No. _____

In the
Supreme Court of the United States

JULIUS BARBOUR, ET AL.,
Petitioners,

v.

HALLIBURTON COMPANY, ET AL.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners, class members in settled class-actions, did not receive notice of a requirement, imposed post-settlement, to have filed an individual lawsuit in order to be entitled to recovery under the settlements until after the deadline to file such suits had passed. The court of appeals nevertheless held that petitioners were not denied due process, because they purportedly had notice of the suit-filing requirement in time to attempt to show cause why the failure to meet the deadline should be excused. That ground was not briefed but instead was raised by the court *sua sponte* at oral argument. The questions presented are:

1. Whether class members are given constitutionally adequate notice under *Eisen v. Carlisle & Jacquelin*, which requires direct individual notice when practicable, where a notice of a class action settlement that is mailed to some class members does not disclose a requirement to take certain action to preserve one's entitlement to compensation under the settlement, and notice is not mailed to them or not mailed until after the deadline to comply with the requirement.

2. Whether it is a violation of due process or an abuse of discretion for a court of appeals to base its decision on a ground raised only by the court itself during oral argument.

3. Whether, regardless of notice, it violates due process to deny compensation to a class member for not meeting an eligibility qualification imposed by the claims administrator based on a post-settlement MDL procedural order and where the class member met the qualification at the time of settlement and at the time of claim submission.

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 14.1(b) of the Rules of the Supreme Court of the United States.

Petitioners in this Court, who were the plaintiffs-appellants below, are:

Julius Barbour, Edward Barnhill, Jr., Edward Barnhill, Sr., Karen Barnhill, Scott Black, Cleve Boatwright, Norwood Cain, Sr., Arthur Coleman, Frank Conley, Jerel Conley, Troy Cornelius, Sr., Darrin Covert, Charles Cowart, Dobby Darna, Randolph Darna, III, Randolph Darna, Jr., Richard Delacey, James Dooley, Michael Shane Dooley, Allan Dopirak, Bobby Esfeller, Ricky Gomes, Benjamin Hamilton, Richard Harbison, Sr., Richard Harbison, Jr., Ernest Harris, Doran Hoffman, James Johns, Daryl Johnson, Rory Johnson, Roy Kibbe, David Krause, Michael Krause, William Ladnier, Sr., William Ladnier, Jr., Richard Lolly, Franklin McCall, Anthony Moralis, Helton Nelson, Lloyd Nielson, Destin O'Brien, Thomas O'Brien, James Parker, III, Jason Parker, Robert Chad Paul, Charles Porter, Ernest Price, Justin Sawyer, David Simms, Sr., Thomas Smith, James Stewart, William Stewart, Donald Stork, Sr., Marion Strange, Richard Turner, Cecil Wainwright, Jr., Derek Wainwright, Jerry Walker, Charles Wallace, Clarence Waters, Travis Wilkerson, Deloyd Williamson, Joseph Williamson, Martin Young, Dennis Zirlott, Donald Zirlott, George Zirlott, and Simon Zirlott.

Respondents in this Court, who were the defendants-appellees below, are:

Halliburton Energy Services, Inc., Halliburton Company, Transocean Holdings, L.L.C., Triton Asset Leasing GMBH, Transocean Deepwater, Inc., and Transocean Offshore Deepwater Drilling, Inc.

STATEMENT OF RELATED PROCEEDINGS

- *In re Deepwater Horizon*, No. 18-30243 (5th Cir.) (consolidated opinion issued and judgment entered August 13, 2019; petition for rehearing denied Sept. 10, 2019).
- *In re Deepwater Horizon*, No. 18-30413 (5th Cir.) (consolidated opinion issued and judgment entered August 13, 2019; petition for rehearing denied Sept. 10, 2019).
- *In re Deepwater Horizon*, No. 18-30533 (5th Cir.) (consolidated opinion issued and judgment entered August 13, 2019; petition for rehearing denied Sept. 10, 2019).
- *In re Oil Spill by Oil Rig "Deepwater Horizon"*, No. 2:10-MD-2179 (E.D. La.) (claims appeal determination and reasons entered January 4, 2018).
- *In re Oil Spill by Oil Rig "Deepwater Horizon"*, No. 2:10-MD-2179 (E.D. La.) (claims appeal determination and reasons entered March 26, 2018).

- *In re Oil Spill by Oil Rig "Deepwater Horizon"*, No. 2:10-MD-2179 (E.D. La.) (order entered January 31, 2018).
- *In re Oil Spill by Oil Rig "Deepwater Horizon"*, No. 2:10-MD-2179 (E.D. La.) (order entered February 26, 2018).

Petitioners are unaware of any other proceedings in state or federal trial or appellate courts that are directly related to the case in this Court.

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Petitioners pray that the Supreme Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is found at 934 F.3d 434 (5th Cir. 2019), and is attached as App. 1-25. The unreported order of the court of appeals denying the petition for rehearing is attached as App. 50-55. The opinion of the United States District Court for the Eastern District of Louisiana denying the claims appeals of 63 of the petitioners is found at 2018 WL 334030 (E.D. La. January 4, 2018), and is attached as App. 26-43. The unreported opinion of the United States District Court for the Eastern District of Louisiana denying the claims appeals of five of the petitioners is attached as App. 44-46. The unreported order of the United States District Court for the Eastern District of Louisiana denying the objection to the January 4, 2018 decision by the magistrate judge is attached as App. 48-49. The unreported order of the United States District Court for the Eastern District of Louisiana denying petitioners' motion for relief from the order approving the distribution model is attached as App. 47.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2019. A timely petition for rehearing was denied on September 10, 2019. This Court has jurisdiction to review the decision of the court of appeals by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. 5.

STATEMENT OF THE CASE

This case raises important and likely recurring questions regarding the rights of class members in class actions in multidistrict litigation or in other cases under maritime law, including the application of this Court's decisions holding that due process requires that class members be given the best notice that is practicable under the circumstances, which is individual notice when practicable, and whether that standard is satisfied when individual notice fails to disclose a requirement that a class member must satisfy in order to receive compensation under a class settlement but merely refers class members to a website upon which is posted a document (also not referred to in the direct notice) stating the requirement, and whether class members may be denied compensation under a settlement agreement that undisputedly includes them in the settlement class based on an eligibility qualification that they met at the time the settlement was entered into and at the time they submitted their claims but not at the time the claims administrator evaluated their claims.

The district court had jurisdiction of the class actions to which the subject settlement agreements related under Article III, section 2 of the United States Constitution (which confers jurisdiction on the federal

courts to hear "all Cases of admiralty and maritime Jurisdiction"), 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1333 (admiralty or maritime claims), and the Admiralty Extension Act, 46 U.S.C. § 30101, since the class actions were brought under maritime law. The court of appeals had appellate jurisdiction under 28 U.S.C. § 1291 and Rule 4 of the Federal Rules of Appellate Procedure in that the orders appealed from are final orders or judgments of the district court disposing of all the petitioners' claims, and the notices of appeal were filed within the prescribed 30-day period following the entry of the orders.

Petitioners are 68 commercial menhaden[1] fishermen whose livelihoods were severely impacted by the oil spill that resulted from the Deepwater Horizon disaster in April 2010. Their claims for damages were asserted through their inclusion as class members in multiple class action lawsuits in the MDL seeking actual and punitive damages against defendants that included BP Exploration & Production Inc. ("BP"), Halliburton Energy Services, Inc., ("Halliburton"), and Transocean Holdings, LLC ("Transocean"). Such actions included the class-action portion of the "B1 Master Complaint" for economic and property damages claims that the district court ordered filed for administrative purposes and a class action suit filed by First National Bank, USA and others styled *Bruhmuller, et al. v. BP*

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[1] Menhaden is "[a]n abundant inedible fish . . . of American Atlantic and Gulf waters, used as a source of fish oil, fish meal, fertilizer, and bait." The American Heritage Dictionary, Second College Edition (1985).

Exploration & Production, Inc., et al., no. 2:13-cv-097.[2] App. 6.

BP eventually agreed to a class settlement of economic and property damages claims in 2012, termed the Deepwater Horizon Economic and Property Damages Settlement ("the DHEPDS"). However, menhaden fishermen were inexplicably excluded from the settlement, even though other commercial fishermen were included.[3] App. 7.

Halliburton and Transocean subsequently reached separate, but substantially identical (except for the amount of payment), agreements with class counsel to settle punitive damages claims against them ("the Settlement Agreements").[4] The Settlement Agreements

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[2] The *Bruhmuller* complaint described the plaintiff class as:

> All individuals and entities residing or owning property in the United States who claim economic losses, or damages to their occupations, businesses, and/or property as a result of the April 20, 2010, explosions and fire aboard, and sinking of, the Deepwater Horizon, and the resulting Spill,who have opted out of the [BP] Settlement or whose claims are expressly or impliedly excluded fromthe Settlement.

[3] Even though menhaden fishermen were excluded from participation in the DHEPDS, a company that processes menhaden into fish oil products reportedly received almost $45 million. *See* https://money.cnn.com/2011/04/21/smallbusiness/thebuzz/?section=money_latest; http://www.cbsnews.com/news/how-fate-and-45m-from-bp-gave-one-fish-oil-producer-a-banner-year/.

[4] The HESI Settlement Agreement was entered into and filed on September 2, 2014 and amended on September 2, 2015. The

provided for the settlement funds to be apportioned between two classes: those who had received compensation in the BP settlement (the DHEPDS Class) and those who had been excluded from or opted out of that settlement (the New Class). The New Class included a sub-class of commercial fishermen, defined as all those who had operated in the area affected by the spill during a specified time period. That subclass consisted mostly of menhaden fishermen, who had been excluded from the DHEPDS. There is no dispute that the petitioners are within the settlement class definition of the Settlement Agreements. App. 7.

The Settlement Agreements did not set out any requirements for compensation for commercial fishermen other than meeting the sub-class definition. They did not contain a provision requiring any proof of actual economic loss by a class member in order to receive compensation. The amount of punitive damages payments for menhaden fishermen was to be independently determined by the court-appointed claims administrator as a 1:1 ratio to estimated economic loss based on data regarding the impact of the oil spill on the overall menhaden catch. The Settlement Agreements did not provide that a class member had to have a pending lawsuit or viable compensatory damages claim against Halliburton or Transocean in order to be in the settlement class and receive compensation. Indeed, the Settlement Agreements contemplated that some class members would not have filed lawsuits (which is, after all, the

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Transocean Settlement Agreement was entered into and filed on May 29, 2015. App. 7.

whole point of class actions), since they included provisions tolling the statute of limitations on any causes of action "that have been or could be asserted." In any event, it is undisputed that at the time the Settlement Agreements were executed the petitioners had viable, non-time barred causes of action against Halliburton and Transocean and that their claims were being asserted in one or more putative class actions in the MDL. App. 7-8.

On March 29, 2016, months after the Settlement Agreements had been entered into and filed for approval, the district court entered Pretrial Order No. 60 ("PTO 60") in the MDL, which dismissed the B1 Master Complaint and ordered persons who did not participate in the DHEPDS and had asserted their claims through joinders in the Master Complaint or as parties to multi-plaintiff lawsuits to file single-plaintiff lawsuits in order to continue to pursue claims for economic or property damage against BP or other parties. The court set a deadline of May 2, 2016 for persons to file individual lawsuits in order to avoid having their claims dismissed. App. 8. Although PTO 60's dismissal of the B1 Master Complaint dismissed one of the class actions in which petitioners were in the plaintiff class, the district court did not at that time dismiss the *Bruhmuller* class action that also included petitioners in the plaintiff class. That class action was not dismissed until December 16, 2016, after the petitioners had submitted their claims to the claims administrator. *See In re Oil Spill by Oil Rig "Deepwater Horizon"*, 2016 WL 10586172, *9 (E.D. La. Dec. 16, 2016).

Notice of PTO 60 was sent only to known counsel of record for plaintiffs who had filed lawsuits or joinders in the Master Complaint and persons who had filed opt-outs from the DHEPDS stating that they were unrepresented.[5] Consequently, the petitioners, who had not opted out of the DHEPDS and who at all material times were unrepresented[6], did not receive actual notice of PTO 60 until long after the May 2, 2016 deadline for filing individual lawsuits had passed.

On April 12, 2016, the district court gave preliminary approval of the Settlement Agreements and approved the form for the notice of the settlements to be published and distributed to class members. "Short-form" notices were to be mailed to class members and published in various newspapers, and a "long-form" notice was to be posted on the settlement website. Even though the notices (App. 56-59; 60-99) were promulgated after PTO 60 was issued, neither made any mention of that order, its requirements, or any implications it would have with regard to the

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[5] Notice of PTO 60 was provided by four methods: (1) electronic notice to all counsel of record who signed up for electronic service with File & Serve, (2) notice by mail to persons who had opted out of the DHEPDS and who stated on the opt-out form that they were unrepresented, (3) e-mail from the PSC to known counsel of record for plaintiffs who joined in the Amended B1 Master Complaint and/or opted out of the DHEPDS, and (4) posting PTO 60 on the court's website. *In re Oil Spill*, 2016 WL 10586172 at *5.

[6] The petitioners maintained in the district court and the court of appeals that they were not represented by counsel during the pertinent time period when they could have complied with PTO 60, and neither the claims administrator nor the appellees disputed that position.

Settlement Agreements. The only thing the short-form notice told the New Class members they would have to do to receive benefits was to file a claim by December 15, 2016. The notice gave the web address for the settlement website to go to "for more information." App. 58-59. The long-form notice set out the eligibility requirements for commercial fishermen, and those requirements did not include having a pending individual lawsuit in the MDL. App. 74-75, 97-99.

The preliminary approval order set a deadline of September 26, 2016 to file objections to the Settlement Agreements and set a fairness hearing for October 20, 2016 for consideration of objections. The order also directed the claims administrator to file a proposed distribution model for payment of settlement proceeds by June 15, 2016. The order did not expressly address consideration of potential objections to the distribution model. The short-form notice gave the deadline to opt out of or object to the settlements, but did not mention the distribution model or any opportunity to contest its provisions.

On June 7, 2016, the district court entered an order directing certain specifically described groups of persons who purportedly had not complied with PTO 60 to show cause in writing why their claims should not be dismissed ("the show-cause order"). The order set a deadline of June 28, 2016 to file such written showing. The district court directed that notice of the show-cause order be given using the same or similar means to

those used for PTO 60.[7] Thus, as with PTO 60, the means of notice did not give individual or actual notice of the show-cause order to unrepresented persons who had not opted out of the DHEPDS, including petitioners.

On June 13, 2016, the claims administrator filed a proposed distribution model for the New Class portion of the Settlement Agreements for court approval. The distribution model was also posted on the Halliburton/Transocean settlement website. The distribution model provided that no New Class claimant would receive compensation unless such claimant had reached a settlement or had complied with PTO 60 by filing an individual lawsuit. This provision was also set out in the claim form that was an exhibit to the distribution model. The distribution model was the first mention of a requirement of compliance with PTO 60 as a condition for compensation to New Class members under the Settlement Agreements, and this came more than a

[7] The show-cause order provided that "all counsel of record should receive a copy via F&S [File and Serve]," that the order would be posted on the court's website, that "[c]ounsel for BP shall mail this Order to each unrepresented individual and business to which it previously mailed PTO 60," and that "to the extent practicable, the PSC shall email a copy of this Order to known counsel of record for Plaintiffs who joined the Amended B1 Master Complaint, and/or opted out of the Economic and Property Damages Settlement and may therefore be subject to this Order." Petitioners had not retained counsel and had not been mailed a copy of PTO 60 by BP and thus were not among those receiving individual notice of the order.

month after the deadline for such compliance had passed.

The short-form notices were mailed beginning on June 15, 2016. However, the record reflects no effort to identify commercial fishermen in the New Class to be given individual notice. Instead, according to the affidavit of the C.O.O. of the company engaged to act as "notice administrator," the list of persons to receive short-form notices by mail or e-mail was derived from lists of (1) DHEPDS class members; (2) persons who had opted out of the DHEPDS; (3) persons who had filed short form joinders in the MDL; (4) real property owners identified in relation to the DHEPDS; and (5) persons who had complied with PTO 60.[8] Consequently, the mailed short-form notice was not intended to reach class members such as petitioners who had been involuntarily excluded from the DHEPDS, had not been actual plaintiffs in the MDL, and had not complied with PTO 60 because they had not received notice of the order or its requirements.

A number of New Class members who were represented by counsel filed objections to the PTO 60 compliance requirement, which the district court addressed in conjunction with objections to the Settlement Agreements considered at the fairness hearing on October 20, 2016. While the district court approved the other parts of the distribution model in its order of February 15, 2017, the court expressly declined to rule on the objections to the PTO 60 compliance requirement, instead holding that such

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[8] ROA. 18-30243.4814-4818.

objections were premature because claims determinations could be appealed to the district court, so that claimants who were denied compensation based on that requirement could raise the objections "after claims determinations are concluded."[9]

Petitioners learned of the PTO 60 compliance requirement when they obtained claim forms in preparation for filing claims, which were filed on or shortly before the filing deadline of December 15, 2016. There was no evidence below that petitioners obtained such actual knowledge prior to the deadline for responding to the show-cause order. After petitioners' claims were denied by the claims administrator, they sought review by the district court pursuant to its holding that the PTO 60 compliance requirement could be challenged "after claims determinations are concluded" through appeals of their claims determinations to the district court, as well as by a motion under Rule 60(b) of the Federal Rules of Civil

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[9] The district court stated:

> The majority of objectors direct their concerns to the determinations under the New Class Distribution Model rather than the underlying New Class Settlement or the Distribution Model itself. Because the New Class Claims Administrator's determinations can be appealed to this Court, the objections are premature. . . . Seventy-four objectors who failed to comply with PTO 60 now object to the impact this failure will have on their New Class distribution. . . . The Court makes no decision on the propriety of the Claims Administrator's interpretation. This objection is most properly considered in an appeal to this Court after claim determinations are concluded.

ROA.18-30243.5276.

Procedure. The court, by the magistrate judge, addressed the claims appeals in two separate decisions, involving 63 and five fishermen respectively. App. 26-43; 44-46. The magistrate judge affirmed the claims determinations, rejecting the challenge to the PTO 60 compliance requirement as applied to the petitioners. The district judge refused review of the magistrate judge's ruling. App. 48-49. The district court summarily denied petitioners' Rule 60(b) motion without opinion or explanation. App. 47.

Petitioners appealed to the court of appeals from each of the district court's orders, and the appeals were consolidated. The court of appeals affirmed the judgments of the district court in each case. With respect to the petitioners' procedural due process argument, the court held that, notwithstanding the undisputed lack of notice of PTO 60 and the claims administrator's PTO 60 compliance requirement until after the deadline for compliance, petitioners were not denied due process because, the court said, they had opportunities to seek relief from the consequences of not complying with PTO 60 after they were on notice of the PTO 60 compliance requirement but had not taken advantage of them. The court imputed to the petitioners knowledge of the compliance requirement as of the filing of the distribution model on June 13, 2016 and reasoned that, since that date was before the June 28, 2016 deadline to respond to the show-cause order and the September 26, 2016 date to file objections to the Settlement Agreements, petitioners could and should have used the former vehicle to ask the district court to permit them to comply with PTO 60 out of time or used the latter proceeding to object to the PTO 60

compliance requirement. Neither the appellees nor the claims administrator, appearing as amicus curiae, had asserted this non-pursuit of such opportunities as a ground for rejecting petitioners' due process argument; rather, the court of appeals raised this as an issue for the first time at oral argument.

REASONS FOR ALLOWANCE OF THE WRIT

The Court should grant the writ to ensure adherence to its decisions regarding the means of notice required to satisfy due process, which the court of appeals failed to apply, to enforce the universal premise, grounded in principles of due process and fundamental fairness, that an appellate court may not base its decision on grounds not raised until oral argument, and to correct a fundamental denial of substantive due process to class members in a class action settlement.

1. The court of appeals erred in holding, contrary to this Court's decisions in *Eisen v. Carlisle & Jacquelin*, *Schroeder v. City of New York*, and *Mullane v. Central Hanover Bank & Trust Co.*, that petitioners were on notice of the PTO 60 compliance requirement prior to the deadline for responding to the district court's show-cause order even though no individual notice of the requirement was given.

The court of appeals did not hold that the petitioners received adequate notice of PTO 60 before the May 2, 2016 deadline for compliance had passed. Neither the appellees nor amicus below defended the

notice of PTO 60 with respect to these claimants. The district court had held in another context that the means of notice of PTO 60 were not adequate with respect to a party who, like the petitioners, was unrepresented at the time PTO 60 was issued and had not participated in the DHEPDS. *See In re Oil Spill by Oil Rig "Deepwater Horizon"*, 2016 WL 10586172, *5 (E.D. La. Dec. 16, 2016). Petitioners obviously did not have notice that PTO 60 compliance was a requirement for compensation under the Settlement Agreements prior to the compliance deadline, because that requirement was not promulgated until after the deadline.

Once the Settlement Agreements were executed, petitioners had a property interest in their share of the settlement funds. *See Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972) (contractual rights are property within the meaning of the due process clause); *Charles v. Baesler*, 910 F.2d 1349, 1352 (6th Cir. 1990) (same); *Douglas v. New York State Adirondack Park Agency*, 895 F. Supp. 2d 321, 384 (N.D.N.Y. 2012) (noting property interest from settlement agreement), *modified on reconsideration on other grounds*, 2012 WL 5364344 (N.D.N.Y. Oct. 30, 2012).

Where the government prescribes actions that a person must take in order to preserve or protect a property interest, due process requires that such person receive notice of the requirements and a reasonable opportunity to comply. *United States v. Locke*, 471 U.S. 84, 106 n.15 (1985); *Hodel v. Irving*, 481 U.S. 704, 730 (1987) (Stevens, J., concurring in the judgment); *García-Rubiera v. Fortuño*, 727 F.3d 102,

110 (1st Cir. 2013). It is manifest from the circumstances noted above that the petitioners did not receive due process—notice and opportunity to comply—because they did not receive notice of the need for action before the opportunity to comply was barred. Consequently, the denial of their claims based on PTO 60 violated their due process rights.

The court of appeals nevertheless held that petitioners were not denied due process despite such lack of notice prior to the deadline for compliance because, the court concluded, the petitioners had received notice of the PTO 60 compliance requirement in time to file a response to the district court's show-cause order of June 7, 2016 and thereby attempt to persuade the district court to allow them to file individual complaints even though the deadline had passed, or to utilize other opportunities to seek relief from the consequences of non-compliance. App. 21-22. The court imputed notice to petitioners of the PTO compliance requirement in the distribution model as of the date the distribution model was filed (June 13, 2016) and held that this left petitioners with approximately two weeks before the district court's deadline for filing a response to the show-cause order (June 28, 2016).[10] The court held that because

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[10] The court of appeals mistakenly assumed that petitioners had conceded that they were on notice of the PTO 60 compliance requirement as of the filing of the distribution model for approval. App. 21-22. Petitioners made no such concession in their briefing or during oral argument, and neither the appellees nor amicus asserted such a concession. To the contrary, petitioners argued in their brief that they did not even receive adequate notice of the PTO 60 compliance requirement through the short-form notices

petitioners did not seek relief through the show-cause order, they were foreclosed from obtaining relief based on violation of their due process rights. App. 22.

Beyond the apparent lack of precedent for the legal proposition that a person denied adequate notice of a deadline must, as one of the judges on the panel put it, throw himself on the mercy of the court and seek relief from the consequences of missing the deadline, the reasoning of the court of appeals that the petitioners should have responded to the show-cause order is fundamentally flawed based on this Court's precedents concerning the manner of notice required by due process. In order for petitioners properly to be charged with failing to avail themselves of the show-cause order or other opportunity for relief, it would have to be the

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(which were mailed after the distribution model was filed) or the long-form notice posted on the settlement website; they asserted that "the notices of settlement . . . did not inform New Class members that they would be required to file individual suits under PTO 60 to avoid having their agreed-upon entitlement to compensation snuffed out" and that "the notices of settlement told them in effect the exact opposite: that they would have to do nothing other than file a claim with information to verify that they met the definition of the New Class in order to receive compensation." The issue addressed in the briefs was the adequacy of notice of PTO 60 and the PTO 60 compliance requirement regarding the settlements prior to the deadline for compliance and the due process implications of such lack of notice. The precise later point at which petitioners properly could have been charged with notice of PTO 60 or the compliance requirement was not an issue until the court of appeals made it an issue during oral argument, and thus petitioners were not afforded a meaningful opportunity prior to the court's ruling to address the issue of whether the mere filing of the distribution model gave petitioners constitutionally adequate notice.

case that they were given adequate notice of the distribution model's PTO 60 compliance requirement prior to the pertinent deadline and that they were given adequate notice of the opportunity for relief. As explained below, neither of those conditions was present.

First, the court's reasoning is based on the erroneous conclusion that the filing of the distribution model was sufficient notice to the petitioners of the PTO 60 compliance requirement contained therein. Under Rule 23, class members are entitled to "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). This provision states the due process standard. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974). Due process requires that the means employed to give notice must be means that a person who really wanted to inform the absent class member would use if practicable. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). The means must be "reasonably certain to inform those affected." *Id*. Thus, where individual direct notice can be readily given, notice by publication or other non-direct means does not satisfy the requirements of due process. *Eisen*, 417 U.S. at 175; *Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962). In such case, direct individual notice is "an unambiguous requirement." *Eisen*, 417 U.S. at 176.

As noted above, a "short-form" notice was mailed to class members and was the only individual notice given to them about anything related to the settlements.

However, as noted above, the record reflects that there was no purpose to send that notice to New Class members who had not complied with PTO 60 for whatever reason. The record also reflects no determination that it would have been impracticable to identify and give individual notice to menhaden fishermen as a group, particularly since they constituted the bulk of the commercial fishermen subclass of the New Class, and the claims administrator's amicus brief admits knowledge of the identities of the companies that processed most of the menhaden catch, from whom a list of their fishermen-suppliers readily could have been obtained.

Furthermore, even if petitioners had received the short-form notice or seen it in a newspaper, the notice did not mention the distribution model or the PTO 60 compliance requirement for compensation; rather, it told New Class members that the only thing they had to do to receive compensation was to file a timely claim. It would have been a simple matter to include the PTO 60 compliance requirement in the short-form notice. The distribution model stated, for example, "For those claimants who were not included within the DHEPDS and are allowed to file a new claim under this Distribution Model, their claims will be assigned no value unless they adequately preserved their right to pursue damages by complying with the MDL-2179 Pretrial Order 60." That brief statement could easily have been placed in the short-form notice that was mailed to New Class members, but it was not.

To be constitutionally adequate, a class-action notice must describe a class member's rights in the

action. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Since compliance with PTO 60 by filing an individual lawsuit was declared in the distribution model to be a requirement to receive compensation under the Settlement Agreements, then the short-form notice, which did not disclose that requirement, did not accurately describe the petitioners' rights with respect to the settlements and thus did not satisfy the requirements of due process. The mere filing of the distribution model and posting of it on the settlement website was not the best notice of the PTO 60 compliance requirement that was practicable and was not reasonably certain to give actual notice of the requirement to the petitioners prior to the deadline to respond to the show-cause order, which was only two weeks after the distribution model was filed. Therefore, contrary to the holding of the court of appeals, the petitioners did not have constitutionally adequate notice of the PTO 60 compliance requirement in time to be able to seek relief under the show-cause order.

In short, due process required that the petitioners be given adequate notice of the PTO 60 compliance requirement in time to comply with that requirement—as the court of appeals apparently acknowledged—but excluding petitioners from individual notice, or in any event omitting the compliance requirement from the short-form notice and instead relying on filing the proposed distribution model and posting it on the settlement website, did not give adequate notice to petitioners in time to comply with PTO 60 or to respond to the show-cause order, even under the court's view that there was a post-deadline opportunity for compliance. Accordingly, the

holding of the court of appeals, which was based on the view that non-individual notice was sufficient even though individual notice would have been better notice and was practicable, was inconsistent with the holdings of this Court in *Eisen*, *Schroeder*, and *Mullane*.

Second, even if mere constructive notice of the PTO 60 compliance requirement could have satisfied due process under the circumstances, the court's reasoning is nonetheless erroneous with respect to when petitioners properly could be deemed to have received constructive notice of the pertinent provisions of the distribution model. The court of appeals imputed to the petitioners notice of the PTO 60 compliance requirement as of the date it was filed with the district court for approval, June 13, 2016. But the mere filing of the distribution model for approval and posting it on the settlement website did not give constructive notice of the PTO 60 compliance requirement to these unrepresented absent class members, any more than the filing of PTO 60 and posting notice of it on the district court's website gave adequate notice of PTO 60 in the first place.

As noted, the short-form notice did not mention the distribution model, so the petitioners would not have had constructive notice of the distribution model's provisions merely by receiving the short-form notice. The PTO 60 compliance requirement was not even placed in the long-form notice, which a class member could eventually have found when he or she went to the settlement website "for more information" as suggested by the short-form notice. The short-form notice conveyed no urgency of consulting the website for more

information, since the claim-submission deadline was not until December 15, 2016, approximately six months away. The long-form notice did mention the distribution model, but the only substantive discussion thereof was to indicate that class members could consult the distribution model to find out how much their payment would be. That notice likewise suggested no urgency in consulting the distribution model and contained not even a hint that the distribution model might contain additional eligibility requirements or a provision that would retroactively exclude a class member from participation in the settlements. This is particularly significant given the fact that the long-form notice set out the eligibility requirements for commercial fishermen, and those stated requirements did not include having a pending individual lawsuit in the MDL. App. 97-99. In short, nothing in the means of notice supports a conclusion that the petitioners knew or should have known of the PTO 60 compliance requirement before the June 28, 2016 deadline for responding to the show-cause order.

Third, the reasoning of the court of appeals begs the question of whether petitioners had notice of the show-cause order even if they had adequate notice of the PTO 60 compliance requirement in time to seek relief under the order. Notice of the PTO 60 compliance requirement could not reasonably be deemed an impetus to action unless petitioners were also on notice of some possibility to avoid the consequences of non-compliance by responding to the show-cause order.

The mere filing of the show-cause order was not adequate notice to the petitioners, who were still

unrepresented and had never been actual parties to any litigation in the MDL. As noted above, the district court held that the mere filing of PTO 60 and posting notice on the court's website was not adequate notice of the order to unrepresented persons who were not actual parties and did not file an opt-out from the DHEPDS, and the show-cause order specified means of notice the same as or similar to those for PTO 60. Thus, petitioners were no more on notice of the show-cause order from such means of notice than they were on notice of PTO 60 from the means of notice utilized with respect to that order. Notice of the show-cause order was not given by the notices of settlement or the distribution model. The notices of settlement did not mention the PTO 60 compliance requirement, so they obviously did not mention the show-cause order as a potential basis for relief from that requirement. As shown above, petitioners did not have adequate notice of the distribution model prior to the deadline for responding to the show-cause order, and, in any event, the distribution model, like the settlement notices, did not mention the show-cause order and suggested no possibility for avoidance of the consequences of not complying with PTO 60. Rather, the distribution model presented the exclusion from compensation because of not having complied with PTO 60 as a *fait accompli* and did not indicate any possibility for relief from the consequences of non-compliance.

In *Goss v. Lopez*, 419 U.S. 565 (1975), this Court said, "The fundamental requisite of due process of law is the opportunity to be heard, . . . a right that has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . .

contest." *Id.* at 579 (internal quotation marks and citation omitted). As shown above, petitioners were not adequately informed that the show-cause procedure was pending and thus had no meaningful opportunity to contest the enforcement of the PTO 60 deadline against them through a response to that order. In short, the court of appeals penalized the petitioners for not responding to an order of which they had not been given constitutionally adequate notice, which is a manifest violation of their due process rights.

The court's holding that petitioners had other opportunities besides the show-cause order to object to the PTO 60 compliance requirement is likewise fraught with error, principally because the court's reasoning is also based on the erroneous view that the mere filing and posting of the distribution model gave the petitioners adequate notice of the PTO 60 compliance requirement as of June 13, 2016 and thus prior to the deadline for raising objections to the distribution model. Absent notice of that requirement, there was no notice that there was anything to which petitioners would need to object.

In addition, petitioners did not receive adequate notice of the opportunity and deadline to object to the distribution model. Although the mailed short-form notice disclosed the right to object to the settlement agreements, it did not disclose the existence of a distribution model or any opportunity to object to its provisions, even though that could also have been mentioned. Therefore, notice regarding potential objections to the distribution model was not adequate under this Court's precedents. Consequently,

penalizing petitioners for not objecting, as the court of appeals did, is inconsistent with due process.

Beyond the inadequacy of notice, the reasoning of the court of appeals regarding the opportunity to object to the settlement agreements disregarded the fact that the district court determined that the fairness-hearing procedure was not the proper avenue for objecting to the PTO 60 compliance requirement. As noted above, some New Class members sought to present an objection to the PTO 60 compliance requirement, and the district court held that the objection was premature and that such objections should be presented to the court through appeals from individual claims determinations. The petitioners presented their objection in the manner directed by the district court. Had petitioners presented their objections as an objection to the settlement agreements for consideration at the fairness hearing, they likewise would have been instructed that their objections were premature. In other words, such an effort would have been an exercise in futility. Similarly, petitioners could not have challenged the compliance requirement by appealing from the order approving the settlements and the distribution model, because the district court had not yet decided that issue and it was not ripe for appeal. A party cannot be deemed to have waived a position by refraining from action where such action would have been futile. *See NLRB v. Robin American Corp.*, 667 F.2d 1170, 1171 (5th Cir. 1982). Therefore, the court of appeals clearly erred in holding that petitioners forfeited their due process argument by not taking action that would have been futile and was not a proper means asserting their objection and for

instead presenting their due process argument in precisely the manner that the district court stated was the only proper manner.

In sum, by the district court's own reasoning and the apparent acknowledgment of the court of appeals, the petitioners did not have adequate notice of PTO 60's directive to file individual lawsuits in the MDL prior to the deadline for compliance. Since the requirement of compliance with PTO 60 as a condition for compensation under the Settlement Agreements was not promulgated by the claims administrator until after the compliance deadline, petitioners obviously did not have adequate notice of that condition in time to comply. Since the short-form notice was not calculated to reach petitioners, and the PTO 60 compliance requirement was not set out in the short-form notice in any event, petitioners were not given, prior to the deadline to respond to the show-cause order, the individual or otherwise best-practicable notice of that requirement as mandated by the decisions of this Court.

For the foregoing reasons, the purported notice relied on by the court of appeals was not the best notice that was practicable under the circumstances. Since the reasoning and decision of the court of appeals was thus contrary to this Court's precedents, including *Eisen*, *Schroeder*, and *Mullane*, the Court should grant the writ to ensure proper application of its precedents regarding the means of notice required to satisfy due process.

2. The court of appeals denied due process or abused its discretion in rejecting petitioners' due process argument on grounds not asserted by appellees or amicus but raised by the court *sua sponte* at oral argument.

As noted above, the ground relied on by the court of appeals to reject petitioners' argument that application of the PTO 60 compliance requirement violated their due process rights—that petitioners had received notice of PTO 60 compliance requirement in time to seek relief from its consequences before their claims were denied—was not raised by the appellees or amicus in their briefing but was raised for the first time by the court itself during oral argument. The court of appeals thus effectively violated its own rule that an issue raised for the first time at oral argument will not be considered by the court. *See*, *e.g.*, *Arsement v. Spinnaker Exploration Co.*, 400 F.3d 238, 247 (5th Cir. 2005). That rule is universal and well-settled, reflecting "the premise of our adversarial system . . . that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

The rule is rooted in considerations of due process and fairness. Judge Posner stated that "it would not be quite cricket" for an appellate court to decide a case on a ground raised for the first time at oral argument because of the absence of notice to the other party that the matter was at issue. *Principal Mutual Life Ins. Co. v. Charter Barclay Hospital, Inc.*, 81 F.3d 53, 56 (7th

Cir. 1996). The Florida Supreme Court noted that the rule is founded on "[b]asic principles of due process." *Bainter v. League of Women Voters*, 150 So. 3d 1115, 1126 (Fla. 2014). Also invoking due process, by reference to its elements (notice and meaningful opportunity to be heard), the Hawaii Court of Appeals said that the purpose of the rule was to ensure that the opposing party had notice of the issue and that introducing an issue at oral argument deprives the opposing party of the opportunity to respond. *State v. Liulama*, 845 P.2d 1194, 1204 (Haw. Ct. App. 1992). Similarly, the North Dakota Supreme Court said that only issues that were briefed by the parties could be considered, so as to give the opposing party "a fair and adequate opportunity for response." *Roise v. Kurtz*, 587 N.W.2d 573, 575 (N.D. 1998). The court said that the rule was based on reasons similar to the reason for the rule that an appellate court will not consider issues raised for the first time on appeal—because it would be "fundamentally unfair" to do so; in other words, both rules are based on principles of fundamental fairness. *Id.* at 574-75. *Cf. Allen v. Friel*, 194 P.3d 903, 907 (Utah 2008) (analogous rule that appellant may not raise new issue in reply brief "is rooted in considerations of fairness").

Furthermore, it is well settled that a party waives an argument or issue not advanced in its brief to the court but raised only at oral argument, and that is so to the same extent, if not to an even greater degree, when the new issue is raised at oral argument not by the party but by the court. *See Lear v. Cowan*, 220 F.3d 825, 828-829 (7th Cir. 2000) (stating that issue raised at oral argument by one of the judges was "thoroughly

waived"). Even if the court had discretion under certain circumstances to consider an unasserted and waived issue *sua sponte*, it would plainly be an abuse of that discretion to do so without giving the opposing party any meaningful opportunity to be heard on the matter before ruling, such as by ordering supplemental briefing prior to oral argument. In *Thompson v. Dallas City Attorney's Office*, 913 F.3d 464, 471 (5th Cir. 2019), the court held that the district court did not deny due process or abuse its discretion by considering an argument raised in a reply brief in support of a motion to dismiss because the new argument resulted from a court decision that was issued after the movant filed the principal brief and because the court gave the non-movant "an adequate opportunity to respond prior to a ruling." The converse is plainly implied: a court does deny due process or abuse its discretion in such a circumstance if it fails to give the opposing party an adequate opportunity to respond before ruling. Thus, in *Gillaspy v. Dallas Independent School Dist.*, 278 Fed. Appx. 307, 315 (5th Cir. 2008), the court reversed a summary judgment where the dispositive argument was first advanced in the movant's reply brief, and there was no indication that the district court afforded the non-movant an opportunity to address the new argument before the court ruled. Therefore, the action of the court of appeals was a violation of due process as well as being sufficiently unwarranted and unfair to constitute an abuse of discretion, and it so far departed from the accepted and usual course of proceedings as to warrant the exercise of this Court's supervisory power.

3. Denial of compensation to petitioners based on the PTO 60 compliance requirement violated petitioners' substantive due process rights because it was arbitrary and capricious.

Deprivation of property by action that is arbitrary or lacks a rational basis also violates due process even where there is notice and opportunity to be heard. *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Simi Investment Co. v. Harris County*, 236 F.3d 240, 249 (5th Cir. 2000). The denial of compensation based on the PTO 60 compliance requirement was arbitrary and irrational in at least three respects.

First, the insistence on an ongoing lawsuit by New Class members pursuant to PTO 60 at the time claims were submitted was arbitrary because PTO 60 was not issued until several months after the Settlement Agreements were executed and logically should have had no effect on claims that had already been settled at the time it was issued. It is undisputed that at the time the Settlement Agreements were entered into, petitioners had viable causes of action for compensatory damages against Halliburton and Transocean and satisfied all the elements of maritime law standing and punitive damages recovery subsequently invoked by the claims administrator as requirements for compensation. The settlement class was defined in the Settlement Agreements, and membership in the settlement class and consequent entitlement to compensation were fixed when the agreements were executed. Neither the appellees nor amicus asserted, and the court of appeals did not hold,

that petitioners did not have a property right subject to due process protections at that point. Since petitioners met all the requirements for compensation at the time the settlement agreements were entered into, and would have been compensated but for the subsequent issuance of PTO 60 and the claims administrator's seizing on that event as relevant to a case that had been settled months before the order was issued, it was arbitrary and capricious for the claims administrator to insist on, and for the court to enforce, post-settlement PTO 60 compliance as a condition for compensation. Under the Settlement Agreements, the claims administrator was to come up with a plan to pay the class members; instead, he came up with a plan that denied recovery to persons who clearly were class members under the settlement-class definition. Neither the appellees nor amicus pointed out any provision of the Settlement Agreements that compelled the claims administrator to impose the PTO 60 compliance requirement. Thus, the claims administrator's decision to do so was arbitrary and capricious. Since the petitioners had a property interest in a share of the settlement funds as New Class members who met any compensatory-damages-claim requirements for compensation at the time the Settlement Agreements were reached, there is no justification for the actions of the claims administrator which took that property interest away from petitioners.

Second, even if it was reasonable for the claims administrator to examine a claimant's inclusion in the Settlement Agreements as of the time claims were filed rather than at the time the Settlement Agreements were executed, the claims administrator's denial of

petitioners' claims was still arbitrary because, at the time petitioners submitted their claims, they had viable pending claims for compensatory damages as class members in the *Bruhmuller* class action. The claims administrator, appearing before the court of appeals as amicus curiae, admitted that, in denying compensation to New Class members such as petitioners because of non-compliance with PTO 60, the claims administrator focused only on the class action allegations in the B1 master complaint, reasoning that the dismissal of the B1 master complaint left petitioners without a pending cause of action for compensatory damages at the time they filed their settlement claims, a deficiency that only filing individual lawsuits pursuant to PTO 60 could have avoided. The claims administrator's brief stated:

> With the dismissal of the B1 Master Complaint, Appellants had no pending complaint for compensatory damages on file in the MDL to correspond with their claim in the settlement program for punitive damages. And, because they took no other action to preserve their rights by compliance with PTO 60, Appellants had no basis to claim or recover compensatory damages in the MDL at the time their claims were submitted to the New Punitive Damages Settlement Program.

However, because the *Bruhmuller* class action was not dismissed until December 16, 2016, after petitioners had filed their claims, petitioners did have pending causes of action at the time they filed their claims by virtue of being members of the putative class in the *Bruhmuller* case. Since the claims administrator

conceded that possession of a pending cause of action at the time of claim submission was the ultimate criterion for eligibility for New Class members, the denial of compensation to petitioners, despite the fact that they had pending causes of action at that time through the still-pending *Bruhmuller* case, was arbitrary and capricious.

Third, the claims administrator's denial of compensation to petitioners based on the asserted lack of a viable compensatory damages claim was arbitrary and capricious because he did not impose such a strict requirement of trial-type proof of maritime law requirements on other class members who similarly failed to meet the requirements for recovery of punitive damages under maritime law. The Settlement Agreements provided for compensation to the DHEPDS class even though members of that class could not have satisfied the requirements to recover punitive damages from Halliburton and Transocean at trial. Under maritime law, to recover punitive damages from a particular defendant, a plaintiff must have recovered compensatory damages *from that defendant*. *See* App. 13 ("Under maritime law, a plaintiff's recovery of punitive damages is tied to his or her *underlying* compensatory damages claim") (emphasis added) (citing *Exxon Shipping Co. v Baker*, 554 U.S. 471, 506–07 (2008)). DHEPDS participants had received settlement funds from BP, not from Halliburton and Transocean, who were not parties to the DHEPDS, and voluntarily dismissed their suits. Since those persons could not show that they had recovered compensatory damages from Halliburton or Transocean, and they had no pending suits against those parties, they could not

satisfy the requirement of having recovered or having the potential to recover compensatory damages from the party from whom they sought punitive damages.

In short, the claims administrator did not apply his strict maritime law punitive damages standards to the DHEPDS class. This is as it should be, since the Settlement Agreements included those persons in the definition of the settlement class and set out no requirements for recovery other than class membership. But by the same token, the petitioners were also included in the class definition, and it was the height of arbitrariness for the claims administrator to select only persons lacking pending individual lawsuits to which to apply a strict trial-type proof requirement for compensation while ignoring the maritime-law deficiencies of other class members. The fact that the Settlement Agreements included DHEPDS members in the settlement demolishes the assumption that the Settlement Agreements required a strict maritime law compensatory damages component for a class member to be eligible for compensation and thus renders the claims administrator's insistence on PTO 60 compliance for the petitioners, which was based on that very assumption, arbitrary and capricious. There is no rational basis for the singling out and disparate treatment of the petitioners with regard to maritime law standing requirements, and the claims administrator's arbitrary action in denying compensation to petitioners thus violated petitioners' substantive due process rights. Accordingly, the Court should grant the writ in order to give clear guidance on the limits of a claims administrator's ability to impose

additional or disparate requirements for claim eligibility when developing a plan for carrying out a class action settlement agreement.

CONCLUSION

Because the court of appeals did not follow this Court's decisions in *Eisen v. Carlisle & Jacquelin* and related cases and also did not afford petitioners a meaningful opportunity to be heard on the issue that was the basis for the court's decision, and because the exclusion of the petitioners from recovery under the settlements was otherwise so egregiously inconsistent with due process and fundamental fairness, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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