

No. 04-_____

IN THE
Supreme Court of the United States

REBECCA CRYSTIAN, et al.,

Petitioners,

v.

TOWER LOAN OF MISSISSIPPI INC, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

MERRIDA COXWELL
CHARLES R. MULLINS
COXWELL & ASSOCIATES,
PLLC
POST OFFICE BOX 1337
JACKSON, MS 39215
(601) 948-1600

DON BARRETT
MARSHALL SMITH
BARRETT LAW OFFICE, P.A.
P.O. BOX 987
404 COURT SQUARE NORTH
LEXINGTON, MS 39095
(662) 834-2376

DAVID ARKUSH
BRIAN WOLFMAN
(Counsel of Record)
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION
GROUP
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

G. WAYNE HYNUM
1507 HARDY STREET
SUITE 105
HATTIESBURG, MS 39401
(601) 583-2608

Counsel for Petitioners

October 12, 2004

QUESTION PRESENTED

In a class action settlement purporting to resolve the money damages claims of absent members, did the denial of petitioners' attempts to opt out violate Federal Rule of Civil Procedure 23 or the Due Process Clause of the Fifth Amendment?

PARTIES

Petitioners Rebecca Crystian, et al., are approximately 835 individuals who were among approximately 1200 members of the plaintiff class who appeared in the district court and were denied the right to opt out of this class action by that court. All petitioners appeared as appellants in the court of appeals below. Each petitioner is listed by name immediately after the list of respondents.

The named respondent, Tower Loan of Mississippi Inc., appeared as defendant-appellee in the court of appeals below. The other defendants-appellees in the court of appeals (and respondents in this Court) are American Federated Insurance Company, American Federated Life Insurance Company, and First Tower Loan Inc. Respondents also include Claudia Smith and Wilbert Walker, as representatives of a plaintiff class of other similarly-situated individuals. That plaintiff class appeared as appellees in the court of appeals below.

In addition to named petitioner Rebecca Crystian, the petitioners are: Martha Shaffer, Pam White, Felicia Goodwin, Gwendolyn Bowden, Johnnie Bowden, Susie Brister, Douglas Brown, Rosie Brown, Carrie Lee Davis, Alfred Levi, Betty Reed, Derrick Edmond, Cornelius Walker, Annette Brown, Timothy Puckett, Angela Puckett, Doris Coleman, Perry Harris, Sandra Harris, Dora Ratliff, Linda Westbrook Smith, Donnie Smith, Dorothy L. Ginn, Jewell E. Ginn, Alean Lampton, Flossie Riley, Emma Smith, Maxine Stewart, Andrea Mitchell, the surviving heirs of Elijah Ratcliff, Sr., Kathy White, Shirley Causey, Elijah Ratcliff, Jr., Pearl Ransom, Roy Ransom, Mary Benson, Harold Barkley (Chapter 13 Trustee for the Southern District of Mississippi), Locke Barkley (Chapter 13 Trustee for the Northern District), Randolph Sullivan, Patricia A. Black, Willie J. Myers, Homer Smith, Linda Smith, Queen E. Mixon, Carolyn H. Smith, Ola M. Smith, Herbert M.

Brumfield, Joyce Brumfield, Stanley Wilson, Sheila Wilson, Jackie Barnes, Kathy Myers, Lula Echols, James McDonald, Roger Lee Daniels, Lillian Bonner, Mark Peters, Brenda Peters, Ann N. Barnes, Eartha T. Henry, Mary L. Goodwin, Joe Taylor, Rose Taylor, Addie Lee Henry, Shirley M. Wood, John Fowler, Annie Ree Fowler, June Daniels, Janice Alexander, Teresa Bowden, Alvin Jarvis, Helen Jarvis, Ruby Dale Polion, Brenda M. Robinson, Craig Echols, M.C. McDonald, Elizabeth McDonald, Edna E. Loper, Leona Marsh, James Sandifer, Alma Sandifer, E.J. Bridges, Evelyn Bridges, Betty Jo Berry, Ronald Walker, Rose Mary Walker, Josephine Hawthorne, Wilmon Abram, L.H. Burton, Derrit Loper, Angela Taylor, Clarence Peters, Gloria Peters, Darlene Peters, Ada Lee Pittman, Brenda Tillman, Jerry McDougle, Gwen Jordan, Calvin Weathersby, Theresa Weathersby, Luvion Tillman, Robert Tatum, Johnnie Mae Tatum, Mandy Powell Reed, Robert McInnis, Cleo Awrey, Carolyn Plummer Jefferson, Felicia McDougle, Leeontrae Dunston, Roy Poole, Nadine Poole, Myrtle John, Maja Smith, Ola Smith, Joseph Johnston, Jo Ann Johnston, Emma L. Boyd, Tommie Akins, Carl Alexander, Cornelious Alexander, Earnestine Alexander, Freddie L. Alexander, Willie Allen, Hazel Anderson, Joann Anderson, Nathaniel Anderson, Willie Anderson, Willie M. Anderson, Wilson Anderson, Mary Ann Archer, Jannie Arrington, Mattie Arrington, James Bailey, Lucille Bailey, Nancy Bailey, Vannie Bailey, James Baker, Jr., Lucinda & Diane McNityre Baker, Lucinda & Lee Baker, Annie Banks, Jason Banks, Robert & Callie Banton, Cordelia Barnes, Dorothy Edwards Barnes, Kathy Barnes, Wendell Barnes, William L. Barnes, Ceaser Barnett, Dora L. Barnett, Herman H. Barnett, Bill Barton, Jeffery Bass, Hattie L. Batton, Valentina Belle, Jimmie Lee Bender, Willie Pearl Bender, Ella L. Benson, Altha Berry, Elton Berry, Derwin D. Bibbs, Frank Billingsley, Gracy Billingsley, Cleophia Blackburn, Clementine & Herman Blanden, Mary A. Bounds, Lillie M. Boyd, Tracy Boyd, Carol Brandon (Cruell), Alice Brown, Edward Brown, Johnny

Brown, Lula Pearl Brown, Rachel M. Brown, Robbie Brown, Rosie M. Brown, Shirley Brown, Shirley Brown, Lue R. Brown-Davis, Betty & Robert Bruce, Patricia Bruce, Josie Budana, Odean Burks, Terry Burns, Viral L. Burton, Tonie Bentley, Earnest E. Black, Carl Band, Sr., Lynn & Robert Bouldin, Catherine Braggs, Evelyn & Cal J. Brooks, Margie & Charlie Brooks, Jacqueline Brown, Velma Brown, Velma Burks, Robert Caffery, Maple Campbell, Billy Carpenter, Arlene Carter, Rose P. Carter, Ted Carter, Ethel Mae Chambers, Joyce Colenberg Chambers, Delores J. Chambliss, Larry Chambliss, Dorothy Chandler, Robert & Frankie Chapman, Nora Claiborne, Ouida Claiborne, Sadie Claiborne, Tommy Claiborne, Patricia Clardy, Victor Clardy, Charles Clark, Eva Clark, Harvey Lee Clark, Lola Clark, Lucille Clark, Sadie Coats, Kelvin D. Cole, Geraldine Coleman, Robert & Millie Coleman, Eloise Collins, Mamie Collins, Michelle Collins, Ruby Collins, Lonnie F. Conley, Cassandra Cooper, James A. Cooper, Bettie M. Cox, James Earl Crawford, Mary Croft, Florene Crystian, Theodore Roosevelt Crystian, Isaac Culbert, Ruby Culbert, Linda Cunningham, Clarence Curry, Evelyn Carson, Barnice Craft, Mary Crawford, Nancy Daniels, Alexis Davis, Brenda Davis, Frances Davis, Linda F. Davis, Mack Louis Davis, Henry & Bobbie Dawson, Sheva Dean, Earnestine Deering, Jessie Mae Denson, Andrew Dillare, Mary Jean Dixon, Myrtis Doss, Al J. Dunbar, Clara Mae Dunbar, Millie Durant, Geneva Easley, Carolyn S. Echoles, Carrie Edwards, Jerome Edwards, Ronnie Edwards, Bobbie Brown Ellis, Irene Springle Epps, James Eskridge, Gloria Edmond, William E. Falls, Willie L. Falls, Bobbie P. Fells, Lucille Fells, Thomas Fells, Bernice M. Felton, Regina H. Felton, Robert Felton, Yolanda Felton Brooks, April Fletcher, Raymond Flowers, Alicia Fondren, Elizabeth Ford, Georgia Ford, Tannie & Glinda Ford, Cynthia Fountain, Annie Franklin, Rosie Freeman, Lula Friar, Nancy Frizell, Graylin Frunches, Lillian M. Frye, Denel Fulton, Jerry Fulton, Melvin Fulton, Jessie Gaddy, Nathaniel Gaines, Bertha Gamble, Jimmy Garrett,

Sharron Garner, Minnie Garnett, Ernest Garrett, Brenda L. Gary, Cordelia Gary, Emma Lee Gary, Linda Lee Gary, Thomas Gary, Annie Gatewood, Sheffer Gavin, Sr., Aaron Gearld, Sr., Elmo Gee, Luther German, Annis Germany, Bobbie Ruth Gibson, Estella Gibson, Inez Marie Gibson, Kenny R. Gibson, Tonya Gibson, Lula Gilbert, Alice Giles, Silas Gilmore, Albert Gladney, Jr., Bessie Ree Glenn-Hosey, Tecora Goines, Carol Ann Alexander Goldman, Catherine Goss, Bernice Raymond Graham, Dellaphine & James Graham, Sherry Graham, Vivian L. Granderson, Bertha M. Grant, Clifton Gray, Betty Mae Grayson, Diane Grayson, Gertrude Grayson, Jessie L. Grayson, Earnest L. Green, Henrietta Green, Lisa Green, Mary Alice Green, Tressie Green, Bessie B. Greer, Leon Griffin, Lillie Grover, Dorothy Guynes, Bessie & Atmon Hackett, Fred Hall, Jr., Tracy L. Hall, Minnie Halton, L.M. Hampton, Bettie J. Hankins, Tom Hardges, Harold Hardimon, Geraldine Hardy, Donna L. Harmon, Ida Harrell, Carlos Harris, Charlie Harris, Jessie J. Harris, Linda K. Harris, Pecola Harris, Willie Pearl Harris, Joan E. Hart, Robert H. Hart, Evangeline Harvey, Lucille Haughton, Thomas E. Hawkins, William Hawthorne, Dexter Hayes, Eddie Lee Hayes, Lucy Mae Hayes, Sadie M. Hayes, Roscoe Haynes, Jr., Cordelia F. Heath, Ida Hemphill, Carolyn Henderson, Dorothy Henderson, Brenda L. Hicks, Cornelius Hicks, Patricia Hicks, Steve Hicks, A.C. Hill, Jerlean Shorter Hill, Jerry Hill, Johnnie Hill, Julie & Hackett Hill, Atlean Hillyard, Ella M. Holder, Janice M. R. Holiday, Willie E. Holiday, Dixie T. Holland, Max Holland, Charles Hollins, Jr., Ralph Holman, Hattie Holmes, Arlee Holt, Adell Holts, Mattie Hooker, Jimmy D. Hosey, Mary Hoskins, Nerissa Jean Hough, Lavern House, Rosie Head Howze, Dora Hoye, Annie M. Hubbard, Delores Diann Hubbard, Aslene Hudson, Mary J. Hulbert, Jacqueline D. Hunter, Maggie Hutton, Clara & Melvin Hall, Dorsey Hamlin, Earnestine Hamlin, Esther L. Hamlin, Gracie Hathorn, Shaft Hathorn, Norma Hisaw, Essie B. Ivey, Coresta Jackson, Edna Jackson, Mary L. Jackson, Susie Marie Jackson, Minnie L. Jenkins, Ann Johnson, Beulah

Johnson, Helenteen Johnson, Jackie Lynn Johnson, Mary Louise Johnson, Mattie Johnson, Nerline Johnson, Otis & Annie Johnson, Roberta Johnson, Ruby Johnson, Vera Johnson, Willie & Carl Johnson, Betty Jones, Charles W. Jones, Christine Jones, Darlene Jones, Ethel Jones, Kimble Jones, Mary White Jones, Rosie Jones, Wanda Jones, Doris c/o Dorothy Jones, Earnest Jordan, Ester H. Jordan, Fletter & Jessie Joseph, Eliza Journigan, Bertha S. Joy, Isiah Johnson, Jerry Kern, Clydis C. Keyes, Pauline Keyes, Estella Keys, Rose M. Keys, Roy C. Keys, Bernadette King, Gerald L. King, Harold Russell King, Jerry King, Claudia Knight, William Kyles, Gertrude Lake, Spencer Lake, Doristine Lampley, Joanne Langdon, Alphonse Larry, Marie Larry, Marie Larry, Herman Leach, Charles H. Lee, Otis Lee, Tonnie Lee, Brenda Levy, Leroy Levy, Aguster Lucille Lewis, Sophia Lewis, Eula Lindsey, Joseph Lindsey, Mae Nell Lindsey, Carlee Logan, Josie M. Long, Shamika Long, Christine Love, Louise Lucas, Patricia Ann Lockett, Tonia Lutch, Angela S. Lyons, Bessie M. Lott, Earnestine Lockett, Lendall Lockett, Matisha Lockett, Billie Jean Mack, Luster Mackey, Gracie Malone, Shirley M. Mapp, Dereneice Marbley, Don Marsh, Tammy Marsh, Jessie Marshall, Sherry Martin, Thomas M. Martin, Victoria D. Matthews, Otho May, Earnest McClee, Chester McCormick, Diane G. McCoy, Nanette Parker McCoy, Ricky J. McCoy, Roy D. McCray, Tommy L. McCullough, L. C. McCullum, Georgia Roberts McDonald, James McDonald, Jerlean McDonald, Johnny Earl McDonald, Grace McDuffy, Howard Lee McFarland, Bernice McGee, Claudia McGee, Alma D. McGill, Carl McInnis, Dorothy McInnis, Bernice McKinney, Artimease McLaurin, Catherine McLaurin, Troy McMurry, William J. McWilliams, Gloria L. Menzie, Carrie Mae Miller, Artis Millsap, Arthur D. Minor, Verine Minor, Alice Mitchell, Stephanie Mitchell, Charles Monroe, Catherine Montgomery, Shirley Montgomery, Annie P. Moore, Barbara Moore, Curtis Moore, Donald W. Moore, Ethel L. Moore, Geneva Moore, Jackie Moore, Johnny Moore, Mary Moore, Percy Moore,

Perry M. Moore, Rosalind Moore, Shirley Moore, Bonnie Jean Morgan, Nellie Morgan, Ronald Morgan, Carl L. Moss, Audrey Murrell, Elnora Myers, Mary Myles, Peggy McGruder, Louis McMorris, Christine Miller, Patricia R. Moore, Alberta Myers, Georgia H. Neal, Lisa R. Neal, Willie Lee Neal, Bessie Nealy, Allen James Nelson, David Newell, Pam Newell, Veronica Newsom, Debra Nichols, Verean Nichols, Josephine Nicholson, Kenneth Nixon, Merline Nixon, Verlisia Nixon, Willie L. Norwood, Eugene Nichols, Lillie Mae Nichols, Lynn Nichols, Mozell Nichols, Percy Nichols, Thelma R. Nichols, Betty O'Bryant, Julia O'Neal, Stephanie Odoms, Douglas G. Osborne, Sandra Osborne, Deborah D. Page, L.B. Page, Willie Page, Carrie Parker, Annie Rose Patten, Cordelia Patterson, Deborah Patterson, James S. Payton, Gail Pearson, Hazel L. Pearson(Reynolds), J. C. Perkins, Bernice & Dorothy Perry, Eddie Perry, Louis Edward Perry, Patricia Pettis, Anita Phelps, Linda B. Phillips, Regina Phillips, J. D. Phillips, Jr., Larry Pickens, Lula B. Pierce, Shelia Pierce, Rufus Pierce, Jr., Rosie Pippins, Gladys M. Poe, Christopher Pollard, Albertine Porter, Beatrice Mathis, Bettye Porter, Velma Porter, Willie Porter, Jr., Lisa Porterfield, Inez & Bobby Potts, Cornelius Powell, Tom Powers, Archie J. Prater, Patricia Price, Donald Pride, Correen Prince, Joseph Prince, Antonio Prowell, Clarence Pugh, Mary Helen Pugh, Jessie Queen, Leon Queen, Jr., Emmitt Ramble, Jessie L. Randle, Dora Rankin, Maggie Rankin, Lucille Rankin Fluker, Velma Rayford, Thomas Edison Reed, Melvin Renolds, Mattie Reuben, Lillie Rhodes, Joyce Rias, Elizabeth Rice, Roy Richmond, Addie Lee Roberts, Patricia Roberts, Ruthie L. Robertson, Carlton Robinson, Claudine Robinson, Earnestine Robinson, Jacqueline V. Robinson, Joseph Robinson, Kenneth C. Robinson, Rosette Robinson, Dorothy Rucker, Carl T. Ryan, Chuby Sampson, Ethel Sanden, Minnie Lee Sanders, Annie Ruth Sansom, Brenda Satcher, Robert Sayles, Robert Sayles, Sr., Juanita Scott, Tammie Scott, Wendell Selmon, Leroy Shaffer, Robert Shaffer, Morris Shanklin, Clarence Shavers, Freddie Sheard, Amelia Short, Roman Shorter, Jr., Ethel W.

Simmons, Jerry D. Simmons, Mattie Hales Simmons, Annie Simpson, James L. Sims, Marylyn L. Small, Victor Small, Cathy A. Smith, Delia Smith, Francis Smith, George Smith, Horace Smith, Houston Smith, James Smith, Jerry & Janice Smith, Leon Smith, Linda Smith, Marcella/Fred Smith, Mildred Smith, Milton Smith, Mirtie Smith, Sarah D. Smith, Suzette Smith, Wanda Sue Smith, Willie Smith, Jr., Celia Snyder, James Spearman, Kenneth L. Starks, Annie Sterling, Lorie Stewart, Leonia H. Stiff, Joe Stiffen, Willie Stigger, Sylvia Stowers, Dorothy Streater, Mary Stringer, Roy & Nettie Smith, Jimmie L. Spiller, Carl A. Taylor, Carolyn Ann Taylor, Hennie Gails Taylor, Robert Taylor, Roosevelt Taylor, Kattie L. Tedford, Barbara S. Tenner, Mary Terrell-Trotter, Sally Terry, Allene Thomas, Annie Thomas, Bobbie Thomas, Laz A. Thomas, Rufus Thomas, Carl Thompson, Claudia Thompson, Etta Thompson, Mylinda Thompson, Efna R. Tillman, Cynthia Tolbert, Dwight M. Tolbert, Frank Tolliver, Anthony T. Townes, Yvonne Traylor, Annie Trevillion, Diane Truddle, Cuba Tucker, Etta V. Turner, Huren Turner, Ruby Turner, Charlie Turner, Sr., Gladys Tyler, Mary L. Travis, Larry D. Vance, Alberta Vaughn, R. T. Vessel, Johnny Wade, Carrie Walker, Emily Lorraine Walker, Jennifer Walker, Carol Wallace, Richard Walson, Donald Walters, Carolyn Walton, Emma Walton, Cynthia L. Warner, Joseph G. Warren, Daisy Washington, Donnie Washington, Thelma L. Washington, Herman Washington, Sr., Vera Watson, Betty Weatherall, Ray D. Weathers, Jurdine W. Webster, Carl Lee Wells, Sandra K. Wells, Carol M. Wheat, Earnestine Whipps, Sims Whipps, Sr., Joyce White, James Whitehead, Sr., Wonder Wiley, Jr., Loretta Wilkes, Arthur Williams, Audrey D. Williams, Betty Diane (Rankin) Williams, Fred Williams, Jesse Williams, Maggie H. Williams, Mary Williams, Ray L. Williams, Sandra Williams, Wilma Williams, Darron Willis, Roy Wilson, Shirley Wilson, Tommy J. Wilson, Cassie Windham, Shirley Windham, Troy Windham, Bertha Winston, Ruby Winters, Jerry Witherspoon, Bettye Jean Wolfe, Charles Wolfe, Ailean Womack, Sam

Wooden, Cleveland Wright, Joyce Ann Wright, Lula M. Ward,
Thelma Wheatson, Rose Zetta Williams, Willie Wilson, Bobby
Yates, Barbara Young, Carolyn Young, Isaac Young, Mattie &
Douglas Young.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES xii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 2

JURISDICTION 2

RULE AND CONSTITUTIONAL PROVISION
INVOLVED 2

STATEMENT OF THE CASE 2

1. The Nature Of The Predatory Lending Allegations And
The Remedies For Similar Violations Obtained By
Other Plaintiffs In Individual Actions 3

2. Procedural History 4

3. Terms Of The Settlement 6

4. Decisions Below 7

REASONS FOR GRANTING THE WRIT 8

The Fifth Circuit’s Denial Of Petitioners’ Right
To Opt Out To Pursue Their Claims To Money
Damages Conflicts With Decisions Of Other
Courts Of Appeals And Of This Court 8

1.	The Courts Of Appeals Disagree On Whether Absent Class Members Have A Due Process Right To Opt Out Of Any Class Action That Asserts, Or A Class Settlement That Releases, Substantial Monetary Claims	10
2.	The Courts Of Appeals Are Deeply Divided On Whether Rule 23(b) Provides Class Members The Right To Opt Out Of Class Actions That Assert Monetary Claims On Their Behalf.	16
3.	The Continuing Division Among The Courts Of Appeals On The Questions Left Unresolved In <i>Ticor</i> and <i>Adams</i> Harms Absent Class Members Across The Country.	19
	CONCLUSION	21
	APPENDIX	
	Court of Appeals' Opinion	1a
	District Court Opinion	9a
	Court of Appeals' Denial of Rehearing	109a
	Federal Rule of Civil Procedure 23	111a

TABLE OF AUTHORITIES

CASES

<i>In re A.H. Robins Co., Inc.</i> , 880 F.2d 709 (4th Cir. 1989), <i>cert. denied</i> , 493 U.S. 959 (1989)	12, 13, 16
<i>Adams v. Robertson</i> , 520 U.S. 83 (1997)	1, 8, 9
<i>Allison v. Citgo Petroleum Corp.</i> , 151 F.3d 402 (5th Cir. 1998)	17, 18
<i>Barabin v. Aramark Corp.</i> , No. 02-8057, 2003 WL 355417 (3d Cir. 2003) . . .	18
<i>Brown v. Ticor Title Ins. Co.</i> , 982 F.2d 386, 392 (9th Cir. 1992), <i>writ dismissed as improvidently granted</i> , 511 U.S. 117 (1994)	10, 11, 12
<i>Coleman v. General Motors Corp.</i> , 296 F.3d 443 (6th Cir. 2002)	18
<i>DeBoer v. Mellon Mortgage Co.</i> , 64 F.3d 1171 (8th Cir. 1995), <i>cert. denied</i> , 517 U.S. 1156 (1996) . . .	12, 13, 14, 16
<i>Eubanks v. Billington</i> , 110 F.3d 87 (D.C. Cir. 1997)	12, 16
<i>First Federal of Mich. v. Barrow</i> , 878 F.2d 912 (6th Cir. 1989)	12, 16
<i>Holmes v. Cont'l Can Co.</i> ,	

706 F.2d 1144 (11th Cir.1983)	11-12, 16
<i>International Shoe v. Washington</i> , 326 U.S. 310 (1945)	14
<i>Jefferson v. Ingersoll International Corp.</i> , 195 F.3d 894 (7th Cir. 1999)	11, 12, 16, 18
<i>Kyriazi v. W. Electrical Co.</i> , 647 F.2d 388 (3d Cir. 1981)	12, 13, 16
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	14
<i>Martin v. Wilks</i> , 490 U.S. 755 (1989)	15
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	14
<i>Molski v. Gleich</i> , 318 F.3d 937 (9th Cir. 2003)	11, 12, 16, 17, 18, 19
<i>In re Monumental Life Insurance Co.</i> , 365 F.3d 408 (5th Cir. 2004), <i>cert. denied</i> , --- U.S.--, 2004 WL 2153519 (Oct. 4, 2004)	19
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950)	14
<i>Murray v. Auslander</i> , 244 F.3d 807 (11th Cir. 2001)	11, 16, 18
<i>Ortiz v. Fibreboard Corporation</i> , 527 U.S. 815 (1999)	11, 15, 20

Phillips Petroleum Company v. Shutts,
472 U.S. 797 (1985) 10, 11, 14, 17

Reynolds v. National Football League,
584 F.2d 280 (8th Cir. 1978) 13

Robinson v. Metropolitan-North Commuter R.R. Co.,
267 F.3d 147 (2d Cir. 2001),
cert. denied, 535 U.S. 951 (2002) 11, 12, 16, 18

Ticor Title Insurance Co. v. Brown,
511 U.S. 117 (1994) 1, 8, 9, 16, 17

White v. National Football League,
41 F.3d 402 (8th Cir. 1994),
cert. denied, 515 U.S. 1137 (1995) 14

STATUTES AND RULE

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 5

28 U.S.C. § 1367 5

Mississippi Code Annotated § 63-19-55 5

Federal Rule of Civil Procedure 23 *passim*

MISCELLANEOUS

Civil Rules Advisory Committee Notes to Rule 23,
39 F.R.D. 69 (1966) 17, 20

Federal Practice & Procedure: Civil 2d (2d ed. 2003) . . . 13

Moore's Federal Practice (1995) 13

Linda S. Mullenix,
“No Exit: Mandatory Class Actions In The New
Millennium And The Blurring Of Categorical
Imperatives,” 2003 U. Chi. Legal F. 177 19

Richard A. Nagareda,
“The Preexistence Principle And The Structure of
The Class Action,” 103 Colum. L. Rev. 149 (2003).18

Newberg on Class Actions (4th ed. 2004) 13, 14

PETITION FOR A WRIT OF CERTIORARI

Petitioners Rebecca Crystian, et al., seek a writ of certiorari to review a ruling that conflicts with the decisions of other courts of appeals and of this Court. Approximately 1,200 class members, including the approximately 835 who are petitioners here, sought to opt out of a class action settlement with respondents Tower Loan of Mississippi, et al., and pursue their own money damages claims. Neither the class certification nor the settlement permitted opt-outs, and the court of appeals determined that neither Federal Rule of Civil Procedure 23 nor the Due Process Clause provided a right to opt out. The decision below thus bound dissenting class members, against their will, to a settlement that extinguished their claims to potentially thousands of dollars in damages in exchange for relief averaging under \$65 per class member, while providing hundreds of thousands of dollars in fees for class counsel.

This Court has expressly stated that Rule 23 and the Due Process Clause may require an opt-out right for damages claims. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994). It has twice granted certiorari to determine the due process question, but it dismissed the writ as improvidently granted each time. *See id.*; *Adams v. Robertson*, 520 U.S. 83 (1997). In one instance, the Court dismissed because the case's posture did not permit deciding the Rule 23 question before reaching the constitutional question. *See Ticor*, 511 U.S. 117. In the other, it dismissed because the constitutional question had not been properly presented to the court to which the petitioners sought certiorari. *See Adams*, 520 U.S. 83. This petition presents none of the problems that led the Court to dismiss the writ in *Ticor* and *Adams*. It therefore provides the opportunity to resolve a long-standing conflict among the courts of appeals on whether Rule 23 provides damages claimants the right to opt out of class actions and, if not, whether the Due Process Clause guarantees that right.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unofficially reported at 91 Fed. Appx. 952 and is reproduced in the appendix at Pet. App. 1a. The opinion of the United States District Court for the Southern District of Mississippi is reported at 216 F.R.D. 338 (2003) and is reproduced in the appendix at Pet. App. 9a.

JURISDICTION

The court of appeals entered judgment on March 16, 2004. Pet. App. 1a. Petitioners filed a timely petition for rehearing *en banc* on March 30, 2004, which the court of appeals denied on July 14, 2004. Pet. App. 109a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE AND CONSTITUTIONAL PROVISION INVOLVED

Federal Rule of Civil Procedure 23 is reproduced at Pet. App. 111a. The Due Process Clause of the Fifth Amendment provides in relevant part: “No person shall be . . . deprived of life, liberty, or property, without due process of law”

STATEMENT OF THE CASE

This case involves the settlement of a class action brought on behalf of people who borrowed from respondent Tower Loan of Mississippi between February 15, 1993, and September 1, 2001. The class complaint alleged a variety of predatory lending practices. Under the settlement, the class receives a total of \$6.62 million (an average of \$62.27 per class member), class counsel will receive up to \$900,000 in attorneys’ fees, and Tower must alter its lending practices for five years, after which it is free to resume the very conduct challenged in this litigation. Over 1,200 class members—approximately 835 of whom are petitioners here—objected to the settlement and attempted to opt out,

believing they could do better pursuing their own claims. Although the action asserted routine consumer claims for monetary damages, the court of appeals affirmed certification of a mandatory, non-opt-out class under Federal Rule of Civil Procedure 23(b)(1)(A). As a result, class members who wished to pursue their claims independently were prohibited from doing so. This case presents the question whether it was lawful to deny those class members the right to opt out.

1. The Nature Of The Predatory Lending Allegations And The Remedies For Similar Violations Obtained By Other Plaintiffs In Individual Actions

Plaintiffs alleged that Tower engaged in a variety of predatory lending practices in violation of Mississippi and federal law. Specifically, they claimed that Tower employed a practice known in the industry as “insurance packing,” which consists of using fraudulent and misleading disclosures and coercive marketing practices to induce borrowers to purchase insurance in conjunction with their loans at unfavorable rates and under unlawful conditions. Some plaintiffs were induced to buy personal property insurance they claim was worthless because their property was already fully insured. Others were charged for insurance without being told it was optional, or were charged premiums beyond the terms of their loans. Still others were fraudulently induced to refinance their loans, taking on additional interest payments and insurance premiums—a tactic known as “flipping” that almost invariably harms borrowers. These practices imposed unlawful premiums and in some cases destroyed borrowers’ credit ratings and led to repossessions and foreclosures. Plaintiffs principally sought monetary relief in the form of compensatory and punitive damages.

Several attorneys have sworn in uncontested affidavits that past plaintiffs with similar claims have won, or settled for, substantial damages. In one action against another Mississippi

loan company, 23 plaintiffs won highly individualized damages judgments ranging from \$5,000 to \$250,000. *See* Fifth Circuit Record (hereafter “R.”) 1748-52, 1800-01; *see also* R. 1095 (affidavit of attorney who litigated thousands of cases involving issues here stating that “all the individual settlements were far in excess of those contemplated by the Tower Class Settlement”); R. 2008 (affidavit of attorney who represented six clients in three cases involving claims of insurance packing and flipping stating that most settled prior to trial for significantly more than \$100). Here, class counsel has conceded that class members’ circumstances vary widely and that between 1,000 and 1,500 class members could likely win substantial damages awards if permitted to pursue their own state-court actions. Abernathy Testimony, R. vol. XI 37-38, 46-47.

2. Procedural History

Petitioner Crystian, hundreds of other petitioners, and many other plaintiffs sued Tower and its affiliates in Mississippi state courts in 1998. R. 1467. Their complaints contained numerous state-law counts, including breach of fiduciary duty, breach of the covenants of good faith and fair dealing, fraudulent misrepresentation or omission, negligent misrepresentation or omission, civil conspiracy, restitution, unjust enrichment, fraud, and usury. *See, e.g.*, Complaint ¶¶ 28-93, *Barnes v. First Tower Loan, Inc.*, No. 98-0022 (Cir. Ct. Jefferson Cty., Miss. filed Feb. 17, 1998), R. 1451-64. The complaints primarily sought compensatory and punitive damages and did not seek class certification. *Id.* ¶ 101, R. 1467.

Separately from petitioners, plaintiff Bryant Jones had previously sued Tower in United States District Court for the Southern District of Mississippi, landing before Judge Charles Pickering. *See Bryant Jones, et al. v. Tower Loan*, No. 2:96cv63PG (S.D. Miss.). Jones asserted state-law claims similar to petitioners’ and added separate counts alleging

violations of several federal statutes, including the Truth in Lending Act and the Fair Debt Collection Practices Act. R. 22-24, 27. He also sought class certification under Federal Rules of Civil Procedure 23(b)(1), (b)(2), and (b)(3). Faced with hundreds of similar state-court claims and one putative federal class action, Tower supported certification, but only for a mandatory class under (b)(1) and (b)(2) that would sweep in all other claims pending against it. However, in February 1998, Judge Pickering rejected mandatory class certification, specifically commenting that class members must be provided the right to opt out. Oral Bench Opinion, R. 1101-04 (Feb. 5, 1998).

With the first mandatory class defunct, new counsel took the same claims to another judge in the same federal district court (Judge David Bramlette), resulting in the present action. *See* Complaint, R. 1. The complaint asserted federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction under 28 U.S.C. § 1367. The first eighteen counts of the class complaint focus entirely on obtaining money damages from defendants. The complaint seeks “actual and compensatory damages,” Second Amended Complaint ¶ 121(b), R. 513, under federal anti-trust law, the Truth in Lending Act, the Fair Debt Collection Practices Act, and other statutes, *id.* ¶ 121(c), R. 513, “punitive damages in a fair and reasonable amount,” *id.* ¶ 121(d), R. 514, restitution and/or disgorgement, *id.* ¶ 121(e), R. 514, and any monetary relief that might be available under Mississippi Code Annotated § 63-19-55. *Id.* ¶ 121(f), R. 514. After the foregoing requests for comprehensive compensatory, punitive, and other monetary relief, the nineteenth count of the complaint includes one boilerplate request for injunctive relief. *Id.* ¶ 121(g), R.514.

Tower again supported mandatory class certification, and Judge Bramlette agreed. On September 9, 1998, he certified the same claims and same class that Judge Pickering had just rejected—a mandatory class under Rules 23(b)(1)(A),

(b)(1)(B), and (b)(2)—and enjoined all pending and future state-court actions against Tower. R. 191. Thus, hundreds of class members who had not yet sued Tower individually, including hundreds of the petitioners in this Court, were enjoined from filing purely on the basis of speculation that their eventual claims would be appropriate for mandatory class treatment.

3. Terms Of The Settlement

In the spring of 2002, class counsel and counsel for Tower agreed to settle the case, and, on April 16, 2002, the district court preliminarily approved the settlement. The agreement divides \$6.62 million among approximately 100,000 class members. *See* Settlement Agreement at 12-13, R. 979. The \$6.62 million comprises “compensatory” and “punitive” damages funds of \$2.23 and \$4.39 million, respectively. Approximately 67,000 principal borrowers will receive \$27.50 in compensatory damages and \$41.25 in punitive damages, while 28,000 co-obligors will receive \$13.75 and \$20.62, respectively. R. 979-80 & n.2. Repeat borrowers will receive an extra \$18.00 in punitive damages. *Id.* Thus, the maximum amount that any class member will receive—regardless of the number of loans, the type or amount of insurance involved, the amount of premiums paid, the conduct of Tower and its agents in individual instances, the class members’ knowledge of whether the loans included insurance, and any resulting tarnished credit ratings, foreclosures, or repossessions—is \$86.75, the amount available to repeat, principal borrowers. The agreement also restricts Tower’s lending practices for five years, a benefit only to those plaintiffs who choose to borrow from Tower again in that period.

Critically, the settlement prevents class members from opting out and extinguishes all claims they may have against Tower regarding any aspect of its loan practices, including the damages claims in petitioners’ state-court suits.

4. Decisions Below

More than 1,200 class members objected to the settlement, including nearly every person with a pending state-court action. Petitioners objected and filed motions to opt out in June 2002. As relevant here, petitioners argued that both Rule 23 and the Due Process Clause required that they be permitted to opt out because they sought substantial money damages. On March 27, 2003, the district court rejected all objections and approved class certification, the fairness of the settlement, and attorneys' fees of up to \$900,000. Pet. App. 9a. The district court held that (b)(1)(A) certification was proper because separate adjudications of class members' claims would have risked creating incompatible standards of conduct for Tower, Pet. App. 84a-88a, and that (b)(2) certification was proper because the action was predominantly for injunctive relief rather than damages. Pet. App. 88a-89a. It rejected petitioners' due process arguments by labeling them rehashes of the arguments against (b)(1)(A) and (b)(2) certification because both inquiries turn on whether monetary or injunctive relief predominates in the action. Pet. App. 105a. It thus held that the Due Process Clause imposes no limits on mandatory class certification under Rule 23(b): "[N]o due process right to opt out arises in a properly certified Rule 23(b)(1) or Rule 23(b)(2) class action." Pet. App. 106a.

The Fifth Circuit affirmed on March 16, 2004. Notwithstanding the complaint's near-exclusive emphasis on damages, the court held that because both the class complaint and the state-court complaints included claims for injunctive relief, they presented the risk of "inconsistent or varying adjudications" that could "establish incompatible standards of conduct" for Tower under the terms of Rule 23(b)(1)(A). Pet. App. 2a-5a. Although many of the objectors, including hundreds of petitioners here, had yet to file suits against Tower (having been enjoined from doing so since 1998), the court of appeals extended its rationale to *future* plaintiffs, supposing that

future actions would “probably” request injunctive relief. Pet. App. 3a. The court also upheld the inclusion of damages claims within the (b)(1)(A) certification, even though the supposed risk of “inconsistent adjudications” stemmed *only* from the claims for injunctive relief. Pet. App. 2a-5a. The court declined to address the propriety of (b)(2) certification. In answer to petitioners’ due process arguments (and all other arguments raised by the objectors), the court stated only that it affirmed “essentially for the reasons given in [the district court’s] able opinion.” Pet. App. 8a.¹

REASONS FOR GRANTING THE WRIT

The Fifth Circuit’s Denial Of Petitioners’ Right To Opt Out To Pursue Their Claims For Money Damages Conflicts With Decisions Of Other Courts Of Appeals And Of This Court

This Court has twice granted certiorari on the question whether “absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf.” *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 120-21 (1994) (per curiam); *Adams v. Robertson*, 520 U.S. 83, 85 (1997) (per curiam) (“We granted a petition for certiorari to the Supreme Court of Alabama to determine whether the Alabama courts’ approval of the class action and the settlement agreement in this case, without affording all class members the right to exclude themselves from the class or

¹The district court’s opinion, however, was not a product of its own toil. It is, from beginning to end, largely a word-for-word recitation of Tower’s proposed findings of fact and conclusions of law, right down to headings, footnotes, cross-references, and citations. *Compare, e.g.*, Pet. App. 82a-107a (approving class certification and rejecting due process arguments), *with* Defendant’s Proposed Conclusions of Law, ¶¶ 114-40 & Conclusion, at 95-96 (same).

the agreement, violated the Due Process Clause of the Fourteenth Amendment.”). In both cases, as here, the plaintiffs sought both monetary and injunctive relief. *Ticor*, 511 U.S. at 118; *Adams*, 520 U.S. at 86. In each case, however, this Court dismissed the writ as improvidently granted after briefing and oral argument on the merits. *Ticor*, 511 U.S. at 121-22; *Adams*, 520 U.S. at 85.

In *Ticor*, the Court dismissed in order to avoid deciding a potentially unnecessary constitutional question. There is a “substantial possibility,” the Court noted, that class actions asserting monetary claims may only be certified under Rule 23(b)(3), which itself guarantees absent class members the right to opt out. 511 U.S. at 121-22. Therefore, the Court reasoned, it may not be necessary to consider whether the Due Process Clause provides that right. *Id.* Because *Ticor* did not provide the opportunity to decide the Rule 23 question, the Court dismissed to avoid reaching a constitutional ruling “potentially hypothetical to everyone” aside from the litigants before it. *Id.* at 122. In *Adams*, the Court dismissed because petitioners failed to establish that they had properly presented the due process issue to the Alabama Supreme Court. 520 U.S. at 86-87.

This petition presents precisely the same question on which the Court granted certiorari in *Ticor* and *Adams*, and it is free of the problems that led the Court to dismiss them. Here, the Court may decide the Rule 23 question first and reach the constitutional issue only if it determines that Rule 23 does not provide petitioners an opt-out right. Moreover, the petition comes from a court of appeals to which all issues were properly presented. Thus, this case offers a vehicle for addressing a substantial issue in which the Court has expressed “continuing interest,” *Adams*, 520 U.S. at 92 n.6, and on which the Court has twice previously granted review. It also presents the opportunity to resolve conflicts among the courts of appeals on issues of great importance.

1. The Courts Of Appeals Disagree On Whether Absent Class Members Have A Due Process Right To Opt Out Of Any Class Action That Asserts, Or Any Class Settlement That Releases, Substantial Monetary Claims.

In *Brown v. Ticor Title Insurance Company*, 982 F.2d 392 (9th Cir. 1992), *writ dismissed as improvidently granted*, 511 U.S. 117 (1994), the Ninth Circuit held that due process requires providing opt-out rights to any class members seeking substantial damages claims, even when the class also claims injunctive relief. *Id.* at 386. Here, the Fifth Circuit held precisely the opposite. Notwithstanding that the plaintiff class sought substantial monetary damages, that the settlement pays the class from a “Compensatory Damages Fund,” Pet. App. 92a & n.20, and releases all damages claims, Pet. App. 74a-75a, 92a, and despite class counsel’s concession that 1,000-1,500 class members held valuable individualized damages claims, R. vol. XI 37-38, 46-47, the court of appeals approved mandatory certification based on the mere presence of a boilerplate claim for injunctive relief.

The Ninth Circuit’s *Ticor* decision stems from this Court’s holding in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), that absent members of classes seeking “wholly or predominantly” money judgments must be provided notice, adequate representation, and the right to opt out. *Ticor*, 982 F.2d at 392 (citing *Shutts*, 472 U.S. at 811-12 & n.3). The Ninth Circuit read *Shutts* to say precisely that:

According to *Shutts*, minimal due process requires that “an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form to the court,” if monetary claims are involved.

Id. (citing *Shutts*, 472 U.S. at 811). This Court reaffirmed and

bolstered the *Shutts* holding in *Ortiz v. Fibreboard Corporation*, 527 U.S. 815, 846-48 (1999), in which the Court expanded upon the rationale for providing opt-out rights to absent class members with substantial damages claims and reversed the certification of damages claims in a mandatory Rule 23(b)(1)(B) class.

Subsequently, the Ninth Circuit reaffirmed *Ticor* and rejected—in direct contrast to the decision below—a class action settlement that released absent class members’ substantial damages claims without providing an opt-out right. *Molski v. Gleich*, 318 F.3d 937, 950-51 (9th Cir. 2003) (citing *Ticor*, 982 F.2d at 392). The Seventh Circuit has gone even further, reading *Ortiz* to require opt-out rights “whenever possible.” *Jefferson v. Ingersoll Int’l Corp.*, 195 F.3d 894, 899 (7th Cir. 1999) (“*Ortiz* . . . says in no uncertain terms that class members’ right to notice and an opportunity to opt out should be preserved whenever possible.”). The result below cannot be squared with *Molski* or *Jefferson*.

Moreover, several courts of appeals now permit a variety of flexible arrangements under Rule 23(b) in order to satisfy due process concerns. For example, the Second, Seventh, Ninth, Eleventh, and D.C. Circuits permit splitting actions into separate mandatory and opt-out classes (so-called “hybrid” actions), or certifying one mandatory class but nevertheless granting opt-out rights to some members at the courts’ discretion. *See Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 166-68 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002); *Jefferson*, 195 F.3d at 897-98; *Molski*, 318 F.3d at 950-51 & n.16; *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) (splitting); *Holmes v. Cont’l Can Co.*, 706 F.2d 1144, 1160 (11th Cir.1983) (permitting opt-outs for mandatory class members); *Eubanks v. Billington*, 110 F.3d 87,

96 (D.C. Cir. 1997).² Had the Fifth Circuit followed these holdings, it would not have certified petitioners' damages claims in a mandatory class and extinguished them through settlement, even assuming that the injunctive claims were properly certified.

In contrast to the Ninth Circuit's approach in *Ticor* and the Seventh Circuit's approach in *Jefferson*, other circuits, like the Fifth Circuit below, permit the certification of substantial damages claims into mandatory classes. Indeed, the Third, Fourth, Sixth, and Eighth Circuits go further than merely permitting such certification—they encourage mandatory class certification even when damages claims are present and opt-out certification is available. See *Kyriazi v. W. Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981); *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 728 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989); *First Fed. of Mich. v. Barrow*, 878 F.2d 912, 919-20 (6th Cir. 1989); *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995) (“When either subsection (b)(1) or (b)(2) is applicable (b)(3) should not be used[.]”), *cert. denied*, 517 U.S. 1156 (1996).

Following commentators who characterize opting out as a *privilege* rather than a right, these courts reason that mandatory classes are preferable to opt-out classes largely for efficiency, convenience, and maximum *res judicata* effect. See *Robins*, 880 F.2d at 728 (citing Charles Wright et al., 7A *Federal Practice & Procedure: Civil 2d* § 1772, at 425 (2d ed. 1986); James Wm. Moore et al., 3B *Moore's Federal Practice*

²These courts frequently co-mingle discussion of what Rule 23(b) and due process require, essentially treating the two inquiries as coextensive or reading Rule 23(b) to require whatever is necessary to avoid due process problems. See *Robinson*, 267 F.3d at 165-66; *Jefferson*, 195 F.3d at 897-98; *Molski*, 318 F.3d at 947-51 & n.16. Thus, it is difficult to characterize them neatly as either due process or Rule 23(b) decisions. Typically, they are both.

¶ 23.31[3], at 236-37 (2d ed. 1987)); *DeBoer*, 64 F.3d at 1175 (citing Wright et al., 7A *Federal Practice & Procedure: Civil 2d* § 1777, at 521, for the proposition that “the *privilege* to opt-out of the action should be operable only when the class action is maintainable under [Rule 23(b)(3)] alone”) (emphasis added, brackets in original); see also *Reynolds v. Nat’l Football League*, 584 F.2d 280, 284 (8th Cir. 1978) (“[W]hen the choice exists between (b)(1) and (b)(3) certification, generally it is proper to proceed under (b)(1) exclusively in order to avoid inconsistent adjudication or a compromise of class interests.”). In so holding, these circuits believe that district courts ought to exercise their discretion to do something that, in petitioners’ view, violates absent members’ due process rights under *Shutts* and *Ortiz*. They expressly encourage certifying claims that could be certified with opt-out rights into mandatory classes instead, in part simply for the convenience of avoiding more extensive procedural requirements. See *Kyriazi*, 647 F.2d at 393 (“We therefore agree . . . that an action maintainable under both (b)(2) and (b)(3) should be treated under (b)(2) to enjoy its superior *res judicata* effect and to eliminate the procedural complications of (b)(3)[.]”).³

The Third, Fourth, Fifth, and Sixth Circuits are silent on why they are unconcerned for due process in this context. But the Eighth Circuit has been explicit: It has adopted a peculiarly

³In direct contrast to this Court’s emphasis on the due process rights of absent class members in *Shutts* and *Ortiz*, leading treatises recommend that courts intentionally deprive absent class members of opt-out rights where convenient. See Conte & Newberg, 2 *Newberg on Class Actions* § 4:8 at 31 (4th ed. 2004) (“Subdivisions (b)(1)(A) and (B) therefore have unique applicability in damages cases where the court is desirous of avoiding opt-out rights for class members.”); Wright et al., 7A *Federal Practice & Procedure: Civil 2d* § 1777, at 521 (2d ed. 2003); Moore et al., 3B *Moore’s Federal Practice* ¶ 23.31[3], at 236-37 (1995).

narrow reading of *Shutts*. In direct conflict with the Ninth and Seventh Circuits, the Eighth Circuit interprets *Shutts* to require opt-outs only when absent class members are outside the personal jurisdiction of the certifying court. See *White v. Nat'l Football League*, 41 F.3d 402, 407-08 (8th Cir. 1994), *cert. denied*, 515 U.S. 1137 (1995); *DeBoer*, 64 F.3d at 1175. This approach defines class action due process concerns as purely jurisdictional in nature—simply a matter of minimum contacts with the forum state under *International Shoe v. Washington*, 326 U.S. 310 (1945).

The Eighth Circuit's view of *Shutts* is almost certainly incorrect. This Court has made clear that opt-out rights in class actions stem not just from personal jurisdiction concerns, but also from two other veins of due process jurisprudence. First, as *Shutts* explicitly noted, claims for damages are a form of property protected by the Due Process Clause. 472 U.S. at 807 (“[P]etitioner correctly points out that a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs.”) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982). Opt-out rights, therefore, are not simply a matter of geography. They guard against the unconstitutional deprivation of property without adequate procedures, see, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976), by allowing each class member to control the disposition of his or her constitutionally protected property. The teaching of *Shutts* is that although minimum contacts are *not* necessary to bind absent class members, minimal due process—notice, adequate representation, and an opportunity to opt out of damages actions—must be accorded all absent class members, not just those lacking jurisdictional contacts, before they can be said to have “consented” to be bound by litigation or settlement. *Shutts* gave no indication that absent class members who had minimum contacts with the forum state could have been denied notice, adequate representation, and the

opportunity to opt out.

Second, *Ortiz* elaborated on the Court’s due process concerns, explicitly extending them beyond jurisdiction. The Court explained that opt-out rights stem from “our deep-rooted historic tradition that everyone should have his own day in court,” *Ortiz*, 527 U.S. at 846 (citing *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (internal marks omitted)), and it specifically noted that “[t]he inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class” where “[t]he legal rights of absent class members . . . are resolved regardless of either their consent, or, in a class with objectors, their express wish to the contrary.” *Id.* at 846-47. The Court therefore adopted a limiting construction of Rule 23(b)(1)(B) and reversed the certification of a mandatory damages class under that rule in order to avoid “serious constitutional concerns” presented by more permissive certification. *Id.* at 842, 845, 864.

This petition raises precisely the due process problem identified by *Ortiz*: Here, over 1,200 class members have been bound to a class settlement that extinguishes their legal rights, and offers them virtually nothing in return, against “their express wish to the contrary.” *Id.* at 847. The due process question has been the subject of deepening confusion in the courts of appeals since this Court was unable to resolve it in *Ticor* and *Adams*, and this Court should again grant review to decide it.

2. The Courts Of Appeals Are Deeply Divided On Whether Rule 23(b) Provides Class Members The Right To Opt Out Of Class Actions That Assert

Monetary Claims On Their Behalf.

In dismissing *Ticor*, this Court noted the “substantial possibility” that, “in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not.” 511 U.S. at 121. As discussed above, the Court dismissed the writ in *Ticor* because it could not reach the Rule 23(b) question before deciding the constitutional question. Here, the Court may decide the Rule 23(b) question first. Indeed, because the courts are as deeply divided over the Rule 23(b) questions as they are over the due process question, the interpretation of Rule 23(b) is an issue that would independently merit review even absent the substantial constitutional issue.

As explained in part 1, most courts of appeals read the Due Process Clause and Rule 23(b) as coterminous regarding when opt-out rights are required. *See, e.g., Robinson*, 267 F.3d at 165-66; *Jefferson*, 195 F.3d at 897-98; *Molski*, 318 F.3d at 949-51 & n.16. As a result, the courts disagree about Rule 23(b) in much the same manner in which they disagree about the Due Process Clause: The Third, Fourth, Sixth, and Eighth Circuits hold that courts should certify claims into mandatory classes whenever possible, even when those claims could be certified in a (b)(3) opt-out class. *See Kyriazi*, 647 F.2d at 393; *Robins*, 880 F.2d at 728; *Barrow*, 878 F.2d at 919-20; *DeBoer*, 64 F.3d at 1175. In contrast, the Second, Seventh, Ninth, Eleventh, and D.C. Circuits interpret Rule 23(b) to require a more expansive opt-out right, and they permit a variety of flexible class certification arrangements to provide it. *See Robinson*, 267 F.3d at 166-68; *Jefferson*, 195 F.3d at 897-98; *Molski*, 318 F.3d at 950-51 & n.16; *Murray*, 244 F.3d at 812; *Holmes*, 706 F.2d at 1160; *Eubanks*, 110 F.3d at 96. In these latter courts, class counsel cannot avoid (b)(3) certification and deny opt-out rights simply by appending an injunctive claim to an otherwise typical action for damages, as occurred here.

Within this broad split on Rule 23(b), there are also several relevant sub-splits. Most importantly, the courts of appeals conflict on whether to apply the “predominance” inquiry to all mandatory classes or only to (b)(2) classes.⁴ The Ninth Circuit holds that courts must consider whether monetary or injunctive claims predominate before certifying *any* mandatory class. That is because the same Rule 23(b) and due process concerns obtain any time absent members may be denied opt-out rights: “[T]hese concerns would be applicable to *any* mandatory class, whether under Rule 23(b)(1) or (b)(2).” *Molski*, 318 F.3d at 949 n.13. This Court suggested in *Ticor* that it may also treat (b)(1) and (b)(2) identically for purposes of determining when Rule 23(b) requires opt-out rights. *See* 511 U.S. at 121.

In contrast, the Fifth Circuit, despite penning a leading case on the predominance inquiry under (b)(2), *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998), does not, as the decision below makes clear, apply that test before certifying mandatory (b)(1)(A) classes. The court below declined to inquire into the predominance of monetary or injunctive claims and instead adopted an opposite approach: It held that even in an action containing substantial damages

⁴Although the text of Rule 23(b)(2) does not refer to a predominance requirement, the Civil Rules Advisory Committee Notes to Rule 23(b)(2) state that (b)(2) certification is improper for actions “in which the appropriate final relief relates exclusively or predominantly to money damages.” 39 F.R.D. 69, 102 (1966). Therefore, some courts read predominance solely as a Rule 23(b)(2) requirement. *Shutts*, however, suggests that the predominance inquiry applies to *all* mandatory classes because it stems from the due process rights of class members who have claims for money damages, not from the particularities of any subdivision of Rule 23(b). *Shutts*, 472 U.S. 812 & n.3 (requiring the right to opt out for absent class members of actions seeking “wholly or predominantly” money judgments).

claims, the presence of a claim for injunctive relief permits mandatory certification of the entire action and approval of a settlement releasing all claims.

If this Court were to hold that courts must consider predominance before certifying any mandatory class—thus requiring a predominance inquiry in this case—then it would necessarily resolve at least one further split: Regardless of whether they use predominance analysis for all mandatory classes or just (b)(2) classes, the courts of appeals disagree sharply on what such analysis requires. *See, e.g.*, Richard A. Nagareda, *The Preexistence Principle And The Structure of The Class Action*, 103 Colum. L. Rev. 149, 236 n.368 (2003) (“Judicial efforts to give practical meaning to [the predominance inquiry] have led to a dizzying array of results.”).

The Third, Sixth, Seventh, and Eleventh Circuits follow a standard announced by the Fifth Circuit in *Allison*, 151 F.3d at 415 (“[M]onetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief. By incidental, we mean damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief.”). *See Barabin v. Aramark Corp.*, No. 02-8057, 2003 WL 355417, at *1-2 (3d Cir. 2003); *Coleman v. Gen. Motors Corp.*, 296 F.3d 443, 446-47 (6th Cir. 2002); *Jefferson*, 195 F.3d at 897-98; *Murray*, 244 F.3d at 812. The Second and Ninth Circuits have explicitly rejected the Fifth Circuit’s approach and instead employ an “ad hoc balancing” analysis announced in *Robinson*, 267 F.3d at 163-64. *See Molski*, 318 F.3d at 949-50 & nn.14-15.

The two approaches are wholly at odds with one another. The Second and Ninth Circuits grant district courts broad discretion to balance several factors in an attempt to divine the overall purpose behind an action, *see, e.g., Molski*, 318 F.3d at 949-50 & nn.14-15, and criticize the Fifth Circuit’s

“bright-line” approach for “nullify[ing] the discretion vested in the district courts through Rule 23.” *Id.* at 950. The Fifth Circuit strongly disapproves considering the plaintiffs’ intent, while the Ninth expressly relies on that inquiry. *Compare In re Monumental Life Ins. Co.*, 365 F.3d 408, 415 (5th Cir. 2004) (“[C]ertification does not hinge on the subjective intent of the class representatives and their counsel in bringing suit.”), *cert. denied*, --- U.S. ---, 2004 WL 2153519 (Oct. 04, 2004), *with Molski*, 318 F.3d at 950 (“[W]e have focused on the language of Rule 23(b)(2) and the intent of the plaintiffs in bringing the suit.”).

For all of these reasons, the courts’ deep division on the application of Rule 23(b) merits review in addition to, and independently of, the due process question.

3. The Continuing Division Among The Courts Of Appeals On The Questions Left Unresolved In *Ticor* and *Adams Harms* Absent Class Members Across The Country.

In the words of one commentator, the courts of appeals are “all over the map concerning what due process requires for mandatory classes.” Linda S. Mullenix, *No Exit: Mandatory Class Actions In The New Millennium And The Blurring Of Categorical Imperatives*, 2003 U. Chi. Legal F. 177, 207. The courts of appeals fundamentally conflict in several ways on the opt-out rights of absent class members. To reiterate: Regarding due process, some courts require opt-out rights in any case involving substantial damages and permit broad flexibility under Rule 23(b) to accommodate them. Some go further and require opt-out rights whenever possible. Other courts, like the court below, permit the denial of opt-out rights based on the mere presence of a claim for injunctive relief. Still others recommend denying opt-out rights whenever possible. Regarding Rule 23(b), some courts inquire into whether monetary or injunctive relief predominates before

certifying *any* mandatory class. Others, like the court below, only ask that question in (b)(2) certifications. Finally, all courts that employ a predominance analysis conflict on how it should be conducted.

This case highlights the extent of confusion in this area of law and its consequences for absent class members. The Fifth Circuit's certification of substantial damages claims under Rule 23(b)(1)(A)—a subdivision meant to guard against incompatible court orders resulting from multiple adjudications of the same *injunctive* claim, *see* Civil Rules Advisory Committee Note to Rule 23, 39 F.R.D. at 100—reflects a Rule 23(b) and due process jurisprudence in deep disarray. Its holding instructs class counsel, and settling defendants who seek to avoid individual suits, that they can subvert (b)(3) opt-out rights and bind absent class members into mandatory class actions simply by adding boilerplate injunctive requests to otherwise classic actions for damages. As a result, courts lock thousands of people into class actions against their will, depriving them of the right to pursue their own claims when they believe class counsel fails to represent their interests.

Here, over 1,200 people have been bound, against their express wishes to the contrary, to a settlement that provides (1) injunctive relief that is worthless to the many class members who will not borrow from Tower in the next five years, and (2) only a small fraction of the monetary relief that class counsel has acknowledged might be available to a significant portion of the class. This result is antithetical to our “day-in-court ideal,” *Ortiz*, 527 U.S. at 846-47, and underscores the need to address, in this case, the issues that the Court was unable to resolve a decade ago in *Ticor*.

CONCLUSION

For the reasons stated above, the petition for a writ of

certiorari should be granted.

Respectfully submitted,

David Arkush
Brian Wolfman
(Counsel of Record)
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-7721

Merrida Coxwell
Charles R. Mullins
Coxwell & Associates, PLLC
P.O. Box 1337
Jackson, MS 39215-1337
(601) 948-1600

G. Wayne Hynum
1507 Hardy Street, Suite 105
Hattiesburg, MS 39401-4978
(601) 583-2608

Don Barrett
Marshall Smith
Barrett Law Office, P.A.
P.O. Box 987
404 Court Square North
Lexington, MS 39095
(662) 834-2376

Attorneys for Petitioners

October 12, 2004