NO. 15-3228
Consolidated with Nos. 15-3221, 15-3227, and 15-3254

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: MOTOR FUEL TEMPERATURE SALES PRACTICES LITIGATION

ZACHARY WILSON, *et al.*,
Plaintiffs-Appellees,
v.
BP CORPORATION NORTH AMERICA, INC., *et al.*,
Defendants,
and
CHEVRON USA, INC., *et al.*,
Defendants-Appellees,
v.
Melissa Holyoak, *et al.*,
Objectors-Appellants.

On Appeal from the United States District Court for the District of Kansas
Case No. 2:07-md-01840-KHV
The Honorable Katherine H. Vratil, Presiding

Opening Brief of Appellants Amy Alkon, Theodore H. Frank,
Melissa Holyoak, Nicolas S. Martin, and Adam Schulman

ORAL ARGUMENT REQUESTED

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Corporate Disclosure Statement (FRAP 26.1)

Pursuant to the disclosure requirements of FRAP 26.1, Objectors-Appellants Amy Alkon, Nicolas Martin, Theodore H. Frank, Melissa Holyoak, and Adam Schulman state that they are all natural persons, and, as such, are not a subsidiary or affiliate of a publicly owned corporation and there is no publicly held corporation that owns ten percent or more of any stock issued by them.

Dated: February 8, 2016

By: */s/ Theodore H. Frank*

Certificate of Service

I hereby certify that on February 8, 2016, I electronically filed the foregoing Corporate Disclosure Statement with the Clerk of the United States Court of Appeals for the Tenth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

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Statement of Related Cases

As FRAP 28(i) permits, Alkon adopts by reference Speedway's Statement of Related Cases. OB1-2.[1]

Glossary of Terms

A:	Appendix filed by Speedway Appellants in 15-3221
ATC:	Automatic Temperature Compensation
CEC:	California Energy Commission
Dkt.:	Docket in No. 2:07-cv-MD-01840-KHV (D. Kan.)
IOLTA:	Interest on Lawyer Trust Accounts
NCWM:	National Conference of Weights and Measures
OB:	Opening Brief filed by Speedway Appellants in 15-3221
SA:	Supplemental Appendix filed by Alkon Appellants in 15-3228

10th Cir. R. 31.3(B) Statement

The Tenth Circuit ordered separate briefs in its scheduling order of November 23, 2015. The Alkon Appellants' (collectively Alkon) interests differ somewhat from the Speedway Appellants' (collectively Speedway) interests, because Alkon appeals a different set of settlements than Speedway and raises different

[1] OB, A, and SA refer to the Opening Brief filed by Speedway Appellants in No. 15-3221; the Appendix filed by Speedway Appellants in 15-3221; and the Supplemental Appendix filed by the Alkon Appellants in 15-3228 respectively. Dkt. refers to the Docket in No. 2:07-md-01840-KHV (D. Kan.). We paginate the Supplemental Appendix to begin after the last page of the 15-3221 Appendix.

arguments for reversal; and because Speedway necessarily challenges a standing ruling while Alkon's standing to object and appeal is uncontested. While both Alkon and Speedway raise separation-of-powers and First Amendment arguments, Alkon's reasoning differs from Speedway's.

Statement of Subject Matter and Appellate Jurisdiction

The district court putatively had diversity jurisdiction under 28 U.S.C. § 1332(d)(2)(A), because this case was a class action with a putative class of plaintiffs who purchased motor fuel in one of twenty-six states (for example, appellant Adam Schulman is a citizen of Virginia) and at least one defendant was a citizen of a different state (for example, defendant Chevron USA, Inc., is a citizen of California and Delaware). A637-38. Article III jurisdiction was lacking to approve the settlement for reasons detailed by Speedway and Alkon. OB27-35; Section II, below.

This court has appellate jurisdiction under 28 U.S.C. § 1291. The district court ordered final approval of the settlements on April 24, 2012, and August 21, 2015, and issued final judgment on September 22, 2015. A3114; A7471; A7565. (The district court had previously refused to issue a Rule 54(b) final judgment. A3815.) The Speedway appellants filed a notice of appeal on September 17, 2015. Dkt. 4857. The Alkon appellants filed a notice of appeal on September 25, 2015. Dkt. 4864. This notice is timely under Fed. R. App. P. 4(a)(1)(A) and 4(a)(3). Alkon, as a class member who objected to settlement approval below, has standing to appeal a final approval of a class action settlement without the need to intervene formally in the case. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

Statement of the Issues

1. Multiple circuits hold that class counsel may not be the primary beneficiary of a settlement.

(a) Did the district court commit clear error in finding that the benefits of the settlement to the class made the settlement fair when it (i) failed to consider evidence showing the costs exceeded the benefits; (ii) made findings that were economically fantastic and methodologically flawed; and (iii) made internally inconsistent findings that contradicted sources it relied upon?

(b) Did the district court err as a matter of law when it failed to give a reasoned response to the evidence and argument that the settlement, at best, merely eliminated cross-subsidization and redistributed expenses within the class, to the prospective disadvantage of about half of the class members, without any net benefit to the class?

(c) Did the district court err as a matter of law in approving a settlement where class members admittedly received no unique benefits in exchange for the release of their claims, but class counsel was permitted to apply for a Rule 23(h) award of $24.7 million?

(d) Did the district court err as a matter of law in holding that "informational benefits" justified a series of settlements that proposed paying class counsel $24.7 million, when those informational benefits were calculated by the source the district court relied upon to be about one penny per class member per year?

2. Does a district court have Article III authority to structure settlements and injunctive relief to influence and lobby third-party regulators and legislators to change the law and impose a new regulatory regime, where it is one (a) making legislative judgments previously rejected by state and federal regulators and legislators and (b) granting prospective releases for future conduct under the proposed regulatory regime?

3. Did the district court err as a matter of law in certifying a class as "superior" under Rule 23(b)(3) where it had made a factual finding that a successful class litigation for damages would be unable to ascertain class members and feasibly provide compensation?

4. The Supreme Court holds that "except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014). Did the district court err as a matter of law in holding that settlements that used class settlement funds to subsidize speech by a third party that class members disagree with (and silence speech by third parties that class members agree with) was permissible under the First Amendment?

As FRAP 28(i) permits, Alkon further adopts by reference Speedway's statement of the issues #1 through #4. OB2-3.

Standard of Review

As FRAP 28(i) permits, Alkon adopts by reference Speedway's statement of the standard of review (OB26-27), and adds further that an "abuse of discretion occurs when the district court bases its ruling on an erroneous conclusion of law or relies on clearly erroneous fact findings." *Hackett v. Barnhart*, 475 F.3d 1166, 1172 (10th Cir. 2007). The abuse of discretion standard does not preclude an appeals court from "interven[ing] when a District Court makes a finding that is methodologically flawed." *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 184 (3d Cir. 2004) (Becker, J.); *cf. also Transcraft, Inc. v. Galvin Stalmack Kirschner Clark*, 39 F.3d 812, 818-20 (7th Cir. 1995) (Posner, J.) ("fantastic" economic theory of damages cannot support jury verdict). For a district court's settlement approval to "survive appellate review," the district court "must give a reasoned response to all non-frivolous objections." *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012).

Statement of the Case

As FRAP 28(i) permits, Alkon adopts by reference Speedway's statement of the case and statement of facts (OB4-22), and adds as follows:

A. Motor fuel, volume, temperature, and their regulation.

Motor fuel, like most liquids, expands with temperature. As a matter of basic physics, warmer fuel will have slightly fewer molecules of gasoline per gallon than colder fuel. A 15-degree-Fahrenheit difference will reduce the energy content of a gallon of gas by about 1%, reducing mileage accordingly. For comparison, federal mandates for gasoline blended with 10% ethanol reduce energy content of a gallon of gas by about 2%, and "the energy content of conventional gasolines also varies widely from batch to batch"—as much as 5%. Environmental Protection Agency, *Fuel Economy Impact Analysis of RFG* 1-2 (Aug. 1995) (available at http://is.gd/epa_rfg).

In many states, American retailers purchase from wholesalers temperature-adjusted "gross gallons," reflecting the amount of motor fuel that would constitute a gallon at 60 degrees Fahrenheit. A635; A645. American retailers sell motor fuel by the gallon, and are required by law to sell volumetrically—*i.e.,* by volume without reference to temperature. A4488-91; A4517-18; A2209; OB8-11. In Canada, by contrast, where regulation does not require gasoline to be sold volumetrically, retailers "temperature-adjust" sales of gasoline using ATC—automatic temperature compensation. A646-67. American retailers are not currently permitted to use ATC to sell gasoline. OB8-11.

Federal and state regulators have repeatedly considered whether to shift from volumetric requirements to ATC, and have repeatedly rejected the proposition. OB12-18. For example, in addition to the studies cited by Speedway, the California Energy Commission ("CEC") unanimously found after a year-long cost-benefit analysis that the "results are *negative or a net cost to society* under all the options examined." SA7801 (emphasis added). Though the average size of a "gallon" would increase, "retail station owners will in fact raise their fuel prices to compensate for selling fewer units, all other things being equal." SA7870-71. The CEC estimated that the total cost to all of its citizens from mistaken purchases of low-cost gasoline that is actually higher cost because of temperature differences between stations is "a little more than $250,000 a year." A7871. With 24.8 million licensed drivers in California, that translates to just over *$0.0104*—a penny plus a rounding error—per California driver per year.

It is undisputed that many absent class members oppose ATC at retail. *E.g.*, A1763-68 (American Trucking Association, "the largest diesel fuel consumer group in the United States has repeatedly taken a public position against [ATC]" (citing Dkt. 1343-8)). The National Conference on Weights and Measures noted that the "overwhelming majority of comments" it received opposed ATC based on, *inter alia*, economic cost factors and lack of benefit to consumers. A2472 at ¶ 12. Indeed, Consumer Union, which publishes *Consumer Reports*, tells its members they need not be concerned about the issue because the temperature in below-ground double-walled tanks are generally insulated against temperature changes. A5464.

B. Plaintiffs sue, and several defendants settle.

In 2007, the Judicial Panel on Multidistrict Litigation transferred numerous class actions against American retailers over the practice of volumetric motor-fuel sales, alleging, *inter alia*, violations of state consumer-protection law, unjust enrichment, and various contract-law claims, seeking damages and injunctive relief. A634-A767. Plaintiffs asserted a goal of forcing the industry to shift to ATC, recognizing that this would require a legislative or regulatory change in state law. OB9-11.

Plaintiffs negotiated 29 settlements in 2009, 2012, and 2014, affecting over 100 million class members. OB19; A7495. None pay class members any money. Speedway describes the two types of settlements: ATC-Conversion settlements (including Costco and Valero) that require no cash outlay beyond attorneys' fees, but require ATC conversion where permitted by law; and Regulator Fund settlements (including, *inter alia*, Citgo and Sunoco). OB20-23. The Regulator Fund totals $23.9 million. A7485-91. Class counsel will seek 30% of the Regulator Fund and another $18 million or so in fees from defendants that have not contributed to the Regulator Fund; many of those defendants have agreed to "clear sailing" where they will not contest those fees. *Id.*; Dkt. 1820; Dkt. 4827.

The Regulator Fund Settlements approved by the district court require defendants to pay a lump sum to facilitate retailers' and/or regulators' transition to ATC. *E.g.*, A5763-64. In six of the Regulator Fund settlements with wholesale distributors (BP, Chevron, ConocoPhillips, ExxonMobil, Shell, and Sinclair), the Regulator Fund also permits distribution to retail gas stations. A7486. If state regulators approve the use of ATC, the fund created by these settlements will be doled out by plaintiffs' counsel, acting as the "Settlement Administrator," to state weights-and-measures agencies for the purpose of offsetting the costs of inspection and oversight when retailers begin installing ATC and, in certain of the settlements, to branded gas stations to offset their cost of ATC installation. *Id.*; A5674; A7471 (appointing class counsel as settlement administrator).

In eventually approving the settlements, the district court steered the parties toward adopting ATC, refusing to provide preliminary approval for proposed settlements that had other regulatory schemes it disliked, such as Valero's proposal to resolving any complaints about volumetric sales by disclosing tank temperatures to consumers. A4286. Some of the settlements not only regulate industry players, but purport to preempt class members' litigation against those industry players' future conduct. *E.g.*, A4419.

In preliminarily approving the settlements, the district court held that "individual distributions to class members are not feasible because individual class members cannot be identified through reasonable effort, individual damages would be difficult if not impossible to calculate and individual distributions would be too small to be economically viable." A4274.

C. The district court approves settlements over objections.

1. The Alkon objectors.

There is no dispute that Objectors Amy Alkon and Nicolas Martin ("Alkon") are members of the Costco class; and that Theodore H. Frank, Melissa Holyoak, and Adam Schulman ("Frank") are collectively members of the BP, Chevron, Citgo, ConocoPhillips, ExxonMobil, Shell, Sinclair, and Valero settlement classes. SA7944; A5477-89; A7493. Alkon and Frank ("Alkon") are represented by attorneys from the non-profit Center for Class Action Fairness ("Center"), which became part of the Competitive Enterprise Institute in 2015. The Center's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it has won millions of dollars for class members and a dozen federal appeals. A5479-81 (citing*, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12 (calling Center attorney Frank "the leading critic of abusive class action settlements"); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (Posner, J.) (praising the Center's work); *In re Classmates.com Consol. Litig.*, No. 09-cv-0045-RAJ, 2012 U.S. Dist. LEXIS 83480, at *29 (W.D. Wash. Jun. 15, 2012) (same)).

2. The Costco approval.

Costco settled first, in 2009, agreeing to implement ATC if regulators permitted. A1512.

Class counsel, through the declaration of putative economic expert Andrew Safir, argued that the settlement provided Costco class members $100 million in benefit through the adoption of ATC. SA8002-06. Safir reasoned that ATC would mean that Costco would be selling larger "gallons" of gasoline to consumers and that consumers would effectively be receiving free gas as a result. SA8005. Safir, however, assumed that because of the competitive market for gasoline, retailers would be able to pass on to consumers the fixed costs of ATC conversion. *Id.*

Alkon objected that the injunctive relief was economically worthless, and that the settlement disproportionately benefited class counsel at the expense of the class; she further objected that the settlement would only benefit some class members at the expense of others, and the net benefit would be negative because of the increased costs of ATC. SA7941; SA7968; SA8010; SA8019; SA8077. These positions were supported by the declaration of economist Dr. David R. Henderson. SA8037. Henderson noted the fallacy of Safir's reasoning: if a court decrees that a "dozen" eggs were now eighteen instead of twelve, retailers would simply raise the prices to reflect the new cost of a dozen eggs, rather than give away six eggs, but Safir assumed without any basis the contrary conclusion. SA8041-42. Because of the competitive market for gasoline, any temperature differentials in volumetric gasoline sales simply meant that customers purchasing at above-average temperatures were cross-subsidizing customers purchasing at below-average temperatures without any additional profit to the retailers, who have had the surplus competed away. SA8042-43; *see also* Expert Report of Kevin Murphy, Dkt. 3082-3 at 23-28 (under seal) (retail price compensates consumers for swellage). Switching to ATC would end the cross-subsidization, but that only meant that some class members would benefit at the expense of other class members without any net benefit to the class as a whole. SA8043-44. Alkon separately moved to strike Safir's declaration as unreliable under *Daubert*. SA8011-14; Dkt. 1665.

Class counsel asserted that Costco would not be able to raise prices to recover ATC implementation costs, contradicting their own expert. *Compare* SA8118 *with* SA8005 (deducting implementation costs from benefit). Costco refused to represent to the court that it would not raise prices in response to the settlement. A1998-99. Appellees did not attempt to rebut the cross-subsidization analysis; rather, they asserted that there was no such thing as cross-subsidization outside of antitrust law. Dkt. 1663 at 2.

The district court ultimately approved the Costco settlement after some amendments. A2004; A3114. The court held that it was not relying on the Safir affidavit, and did not reach Alkon's motion to strike. A3147. Relying on the CEC Report, the district court held that the "economic benefits" of "increased price transparency and fairness, accuracy and consistency of fuel measurement for their fuel dollar, regardless of fuel temperature" supported the settlement. A2052; A3145-47. It rejected the idea that Costco would simply pass on the additional cost of larger "gallons" and ATC compliance to consumers, holding that it did not have the ability to do so, and even if it did, consumers could simply purchase gasoline from non-ATC vendors. A2052; A3143-45. The court provided no explanation why it adopted one of the CEC's conclusions, and not the others. It refused to consider the Henderson testimony, because "the Court finds that the proposed injunctive relief provides a substantial informational benefit to class members." A3145. It did not address or mention the cross-subsidization argument. Nor did it attempt to calculate whether a settlement with a proposed $10 million fee justified the informational benefit of one cent per class-member driver per year.

Some objectors immediately appealed; this Court dismissed those appeals for lack of jurisdiction after the district court held a Rule 54(b) judgment was inappropriate. A3815. None of those appellants have renewed their appeals.

3. The other settlements' approval.

After Costco, there were 28 other settlements. In 2015, Frank objected to the BP, Chevron, Citgo, ConocoPhillips, ExxonMobil, Shell, Sinclair, Sunoco and Valero settlements, adopting by reference the earlier Alkon objections, the Henderson declaration, and the Speedway objection. A5438. They further objected that the Regulator Settlements were impermissible compelled speech, that the class should not be certified under Rule 23(b)(3), and that the settlements violated separation of powers by asking for legislative policy determinations. *Id.*

Class counsel asserted that Henderson was wrong because there is no evidence of a "discernible class of 'cold weather purchasers.'" A5542; A5556. But nothing in Henderson's analysis depended on whether temperatures were above or below 60 degrees; the only question was whether customers of gas stations were purchasing at above-average or below-average temperatures, and by definition, about half were in each group. SA8042-43. Class counsel's response did not address Henderson's cross-subsidization argument or even mention cross-subsidization. A5530.

Again, the district court rejected the objections and approved all of the settlements, repeating its analysis from the Costco approval, and again failing to consider the Henderson declaration, or give any explanation why it was ignoring the evidence that some class members (and, on net, the class as a whole) would be made worse off by a shift to ATC; the opinion did not even mention Henderson. A7471. The court noted the "dim prospects of prevailing," A7511, and rejected Frank's objection to the allocation of benefits so heavily to class counsel because "any fee award can be fair and reasonable." A7513. The court rejected the compelled-speech argument on the grounds that class members could choose to opt out and that no political candidates were funded, but did not address the problem that the settlements would pay millions to class counsel to lobby for a shift to ATC. A7507-08. The court held Rule 23(b)(3) certification appropriate on "superiority" grounds because it held that the settlements provide injunctive benefits to class members and that there was no showing that class members can feasibly pursue individual claims. A7508. The court rejected the separation-of-powers argument on the grounds that the final regulatory/legislative decision would be left to the states. A7508-09. Again, it did not calculate whether the proposed attorneys' fees and expenses of $14.7 million for these 28 settlements was proportionate to the informational benefit of about one cent per class member per year. As in the Costco opinion, the district court cited no other evidence or quantification of informational benefit beyond the CEC Report.

D. Material settlement terms remain to be litigated below.

The district court issued final judgment (A7565) without resolving class counsel's motions for $24.7 million in fees and expenses, which remain pending before a magistrate, with appeals presumably to be taken to the district court, and then likely again to this Court. Final judgment started the time limit for appeal running, and Alkon timely appealed. Dkt. 4864. On November 9, 2015, this Court denied Alkon's motion to stay this appeal until the fee issue was resolved.

Summary of Argument

According to the California Energy Commission, whether gasoline should be sold purely by volume or temperature-adjusted (ATC) affects consumers by as much as $0.01/driver/year on average; federal and state regulators and legislators have spent much more than that debating the question, though they all conclude that ATC isn't worth the candle. Rather than letting the legislative authorities do their job, plaintiffs seek to manipulate the outcome (and capitalize on the issue) with 29 class action settlements where the only pecuniary beneficiary of the settlement is class counsel and their legislative agenda: the class receives no cash, and class counsel is funded to lobby for (and essentially implement) new regulations and legislation.

A settlement structured in self-dealing fashion to make class counsel the primary beneficiary cannot be approved, even if it meets other standards for settlement approval. Here, the only beneficiary of the settlement is class counsel and their legislative agenda: the class receives no cash, and class counsel is funded to lobby for new regulations and legislation. In ruling on the settlements (some of which immunized *future* conduct of some defendants from suit by class members), the district court made legislative judgments that some future industry standards were better than other future industry standards. This regulation through litigation was not even *good* regulation: it rejects cost-benefit analysis, reaches conclusions contrary to every state and federal regulator and legislature to look at the issue, and would make class members worse off than no settlement and no "relief" at all. Alkon's expert, Dr. Henderson, demonstrated that, in the competitive market that class counsel and the district court acknowledged existed, volumetric sales had no net impact on the class as a whole: prices adjust to reflect the average temperature (be that temperature below or above 60 degrees), and customers that happen to buy at above-average temperatures cross-subsidize customers that happen to buy at below-average temperatures. A shift to ATC would eliminate the cross-subsidization, but have no net benefits to the class, while creating costs that regulators found exceeded any benefits. Class counsel introduced no expert witness to rebut this argument, and did not even attempt to address it (other than to falsely contend that cross-subsidization has no effect outside of antitrust litigation); unfortunately, the district court did not attempt to address it either, which held that the Henderson report need not be addressed because the court could weigh benefits without considering costs to the class. This, by itself, requires remand, but this Court can go further and reject the settlements entirely.

But even if one grants the district court's economic assumptions *arguendo*, the settlement still fails under the "primary beneficiary" test. The CEC Report's finding of "informational benefit" that the district court rested its hat on (A3145-46) found that the value of that benefit to be approximately one cent per driver per year in the state of California. A4492-93; A7871. The district court made no other findings quantifying informational benefit. Class counsel structured a settlement to pay it a proposed $24.7 million, and this is wholly disproportionate to the benefit to be realized by the class under the best of circumstances.

Even aside from the "fantastic" economics that premises plaintiffs' cause of action, this Court can reject the settlement on multiple other independent grounds. The settlements and litigation violate separation of powers because they ask the district court to make a legislative judgment—one that the district court necessarily made in deciding whether to approve settlements. The Regulator Fund settlements are *cy pres* settlements that compel class members, in violation of the First Amendment, to use class money to pay class counsel to engage in political lobbying on a controversial legislative question.

The settlements should be rejected.

Argument

I. Rule 23(e) prohibits class counsel from using the settlement process to make themselves better off at the expense of the class; a settlement that provides no consideration to class members for their release but pays millions in attorneys' fees cannot be approved, no matter how low-value the underlying litigation is.

A. Class action settlements present unique conflicts of interest that require judicial scrutiny.

The basic problem is this: While class counsel and defendants have an incentive to bargain effectively over the *size* of a settlement, similar incentives do not govern their critical decisions about how to divvy it up—including the portion allocated to counsel's own fees. The defendant cares only about the bottom line, and will take any deal that drives it down. Meanwhile, class counsel have an obvious incentive to seek the largest portion possible for themselves, and will accept bargains that are worse for the class if their share is sufficiently increased. Humans are human, and unfortunately, the *people* at the bargaining table can all get something for themselves by favoring attorneys' fees over class recovery; as Judge Posner has recently explained: "From the selfish standpoint of class counsel and the defendant, … the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014); *accord In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013). That is problematic because our adversary system—and the valuable role class actions play within it—both depend upon *unconflicted* counsel's zealous advocacy for their clients, especially where (as here) those clients do not even get to choose their counsel for themselves.

Rule 23(e) thus assigns to courts the final judgment on whether any class-action settlement reached is fair and reasonable to absent class members. But that judgment cannot be just an ad hoc gut check as to how class members have fared. Instead, the vitality of the class-action mechanism depends on *how* courts scrutinize such settlements, and whether their doctrinal tests correctly align the incentives of class counsel with those of the vulnerable, absent class members whose claims they purport to settle away.

The potential for conflict is structural and acute because every dollar reserved to the class is a dollar defendants will not want to pay class counsel. Defendants care only about minimizing payments and are indifferent to allocation, and so a court must ensure that counsel is not self-dealing at the class's expense. *Redman v. RadioShack*, 768 F.3d 622, 629 (7th Cir. 2014); *Pearson v. NBTY, Inc.,* 772 F.3d 778, 786-87 (7th Cir. 2014); *Eubank*, 753 F.3d at 720; *Pampers,* 724 F.3d at 718; *In re Bluetooth Headset Litig.*, 654 F.3d 935, 948 (9th Cir. 2011). The problem, however, is that class counsel can create the illusion of valuable relief to class members, which in turn justifies an outsized attorneys' fee request absent rigorous doctrinal tests designed to weed out this abuse.

A key tool for inflating the apparent relief to the class is a hard-to-value injunction the defendant is more than willing to accept. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 803 (3d Cir. 1995). For example, a class action often concerns a practice that is not (or is no longer) material to a defendant's business, which the defendant will promise not to resume. It is hard to imagine how such injunctions actually inure to the benefit of class members. *See, e.g.*, *Pampers*, 724 F.3d at 718-21; *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 882 (7th Cir. 2000) (Easterbrook, J.); *Pearson*, 772 F.3d at 784-86. But it is easy for *both* of the settling parties to come before the court and claim they have value. And this provides a ready cover for a large fee award.

Note that all class-action settlements inhabit a difficult place in our adversary system: A district court has *litigants* before it who (1) want to settle, (2) have almost all of the financial interest in the case, and (3) have all the information, and they are both arrayed against *third-party* objectors who ask the court to forge onward in a litigation that the litigants want to give up. It is very easy to take the words of both the active parties about the value of the settlement, and reflexively view objectors as only flies in the ointment. Simply put, the inflation of settlement value for the sake of a fee award is—for structural reasons—already too easy because of the lack of adversary presentation. *See, e.g.*, *Eubank*, 753 F.3d at 719-20. For this reason, "objectors play an essential role in judicial review of proposed settlements of class actions." *Pearson*, 772 F.3d at 787 (rejecting view that judiciary should not scrutinize settlements closely).

This isn't just a case where the district court "approve[d] a settlement involving a meager recovery for the class but generous compensation for the lawyers," *id.*, but one where the class receives *nothing* in pecuniary compensation for the waiver of claims against it, and the only consideration is the possibility of injunctive relief—regulation through litigation—that every regulatory agency to consider the question agrees would make consumers worse off.

Appellees will try to hang their hat on the four-factor *Rutter & Wilbanks Corp. v. Shell Oil Co.* test. 314 F.3d 1180, 1188 (10th Cir. 2002). But while meeting the low bar (two of the four factors will be met in *every* class action settlement, no matter how abusive) of the *Rutter* test is *necessary* for settlement approval, it is not *sufficient*. Simply avoiding explicit collusion does not immunize a settlement, because arm's-length negotiations protect the interests of the class only with respect "to the amount the defendant will pay, not the manner in which that amount is allocated between the class representatives, class counsel, and unnamed class members." *Pampers*, 724 F.3d at 717. Thus, courts in other circuits routinely reverse settlements for reasons outside of their similar multi-factor tests, even when those tests include many more factors than the *Rutter* test. *E.g., Pampers*, 724 F.3d at 718 (looking beyond Sixth Circuit's seven-factor test to find settlement unfair when it constitutes "preferential treatment" for class counsel); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013) (failure to consider "the degree of direct benefit provided to the class" reversible error, though not in Third Circuit's nine-factor test); *Bluetooth*, 654 F.3d at 946 (consideration of eight-factor test "alone is not enough to survive appellate review"); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 195 (5th Cir. 2010) (multi-factor test not sole reasons a settlement should be rejected under Rule 23(e)).

Perhaps appellees will argue that it is ok for the class to get no pecuniary relief because the underlying litigation was risky and, indeed, was repeatedly lost when defendants refused to settle. But this is no defense. Alkon is not arguing that the underlying litigation value is actually hundreds of millions of dollars rather than the tens of millions of dollars class counsel induced some defendants to collectively pay (mostly to class counsel). Alkon's argument is simply that Rule 23(e) does not permit class counsel to structure a settlement so that it "benefits class counsel vastly more than it does the consumers who comprise the class." *E.g., Pampers*, 724 F.3d at 721; *see also Pearson*, 772 F.3d at 782. That defendants may pay "too much" in a settlement to avoid litigation expense does not mean that class counsel gets to extract all of the windfall for itself; such a settlement may be "adequate," but the self-dealing is inherently unfair. Any other result creates the perverse incentive that class counsel can selfishly grab the lion's share of settlement benefit in a meritless suit, but not in a meritorious suit—a rule that subverts the class-action system and hurts both consumers and businesses.

B. The district court's finding of settlement benefit cannot stand.

There was no dispute that motor-fuel retailers operate in a highly competitive environment; the plaintiffs asked the court to make that finding and it did. *E.g.,* A7513. But even as the district court premised several conclusions on that fact, it reached other conclusions that were inconsistent with that premise, and ignored the analysis of Dr. Henderson. These were multiple independent errors requiring reversal, or at least remand. Alkon's objection that the settlements did not provide material benefit to the class should have been upheld.

1. The district court's findings were economically "fantastic" and "methodologically flawed."

As Dr. Henderson testified, as a matter of basic economics, retailers in a competitive environment cannot realize any abnormal rents from volumetric sales of gasoline—no matter what temperature they sell at. SA8040-41. Even if retailers are able to "shortchange" consumers by a substantial percentage on average by selling gasoline at abnormally high temperatures, consumers suffer no disadvantage because the retail price reflects the actual cost to the retailer of the volumetric gallon that is sold.

This can be demonstrated by imagining a more extreme hypothetical world where evil villain Lex Luthor invents and gives every gasoline retailer a device that permits retailers to costlessly swell gasoline to double the size of when it was purchased wholesale, *i.e.*, a gross gallon purchased wholesale can be sold as two gallons retail using the infernal fictional device. Will competing retailers that had been selling gasoline for $2.00/gallon continue to do so now that the marginal cost of that gallon has been effectively halved? Of course not: retailers will try to underbid one another in price to gain a greater share of this suddenly highly profitable market for themselves. One will drop its price to $1.90, its neighbor losing sales will bid further down, and on until a new equilibrium is reached. In the highly competitive market that the district court held existed, this means by definition that the retailers will compete away all of the excess profits from the swellage. Like the marginal cost, the price will decline by 50% from $2.00 to $1.00 per the artificially swollen gallon, and retailers will be back to a low-margin lifestyle. Though consumers purchasing a retail gallon are getting only a gross half-gallon, they're paying half as much for that swollen retail gallon.

Now imagine that Luthor's device is banned overnight. Will retailers continue to sell gasoline for $1.00/gallon? Of course not: they'd quickly go under if they did. Though competition constrains the retailers from raising price *above* the marginal cost, a competitive marketplace does not force retailers to sell below marginal cost and engage in a strategy of losing money on every sale and trying to make it up in volume. But according to class counsel's and the district court's analysis, that same competitive pressure will prevent the retailers from returning the price to $2.00/gallon, and customers will suddenly receive enormous amounts of free gasoline. A3146; A7512-13; SA8005. As Dr. Henderson pointed out, this is so much economic nonsense, and is not what a "competitive marketplace" means. A competitive marketplace means only that vendors are constrained from realizing abnormal profits above their marginal costs, not that vendors can never raise prices when their marginal costs go up. In a competitive marketplace, "Price closes in on marginal cost and stays there."

A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1397 (7th Cir. 1989) (Easterbrook, J.); *see generally In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 657 (7th Cir. 2002). (Again, common sense shows this: when the price of oil (and thus refined gasoline) rises, gasoline retailers in the competitive marketplace raise their prices rather than swallow the cost.) Because the district court correctly refused to rely on the Safir report (A3147, for example), there was no admitted testimony or evidence to the contrary. Indeed, the other evidence in the record, such as the CEC Report and the Expert Report of Kevin Murphy, supported this economic common sense. SA7870-71 ("retail station owners will in fact raise their fuel prices to compensate for selling fewer units, all other things being equal."); *cf.* A3145 (citing Dkt. 3082-3 under seal).

Now, within the class, there may be small disparities from volumetric sales. While the retailer's price reflects average swellage or shrinkage, fluctuations in tank temperature mean that some of the retailer's customers will have purchased higher-temperature (or lower-temperature) gasoline than other customers on average. SA8042-43; SA8030. ATC will rectify those fluctuations—but the same competitive marketplace that has the retailer charging close to marginal cost will prevail. Under ATC, those who would have purchased volumetrically at an above-average temperature at that station will have their tiny losses reduced, but those benefits will come entirely at the expense of those who would have purchased volumetrically at a below-average temperature and have their tiny gains eliminated. The only thing the switch to ATC will accomplish is to eliminate the cross-subsidization and redistribute expense amongst class members—at the great social cost of using more expensive equipment that requires more expensive testing and maintenance. Thus the CEC Report's conclusion that an ATC switch could not be rationalized on cost-benefit grounds. SA7803.

But though the district court relied upon the CEC Report to find small informational benefits,[2] it ignored the CEC Report's same finding that retailers would raise prices in response to reflect the larger "gallons" sold under ATC, increasing costs to consumers that more than offset the CEC's calculated one-cent-per-year benefit to drivers. Consumers will be worse off with ATC, and any finding of settlement benefit premised on the benefits of ATC is no benefit at all once costs are considered. The district court's analysis and factual findings are clearly erroneous because they were internally inconsistent; its economic theory that retailers would not raise prices to reflect increases in marginal costs because of competition is "fantastic" and "methodologically flawed"—especially in combination with the refusal to recognize that those same retailers would not be forced to lower prices when marginal costs are reduced by swellage—is based on a fundamental misunderstanding of how competitive marketplaces function, and cannot be credited by this Court. *Allegheny Ludlum Corp.*, 366 F.3d at 184; *cf. also Transcraft*, 39 F.3d at 818-20 ("fantastic" economic theory of damages cannot support jury verdict).

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[2] This finding seems to contradict its earlier holding that as a matter of law that "a reasonable person purchasing motor fuel from Chevron at retail in California would…understand" that a gallon is "a volume of liquid—231 cubic inches to be exact—regardless of temperature." A4517-18.

2. The district court independently erred in refusing to consider the Henderson report.

If nothing else, the district court committed reversible error by entirely failing to consider (1) the Henderson analysis and (2) the cross-subsidization issue. The court held it "need not address the issue" with respect to Costco because it was basing the settlement benefit on the "substantial informational benefit" and did not mention Henderson at all with respect to the other settlements. A3145. But the Henderson analysis shows there is *no* substantial informational benefit: it is offset in the volumetric world by the competitive marketplace, and in the ATC world by the adjustment in prices. That is the opposite of moot, and the district court's unreasoned refusal to consider the economic expert evidence and analysis was by itself error and part of the reason that it reached economically "fantastic" results.

The district court further erred in failing to consider the cross-subsidization argument that, because the volumetric disparities were a wash for the class, in a competitive marketplace, any benefits to consumers could only come at the expense of other consumers; it never even mentioned "cross-subsidization." The lack of a "reasoned response" to a good-faith objection is by itself reversible error. *Dennis*, 697 F.3d at 864. At a minimum, remand is required.

C. Even if the injunctive relief didn't harm class members, class members receive no marginal benefit compared to non-class-members, and thus have received no consideration for the waiver of their claims.

"The fairness of the settlement must be evaluated primarily based on how it compensates class members for the[] past injuries." *Synfuel Techs. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006). The only benefit cited by the district court was the benefit of "achiev[ing] accuracy and consistency of fuel measurement for their fuel dollar, regardless of temperature at the time of pumping." A7511-12. This purported benefit, however, is conferred on all future fuel purchasers, regardless of class membership. And even assuming *arguendo* ATC were of any benefit to consumers generally, no changes in future disclosure or sales practices will benefit past purchasers who were already misled by the defendants' previous conduct. *E.g., True v. Am. Honda Co.*, 749 F. Supp. 2d 1052, 1077 (C.D. Cal. 2010). The settlements' releases apply only to class members, yet, as the district court candidly admits, the settlements "do not confer individual benefits unique to class members." A7511. Given this state of affairs, the settlements unequivocally put class members in a worse position than non-class members. A5459-60. But the district court avoided the inescapable conclusion that because the settlements provide no marginal consideration to the class, they cannot be approved. *Id.*

The class is not some free-floating abstract entity tantamount to the public at large. Andrew J. Trask, *The Roberts Court and the End of the Entity Theory*, 48 AKRON L. REV. 831, 851-54 (2015). "The class is not the client. The class attorney continues to have responsibilities to each individual member of the class even when negotiating a settlement." *Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832, 835 (9th Cir. 1976). Yet here, class members wind up worse off than non-class members in the general public, even though, as this Court has said, "the importance of safeguarding the class' interests cannot be underestimated." *Gottlieb v. Barry*, 43 F.3d 474, 490 (10th Cir. 1994). This was by itself reversible error.

D. Even if the "informational benefits" were unique to class members, they are so *de minimis* that the primary beneficiaries of this settlement are class counsel.

The district court rested settlement benefit (without consideration of cost to consumers or whether class members would receive any benefit that non-class-members wouldn't) on the "informational benefit" and "transparency" on the rare occasion when a consumer choosing to purchase the lowest-price gas mistakenly chooses a station with a higher-temperature gas and receives fewer BTUs per dollar than if she had gone to a different station that by happenstance was charging the same price for lower-temperature gallons of gas. A3146 (citing SA7871); A7512. In California, the CEC estimated that that sum is about $258,000/year—or about one penny per licensed California driver per year. A4492-93. But between the 29 settlements, class counsel deems itself entitled to $24.7 million in fees and expenses, over half of which will be paid without objection from defendants.

Even if we give the most generous deference to the district court's clearly erroneous finding of settlement's benefit to class members, generously project that class counsel's revolutionary lobbying campaign will result in every class member obtaining ATC without legislative or regulatory resistance, generously assume that every one of the 100 million class members (A7511) will receive the benefit of ATC (rather than just those in states certified in the class), and generously assume the economically irrational premise that consumers will bear none of the costs of this more complex regulatory regime, the benefit of one cent per class member per year is grossly disproportionate to the proposed attorneys' fees structured by the settlement, with attorneys collect over 90% of the benefit, even if the fee request is sliced in half.

A5466-68. The attorneys are the "primary beneficiaries" of the settlement, and that cannot stand under Rule 23(e), *Pampers*, or *Pearson*. As in *Pearson*, the attorneys have "selfishly" structured a settlement to benefit themselves without sharing the windfall with class members. 772 F.3d at 787.

II. By imposing legal policies that are being developed through legislative and regulatory processes, the settlements violate separation of powers principles.

As FRAP 28(i) permits, Alkon adopts by reference Section I of Speedway's Opening Brief.

Our constitutional division of power, first between federal and state government, and then again between the three branches of federal government affords the rights of Americans a "double security." The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961). These divisions prevent the concentration of power in the hands of a few, a situation that "may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 301 (James Madison). "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator." *Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring) (quoting Federalist No. 47). As such, "courts ought never to be allowed to depart from the well known boundaries of express law, into the wide fields of [legislative] discretion." *Rogers v. Tennessee*, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting) (internal quotation omitted).

As Speedway details, the establishment and regulation of uniform weights and measures is constitutionally committed to Congress, which has chosen to utilize an intricate and cooperative balance between state and federal authorities to regulate in the area. OB12-18. But at the urging of the settling parties, the district court allowed itself to decide a fundamentally political question of weights and measures. By ratifying the settlement agreements proposed, the district court intruded upon the domain of federal and state regulators and legislators. A5455-57.

> "[C]ourts are not an appropriate mechanism for establishing industry regulations. First, courts are not politically responsive institutions. The civil judicial system is designed to compensate people who have been wrongfully injured by another's conduct; its purpose is not to supplant the administrative and legislative branches of government through regulation. Those branches have the opportunity to see beyond the merits of an individual case, and assess the impact of a rule on society itself. These impacts may be profound and affect the national economy, the health of American citizens, and people's freedom to choose what goods and services they wish to purchase."

Victor E. Schwartz & Christopher E. Appel, *Government Regulation and Private Litigation: The Law Should Enhance Harmony, Not War*, 23 B.U. PUB. INT. L.J. 185, 198-99 (2014) (internal footnotes omitted).

This Court has echoed the concerns about regulation through litigation. In *Winzler v. Toyota Motor Sales U.S.A., Inc.*, the plaintiff brought state law product defect claims on behalf of a putative nationwide class of Toyota Corolla owners. 681 F.3d 1208 (10th Cir. 2012). During the case, Toyota implemented a recall by way of a regulatory process of the National Highway Transportation Safety Administration. *Id.* at 1209. *Winzler* held that this "remedial commitment from our coordinate branches" prudentially mooted the case. *Id.* at 1211. To be sure, the facts of these cases differ in that there is no remedial scheme in place to redress sale of non-ATC fuel. But that is because of a national determination across dozens of jurisdictions that there is nothing to redress; non-ATC sale is the default, and ATC sales are the ones for which additional notice is required, if indeed ATC sales are permitted at all. A2181-2245 (excerpts regarding liquid-measuring devices and vehicle-tank meters from National Institute of Standards and Technology, Handbook 44 (2011)); OB14-15.

Separation of powers principles underlie both *Winzler* and this case: "affording a judicial remedy on top of one already promised by a coordinate branch risks needless inter-branch disputes over the execution of the remedial process and the duplicative expenditure of finite public resources. It risks, too, the entirely unwanted consequence of discouraging other branches from seeking to resolve disputes pending in court." 681 F.3d at 1211. Consumer gas sales could be made on a uniformly ATC basis, but state agencies and Congress have resisted that path; "[a]fter all, there are many ways to skin a cat and many ways to provide an effective equitable remedy." *Id.* at 1214. Plaintiffs do not have the right to supplant the national framework with their own preference, through resolution of a case in an Article III court. *See Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712, 728 (9th Cir. 2012) (holding that national scheme preempted federal court from relying on state law to enjoin bank from using a particular system of posting or requiring the bank to make specific disclosures); *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 677 (S.D.N.Y. 2011) (rejecting settlement where parties sought to use the class action to overwrite Congress's copyright scheme).

At first blush it may seem as though the district court could not have possibly exceeded its judicial domain, as it simply approved as "fair, reasonable and adequate" proposed settlements under Fed. R. Civ. P. 23(e)(2). But it took specific steps that caused it to trespass upon decisions of the political sphere: in addition to the problems identified by Speedway, the district court approved the release of class members' future-accruing claims that would arise out of gasoline sales some defendants make on an ATC basis. As settlements were proposed, the district court rejected settlements that offended its preferred regulatory regime, and accepted other settlements that that furthered legislation it preferred. These are legislative determinations, rather than judicial ones, and are inappropriate for the judicial branch.

A. The releases in the Valero and Costco settlements immunize the defendants with respect to future use of ATC.

The first way in which the settling parties lured the district court into the political arena is by inducing the court to sign off on a release that exceeded the conduct complained of in the case. In relevant part, the Valero and Costco settlements, in virtually identical language, declare that "Settlement Class Members…shall be enjoined from prosecuting any proceeding against [Valero or Costco] with respect to the conduct, services, fees, charges, acts, or omissions of [Valero or Costco] relating to all … actions taken by [Valero or Costco] that are authorized or required by this Amended Settlement Agreement or by the Final Judgment." A4419; A2081. This release prospectively disposes of the issue of whether

ATC sales are actually non-fraudulent, an issue which is not ripe and thus necessarily could not have arisen in this case. There could be any manner of other hypothetical claims based on utilization or installation of the ATC equipment, e.g., that it increases the chance of spilled gas, leading both to wasted gas that consumers pay for and explosions. Undoubtedly there are regulatory issues that the settlement sidesteps by getting consumers and a federal court to bless a solution that regulators haven't. Yet, this release overwrites extant and future law by allowing Valero and Costco to employ the defense of *res judicata* whenever confronted with such a claim by an individual who is a member of these classes.

"Future-conduct settlements can make prospective changes affecting large numbers of people in complex ways. This is the province of legislation and rulemaking. For reasons of technical competence and democratic accountability, decisions of this sort are committed to the political branches." James Grimmelmann, *Future Conduct and the Limits of Class Action Settlements*, 91 N.C. L. REV. 387, 426 (2013). "By having a single group draft a settlement, the class-action process tends toward central planning. By submitting that settlement to a judge for approval, it channels everything through the actor least competent to make the intricate technical decisions and contestable value tradeoffs required. Because the judge is not permitted to modify the settlement but must give an up-or-down ruling on it, the class-action settlement process delegates tremendous agenda-setting power to the attorneys. We should not expect the resulting arrangements to reflect anything like majoritarian preferences. They are not 'appropriate for judicial, as opposed to legislative, resolution.'" *Id.* at 427 (quoting *Golan v. Holder*, 132 S. Ct. 873, 894 (2012)). Ultimately, "[t]he presence of a future-conduct release is, at the very least, a major warning sign that this is not a run-of-the-mill settlement. Courts should, nay must, look on future conduct settlements with more than their usual skepticism." *Id.* at 430.

Professor Grimmelmann's view is in line with existing law. "It is elementary that a settlement agreement cannot release claims that the parties were not authorized to release." *In re Am. Express Fin. Advisors Secs. Litig.*, 672 F.3d 113, 135 (2d Cir. 2011). When a settlement's agreed-upon release exceeds its permissible scope, both the defendants and class counsel get a benefit at the expense of absent class members. An expanded release makes the terms more valuable to the defendant while simultaneously inducing them to grant an even more sizable award of fees to class counsel. As such, the terms of the release need to be closely policed.

To be authorized, all released claims must share "the identical factual predicate" underlying the claims of the original action. *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982); *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010). It is paradoxical to suggest that ATC sales of gasoline—touted by class counsel as the hard-won *benefit* of this litigation—can share a factual predicate "identical" to the original non-ATC sales. Because the settling parties are attempting to waive liability for events that have not yet occurred—the implementation, administration and sale of ATC gasoline—those events by definition cannot share a factual predicate with the acts alleged in the complaint.

Allowing the defendants to insulate their future conduct with respect to post-settlement conduct and services—which could occur in any number of permutations—cannot be permitted. Class counsel and the named representatives are not authorized to trade these future claims away. *See, e.g., Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 577 (E.D. Pa. 2001) ("The release is also too broad because it bars later claims based on future conduct."); Newberg on Class Actions (4th ed. 2002) § 12:15 ("As a matter of settlement strategy, the defendants may negotiate a release of all claims ***up to the date of settlement***, though this date naturally falls after the date the complaint was filed.") (emphasis added). *Cf. also In re Am. Express Fin. Advisors Secs. Litig.*, 672 F.3d at 138 ("[T]here can be no question that the [class members'] claims, to the extent that they involve conduct occurring after the Class Period, cannot be Released Claims."); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 313 (5th Cir. 2007) ("[A] release does not ordinarily preclude claims based on subsequent conduct.").

"[F]uture-conduct releases are a monstrous hybrid between private and public planning, the worst of both worlds. They impose on people who have never heard of or consented to them—but they are negotiated by self-interested private parties rather than elected representatives. Courts are planners of last resort: their job is to sort out the consequences of past plans gone awry, not to make new plans." Grimmelmann, 91 N.C. L. REV. at 473 (internal quotation omitted). The settling parties in the Google Books settlement attempted a similar maneuver. *See Authors Guild*, 770 F. Supp. 2d 666. As part of that settlement, the parties stipulated that unless individual authors opted out of the settlement, they would release Google against liability for copyright infringement stemming from future acts. Judge Chin concluded that this "forward-looking business arrangement" exceeded the permissible scope of a release. *Id.* at 675, 679. Just as *Authors Guild* "was about the use of an indexing and searching tool, not the sale of complete copyrighted works," this case is about the sale of non-ATC volumetric gallons of gasoline, not the sale of gasoline on an ATC basis. *Id.* at 678.

Releasing future claims presents a further problem: it violates Article III of the Constitution. If the named plaintiffs tried to bring a lawsuit against Costco today contending that its gasoline sales practices in 2017 will violate consumer law, the complaint would be dismissed as unripe. *See Farrell-Cooper Mining Co. v. United States DOI*, 728 F.3d 1229, 1238 (10th Cir. 2013) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (internal quotation omitted)). Yet, just because they changed the cover sheet to say "Proposed Settlement" rather than "Complaint," the settling parties induced the district court to issue an advisory opinion that no class member may proceed against Costco's and Valero's future practices—as long as they comport with the settlement agreement. Article III does not allow this. *Calderon v. Ashmus*, 523 U.S. 740, 747 (1998) (dismissing a suit pursuant to Article III that "attempt[ed] to gain a litigation advantage by obtaining an advanced ruling on an affirmative defense"); *Coffman v. Breeze Corp.*, 323 U.S. 316, 324 (1945) (relying on Article III and rejecting use of declaratory judgment as a "medium for securing an advisory opinion in a controversy which has not arisen"); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997) (declining to reach Article III jurisdiction issue because resolution of class certification issue was "logically antecedent to the existence of any Article III issues," but cautioning that "Rule 23's requirements must be interpreted in keeping with Article III constraints"); *cf. also Allen v. Wright*, 468 U.S. 737, 750 (1984) (case or controversy requirement "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded").

Valero and Costco obtained through settlement approval that which would be unobtainable at trial: the preclusion of unripe claims relating to ATC fuel sales. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 328-29 (1955). Only the regulatory and legislative bodies determining weights and measures policy should be passing laws that bear on liability for prospective acts.

B. Public policy abhors the judiciary acting as a legislature.

As elucidated by the Supreme Court: "judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind." *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 440-441 (1923); *Loving v. United States*, 517 U.S. 748, 757-758 (1996) ("Judiciary" is "ill suited" to "responsive and deliberative lawmaking"); *Saxbe v. Bustos*, 419 U.S. 65, 79-80 (1974) (where "the changes suggested implicate so many policies and raise so many problems of a political, economic, and social nature… it is fit that the Judiciary recuse itself.").

One might argue that exercise of policymaking is not as objectionable here as it was in *Keller* because here the district court is simply approving private agreements, rather than imposing weights and measures rules on its own initiative.[3] Quite the opposite actually; if anything, because in this case the court moved further away from adjudicating an adversarial proceeding, it actually moved further away from its appropriate Article III function. *See generally* Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545 (2006); *see also* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Settlement*, 59 FLA. L. REV. 71, 90-113 (2007) (describing the lack of adversarial presentation at the time of class settlement).

Moreover, while it is true that class action settlements partake of private contracts, they are "different than ordinary [contracts]. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval. In contrast, class-action settlements affect not only the

[3] *Contra Williams v. New Orleans*, 729 F.2d 1554, 1566-67 (5th Cir. 1984) (*en banc*) ("It does not matter that the case was not tried to conclusion…The remedy simply does not address the wrong.…A quota which injures persons not participating in accused segregation patterns to the benefit of persons who were not its victims is responsive to a wrong defined in terms of a failed social order—of a judicially envisioned distribution of jobs among races, ethnic groups and sexes. Such social ordering is a peculiar use of judicial power because use of judicial power to resolve disputes has traditionally and constitutionally been confined in the main to disputes whose dimensions are drawn by adverse parties. Social ordering is a horse once mounted from which it is difficult to dismount…. The point is not that courts ought to shrink from duty because its discharge is difficult or controversial. It is instead that the very uniqueness of what we are doing ought to give pause over whether we have undertaken a legislative rather than a judicial role—also a question of constitutional magnitude.").

interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations. And thus there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Pampers*, 724 F.3d at 715. The judicial imprimatur of the approval orders themselves demonstrate that class settlements are more than merely private contracts. *Cf. Shelley v. Kraemer*, 334 U.S. 1 (1948) (finding state action in enforcement of contract). The approval orders certify that there exist classes of ascertainable individuals that are cohesive, homogeneous and adequately represented. The orders enjoin the defendants to perform the relief they agreed to in the settlement. By operation of *res judicata* they bind members of that class to the releases stated in the settlement agreements. On only two occasions in recent history has the Supreme Court considered class action settlements. In both instances it repudiated "judicial regulatory orders that more closely resemble[d] legislative regulation than they d[id] the outcomes of traditional adjudication." Donald G. Gifford, *The Constitutional Bounding of Adjudication: A Full(ierian) Explanation for the Supreme Court's Mass Tort Jurisprudence*, 44 Ariz. St. L.J. 1109, 1154 (2012) (citing to *Amchem* and *Ortiz*).

True, "[i]ndividual states remain free to allow or disallow ATC at retail" (A7507; *see also* A7509, A7526, A7527); the settling parties had no power to pronounce otherwise. But that truism ignores the approval orders' consequences: they certify a class of over 100 million politically divergent class members; they certify the class actions as the superior form of adjudication even though no settlement provides compensation to any class member; they release class members' rights to sue Valero and Costco for claims arising out of defendants' implementation of ATC fuel; they enjoin Valero from lobbying against state adoption of ATC; they allow class counsel to oversee millions of dollars to be used to induce gas stations and state regulators to adopt ATC. Perhaps state regulators will allow the lure of settlement money to willingly push them over the top with respect to ATC. That wouldn't necessarily be irrational, "but the separation of powers [question] does not depend on…whether the encroached-upon branch approves the encroachment." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010) (internal quotation omitted).[4]

What is true of the Constitution's Copyright Clause is equally true of its Weights and Measures Clause: "it is generally for Congress, not the courts, to decide

[4] Contrast private forward-looking class settlements with public law litigation. *See* Grimmelmann, *Future Conduct*, 91 N.C. L. REV. at 428-30. In public law class actions, where the defendant is an institutional political actor, these formal concerns, however well-taken, fall before more pressing issues of substantive justice. Abram Chayes made the most prominent early defenses of what Chayes termed the "public law model of litigation" against the Fullerian critique. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). Chayes argued that concerns over the institutional competence of courts to engage in this policy-making can be mitigated by such "institutional advantages" as the judge's participation in both the confirmation process and contemporary legal practice giving her "some experience of the political process and acquaintance with a fairly broad range of public policy problems." *Id.* at 1308. A judge who approves a remedy correcting the violation of constitutional or statutory rights by a public institution operates in a substantive area with which she is most likely to be familiar as a political actor, and over which the judicial check is critical on basic separation-of-powers grounds. The executive asserts authority over the citizen through its institutions and—as *Brown v. Board* anticipated—the judiciary can and should curtail its unconstitutional abuses of that authority.

how best to pursue the [] Clause's objectives." *Authors Guild*, 770 F. Supp. 2d at 677; *see also United States v. Ware*, 608 F.2d 400, 402 (10th Cir. 1979) ("The court does not have the power to declare what is legal tender. That power is in the Congress. Article I, § 8 of the Constitution, empowers the Congress '(t)o coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.'")

Yet, even though the lower court acknowledged that it "cannot and does not address all factors which state lawmakers and regulatory agencies must consider in deciding policies for weights and measures in particular states"[5] it nonetheless determined that the proposed injunctive resolution was fair, reasonable and adequate and "class members would benefit from an opportunity to purchase fuel at ATC." A7478. It decided that distributional concerns outweighed cost-benefit concerns. A3146; A7512. It also determined that the original Valero settlement's proposed remedy of disclosure only (*i.e.* posting of underground tank temperature of motor fuel without mandating ATC conversion) was unfair as it would provide "little to no benefit to class members." A4286. But those types of determinations are "a paradigm of the kind of polycentric problem for which courts are ill-suited. In effect, we would have to determine the fairness of the [] system to *each and every* [consumer] in order to decide whether it was fair to *any one* of them." *Kansas City S. Ry. Co. v. McNamara*, 817 F.2d 368, 377 (5th Cir. 1987) (discussing tax system decisions).

The judiciary "does not have creative power akin to that vested in Congress." *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2536 (2011).

[5] A7509.

> "[I]n a representative democracy, macro-economic regulation is accomplished most appropriately by elected officials and their lawful delegates. Of course, traditional tort law unavoidably involves economic regulation to some extent. But these new aggregative torts involve self-conscious judicial regulation on such a breathtaking scale, abstracted from any commitment to the individual rights of individual victims, that they clearly exceed the political boundaries of judicial authority."

James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 338 (2005). When the court ratifies prospective arrangements like in this case, it is no longer the least dangerous branch of government. As Hamilton wrote in Federalist 78, when functioning correctly "the judiciary…has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever." "[L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments…" *Id.*

Controversies regarding future behavior should be resolved through the designated administrative and legislative channels as long as those channels are functioning properly. Whereas institutional public law cases (*e.g.,* prison reform cases) require that the judge intervene in *failing* governmental processes, class actions settlements that seek to alter prospective rights require that the judge usurp or, in the worst cases, incapacitate *functional* government processes. *See, e.g, Winzler*; 681 F.3d at 1211; *Authors Guild*, 770 F. Supp. 2d at 678.

Ninth Circuit judge William Fletcher strikes a more nuanced middle ground on the subject of public law consent decrees that is particularly applicable to prospective injunctive remedies in private class actions. He argues, first, that "since trial court remedial discretion in institutional suits is inevitably political in nature, it must be regarded as presumptively illegitimate." William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L. J. 635, 637 (1982). On this point he acknowledges the structural problems identified by Fuller. Yet, recognizing the need for intervention in moments of widespread political injustice, he concludes that "the presumption of illegitimacy may be overcome when the political bodies that should ordinarily exercise such discretion are seriously and chronically in default. In that event, and for so long as those political bodies remain in default, judicial discretion may be a necessary and therefore legitimate substitute for political discretion." *Id.* Adjudicative legitimacy in issuing injunctions then turns on necessity and requires a showing of nonfeasance on the part of government actors. Fletcher's analysis suggests a fundamental difference between § 1983 litigation against government actors and consumer litigation against private parties, leading to a core problem with many prospective injunctive remedies involving private actors: they supplant the work of actively functioning regulatory regimes. This critique is especially apt here where Handbook 44 is reviewed and updated annually, and multiple regulatory bodies have explored, and even voted on switching to ATC-based fuel sales.

Maybe the California Energy Commission and all the other regulatory bodies to have considered and rejected ATC are wrong, and the settlements' resolution would turn out be a boon for society and consumers at large, but it is regulators and elected officials who are supposed to pursue public interests and make those judgments. Class counsel, the named representatives and the judge are fiduciaries for class members; the judge "is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness." Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 141 (1921). Similarly, Judge Posner, has expressed the view that a standard such as the "best interest of the community" is "not a proper judicial standard," calling as it does for a judgment better suited to the legislature or an administrative agency. *Gautreaux v. Pierce*, 707 F.2d 265, 270-72 (7th Cir. 1983). "For a decision to be judicial in character, the standard for decision must be definite enough to allow a reasoned judgment, as distinct from a political judgment such as a legislative or administrative body might make." *Id.*; *see also Public Citizen v. Nat'l Advisory Committee on Microbiological Criteria for Foods*, 886 F.2d 419, 430 n.6 (D.C. Cir. 1989) (Siberman, J., concurring in the judgment) ("Congress may not constitutionally confer on the judiciary the power to make policy choices unguided by statutory standards."). When the district court allowed its judgment to focus on public benefit, rather than class benefit, it lost its tethering to the case or controversy in front of it; it lost its tethering to the judicial process.

III. The district court's finding that it would be infeasible to distribute damages to class members if the litigation were successful should have ended the class-action inquiry and prevented Rule 23(b)(3) certification.

Fed. R. Civ. P. 23(b)(3) requires that a court find, before certifying a class, "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Frank objected that a class action settlement is not a superior method of adjudication under Rule 23(b)(3) where it can provide no compensatory value to class members, and the district court had made precisely that finding in its preliminary approval order. A5452-55 (citing A4274). The district court overruled this objection on the grounds that the settlements do provide benefits to class members and that there was no showing that class members can feasibly pursue individual claims. A7508. The district court confused the benefits of injunctive relief with the standards for waiving pecuniary claims under Rule 23(b)(3), and committed reversible error.

Once the lower court found that it would be infeasible to distribute settlement funds to individual class members (A4274), then the proper conclusion should have been to deny certification of the monetary claims because the class action is not an efficient and superior means of adjudicating this controversy. *See, e.g., Supler v. FKAACS, Inc.*, No. 5-11-CV-00229-FL, 2012 U.S. Dist. LEXIS 159210, at *10-*11 (E.D.N.C. Nov. 6, 2012) (because "benefits to putative class members … are attenuated and insignificant…, class certification does not…promote judicial efficiency." (internal quotations, ellipses, and citations omitted)); *see also Quinn v. Nationwide Ins. Co.*, 281 Fed. Appx. 771, 777 (10th Cir. 2008) (affirming finding of non-superiority where defendant "would have to engage in a significant amount of work simply to identify the purported class members"); *Ballard v. Branch Banking & Trust Co.*, 284 F.R.D. 9, 15-16 (D.D.C. 2012) (denying certification where identification and notification of individual consumer ATM users was impracticable); *Foley v. Buckley's Great Steaks, Inc.*, 2015 U.S. Dist. LEXIS 46477 (D.N.H. Apr. 9, 2015) (finding no superiority because, *inter alia*, proposed settlement was "substantially lawyer-driven"); *cf. also In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir.

2011) (class certification improper where no marginal benefit to class was possible, but on (a)(4) grounds, rather than (b)(3) grounds).

The Ninth Circuit reached a similar conclusion in *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974). There, the court reasoned that "[w]henever the principal, if not the only, beneficiaries to the class action are…not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute," and that, "[w]hen, as here, there is no realistic possibility that the class members will in fact receive compensation, then monolithic class actions raising mind-boggling manageability problems should be rejected." *Id.* at 91-92. (While *Amchem* has since held that settlement classes need not consider manageability issues, *Hotel Tel. Charges* rests its reasoning on more than just manageability issues.) The settlements provide at most an indirect and attenuated benefit to the class, justified on the grounds that individual distributions would be too costly because of the size of the class and the difficult of ascertainability. No waiver of claims certified under Rule 23(b)(3) should be permitted.

IV. The Regulator Fund Settlements impermissibly compel political speech in violation of the First Amendment.

"[E]xcept perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014). But the Regulator Fund Settlements do just that. A5449-52.

As FRAP 28(i) permits, Alkon further adopts by reference Section II.A of Speedway's Opening Brief (OB35-43), and adds as follows:

By analogy one can look to a line of cases arising out of state bar associations' use of IOLTA (Interest on Lawyer Trust Accounts) client trust accounts to generate interest that for the purpose of raising money for third-party charities. *Brown v. Legal Found. of Washington* ultimately rejected the contention that IOLTA was an uncompensated "taking" on the specific facts of that case. 538 U.S. 216, 239-40 (2003). But *Brown* did not reach whether compelled IOLTA donations violated clients' First Amendment right to be free of compelled speech and association. The only opinion to discuss the question suggested that it would be held so in a future case. *Id.* at 253 (Kennedy, J., dissenting). Nothing in the majority suggests Justice Kennedy's analysis on the First Amendment issue is mistaken.

The district court brushed aside Frank's objection to the settlements' compelled subsidies intended to persuade policymakers to change their state laws to allow ATC at retail, finding that the settlements "are not political in nature" because "[t]hey do not fund a political candidate or lobby for a particular political view." A7507. This narrow interpretation of political speech is flat wrong. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477-78 (2007) (issue advocacy and express candidate or electoral advocacy speech are equally "core" political speech). But even if it were correct, making funds available to the state *for the purpose of influencing state officials* to adopt a policy objective certainly represents an attempt to influence political action. By analogy, if a potential donor told a state official that she would give the state $1 million to fund a firearm waiting period only if state law was changed to require such a waiting period, there would be no question about the political nature of this *quid pro quo*. That the political issue is one that a smaller, less vocal group of the citizenry finds important does not make the First Amendment protection any less important. *See Knox v. Service Employees Int'l Union Local 1000*, 132 S. Ct. 2277, 2289 (2012) (that "[t]he subject of the speech at issue … was not one that is likely to stir the passions of many … only highlights the importance of analysis and our holding" that "compulsory subsidies for private speech are subject to exacting First Amendment scrutiny").

That a share of a state's originally-allocated funds ultimately may revert to that state even if it does not change its laws to allow ATC at retail does not alter the political nature of the compelled speech. Unless *no* state changes its laws to allow ATC at retail, then class members' funds will be paid to state agencies in return for that change in the law. There is no dispute that the settlements are intended to encourage such changes in the law. OB9. And the structure of the Regulator Fund Settlements underscores this intent. In six of the settlements, if any funds allocated to a particular state remain unused after three or five years, those funds become available for disbursement to retailers or wholesalers and/or weights and measures departments in other states. *E.g.*, A5715; A5765. Only if any funds still remain unused after another year, will those funds then revert to the original state to which they were allocated. *Id.*. In the remaining two settlements at issue in Frank's appeal, if any funds allocated to a particular state remain unused after five or six years, those funds are contributed to that state. *E.g.,* A6030-31. Even in these settlements, however, the Settlement Administrator may propose modifications to a state's allocated share of the funds, A6028, and, in the Chevron settlement agreement, expressly has "discretion to modify the contributed share of each contributing defendant by up to 25% upon consideration of the circumstances surrounding a particular request" by a state agency for funds to assist in the implementation of ATC, A6130. The ability of states to increase their original share of the funds has the effect of encouraging states to be "early adopters" that change their laws relatively quickly in order to increase the funding they receive.

And even aside from this argument, the district court's finding is facially wrong in that class counsel will obtain attorneys' fees conditioned upon successful lobbying of state legislatures and regulators.

Furthermore, contrary to the district court's holding, the "opportunity" that class members had to "opt out" of the settlements was illusory and does not warrant the conclusion that class members "have not been required to contribute money to state agencies." A7507. The district court itself acknowledged that opting out was not a rational option, recognizing that "the amounts at stake for individual class members are so small" that prosecuting separate suits would be costly and impracticable, A3140, and "in light of the limited size of any potential financial recovery" for any class member from individual suits, it was preferable to concentrate the claims in a class action, A7498-99. Elaborating, the district court found that there was no showing "that class members can feasibly pursue individual claims," because "[a]ny individual damages are exceedingly small relative to the cost of maintaining separate actions, and plaintiffs' losses in the Kansas and California cases suggest dim prospects for prevailing in individual actions." A7508.

A class member's failure to opt out, particularly in this large-scale consumer class action that did not provide individualized notice, cannot be interpreted as consent to the speech or viewpoint advanced by the settlement agreements. *See Oxford*

Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2071 (2013) (Alito, J., concurring) (inaction in response to an opt out form is not consent); Theodore Eisenberg & Geoffrey Miller, *Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1561 (2004) ("Common sense indicates that apathy, not decision, is the basis for inaction."); Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41, 85-89 (2003) ("The notion of failing to opt out as constituting consent is largely fictitious").

Thus, recent jurisprudence has suggested that even an actual opt-out scheme may be too burdensome and that an opt-in scheme may be required by the First Amendment. *Knox*, 132 S. Ct. at 2290-96. Because silence does not equate to consent, "[a]n opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Id.* at 2290. "[A]cceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles." *Id.* Whether or not an opt-out mechanism is proper for a traditional class action, once a third-party recipient of funds for a political purpose is introduced, an opt-in mechanism is required because courts can no longer presume acquiescence by class members in the loss of their First Amendment rights. *See also Keller*, 496 U.S. 1 (attorney members of state-mandated bar cannot be required to pay speech subsidies that advance political and ideological positions); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (finding it unconstitutional to require display of the state's "ideological message" "[a]s a condition to driving an automobile—a virtual necessity for most Americans").

In this context, where, as a result of the district court's order, millions of individual class members—whose only realistic option for obtaining resolution of their claim against defendants is in a class action lawsuit—are being compelled to subsidize a political cause they oppose or, at best, are indifferent to, this court must apply "exacting scrutiny." *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995). There is no overriding governmental interest that can justify compelled subsidization of the speech in favor of state conversion to ATC at retail. Although reaching a satisfactory private class settlement is a laudable goal, it does not rise to the level of a critical or "compelling" governmental interest, and does not justify an infringement on absent class members' rights. *Davis v. East Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 929 n.8 (5th Cir. 1996) (the possibility of "lengthen[ing] the process" of settlement does not justify infringing First Amendment rights); *cf. also Amchem,* 521 U.S. at 620-21 (interest in settlement does not override procedural safeguards of Rule 23); *Keller v. Mobil Corp.*, 55 F.3d 94, 98 (2d Cir. 1995) ("The public interest in having rules of procedure obeyed is at least as important as the public interest in encouraging settlement of disputes."); *In re Deepwater Horizon*, 732 F.3d 326, 343 (5th Cir. 2013) ("While a welcome byproduct of deciding cases or controversies on a class-wide basis, the goal of global peace does not trump Article III or federal law." (internal quotation omitted)). To the extent the government has an interest in "accuracy and consistency of fuel measurement for their fuel dollar, regardless of temperature at the time of pumping," A7511-12, that interest is best achieved through an open debate among state officials acting on their own judgment as well as input from constituents and subject-matter experts, rather than through judicial fiat in a settlement negotiated by a small group of private attorneys second guessing the judgments of state regulators.

Conclusion

The settlement approvals must be reversed. At a minimum, remand is required to determine whether, after costs and benefits are fully weighed, class counsel is the primary beneficiary of this settlement.

Oral Argument Statement

Alkon respectfully requests oral argument. The appeal presents novel issues of public importance. Speedway has submitted a 28-volume appendix, and Alkon has supplemented it with another two volumes; because of the size of the record, oral argument will assist the panel in understanding the key facts and sorting wheat from chaff. Alkon's appellate counsel, though acting *pro se* in part, is an experienced appellate advocate on these issues, winning several landmark cases on class-action settlements in the Third, Seventh, Eighth, and Ninth Circuits.

Dated: February 8, 2016

Respectfully submitted,

/s/*Theodore H. Frank*

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I hereby certify that on February 8, 2016, I electronically filed the foregoing Appellants' Brief and Exhibits with the Clerk of the United States Court of Appeals for the Tenth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

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1. This brief complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) because this brief contains 13,717 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Garamond font.

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