Supreme Court, U.S.
FILED
MAY 1 1 2020
OFFICE OF THE CLERK

No. 19-1366

IN THE

Supreme Court of the United States

SHIYANG HUANG,

Petitioner,

v.

VALESKA SCHULTZ, MELANIE WAUGH, ROSALIND STALEY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

SHIYANG HUANG
Pro Per
2800 SW ENGLER CT.
TOPEKA, KS 66614
(314) 669-1858
defectivesettlement@gmail.com

ORIGINAL

RECEIVED
MAY 15 2020
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

Petitioner is an objecting class member in a mandatory Rule 23(b)(1) class-action settlement with prospective relief. Though Class Counsel argued that Petitioner lacked Article III standing to receive prospective relief or to challenge such prospective settlement terms, the class-action was certified to settle Petitioner's individualized monetary claims, providing no right to opt-out.

The questions presented are:

I. Whether *unnamed* class members under Federal Rule of Civil Procedure 23 must have Article III standing for class certification (as four circuits have held), or must have Article III standing only before a court grants any relief (as two circuits have held), or need not demonstrate Article III standing for any form of relief sought (as four circuits have held).

II. Whether *in personam* claims for monetary relief can be certified for settlement purposes under Federal Rule of Civil Procedure 23(b)(1) to bind absent class members to a class action judgment, without providing a right to opt out under Due Process Clause and Rules Enabling Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Shiyang Huang was an objector in the district court proceedings and an appellant in the court of appeals proceedings.

Respondents Valeska Schultz, Melanie Waugh, and Rosalind Staley, were named plaintiffs in the district court proceedings and appellees in the court of appeals proceedings.

Respondents Edward D. Jones & Co., L.P., The Edward Jones Investment and Education Committee, The Jones Financial Companies, John & Jane Does, 1-25 and Brett Bayston, et al. were defendants in the district court proceedings and appellees in the court of appeals proceedings.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 3

JURISDICTION 3

CONSTITUTIONAL, PROCEDURAL, AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT 5

REASONS FOR GRANTING THE PETITION 11

I. *TYSON FOODS* FURTHER DIVERGED CIRCUITS' DISAGREEMENTS ON ABSENT CLASS MEMBERS' ARTICLE III STANDING 12

A. Recurring Debate Of Unnamed Class Members' Standing Now Have Circuits Four-Way Split, With Three Self-Divided 12

B. With Heterogeneous Named Plaintiffs, *Town of Chester* Requires Standing For Class Objectors As Intervenors *Of Right* 14

C. Absentees' Lack of Standing Below Failed Irreducible Constitutional Minima 15

II. DUE PROCESS FOR MONETARY RELIEF UNDER RULE 23(b)(1) CLAUSES REMAIN PROBLEMATIC AFTER *ORTIZ* AND *DUKES* 16

TABLE OF CONTENTS—CONTINUED

PAGE

A. Circuits Remain Three-Way Split On How Rule 23(b)(1)(A) Differs From Rule 23(b)(3) 16

B. Rule 23(b)(1)(A) Splits ERISA Three Ways, Despite Recurring Individualized Money Claims In Defined-Contribution Plans 17

C. Absentees' Opt-Out Right Cannot Be Sold For Attorney Fees And "Incentive Awards" 18

D. Non-Adverse, Non-Opt-Out Rule 23(b)(1) Settlement-Classes Are Not Justiciable 19

CONCLUSION 20

APPENDIX:

APPENDIX A - The Eighth Circuit's Opinion (Jan. 31, 2020) 1a

APPENDIX B - The District Court's Approval Of Class Action Settlement (Apr. 22, 2019) 4a

APPENDIX C - The District Court's Approval Of Fees And Incentive Awards (Apr. 22, 2019) 13a

APPENDIX D - The Eighth Circuit's Order Denying Rehearing En Banc (Mar. 3, 2020) 17a

TABLE OF AUTHORITIES

CASES — PAGE(S)

Amchem Prods. v. *Windsor*, 521 U.S. 591 (1997) ..... passim
Ariz. Christian Sch. Tuition Org. v. *Winn*, 563 U.S. 125 (2011) 12, 13
Asacol Antitrust Litig., In re, 907 F.3d 42 (1st Cir. 2018) .. 13
AT&T Mobility LLC v. *Concepcion*, 563 U.S. 333 (2011) ... 17
Avritt v. *Reliastar Life Ins. Co.*, 615 F.3d 1023 (8th Cir. 2010) 13, 14
Azar v. *Garza*, 138 S. Ct. 1790 (2018) 1, 14
Clapper v. *Amnesty Int'l USA*, 568 U.S. 398 (2013) ... passim
Cordoba v. *DirecTV, LLC*, 942 F.3d 1254 (11th Cir. 2019) 2, 12
Deepwater Horizon, In re, 739 F.3d 790 (5th Cir. 2014) . 1, 16
Denney v. *Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006) 13
Devlin v. *Scardelletti*, 536 U.S. 1 (2002) 1, 11, 15
Flecha v. *Medicredit, Inc.*, 946 F.3d 762 (5th Cir. 2020) 13
Flying J. Inc. v. *Van Hollen*, 578 F.3d 569 (7th Cir. 2009) 14
Frank v. *Gaos*, 139 S. Ct. 1041 (2019) ..... passim
Golan v. *FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019) . 14
Green v. *Occidental Petro. Corp.*, 541 F.3d 1335 (9th Cir. 1976) 17
Lacy v. *Cook County*, 897 F.3d 847 (7th Cir. 2018) 13, 14
LaRue v. *DeWolff*, 552 U.S. 248 (2008) ..... passim
Mertens v. *Hewitt Assos.*, 508 U.S. 248 (1993) 15
Moore v. *Board of Education*, 402 U.S. 47 (1971) 19
Mullins v. *Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015) 17
Neale v. *Volvo Cars of N. Am., LLC*, 794 F.3d 353 (3d Cir. 2015) 13
Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999) ..... passim
Rail Freight Fuel Surcharge Antitrust Litig., In re, 934 F.3d 619 (D.C. Cir. 2019) 13, 14
Ramirez v. *TransUnion, LLC*, 951 F.3d 1008 (9th Cir. 2020) 12

TABLE OF AUTHORITIES—CONTINUED

PAGE(S)

Spano v. *The Boeing Co.*, 633 F.3d 574 (7th Cir. 2011)..8, 18
Spokeo Inc. v. *Robins*, 136 S. Ct. 1540 (2016).....1
Std. Fire Ins. Co. v. *Knowles*, 568 U.S. 588 (2013).....12
Thole v. *U.S. Bank, N.A.*, 139 S. Ct. 2771 (2019).....12
Tibble v. *Edison Int'l*, 729 F.3d 1110 (9th Cir. 2010).....18
Town of Chester v. *Laroe Estates*, 137 S. Ct. 1645 (2017).....1, 11, 15
Trustees v. *Greenough*, 105 U.S. 527 (1885).....18
Tyson Foods, Inc. v. *Bouaphakeo*, 136 S. Ct. 1036 (2016)..12
Wal-Mart Stores, Inc. v. *Dukes*, 564 U.S. 338 (2011)..passim
Zappos.com, Inc., In re, 888 F.3d 1020 (9th Cir. 2018).....14

RULES AND STATUES

28 U.S.C. § 1254(1).....3
28 U.S.C. § 2072(b).....3, 4, 16
29 U.S.C. § 1002.....4, 7
29 U.S.C. § 1132.....5, 7, 8
Fed. R. Civ. Proc. 23.....passim

OTHER AUTHORITIES

Br. for the U.S. as *Amicus Curiae*, *Frank* v. *Gaos*, No. 17-961 (U.S. Jul. 16, 2018).....6, 13, 15, 19
Br. for the U.S. as *Amicus Curiae*, *Thole* v. *U.S. Bank, N.A.*, No. 17-1712 (U.S. May 21, 2019).....7, 12, 15
Brian Lamb, *ERISA Settlements—The Non-Monetary Concessions Continue to Mount*, Lexology (Apr. 23, 2020)3
Jacklyn Wille, *ERISA Class Settlement Rebounded to $449 Million in 2019*, Bloomberg Law (Dec. 26, 2019).....2, 11
Jerome Schlichter, *State Of Class Certification: Offense In ERISA Cases*, Law360 (Apr. 14, 2020).....3, 11
Robert Klonoff, *Class Actions for Monetary Relief Under Rule 23(b)(1)(A) and (b)(1)(B): Does Due Process Require Notice and Opt-Out Rights?* 82 Geo. Wash. L. Rev. 798 (2014).....16

PETITION FOR A WRIT OF CERTIORARI

This petition makes one simple argument—Petitioner *himself* lacks Article III standing below for a class-action that demanded prospective relief. Respondents also agreed that Petitioner "ha[s] no stake in forward-looking relief". C.A. Plaintiffs Br. 31. If Petitioner had been a ***named*** plaintiff, he would have no chance to seek redress for non-existent future injury. *Azar* v. *Garza*, 138 S. Ct. 1790 (2018) (*per curiam*). (dismissed injunctive relief claims as moot); *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 402 (2013) (Plaintiffs "cannot manufacture standing ... based on hypothetical future harm."); *Town of Chester* v. *Laroe Estates*, 137 S. Ct. 1645, 1650 (2017) ("a plaintiff must demonstrate standing ... for each form of relief"); *Spokeo Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016). ("A "concrete" injury must be '*de facto*'; that is, it must actually exist.") But the rules somehow differ when Petitioner is dragged into Rule 23 as an ***unnamed*** plaintiff, despite this Court's repetition that a class-action "adds nothing to the question of standing". *Id.* at 1547 n.6 (quoting *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 40 n.20 (1976)).

This is an ideal vehicle to resolve the question "***do Rule 23 absentees need Article III standing?***" and protect Article III from class actions that "usurp the powers of the political branches." *Clapper*, *supra* at 408. This Court unanimously held that intervenors *of right* must have Article III standing. *Town of Chester*, *supra* at 1651. And class-action objectors are "easily" *intervenors of right*. *Devlin* v. *Scardelletti*, 536 U.S. 1, 12, 20 (2002). But Courts of Appeals continued to widen the split on *unnamed* class members' standing, a deep jurisdictional divergence with "roughly even split of circuit authority". *In re Deepwater Horizon*, 739 F.3d 790, 801 (5th Cir. 2014). While the Seventh, Eighth, and Ninth Circuits are now divided within, the Fifth and Eleventh Circuits also added fuel to the fire.

Now, there are four answers in nine circuits to Rule 23 absentees' Article III standing question—"inappropriate[]" to ask, *id.* at 806; *yes*; *no*; or *yes* only before "grant[ing] any relief", *Cordoba* v. *DirecTV, LLC,* 942 F.3d 1254, 1274 (11th Cir. 2019). Circuits are truly confused about *unnamed* litigants' standing under Article III for class certifications and are even more confused in settlement class-actions. *E.g. Frank* v. *Gaos,* 139 S. Ct. 1041 (2019) (*per curiam*).

Behind Petitioner's lack of Article III standing for future prospective relief, this case is *really* a class-action for money damages while "fiduciaries" contrived to hide opt-out rights, "depriving people of their right to sue [under] the Due Process Clause." *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 363 (2011). ERISA "authorize[s] recovery for [lost] value of plan assets in a *participant's individual account.*" *LaRue* v. *DeWolff*, 552 U.S. 248, 256 (2008). (emphasis added). But Plaintiffs, in a bid to avoid heightened Rule 23(b)(3), shoehorned individualized money claims into tricks reversed in *Dukes* with Rule 23(b)(2) and *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999) with Rule 23(b)(1)(B).

Due Process problems also manifested deeper in ERISA settlements—some $500-million/year common-fund losing up to 33% in fees, plus irreparable fears to all ERISA-sponsoring employers who could still hire *anyone.* Jacklyn Wille, *ERISA Class Settlement Rebounded to $449 Million in 2019*, Bloomberg Law (Dec. 26, 2019). A plaintiff-side veteran even hijacked *Ortiz*[1] to proclaim "actions for breach of trust are among the classic paradigmatic examples of cases * * * under Federal Rule of Civil Procedure 23(b)(1)."

---

[1] Example of limited-fund is "a breach of trust ... ***requiring an accounting or similar procedure***", 527 U.S. at 834. But *contrast LaRue*, 552 U.S. at 256. (401(k)-type Plans' bookkeeping feature allows "recovery for fiduciary breaches that impair the value of plan assets in * * * ***a participant's individual account.***" (emphases added).

Jerome Schlichter, *State Of Class Certification: Offense In ERISA Cases*, Law360 (Apr. 14, 2020). It shows how *Ortiz*'s innocent dicta are now so distorted to *deprive absentees' opt-out rights*, weaponizing *Ortiz* for *fait accompli* mandatory settlement-classes even when this Court held a "limited fund" class certification "must show that the fund is limited by more than the agreement of the parties". 527 U.S. at 821.

Rule 23(b)(1)(A) is also the last mandatory, non-opt-out option without this Court's bright-line rule. Meanwhile, ERISA fee cases now regularly add "'onerous' non-monetary settlement features" that are "significant and intrusive and that they are sowing the seeds of potential future disputes." Brian Lamb, *ERISA Settlements—The Non-Monetary Concessions Continue to Mount*, Lexology (Apr. 23, 2020). But without even proper standing to seek injunctions, Federal Rules cannot exceed Rules Enabling Act and Due Process. This case presents an ideal vehicle for the Court to close that last class-action loophole under Rule 23(b)(1)(A) and reject due process abuses by purported "fiduciaries".

The Court should grant certiorari and reverse.

OPINIONS BELOW

The Eighth Circuit opinion (Pet. App. 1a-3a) is reported at 791 Fed. Appx. 638. The district court's approval of class settlement and order on attorney's fees and expenses are reprinted at Pet. App. 4a-12a, 13a-16a. The Eighth Circuit's order denying rehearing en banc is at Pet. App. 17a-18a.

JURISDICTION

The Eighth Circuit entered judgment on January 31, 2020. A petition for panel rehearing and rehearing en banc was denied on March 3, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, PROCEDURAL, AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. III, § 2 provides:

> The judicial power shall extend ... to all cases [and] controversies ....

U.S. Const. Amend. V, Due Process Clause provides:

> No person shall ... be deprived of life, liberty, or property, without due process of law.

Federal Rules of Civil Procedure 23(b)(1) provides:

> A class action may be maintained 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.

Rules Enabling Act, 28 U.S.C. § 2072(b) provides:

> Such rules shall not abridge, enlarge or modify any substantive right....

Employee Retirement Income Security Act of 1974 ("ERISA") § 3(34), 29 U.S.C. § 1002(34) provides:

> The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the

> amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) provides:

> A civil action may be brought * * * by a participant, beneficiary or fiduciary for appropriate relief ....

STATEMENT

1. a. Plaintiffs of a class action must meet "threshold requirements" under Federal Rule of Civil Procedure 23. *Amchem Prods.* v. *Windsor*, 521 U.S. 591, 613 (1997). Class representatives must show "numerosity", "commonality", "typicality", and "adequacy-of-representation" under Rule 23(a). *Ibid.* Next, they must satisfy one of Rule 23(b) provisions *Id.* at 614. As relevant here, Rule 23(b)(1)(A) "takes in cases where ... the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners)", and Rule 23(b)(1)(B) is for "'limited fund' cases, instances in which numerous persons make claims against a fund insufficient to satisfy all claims." *Ibid.* (citation omitted). *Also see Dukes*, 564 U.S. at 361 & n.11. ("[I]ndividual adjudications would be impossible or unworkable, as [sic] in a (b)(1) class"). Class members of Rule 23(b)(1) subsection cannot opt-out.[2] Fed. R. Civ. Proc. 23 Committee Notes on Rule—2003 Amendments. This Court, however, recognized that "mandatory class actions aggregating damages claims implicate the due process [clause]". *Ortiz,* 527 U.S. at 846; *Dukes*, 564 U.S. at 360-363.

---

[2] In contrast, a district court must provide notice to class members of Rule 23(b)(3) informing them that they have right to "request[] exclusion" from the class. Fed. R. Civ. P. 23(c)(2)(B)(v). A Rule 23(b)(3) class notice must also inform class members that they will be subject to "the binding effect of a class judgment" if they do not exercise their opt-outs right. Fed. R. Civ. P. 23(c)(2)(B)(vii); *see* Fed. R. Civ. P. 23(c)(3)(B).

b. "Like all American litigation, class action lawsuits are likely to settle." Br. for the U.S. as *Amicus Curiae*, *Frank* v. *Gaos*, No. 17-961, at *3 (U.S. Jul. 16, 2018). (*Frank* U.S. Br.) "Unlike a typical settlement, however, a class-action settlement inherently involves a potential conflict of interest, because it 'compromises the claims of absent class members, litigants not themselves part of the settlement negotiations.'" *Ibid.* "Worse, the class representatives and class counsel litigating on behalf of those absent class members may have incentives to settle which conflict with the class's interests." *Ibid.* (citations omitted). The zero-sum settlement allocation (fees, expenses for attorneys, extra payouts to named Plaintiffs, and *only thereafter*, relief to class members) further exacerbates class-actions' agency conflict of interest against absent class members. *Ibid.*

"In ordinary non-class litigation, parties are free to settle their disputes on their own terms ... By contrast, in a class action, the "claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval." *Frank*, 139 S. Ct. at 1046 (citation omitted). "A court reviewing a class-action settlement serves as a fiduciary of the class," and must keep "the interests of absent class members in close view," *Frank* U.S. Br. at 4. (cleaned up). A settlement class-action still must satisfy all parts[3] of Rule 23. *Amchem*, 521 U.S. at 620 ("undiluted, even heightened[] attention"); *Dukes*, 564 U.S. at 348, 351 ("rigorous analysis" for Rule 23(a) criteria); *Ortiz,* 527 U.S. at 849 (both). Due Process demands Rule 23 class representatives "'possess the same interest and suffer the same injury' as the class members." *Amchem*, 521 U.S. at 625; *Dukes*, 564 U.S. at 348 (same).

[3] *Amchem* did waive Fed. R. Civ. Proc. 23(b)(3)(D) for settlements. 521 U.S. at 620, but it is undeniable that Rule 23(b)(1) has no such criterion.

c. Petitioner is a *former* participant in an ERISA-covered 401(k)-style "Plan" sponsored by his former employer, respondent Edward D. Jones & Co., L.P. ("Edward Jones"). Pet. App. 2a; Edward Jones and several related entities and persons manage the plan and as ERISA fiduciaries. 29 U.S.C. 1002(21)(A)(iii). D. Ct. Doc. 58 (Am. Compl.) ¶¶ 19-24; The plan is a "defined contribution" or "individual account plan", which "provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34). *See LaRue*, 552 U.S. at 255 ("'entire plan' plan language ... does not apply to defined contribution plans" because fiduciaries cannot be liable for participant-made investment decisions). *Current participants* may choose among several investment options and direct Edward Jones, as plan administrator, to invest the amounts allocated to their accounts in specified percentages among those options. Am. Compl. ¶¶ 29-31.

ERISA generally protects employee plan participants by "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." Br. for the U.S. as *Amicus Curiae*, *Thole* v. *U.S. Bank, N.A.*, No. 17-1712, at *1 (U.S. May 21, 2019) (*Thole* U.S. Br.) A "participant" can sue to recover "losses to the plan" from breach of "responsibilities, obligations, or duties imposed upon fiduciaries". ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). For defined contribution plans, *LaRue* held "although § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in * * * a

participant's individual account." 552 U.S. at 256. "For defined contribution plans ... fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive." *Id.* at 255-56. *LaRue* finds that bookkeeping allows even *one* defined-contribution participant to sue under § 502(a)(2) for individualized losses. *Ibid. See Spano* v. *The Boeing Co.*, 633 F.3d 574, 581-83 (7th Cir. 2011) (applying *LaRue* to ERISA 401(k) Plan "excessive fee" class actions).

All current participants' assets are held by trustees—that is—until participants elect to cash-out from the Plan. Petitioner cashed out all his assets from the 401(k) Plan in December 2017, became a *former participant*, and cannot re-enter the Plan again without covered employment[4]. *Accord* C.A. Plaintiffs Br. 31; D. Ct. Doc. 111 at 9. ("Tr.")

2. This case arises from consolidated class actions filed against respondent Edward Jones and its related Plan fiduciaries. Plaintiffs (now respondents) Valeska Schultz, Melanie Waugh, and Rosalind Staley sued under ERISA 502(a)(2) and alleged that Edward Jones "violated their fiduciary duties and engaged in prohibited transactions with assets of the Plan", by "forcing the Plan into investments that charged excessive fees that benefitted the mutual fund partners of Edward Jones", "caus[ing] the Plan to pay excessive recordkeeping and plan administration fees to the Plan's record-keeper". Am. Compl. ¶¶ 7-9 & 123. Before a ruling on Defendants' motion to dismiss former Plaintiff Windle Pompey in part for lack of Article III standing (D. Ct. Doc. 52, later denied as moot), Pompey was replaced by named Plaintiff Staley. Am. Compl. ¶17.

---

[4] An ex-employee may only participate with *invested* dollars, or cash-out. Only covered employee can add more money into the Plan. *See* C.A. Plaintiffs Br. 31; D. Ct. Doc. 52 at 17-18 (Defs. Mot. to Dismiss Pompey in part for lack of Article III standing). C.A. Objector Br. 27 (table).

Defendants' several motions to dismiss were all unsuccessful, except that The Jones Financial Companies, L.L.L.P. was dismissed from the case. D. Ct. Doc. 71.

3. a. The parties reached a settlement agreement before class certification for trial. As relevant here, Plaintiffs Schultz, Waugh, and Staley agreed to settle their case as a class-action settlement. D. Ct. Doc. 93-1. ("Agreement") Plaintiffs moved to seek non-opt-out Rule 23(b)(1) class certification for settlement purposes under the Agreement, which includes all "Current and Former Participants in the Plan who maintained a balance of any amount in the Plan at any point during the period from August 19, 2010 to [December 13, 2018]". *Id.* § 2.2. Defendants were required to, *inter alia*, hire "independent consultants to review the Plan's investment, strategy, structure and fund selection" for future Plan practices. *Id.* § 6.1(b). A $3.175 million cash fund, after attorney fees and expenses, is to be split *pro rata* based on average Plan balances during the class period, regardless of investment choices during that period. *Id.* § 3.2(a). Under Agreement and Rule 23(b)(1) class certification, class members cannot opt-out. *Id.* § 2.14. Class counsel later moved to seek 1/3 of a $3.175 million fund for fees, additional expenses, and $10,000 "case contribution awards" for each of three named plaintiffs. D. Ct. Doc. 101.

b. The district court granted preliminary class certification under Federal Rules of Civil Procedure 23(b)(1), and settlement approval under Rule 23(e)(2). After settlement notification, three class members objected, including Petitioner. D. Ct. Doc. 104. Among other objections, Petitioner believed the settlement's prospective Plan relief is worthless if not detrimental to the Plan. *Id.* at 15-16. Petitioner argued that class certification under Rule 23(b)(1)(B) or Rule 23(b)(1)(A) is both impermissible and unsubstantiated. *Id.* at 7-10. Further, Petitioner raised

several reasons that Plaintiffs cannot adequately protect the class's interests under Rule 23(a)(4). *Id.* at 17-23.

In response, Plaintiffs said their allegations of excessive "fees were, in fact, much closer to a reasonable number". Tr. 6. Plaintiffs emphasized such Rule 23(b)(1) class certification was normal, and "nothing in *LaRue* suggests that plaintiffs could bring a claim for only their own small part of the loss", for "502(a)(2) requires that a claim be brought on behalf of the Plan". D. Ct. Doc. 109 at 18-19. Defendants said they only settled the case to reduce costs of litigation. D. Ct. Doc. 108 at 2. Defendants particularly noted "potential conflicts among putative class members"—while partnership owners are *de facto* Defendants, many are also unnamed plaintiffs as Plan participants. *Id.* at 6-7.

In the Rule 23(e) fairness hearing, Plaintiffs further argued that "[Petitioner] is a former participant in the plan, has left the plan, and so to the extent that [Petitioner] has objections concerning the relief to the class on a moving forward prospective basis, [*Plaintiffs*] *would also challenge the standing of that objector to raise that.*" Tr. 9. (emphasis added) *Accord* C.A. Plaintiffs Br. 31; D. Ct. Doc. 52 at 17-18.

c. After the hearing, the district court reviewed Rule 23(e) factors, granted settlement approval, and awarded fees and expenses to named plaintiffs and counsel. Pet. App. 4a-16a. The district court noted Petitioner was "one real objection out ... over 74,000", Tr. 10, but it overruled Petitioner's objections "for the reasons stated on the record and in the parties' respective briefing". Pet. App. 6a, 15a.

4. The Court of Appeals affirmed. Pet. App. 1a-4a. The panel wrote "without accepted settlement agreement, parties remained adverse"—as to the settling parties. *Id.* at 3a. It then cited two cases revived from Rule 12(b)(1) dismissal for standing and found "[named] plaintiffs had standing to bring the class action." *Ibid.* It declined to

review legal standards of Rule 23(b)(1) *de novo* (*see* C.A. Objector Br. 33) and reviewed for abuse of discretion (*id.* at 4a). The panel—citing a case 10 years before *Dukes*—found that this case fits under Fed. R. Civ. Proc. 23(b)(1)(A), because the class-action was "brought on behalf of plan and relief would benefit plan as whole, [thus] individual actions raised risk of inconsistent adjudications." *Ibid.* The panel saw named plaintiffs' $10,000 awards "not unfair to class, and are regularly granted". *Ibid.* A petition for rehearing and rehearing en banc was denied. Pet. App. 17a-18a.

REASONS FOR GRANTING THE PETITION

This case is a perfect vehicle to end a widening split on Rule 23 absentees' standing, for one rare reason: Petitioner is arguing that he ***himself***—not his opponent—lacked Article III standing to allege *any* future injuries or seek *any* prospective relief. *Town of Chester* unanimously requires Article III standing "for each form of relief that is sought." 137 S. Ct. at 1650. While named plaintiffs sought relief within the Plan, Petitioner must have standing for all out-of-plan relief for Article III's minimum. Circuits are 4-way divided, and three (including Eighth Circuit) are also self-split. This Court should break this deep jurisdictional tie.

If this $500 million/year "classic" sits unresolved, unavoidable constitutional dangers remain. *See Schlichter*; *Wille*. By "manufactur[ing]" Petitioners' prospective injury, *Clapper*, 568 U.S. at 416, Respondents invented another Rule 23(b)(1)(A) circuit split for money damages, thereby escaping the commands of *Dukes* and *Ortiz*. This Rule 23(b)(1) abuse forced Petitioner's appeal to be the "only means of protecting himself from being bound". *Devlin*, 536 U.S. at 10-11. Such named plaintiffs—who each settled for $10,000 extra personal bonuses—failed both Rule 23 and Due Process. *Dukes*, 564 U.S. at 363. ("In the context of a class action predominantly for money damages ... absence

[of] opt out violates due process.") *Std. Fire Ins. Co.* v. *Knowles*, 568 U.S. 588, 593 (2013) ("class representative[s] [owe] fiduciary duty not to 'throw away what could be a major component of the class's recovery'")

I. *TYSON FOODS* FURTHER DIVERGED CIRCUITS' DISAGREEMENTS ON ABSENT CLASS MEMBERS' ARTICLE III STANDING

A. Recurring Debate Of Unnamed Class Members' Standing Now Have Circuits Four-Way Split, With Three Self-Divided

"[E]very federal court has an independent obligation to consider standing". *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 146 (2011). This Court recognized that Article III concerns "extend[] to proposed class action settlements." *Frank*, 139 S. Ct. at 1046. (Unable to reach merits after the Solicitor General doubted named Plaintiffs' Article III standing[5]; *Frank* U.S. Br. at 11.) In *Thole* v. *U.S. Bank, N.A.*, another ERISA class-action, this Court added Solicitor General's question on "[w]hether [class plaintiffs] have demonstrated Article III standing". 139 S. Ct. 2771 (2019) (*cert. granted*). *See Thole* U.S. Br. at 20. This is a perfect vehicle to resolve that recurring Article III question, as Petitioner sits right in the middle of a four-way split.

After this Court's *Tyson Foods, Inc.* v. *Bouaphakeo,* the Eleventh Circuit only requires absentees' standing before granting relief, citing "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Cordoba*, 942 F.3d at 1274 (quoting 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring)). *Accord Ramirez* v. *TransUnion, LLC*, 951 F.3d 1008, 1023 (9th Cir. 2020) (quoting same). *But class-action settlements are also*

---

[5] Recently, one circuit also granted *en banc* review of named plaintiff's Article III standing in class-action settlement. No. 16-16486 (11th Cir.)

final judgments. They "inherently involve[] a potential conflict of interest" when named Plaintiffs settle with only consent of defendants, without protecting absentees. *Frank* U.S. Br. at 3. When settling parties lack adversity in a settlement such as in *Frank*, it remains a question on how to scrutinize jurisdictional matters in class actions. *Id.* at 11.

The Fifth Circuit still dodges so-called "inappropriate" standing inquiries after *Deepwater Horizon*. In *Flecha* v. *Medicredit, Inc.*, it reversed class certification on "logically antecedent" Rule 23(a) and 23(b) grounds, but declined to reach standing issues despite finding "[c]ountless unnamed class members lack standing." 946 F.3d 762, 767-768 (5th Cir. 2020). Judge Oldham noted the same part of *Tyson Foods* (adopted by the Eleventh Circuit) and argued that jurisdiction—not Rules—should be dispositive. "'In an era of ... class actions, sweeping injunctions with prospective effect ... courts must be more careful to insist on the formal rules of standing, not less so.'" *Id.* at 770 (concurring op.) (quoting *Winn*, 563 U.S. at 146). Indeed, what should courts do, if a class survives Rule 23(a), but lacks standing?

Before *Cordoba* and *Flecha*, a "divergence" already existed in "treatment of uninjured putative class members." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 56 (1st Cir. 2018). The Second Circuit held "no class may be certified that contains members lacking Article III standing". *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). First, Eighth, and D.C. Circuits adopted the *Denney* test. *Asacol, supra*; *Avritt* v. *Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619 (D.C. Cir. 2019). But other circuits flatly disagree. "[U]nnamed, putative class members need not establish Article III standing." *Neale* v. *Volvo Cars of N. Am., LLC,* 794 F.3d 353, 362 (3d Cir. 2015). *Lacy* v. *Cook County*, 897 F.3d 847, 864 (7th Cir. 2018) ("inevitable").

Further, several circuits are also divided within, leaving absentees' Article III problems to a lottery among binding precedents. *Compare* Eighth Circuit's *Avritt, supra* (adopting *Denney*) *with Golan* v. *FreeEats.com, Inc.*, 930 F.3d 950, 958 n.5 (8th Cir. 2019) ("We do not consider whether the significant portion of absent class members ... would have standing"); *compare* Ninth Circuit's *Ramirez*, 951 F.3d at 1028 ("each class member must have standing to recover damages") *with In re Zappos.com, Inc.*, 888 F.3d 1020, 1028 n.11 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1379 (2019) ("only one Plaintiff needs to have standing for a class action to proceed."); *also compare* Seventh Circuit's *Lacy, supra* (uninjured are "inevitable") *with Flying J. Inc.* v. *Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009) (Unnamed class members must have standing to replace named plaintiffs).

B. With Heterogeneous Named Plaintiffs, *Town of Chester* Requires Standing For Class Objectors As Intervenors *Of Right*

"[A]ny competently crafted class complaint literally raises common 'questions.'" *Dukes*, 568 U.S. at 349. But too often, named plaintiffs seek big class sizes that are *not* "sufficiently cohesive". *Amchem*, 521 U.S. at 623. Standing of Petitioner should be resolved during class certification, where "rigorous analysis" of Rule 23(a) also allows limited merits inquiries. *Dukes,* 564 U.S. at 348. *Lacy,* 897 F.3d at 863 ("by preponderance of evidence"); *Rail Freight*, 934 F.3d at 626 ("part-and-parcel of the 'hard look' required"). Petitioner's "withdrawal of funds from the Plan" destroyed any imminent risk for future injury. *LaRue*, 552 U.S. at 256 n.6. Petitioner's lack of standing for prospective relief must lead to a *vacatur*. *Azar*, 138 S. Ct. at 1793. Unsurprisingly, while plaintiffs want standing for all, adverse class-action Defendants often raise merits early in hopes to decertify classes—even if just *one* lacks standing. But regardless, this

Court's unanimous *Town of Chester* opinion held that "an intervenor of right must demonstrate Article III standing". 137 S. Ct. at 1651. Class objectors are intervenors *as of right*, and both majority and dissent in *Devlin* fully agree. 536 U.S. at 12, 20. Petitioner, *a former participant,* is distinct from named Plaintiffs as *current Plan participants.* As a former Plan member, all that Petitioner *might* get—without equitable remedy—is "monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties." *Mertens* v. *Hewitt Assos.,* 508 U.S. 248, 255 (1993). "Money damages are, of course, the classic form of *legal relief*". *Ibid.* Since class objectors appeal to only seek different outcomes from settling Plaintiffs—*Town of Chester* logically requires Petitioner to have every Article III standing element. Otherwise, no jurisdiction exists. *See Clapper*, 568 U.S. at 408. (Article III standing "is built on separation-of-powers principles, [and] serves to prevent the judicial process from ... powers of the political branches.")

C. Absentees' Lack of Standing Below Failed Irreducible Constitutional Minima

"[C]onstitutional avoidance is not a justification ... when the constitutional question is a threshold one of the court's jurisdiction." *Thole* U.S. Br. at 21-22. Even the Plaintiffs admitted, "former [Plan] participants like [Petitioner] have no stake in forward-looking relief". C.A. Plaintiffs Br. 31; *accord* Tr. 9. As in *Frank*, no matter the time and resources spent, a reviewing court cannot reach merits when subject-matter jurisdiction under Article III is in serious doubt. Petitioner "must also demonstrate standing to pursue injunctive relief", *Town of Chester,* 137 S. Ct. at 1651. But Plaintiffs cannot "manufacture[]" non-existent future harms for Petitioner. *Clapper*, 568 U.S. at 416. *Frank* U.S. Br. at 23 (future injury must be *imminent* and *redressable* to justify any relief granted under Article III jurisdiction.)

Despite Plaintiffs' self-admission, lower courts were too disarmed to realize the dangers of a separation-of-powers violation. The Eighth Circuit inexplicably insisted standing review for only named Plaintiffs, and erred further to hold that *only* named plaintiffs need standing to bind class members under Rule 23. "[N]either the District Court nor the [Eighth] Circuit ever opined on whether any [unnamed] plaintiff sufficiently alleged standing". *Frank*, 139 S. Ct. at 1046. Such drive-by jurisdictional rulings must be reversed.

II. DUE PROCESS FOR MONETARY RELIEF UNDER RULE 23(b)(1) CLAUSES REMAIN PROBLEMATIC AFTER *ORTIZ* AND *DUKES*

A. Circuits Remain Three-Way Split On How Rule 23(b)(1)(A) Differs From Rule 23(b)(3)

The Rules Enabling Act provides that procedural rules cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Thus, Rule 23 "cannot 'create new rights and then settle claims brought under them.'" *Deepwater Horizon,* 739 F.3d at 828 (Garza, J., dissenting). Petitioner's lack of future injuries was *not a coincidence*—this is a ***mandatory class-action for damages***, skipping Rule 23(b)(3) scrutiny and warnings of Rules Enabling Act. Despite implications on Due Process, "given *Shutts*, *Ortiz*, and *Dukes*, courts are [still] in disarray over what due process requires in suits for money judgments under (b)(1)(A)". Robert Klonoff, *Class Actions for Monetary Relief Under Rule 23(b)(1)(A) and (b)(1)(B): Does Due Process Require Notice and Opt-Out Rights?* 82 Geo. Wash. L. Rev. 798, 801 (2014). But "nonparties can [only] be bound in 'properly conducted class actions'". *Smith* v. *Bayer Corp.*, 564 U.S. 299, 314 (2011) (quoting *Taylor* v. *Sturgell*, 553 U.S. 880, 894 (2008)). "A nonnamed class member is not a party to the class-action litigation before the class is certified". *Knowles*, 568 U.S. at 593 (cleaned up).

The Due Process / Rule 23(b)(1) question here is—can money-damage class-actions offer only perfunctory notices, ***but not the opt-out?*** This Court's precedents all said *no*. *Ortiz*, U.S. at 844 ("implausible"); *Dukes*, 564 U.S. at 363 ("absence [of] opt out violates due process"); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 349 (2011) ("absent members must be afforded ... a right to opt out of the class.") *Petitioner's lack of standing to receive prospective relief cannot cause inconsistency*, because the original design of Rule 23(b)(1)(A) was to protect Defendants from bipolar or contradictory injunctions from separate lawsuits. *Amchem*, 521 U.S. at 614. But circuits disagree on their takes too. The Eighth Circuit now offers an open door for Rule 23(b)(3) classes to slide under Rule 23(b)(1)(A)—as long as any fictitious "injunctive" reason exists. Meanwhile, the Ninth Circuit banned Rule 23(b)(1)(A) for money damages for over forty years. *Green* v. *Occidental Petro. Corp.*, 541 F.3d 1335, 1340 (9th Cir. 1976). The Seventh Circuit, after *Dukes*, also preferred hybrid use of Rule 23(b)(3) under separate stages of litigation. *Mullins* v. *Direct Digital, LLC*, 795 F.3d 654, 671 (7th Cir. 2015). ("[C]ourts often bifurcate the case into a liability phase and a damages phase.")

B. Rule 23(b)(1)(A) Splits ERISA Three Ways, Despite Recurring Individualized Money Claims In Defined-Contribution Plans

While the Eighth Circuit, Pet. App. 3a, completely ignored this Court's *LaRue*[6] precedent to allow defined-contribution Plan suits under Rule 23(b)(1)(A)—citing a case ten years before *Dukes*—the Ninth Circuit *sua sponte* flagged its worry about "whether defined-contribution plans are properly certified under Rule 23(b)(1)(A)". *Tibble* v.

---

[6] Particularly, *LaRue* allows any *individual* 401(k) Plan participant to recover solely "in a participant's individual account." 552 U.S. at 256.

Edison Int'l, 729 F.3d 1110, 1127 n.14 (9th Cir. 2010), *vac'd sub nom*, 135 S. Ct. 1823 (2015). The Seventh Circuit also quoted *LaRue* at length to reject two purported "Plan-wide" Rule 23(b)(1) class certifications, with *nearly the same background facts* in this case—same attorney, same "excess fee" allegations in ERISA 401(k) defined-contribution Plan, and dual Rule 23(b)(1)(A) plus (b)(1)(B)[7] class certification. *Spano*, 633 F.3d at 588. *Spano* said plaintiffs to "fare no better under Rule 23(b)(1)(A)". *Ibid.* "The plaintiffs assume that [Defendants] could not simultaneously offer [fund selections] to some people and not to others, but we do not see why that would be a problem ... [Defendants] would simply have to divide its plan into one or more sub-plans." *Ibid.* Citing lack of opt-out rights required by *Ortiz*, it warned against improper mandatory class actions and its Due Process problems for absent class members. *Id.* at 587.

C. Absentees' Opt-Out Right Cannot Be Sold For Attorney Fees And "Incentive Awards"

Plaintiffs were willing to trade-in absentee parties' opt-out rights under Rule 23(b)(1) to settle with rich incentive awards and fees. But neither *injury* nor *interest* was the same for them to represent the class. For *injury*, named Plaintiffs want different prospective relief that Petitioner cannot receive. For *interest*, Class Counsel sought "perverse incentives for class representatives to place at risk potentially valid claims for monetary relief". *Dukes*, 564 U.S. at 364. They "intermeddle[d]" a common-fund to let each named Plaintiff pocket $10,000 "incentive awards" as personal gains. *Trustees* v. *Greenough*, 105 U.S. 527, 538 (1885). Class Counsel also fought to get 33 1/3% share as

---

[7] While Plaintiffs sought both Rule 23(b)(1)(A) and (b)(1)(B) certification, the Eighth Circuit refused to opine on Rule 23(b)(1)(B). *Ortiz*'s core holding demanded (b)(1)(B) certifications show proofs that a fund is "limited by more than the agreement of the parties". 527 U.S. at 821.

fees—a major monetary "incentive to reach any agreement [that] might survive a Rule 23(e) fairness hearing". *Ortiz,* 527 U.S. at 852. *But see Frank* U.S. Br. at 29. ("If the fees set in the settlement agreement appear unrealistically high, that provision casts doubt on the settlement.")

D. Non-Adverse, Non-Opt-Out Rule 23(b)(1) Settlement-Classes Are Not Justiciable

Amchem waived manageability concerns for Rule 23(b)(3) settlement-classes, 521 U.S. at 620. But Rule 23(b)(1) has no manageability concerns—*it has all the same standards for both settlement and trial.* It is dangerous—"the moment of certification requires 'heightened[] attention,' ... because certification of a mandatory settlement class ... effectively concludes the proceeding save for the final fairness hearing." *Ortiz,* 527 U.S. at 849. Only selfish "fiduciaries" seek mandatory Rule 23(b)(1) for settlement—when Plaintiffs doubt their own Rule 23 survival before they *may* seek trial. Having the same Rule 23(a) and 23(b)(1) criteria, Plaintiffs now pick heads-I-win to certify for trial, or tails-you-lose when near a dismissal, by harassing Defendants into settling any weak claims *in terrorem*. This is one such case as Defendants-as-class-members implied doomed adequacy-of-representation for trial, but Plaintiffs settled to avoid concrete adverseness of parties. While Defendants may be interested to minimize costs of defending meritless suits, Plaintiffs have no entitlement to Rule 23 class proceeding, and they must prove to meet Rule 23 standards. *Dukes,* 564 U.S. at 348. Instead of waiving manageability within Rule 23(b)(3), Rule 23(b)(1) settlement-classes only invites more of "the anomaly that both litigants desire precisely the same result". *Moore* v. *Board of Education,* 402 U.S. 47, 48 (1971) (*per curiam*). "There is, therefore, no case or controversy within the meaning of Art. III of the Constitution." *Ibid.* Such posture cannot bind absent parties.

This case demonstrates Respondents' attempt to make a Rule 23 class-action "usurp the powers of the political branches." *Clapper*, 568 U.S. at 408. This case shows how disguised Rule 23 "fiduciaries" can water down Article III and Due Process altogether. Such adventurous abuse of absent class members—under the disguise of Rule 23 fiduciary duties—should not survive any longer.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully Submitted,

/S/ SHIYANG HUANG
SHIYANG HUANG
PRO PER
2800 SW ENGLER CT.
TOPEKA, KS 66614
defectivesettlement@gmail.com

MAY 2020