RECORD NO. 11-5205

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The
United States Court of Appeals
For The District of Columbia Circuit

ELOUISE PEPION COBELL, *et al.*,

Plaintiffs-Appellees

KIMBERLY CRAVEN,

Movant-Appellant,

v.

KENNETH LEE SALAZAR,
Secretary Of The Interior, *et al.*,

Defendants-Appellees,

HARVEST INSTITUTE
FREEDMAN FEDERATION, LLC, *et al.*,

Movants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF COMPETITIVE ENTERPRISE INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT KIMBERLY CRAVEN

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F.R.A.P. 26.1 CORPORATE DISCLOSURE STATEMENT

The Competitive Enterprise Institute (CEI) is a nonprofit public interest organization dedicated to advancing the principles of individual liberty, limited government, and the rule of law. No publicly-held entity owns an interest of more than ten percent of CEI. CEI does not have any members who have issued shares or debt securities to the public.

Date: October 24, 2011

Respectfully Submitted,

/s/ Amy Miller

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BRIEF OF COMPETITIVE ENTERPRISE INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT KIMBERLY CRAVEN

INTEREST OF THE *AMICUS CURIAE*[1]

The Competitive Enterprise Institute (CEI) is a nonprofit public interest organization dedicated to advancing the principles of individual liberty, limited government, and the rule of law. CEI engages in research, education, and advocacy on a broad range of regulatory, legal, and constitutional issues. CEI attorneys served as co-counsel for the petitioners in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), and as counsel of record in cases such as *Competitive Enterprise Institute v. N.H.T.S.A.*, 956 F.2d 321 (D.C. Cir. 1992). CEI participated as amicus in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), and filed an *amicus* brief on behalf of economists and legal scholars in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007).

The proper administration of class actions is vital to the functioning of the free market and the rule of law. Large settlements—including large class-action settlements—are rarely isolated events; instead they signal to future litigants (or future class-action lawyers) that the rules underlying litigation have changed, and that they should continue to push the boundaries of the legal

[1] Pursuant to Rule 29(c)(1), no party or entity other than *amicus curiae* and its counsel authored this brief in whole or in part or made any monetary contribution intended to fund this brief's preparation or submission.

system. Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 974 (2010). Moreover, while class-action settlements are designed to introduce finality to complex litigation, inadequate representation leads to frequent (and costly) challenges to the settlement after the fact. BRIAN ANDERSON & ANDREW TRASK, THE CLASS ACTION PLAYBOOK 247-51 (2010). Therefore, CEI has a strong interest in the proper administration of class-action settlements.

ARGUMENT

There is always, in large sprawling class actions where settlement appears to be at hand, a strong temptation to be "adventuresome" in applying Rule 23. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617-18 (1997) ("class-action practice has become ever more "adventuresome" as a means of coping with claims too numerous to secure their 'just, speedy, and inexpensive determination' one by one"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (counseling "against adventurous application" of Rule 23). Doing so can resolve years of litigation, and it can provide some relief to parties who have received none to date. But, despite this strong temptation to both the parties and the courts who oversee them, adveturesome interpretations of Rule 23 resolve litigation only at a heavy cost.

This is just that kind of case. The *Cobell* litigation has spanned fifteen years, more than twenty published opinions, and even—sadly—outlived even

its original named plaintiff.[2] But the fact that this litigation has taken so long does not absolve the courts of the obligation to ensure that any settlement is conducted with regard for due process, the rule of law, and for the interests of the absent class members.

Nonetheless, the parties have all pushed for a comprehensive settlement that would offer $1,800 to each class member in lieu of the accounting they had originally sought and the final monetary award to which they would be entitled. In doing so, the court below certified a class that did not meet the requirements of Rule 23, and violated the due process rights of the various absent class members.

In this case, the lower court's misapplication of Rule 23 effected a settlement of an inordinately complicated legal dispute. Relaxing the demanding standards of Rule 23 in order to accomplish settlements is a constant temptation for courts. *See*, *e.g.*, *Amchem*, 521 U.S. 591, 620 (1997); *Ortiz*, 527 U.S. at 849. But, as the Supreme Court has ruled again and again, and as other appellate courts have recognized, allowing the desire of the parties to settle claims to override the need for a rigorous analysis of Rule 23's

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[2] Ms. Cobell passed away, succumbing to complications from cancer on October 16, 2011. *See* "Elouise Cobell, Blackfeet woman who led $3.4B settlement in Indian land trust case, dies at 65," *Washington Post*, available at http://www.washingtonpost.com/local/obituaries/elouise-cobell-blackfeet-woman-who-won-34b-settlement-in-indian-land-trust-case-dies-at-65/2011/10/17/gIQA3CCaqL_story.html (last viewed Oct. 24, 2011).

requirements often results in outcomes that are bad for the class members and bad for subsequent caselaw.

> But other specifications of the Rule--those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand *undiluted, even heightened, attention in the settlement context*. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold

Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 620 (1997) (emphasis added, internal citations omitted); *Thomas v. Albright*, 139 F.3d 227, 234 (D.C. Cir. 1998) ("A 'settlement-only class certification' does, however, depend upon compliance with all the requirements of Rule 23(a) and (b). "); *see also In re Bluetooth Headset Prods. Liab. Litig.*, 2011 U.S. App. LEXIS 17224, *25 (9th Cir. Aug. 19, 2011) ("Courts have long recognized that settlement class actions present unique due process concerns for absent class members.") (internal quotation omitted).

When that heightened scrutiny is applied in this case, it becomes clear that the superhuman efforts to resolve this litigation involved superhuman efforts to sidestep the requirements of Rule 23. And for that reason primarily, the court below wrongfully certified two classes for settlement and wrongly approved that settlement as fair, reasonable, and adequate.

I. TO THE EXTENT THAT CONGRESS WAIVED THE REQUIREMENTS OF RULE 23, CERTIFICATION OF THE *COBELL* SETTLEMENT WAS UNCONSTITUTIONAL AND VIOLATED THE COURT'S FIDUCIARY DUTY TO CLASS MEMBERS.

The Congressional legislation that authorized payment of the settlement stated that "Notwithstanding the requirements of the Federal Rules of Civil Procedure, the court in the Litigation may certify the Trust Administration Class." (App. 620.) To the extent this Congressional funding resolution waived the rigorous analysis in which courts must engage, it was unconstitutional on its face, because it deprived the members of the class of their due process rights.

A. The Protections of Federal Rule of Civil Procedure 23 Protect the Due Process Rights of Absent Class Members and Defendants.

There is no question that the requirements of Rule 23 have a Constitutional dimension.

This Circuit has long-recognized that adequacy of representation is a due process requirement. *Nat'l Ass'n of Reg'l Med. Programs v. Matthews*, 551 F.2d 340 (D.C. Cir. 1976) ("the adequacy of class representation has a constitutional dimension") *see also Nat'l Ass'n for Mental Health, Inc. v. Califano*, 717 F.2d 1451, 1457 (D.C. Cir. 1983). So has the Supreme Court. *Hansberry v. Lee*, 311 U.S. 32, 41-42 (noting constitutional requirement that "the named plaintiff at all times adequately represent the interests of the absent class members."); *see also Amchem*, 521 U.S. at 626–28; *Ortiz*, 527 U.S. at 848 n.24 (adequacy of

representation is a "constitutional requirement"). Indeed, there is no way to bind class members to the preclusive effect of a settlement consistent with due process of law unless they have been adequately represented at the settlement stage. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992). Given that subsequent courts make the decision as to whether the claimants in front of them were adequately represented, *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 257-58 (2d Cir. 2001), a settlement with a clear conflict of interest virtually guarantees subsequent challenges.

Commonality is a due process requirement as well. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) (Rule 23(a)(2) commonality requirement "represents a measured response to the issues of how the due process rights of absentee interests can be protected and how absentees' represented status can be reconciled with a litigation system premised on traditional bipolar litigation"). Enforcing commonality does not just protect the due process rights of the absent class member, it also protects the defendant. *See* Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1139-40 (2011) ("The unavailability of class certification [where commonality is lacking] forms not a misguided concern for absent class members but, rather, a well-taken concern that they ought not to gain the leverage of a class-wide trial without also affording the defendant the prospect of a victory that would have a commensurately binding scope. In

poker parlance, a proper class action effectively operates like a call of 'all-in' on the part of class counsel, such as to make for preclusive symmetry as between the plaintiff class and the defendant.").

B. Congress May Not Waive the Due Process Rights of Litigants Without Proper Scrutiny.

Neither a court nor a legislature may waive these Rule 23 requirements for absent class members in the middle of litigation. This is particularly true where the legislature is a party to the lawsuit (the federal government is the defendant here; Congress is a branch of that government). *United States v. Winstar*, 518 U.S. 839 (1996). Moreover, in a case like this, where Congress effectively waived the Court's power to oversee the settlement, it did so without adequate scrutiny. *Home Tel. Co. v. City of Los Angeles*, 211 U.S. 265, 273 (1908) ("[t]he surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized.")

As the Court in *Amchem* observed, the Federal Rules of Civil Procedure reflect an exercise of government power that ensures the just and fair ordering of civil litigation:

> Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. See

> 28 U.S.C. § § 2073, 2074. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure "shall not abridge ... any substantive right." § 2072(b).

521 U.S. at 620. In this case, without any scrutiny of its actions—in the context of a funding resolution—Congress attempted to surrender the court's power to oversee the proper functioning of a particularly thorny piece of complex litigation. Doing so was an abuse of its power.

This does not mean that Congress was powerless to resolve the dispute between Ms. Cobell's class and the Department of the Interior. Congress certainly had the power to enact a claims process as an alternative to a class action. *See Id.* at 628-29. Indeed, as the Supreme Court observed, enacting an "a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims" of a longstanding, far-reaching, and diverse set of harms. *Id.* But that is not what Congress did here. Congress did not set up an administrative claims process to ensure that each class member was compensated in a secure, fair, and efficient fashion. Instead, it simply declared that, for purposes of the Trust Administration Class, the lower court could certify a class even if it had to ignore the Federal Rules of Civil Procedure to do so. (App. 587.) But Congress cannot waive the due process protections inherent in Rule 23 by fiat. *Home Tel. Co.*, 211 U.S. at 273*;*

see also Amchem, 521 U.S. at 629 ("Rule 23 … must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view").

Certainly, nothing prevented Congress from forming an administrative claims process to address these concerns. But that was not the solution it chose; instead it suspended the Federal Rules of Civil Procedure while leaving it to the courts to address this particular litigation crisis.

C. Regardless of Whether Rule 23 Applied to This Case, Certifying the Settlement Classes Without Conducting a Rigorous Inquiry Was an Abdication of the Court's Fiduciary Duty to Absent Class Members.

As important as the due process implications of this maneuver, the Court also breached its fiduciary duty to the absent class members. Given the inherent conflicts that arise when a class action approaches settlement (namely, that class counsel may have a greater interest in settlement than his clients), a court owes a fiduciary duty to absent class members to protect their interests. *Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745, 748 (7th Cir. 2006) ("the district court judge functions as a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries").

The lower court did not consider the full range of Rule 23's requirements in certifying the class. It certainly did not subject this sweeping class to the "rigorous analysis" required for federal courts. *Wal-Mart Stores, Inc.*

v. Dukes, 131 S. Ct. 2541, 2551 (2011). Instead, its orders certifying the proposed settlement class and giving final approval to the settlement total sixteen double-spaced pages, and—with the exception of a paragraph of conclusory findings—performed no analysis of commonality, adequacy of representation, or the predominance of common issues over individualized issues. (App. 784-96; 651-53. The lower court's conclusory Rule 23 findings are at 787-88.)[3]

In doing so, the lower court skipped ensuring that these absent class members—whose claims will be discharged by this settlement, but who did not have a say in it themselves—had their due process rights protected.

II. MRS. COBELL'S REQUEST FOR A $13 MILLION INCENTIVE PAYMENT RENDERED HER AN INADEQUATE CLASS REPRESENTATIVE.

A. A Class Representative Must Possess Undivided Loyalty to Absent Class Members.

It is a matter of black-letter law in most appellate circuits that a class representative must "possess undivided loyalties to class members." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998); *see also*

[3] The lower court had previously certified a version of the Historical Accounting Class fourteen years ago, on February 4, 1997. (App. 651.) Both the litigation and the proposed class had evolved extensively since then, and the district court remained under a continuing obligation to ensure that the class as currently defined met the requirements of Rule 23. *See*, *e.g.*, *Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir. 1985) ("class actions depend on the continuing supervision of the district court, including reconsideration of the efficacy of class action treatment as the circumstances change").

In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785, 796 (3d Cir. 1995).

This undivided loyalty is critical to the protection of class members' interests. Given the large fees at issue in most class actions, particularly when compared to the recoveries available to the class members, it is not rational for the class members to invest the time and effort necessary to adequately protect their rights on their own. Elizabeth Chamblee Burch, *Optimal Lead Plaintiffs*, 64 VAND. L. REV. 1109, 1115-16 (2011) ("Class members … have a small stake in a big problem and thus have little incentive to invest significant time into understanding the litigation or monitoring the attorneys."). As the Seventh Circuit has described the issue:

> The class action is an awkward device, requiring careful judicial supervision, because the fate of the class members is to a considerable extent in the hands of a single plaintiff (or handful of plaintiffs, when, as is not the case here, there is more than one class representative) whom the other members of the class may not know and who may not be able or willing to be an adequate fiduciary of their interests. Often the class representative has a merely nominal stake (Culver has no stake), and the real plaintiff in interest is then the lawyer for the class, who may have interests that diverge from those of the class members. The lawyer for the class is not hired by the members of the class and his fee will be determined by the court rather than by contract with paying clients.

Culver v. City of Milwaukee, 277 F.3d 908, 910 (7th Cir. 2002).

Given this dilemma, one of the chief responsibilities of the class representative is to provide a degree of independence from class counsel, so that when the interests of the class inevitably conflict with those of class counsel, the interests of the class are still protected. *See CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 724 (7th Cir. 2011) (Posner, J.) (adequate class representative is "able to ensure that class counsel act as faithful agents of the class"); *Kirkpatrick v. JC Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987) (proposed class representatives inadequate where "they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys").

This is why courts will refrain from certifying a class when they suspect that the class representative does not possess undivided loyalty to the class, but may instead have some additional loyalty—such one stemming from a familial or business relationship—to counsel. *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 (11th Cir. 2003) ("Long-standing personal friendship" and prior business relationship between plaintiff and counsel rendered plaintiff inadequate class representative); *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1374 (11th Cir. 1984) (affirming denial of certification where named plaintiff was employee of class counsel); *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 94–95 (7th Cir. 1977) (counsel's brother and colleague were inadequate class representatives).

B. The $12.5 Million Incentive Payment Request Divorced Ms. Cobell's Loyalties From the Class Members.

Just as a plaintiff's close relationship with counsel may compromise her independence, so too may her reliance on any incentive payments. *See Arellano v. T-Mobile USA, Inc.*, 2011 U.S. Dist. LEXIS 21441, *8 (N.D. Cal. Mar. 3, 2011) ("If the proposed settlement by itself is not good enough for the named plaintiff, why should it be good enough for absent class members similarly situated?"). It is true that this Circuit has determined that incentive payments are not, by themselves, inappropriate in all cases. *See Thomas v. Albright*, 139 F.3d 227, 229 (D.C. Cir. 1998) (affirming approval of incentive payments to 30 named plaintiffs). Nonetheless, a court must remain mindful of the effect any incentive payment would have on the independence of a class representative. *Arellano*, 2011 U.S. Dist. LEXIS 21441 at *8 (observing that incentive payments "too often are simply ways to make a collusive or poor settlement palatable to the named plaintiff").

But divided loyalty does not necessarily mean loyalty to class counsel. As this Court has observed, when class members have different interests in the amount they will recover from a settlement, their interests will begin to diverge from each other. *Thomas*, 139 F.3d at 235. There can be no question that there is tremendous divergence between an interest in a $12.5 million incentive payment, and the $1,800 payment most class member will receive. And it is

difficult to see how a class representative could possess an undivided loyalty to class members when she stands to recover more than ***7,000*** times as much as any of them do should the settlement go through. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (award to named plaintiff that was 3,000 times average class member's recovery evidence of self-dealing). This is not a problem of character; it is a structural conflict. Because Ms. Cobell stood to gain millions of dollars should the settlement go through, it was an abuse of discretion to trust her to act as a fiduciary for the interests of class members who stood only to receive $1,800. Indeed, her interest in a completed settlement was far closer to her lawyers' (who requested $223 million in fees, and have received $99 million) than it was to her fellow class members'. (The same holds true for the other three class representatives, each of whom stood to receive payments in the six-figure, rather than four-figure, range.) Moreover, the requested $12.5 million would not appear out of thin air; it would necessarily come from relief that would otherwise go to the rest of the class. *Young v. Higbee Co.*, 324 U.S. 204, 213 (1945). To the extent Ms. Cobell sought a payment that was orders of magnitude greater than the amount most class members would receive, she had created a clear conflict of interest with the remainder of the class. *Id.* at 214.

The parties—and the lower court—have characterized arguments on this issue as attacks on Ms. Cobell's character. (App. 779 ("I was distressed to hear

Ms. Cobell attacked today …").) But there is a distinct difference between recognizing a conflict of interest and personally attacking a class representative. *No* class representative who stood to collect thousands as much as those she purported to represent could adequately represent the other members of the class. In fact, this is the exact reason that we do not trust class *counsel,* who are ostensibly bound by ethical rules, to act as proper fiduciaries for class members in class-action settlements. *Kirkpatrick*, 827 F.2d at 727; *Culver*, 277 F.3d at 910. There is no reason to expect Ms. Cobell to withstand temptation any better than her attorneys would.

While a class representative must possess a degree of integrity and personal character, courts rightly do not expect class representatives to be saints. *See Dubin v. Miller*, 132 F.R.D. 269, 272 (D. Colo. 1990) ("few [class] plaintiffs come to court with halos above their heads; fewer still escape with those halos untarnished"); *CE Design Ltd.*, 637 F.3d at 728 ("trivial credibility problems" do not render named plaintiff inadquate). But, consistent with that recognition, courts cannot and should not place conflicts that would test a saint in front of class representatives. In this case, requiring Ms. Cobell to choose between a $12.5 million incentive award (or even the other class members' six-figure incentive awards) and the $1,800 awarded to the remainder of the class presents just that sort of temptation.

C. The Class Representatives' Inconsistent Testimony About the Fairness of the Class Settlement Rendered Them Inadequate Class Representatives.

Originally, Ms. Cobell's (and the other class representatives) stance was that they sought no recovery for themselves, just the absent class members. *See* Todd Wilkinson, "A Blackfeet's crusade to settle accounts with US," *Christian Science Monitor* (Mar. 20, 2002). More importantly, the class representatives—in particular Ms. Cobell—opposed a more generous $7 billion settlement offer the made in 2007 as "a slap in the face." (App. 736 ("[T]his is no offer. Instead, it is a slap in the face of every individual Indian Trust beneficiary."))

Since that time, the class representatives have reversed themselves. Given the addition of the incentive payments, there are reasonable grounds to suspect that the proposed incentive payment here was an attempt to "make a … poor settlement palatable to the named plaintiff." *Arellano*, 2011 U.S. Dist. LEXIS 21441 at *8. More importantly, however, these inconsistencies are precisely the kind of credibility problem that make named plaintiffs inadequate to represent a class. *Coyle v. Hornell Brewing Co.*, 2011 U.S. Dist. LEXIS 57995, *12 (D.N.J. May 26, 2011) (finding named plaintiff inadequate where she made unintentional misrepresentations), *aff'd in relevant part on reconsideration,* 2011 U.S. Dist. LEXIS 97762 (D.N.J. Aug. 30, 2011). This concern is equally important in a class-action settlement, since the attacks on the credibility of the class representatives will come in subsequent actions by absent class members.

Stephenson, 273 F.3d at 257-58; *Hesse v. Sprint Corp.*, 598 F.3d 581, 588-89 (9th Cir. 2010) (refusing to recognize preclusive effect of class-action settlement because named plaintiff was inadequate); *Hege v. Aegon*, 780 F. Supp. 2d 416, 432 (D.S.C. 2011) (refusing to recognize preclusive effect of class-action settlement where "representation Plaintiffs received was constitutionally inadequate").

III. 23(B)(3) WOULD NOT JUSTIFY CERTIFICATION OF THE TRUST ADMINISTRATION CLASS.

The court below stated that its was certifying the Trust Administration Class "pursuant to Rule 23(b)(3)." (App. 652; 788.) While it is certainly true that adding a right to opt out would have at least allowed those class members with greater monetary interests to preserve them, it still would not have been enough, given the wide heterogeneity of the proposed class, to justify certification.

The certified class was anything but homogenous. It covered a wide variety of conduct, including allegations that the federal government did not keep adequate records (in some cases destroying them), did not account to the trust beneficiaries with respect to the money they were owned, obstructed the appointment of a proper Special Trustee, mismanaged trust funds, lost trust funds, under-invested trust funds, charged improper administrative fees, did not investigate charges of embezzlement, and mismanaged land and resources,

including oil, natural gas, mineral, timber, grazing, and other resources and rights" by, among other things, not leasing land, not getting fair market values for land they did lease, and other instances of mismanagement. (App. 475-77.)

The list of alleged transgressions is a long and varied, and contains a number of activities that are mutually exclusive from each other. (The government could not, for example, under-invest funds it had failed to invest, or imprudently negotiate the lease of land that it had failed to lease.) As a result, these issues simply cannot be common to all of the class members—meaning that the class could not pass the commonality requirement of Rule 23(a)(2), let alone the more demanding predominance requirement of Rule 23(b)(3). Were one being generous, one could claim that the "common issue" was the policy and practice of mis-administering the trust accounts. But as the Supreme Court ruled last Term, these kinds of generalized "policy and practice" questions are not sufficient to pass muster under Rule 23(a)(2). *Dukes*, 131 S. Ct. at 2551 ("the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once"). Instead, the "common issues" must be of such a kind that resolving them "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* It is plain from the list of conduct plaintiffs have crammed into their Amended Complaint that there is no one issue that,

were it resolved, would resolve the claims of the Trust Administration class in a single stroke. Instead, a series of individualized inquiries would be required to determine the harm that had occurred to each class member.

At the fairness hearing, the parties urged the lower court to ignore *Dukes* because it involved a case that was "hotly contested" instead of on the verge of settlement. (*See* App. 767 (informing court that *Dukes* did not apply to certification of classes here because "the Wal-Mart case did not involve a settlement").) That argument was simply, flatly, wrong. As the Supreme Court has consistently held, the only aspect of Rule 23(b)(3) that a court overseeing a settlement may safely ignore is whether the class would allow for a manageable trial:

> Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.
>
> But other specifications of the Rule--those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand *undiluted, even heightened, attention in the settlement context*. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold

Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 620 (1997) (emphasis added, internal citations omitted); *see also Thomas*, 139 F.3d at 234 ("A 'settlement-only class certification' does, however, depend upon compliance with all the

requirements of Rule 23(a) and (b).”). Nor does the fact that a settlement may appear fair overall substitute for its meeting the requirements of Rule 23. *Amchem*, 521 U.S. at 622 (“Federal courts, in any case, lack authority to substitute for Rule 23’s certification criteria a standard never adopted--that if a settlement is “fair,” then certification is proper.”). Here, the court below did not provide heightened attention to the remainder of the Rule 23 requirements. Indeed, its order modifying the Historical Accounting Class and certifying a new Trust Administration made no mention of whether either settlement classes met the requirements of Rule 23, and its subsequent July 27 order finalizing the settlement approval made only conclusory findings that the class met those requirements. (App. 784-96; 651-53.)

IV. CERTIFYING THE HISTORICAL ACCOUNTING CLASS UNDER RULE 23(B)(2) WAS NOT APPROPRIATE.

The lower court had certified the Historical Accounting Class under Rule 23(b)(2). (*See*, *e.g.*, App. 767.) As the Supreme Court has made clear, Rule 23(b)(2) is appropriate for lawsuits that demand injunctive or declaratory relief that applies to the class as a whole, but not to relief that is merely “equitable,” or that would require different injunctions for different class members. *Dukes*, 131 S. Ct. at 2560.

In this case, despite its certification under Rule 23(b)(2), the Historical Accounting Class has wound up with—not a classwide injunction—but

classwide monetary relief in the form of $1,000 each. (App. 566) This is precisely the kind of relief that is not supposed to be certified under Rule 23(b)(2). *Dukes*, 131 S. Ct. at 2560.

Nor could the case have been certified in its original form under Rule 23(b)(2). The plaintiffs in this case had demanded an accounting. To the extent that an accounting is injunctive relief (as opposed to merely equitable), it is *individualized* injunctive relief, providing each member of the class with an understanding of what his unique interests in government-managed resources were worth. And the Supreme Court has made it very clear that that this kind of individualized relief is exactly the kind one cannot receive in a rule 23(b)(2) class action. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011) (individualized injunctive relief cannot satisfy Rule 23(b)(2)); *see also Blackman v. Dist. Columbia*, 633 F.3d 1088, 1094 (D.C. Cir. 2011) ("at some level of abstraction, a degree of cohesion will exist in almost any putative class. But this does not mean it is prudent to generalize to such a degree, especially when IDEA operates from the premise that each child will have unique disabilities and presumes that each program will be personalized.") (Brown, J. concurring).

Indeed, in this case, by certifying the class under Rule 23(b)(2), thus preventing any class members from opting out, the court denied class members their due process rights. *Dukes*, 131 S. Ct. at 2559 ("In the context of a class action predominantly for money damages we have held that absence of notice

and opt-out violates due process."). The Historical Accounting Class received predominantly—in fact *exclusively*—monetary relief, but its members were not afforded any opportunity to opt out of the litigation. (App. 548 ("In accordance with FRCP 23(b)(2), no opt out will be available to those Class Members in the Historical Accounting Class.").)

Nor is there a good link between the accounting sought and the monetary relief received. The class members ostensibly sought an accounting to learn just how much of the money they were due had been misallocated or mismanaged. Instead, they will each receive $1,000, an amount that is supposed to take the place of learning how much money they were actually entitled to. In many cases, that money may reflect a windfall, in a few rare cases it may accurately reflect the class member's restitutionary interest, discounted appropriately by her chance of success at trial. But in a significant minority of cases, this amount will not be worth even the class member's interest in the accounting. If one is owed millions of dollars, giving away the necessary precursor to recovering that money is hardly worth only $1,000. Nor could a class member opt out of the Trust Administration Class in an informed fashion if he does not know how much his claim is worth.

CONCLUSION

For the reasons discussed above, *amicus curiae* recommends that this Court reverse the approval of the *Cobell* settlement and decertify the Historical Accounting and Trust Administration Classes as not complying with the requirements of Rule 23.

Respectfully submitted,

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Dated: October 24, 2011

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