No. 23-1063

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

BLUE CROSS BLUE SHIELD ASSOCIATION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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May 29, 2024

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QUESTION PRESENTED

After nearly a decade of litigation, years of settlement negotiations aided by multiple mediators, and two separate multi-day fairness hearings, the district court presiding over the Blue Cross Blue Shield Antitrust MDL No. 2406 ("MDL") approved a $2.67 billion class action settlement that includes a release for past and future claims based on an identical factual predicate to the claims settled in the MDL. This is a permissible and common release that is routinely approved by federal courts around the country. Consistent with that longstanding practice, Chief Judge William Pryor wrote for a unanimous panel of the Eleventh Circuit affirming the district court's approval of the settlement and expressly upholding the release. Shortly thereafter, the Eleventh Circuit denied rehearing en banc without a single judge calling for a poll. The restated question presented is:

Does a district court abuse its discretion in approving a class action settlement that releases future antitrust claims that arise from an identical factual predicate as the underlying, settled litigation?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

1. Defendant-Respondent Blue Cross Blue Shield Association has no parent corporation and no publicly held corporation owns 10% or more of its stock

2. Defendant-Respondent Blue Cross and Blue Shield of Alabama has no parent corporation and no publicly held corporation owns 10% or more of its stock.

3. Defendant-Respondent Blue Cross and Blue Shield of Arizona, Inc. is a wholly owned subsidiary of Prosano, Inc. and no publicly held corporation owns 10% or more of its stock.

4. Defendant-Respondent Blue Cross of Idaho Health Service, Inc., is wholly owned by its parent company, Gemstone Holdings, Inc., which is a mutual insurance holding company. No publicly held corporation owns 10% or more of its stock.

5. Defendant-Respondent Blue Cross and Blue Shield of Kansas, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

6. Defendant-Respondent Blue Cross and Blue Shield of Kansas City has no parent corporation and no publicly held corporation owns 10% or more of its stock.

7. Defendant-Respondent Blue Cross and Blue Shield of Massachusetts, Inc. has no parent

corporation and no publicly held corporation owns 10% or more of its stock.

8. Defendant-Respondent Blue Cross Blue Shield of Michigan has no parent corporation and no publicly held corporation owns 10% or more of its stock.

9. Defendant-Respondent Blue Cross & Blue Shield of Mississippi is a Mutual Insurance Company. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

10. Defendant-Respondent Blue Cross and Blue Shield of Nebraska is wholly owned by GoodLife Solutions, Inc., which is wholly owned by GoodLife Partners, Inc., a mutual insurance holding company. GoodLife Partners, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

11. Defendant-Respondent Blue Cross and Blue Shield of North Carolina has no parent corporation and no publicly held corporation owns 10% or more of its stock.

12. Defendant-Respondent Blue Cross Blue Shield of North Dakota, formerly known as Noridian Mutual Insurance Company, is wholly owned by HealthyDakota Mutual Holdings. HealthyDakota Mutual Holdings has no parent corporation and no publicly held corporation owns 10% or more of its stock.

13. Defendant-Respondent Blue Cross & Blue Shield of Rhode Island has no parent corporation and

no publicly held corporation owns 10% or more of its stock.

14. Defendant-Respondent Blue Cross and Blue Shield of South Carolina has no parent corporation and no publicly held corporation owns 10% or more of its stock.

15. Defendant-Respondent Blue Cross Blue Shield of Tennessee, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

16. Defendant-Respondent Blue Cross and Blue Shield of Vermont's parent company is Blue Cross and Blue Shield of Michigan. No publicly held corporation owns 10% or more of its stock.

17. Defendant-Respondent Blue Cross Blue Shield of Wyoming has no parent corporation and no publicly held corporation owns 10% or more of its stock.

18. Defendant-Respondent California Physicians' Service, d/b/a Blue Shield of California has no parent corporation and no publicly held corporation owns 10% or more of its stock.

19. Defendant-Respondent Cambia Health Solutions, Inc., formerly known as The Regence Group, Inc., has no parent corporation and no publicly held corporation owns 10% or more of its stock.

20. Defendants-Respondents Regence BlueShield; Regence BlueCross BlueShield of Oregon; and Regence BlueCross BlueShield of Utah, each have

as its sole member, Regence Insurance Holding Corporation, which has Defendant-Respondent Cambia Health Solutions, Inc. as the parent of the holding company system. Cambia Health Solutions, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

21. Defendant-Respondent Regence BlueShield of Idaho, Inc. is managed by Defendant-Respondent Cambia Health Solutions, Inc. under an amended and restated management and administrative services agreement. Cambia Health Solutions, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock, and Regence BlueShield of Idaho, Inc., has no parent corporation and no publicly held corporation owns 10% or more of its stock.

22. Defendant-Respondent Capital Blue Cross has no parent corporation and no publicly held corporation owns 10% or more of its stock.

23. Defendant-Respondent CareFirst, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock. Defendants-Respondents Group Hospitalization and Medical Services, Inc. and CareFirst of Maryland, Inc. are wholly owned subsidiaries of CareFirst, Inc. and no publicly held corporation owns 10% or more of their stock, respectively. Group Hospitalization and Medical Services, Inc. and CareFirst of Maryland, Inc., through their subsidiary CareFirst Holdings, LLC, and its wholly owned subsidiary, CareFirst Consolidated, Inc., own in virtually equal shares CareFirst BlueChoice, Inc. No publicly held

corporation owns 10% or more of CareFirst BlueChoice, Inc.'s stock.

24. Defendant-Respondent Elevance Health, Inc., formerly known as Anthem, Inc., has no parent corporation and no publicly held corporation owns 10% or more of its stock.

25. Defendant-Respondent Anthem Blue Cross Life and Health Insurance Company and Defendant-Respondent Blue Cross of California, d/b/a Anthem Blue Cross are wholly owned subsidiaries of WellPoint California Services, Inc., which is a wholly owned subsidiary of Anthem Holding Corp., which is a wholly owned subsidiary of Defendant-Respondent Elevance Health, Inc. Elevance Health, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

26. Defendants-Respondents Anthem Health Plans, Inc., d/b/a Anthem Blue Cross and Blue Shield; Anthem Health Plans of Kentucky, Inc., d/b/a Anthem Blue Cross and Blue Shield; Anthem Health Plans of Maine, Inc., d/b/a Anthem Blue Cross and Blue Shield; Anthem Health Plans of New Hampshire, Inc., d/b/a Anthem Blue Cross and Blue Shield; Community Insurance Company, d/b/a Anthem Blue Cross and Blue Shield; and Rocky Mountain Hospital and Medical Service, Inc., d/b/a Anthem Blue Cross and Blue Shield and d/b/a Anthem Blue Cross and Blue Shield are wholly owned subsidiaries of ATH Holding Company, LLC, which is a wholly owned subsidiary of Defendant-Respondent Elevance Health, Inc. Elevance Health, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

27. Defendant-Respondent Anthem Health Plans of Virginia, Inc., d/b/a Anthem Blue Cross and Blue Shield is a wholly owned subsidiary of Anthem Southeast, Inc., which is a wholly owned subsidiary of Defendant-Respondent Elevance Health, Inc. Elevance Health, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

28. Defendant-Respondent Anthem Insurance Companies, Inc., d/b/a Anthem Blue Cross and Blue Shield is a wholly owned subsidiary of Defendant-Respondent Elevance Health, Inc. Elevance Health, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

29. Blue Cross and Blue Shield of Georgia, Inc. merged with and into Blue Cross Blue Shield Healthcare Plan of Georgia, Inc. Defendant-Respondent Blue Cross Blue Shield Healthcare Plan of Georgia, Inc. is a wholly owned subsidiary of Cerulean Companies, Inc., which is a wholly owned subsidiary of Anthem Holding Corp., which is a wholly owned subsidiary of Defendant-Respondent Elevance Health, Inc. Elevance Health, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

30. Defendant-Respondent Blue Cross Blue Shield of Wisconsin, d/b/a Anthem Blue Cross and Blue Shield is a wholly owned subsidiary of Crossroads Acquisition Corp., which is a wholly owned subsidiary of Anthem Holding Corp., which is a wholly owned subsidiary of Defendant-Respondent Elevance Health, Inc. Elevance Health, Inc. has no parent corporation and no publicly held corporation

owns 10% or more of its stock. Blue Cross Blue Shield of Wisconsin is also the parent company of Compcare Health Services Insurance Corporation.

31. Defendant-Respondent Anthem HealthChoice Assurance, Inc. fka Empire HealthChoice Assurance, Inc. d/b/a Anthem Blue Cross and as Anthem Blue Cross and Blue Shield is a wholly owned subsidiary of WellPoint Holding, Corp., which is a wholly owned subsidiary of Defendant-Respondent Elevance Health, Inc. Elevance Health, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

32. Defendant-Respondent HMO Missouri, Inc., d/b/a Anthem Blue Cross and Blue Shield is a wholly owned subsidiary of Defendant-Respondent RightCHOICE Managed Care, Inc. RightCHOICE Managed Care, Inc. is a wholly owned subsidiary of Anthem Holding Corp., which is a wholly owned subsidiary of Defendant-Respondent Elevance Health, Inc. Elevance Health, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock. RightCHOICE Managed Care, Inc. is also the parent company of Healthy Alliance Life Insurance Company.

33. Defendant-Respondent Excellus Health Plan, Inc., d/b/a Excellus BlueCross BlueShield is a subsidiary of Lifetime Healthcare, Inc., and no publicly held corporation owns 10% or more of its stock.

34. Defendant-Respondent GuideWell Mutual Holding Corporation has no parent corporation and no

publicly held corporation owns 10% or more of its stock.

35. Defendant-Respondent Blue Cross and Blue Shield of Florida, Inc. is a wholly owned subsidiary of GuideWell Mutual Holding Corporation and no publicly held corporation owns 10% or more of its stock.

36. Defendant-Respondent Hawaii Medical Service Association (Blue Cross and Blue Shield of Hawaii) has no parent corporation and no publicly held corporation owns 10% or more of its stock.

37. Defendant-Respondent Health Care Service Corporation is an Illinois Mutual Legal Reserve Company that operates through its divisions Blue Cross and Blue Shield of Illinois, Blue Cross and Blue Shield of Texas, Blue Cross and Blue Shield of New Mexico, Blue Cross and Blue Shield of Oklahoma and Blue Cross and Blue Shield of Montana. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

38. Defendants-Respondents Highmark BCBSD Inc.; Highmark West Virginia Inc.; and Highmark Western and Northeastern New York Inc. are controlled affiliates of Defendant-Respondent Highmark Inc., formerly known as Highmark Health Services. Highmark Inc.'s parent company is Defendant-Respondent Highmark Health, a Pennsylvania nonprofit organization. No publicly held corporation owns 10% or more of their stock, respectively.

39. Defendant-Respondent Horizon Healthcare Services, Inc., d/b/a/ Horizon Blue Cross Blue Shield of New Jersey (a private non-governmental party) is wholly owned by Horizon Operating Holdings, Inc., which is wholly owned by Horizon Mutual Holdings, Inc., a not-for-profit mutual insurance holding company. Horizon Mutual Holdings, Inc., has no parent corporation and no person owns 10% or more of its stock.

40. Defendant-Respondent Independence Hospital Indemnity Plan, Inc., formerly known as Independence Blue Cross, is a wholly owned subsidiary of Independence Blue Cross, LLC, which is a wholly owned subsidiary of AmeriHealth, Inc., which is a wholly owned subsidiary of Defendant-Respondent Independence Health Group, Inc. Independence Health Group, Inc., a Pennsylvania non-profit corporation, has no parent corporation and no publicly held corporation owns 10% or more of its stock.

41. Defendant-Respondent Louisiana Health Service & Indemnity Company, d/b/a Blue Cross and Blue Shield of Louisiana has no parent corporation and no publicly held corporation owns 10% or more of its stock.

42. Defendant-Respondent BCBSM, Inc., d/b/a Blue Cross Blue Shield of Minnesota, has as its parent corporation Defendant-Respondent Aware Integrated, Inc. Aware Integrated, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

43. Defendant-Respondent Caring for Montanans, Inc., formerly known as Blue Cross and Blue Shield of Montana, Inc., has no parent corporation and no publicly held corporation owns 10% or more of its stock.

44. Defendant-Respondent Premera and Premera Blue Cross, also d/b/a Premera Blue Cross Blue Shield of Alaska, has no parent corporation and no publicly held corporation owns 10% or more of its stock.

45. Defendant-Respondent Triple-S Salud, Inc. is a subsidiary of Triple-S Management Corporation and no publicly held corporation owns 10% or more of its stock.

46. Defendant-Respondent Triple-S Management Corporation is a wholly owned subsidiary of GuideWell Mutual Holding Corporation and no publicly held corporation owns 10% or more of its stock.

47. Defendant-Respondent USAble Mutual Insurance Company, d/b/a Arkansas Blue Cross and Blue Shield and as BlueAdvantage Administrators of Arkansas, has no parent corporation and no publicly held corporation owns 10% or more of its stock.

48. Defendant-Respondent Wellmark, Inc. (Wellmark Blue Cross and Blue Shield of Iowa) has no parent corporation and no publicly held corporation owns 10% or more of its stock.

49. Defendant-Respondent Wellmark of South Dakota, Inc. (Wellmark Blue Cross and Blue Shield of

South Dakota) is a wholly owned subsidiary of Wellmark, Inc. and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

After nearly a decade of litigation, the parties to the Subscriber track of the Blue Cross Blue Shield Antitrust MDL No. 2406 (the "MDL") reached a class action settlement ("Settlement") that required Defendants-Respondents to make a $2.67 billion monetary payment and significant changes to their businesses. The sole consideration Defendants-Respondents received in exchange was a standard release—one that bars past and future claims related to the factual predicates of the *very litigation* they just paid handsomely (in monetary and injunctive relief) to settle.

The district court carefully reviewed the Settlement and concluded that it was fair, reasonable and adequate, particularly given the substantial risk that the class action plaintiffs would recover nothing if they proceeded to trial. A unanimous panel of the Eleventh Circuit affirmed. In a thorough opinion written by Chief Judge William Pryor, the Eleventh Circuit applied established caselaw permitting exactly this type of release. As Chief Judge Pryor explained: "the release provision permissibly releases only claims based on an identical factual predicate to the underlying litigation" and comports with longstanding precedent from the Eleventh Circuit, its sister circuits and this Court. Pet App. 13a, 15a. The Eleventh Circuit subsequently denied rehearing en banc without a single judge calling for a poll. Pet.App. 174a.

Petitioner now asks this Court to grant certiorari to address whether such standard releases are lawful

and permissible. Certiorari is not warranted for several reasons.

First, there is no split in authority on the question implicated here: whether a district court, within its discretion under Federal Rule of Civil Procedure 23(e), may approve a class action settlement in which settlement class members release future claims that arise from an identical factual predicate as the claims underlying the settled litigation. The answer, from federal courts around this country, is unequivocally and consistently, "yes". The decision below is thus consistent with this Court's precedent, as well as every other federal court decision cited in the petition itself: while parties cannot release future claims for which the factual predicates have not yet occurred, they *can* release future claims that share an identical factual predicate with the settled litigation. The latter is precisely what the release provides here.

Second, the petition does not raise a question that warrants a grant of certiorari. Petitioner's argument that Supreme Court review is "urgently" needed is based not only on a mischaracterization of the law, as just described, but also on a mischaracterization of the release obtained by Defendants-Respondents. Contrary to Petitioner's suggestion, nothing about the Settlement's release creates "immunity" or threatens effective private enforcement of the antitrust laws; indeed, Defendants-Respondents are currently defending numerous opt-out cases challenging the very conduct that Petitioner asserts is immunized by the Settlement. Petitioner itself, as an opt-out from the damages settlement class, could likewise bring a lawsuit challenging that conduct and seeking both damages and individualized injunctive relief.

Third, the Eleventh Circuit's decision is correct and need not be disturbed. The court followed the well-settled law that permits parties to agree upon, and courts to approve, a release of all claims based on an identical factual predicate as the settled litigation; it went no further. The Eleventh Circuit's decision also recognizes and is consistent with the critical public policy favoring the settlement of class actions.

The petition accordingly should be denied.

OPINIONS BELOW

The order of the court of appeals denying rehearing en banc (Pet.App. 173a–174a) is unreported. The opinion of the court of appeals (Pet.App. 1a–45a) is reported at 85 F.4th 1070. The opinion of the district court (Pet.App. 46a–172a) is unpublished but is available at 2022 WL 4587618. The district court's partial amendment to its opinion is unreported but is available on the district court docket as D. Ct. Doc. 2939 (Sept. 7, 2022).

STATUTES OR OTHER PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and

upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . . In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Federal Rule of Civil Procedure 23(e)(2) provides:

> **(e) Settlement, Voluntary Dismissal, or Compromise.** 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. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise: . . .
>
> (2) ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;

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

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

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

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

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

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

STATEMENT OF THE CASE

1. Defendants-Respondents are the Blue Cross Blue Shield Association ("BCBSA"), the undersigned Blue Cross and Blue Shield Plans and various affiliated entities (collectively, the "Blues"). Pet. 1.

BCBSA owns and licenses the Blue Cross and Blue Shield federal trademarks ("Blue Marks") to locally operated Blue Plans. Pet.App. 3a. These license agreements grant each Blue Plan the right to use the Blue Marks within a defined geographic service area (known as an exclusive service area or "ESA"), consistent with how the Plans historically operated at common law. *In re Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-cv-20000-RDP, 2022 WL 3221887, at *2, 5–6 (N.D. Ala. Aug. 9, 2022). Blue Plans then use the Blue brands to contract with local healthcare providers, on the one hand, and health insurance subscribers, on the other, to offer healthcare benefit products to members nationwide—something no individual Blue Plan could do on its own given the Blues' common law trademark history. D. Ct. Doc. 120, at 30 (Sept. 30, 2013). The Blue system, and the rules supporting it, enable Blue Plans to provide health insurance coverage and administrative services to millions of people in the United States and to compete with large national health insurers such as Aetna, Cigna and UnitedHealthcare. *Id.* at 30–31.

2. Starting in 2012, plaintiffs filed dozens of complaints across the country challenging various rules set forth in the licenses and related agreements between BCBSA and the Blue Plans. Pet.App. 3a–4a. Some complaints were brought by health insurance

subscribers and others were brought by healthcare providers. Pet.App. 4a. But these complaints all challenged certain core rules that govern the Blue System, including ESAs and National Best Efforts ("NBE"),[1] and alleged that the rules violated the Sherman Act and similar state laws. Pet.App. 3a.

In 2013, the Judicial Panel on Multidistrict Litigation consolidated these actions into an MDL and transferred them to the Northern District of Alabama. Pet.App. 3a. Following consolidation, the MDL proceeded on two tracks, the Subscriber track (claims of putative classes of fully insured Blue members) and the Provider track (claims by putative classes of various types of hospitals, physicians and other healthcare professionals). Pet.App. 3a.

3. In 2015—three years into the litigation—the Blues began settlement negotiations with Subscriber-Plaintiffs. Pet.App. 49a. The parties engaged a mediator and special master to oversee scores of mediation sessions. Pet.App. 49a. Over the succeeding five years, Subscriber-Plaintiffs and the Blues conducted "protracted, complicated and challenging" negotiations in an effort to resolve the "extraordinarily complex" Subscriber claims. Pet.App. 48a, 50a.

In 2019, separate counsel joined the negotiations on behalf of a new plaintiff that would represent a

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[1] The NBE rule required a Blue Plan to derive at least two-thirds of its national revenue from selling products using the Blue brands. Pet.App. 192a. The Blues removed NBE in April 2021 as part of the Settlement. *In re Blue Cross Blue Shield Antitrust Litig.*, 2022 WL 3221887, at *1.

putative sub-class of self-funded subscribers (also known as "ASOs").[2] Pet.App. 50a. ASO subclass counsel sought and received access to the discovery record and relevant briefing on class certification and summary judgment. Pet.App. 50a.

On October 16, 2020, the Subscriber class representatives, the self-funded subclass representatives and the Blues entered into a settlement agreement (the "Settlement"). *In re Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-cv-20000-RDP, 2020 WL 8256366, at *2 (N.D. Ala. Nov. 30, 2020). The district court granted a motion for preliminary approval of the Settlement on November 30, 2020. *Id.* at *28. The district court explained that the Blues had agreed to pay $2.67 billion (the "Settlement Fund"), and to make "historic and substantial" structural changes to the Blues' businesses, including elimination of NBE. *Id.* at *2.

4. The Settlement resolves claims on behalf of two classes of Blue subscribers: (1) an indivisible-injunctive-relief class under Rule 23(b)(2); and (2) a damages-and-divisible-injunctive-relief class under Rule 23(b)(3). Pet.App. 55a. Each class includes both fully insured subscribers and ASOs.

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[2] Self-funded subscribers do not purchase health insurance from Blue Plans; rather, they purchase certain "administrative services only" (hence, "ASOs")—such as access to a Blue Plan's provider networks and claims processing services—in order to facilitate their members' healthcare coverage, while spreading their own risk and self-financing the cost of their members' care. D. Ct. Doc. 2616, at 6–7 (Nov. 2, 2020). Petitioner is one such self-funded or "ASO" account. Pet.App. 10a.

The $2.67 billion Settlement Fund was allocated to the Rule 23(b)(3) class. Pet.App. 58(a). Additionally, certain self-funded subclass members in the Rule 23(b)(3) class will receive the right to request a "Second Blue Bid" when seeking a new contract for ASO services. Pet.App. 220a–221a.

The Settlement also requires significant structural changes to the Blue System that are indivisible among class members. This relief includes: (i) elimination of NBE; (ii) changes surrounding Blue Plan bidding for national accounts, including provisions concerning certain large multi-Service-Area accounts; (iii) limitations on the conditions that can be imposed to disallow acquisitions of Blue Plans; and (iv) provisions addressing other aspects of the Blues' businesses, including self-funded account contracting with non-provider vendors and/or specialty service provider vendors, and most-favored nation clauses. Pet.App. 216a–226a. The Settlement also created a Monitoring Committee and compliance process to oversee compliance with the Settlement, mediate certain disputes related to the Settlement, and assess whether new BCBSA rules related to the Settlement comply with the Settlement's terms. Pet.App. 227a–230a. Finally, the Settlement expressly acknowledges that ESAs will continue in light of these other significant structural changes. Pet.App. 218a–219a.

5. The sole consideration the Blues received in exchange for $2.67 billion and the "historic" injunctive relief just described is a full release of claims from the Settlement classes. The Settlement provides that settlement class members release all claims, including future claims, against the Blues that are:

> based upon, arising from, or relating in any way to: (i) the factual predicates of the Subscriber Actions (including but not limited to the Consolidated Amended Class Action Complaints filed in the Northern District of Alabama) including each of the complaints and prior versions thereof, or any amended complaint or other filings therein from the beginning of time through the Effective Date; (ii) any issue raised in any of the Subscriber Actions by pleading or motion; or (iii) mechanisms, rules, or regulations by the Settling Individual Blue Plans and BCBSA within the scope of Paragraphs 10 through 18 approved through the Monitoring Committee Process during the Monitoring Period.

Pet.App. 198a. In other words, the future release obtained by the Blues from the settling class is limited to claims based on the same factual predicate as the claims resolved by the Settlement. *See, e.g.*, Pet.App. 120a. Given this limitation, settlement class members retain the right to assert claims that are not "based in whole or in part on the factual predicates of the Subscriber Actions or any other component of the Released Claims," including certain claims relating to coverage, benefits and administration of claims arising in the ordinary course of business. Pet.App. 199a. And, of course, the release does not affect the claims of non-settlement class members at all.

Although the Rule 23(b)(2) class members released any "claims for indivisible injunctive or declarative relief against the Releasees" based on the

same factual predicates as the Subscriber Actions, Pet.App. 66a (as defined in the "Settlement Agreement" (Pet.App. 175a–265a)), those who opted out of the Rule 23(b)(3) class may continue to pursue "any claims for individualized declaratory or injunctive relief", D. Ct. Doc. 2939, at 2. Indeed, notwithstanding the Settlement release, the Blues are facing claims by dozens of settlement opt-outs for individualized injunctive relief. *See Alaska Air Grp., Inc. v. Anthem, Inc.*, No. 2:21-cv-1209 (N.D. Ala); *JetBlue Airways Corp. v. Anthem, Inc.*, No. 2:22-cv-558 (N.D. Ala.); *Bed Bath & Beyond, Inc., now known as 20230930-DK-Butterfly-1 v. Anthem, Inc.*, No. 2:22-cv-1256 (N.D. Ala.); *VHS Liquidating Tr. v. Blue Cross of Cal.*, No. RG21106600 (Super. Ct. Alameda Cnty.); *Ford Motor Co. v. Blue Cross Blue Shield of Mich. Mut. Ins. Co.*, No. 2:23-cv-11286 (E.D. Mich.).

6. Last, the parties agreed that nothing in the Settlement would "constitute or be construed as an admission of liability or wrongdoing by any Settling Defendant." Pet.App. 215a.

7. On August 9, 2022, the district court certified the settlement classes and granted final approval. Pet.App. 55a. Applying Rule 23(e)(2) and Eleventh Circuit precedent, the district court found that the Settlement was fair, reasonable and adequate, Pet.App. 83a–104a, and provided "immediate and substantial benefits to tens of millions of Class Members" through the significant injunctive and monetary relief terms, Pet.App. 87a. This finding took into account "the significant costs, risks, and delay of trial and appeal" and noted that, without resolution, there would be "expensive and hard fought litigation

for more years in this court, transferor courts, and appellate courts." Pet.App. 87a.

Petitioner, an opt-out from the Rule 23(b)(3) class and a member of the Rule 23(b)(2) class, objected on the grounds that the Settlement's release was impermissible because it requires members of the Rule 23(b)(2) class "to release future claims for injunctive and equitable relief", and, accordingly, "such a prospective release of a private party's right to enforce the antitrust laws" would violate public policy. Pet.App. 112a.

In overruling this objection, the district court held that the Settlement's release of future claims was permissible because the release's scope was consistent with the well-established caselaw upholding class-settlement releases so long as the released claims share an identical factual predicate with the settled claims. Pet.App. 112a–122a; *see also* D. Ct. Doc. 2939, at 1–2. The district court rejected Petitioner's argument that "federal antitrust policy" bars such a release because "any released claim here would by definition arise from continued adherence to the existing arrangements that are 'the factual predicates of the Subscribers Actions'." Pet.App. 122a. In reaching this conclusion, the district court noted that the caselaw on which Petitioner relied was "inapposite".[3] Pet.App. 122a.

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[3] The district court also overruled a separate objection by Petitioner that the Settlement would perpetuate illegal conduct, instead finding that "the post-Settlement Blue System will not be clearly illegal" based upon "the material changes to the Blues' going-forward system which add significant procompetitive

After entering the final approval order, the district court later amended the order to clarify the scope of the release for future claims of injunctive relief. D. Ct. Doc. 2939, at 1–2.[4] The court clarified that while the release bars "all claims for indivisible injunctive or declaratory relief . . . a Self-Funded Account opt-out does not release any claims for individualized declaratory or injunctive relief." *Id.*

8. In an opinion written by Chief Judge Pryor, the Eleventh Circuit affirmed. Pet.App. 3a. Rejecting Petitioner's argument that "federal antitrust policy" bars prospective releases of antitrust claims in class settlements, the Eleventh Circuit explained that "releases of future claims are an important part of many settlement agreements" and are "commonly approved and enforced in class actions." Pet.App. 14a. Further, the court noted that the Eleventh Circuit and its predecessor court had twice approved of prospective releases of antitrust claims, Pet.App. 14a (citing *In re Managed Care*, 756 F.3d 1222, 1235–37 (11th Cir. 2014), *cert. denied* 574 U.S. 1153 (2015), and *In re Chicken Antitrust Litig Am. Poultry*, 669 F.2d 228, 234 (5th Cir. Unit B 1982)), and had once reversed a district court's refusal to enforce a broad release of antitrust claims in a class action settlement,

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features", and "the uncertainty" surrounding the court's prior decision that the aggregation of ESAs and NBE was *per se* unlawful. Pet.App. 109a. The district court further referred to a separate decision issued the same day in which it concluded that ESAs alone, without NBE (which the Blues had already eliminated under the Settlement), were subject to the rule of reason and presumptively pro-competitive. *In re Blue Cross Blue Shield Antitrust Litig.*, 2022 WL 3221887, at *7.

[4] This Amendment—which is the partially operative final approval order—was not included in Petitioner's appendix.

Pet.App. 14a (citing *Thomas v. Blue Cross Blue Shield Ass'n*, 594 F.3d 814, 822 (11th Cir. 2010)). The Eleventh Circuit also recognized that its sister circuits, including the Second Circuit, have likewise consistently approved class action antitrust settlements that include releases of future claims where those claims are "based on an identical factual predicate to the underlying litigation". Pet.App. 13; *see also* Pet.App. 15a (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 106 (2d Cir. 2005)). In so ruling, the court considered and distinguished Petitioner's authority—much of which is the same caselaw cited in the petition here. As the court explained, none of Petitioner's cases, including *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Redel's Inc. v. General Electric Co.*, 498 F.2d 95 (5th Cir. 1974), concerned a release of claims, like the one here, as to a defined class and only where the released claims share the same factual predicate as the settled litigation. Pet.App. 16a, 18a–20a.

9. Home Depot and another appellant[5] sought rehearing en banc, which the Eleventh Circuit denied without a single judge calling for a poll. Pet.App. 174a. Home Depot's timely petition followed.

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[5] That appellant, David G. Behenna, also petitioned for certiorari in this Court. *Behenna v. Blue Cross Blue Shield Ass'n, et al.*, No. 23-1163. Because that petition for certiorari relates solely to the award of attorneys' fees under the Settlement at this stage, Defendants-Respondents take no position, consistent with the Settlement, but reserve the right to participate in that proceeding as Respondents should the need arise. *See* Pet.App. 240a–241a; S. Ct. R. 12.6.

REASONS FOR DENYING THE PETITION

The petition does not satisfy this Court's criteria for review. *First*, the decision below, which relied on well-settled law permitting releases of antitrust claims challenging ongoing conduct, does not conflict with either the precedents of this Court or the precedents of any other circuit. (*See* Section I.) *Second*, the question presented does not warrant Supreme Court review, and Petitioner mischaracterizes the release as leading to effective antitrust immunity to argue to the contrary. (*See* Section II.) *Third*, and finally, the Eleventh Circuit's decision was correct and should not be disturbed. (*See* Section III.)

I. THE DECISION BELOW DOES NOT CONFLICT WITH EITHER SUPREME COURT OR CIRCUIT PRECEDENT OUTSIDE THE ELEVENTH CIRCUIT.

In an effort to manufacture a question worthy of certiorari, Petitioner claims the key question is whether an antitrust settlement may permissibly release "new claims arising out of a continuing antitrust conspiracy". Pet. 15. That is a red herring. The settlement agreement does *not* release new claims. The agreement releases only claims that share an identical factual predicate with the settled litigation. As Chief Judge Pryor explained, federal courts regularly approve class action settlements with the latter type of release. Pet.App. 14a–15a; *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 350–51 (6th Cir. 2009); *Wal-Mart Stores*, 396 F.3d at 107; *In re Prudential Ins. Co. of Am. Sales Prac. Litig.*, 261 F.3d 355, 366–67 (3d Cir. 2001); *In re Chicken Antitrust*

Litig., 669 F.2d at 239. In the face of this clear authority, Petitioner strains to find either a departure from Supreme Court precedent or a circuit split, but neither exists.

A. The Decision Below Does Not Conflict with This Court's Precedent.

1. Petitioner first argues that the Eleventh Circuit "flout[ed] this Court's precedent" by approving a settlement that released prospective claims, in contravention of *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955). Pet. 21. But *Lawlor* has nothing to do with the question presented here.

The issue in *Lawlor* was whether res judicata barred a subsequent antitrust suit following a prior settlement between only some of the same parties. 349 U.S. at 324–26. In that case, the parties settled monopolization claims related to the exclusive licensing for film advertising materials. *Id.* at 324. Ten years later, after several of the parties sued again alleging *new* antitrust violations with *new* co-conspirators, the settling defendants argued that the second suit was barred by res judicata. *Id*. at 325. This Court held that it was not, concluding that the new conduct complained of in the second suit was *subsequent to* and *different from* the conduct alleged and released in the prior suit. *Id.* at 328. *Lawlor* thus does not apply to the issue presented here—namely, whether a district court can approve a class action settlement under Rule 23 that releases future claims that share an identical factual predicate with the settled litigation.

Indeed, if anything, *Lawlor* confirms that the Eleventh Circuit's decision is correct. *Lawlor*'s res judicata analysis turned on whether the two lawsuits involved the "same course of wrongful conduct". *Id.* at 327–28. In determining that the later suit was *not* barred by the prior judgment, the Court emphasized that "there [were] *new antitrust violations* alleged . . . not present in the former action", as well as a "substantial change in the scope" of the alleged conspiracy. *Id*. at 328 (emphasis added). *Lawlor* thus reinforces the same principle on which the Eleventh Circuit relied: ongoing conduct that shares an identical factual predicate with the settled litigation may be prospectively released; new and differing conduct may not. *See* Pet.App. 19a–20a.

2. Petitioner also points to dicta in *Mitsubishi*, 473 U.S. 614, and *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), to support the proposition that any prospective waiver of an antitrust claim is void as against public policy. Both cases are inapposite, and neither conflicts with the decision below.

In *Mitsubishi*, this Court enforced an international arbitration agreement with a forum-selection clause requiring adjudication of American antitrust claims before a Japanese arbitration panel. 473 U.S. at 639–40. In a footnote, the Court hypothesized that *if* a Swiss choice-of-law clause in the agreement operated in tandem with the forum-selection clause to extinguish all antitrust claims in the United States, the agreement would violate public policy as it would effectively prevent the plaintiff from bringing an antitrust claim in the United States *in the first instance*. *Id.* at 637 n.19. That is not what the

Release here does: the only claims that have been released share an identical factual predicate with litigation that has *already been brought and settled* for several billion dollars and significant injunctive relief. *See* Pet.App. 16a (Eleventh Circuit explaining that, in *Mitsubishi*, this "Court did not hold that *every* prospective release of antitrust claims would violate public policy; it stated only that *categorically barring* parties from seeking relief under the Sherman Act *regardless of the underlying claim* would violate public policy." (emphases added)). Therefore, even assuming a decision to enforce an international arbitration agreement has anything to do with approval of a class action settlement under Rule 23(e), the Eleventh Circuit's decision is not inconsistent with *Mitsubishi*.

Italian Colors is similarly inapplicable and *not* at odds with the Eleventh Circuit's decision below. Petitioner selectively cites *Italian Colors* for the proposition that courts "desire to prevent prospective waiver[s] of a party's right to pursue statutory remedies". Pet. 21 (quoting *Italian Colors*, 570 U.S. at 236.) However, this narrow citation misses the point of what this Court did—*and did not*—hold in that case. In *Italian Colors*, this Court held that a contractual waiver of class arbitration was enforceable, even though the respondents there argued that the costs of *individual* arbitration rendered their antitrust claims functionally unavailable. 570 U.S. at 236–37. Contrary to Petitioner's assertions, *Italian Colors* in fact *rejected* that public policy compelled the invalidation of the class-arbitration waiver, determining that plaintiffs still had the ability to vindicate their statutory rights,

even if the contractual waiver made it more difficult to do so. *Id.* at 236–37. Nothing about this conclusion—which is the *opposite* of what Petitioner asserts—conflicts with the approval of the release here.

Nor is Petitioner aided by the Government's amicus brief from *Italian Colors*. The Government supported the *Italian Colors* respondents; this Court reversed. 570 U.S. at 239. In other words, this Court did not adopt the reasoning in the Government's brief, which cited the same cases Petitioner cites here. *Compare* U.S. Amicus Br. at 21, *Italian Colors*, 570 U.S. 228 (2013) (No. 12-133), *with* Pet. 15–29.

In sum, there is no conflict between this Court's precedent and the decision below.

B. No Circuit Split Exists on the Question Presented.

Petitioner's next attempt to show certworthiness—a manufactured circuit split—similarly fails. No such circuit split exists; to the contrary, the circuits are entirely consistent that parties may release future claims arising from the identical factual predicate. That is all the Settlement's release does.

1. Petitioner argues that the Eleventh Circuit's decision "deepens an entrenched circuit split" over whether parties may release prospective antitrust claims. Pet. 15. There is no such circuit split—and, tellingly, Petitioner has never before (not in its objection to the district court, not in its appeal to the Eleventh Circuit, and not in its petition for rehearing

en banc) claimed that there is. In an attempt to create one now, Petitioner mixes together caselaw addressing two different questions: whether a district court *may approve* a class action settlement containing a release of prospective claims that share an identical factual predicate with the settled claims, on the one hand, and whether a later-filed claim *falls within the scope* of a release, on the other. These are two entirely different questions for which the federal courts (rightfully) have reached different answers. But on the single issue presented here—the approvability of a future release for claims that fall within the same factual predicate—there is no disagreement.

2. As Petitioner acknowledges, the Second and Seventh Circuits have both affirmed releases of future claims in antitrust settlements so long as the released claims arise from an "identical factual predicate" as the settled litigation—exactly as the Eleventh Circuit held below. *Wal-Mart Stores*, 396 F.3d at 107; *MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc.*, 161 F.3d 443, 447–48 (7th Cir. 1998). Petitioner points to no court that has ever held otherwise. Instead, every other case Petitioner cites for the supposed "circuit split" arose in a different legal posture—namely, whether an existing release could be *enforced* to bar a later-filed claim. That is a different question for a different day before a different court. *See Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 720 (2d Cir. 2023) ("A holding as to the proper scope of the release—*i.e.*, whether the future release violates federal law—can await a case in which the issue would directly affect the proceedings."). Once the *enforcement* cases are separated from the class

action *approval* cases, it is clear there is no circuit split. Indeed, Petitioners do not cite a single Rule 23 class action settlement approval case in this entire section of the petition.

3. In an attempt to manufacture a conflict between the Eleventh and Third Circuits, Petitioner relies on a line of dicta in *Toledo Mack Sales & Services, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008). In that case, the Third Circuit considered a sufficiency-of-the-evidence challenge to a grant of judgment as a matter of law. *Id.* at 208. The defendant argued, in part, that the suit was barred by a release in a prior settlement. *See id.* at 210 n.2. The court held that the release, which by its own terms applied only to claims that had arisen "as of the date of this release", *id.*, did "not apply to claims for antitrust damages based on *events which occur after the execution of the release*", *id.* at 218 n.9 (emphasis added). This is a straightforward interpretation of the terms of a specific release. It has nothing to do with the permissible scope of a release in a class settlement.

Nor is Petitioner helped by the other Third Circuit case that it cites. Indeed, in that case, *Three Rivers Motor Co. v. Ford Motor Co.*, 522 F.2d 885 (3d Cir. 1975), the court expressly noted that "there is nothing in the public policy behind antitrust laws that prohibits general releases encompassing antitrust claims, provided that the release does not seek to waive damages from *future violations* of antitrust laws" unrelated to the factual predicate underlying the settled claims, *id.* at 896 n.27. This decision says nothing about a release of future claims related to

ongoing conduct that was at issue in the underlying, settled litigation.

4. Nor is there a conflict between the Fifth and Eleventh Circuits on this point. In an attempt to argue otherwise, Petitioner points to *Redel's*, Pet. 18–19, which is in fact a *pre-split* decision from the Fifth Circuit and, therefore, binding on the Eleventh, *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981). Indeed, up until this point, Petitioner has consistently argued that *Redel's* is binding law that controls the outcome here. *See, e.g.*, Pet. C.A. Br. 61–62; Pet. C.A. Reh'g Br. 41–42.

Those efforts have all failed because, as the Eleventh Circuit correctly held, *Redel*'s does not say what Petitioner claims it says. In *Redel's*, the former Fifth Circuit held that a general release in a franchise agreement did not bar certain antitrust claims arising thereafter, including because of public policy concerns. 498 F.2d at 100–01. Importantly, however, the release the defendant attempted to enforce in *Redel's* was different than the one here. First, unlike the release here, the release in *Redel's* applied on its face only to claims that existed "as of the date of the execution of th[e] agreement". *Id.* at 98–99. Thus, "the unambiguous language" of the release made clear that "the parties did not intend the release to apply prospectively". *Id.* at 99. The court reached this conclusion as a matter of contract interpretation before even discussing public policy. Second, as the Eleventh Circuit correctly explained, the release in *Redel's* was overbroad, purporting to bar claims arising from later antitrust violations *without any factual or temporal* limitation. Pet.App. 16a; 498 F.2d at 100. Third, the public policy at issue in *Redel's* was

the policy against releasing future claims that were never intended to be released—something that is not at issue here, where the Settlement plainly intends a prospective release. Pet.App. 199a. As such, in *Redel's* there was no limitation based on an identical factual predicate to antitrust claims asserted *in a settled litigation* because *there was no settled litigation*; instead, the release was contained in a pre-suit franchise agreement. *See* 498 F.2d at 100. These distinctions make *Redel's* entirely different from the circumstances here.

5. Petitioner is also wrong to argue that there is a conflict with two cases in the Sixth Circuit. The first case, *Watson Carpet & Floor Covering, Inc. v. Mohawk Industries, Inc.*, 648 F.3d 452 (6th Cir. 2011), concerned the application of a prior release to bar a subsequent suit, *id.* at 454. Because the relevant settlement agreement was governed by Tennessee law, the Sixth Circuit applied Tennessee law to hold that, under state law, a general release "cannot operate prospectively so as to defeat an action which arises at a time []after the parties sign the release." *Id.* at 459–60 (quoting *Sherman v. Am. Water Heater Co.*, 50 S.W.3d 455, 459 (Tenn. Ct. App. 2001)). That ruling has nothing to do with the *propriety* of the release in the first place, which is the federal law question presented here. The second case, *Gaines v. Carrollton Tobacco Board of Trade, Inc.*, 386 F.2d 757 (6th Cir. 1967), concerned whether a suit was estopped due to prior conduct, *not* whether the suit was barred by a settlement release, *id.* at 759. In dicta, the Sixth Circuit speculated that a hypothetical agreement, "if executed in a fashion to waive damages arising from future violations of the antitrust laws,"

might violate public policy. *Id.* Even if not dicta, that is not what happened here: the Settlement does not release new, future conduct, but rather releases claims over present, ongoing conduct that shares an identical factual predicate to the settled litigation.

6. Lastly, the Eighth Circuit likewise does not bar prospective releases. Petitioner cites *Fox Midwest Theatres v. Means*, 221 F.2d 173 (8th Cir. 1955), a 70-year-old case that, again, focused on the enforcement of a prior release rather than the standards for approving such a release at the settlement approval stage, *id.* at 180–81. Addressing the argument that the release barred a later suit, the court noted in dicta that a party cannot release future antitrust damages claims of which it *does not yet have a cause of action* without violating public policy. *Id.* at 180. Again, the Settlement here does not release claims for which a plaintiff does not yet have a cause of action; rather, the Settlement releases only claims for which the identical factual predicate already exists.

There is simply no "division" among the circuits. Pet. 4.

II. THE PETITION DOES NOT PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW WARRANTING THIS COURT'S REVIEW.

Petitioner's next attempt to persuade this Court to grant review is based on the "exceptional[] importance" of the question presented. Pet. 29–33. This claim rests on a fiction: that the Eleventh Circuit's decision threatens to undermine private enforcement of the antitrust laws by creating blanket antitrust immunity for settling defendants. Nothing

could be further from the truth. Not only will the decision below not undercut private enforcement generally, but it has demonstrably not done so for Defendants-Respondents specifically. This Court's intervention is unnecessary.

1. Petitioner's argument that the Eleventh Circuit's decision will create blanket antitrust immunity for Defendants-Respondents is just wrong. Pet. 31–32. The release at issue in this case creates no such immunity; instead, it follows well-settled precedent in releasing only claims based on factual predicates that existed at the time of the Settlement's effective date. *See* Section I, *supra*. Moreover, Petitioner has not pointed to *any* cases in the Second, Seventh or Eleventh Circuits (where Petitioner claims this supposed blanket immunity is permitted) in which class-settlement releases have thwarted effective private enforcement. Defendants in those circuits are not trying to—and cannot—purchase wholesale antitrust immunity through class action settlements. New conduct cannot be immunized by a release, and class action settlements cannot be approved if they perpetuate clearly illegal conduct, which operates as an independent bar to an antitrust defendant's ability to acquire immunity for ongoing conduct. *E.g.*, Pet.App. 17a–18a; *Isby v. Bayh*, 75 F.3d 1191, 1197 (7th Cir. 1996); *Robertson v. Nat'l Basketball Ass'n*, 556 F.2d 682, 686 (2d Cir. 1977). The decision below did not create blanket antitrust immunity that requires this Court's correction.

2. Indeed, one need look no further than this very case to see that the Settlement has not created any sort of antitrust immunity for Defendants-Respondents. Pet. 33. As an initial matter, the

Settlement's release applies to only a defined class of subscribers for a defined set of claims in a specified class period; it does *not* apply to subscribers that purchased from the Blues outside the class period, and it does *not* apply to all claims. As such, Defendants-Respondents are not immunized from any challenges raised by non-class members to the same conduct at issue. Further, opt-outs from the Settlement are currently suing Defendants-Respondents across the country in state and federal courts, bringing antitrust claims based on the exact same conduct that Petitioner claims is barred from suit and seeking both damages and individualized injunctive relief.[6] Were the release as broad and immunity conferring as Petitioner claims, Defendants-Respondents would have moved to dismiss each of those cases as barred by the Settlement's release. They did not, because the Settlement expressly allows opt-outs to sue for both damages *and* individualized declaratory and injunctive relief. D. Ct. Doc. 2939, at 1–2.

Moreover, perhaps the height of irony is that Petitioner itself could sue Defendants-Respondents, as many others have done. The fact that Petitioner has chosen (at least to date) not to do so does not create some immunity. Thus, the release confers no

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[6] *Alaska Air Grp., Inc. v. Anthem, Inc.*, No. 2:21-cv-1209 (N.D. Ala); *JetBlue Airways Corp. v. Anthem, Inc.*, No. 2:22-cv-558 (N.D. Ala.); *Bed Bath & Beyond, Inc., now known as 20230930-DK-Butterfly-1 v. Anthem, Inc.*, No. 2:22-cv-1256 (N.D. Ala.); *VHS Liquidating Tr. v. Blue Cross of Cal.*, No. RG21106600 (Super. Ct. Alameda Cnty.); *Ford Motor Co. v. Blue Cross Blue Shield of Mich. Mut. Ins. Co.*, No. 2:23-cv-11286 (E.D. Mich.).

immunity. It simply offers Defendants-Respondents the most expansive peace they could buy so that they could be free from ongoing class litigation relating to this factual predicate. Far from impermissible, this type of release furthers the very strong public policy in favor of settlements, as discussed further *infra*.

III. THE ELEVENTH CIRCUIT'S DECISION IS CORRECT.

Finally, review is not warranted in this case because the court below was correct to uphold the release.

1. The Settlement releases only claims "based upon, arising from, or relating in any way to . . . the factual predicates of the Subscriber Actions". Pet.App. 9a. The release applies "to the fullest extent permitted by law" and no more. Pet.App. 245a. Recognizing that the release in this Settlement fell within well-established legal principles, the Eleventh Circuit articulated a sound legal principle entirely consistent with this Court's jurisprudence and that of every other circuit to have ruled on this issue: class plaintiffs can release claims that challenge ongoing conduct for which the factual predicates are known when the settlement is executed, but they cannot provide blanket antitrust immunity for future conduct.

2. Further, the decision below correctly vindicates the important federal policy encouraging the settlement of class actions, including in the antitrust context. *Syncor v. Cardinal*, 516 F.3d 1095, 1101 (9th Cir. 2008); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (Friendly, J.); *In re Beef Indus.*

Antitrust Litig., 607 F.2d 167, 175 (5th Cir. 1979) (quoting 3 Newberg on Class Actions § 5570c (1st ed. 1977)). As courts have recognized, if antitrust defendants could not obtain releases for claims challenging ongoing conduct, they would have no incentive to settle at all because they could not obtain the "global peace" necessary to make a settlement worthwhile. *E.g.*, *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 310–11 (3d Cir. 2011) (en banc); *In re Chicken Antitrust Litig.*, 669 F.2d at 238. Instead, they would be forced to litigate all claims to judgment because their ongoing conduct would be under constant threat of new suit, even by those who had already settled their claims. As the Eleventh Circuit's decision affirms, the release in this Settlement was not just important—it was the *only* consideration that Defendants-Respondents obtained in exchange for $2.67 billion and the significant modifications to their business practices to which they agreed. Pet.App. 9a–10a. Releasing claims for classwide injunctive relief as to ongoing conduct was the only way Defendants-Respondents could obtain the "total peace" necessary to agree to the Settlement. *Berry*, 807 F.3d at 613.

The rule embraced by the decision below (as well as by each case cited in the petition) harmonizes the federal policy in favor of class action settlements with the policy promoting private antitrust enforcement. In contrast, Petitioner's rule—which no court has adopted—would cause antitrust defendants and class action plaintiffs alike to expend hundreds of thousands of additional hours litigating private antitrust class actions even where a settlement would otherwise be possible, burdening lawyers, clients and

the busy federal courts. *See* Pet.App. 98a (noting the expense of the Subscriber track, even with a settlement); *cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007). Such a result would contravene, not vindicate, public policy.

Thus, the Eleventh Circuit rightly held that the district court did not abuse its discretion in approving the Settlement.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

May 2024

Respectfully submitted,

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