No. 09-56859

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT RADCLIFFE; CHESTER CARTER; ARNOLD LOVELL, JR.; CLIFTON C. SEALE, III; MARIA FALCON; and CHARLES JUNTIKKA,
Plaintiffs-Appellants,

v.

JOSE HERNANDEZ; ROBERT RANDALL; BERTRAM ROBISON; and KATHRYN PIKE,
Plaintiffs-Appellees,

and

TRANSUNION, LLC; EXPERIAN INFORMATION SOLUTIONS INC.; and EQUIFAX INFORMATION SERVICES LLC,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California

BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

This appeal challenges an extraordinary order barring appellant Charles Juntikka from sending a letter, at his own expense, to former clients who are members of a nationwide class action. The case was brought on behalf of fifteen million class members against the three major credit reporting agencies. By the district court's own estimation, each defendant is potentially liable for $1 billion in statutory damages, but the settlement would require each defendant to pay damages averaging less than $1 per class member. Juntikka wishes to contact his former clients to inform them of his opinion of the settlement, their right to opt out or object, and his potential availability to represent them. The district court, however, prohibited the contact, concluding that the letter Juntikka proposed to send was not sufficiently "neutral" and that Juntikka should not be allowed to "foist his views upon former clients." 1-RE-11. Because it does not include the findings necessary to impose such a "serious restraint[] on expression," *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-04 (1981), this Court should reverse the district court's order.

STATEMENT OF JURISDICTION

The district court had jurisdiction over the underlying action under 28 U.S.C. § 1331. The court entered the challenged order on November 16, 2009. 1-RE-1. On November 20, 2010, Juntikka, along with his clients Robert Radcliffe;

Chester Carter; Maria Falcon; Clifton C. Seale, III; and Arnold E. Lovell (the *White* plaintiffs), filed a timely notice of appeal. 2-RE-28. Juntikka then filed a motion in this Court to stay the deadline to opt out or object to the settlement and the hearing on final approval. In response to the stay motion, the settling plaintiffs and defendants argued that this Court lacked jurisdiction because the order appealed was not final. In its order denying the stay motion, this Court ordered the parties to brief the question of jurisdiction.

By the time this Court decides the appeal, the district court will likely have issued a final judgment in this case. In that event, this Court would have jurisdiction over both the judgment, 28 U.S.C. § 1291, and any earlier orders—including the order at issue here—that merge with that judgment. *See In re Frontier Properties, Inc.*, 979 F.2d 1358, 1364 (9th Cir. 1992). Even if the case does not become final, however, this Court would still have jurisdiction over the appeal because an order prohibiting communication with members of a class is appealable both as a collateral order, *see In re Sch. Asbestos Litig.*, 842 F.2d 671, 677-79 (3d Cir. 1988), and as an injunction under 28 U.S.C. § 1292(a)(1), *see Gates v. Cook*, 234 F.3d 221, 227-28 & n.5 (5th Cir. 2000). Moreover, this Court would also have jurisdiction to grant the requested relief by treating this appeal as a petition for mandamus. *See Williams v. U.S. Dist. Court*, 658 F.2d 430 (6th Cir. 1981). Each of these jurisdictional issues is discussed in more detail in Part III.

STATEMENT OF ISSUES

1. Did the district court's order prohibiting appellant Charles Juntikka from communicating with class members violate Federal Rule of Civil Procedure 23, where the court made no finding of abuse or deception?

2. Was the district court's order an unconstitutional prior restraint of speech, where the district court prohibited the communication solely because it included Juntikka's "viewpoint on the merits of the settlement"?

STATEMENT OF FACTS AND OF THE CASE

I. The Underlying Class Action

The litigation giving rise to this appeal involves the claims of about fifteen million class members against the nation's three largest consumer credit reporting agencies—Experian, Trans Union, and Equifax—under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681a(f), and several state-law causes of action. 1-RE-2-4; 2-RE-25. Appellant Charles Juntikka, together with other counsel, filed the lead case in November 2005 on behalf of five consumers (the *White* plaintiffs) whose credit reports continued to show their debts as delinquent even after the debts had been discharged in bankruptcy. Doc. 1. The plaintiffs claimed that the credit reporting agencies' practice of reporting these discharged debts violated the FCRA's requirement that the agencies (1) follow "reasonable procedures to assure maximum possible accuracy of the information concerning the individual about

whom the report relates," and (2) conduct reasonable investigations of disputed debts. 15 U.S.C. §§ 1681e(b), 1681i(a).

While the *White* plaintiffs were conducting discovery, the plaintiffs in a parallel case before the same judge filed a motion for class certification and a proposed settlement that purported to release all the class members' claims. *See Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 380 (C.D. Cal. 2007). The *White* plaintiffs objected to the settlement on the ground that it dramatically undervalued the claims, and the district court agreed. *Id.* at 381, 389-396. The court held that the proposed monetary relief "pale[d] in comparison to Plaintiffs' potential recovery through litigation," *id.* at 393, explaining that an FCRA claim for statutory damages of $100 to $1000 would "be available to the vast majority of the plaintiff class." *Id.* at 389. Even setting aside actual damages and attorneys' fees, and assuming the minimum statutory damages, the court concluded that the defendants were potentially liable for about $1 billion each. *Id.* The court also held that certification of the class would be improper, concluding that, although Rule 23's numerosity, commonality, and typicality requirements were satisfied, the named plaintiffs were not adequate class representatives because they represented only a small subclass entitled to economic relief and had no incentive to protect the interests of the majority of class members. *Id.* at 383-86.

Following its denial of preliminary approval in *Acosta*, the district court urged the parties to engage in mediation. *See* Doc. 338, at 4. The parties complied and, after several sessions, agreed to injunctive relief that would require the defendants to overhaul their process for reporting post-bankruptcy debts. *Id.* at 6, 14-27. In August 2008, the court certified the class and approved settlement of the class's claims for injunctive relief. *Id.* at 32-33. The settlement left the class's claims for damages unresolved. *Id.* at 33.

II. The Settlement Here

Before the parties reached agreement on damages, the district court reversed its position on certifiability. In January 2009, the court issued a tentative decision denying class certification and holding, contrary to its order in *Acosta* and its approval of the settlement for injunctive relief, that the class did not satisfy the commonality, typicality, or adequacy requirements of Rule 23. Doc. 369-1.

Shortly after, some of the *White* plaintiffs' lawyers reached agreement with the defendants on the damages claims. Doc. 374. The proposed settlement provided for damages of about $26 million—after deductions of about $11.75 million in attorneys' fees and $6.85 million in notice costs—which, if divided equally among the class, would amount to an average of less than $1 per defendant for each class member. *See* Docs. 423, 461, 553. The *White* plaintiffs, however, refused to consent to the agreement and instructed their attorneys of record to

oppose it or withdraw from representing them. *See* Doc. 395. Over their clients' objections, the *White* plaintiffs' lawyers, with the exception of Juntikka and Dan Wolf, filed the proposed settlement anyway. Doc. 381. Several days later, settling plaintiffs' counsel withdrew from representing the *White* plaintiffs. Docs. 394, 401.

The district court granted preliminary approval of the settlement, conditionally certifying the class and appointing the settling lawyers as class counsel. Doc. 423.

III. Juntikka's Efforts to Contact Class Members and the District Court's Order

Believing that the agreement between the settling parties was fundamentally unfair to the class, Juntikka filed a motion for leave to send a letter expressing his views to about 2,500 class members whom he was currently representing and about 20,000 class members whom he had formerly represented in bankruptcy proceedings. Doc. 482. Juntikka attached to the motion a copy of a proposed letter, which included several changes made in response to objections raised by counsel for the settling plaintiffs and defendants. He began the letter by briefly describing the subject of the lawsuit and stating: "At the outset, I want to inform you that I am *against* this settlement because I believe the amount of the awards is inadequate and the conditions for obtaining those awards are unfair." 2-RE-31. He also informed recipients that they would receive a court-ordered notice of the settlement and "urge[ed] [them] to refer to that notice when considering what action, if any,

[they] might take." *Id.* Juntikka then accurately characterized the terms of the settlement and the position of the lawyers who supported it, noting that, "in their view, there is a substantial risk that they will lose this case if it were to proceed in court." *Id.*

Juntikka went on to set forth his view that, "despite the risk, the settlement amount is far too low." 2-RE-32. He also explained his objection that payments would only be made to class members who filled out a claim form certifying their belief that errors appeared on their credit reports, even though "most people do not know whether there were errors on their reports." *Id.* He cautioned, however, that those opting out would "not get any benefit from the settlement" and that, although he was "contemplating commencing a new lawsuit," he could not guarantee that such a suit would be brought or would be successful. *Id.*

Counsel for both the settling plaintiffs and defendants opposed Juntikka's motion for permission to send the letter, arguing at the hearing on the motion that Juntikka should be allowed to send, at most, a "simple letter" advising his former clients that "there are other lawyers that have been appointed as class counsel," that "he is not one of the lawyers supporting the settlement," and that "if someone would like to contact him to discuss it, they should feel free to do so." 2-RE-61-62, 82-84. At the end of the hearing, the court tentatively suggested that it might approve a letter informing recipients that Juntikka "represent[s] plaintiffs objecting

to the settlement." 2-RE-122. Juntikka, however, declined to accept the judge's suggested language because it did not "adequately advise[] the parties of the opposition and the reasons for it." 2-RE-124.

A week later, the district court issued a written order denying Juntikka's motion. 1-RE-1. Although the court stated that it would allow Juntikka to send the proposed letter to clients he currently represents, it prohibited him from sending it to former clients. 1-RE-12. The court acknowledged that Federal Rule of Civil Procedure 23 restricts the ability of the court to limit communication with class members, but held that "[t]he need for a limitation is great where, as here, a neutral, court-approved settlement notice has been sent to the class and the objecting plaintiffs' counsel seeks to encourage class members to opt out, presenting his alternative view of the settlement." 1-RE-10. It concluded that Juntikka should not be allowed to "foist his views upon former clients." 1-RE-11.

Juntikka and the *White* plaintiffs appealed the district court's order and moved in the district court for a stay of the impending deadline to opt out or object to the settlement and the hearing on final approval. Docs. 509, 510. After initially granting the stay, the district court vacated, then denied it. Docs. 524, 525, 527. The court also amended its order to elaborate on its reasoning, stating that it need not find a communication to be misleading in order to prohibit its distribution. 1-

RE-25. The court explained that it would allow Juntikka to send a neutral letter, but not to "present his views of the unfairness of the settlement." 1-RE-25-26.

Juntikka then moved for a stay in this Court, which the settling parties opposed. Among other things, the parties argued that the Court lacked jurisdiction over the appeal and could adequately address the challenged order after final approval of the settlement. On December 10, 2010, this Court denied the motion to stay and ordered the parties to "include a discussion of the jurisdictional issues in their briefs."

IV. The Current Status of the Settlement

In the district court, the *White* plaintiffs filed objections challenging the adequacy of both the settlement and class counsel's representation. Doc. 553. On May 20, 2010, the district court heard argument on final approval and, on June 30, 2010, issued a written order. 2-RE-23. Without ruling on the majority of the *White* plaintiffs' objections, the court agreed with their contention that the class notice improperly required class members to certify their belief that errors appeared on their credit reports. 2-RE-25. Accordingly, the court ordered that a new notice requiring no certification be sent to the class. The court has not yet ruled on final approval of the settlement.

SUMMARY OF ARGUMENT

Although Rule 23 gives district courts discretion to oversee contact between counsel for the parties and members of a class, that discretion must be exercised in a manner consistent with the purposes of the rule. In *Gulf Oil*, 452 U.S. 89, the Supreme Court held that Rule 23 allows orders barring communications with absent class members only if the court makes specific findings of abuse or deception. *Id.* at 101-02. Moreover, even when permissible, the Court held that such an order must be "carefully drawn" to limit the communications "as little as possible, consistent with the rights of the parties under the circumstances." *Id.* These requirements help to ensure that class members have the opportunity to consult with a knowledgeable lawyer, who can review their individual circumstances and help them to make an informed decision about whether to accept the settlement or opt out. Without the availability of outside counsel, many class members would be unable to exclude themselves from the settlement and pursue their individual "day in court." *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999).

Here, contrary to *Gulf Oil*, the district court's order was predicated neither on findings of factual misstatements in Juntikka's proposed letter nor on specific instances of abuse. The letter—although expressing Juntikka's opinion that the settlement was not in the class's best interest—was non-misleading and balanced.

Juntikka disclosed in the opening paragraph that he was offering only his opinion of the settlement, provided the contrasting views of the settling parties' counsel, and advised recipients to review the official court notice before making any decisions. 2-RE-31-32. Moreover, Juntikka acknowledged that some class members may have claims that justify remaining in the settlement. 2-RE-32. Because the district court's order lacked the requisite findings that anything about Juntikka's letter was abusive or misleading, its restriction on communications concerning class members' important rights cannot stand. *See In re Cmty. Bank of N. Va.*, 418 F.3d 277, 310-13 (3d Cir. 2005) (holding that a materially indistinguishable order violated Rule 23).

Even more seriously, the district court's order deprived—and continues to deprive—Juntikka of his First Amendment right to express his views about the settlement to his former clients, and those clients of their corresponding right to receive Juntikka's advice. As this Court held in *Domingo v. New England Fish Co.*, a restriction on communications with class members under Rule 23 is a prior restraint on speech that is justified under the First Amendment only in the most extraordinary circumstances—where "the substantive evil [is] extremely serious and the degree of imminence extremely high." 727 F.2d 1429, 1440 n.9 (9th Cir. 1984). Here, the district court justified its order on a perceived need to prevent Juntikka from informing class members of his "viewpoint on the merits of the

settlement." 1-RE-11. That justification comes nowhere close to the extraordinary justifications necessary to uphold a prior restraint. To the contrary, a government actor's disagreement with a speaker's viewpoint is perhaps the *least* acceptable reason for a restriction on speech under the First Amendment.

STANDARD OF REVIEW

District court orders issued under Federal Rule of Civil Procedure 23(d) to structure and oversee class actions are reviewed for abuse of discretion. *Gulf Oil v. Bernard*, 452 U.S. 89, 101, 104 (1981); *Cmty. Bank*, 418 F.3d at 312-13. "A district court by definition abuses its discretion when it makes an error of law." *Koons v. United States*, 518 U.S. 81, 100 (1996); *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091-92 (9th Cir. 2010). Because the facts regarding Juntikka's proposed letter, and the district court's reasons for prohibiting it, are not in dispute, the only question before this Court is the purely legal one of whether the district court's reasons for its order were legitimate under *Gulf Oil*—a question that is reviewed de novo. *See Yokoyama*, 594 F.3d at 1091-92. Moreover, because the First Amendment rights of both Juntikka and his former clients are at stake, "an appellate court has an obligation to make an independent examination of the whole record." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (internal quotation omitted).

ARGUMENT

District courts have significant discretion to regulate notice to a class. *See Gulf Oil*, 452 U.S. at 100-01. That discretion, however, is subject to important limits. First, Rule 23 constrains the judge's discretion by limiting it to orders that are "consistent with the general policies embodied" in the rule, including the right of class members to communicate with counsel of their choice. *Id.* at 99. Second, because a restriction on communications with class members is a prior restraint on speech, the First Amendment imposes significant limits on the court's ability to regulate communications other than the formal court-approved notice. *See Domingo*, 727 F.2d at 1440 n.9; *see also Sch. Asbestos*, 842 F.2d at 680 (holding that the court's discretion "must be exercised within the bounds of the first amendment and the Federal Rules"). The district court's order here contravenes both limits.

I. The District Court's Prohibition on Communications with Class Members Violated Rule 23.

A. Rule 23 Limits the Authority of District Courts to Restrict Communications With Class Members.

In *Gulf Oil*, 452 U.S. 89, the Supreme Court addressed the intersection between a district judge's duty under Rule 23 to provide notice to protect the interests of absent class members and the class members' right to receive information about pending class actions from lawyers of their choosing. The district judge there had issued an order prohibiting lawyers for the named plaintiffs

from communicating with absent class members without first obtaining leave of the court. The en banc Fifth Circuit reversed the order, holding both that it was inconsistent with Rule 23 and that it was an unconstitutional prior restraint under the First Amendment. *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980) (en banc).

The Supreme Court, although agreeing "that the order involved serious restraints on expression," *Gulf Oil*, 452 U.S. at 103-04, did not reach the First Amendment issue. *Id.* at 99 (noting that "prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision"). The Court found it sufficient to hold that the district court's order violated Rule 23 because it lacked careful factual findings about specific harms that the prohibited communications would cause. *Id.* at 103-04. The Court acknowledged that communications with absent class members may present the potential for abuse in particular cases, and that district courts for that reason have discretion to regulate such communications. *Id.* at 100. A court's discretion, however, "is not unlimited, and indeed is bounded by the relevant provisions of the Federal Rules." *Id.* at 101. Because restrictions on communicating with class members have the potential to interfere with efforts to vindicate the interests of the class, the Court held that such orders "should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights

of the parties." *Id.* at 101; *see also Domingo*, 727 F.2d at 1438-41. Moreover, "such a weighing—identifying the potential abuses being addressed—should result in a carefully drawn order" that limits communications with class members "as little as possible." *Gulf Oil*, 452 U.S. at 102.

The rule announced in *Gulf Oil* ensures that restrictions on communications under Rule 23 are "consistent with the general policies embodied" in the rule—in particular, the rule's core purpose of ensuring that absent class members who may wish to pursue their claims individually are not bound to an unfair outcome. *Id.*; *see Ortiz*, 527 U.S. at 845-46; *see Hansberry v. Lee*, 311 U.S. 32, 41 (1940). Class actions may have a res judicata effect on absent class members' claims, and the Supreme Court has thus held that due process requires class members to be provided a meaningful opportunity to opt out of monetary settlements. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); *Ortiz*, 527 U.S. at 846. The district court's authority under Rule 23 to oversee communications between counsel for the parties and absent class members is designed to ensure that the class members are given adequate notice of their right to their own "day in court." *Ortiz*, 527 U.S. at 846; *see Cmty. Bank*, 418 F.3d at 313 n.30 (noting the "importance of ensuring that class members make an informed decision whether to remain in a prospective class"); *Greenfield v. Villager Indus.*, 483 F.2d 824, 831-32 (3d Cir. 1973) (holding that class actions are the exception to the general rule

that only fully participatory parties are bound by judgments, and can only be tolerated if specific due process protections are in place).

To make notice of the opt-out right meaningful, Rule 23 also requires the district court to inform absent class members of their right to retain counsel of their choice. *See* Fed. R. Civ. P. 23(c)(2)(B) (requiring notice "that a class member may enter an appearance through an attorney if the member so desires [and] that the court will exclude from the class any member who requests exclusion"); *see Cmty. Bank*, 418 F.3d at 312-13. That right is essential to effective notice because it allows class members to obtain individualized advice about "whether joining a proposed class-wide settlement is in their best interest." *Cmty. Bank*, 418 F.3d at 312-13. The court's official notice, precisely because it must be balanced, *see Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009), could not otherwise provide absent class members with an opinion about whether it is in their best interest to join the settlement or to pursue a separate case. Nor could it provide legal advice about the strength of potential claims in a class member's individualized circumstances, particularly in complex consumer class actions with thousands or millions of members. *See Cmty. Bank*, 418 F.3d at 311 n.26 (noting that outside counsel play an important role in helping absent class members evaluate the decision of whether to opt-out of the settlement class); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812-13

(3d Cir. 1995) (describing "informational barriers" facing absent class members in the class-action settlement context).

An order that invokes Rule 23 to restrict, rather than facilitate, communications to class members from lawyers willing to provide them with individual advice subverts Rule 23's purpose of helping class members to meaningfully exercise their rights. Such an order "deprive[s] them of the opportunity to confer with attorneys presumably most knowledgeable" about the case and, "[a]t the time they most need[] counsel . . . cuts them off from the attorneys most available until the time to make a choice has expired." *Gulf Oil*, 619 F.2d at 470. As a result, "class members [may be] left uninformed, and sign releases" that are contrary to their best interests. *Rodgers v. U.S. Steel Corp.*, 508 F.2d 152, 160 (3d Cir. 1975); *see also Cmty. Bank*, 418 F.3d at 311 n.26.

The availability of advice from independent counsel is important for another reason. As the district court previously recognized in rejecting the earlier proposed settlement in this case, class action settlements create incentives for plaintiffs' counsel to push for a settlement's approval even when not in the best interests of class members. *Acosta*, 243 F.R.D. at 399. A settlement class is at risk of becoming "a vehicle for collusive settlements that primarily serve the interests of defendants—by granting expansive protection from law suits—and of plaintiffs' counsel—by generating large fees gladly paid by defendants as a quid pro quo for

finally disposing of many troublesome claims." *General Motors*, 55 F.3d at 778; *see also Bolin v. Sears*, 231 F.3d 970, 976 (5th Cir. 2000) (noting the concern that defendants could "purchase res judicata"); *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) (noting the danger that "the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees"). It is largely because of this divergence of interests that Rule 23 requires district courts to monitor communications between class counsel and absent class members, rather than simply leaving them to the lawyers and named plaintiffs who brought the case. *See Impervious Paint Indus. v. Ashland Oil*, 508 F. Supp. 720, 722-23 (W.D. Ky. 1981). In this regard, the independent views of outside counsel serve as another important counterweight to the self-interested views of counsel for the class. *See General Motors*, 55 F.3d at 801-02; *Mars Steel Corp. v. Continental Ill. Nat'l Bank and Trust Co.*, 834 F.2d 677, 681-82 (7th Cir. 1987).

B. The District Court Did Not Make Factual Findings Justifying the Need for the Challenged Order.

The district court here prohibited Juntikka from sending any communications to former clients that include "his views of the unfairness of the settlement." 1-RE-25-26; *see also* 1-RE-11 (concluding that Juntikka may not "foist his views upon former clients"). Although the court suggested that it might have allowed Juntikka to send a "neutral" letter similar to the official class notice,

it unequivocally prohibited him from providing any "alternative view of the settlement." 1-RE-10. The court's order deprives 20,000 of Juntikka's former clients of the views of a lawyer who has experience in the relevant area of law and who is potentially available to take their case. These class members have more than just a theoretical interest in Juntikka's advice—they have previously retained him in other matters and therefore presumably value his opinion. Moreover, cutting off Juntikka's communications with these former clients is especially damaging because he had previously told them that he represented plaintiffs in the case and, if he is prevented from telling them that he now opposes the settlement, they are likely to believe he supports it. 1-RE-11; 2-RE-4-7 ¶¶ 13-15; 2-RE-128-31; 2-RE-135 (declaration from a client who was confused in this way).

In addressing an order nearly indistinguishable from the district court's order here, the Third Circuit in *Community Bank* relied on *Gulf Oil* in holding that the order violated Rule 23. 418 F.3d 277. The district court there had prohibited objectors' counsel from sending solicitation letters to class members that included their views on the merits of a proposed settlement. The Third Circuit reversed the order, holding that the district court was "not free to bar wholesale solicitation letters" absent findings that the letters were materially misleading. *Id.* at 313 n.30. The court thus ordered the district court to "reexamine the solicitation letters,

specify the misleading statements (if any)," and "make[] specific findings of fact with respect thereto." *Id.* at 312.

Like the district court in *Community Bank*, the court here did not make the "specific record showing" required to justify restricting class members' access to the views of counsel. *Cmty. Bank*, 418 F.3d at 310. The court's order included no finding that the letter was misleading. To the contrary, the court asserted that it was not required to find a communication misleading in order to prohibit it. 1-RE-25. Nor is there any reason to believe that class members would be misled. Juntikka's letter candidly explains in the first paragraph that he is giving only *his* opinion of the settlement and advises recipients not to make any decisions before reviewing the official, court-approved notice. 2-RE-31. The letter also summarizes the settling parties' opposing view and notes that those opting out would lose the benefits of the settlement. 2-RE-31-32. Nothing about the letter is misleading. If it *had* been misleading, the district court presumably would not have allowed Juntikka to send it to 2,500 of his current clients.

Rather than basing its decision on specific findings of abuse, the district court reasoned that "where, as here, a neutral, court-approved settlement notice has been sent to the class," any communication presenting an "alternative view" of the settlement would function as a "competing class notice." 1-RE-10-11. But the court cited no authority for the proposition that stifling "alternative views[s]" is an

interest "consistent with the general policies embodied" in Rule 23. *Gulf Oil*, 452 U.S. at 99. The court relied on *Rodriguez*, 563 F.3d 948, but that case dealt with the importance of neutrality in *official* class notices under Rule 23, which class members may read as an "expression of opinion by the judge as to the merits of the proposed settlement." *In re Traffic Executive Association-Eastern Railroads*, 627 F.2d 631, 634 (2d Cir. 1980) (cited in *Rodriguez*, 563 F.3d at 963 n.7). Here, Juntikka's proposed letter does not purport to be an official court notice, and there is no risk that recipients would believe it to be an official communication from the court.

Even if the district court believed that class members would somehow be unduly influenced by Juntikka's opinion, it would have been required to make findings to support that position. Nothing in Juntikka's letter would support such a finding. Recipients of the letter would not have been obligated to contact Juntikka or agree with his opinion, and the letter could "readily [have] be[en] put in a drawer to be considered later, ignored, or discarded." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 479 (1988). To conclude that class members are too fragile even to be exposed to dissenting opinions would be incompatible with Rule 23's core assumption that class members have the right to consult with outside counsel and to form their own views about whether to join or opt out of a settlement. *Cf. Peel v. Attorney Reg. & Disciplinary Comm'n*, 496 U.S. 91, 105, 109 (1990)

(rejecting the "paternalistic assumption" that recipients of a lawyer's mailed solicitation are "no more discriminating than the audience for children's television"). Regardless of whether class members ultimately decided to follow Juntikka's advice, the availability of an additional opinion would have allowed them to make a more informed decision.

Indeed, the only "harm" likely to result from Juntikka's letter—and presumably the result that the settling parties fear—is that class members will agree with Juntikka's opinion about the settlement. As Juntikka's letter acknowledges, some class members may have claims that justify remaining in the settlement. The majority of the class, however, stands to lose very little by opting out of the settlement—particularly if Juntikka represents them in a separate action in which statutory damages are potentially available. *See Acosta*, 243 F.R.D. at 389-96. Based on the response he received to the letter he sent his current clients—a letter that the district court permitted—Juntikka estimates that about 7,000 of his former clients would have opted out if they had received the prohibited letter, and about a dozen more would likely have objected. 2 RE-3-4, ¶ 11. If these clients, on the other hand, had *not* received the letter from Juntikka, the vast majority of them would neither have filed a claim nor opted out, and would thus have received no benefit from the settlement. 2-RE-3 ¶¶ 9-10. Although the settling parties may argue that a large number of additional opt-outs could theoretically make it less

likely that the district court would approve the settlement, that, even assuming it were true, would not justify keeping class members in ignorance of the fact that the settlement provides them with little benefit. *See Impervious Paint*, 508 F. Supp. at 723 ("It is essential that the class members decision to participate or to withdraw be made on the basis of independent analysis of [their] own self-interest.").

C. The District Court's Chosen Remedy Was Not Narrowly Tailored to Address the Perceived Abuses.

Even if the district court were correct that Juntikka's proposed communication with absent class members was somehow improper, its order would still be unlawful because the order was not carefully tailored to address any perceived improprieties. *Gulf Oil* stressed that restrictions on communications with class members, even if based on demonstrated instances of abuse, must be "carefully drawn" and must limit the communication "as little as possible." 452 U.S. at 101-02; *see also Cmty. Bank*, 418 F.3d at 310. Here, the district court's order, without exception, flatly prohibits Juntikka from sending the proposed letter to any of 20,000 former clients. Such an order is exactly the sort of broad-brush approach that the Supreme Court feared, and thus prohibited, in *Gulf Oil*.

Far from being narrowly tailored, the district court's objection to Juntikka's proposed letter—that it was not sufficiently "neutral"—would apply equally to nearly *any* communication between lawyers and members of a class about the merits of a settlement. Indeed, it is difficult to imagine why any lawyer would go

to the trouble of contacting members of a class merely to reiterate the neutral presentation of the official class notice. As previously explained, one of the central goals of Rule 23's notice provisions is to ensure that class members are able to obtain the independent views of lawyers other than counsel for the settling parties. If the expression of views different from those contained in the class notice were a valid basis for restricting communications, the rule's guarantee of a right to consult independent counsel would be "essentially eviscerate[d]." *Cmty. Bank*, 418 F.3d at 313.

Moreover, the district court made little effort to find less-restrictive alternatives that would have imposed a more tolerable burden on Juntikka and the class. Without explanation, the court rejected a proposed compromise by Juntikka that would have allowed the settling parties to include a counter-statement setting forth their views. 2-RE-118. If the court were concerned that class members might be confused or misled by Juntikka's letter—although nothing about the letter was confusing or misleading—it could have accepted Juntikka's suggested alternative, or it could have addressed any perceived inaccuracies by requiring Juntikka to include some notice or disclaimer stronger than the ones he had voluntarily included. Instead, however, the only alternative considered by the district court was for Juntikka to rewrite the letter "in a more neutral tone alerting [his former clients] to his involvement in the settlement process; informing them that he is not

one of the lawyers who has been appointed Settlement Class Counsel; and giving them his contact information." 1-RE-11. In other words, the court would allow Juntikka to send his letter only if he removed from it the message that he sought to communicate. That approach is far from the "narrowest possible relief which would protect the respective parties." *Cmty. Bank*, 418 F.3d at 310.

In the few cases where other courts have sought to remedy outside lawyers' improper communications with class members, they have been careful to impose tailored remedies that limit communications as little as possible. For example, in *Georgine v. Amchem Products, Inc.*, a case in which misleading solicitations received stern treatment, the court's remedy consisted only of a second opt-out period. 160 F.R.D. 478 (E.D. Pa. 1995). The court specifically rejected the defendants' request for an order requiring future communications with class members to include a statement disclosing that the lawyer had a financial interest in convincing clients to opt out. *Id.* at 517. Even in egregious cases, in which the *defendant* in a class action contacted class members to convince them to opt out against their best interests, courts have been reluctant to forbid communications entirely. *See, e.g.*, *Haffer v. Temple Univ.*, 115 F.R.D. 506, 512 (E.D. Pa. 1987). The district court's order here is a distant outlier even when compared to these cases, which posed a genuine risk that class members could have been misled by lawyers' communications. Because the district court made no effort to consider

more limited restrictions of the sort imposed by other courts, the order violates Rule 23.

II. The District Court's Order Imposes an Unconstitutional Prior Restraint on Speech, Infringing the First Amendment Rights of Both Juntikka and His Former Clients.

A. A Restriction on Communications with Class Members Is a Prior Restraint on Speech.

Because the First Amendment protects solicitation by attorneys, courts "are not free to bar wholesale solicitation letters." *Cmty. Bank*, 418 F.3d at 313 n.30; *see Domingo*, 727 F.2d at 1440 n.9. Although judges may curtail speech to counter serious harms to class members in narrow circumstances, "[o]rders regulating communications between litigants . . . pose a grave threat to first amendment freedom of speech. Accordingly, a district court's discretion to issue such orders must be exercised within the bounds of the first amendment." *Sch. Asbestos*, 842 F.2d at 680; *see also Edenfield v. Fane*, 507 U.S. 761, 765 (1993) (declaring unconstitutional a restriction on in-person solicitation by accountants and holding "it is clear that this type of personal solicitation is commercial expression to which the protections of the First Amendment apply"); *Shapero*, 486 U.S. 466 (holding that truthful written solicitations by lawyers are protected by the First Amendment, even if they were mailed for the lawyer's pecuniary gain); *id.* at 479 (Brennan, J., concurring) ("[S]o long as the First Amendment protects the right to solicit legal

business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations . . . .").

The district court's order here is subject to particularly searching scrutiny under the First Amendment because it conditioned Juntikka's communications with class members on the court's prior approval and thus constituted a prior restraint on speech. *Domingo*, 727 F.2d at 1440 n.9. Such a restriction carries a heavy presumption against its validity. *Berger v. City of Seattle*, 569 F.3d 1029, 1059 (9th Cir. 2009) (en banc). As this Court held in *Domingo*, a prior restraint on communications between lawyers and class members is justified only when "the substantive evil [is] extremely serious and the degree of imminence extremely high." 727 F.2d at 1440 n.9; s*ee Gulf Oil*, 619 F.2d 459 (holding that a ban on communication with class members is a prior restraint); *Rodgers*, 508 F.2d at 162 (holding that a ban on communication with class members is a prior restraint and "raises serious first amendment issues"); *see also Gulf Oil*, 452 U.S. at 104 (not reaching the First Amendment issue, but noting that "the order involved serious restraints on expression").

Moreover, the order implicates the First Amendment rights not only of Juntikka, but of the 20,000 former clients who, under the order, will not receive the benefit of Juntikka's advice. Courts have consistently recognized that the First Amendment "involves not only the right to speak and publish but also the right to

hear, to learn, to know." *Presidents Council Dist. 25 v. Cmty. School Bd. No. 25*, 409 U.S. 998, 999 (1972). In *Carey v. Population Services International*, 431 U.S. 678 (1977), for example, the Supreme Court struck down a New York statute that restricted advertising for contraceptives. The Court reasoned that people could not meaningfully exercise their constitutional right to make family-planning decisions if their access to such information was significantly impeded by the state. *Id.* at 684-85. Notably, the Court was not swayed by the argument that it was theoretically possible to obtain the same information from other sources; it was enough that one significant channel of information was cut off. *Id.* at 688-90.

Similarly, class members cannot meaningfully exercise their constitutional rights to opt out or retain legal counsel of their choice if they are cut off from counsel willing to represent them. *See Gates*, 234 F.3d at 227 (fundamental right "to consult counsel of [one's] choice on matters of great concern to them"). Truthful attorney solicitations serve as a necessary aid to consumers who may otherwise be unaware of even the existence of a viable legal claim, *see Bates v. State Bar of Arizona*, 433 U.S. 350, 370 (1977), much less of their constitutional right to opt out of a class action, *see Ortiz*, 527 U.S. at 845.

B. The District Court Made No Findings That Remotely Justify a Prior Restraint.

The same reasons why the district court's order fails to satisfy Rule 23 also demonstrate why it fails to satisfy the requirements of the First Amendment. The

district court's order does not even come close to demonstrating the "extremely serious" and "imminent" harms necessary to justify a prior restraint on speech Indeed, the court's expressed reason for prohibiting Juntikka's letter—that it presented an "alternative view" of the settlement, with which the parties disagreed, 1-RE-10—is an independent reason to hold the order unconstitutional. Speech restrictions based on the speaker's viewpoint are anathema to the First Amendment. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). A court cannot "interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995); *see also Dream Palace v. County of Maricopa*, 384 F.3d 990, 1021 (9th Cir. 2004) (holding that the government does not have "free license to suppress specific content of a specific message") (internal quotation omitted).

Nor is the order narrowly tailored under the First Amendment. Again, the court did not consider the possibility of a notice or disclaimer to remedy any perceived inaccuracies. Although a compelled disclosure would still raise significant First Amendment concerns, *see Ibanez v. Florida Dep't of Bus. &*

Prof'l Regulation, 512 U.S. 136, 144-49 (1994), it would at least have been less restrictive than an outright ban. To be sure, Juntikka is not completely prohibited from contacting his former clients—only from giving them his views on the settlement. But a restriction on speech cannot be justified on the ground that the restricted speaker remains free to say other things. Juntikka has a First Amendment right to send not just any letter, but the letter he wants to send. *See Hurley*, 515 U.S. at 579 ("A speaker has the autonomy to choose the content of his own message . . . ."); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (noting the "First Amendment right to choose to send one message but not the other"). The district court's broad prohibition on *all* expression of Juntikka's opinion about the settlement therefore violates the First Amendment.

III. This Court Has Jurisdiction to Review the Challenged Order.

In their opposition to Juntikka's motion for a stay, the settling parties raised the question of this Court's jurisdiction over the district court's interlocutory order. That question may no longer be at issue by the time this Court decides this appeal. By then, the district court likely will have issued a final judgment, into which all previous orders—including the order challenged here—would merge. *See Frontier Props.*, 979 F.2d at 1364. This Court would then have jurisdiction over that judgment, and the challenged order, under 28 U.S.C. § 1291. *See id.*

Even if the district court proceedings are not final when this Court renders its decision, the Court would have jurisdiction to review the challenged order. The courts of appeals have regularly accepted jurisdiction over similar orders for a variety of valid reasons. *See, e.g.*, *Sch. Asbestos*, 842 F.2d at 677-79 (collateral order doctrine); *Gates*, 234 F.3d at 227-28 & n.5 (appeal of an injunction under 28 U.S.C. § 1292(a)(1)); *Williams*, 658 F.2d 430 (writ of mandamus). Although they have invoked different procedural mechanisms, these decisions agree that immediate review of restrictions on communications with class members is critical to avoid irreparable injury to First Amendment rights. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347 (1976). Absent the availability of an appeal, Juntikka and thousands of class members will be injured throughout the settlement approval process and beyond, a "more than 'minimal'" period of time. *Sch. Asbestos*, 842 F.3d at 679. Even if an appeal after final judgment were ultimately successful, it would do nothing to remedy the serious constitutional injury caused by the weeks or months that the case may take to conclude. *See Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303 (1983) (Brennan, J., in chambers, granting stay pending appeal) (emphasizing "the special importance of swift action to guard against the threat to First Amendment values

posed by prior restraints" and observing that "even a short-lived gag order" causes "irreparable injury to First Amendment interests as long as it remains in effect").

The importance of the First Amendment rights involved here justifies immediate appellate review for several reasons.

A. The District Court's Order Is an Appealable Collateral Order.

An interlocutory decision by a district court is an appealable collateral order if it "(1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment." *Sell v. United States*, 539 U.S. 166, 176 (2003). As the Third Circuit held in *School Asbestos*, an order restricting communications with class members satisfies all three criteria. 842 F.2d at 677-85.

First, the district court's order is conclusive. Like the district court in *School Asbestos*, the court here "gave no indication that the order is tentative or open to modification at a later date. To the contrary, the district court refused to either stay or to modify the order." 842 F.2d at 678. Indeed, the court told Juntikka that he would have only one opportunity to propose a letter to send during the opt-out period. 2-RE-91; 2-RE-116-119. Because the district court rejected Juntikka's proposed letter, that opportunity has now passed.

Second, the order's impact on "first amendment rights is an issue wholly separate from the merits," *id.*, and that issue is "unquestionably important." *United*

States v. Brown, 218 F.3d 415, 420 (5th Cir. 2000). For this reason, "importance weighs profoundly in favor of appealability" in First Amendment cases. *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 180-81 (5th Cir. 2009).

Finally, the district court's order would be "effectively unreviewable" on appeal from a final judgment because it is an order "affecting rights that will be irretrievably lost in the absence of an immediate appeal." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430-31 (1985). The "irretrievable loss" caused by the order here is the ongoing infringement of Juntikka's and the class's "free speech rights, which cannot be corrected on appeal from a final judgment in this litigation." *Sch. Asbestos*, 842 F.3d at 678. "Even if they are ultimately lifted," prior restraints on communication in class actions "cause irremediable loss." *Gulf Oil*, 619 F.2d at 469.

B. The District Court's Order Is an Injunction Appealable Under 28 U.S.C. § 1292(a)(1).

The Court also has jurisdiction under 28 U.S.C. § 1292(a)(1), which allows the interlocutory appeal of orders "granting, continuing, modifying, refusing or dissolving injunctions." The Second, Third, Fifth, and Eighth Circuits have all found jurisdiction under § 1292(a)(1) over orders very similar to the one at issue here. *See Bailey v. Sys. Innovation, Inc.*, 852 F.2d 93, 96-97 (3d Cir. 1988) (gag order appealable because "essentially, if not explicitly, injunctive"); *see also Great Rivers Coop.v. Farmland Indus.*, 59 F.3d 764, 766 (8th Cir. 1995); *Gates*, 234 F.3d

at 227-28 & n.5; *Parker v. CBS, Inc*., 320 F.2d 937 (2d Cir. 1963). The immediate appealability of injunctions is especially important where, as here, a challenged order involves a restraint on speech. *See Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 224 (6th Cir. 1996) (noting that an appellate court's "ability to review even a temporary restraint on pure speech is obviously critical"). Because "prior restraints on the exercise of protected rights can cause devastating and irreparable harm," the availability of appeal under § 1292(b) will "often will be vital." *N.J.-Phil. Presbytery of the Bible Presbyterian Church v. N.J. State Bd. of Higher Educ.*, 654 F.2d 868, 884 (3d Cir. 1981).[1]

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[1] Although this Court has held that an order is an "injunction" only if directed at a party, review under § 1292(a)(1) is also available whenever an order has the "substantial effect" of an injunction. *United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1441 (9th Cir. 1994) (internal quotation omitted); *see Procter & Gamble*, 78 F.3d at 224 (allowing interlocutory appeal of a district court's order prohibiting a non-party magazine from writing about a pending case). There is some uncertainty in this Court's precedent about the requirements under § 1292(a)(1) for appealability of an order that is not labeled an injunction but effectively grants injunctive relief. *See Calderon v. U.S. Dist. Court*, 137 F.3d 1420, 1422 n.2 (9th Cir. 1998). In some cases, the Court has required a showing that such an order satisfies the requirements of *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), that the "district court ruling must (1) have the practical effect of entering an injunction, (2) have serious, perhaps irreparable, consequences, and (3) be such that an immediate appeal is the only effective way to challenge it." *Calderon*, 137 F.3d at 1422 n.2. But because "*Carson* involved an order denying relief; it is unclear whether *Carson* also applies when the order in question grants injunctive relief." *Id.* Although the order here was not labeled an "injunction," it grants injunctive relief because it prohibits Juntikka from engaging in specified conduct and thus exposes him to the risk of contempt if he fails to refrain from that conduct. *See Gulf Oil*, 452 U.S. at 104 n.17 (stressing the risk of a contempt citation resulting from a violation of a district court's order under Rule 23).

C. The Court Has Jurisdiction to Issue a Writ of Mandamus.

If it chooses to reject the approach of the circuits that have found similar orders appealable under the collateral-order doctrine and § 1292(a)(1), this court may still exercise its discretion to treat this appeal as a petition for a writ of mandamus. *See Special Invs., Inc. v. Aero Air, Inc*., 360 F.3d 989, 993 (9th Cir. 2004). Other circuits have reversed restrictions on communications with class members by means of mandamus, and this Court has reviewed gag orders via mandamus outside the class-action context. *See Levine v. U.S. Dist. Court*, 764 F.2d 590, 593-601 (9th Cir. 1985); *Williams v. U.S. Dist. Court*, 658 F.2d 430 (6th Cir. 1981); *Rodgers v. U.S. Steel Corp*., 536 F.2d 1001, 1006 (3d Cir. 1976); *see also Coles v. Marsh*, 560 F.2d 186, 189 (3d Cir. 1977).

Assuming jurisdiction is not otherwise available, mandamus is warranted here because the order is a clear violation of Rule 23 and the First Amendment, and thus causes irreparable injury on an issue of the highest importance. As then-Judge Alito observed in the context of a nationwide class action, "the issuance of a writ of mandamus is appropriate to prevent the harm to First Amendment rights that would occur if review of the district court's decision had to wait until a final judgment is entered in this protracted litigation." *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1294-95 (3d Cir. 1994); *In re Perry*, 859 F.2d 1043, 1046-50 (1st Cir. 1988) (mandamus warranted "by the passage of time during which the petitioners are

impaired in the exercise of their freedom of speech"); *In re Justices*, 695 F.2d 17, 20 (1st Cir. 1982) (writ is uniquely appropriate when "interlocutory relief is necessary to prevent irreparable harm").

CONCLUSION

The district court's order prohibiting Juntikka from communicating with his former clients should be reversed and the case remanded with instructions to allow class members an additional opportunity to opt out or object to the settlement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32 (A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 09-56859

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 8,688 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief substantively complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirement of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14 point Times New Roman.

/s/Gregory A. Beck
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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Plaintiffs-Appellants state that there are no known related cases pending in this court.

/s/Gregory A. Beck
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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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