

No. 05-1098

IN THE
Supreme Court of the United States

Rebecca Bahar et al.,
Petitioners,

v.

Michigan Bell Telephone Company,
d/b/a/ SBC Michigan.

On Petition for a Writ of Certiorari
to the Michigan Court of Appeals

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR THE PETITIONERS.....	1
CONCLUSION.....	10

TABLE OF AUTHORITIES

CASES

<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	4
<i>Beyer v. Verizon North</i> , No. 258504, 2006 Mich. App. LEXIS 803 (Mich. App. Mar. 28, 2006)	1
<i>City of Tacoma v. Taxpayers of Tacoma</i> , 357 U.S. 320 (1958).....	9
<i>EEOC v. U.S. Steel Corp.</i> , 921 F.2d 489 (CA3 1990).....	5
<i>Hansberry v. Lee</i> , 311 U.S. 32 (1940).....	8
<i>In re Engelhard & Sons Co.</i> , 231 U.S. 646 (1914).....	8
<i>Jones v. Bates</i> , 127 F.3d 839 (CA9 1997).....	7
<i>Michigan Bell Tel. Co. v. Engler</i> , 72 Fed. Appx. 380 (CA6 2003)	10
<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815 (1999).....	4
<i>Richards v. Jefferson County</i> , 517 U.S. 793 (1996).....	8, 9, 10
<i>Riddle v. Cerro Wire and Cable Group, Inc.</i> , 902 F.2d 918 (CA11 1990).....	5
<i>Rodriguez v. East Texas Motor Freight</i> , 505 F.2d 40 (CA5 1974)	6
<i>Salinas v. Roadway Express, Inc.</i> , 735 F.2d 1574 (CA5 1984)	6
<i>Satsky v. Paramount Comm., Inc.</i> , 7 F.3d 1464 (CA10 1993)	6
<i>Smith v. Illinois Bell Telephone Co.</i> , 270 U.S. 587 (1926)	8
<i>Thomas v. Shelton</i> , 740 F.2d 478 (CA7 1984)	7
<i>Tyus v. Schoemehl</i> , 93 F.3d 449 (CA8 1996)	5
<i>United States v. Booker</i> , 436 F.3d 238 (CADDC 2006)	9
<i>Verizon Communications Inc. v. FCC</i> , 535 U.S. 467 (2002).....	10
<i>Washington v. Washington State Commercial Passenger Fishing Vessel Association</i> , 443 U.S. 658 (1979).....	9
<i>Wyoming v. Colorado</i> , 286 U.S. 494 (1932)	9

STATUTES

Mich. Comp. Laws 484.2310(7).....	2, 10
-----------------------------------	-------

OTHER AUTHORITIES

C.J.S. JUDGMENTS (2005)	9
Wright & Miller, FEDERAL PRACTICE & PROCEDURE (3d ed. 2004)	5

REPLY BRIEF FOR THE PETITIONERS

The Michigan courts held in this case, as a matter of federal law, that a judgment in a suit by the government also precludes any private action, so long as the government initially pursued the same interests as the private parties. The court deemed it irrelevant that the settlement compromises the private plaintiffs' rights in order to obtain concessions that further unrelated state goals. That legal ruling – which is binding precedent¹ – is supported by some authority but squarely conflicts with other federal precedent and is inconsistent with the decisions of this Court. The ruling also arises in the exceedingly important context of this case, which extinguished the federally protected rights of hundreds of thousands of individuals to recover hundreds of millions of dollars in fees respondent collected in violation of a state statute. Certiorari should accordingly be granted.

1. Respondent would recast the decision below as simply applying the accepted principle that “a prior suit by the government bars a subsequent suit by a private individual if the government adequately represented the interests of the private litigant.” BIO 14. It is equally well accepted, respondent argues, that government representation is “adequate” when “the legal interests of the private individual ‘d[o] not differ from those of [the official] in the initial suit.’” BIO 15 (quoting Pet. App. 7a²). Accordingly, respondent

¹ Respondent's emphasis that the decision below was “unpublished” and hence “non-precedential” (BIO 8, 15, 16), omits that in the parallel *Beyer* litigation it cites (*id.* 7 n.8) the Michigan Court of Appeals adopted and published the opinion in this case, thereby rendering it binding precedent (see *Beyer v. Verizon North*, No. 258504, 2006 Mich. App. LEXIS 803 (Mar. 28, 2006)).

² Although respondent reproduces some of the documents in the case yet again – because the docket number is mistaken in one case reproduced in the Petition Appendix, while an extra comma appears in another – petitioners follow the usual practice of citing the Petition Appendix.

claims, petitioners merely “assert that the court erred in applying that well-understood standard.” *Ibid.*

In fact, the court of appeals’ legal ruling turns on a further legal principle that other courts reject: that the private and public interests “do not differ” (Pet. App. 7a) – and government representation is therefore constitutionally “adequate” – whenever the government and the private parties have a general interest in enforcement of the same statute. See Pet. App. 8a (concluding that “petitioners’ legal interests do not differ from those of the defendants in the initial suit” because both sought “enforcement of the prohibitions of EUCL charges” and, therefore, *res judicata* bars petitioners’ suit); BIO 2 (preclusion applies because “the interest asserted by petitioners – the enforcement of § 310(7) – is the very interest that the Governor and the Commissioners * * * represented in *Engler*”). On this view, *res judicata* merely “depends on the *relationship* between litigants” (*id.* 24 (emphasis in original)), rather than on whether the government officials *in fact* acted consistently with the interests of the private parties they purportedly represented. Accordingly, under the Michigan standard, it makes no legal difference if the state’s litigation decisions are also driven by other conflicting interests, or indeed if the state eventually pursues those other interests at the cost of abandoning enforcement of the private plaintiff’s legal rights. See Pet. App. 9a; BIO 24-25. This Court has never squarely addressed, much less approved, such a broad application of *res judicata*.

This case demonstrates the great importance of the further legal principle embraced by the court of appeals in defining when governmental and private interests “do not differ.” For the state officials manifestly did trade off enforcement of the EUCL provision in favor of other interests they deemed essential to the State. In this respect, the brief in opposition is substantially misleading. Respondent did not merely file “a suit * * * challenging the constitutionality of § 310(7) [the EUCL provision]” (BIO 1); the settlement did

not merely permit respondent “to continue to collect EUCL charges from its Michigan customers at a reduced rate” (*ibid.*); the eventual consent judgment did not merely “incorporat[e] the EUCL terms of the settlement” (*id.* 6); the consent decree did not merely “reduce[] [respondent’s] EUCL charges by 15%” (*ibid.*); and the state defendants did not merely “decide[] that the public would be best served by ensuring that § 310(7) continue to be enforced on a ‘going forward’ basis” (*id.* 24). Rather, as the petition explained and respondent does not attempt to contest, respondent’s complaint in *Engler*, the settlement negotiations, the settlement agreement, and the consent decree *all* involved the resolution of an array of disputes that were wholly unrelated to the EUCL charge.³

As described at length in the petition, Pet. 24-25, respondent’s complaint in *Engler* challenged not merely the EUCL provision but also the state’s rate-freeze, which necessarily had substantial financial consequences for respondent. The State openly admitted that its settlement with respondent resolved “not only this litigation, but also several other important public policy issues, including the recently enacted legislation designed to advance the deployment of broadband (i.e., high-speed internet) and other telecommunications.” Resp. Opp. Interv. 18 n.18. The State further obtained “concessions” that “will inure to the benefit of the state,” *ibid.*, including concessions on a property tax dispute and settlement of three appeals in unrelated cases between the State and respondent. Pet. App. 120a-121a. The

³ Respondent retreats to pure rhetoric in asserting that “[p]etitioners fundamentally mischaracterize the settlement, taking bits and pieces of its language” out of context. BIO 4 n.4. It could not be more telling that respondent first reports that it will not “attempt to refute each and every one of petitioners’ mischaracterizations” (*ibid.*), but then proceeds not to challenge *any* aspect of the petition’s wholly accurate description of the settlement in the entire twenty-eight-page brief in opposition.

State paid for these benefits by giving up enforcement of the EUCL provision.⁴

Respondent is right that the question is not whether the private party is satisfied with “the *outcome* of litigation – and, in particular, not * * * whether the terms of the settlement are ones that petitioners would have chosen.” BIO 24. For neither the substance nor the “implication” of petitioners’ argument is that the application of *res judicata* turns on “the terms of the underlying settlement.” *Contra id.* 25. The legal principle at stake is not difficult to grasp, and respondent cannot elide it. Thus, ordinarily absent class members are bound by the decisions of class representatives. But if the class representatives instead trade off the interests of certain class members in favor of those of others, representation is not adequate and preclusion does not apply. That is the essence of this Court’s seminal decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). So too, even if one accepts that government officials generally “do adequately represent the interests of private individuals in avoiding paying unlawful rates for telephone usage” (BIO 21), that presumption is more than rebutted by the inherent conflict that arises in circumstances, such as these, in which the government sacrifices those common interests in favor of other interests it deems more important.

2. Though all agree that litigation by a public official may, in some circumstances, bind absent private parties (Pet. 10-11; BIO 14), there is broad disagreement and confusion

⁴ As described in the petition and by the trial court, but substantially mischaracterized by respondent (see BIO 5-6 & n.7), the Attorney General attempted to intervene to oppose the settlement on the ground that it was not in the interests of the ratepayers but was denied permission to make any objection other than that the Governor and Commissioners lacked the state law authority to act on behalf of the State in settling the lawsuit. See Pet. 5, 7; Pet. App. 28a.

about when those circumstances arise. As the authors of Wright & Miller have explained, there are easy cases in which “rights asserted are so far public that private suitors lack standing to pursue them” or, at the other extreme, cases in which the rights are “so manifestly individual and private that the government either lacks occasion to litigate at all or clearly cannot foreclose private remedies.” 18A Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 4458.1 (3d ed. 2004). “Many cases occupy an uncertain middle ground,” in which “delicate questions may arise as to the interplay between public and private rights.” *Ibid.* Courts have noted that resolving such cases “is often very difficult,” in light of the lack of clear direction from this Court. *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 494 (CA3 1990); cf. also *Tyus v. Schoemehl*, 93 F.3d 449 (CA8 1996).

This case illustrates the legal conflict that has arisen in this “uncertain middle ground.” As described in the petition, the principle adopted by the Michigan courts that adequate representation is established if the government and private parties have the same general interest in enforcing a particular statute is squarely rejected by other courts. For example, in *Riddle v. Cerro Wire and Cable Group, Inc.*, 902 F.2d 918 (1990), the Eleventh Circuit acknowledged that both the present plaintiff and the government plaintiff in a former case sought to enforce the same statute (Title VII), but nonetheless held that this was insufficient to bind the private party to the prior government consent decree. *Id.* at 922 (facts “indicate that Riddle and the EEOC did not have the same interests in pursuing litigation” against the plaintiff’s employer). See also Pet. 17-20 (collecting cases).

Instead, numerous courts impose additional requirements before government representation will foreclose individual litigation to vindicate private rights, requirements that are not imposed in Michigan courts and would have precluded the application of *res judicata* to this case.

First, many courts require that the government not only have sought to enforce the same legal duties, but also that the government have pursued and obtained relief for the individuals it purportedly represented. See Pet. 13-14. In *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1470 (1993), for example, the Tenth Circuit held that there could be no preclusion of the plaintiff's claims for private damages arising from the defendant's mining operations, even though the State had already sued the defendant for the same conduct. The determinative difference between the two suits, the court held, was that the State did not sue to recover "for injuries to Plaintiffs' private interests." *Ibid.*

Likewise, in *Salinas v. Roadway Express, Inc.*, 735 F.2d 1574 (CA5 1984), an employer claimed that the plaintiffs' suit was barred by the preclusive effect of a prior consent decree between the employer and the federal government. The consent decree provided for a wide range of changes in the defendant's employment practices, but did not provide any relief to the individuals suing in the second case. *Id.* at 1580. For that reason, the Fifth Circuit held, the plaintiffs did not "have interests such as to be in privity with the Attorney General." *Ibid.* See also *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 66 (CA5 1974) (private suit not barred when "relief in the consent decree does not encompass an important segment of the plaintiffs' class here").

There can be no question that the rule applied in *Satsky* and *Salinas* is in direct conflict with the res judicata principles applied in Michigan. In all three cases, the public and private plaintiffs alleged that the defendants breached their "general duty to obey" a valid law, Pet. App. 8a, and sought "the same result" in the sense that each suit sought enforcement of that obligation, *ibid.* Compare, *e.g.*, *Salinas*, 735 F.2d at 1579-80. And in all three cases, the government settled for relief that did not include a private remedy for the individual plaintiffs. Compare Pet. App. 2a with *Satsky*, 7 F.3d at 1470; *Salinas*, 735 F.2d at 1580. In this case, the discrepancy in relief had no bearing in the court of appeals' res judicata analysis. See

Pet. App. 8a-9a. However, in *Satsky* and *Salinas*, it made the determinative difference, barring application of res judicata to the plaintiffs' claims. See *Satsky*, 7 F.3d at 1470; *Salinas*, 735 F.2d at 1580.

Second, and more generally, many courts demand proof that the government had the same *practical* interests as the private party, in order to ensure that the private interests were advanced in the first litigation with the same zeal as would be expected if the citizen had been permitted to litigate her claims for herself. See Pet. 17-21; see, e.g., *Jones v. Bates*, 127 F.3d 839, 848 (CA9 1997) (“[D]ue process requires *both* that the prior litigation of the issue have been motivated by the same underlying purposes, *and* that the original party have had an *incentive* and opportunity to litigate the issue in the manner best suited to furthering those common underlying purposes.”) (emphasis added); *Thomas v. Shelton*, 740 F.2d 478 (CA7 1984) (no preclusion when, given the government’s limited financial stake in the suit, “there can be no assurance that the government would fight as hard to prove its claim as [the plaintiff] would to prove his”).

These cases recognize that the simple fact that the government is seeking to enforce a statute conferring private rights is by no means a guarantee that the government is acting to represent the interests of individual citizens rather than the broader interests of the public at large, the government’s own institutional interests, or officials’ other policy priorities. Indeed, as noted in the petition, the Solicitor General has made this very point to this Court in the past, arguing that the interests of the government may diverge from those of private parties even in civil rights enforcement actions, making preclusion inappropriate. See Pet. 17.

2. Certiorari is also because the court of appeals’ decision is wrong, extinguishing the federally protected right of hundreds of thousands of Michigan ratepayers to have their day in court before being deprived of an opportunity to recover hundreds of millions of dollars in illegal fees.

This Court has repeatedly held that the narrow exception to the “deep-rooted historic tradition that everyone should have his own day in court” requires far greater protection of the absent parties’ interests than afforded in this case. *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996). In *Richards*, for example, this Court emphasized that “a prior proceeding, to have binding effect on absent parties, would *at least* have to be ‘so devised *and applied* as to insure that * * * the litigation is so conducted as to insure the full and fair consideration of the common issue.’” *Id.* at 801 (emphases added) (citing *Hansberry v. Lee*, 311 U.S. 32, 43 (1940)). This requires, at a minimum, that the purported representative have no “conflict with the absent members.” *Ibid.* As described above, the State had an inherent conflict of interests with plaintiffs in this case, given its obligation to further the State’s broader interests in securing tax revenue, resolving unrelated litigation, and advancing the Governor’s telecommunications policy agenda. Indeed, as in *Richards*, there is no indication in this case that the State even “understood [its] suit to be on behalf of the absent” ratepayers, rather than on behalf of the State’s broad institutional and policy interest, as the settlement makes no provisions for, or even mention of, the rights of the absent parties. See Pet. App. 116a-122a.

This Court’s decisions in *In re Engelhard & Sons Co.*, 231 U.S. 646 (1914), and *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587 (1926), provide no authority for a contrary conclusion. The critical legal issue in this case – whether representation is adequate when the government trades off the interests it has in common with private parties – was not presented in those cases, in which it did not arise. In any event, the statements upon which respondent relies (BIO 21-22) did not address the question whether government litigation could extinguish a private right to sue to recover illegal charges, as the cases arose during a time, at the beginning of the last century, when such private suits were not authorized. See *Engelhard*, 231 U.S. at 651 (at the time,

“it was not competent for each individual having dealings with the regulated company to raise a contest in the courts” over disputed rates) (internal quotation marks and citation omitted); *Richards*, 517 U.S. at 804 (Due Process issue arises when res judicata rules extinguish a “chose in action”).⁵

3. Finally, there is no basis for respondent’s assertion that this case does not present a proper vehicle for resolving the important questions raised by the decision below.

First, the case is not even “technically moot.” Contra BIO 12. Respondent’s contrary assertion relies on the unsupportable claim that the trial court’s dismissal of petitioners’ suit on the merits – which the court of appeals declined to review in light of its res judicata holding – has become a “final judgment” in this case and is no longer subject to further review by the court of appeals. *Ibid.* But Michigan does not depart from the “general rule that there can be only one final judgment” in a case. 49 C.J.S. JUDGMENTS § 76, at 150-51 (2005). It “follows as a necessary consequence of the general rule that, when a final judgment has once been entered, no second or different judgment may be rendered * * * until the first shall have been vacated and set aside or reversed on appeal or error.” *Ibid.*; see also *United States v. Booker*, 436 F.3d 238 (CADC 2006) (same). The only final judgment in this case is the one pending before this Court. If it is vacated, respondent points to nothing that would prevent the court of appeals from considering the trial court’s alternative ground for dismissal on remand.

⁵ Likewise, *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), and similar cases are inapposite, involving the distinct question of the preclusive effect of suits between sovereigns. See *id.* at 670 (suit between United States, Indian Tribes, and the State of Washington); see also *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958) (suit between municipality, state, and federal agency over building of a dam); *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932) (water rights dispute between two states).

Second, the court of appeals' decision does not rest on an supposed adequate and independent state-law ground that "petitioners do not have a cause of action to enforce § 310(7)." Contra BIO 13. The court of appeals made absolutely clear that res judicata was the sole ground for its decision, declining to reach respondent's other arguments for dismissal. See Pet. App. 9a. The court merely stated in one sentence that the statutory scheme did not "look[] toward private enforcement of its requirements" (*id.* 8a) to inform its rationale for holding that petitioners' claims were barred by res judicata. See *ibid.* The authorities cited in the petition (at 3) establish that petitioners' cause of action is clearly established under Michigan law, and respondent *did not even argue* to the contrary below.⁶

Third, respondent's alternative defenses for the dismissal of the case – none of which were passed upon by the court of appeals – present no reason to deny review of the important question the court below *did* decide. See *Richards*, 517 U.S. at 797 n.3 (deciding only res judicata question and specifically declining to consider merits of underlying dispute). As noted in the petition, although the state trial court thought Michigan's rate-setting scheme was unconstitutional, that unreviewed decision conflicts directly with the Sixth Circuit's observation that the Michigan scheme is "identical" to the one upheld in *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002). See *Michigan Bell Tel. Co. v. Engler*, 72 Fed. Appx. 380, 382 (CA6 2003).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, certiorari should be granted.

⁶ Respondent argued only that such claims fall within the exclusive jurisdiction of the Michigan Public Utility Commission, see BIO 13 n.11, an argument the trial court rejected (Pet. App. 29a-31a) and the court of appeals did not reach (*id.* 9a).

Respectfully submitted,

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