v. Civil Service Commission of the City & County of San Francisco*, 688 F.2d 615, 634 (9th Cir. 1982). But that case—which did not involve a promise to opt out of any future settlement—cannot be reconciled with intervening Supreme Court precedent, and does not control this case.

C. Third, even setting aside both the promise and due process, the court abused its discretion under Rule 23(e)(4). Although that provision doesn't mandate

that courts *always* provide a second opt-out right after settlement, it does not permit a court to do what the district court did here: refuse to provide an opt-out right to someone with a valuable claim who was never made aware of the settlement.

II.A. The district court also concluded that Simpson lacked Article III "standing" to raise her arguments because she submitted a standard-issue claim form barring a separate lawsuit. ER 13. That too is reversible error. The whole question on appeal is whether she may lawfully be barred from filing a separate lawsuit. She has standing to press that argument because she is injured by a settlement that, were it to go into effect, would liquate her claim against her will. And that injury is redressable: If she wins, she will preserve her claim and retain her ability to bring suit for treble damages, an admission of liability, and injunctive relief. *See Devlin v. Scardelletti*, 536 U.S. 1, 6–7 (2002).

B. At any rate, Ms. Simpson preserved her right to object to the settlement. She did so expressly and on time. And she informed the district court that she submitted the claim form only to protect her ability to recover settlement funds in the event that her objections would be unsuccessful. But even if that weren't so, the claim form still would not bar her recovery here, for it is triggered only by the entry of a "judgment," which will not happen if the settlement is reversed. Finally, penalizing Simpson for acting to protect her ability to collect on any settlement

should her objections fail would permit an intolerable Hobson's choice and raise grave constitutional concerns. It must be rejected.

ARGUMENT

I. The district court's approval of the settlement violates due process and Rule 23.

For three reasons, the district court's settlement approval violates due process and Rule 23. First, the class notice promised Ms. Simpson that she would have the right "to ask to be excluded from any settlement," but she was never given that right. Second, due process required that she be given some opportunity to opt out. Third, the court abused its discretion under Rule 23(e)(4) by tolerating the arbitrary denial of an opt-out right under the circumstances.

A. By promising Ms. Simpson the right "to be excluded from any settlement" and then failing to allow her to do so, the settling parties violated her due-process rights and Rule 23.

1. The class notice unambiguously promised Ms. Simpson that she could demand exclusion from "any" future settlement.

The 2015 class notice informed class members that a damages class had been certified under Rule 23(b)(3), and that they could either "do nothing" (in which case they would remain in the class) or "ask to be excluded" (in which case they would be removed). ER 106. What would happen if they chose to do nothing? The most important section of the notice—entitled "Your Rights and Options"—provided the answer: "If you stay in, and the Plaintiffs obtain money or benefits,

either as a result of the trial or a settlement, you will be notified about how to obtain a share (or how to ask to be excluded from any settlement)." ER 111.

This sentence communicated two important pieces of information to class members like Simpson. The first concerned what would happen in the event that the class claims were litigated to a final judgment at trial—the primary scenario contemplated in the notice. In that scenario (as explained in the next sentence), all class members who stayed in the class would be bound by the judgment, "regardless of whether the Plaintiffs [were to] win or lose the trial." *Id.* And if the plaintiffs were to win a judgment entitling class members to money, absent members would be "notified about how to obtain a share." *Id.*

The second piece of information concerned what would happen in the event that "any settlement" were reached between the parties—that is, if the class claims were bargained away by the named plaintiffs and class counsel through a deal with the defendants. *Id.* In that scenario, which the notice said "may or may not" occur, *id.* § 14, class members would be "notified about . . . how to ask to be excluded" if they were dissatisfied with the deal and preferred to take their chances on their own, *id.* § 13.[6]

[6] The notice referred to the possibility of a "settlement" only in a few places, often in parentheses, while using the word "trial" nearly five times as much. *See, e.g.*, ER 111 ("If you exclude yourself from one or both Classes—which also means to remove yourself from the Classes, and is sometimes called 'opting-out' of the Classes—you will not get any money or benefits from these lawsuits even if the

This language yields only one objectively reasonable meaning: An absent class member like Simpson—faced with the decision whether to cast her lot with others, or go it alone—would understand that, were she to stay in the class, she would have the chance to opt out of "any settlement" purporting to extinguish her claims in the future. No reasonable class member would think otherwise.

Yet the district court disagreed. It believed that this language conferred on Simpson only "a right to be notified of how to *ask* the Court to exclude her from [any] Settlement"—a right that was never fulfilled anyway—not a right to actually *be* excluded from any future settlement. ER 17. The court based this reading on the premise that, under the notice, "[a]ny right to 'ask to be excluded' does not equate to a right to opt out." *Id.* That is wrong for multiple reasons.

First and foremost, it contradicts the rest of the notice. The notice used the phrase "ask to be excluded" nearly a dozen times. Throughout, that phrase was not used in the hyperliteral sense—as meaning merely to "ask" to be excluded, with the possibility of exclusion being entirely contingent on the court's discretion. Instead, the phrase was used as a synonym for "opting out," with exclusion being the automatic consequence of a person's decision to (as the notice puts it) "ask to be excluded" or "exclude yourself." ER 111; *see id.* (using "exclude yourself" and "ask to be excluded" interchangeably: "If you already have a lawsuit . . . and want to

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Plaintiffs obtain them as a result of the trial or from any settlement (which may or may not be reached).").

continue with it, you need to *ask to be excluded* from the Classes. . . . You may *also exclude yourself from* . . ."). So, for example, when the notice informed Simpson what would occur should she "ask to be excluded," it said: "If you ask to be excluded from these lawsuits and money or benefits are later awarded, you *will not* share in those monies or benefits." ER 106. That language is absolute, not conditional.

There is no reason why an ordinary class member would think the same phrase, used in the same document, would mean two different things. Quite the contrary: By pairing the same language that elsewhere in the notice conveys an opt-out right with the words "*any* settlement," the notice unambiguously guaranteed class members an opportunity to assess any future settlement before deciding whether to be bound by it.

Second, the district court's reading is inconsistent with precedent from this Court and the Supreme Court. In *Officers for Justice v. Civil Service Commission of the City & County of San Francisco*—the very case on which the district court most heavily relied—this Court confronted a notice informing class members that they "may request to be excluded from the class." 688 F.2d 615, 634 (9th Cir. 1982). The Court did not even entertain the notion that this was anything other than "an opt-out provision." *Id.* And the Supreme Court, when it mandated opt-out rights in classes certified under Rule 23(b)(3), similarly equated a right to opt out with a right to request exclusion. It held that "due process requires at a minimum that an

absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or '*request for exclusion*' form to the court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (emphasis added). By taking the opposite view, holding that the use of the phrase "'ask to be excluded' does not equate to a right to opt out," ER 17, the district court contravened this precedent.

In attempting to justify its contrary view, the district court did not deny that the phrase "ask to be excluded" *does* equate to a right to opt out when used to refer to exclusion after certification. But the court determined that "an objective reading of the Notice's language" would lead a class member to understand that the same phrase does *not* equate to a right to opt out when used to refer to exclusion from a future settlement. *Id.* The court reached this conclusion not by looking at anything on the face of the notice itself, but by cracking open the Federal Rules of Civil Procedure, comparing different subprovisions of Rule 23, and then reading the phrase to mean two different things based on an implicit incorporation of a distinction it gleaned from the precise wording of these subprovisions. *See* ER 18–19 (comparing Rule 23(c)(2)(b)(v) and (e)(4)). The court apparently thought that an ordinary class member would apply this same lawyerly logic and immediately conclude that "ask to be excluded" means something different when referring to a settlement, conferring only "a right to ask the Court to *exercise its discretion* and exclude her from the Settlement and the Class." ER 19 (emphasis added).

That is mistaken. Suffice it to say, when comprehending the meaning of a key class-notice provision requires a law degree, a copy of the Federal Rules of Civil Procedure, and an ability to parse the distinction between mandatory and discretionary opt-outs, the result is probably not "the best notice that is practicable under the circumstances," as Rule 23(c)(2) requires. And even a lawyer like Ms. Simpson (a bankruptcy practitioner unfamiliar with the finer points of class-action jurisprudence, ER 91) can be forgiven for failing to pick up on this perceived subtlety. As this Court has explained, class notice must be "simple and straightforward," written for the sophisticated and unsophisticated alike. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th Cir. 2015). The "simple and straightforward" understanding is that the phrase "ask to be excluded" is not a chameleon, but has the same meaning throughout the notice. And that meaning is clear: to opt out.

Which is why (and this is the third reason that the district court went astray) courts and class-action litigators have interpreted the exact same language, used in the exact same way, to confer a right to opt out at the settlement stage. *See, e.g.*, *Simpson v. State Dep't of Civil Serv.*, No. 04–cv–1182, 2005 WL 1972556, at *3 (N.D.N.Y. Aug. 17, 2005) (notice of pendency informing class members: "If you stay in and the Plaintiffs obtain money, either as a result of the trial or a settlement, you will be notified about how to apply for a share (or how to ask to be excluded

from any settlement"); ECF No. 118 in *Simpson* (N.D.N.Y. Mar. 1, 2011) (court order directing class counsel, in the wake of a settlement agreement, to notify "class members of the terms of the proposed settlement of this matter and *their right to opt out of the settlement*" (emphasis added)); *see also, e.g.*, *In re Milos Litig.*, No. 08–cv–6666, 2010 WL 199688 (S.D.N.Y. Jan. 11, 2010) (notice of pendency informing class members: "If you stay in the case and the Plaintiffs obtain money or benefits in the NYLL Class Action, either as a result of the trial or a settlement, you will be notified about how to apply for a share (or how to ask to be excluded from any settlement)."); ECF No. 106-1 in *Milos* at 5 (S.D.N.Y. May 20, 2011) (settlement agreement providing that "[a]ny Class Member may request exclusion from the Class *by 'opting out'*" (emphasis added)). The notice left no hint that a different outcome would transpire here.

Fourth, the district court's reading is belied by the factual record. If the notice really meant what the district court thought it meant, class counsel would have "notified" Ms. Simpson of "how to ask to be excluded from any settlement," ER 111, so that the court could "exercise its discretion and exclude her from the Settlement and the Class," ER 19. That did not happen: Not only did the settlement notice fail to inform Ms. Simpson of how she could ask to opt out of the settlement, it went a step further and told her that she could *not* opt out. *See* ER 117.

Fifth, the district court's reading misapprehends Rule 23. As explained above, the court held that the right to "ask to be excluded" at the settlement stage simply "gives Simpson a right to ask the Court to exercise its discretion and exclude her from the Settlement and the Class." ER 19. But there is no basis in the Federal Rules for a discretionary application to exclude a petitioning class member from a settlement. A court may of course reject a settlement that fails to allow for a second opt-out opportunity. Fed. R. Civ. P. 23(e)(4). No provision, however, allows a court to exclude individual class members as a matter of discretion. And it makes no sense to assume that the language here refers to such an exotic procedure.

Finally, class counsel's attempt to avoid the unambiguous meaning of the language here is telling. Counsel represented to the district court what their subjective intentions were in drafting the notice. But those representations are neither relevant nor truthful.

They are not relevant because class members must make decisions based on what they read in the notice—not what they think class counsel might have had in mind when they wrote it. Relying on the unstated (and unknowable) intentions of class counsel would be akin to relying on post hoc legislative history to interpret a statute contrary to its plain meaning. *Cf.* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 Vand. L. Rev. 1457, 1520 (2000).

And, anyway, class counsel's purported intentions are not truthful because the class notice was copied wholesale from a form drafted by the Federal Judicial Center—not written by class counsel. *See* http://bit.ly/2rOgLTR.

At the very least, the phrase "ask to be excluded" is readily susceptible to a reading that would render it consistent with the rest of the notice and the interpretation of that same language by other courts. Any ambiguity should be resolved against the drafter, in favor of absent class members.

2. A second opt-out was required or else the class notice was misleading, and hence inadequate.

Having guaranteed Ms. Simpson the opportunity to opt out of any future settlement, class counsel was required to make good on that guarantee. The failure to do so violates her due-process rights and Rule 23. That is true whether one approaches the problem by focusing on the adequacy of the notice (which was misleading in light of the subsequent refusal to let her opt out) or by focusing on the adequacy of the procedure used to approve the settlement (which was deficient in light of the previous guarantee that she could opt out). Either way, the combination of the two deprives Ms. Simpson of due process and runs afoul of Rule 23.

Begin with the notice. "Notice to class members is crucial to the entire scheme of Rule 23(b)(3)." *Erhardt v. Prudential Group, Inc.*, 629 F.2d 843, 846 (2d Cir. 1980). Because Ms. Simpson's claim is a valuable property right, "[d]ue process requires that the notice . . . fairly apprise" her "of the options that are open to

[her]" before a court may extinguish her claim against her will. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995). And Rule 23 (as noted above) similarly requires "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2).

In any class notice, moreover, the district court must set forth "the time and manner for requesting exclusion" and provide notice "that the court *will* exclude from the class any member who requests exclusion." Fed. R. Civ. P. 23(c)(2)(B)(vi) & (v) (emphasis added). Thus, when a class member requests exclusion pursuant to a class notice, the district court *must* exclude that class member. Ms. Simpson requested exclusion in accordance with the class notice. In denying her the "opportunity" that she requested—to "opt out of the class" under Paragraph 13 of the class notice—the district court ran afoul of Rule 23(c)(2)(B)(v)'s requirement that the district court "exclude from the class any member who requests exclusion."

In light of the settlement-approval process, which bans opt outs, the class notice fails these requirements. By omitting "knowledge critical to an informed decision"—that even in the event of a settlement, there would be no turning back, *In re Katrina Canal Breaches Litigation*, 628 F.3d 185, 198 (5th Cir. 2010)—the notice "threaten[ed] to create confusion and to influence the threshold decision whether to remain in the class," *In re School Asbestos Litigation*, 842 F.2d 671, 683 (3d Cir. 1988). Worse, it rose to the level of being affirmatively "misleading." *Lane v.*

Facebook, Inc., 696 F.3d 811, 826 (9th Cir. 2012); *cf. Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1291 (9th Cir. 2006) (en banc) (finding "inadequate notice" of forum-selection clause because of "misleading language"). Neither due process nor Rule 23 permits that result.

Now consider the settlement procedure. By foreclosing the possibility of any opt-outs after promising class members that they could exclude themselves from any settlement, the procedure falls short of the demands of due process. This is not to say that there is *always* an obligation to provide a right to opt out of any class-action settlement. It is simply to say that, having promised an opt-out right, class counsel was under an obligation to follow through on that assurance—just as a federal agency, for example, must follow through on its promise to provide procedural protections that are more robust than what is constitutionally or statutorily required. *See Service v. Dulles*, 354 U.S. 363, 388 (1957) ("While it is of course true that . . . the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, . . . having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them."); *cf. DeWitt v. Ventetoulo*, 6 F.3d 32, 36 (1st Cir. 1993) ("[T]he state is not obliged by the Constitution to parole its prisoners, but having done so, it is obliged to afford them due process . . . when it revokes paroles.").

B. Ms. Simpson would have a due-process right to opt out of the settlement even if the notice had not guaranteed her that right.

Even setting aside the promise to allow Ms. Simpson to opt out of "any settlement," ER 111, she would have a due-process right to do so here. The Supreme Court has repeatedly held that, in a case for money damages, "due process requires *at a minimum* that an absent plaintiff be provided with an opportunity to remove himself from the class." *Shutts*, 472 U.S. at 812 (emphasis added); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) ("In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process."). Although the Supreme Court has never confronted the question whether class members must be given some additional opportunity to opt out after first learning of the existence of a settlement, fundamental principles of due process compel the answer: At least where the claims are as valuable as these claims might be, class members must be given *some* opportunity to accept or reject a Rule 23(b)(3) settlement. And courts recognize, at least implicitly, the importance of providing an opportunity to opt out after settlement terms are first known. *See, e.g.*, *Denney v. Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir. 2006) ("[T]he original notice informed all class members of the basic settlement terms. . . . An additional opt-out period is not required with every shift in the marginal attractiveness of the settlement."); *Hainey v. Parrott*, 617 F. Supp. 2d

668, 679 (S.D. Ohio 2007) ("[A] second opt-out period is not warranted. The terms of the settlement agreement have not changed appreciably since notice of the settlement was provided and the expiration of the original opt-out period."); *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 WL 1068807, at *3–4 (E.D. Pa. May 11, 2004) ("We are aware of no significant developments since the original opt-out [and proposed settlement] that would require us to provide for a second opt-out period.").

There are good reasons for ensuring that class members have an opportunity to opt out after settlement terms are first known. Class-action settlements like this one bind thousands of strangers to the litigation, extinguishing potentially valuable claims in exchange for global peace. For settlement classes—those certified only for purposes of settlement—class members are entitled, as a matter of due process, to a detailed account of the settlement terms to inform their decision whether to opt out. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993) ("[T]o satisfy due process requirements, notice to Settlement Class Members must generally describe the terms of the settlement in sufficient detail."). There is no good reason why a class member like Simpson is entitled to less. Clearly, "[a] decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known." Advisory Committee's 2003 Note on Fed. R. Civ. P. 23(e)(4). When that is the case, "the claimant can decide to take the risk of

foregoing *certain* benefits guaranteed to him by the settlement agreement, and instead take the risk of suing the defendants 'on his own,' with the hope of obtaining *uncertain* but possibly greater benefits." *In re Inter-Op Hip Prosthesis Liability Litig.*, 204 F.R.D. 330, 354 (N.D. Ohio 2001).

But where, as here, the opt-out decision is compelled at an early stage, when members are unaware of what even the most basic settlement terms might someday be, they are forced to make a critical decision in the dark. They have no information on which to base their decision to opt out. For cases involving "small recoveries," which "do not provide the incentive for any individual to bring a solo action prosecuting his or her rights," this may be tolerable in light of the flexibility of due process. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *see generally Matthews v. Eldridge*, 424 U.S. 319 (1974). For valuable claims, however, it is not. Each claimant "has a substantial stake in making individual decisions on whether and when to settle." *Amchem*, 521 U.S. at 616 (brackets and quotation marks omitted). They cannot meaningfully make that decision with no information.

The district court held to the contrary by relying on this Court's 1982 opinion in *Officers for Justice* and rejecting a "blanket rule that due process requires a settlement-stage opt-out opportunity." ER 14. But we are not asking for such a rule. And both the reasoning and result of *Officers for Justice* have been outstripped

by subsequent Supreme Court precedent affirming the due-process moorings of opt-out rights.

As for the reasoning: *Officers for Justice* concluded that an objector's rights "are protected by" Rule 23(e)'s requirement that there be court approval of any settlement and a "fairness hearing at which dissenters can voice their objections." 688 F.2d at 635. The Supreme Court has since made clear, however, that "a fairness hearing under Rule 23(e) is no substitute for rigorous adherence to those provisions of the Rule 'designed to protect absentees.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 849 (1999) (quoting *Amchem*, 521 U.S. at 620). Nor is it a cure-all for due-process problems. If it were, an opt-right would be unnecessary in the first place.

As for the result: *Officers for Justice* involved what "was in essence a Rule 23(b)(3) class action," and yet "no opportunity to opt out was then provided." 688 F.2d at 633–34. The Court concluded that, "[g]iven the circumstances and posture of this case," it did not "believe that blind adherence" to the Rule was compelled, and held that "due process rights were observed." *Id.* at 633. The Supreme Court has since made clear, however, that due process demands an opportunity to opt out of any Rule 23(b)(3) class action. *See Shutts*, 472 U.S. at 812; *Dukes*, 564 U.S. at 363.

C. The district court abused its discretion by failing to afford an opt-out right under Rule 23(e)(4).

Apart from the demands of due process, the district court also abused its discretion under Federal Rule of Civil Procedure 23(e)(4), which provides: "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." The Advisory Committee notes explain the driving principle: "A decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known." Advisory Committee's 2003 Note on Fed. R. Civ. P. 23(e)(4). As factors informing the exercise of the court's discretion, the Advisory Committee cites "changes in the information available to class members since expiration of the first opportunity to request exclusion, and the nature of the individual class members' claims." *Id.*

This Court should take this opportunity to make clear the outer boundaries of a district court's discretion under Rule 23(e)(4): Where, as here, the members of a class that was previously certified under Rule 23(b)(3) first learn of a settlement that would extinguish valuable claims for money damages, those class members should be afforded an opportunity to opt out of the settlement absent good cause to the contrary, and irrespective of whether there has previously been an opt-out period. As the American Law Institute's *Principles of Aggregate Litigation*—akin to a restatement on the law of class actions—provides, courts should apply "a presumption in favor of the second opt-out and requir[e] on-the-record findings where a second opt-out is not provided for class members." American Law

Institute, *Principles of Aggregate Litigation* § 3.11 (2010). And as Professor Jeanette Cox has observed, due process is universally understood to require detailed notice of settlement terms to ensure an informed opt-out right in a settlement-only class. Jeanette Cox, *Information Famine, Due Process, And The Revised Class Action Rule: When Should Courts Provide A Second Opportunity To Opt Out?,* 80 Notre Dame L. Rev. 377, 401 (2004). Why should it require any less just because a class was earlier certified? *Id.*; *see* Mark C. Weber, *A Consent-Based Approach to Class Action Settlement: Improving* Amchem Products, Inc. v. Windsor, 59 Ohio St. L.J. 1155, 1193–1213 (1998) ("[I]t is incorrect to assume that the willingness to accept representation by the class representative and her attorney constitutes willingness to settle on whatever terms they arrange. . . . [A] fairness determination by the district judge . . . is no substitute for individual choice.").

The circumstances in this case provide the most compelling possible basis for allowing settlement-stage opt out under Rule 23(e)(4). First, there was no hint of any settlement terms at the time of the 2015 class notice. Second, that notice told class members they would be "notified about how to ask to be excluded from any settlement"—at minimum creating *some* reasonable expectation of an opt-out right. Third, there was no good reason for a class member who was intent on fully vindicating her rights to opt out. Indeed, not one class member did opt out and bring a separate case, to our knowledge. *See Low* Dkt. 430-1 (identifying opt-outs).

Finally, the settlement releases Trump of liability on claims that the class could not have brought in the class action and which, as a consequence, each class member could have brought on his own even after a trial on the merits in the class action.

Rule 23(e)(4) was adopted for a reason. While district courts have broad discretion whether to apply the (e)(4) procedure, that discretion is never unlimited. If this case does not demand application of Rule 23(e)(4), it is difficult to understand what would.

II. The district court's "standing" analysis is without merit.

A. There is no Article III standing problem here.

Apart from its due-process and Rule 23 analysis, the district court concluded that Ms. Simpson's objections failed for lack of "standing." The court reached that conclusion even though Ms. Simpson has much at stake: She will lose her right to bring treble-damages claims if the settlement is approved and, conversely, will keep that right if she wins. The court nevertheless reasoned that Ms. Simpson "has not shown how allowing a further opportunity to opt out would redress any injury" because she filed a claim form with boilerplate language foreclosing a separate lawsuit. ER 13.

That reasoning is flawed and circular. The very question raised by Simpson's objections (and hence this appeal) is *whether* she may be lawfully foreclosed from bringing a separate lawsuit. If she prevails, she will retain her valuable claims and

her right to a day in court on those claims, and will be able to seek substantial damages, an admission of liability, and injunctive relief. In other words, her concrete injury will be redressed. Simpson, "[a]s a member of the [] class," unquestionably "has an interest in the settlement that creates a 'case or controversy' sufficient to satisfy the constitutional requirements of injury, causation, and redressability." *Devlin v. Scardelletti*, 536 U.S. 1, 6–7 (2002) (holding that an appealing objector to a settlement that will affect the objector's rights has Article III standing). Under Supreme Court precedent, there is therefore no issue presented here that "implicate[s] the jurisdiction of the courts under Article III of the Constitution." *Id.*[7]

The only Article III standing cases cited by the district court (at ER 13)—cases in which class members seek to challenge attorney fee awards that cannot possibly affect their own circumstances—are easily distinguished. Ms. Simpson is nothing like the class member who "asserts no economic or noneconomic injury" and who attempts only to vindicate some abstract interest in a fee award that will not alter her own recovery. *In re First Capital Holdings Corp. Fin. Prod. Sec. Litig.*, 33

[7] Nor does this appeal raise concerns of prudential standing: the prohibition on raising another person's legal rights, the bar on adjudication of generalized grievances, or the zone-of-interest test. *Id.* "Because [Ms. Simpson] is a member of the class bound by the judgment, there is no question that [s]he satisfies these three requirements. The legal rights [s]he seeks to raise are h[er] own, [s]he belongs to a discrete class of interested parties, and h[er] complaint clearly falls within the zone of interests of the requirement that a settlement be fair to all class members." *Id.*

F.3d 29, 30 (9th Cir. 1994). Just the opposite: She is complaining that she "lost [her] rights to sue" Trump University for money damages by virtue of the settlement and has therefore plainly "suffered an injury by the order [she] appealed." *Id.* (comparing *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977)).

Indeed, if the shoe were on the other foot—that is, if Ms. Simpson had *failed* to file her claim form by the deadline—the settling parties could much more plausibly argue that she lacks Article III standing for that very reason, this time with solid support in Ninth Circuit precedent. *See Knisley v. Network Assocs., Inc.*, 312 F.3d 1123, 1128 (9th Cir. 2002) (holding that a class member's lack of standing was "apparent" where he "refused to submit a claim for his losses, as he was required to do in order to get his share of the settlement proceeds").[8] This sort of Heads-I-Win-Tails-You-Lose approach to Article III standing is untenable.

[8] *See, e.g., City of Livonia Employees' Ret. Sys. v. Wyeth*, No. 07–cv–10329, 2013 WL 4399015, at *6 (S.D.N.Y. Aug. 7, 2013) ("Having failed to file a claim," class member lacked standing to object.); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 340 (S.D.N.Y. 2005) (class member who "did not file a proof of claim" "therefore does not have standing to bring her objections"); *In re Mercury Interactive Corp. Sec. Litig.*, No. 05–cv–3395, 2011 WL 826797, at *2 n.2 (N.D. Cal. Mar. 3, 2011) ("Because neither Mr. Delluomo nor the Orloffs submitted a claim in this case, they lacked standing to object to the settlement.").

B. Ms. Simpson did not waive, and expressly preserved, her right to challenge the settlement's violation of due process and Rule 23.

1. The district court's reasoning also fails on its own terms because Ms. Simpson expressly and timely preserved her right to object notwithstanding her filing of a claim form. The settlement notice itself established a deadline of March 6, 2017—both for filing the claim form and for making any objection to the settlement. Ms. Simpson did both, she did so on time, and her timely court papers made her intentions unmistakably clear: she sought to object and, only in the alternative, to preserve her claim to settlement funds in the event her objections were denied. ER 92.

The district court ignored Simpson's reservation altogether and, in the briefing below, class counsel did not dispute the clarity of the reservation language. Instead, class counsel argued that Simpson, in filling out the claim form itself, "failed to include any comment to the effect that she was merely preserving her rights." *Low* Dkt. 612 at 10. This not only ignores her express reservation but also overlooks that the claim form was an online form with no space for "comment[s]" or indeed for any marginal notations of the type that class counsel criticized Simpson for not having made.

2. Filling out the claim form, in any event, did not amount to waiver because Simpson agreed only to be "bound by the terms of any judgment," upon the entry of which she couldn't "bring a separate lawsuit. "

Under a proper reading of the claim-form language, the claimant only waives her right to sue the defendant upon entry of final judgment. The claim form provides "I understand that I am bound by the terms of any judgment in these actions and may not bring a separate lawsuit for these claims." ER 13. The reference to "judgment" is critical: It is only after the entry of a "judgment" approving the settlement that the class member is prohibited from "bring[ing] a separate lawsuit." Any other reading leads immediately to absurd results. What if the final approval motion were denied and the class then decertified at some point? Ordinarily, when a class is decertified, class members may then file their own separate lawsuits. *See, e.g.*, *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). But on the district court's reasoning, the class members in this case would be barred from bringing a separate lawsuit against the defendant following decertification because of the no-separate-lawsuit clause in the claim form signed in early 2017.

There is, in short, nothing inconsistent between the affirmation on the claim form and Simpson's efforts—before Judge Curiel and before this Court—to combat the entry of final judgment approving the settlement. Simpson agreed to be

bound by the final judgment, should it be entered and should it be upheld on appeal. But she never agreed to forfeit the right to object to the entry of that judgment in the first instance.

3. Finally, the district court's reading of the claim form condones a stark Hobson's choice—you may preserve your right to object, or your right to file a claim, but not both—and thereby raises grave due-process concerns. *Cf. In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 223 n.42 (5th Cir. 1981) (finding no due process violation because "[c]ompletion of the [claim] form did not waive any rights to object to the settlement"). Because a class member must file a claim to obtain any funds under the settlement, and because the claim form requires the class member to affirm that she will be "bound by the terms of any judgment," reading the claim form as the district court does creates a trap. To preserve her claim to settlement proceeds, the class member must surrender her rights to object to the settlement's ban on opt-out rights. And to preserve her right to object on those grounds, she must relinquish her claim to settlement proceeds.

Due process, however, demands that all class members be "afford[ed] [] an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Even if the district court's reading of the claim form were correct, its ruling that Simpson lacks Article III standing would contravene the unconstitutional-conditions doctrine by compelling a class member to waive her

constitutional right to object—and, specifically, to object on the grounds that the settlement violates her due-process rights—as a condition for being permitted to submit her claim under the settlement. The unconstitutional-conditions doctrine exists to prevent just this sort of constitutional Catch-22, and "forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013); *see Vance v. Barrett*, 345 F.3d 1083, 1089 (9th Cir. 2003) (doctrine applies to due-process rights). As far as we are aware, no other federal court has permitted a class-action-settlement process that runs roughshod over class members' due-process rights in this manner. This Court should not become the first.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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June 12, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word length requirements of Circuit Rule 32-1(a) because it contains 11,620 words, exclusive of the portions excluded by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Baskerville font.

/s/ Gary B. Friedman

June 12, 2017 Gary B. Friedman

STATEMENT OF RELATED CASES

As required by Circuit Rule 28-2.6, Objector-Appellant states that she is not aware of any case pending before this Court that presents related legal issues.

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2017, I electronically filed the foregoing Brief for Objector-Appellant with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

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