No. 21-638

In the Supreme Court of the United States

DAVID R. WATKINS AND THEODORE H. FRANK,
Petitioners,

v.

BRIAN SPECTOR, ET AL.,
Respondents.

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

BRIEF OF MONTANA, LOUISIANA, TEXAS, AND UTAH AS AMICI CURIAE SUPPORTING PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae States of Montana, Louisiana, Texas, and Utah routinely appear in federal courts to assert and defend important public interests. Federal courts regularly adjudicate interstate disputes, determine the constitutionality of State laws and policies, and maintain the careful jurisdictional boundaries the Framers planted between national and state sovereigns. States often call upon federal judges to decide the weightiest legal issues of our time. *See, e.g.,* David A. Lieb, *At least 26 states file lawsuits against Biden's business vaccine mandate*, CHI. TRIB. (Nov. 5, 2021); Geoff Mulvihill & Martha Bellisle, *Democratic state attorneys general begin Trump pushback*, LAS VEGAS SUN (Jan. 31, 2017). When they do so, States expect federal judges to act impartially—"without respect to persons"—and to treat litigants fairly and equally. 28 U.S.C. § 453. In short, States expect federal courts to dispense the brand of justice promised by the guarantee of due process. And usually, federal courts provide it.

But not in this case. The judicial behavior below diminishes confidence in federal courts, writ large. And because States must often avail themselves of these fora to vindicate their sovereign interests, that behavior should not become the norm. The States therefore urge the Court to grant the petition so that

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[1] *Amici* timely notified counsel for all parties of their intention to file this brief.

it may put to rest any lower court uncertainty about the requirements of due process.

The States take no position on the second question presented.[2]

SUMMARY OF THE ARGUMENT

When courts adopt—verbatim—proposed orders ghostwritten entirely by prevailing counsel and delivered to the court *ex parte*, it offends due process. When that order contains findings far more expansive than those the court expressed from the bench, the due process violation gets worse. When—at the urging of the prevailing parties—the court reverses course and removes the *ex parte* proposed order from the record, the due process predicament begins to appear calculated.

All of that happened below. On appeal, the Eleventh Circuit breezed past these due process defects by largely ignoring them.

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[2] Forty-eight State Attorneys General, the District of Columbia, and Puerto Rico entered separate consent decrees with Equifax, Inc. on or about July 22, 2019, for claims related to the data breach. *See https://investor.equifax.com/sec-filings/all-sec-filings/content/0001193125-19-198584/0001193125-19-198584.pdf* at 222. In those decrees, the States agreed to the equitable relief and monetary disbursements set forth in the proposed settlement. Four months later in November 2019, Petitioners and others filed objections to the proposed settlement in the district court. The States in this brief take issue with *how* the courts rejected those objections—not the objections' merits.

Due process cannot abide what happened below. Notice and an opportunity to respond must be meaningful. And courts should diligently avoid actions that create the appearance of bias and injustice. Because the lower courts failed on both counts, this petition presents a prime opportunity for this Court to reaffirm and clarify the guarantees of due process.

ARGUMENT

Federal courts exercise extraordinary power in the lives of the States. When it comes to protecting their sovereign prerogatives against their sister States or the federal government, federal courts play *the* essential dispute resolution role—standing between order, on the one hand, and disorder or worse, on the other. George Mason worried mightily that the Constitution placed too much power in the hands of the federal judiciary—the power "utterly to destroy State Governments." Speech of George Mason at the Virginia Convention (June 19, 1788) *in* 2 DEBATES RESOLUTIONS AND OTHER PROCEEDINGS IN CONVENTION ON THE ADOPTION OF THE FEDERAL CONSTITUTION 383 (J. Elliot ed. 1828). "[T]hey will be the judges how far [State] laws will operate …. the destruction of the legislation of the States, whether or not it was intended." *Id.* Brutus concurred, noting that every federal court decision on disputes arising under federal law "will affect the limits of state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted …." Brutus XI, New York Journal (Jan. 31, 1788) *in* THE ESSENTIAL

FEDERALIST AND ANTI-FEDERALIST PAPERS 84 (D. Wootton ed. 2003).

Notwithstanding these visceral concerns, the State conventions swallowed the risk and ratified the Constitution, perhaps accepting Hamilton's argument that a strong federal judiciary would best protect the "limited constitution against [federal] legislative encroachments …." The Federalist No. 78, p 526 (J. Cooke ed. 1961) (A. Hamilton). To be sure, the ratifiers portended malfeasance from Congress more than they did the federal courts. But many in the founding generation remained wary of the potential threat these new courts posed to state sovereignty. So when they ratified, the People—via the conventions—were striking something of a bargain between the States and the new general government they created. The States would submit to the jurisdiction of federal courts in many cases implicating sovereign State interests. In return, the federal courts would exercise their adjudicatory powers with prudence, care, and impartiality. In the end, however, the States merely insisted upon the same protections every other litigant rightfully expects from the federal courts: due process.

Yet below, the courts meted out something less than due process. From the district court's fairness hearing to the substantive *ex parte* communications, then to the district court's entry of a 122-page opinion ghostwritten entirely by prevailing counsel, and the Eleventh Circuit's decision to sweep it all under the rug, the courts below deprived Petitioners of the

fairness and impartiality that the Constitution, court rules, and the judicial canons guarantee. And though the States weren't parties below, they—like any litigants who regularly appear in federal courts—took notice. For while our constitutional order of co-sovereigns has proven enduring, it remains fragile. Federal courts must continue to demonstrate their fitness to serve as non-state arbiters the States can trust. The proceedings below damaged that trust.

That's why the States urge the Court to grant the petition and clarify the requirements of due process.

I. The district court's entry of a ghostwritten order received *ex parte* from prevailing counsel brazenly deprived Petitioners of due process.

"It is axiomatic that [a] fair trial in a fair tribunal is a basic requirement of due process." *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quotations omitted). And at its core, due process requires "notice reasonably calculated to reach all interested parties and a prior opportunity to be heard." *Texaco, Inc. v. Short*, 454 U.S. 516, 534 (1982). "[I]n any proceeding which is to be accorded finality," "[a]n elementary and fundamental requirement of due process" includes "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (citing

Milliken v. Meyer, 311 U.S. 457 (1940); *see id.* at 463 ("[T]raditional notions of fair play and substantial justice implicit in due process are satisfied" where a method of service provides actual notice and an opportunity to be heard)). Despite this Court's qualms with "the cryptic and abstract words of the Due Process Clause," *Texaco,* 454 U.S. at 534, it has had little trouble identifying behavior that falls short of due process. Most often, the Court admonishes the deprivation of due process where it has clearly been withheld. *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (regarding pornography, "I know it when I see it"). Instead of knowing it (pornography) when it sees it, the Court tends to know it (due process) when it *doesn't*.

Looking at the record and decisions below, there's little due process to see. And that provides this Court another prime opportunity to articulate what the "traditional notions of fair play and substantial justice" constitute. They clearly foreclose the treatment Petitioners received below. Each instance highlighted by Petitioners provides a reason for this Court to intervene. But viewed in totality, they amount to nothing less than the deprivation of both the "fair administration of justice" and the "impersonal authority of law." *Offutt v. United States*, 348 U.S. 11, 17 (1954).

The district court permitted class counsel to transform an oral ruling—comprised of only six transcript pages and about 2,000 words—into a 122-page final opinion. The district court adopted this

ghostwritten order *verbatim* and entered it on the docket without first giving Petitioners notice or a chance to object—which violated the local rules. This was done entirely behind closed judicial doors: class counsel sent the draft 122-page opinion—which resolved every substantive and procedural issue remaining in the case—to the district court *ex parte*. This included resolving issues in detail that were *never* discussed at the fairness hearing, where Petitioners' counsel would have had the opportunity to at least verbally respond. Pet. at 12.

But even at the fairness hearing, Petitioners' counsel asked the district court for a chance to respond in writing to hundreds of pages of declarations, exhibits, and new arguments that class counsel had filed the previous night. Pet. at 10. The district court denied Petitioner the opportunity to respond meaningfully to these new attacks on the objectors' motives. Pet. at 10–11. The district court's opinion—again, entirely authored by class counsel—included findings consistent with class counsel's eleventh-hour filings and were definitively adverse to Petitioners.

To recap: class counsel filed materials raising new (and disparaging) accusations against Petitioners the night before the fairness hearing. At the hearing, the district court refused Petitioners' request to rebut these new allegations in writing. Though it said nothing about class counsel's new swipes at the objectors, the district court explained at the hearing that he found some of the new expert evidence supporting

class certification compelling. Then the district court instructed class counsel to summarize the district court's ruling in a written order. Class counsel subsequently submitted a 122-page order to the court *ex parte*—in violation of the court's rules—which the court adopted *in toto*, denying Petitioners the opportunity to see it and object until it was published on the docket. That order, moreover, contained conclusions of law and addressed issues that had not been discussed at the hearing.

This episode unquestionably—and in multiple ways—deprived Petitioners of notice and the right to respond. *See Texaco,* 454 U.S. at 534. For anyone intuitively familiar with the "traditional notions of fair play and substantial justice," *Milliken*, 311 U.S. at 463, it was a textbook deprivation of due process.

But even if the district court's actions could be construed as correct and proper—and they cannot—its actions have created the appearance of impropriety. *See Caperton*, 556 U.S. at 883 ("the Due Process Clause has been implemented by objective standards that do not require proof of actual bias") (citing *Tumey v. Ohio,* 273 U.S. 510, 532 (1927); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986)). This Court has set forth a "stringent" rule against even the *appearance* of bias. *See In re Murchison*, 349 U.S. 133, 136 (1955). "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'"

Withrow v. Larkin, 421 U.S. 35, 47 (1975) (quoting *In re Murchison*, 349 U.S. at 136).

"[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). The appearance of justice is an objective test where "[t]he Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton*, 556 U.S. at 881. The district court's actions failed that test—miserably.

When deciding whether to certify a class in one of the largest data breach cases in U.S. history, neutral observers rightly question the propriety of outsourcing to class counsel the job of writing every word of the substantive legal decision. *See Marcantel v. Michael & Sonja Saltman Fam. Tr.*, 993 F.3d 1212, 1239 (10th Cir. 2021). This Court has noted that the very purpose of rendering a reasoned judicial opinion is in service of due process. *See Caperton*, 556 U.S. at 883 ("To bring coherence to the process, and to seek respect for the resulting judgment, judges often explain the reasons for their conclusions and rulings."). Indeed, in *Caperton* the Court noted that sometimes the opinion-writing process may even reveal a hidden bias that triggers a recusal. *Id.* ("If the judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult to dispel that there is a real possibility

of undermining neutrality, the judge may think it necessary to consider withdrawing from the case.").

Courts must, therefore, examine whether party-drafted findings "represent the judge's own considered conclusions." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). Otherwise, there is a serious risk of the appearance and/or presence of bias. *See Capteron*, 556 U.S. at 883. The precise reason for this concern is borne out in the facts below. Class counsel's ghostwritten opinion adopted far more of class counsel's arguments than the district court intimated at the fairness hearing. For instance, the district court appears to have changed its mind on the utility of Professor Klonoff's 72-page expert report. *See* Pet. at 12 (the ghostwritten opinion downgraded the district court's view of Professor Klonoff's legal opinion from "meritorious and appropriate" at the hearing to "helpful" but "not" something on which the court's opinions were "dependent") (citing App.313a; App.102a).

Even if the local rules didn't, due process would require notice of a ghostwritten opinion and an opportunity to comment on it prior to finality. Parties must be given the opportunity to "respond at length to the proposed findings." *Anderson*, 470 U.S. at 572.

The occurrence of an *ex parte* communication—particularly on a dispositive matter such as this—raises serious red flags on its own. As Petitioners point out, the ghostwritten final opinion gave the district court class counsel's off-the-record views on Petitioners' character and motivation and about how it should

view Professor Klonoff's report. *See Edgar v. K.L.*, 93 F.3d 256 (7th Cir. 1996) (per curiam); *Guenther v. Commissioner*, 939 F.2d 758 (9th Cir. 1991). This error is magnified by the fact that the district court made no specific factual findings during the fairness hearing about the objectors or their counsel, or whether any objector acted with an improper purpose or was a serial objector.

Class certification in these types of cases can at times be messy, complicated, and taxing. Some—though apparently not these Petitioners—may object for untoward reasons. But motives and merits are for the courts to suss out. It offends due process for a judge to outsource the decision-making to prevailing counsel.

II. The Eleventh Circuit's decision on due process misses the point and worsens the due process violations.

Things got worse on appeal. First, the Eleventh Circuit assumed that the district court adopted class counsel's order verbatim. App.35a. Then the panel simply papered over the district court's due process violations. Regarding the ambush of the ghostwritten order, the panel deflected, noting that Petitioners *had* submitted written objections and argued, through counsel, at the fairness hearing. App.30a.

That they did. But those facts aren't particularly relevant to the legitimate due process fouls Petitioners raise: class counsel's *ex parte* presentation of

its proposed order to the district court, the district court's verbatim adoption and entry of the proposed order, the fact that the 122-page order contained material not discussed at the fairness hearing—and the fact that the district court excised the proposed order from the record at class counsel's request. Those were the circumstances that deprived Petitioners of prior notice and "the opportunity to respond at length to the proposed findings." *See Anderson*, 470 U.S. at 572; *Texaco,* 454 U.S. at 534. And at the very least, those circumstances create an impression of patent injustice. *See In re Murchison*, 349 U.S. at 136; *Caperton*, 556 U.S. at 881–83.

The panel then noted that Petitioners failed to object when they witnessed—in open court—the district court instruct class counsel to draft a proposed order summarizing its oral rulings. Nor did Petitioners request, then and there, "the opportunity to review the proposed order or make objections to it." App.31a. But why would Petitioners have done these things at the fairness hearing? Under the local rules, class counsel should have filed the proposed order on the docket, which would have given Petitioners access to the proposed order and an opportunity to object before the district court simply added its signature to the bottom. *See* N.D. Ga. Civ. L.R. 7.3; *see also id.* 5.1(A)(1). It cannot be that a due process violation evaporates simply because the injured party wrongly assumed that opposing counsel (and the court) would follow the rules. This silent suspension of the local rules

certainly disadvantaged Petitioners as much as it helped class counsel.

The Eleventh Circuit's conclusion—that "the process by which the District Court adopted its order was not fundamentally unfair"—only follows because the panel selectively emphasized unremarkable facts and ignored the salient ones. App.32a. The district court's actions reveal not only a glaring appearance but a deportment of bias. *Caperton*, 556 U.S. at 881–83.

* * *

Litigants count on the federal courts to uphold the standards of due process in even the most complicated cases. Petitioners got something less than due process in the lower courts. And that sends an alarming message to the States, who often place the fate of their sovereign interests in those courts' hands. This Court can act now to reaffirm and bolster that confidence.

CONCLUSION

The Court should grant the petition and reverse the Eleventh Circuit's decision, at least as to the Petition's first question.

Respectfully submitted,

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