No. 05-___

IN THE

Supreme Court of the United States

Clara Clark et al.,

Petitioners,

v.

Wyeth, Inc.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether and when is an absent class member forbidden from instituting a collateral challenge that would establish that the class action judgment is not binding upon him because it was not entered consistent with the requirements of due process?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are parties in this Court. The court of appeals' opinion consolidated various appeals from several district court rulings. In CA3 No. 03-3401, the appellants were Clara Clark, Linda Smart, and other unnamed persons defined as members of the nationwide fen-phen class. In CA3 No. 03-3402, the appellants were James Axford and other unnamed persons defined as members of the nationwide fen-phen class. In CA3 No. 03-4465, the appellants were Shanne Webb-Cochran, Renai Kuykendall, Willa Sartin, Dawn Stewart, Joanne Valenti, and other unnamed persons defined as members of the nationwide fen-phen class. In CA3 No. 04-3661, the appellants were Doris Weller and Ellen Carey.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Clara Clark et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Third Circuit's opinion (App. A, *infra*) is published at 431 F.3d 141. The court of appeals disposed of consolidated appeals from three district court orders: PTO 3849 (App. B, *infra*); PTO 3085 (App. C, *infra*); and Pre-Trial Order (PTO) 2929 (App. D, *infra*).

JURISDICTION

The Third Circuit entered its opinion on November 30, 2005. This Court has jurisdiction under 28 U.S.C. 1254.

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioners are individuals who brought state law tort claims against respondent Wyeth based on injuries they suffered from taking the diet-drug combination "fen-phen." Petitioners contended that their claims were not precluded by a prior nationwide settlement of fen-phen-related litigation because they had received constitutionally inadequate representation in the negotiations that produced that settlement. The Third Circuit held as a matter of law that absent class members are forbidden from collaterally attacking a settlement when the district judge previously considered the adequacy of representation. The court of appeals acknowledged a direct conflict between its decision and *Stephenson* v. *Dow Chemical Co.*, 273 F.3d 249 (CA2

2001), aff'd by an equally divided Court, 539 U.S. 111 (2003).

1. Petitioners Clara Clark et al. (petitioners) are former users of "fen-phen," a combination of drugs that, until withdrawn from the market, was widely prescribed for weight loss. Studies have revealed that fen-phen causes a variety of medical conditions, ranging from relatively minor health concerns to fatal heart disease. Many of the conditions are asymptomatic and can be discovered only through medical testing.

When petitioners learned that they had contracted illnesses associated with fen-phen, they sought to sue respondent Wyeth for damages. In response, Wyeth contended that petitioners' claims were precluded by an earlier nationwide settlement of fen-phen-related litigation. With respect to some petitioners, the settlement purports to limit their right to sue; with respect to other petitioners, the settlement purports to extinguish their claims altogether, leaving them with no remedy at all.

Petitioners contended that they were not bound by the settlement. Petitioners rested their argument on three bedrock propositions of this Court's jurisprudence. First, a judgment binds a non-party only if he receives constitutionally adequate representation in the first case. *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940). Second, a non-party has the right to collaterally attack the adequacy of the representation provided in the prior case. *Ibid*. Third, representation is not adequate if a class representative is assigned the responsibility of representing the conflicting interests of a "sprawling" class of individuals with inconsistent interests. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997).

Those principles were particularly salient here because the court of appeals had never been presented with the opportunity to decide in the first instance whether the settlement class comported with *Amchem*. After the district court approved the settlement, Wyeth deliberately settled the

claims of objecting class members rather than permit the appeals to proceed. The appeals were then voluntarily dismissed pursuant to Fed. R. App. P. 42(b). *E.g.*, Nos. 00-2758, 00-2858, 00-2863, 00-2865 (CA3).

In this case, petitioners alleged that the class representatives who purported to compromise their claims were charged with representing an enormous class (with more than *six million* individuals) with disparate and conflicting interests. Although the class was divided into five subclasses for purposes of settlement negotiations, see Pet. App. 3a, the subclasses were not defined in a way that ameliorated in any significant way the substantial conflicts of interest within the class.

The subclasses were instead defined according to how long the plaintiff had taken fen-phen and her knowledge regarding her medical condition. For example, "Subclass 1(a)" was defined to include all persons who had used fen-phen for less than sixty days, excluding only individuals who both (a) had one particular medical condition, "FDA positive valvular heart disease" (VHD); and (b) knew that they suffered from that condition by a particular date.

An estimated two million class members fit within Subclass 1(a). Equally important, those millions of individuals had every one of the many, diverse medical conditions that arises from fen-phen. Subclass 1(a) thus included many individuals with current serious medical conditions whose principal interest was designing a settlement to maximize immediate payment for medical expenses. It also contained many individuals with no current symptoms whose principal interest was the opposite: designing a settlement with guaranteed medical monitoring and long-term insurance. In addition, Subclass 1(a) included many individuals with more moderate conditions who sought a mix of benefits. A further layer of conflict was created by the diverse legal regimes of the fifty states in which the plaintiffs lived, which vary for example in whether they

recognize a "discovery rule" for tort claims, whether they recognize a claim for medical monitoring, and the extent to which they permit punitive damage awards. Yet Subclass 1(a) – and all the subclasses, most of which were similarly diverse in their composition – had as its champion in negotiations only a single class representative.

The settlement that resulted from the negotiations of the class representatives itself demonstrated that the subclasses were not structured to minimize intra-class conflicts. In extinguishing the class members' claims, except to the extent specifically preserved under the terms of the settlement, the settlement assigned to class members widely varying amounts of compensation. The resulting claims "Matrix" divided the class members based on medical conditions. Yet the settlement inexplicably was not negotiated on that basis.

The settlement Matrix illuminates the innumerable trade-offs that subclass counsel inevitably were required to make in negotiations. Some conditions receive no compensation, and, as a result, some members of the class receive no benefit at all in exchange for the extinction of their right to sue respondent. The resources thus conserved were distributed among other class members in a complicated manner, with some members receiving more compensation than others. The settlement took no account, however, of the fact that the value of class members' claims was directly dependent on the law of the state in which their claim would otherwise be heard. Accordingly, members whose states provided more substantial protection for their consumers were treated no better than members not entitled to such protection under the laws of their home states.

Moreover, some of the petitioners saw their claims barred for no consideration at all. Certain of the petitioners allege that fen-phen has caused them to suffer a potentially fatal medical condition known as pulmonary hypertension (PH) that is not secondary to valvular heart disease. However, the settlement agreement extinguishes those claims because they

do not meet the agreement's criteria for primary pulmonary hypertension (PPH). Yet these class members were not represented separately during the negotiations between class counsel and Wyeth that resulted in the settlement agreement. No class representative was appointed for class members suffering from PH.

Finally, there remains the independent issue whether it is possible to provide constitutionally adequate notice to so sprawling a group of persons with asymptomatic injuries. Cf. *Amchem*, 521 U.S. at 627 ("[W]e recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous."). Here, many of the class members were asymptomatic at the time of the settlement and had little incentive to go to the expense of hiring lawyers to participate directly in the case and little reason to believe that opting out was necessary in order to preserve their rights. The fact that less than ten percent of the nationwide fen-phen class registered with the settlement Trust – a prerequisite to securing any benefits – supports the conclusion that constitutionally adequate notice could not be provided.

2. The question whether petitioners were nonetheless bound by the nationwide settlement was decided in the first instance by the district court that had previously approved the settlement.[1] The district court held that petitioners were

[1] Some petitioners instituted their collateral attack in the federal district court in which the nationwide settlement of fen-phen claims had been entered. Other petitioners originally brought suit in state court, and their claims were removed to federal court and transferred to that district court. The district court resolved petitioners' claims in three orders. App. B, *infra* (PTO 3849, addressing claims of persons who were not diagnosed with illness until after deadline to claim settlement benefits had passed); App. C, *infra* (PTO 3085, addressing claims of persons with "pulmonary hypertension"); App. D, *infra* (PTO 2929, addressing claims of "downstream opt-outs"). The Third Circuit consolidated

precluded as a matter of law from contesting the adequacy of their representation in the settlement negotiations because it had previously considered the overall question of adequacy in initially approving the settlement. Pet. App. 23a, 43a-45a.

3. The Third Circuit affirmed. App. A, *infra*. The court of appeals recognized that petitioners had a federal due process right to adequate representation in the settlement negotiations. *Id.* 5a (citing *Hansberry*, *supra*). But it held on the basis of circuit precedent that "[o]nce a court has decided that the due process protections did occur for a particular class member or group of class members, the issue may not be relitigated." *Id.* 6a-7a (citing *Grimes* v. *Vitalink Comms. Corp.*, 17 F.3d 1553 (CA3 1994)). Thus, because a district court in approving any class action settlement necessarily will undertake the adequacy inquiry required by Federal Rule of Civil Procedure 23, absent class members are categorically precluded from attacking the representation they received. *Ibid*.

The court of appeals accordingly found it dispositive that the district court, in originally approving the settlement, had found that class counsel had adequately represented the absent class members. "Appellants were represented by other class members at the fairness hearing and because the District Court decided that the class was adequately represented, the issue of adequate representation of Appellants has already been fairly litigated." Pet. App. 10a.[2]

The Third Circuit recognized the direct conflict between its ruling and the Second Circuit's decision in *Stephenson*, *supra*, which held that absent class members have the right to

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petitioners' appeals from those orders and resolved them in the opinion that gives rise to this petition for certiorari. App. A, *infra*.

[2] The court of appeals deemed it irrelevant that respondent had settled the claims of the objectors to the settlement, precluding any appellate review of the adequacy of the representation provided by class counsel. Pet. App. 10a-11a.

collaterally attack the adequacy of representation in prior settlement negotiations.[3]

REASONS FOR GRANTING THE WRIT

The petition for certiorari should be granted because the question presented is the subject of an intractable circuit split and the decision below conflicts with this Court's precedents. The Court previously granted certiorari to decide this very question, but divided evenly on the disposition, with Justice Stevens not participating. *Stephenson* v. *Dow Chem. Co.*, 273 F.3d 249 (CA2 2001), aff'd by an equally divided Court, 539 U.S. 111 (2003). The issue has thus already been fully briefed in this Court, and this case – in which the question was the only basis for the decision below and the petitioners plainly present a substantial ground for challenging the adequacy of the representation provided by class and subclass counsel – is an ideal vehicle finally to decide it.

I. The Circuits Are Squarely Divided over Whether an Absent Class Member May Collaterally Challenge the Adequacy of Representation Provided by Class Counsel.

As required by Federal Rule of Civil Procedure 23, the district court determined that class counsel had provided adequate representation prior to approving the nationwide fen-phen settlement. The Third Circuit held that this determination itself bound absent class members and precluded a collateral attack on the adequacy of the representation by class counsel. Pet. App. 5a-7a. The court of appeals held that result was compelled by its prior holding in *Grimes* v. *Vitalink Communications Corp.*, 17 F.3d 1553

[3] The district court had held in the alternative that petitioners' collateral attack failed on the merits. The court of appeals did not reach that question, however. If this Court holds that petitioners may collaterally attack the adequacy of their representation, the merits of that claim will remain open for the court of appeals to decide on remand.

(1994), that when a class action court adjudicates the adequacy of representation, that determination precludes later relitigation of the issue. Pet. App. 7a.

The Third Circuit's decision in this case is consistent with Ninth Circuit precedent. In *Epstein* v. *MCA*, 179 F.3d 641 (CA9), cert. denied, 528 U.S. 1004 (1999), that court held (citing *Grimes*) that, so long as the certifying court employs procedures that comport with due process, "the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal." 179 F.3d at 648 (per O'Scannlain, J.). The First Circuit has suggested its agreement as well. *Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29, 33 (1991), *cited in Epstein*, 179 F.3d at 648.

The rule in the Third and Ninth Circuits squarely conflicts with the precedent of the Second Circuit. The court of appeals in this case correctly acknowledged that the Second Circuit had reached the opposite result in *Stephenson*, *supra*, in which this Court granted certiorari. The petition for certiorari in *Stephenson*, in turn, relied on a conflict between that decision and the Third Circuit's decision in *Grimes*, *supra*. See Pet. for Cert., No. 02-271, *Dow Chem. Co.* v. *Stephenson* 13.

In *Stephenson*, Vietnam veterans sought to litigate claims against manufacturers of Agent Orange, a defoliant used during the Vietnam War and alleged to cause serious injuries to exposed soldiers. 237 F.3d at 251. The defendants moved to dismiss, arguing that the plaintiffs' claims had been extinguished by an earlier federal class action settlement. The plaintiffs argued that the settlement was ineffective to preclude their claims because their interests had not been adequately represented by the class representatives in the prior action. The district court held that the plaintiffs were barred from collaterally attacking the prior settlement, concluding that the adequacy of class representation had been

conclusively decided when the settlement was approved. *Id.* at 256.

The Second Circuit disagreed. The court held that even assuming "collateral attack is only permitted where there has been no prior determination of the absent class members' rights," the plaintiffs' suit fell outside of that rule. 237 F.3d at 257-58. The district court had previously determined the adequacy of representation for purposes of class certification and approval of the settlement, and both of those determinations had been upheld on appeal. Nonetheless, those prior proceedings had not "addressed specifically the adequacy of representation for those members of the class whose injuries manifested after depletion of the settlement funds." *Ibid.*

But the court held in any event that permitting the collateral attack was "amply supported by precedent," including this Court's decision in *Hansberry* and the decisions of several other circuits. 237 F.3d at 258 (collecting cases). Accordingly, the court held, "a collateral attack to contest the application of res judicata is available." *Id.* at 259.

At least four other courts of appeals join the Second Circuit in permitting absent class members to collaterally attack the adequacy of representation in class proceedings. *Williams* v. *Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266 (CA7 1998) (addressing due process considerations of prior class action settlement on collateral attack); *Twigg* v. *Sears, Roebuck & Co.*, 153 F.3d 1222, 1226 (CA11 1998) ("Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process, and an absent class member may collaterally attack the prior judgment on the ground that to apply claim preclusion would deny him due process."); *Shults* v. *Champion Int'l Corp.*, 35 F.3d 1056, 1058-59 (CA6 1994); *Gonzales* v. *Cassidy*, 474 F.2d 67, 72 (CA5 1973); see also *State* v. *Homeside Lending, Inc.*, 826

A.2d 997, 1016-17 (Vt. 2003); *Aide* v. *Chrysler Fin. Corp.*, 699 N.E.2d 1177, 1180 (Ind. App. 1998).

The circuits that refuse to prohibit an absent class member from vindicating her due process right to adequate representation obviously would have decided this case differently. Most courts of appeals categorically refuse to permit an initial determination of adequacy to bind an absent class member, who must instead be permitted to challenge later the adequacy provided in the initial class action proceedings. Those courts would reject the result reached by the Third Circuit in this case.

To the extent any court of appeals applies an intermediate rule – under which a challenge to the adequacy of representation is precluded if previously adjudicated in the case – such a rule does not bar petitioners' collateral attack. The district court in approving the fen-phen settlement did not consider the challenges raised by petitioners. For example, petitioners contend that the subclasses suffered from intra-class conflicts because they were defined based on the plaintiffs' knowledge, not on the basis of medical criteria. Petitioners also contend that a representative suffering from "pulmonary hypertension" should have been named. Separately, petitioners maintain that a subclass should have been defined to represent persons who had not yet become ill from fen-phen.

None of those arguments were resolved by the district court in its initial assessment of the adequacy of representation. The Third Circuit notably did not contend otherwise. Rather, it principally relied on the fact that the district court had found that the *settlement* – as opposed to the subclass definitions and the representation provided by counsel – was ultimately fair. For example, the court of appeals cited the district court's determination that the settlement "includes structural protections to protect class members with varying diagnoses," and that the provision of the agreement "waiv[ing] punitive damage claims * * * in

exchange for protection against statute of limitations and claim splitting defenses represents a fair and wholly appropriate trade off." Pet. App. 9a-10a. The court of appeals otherwise found it sufficient that the district court had generally "decided that the class was adequately represented," *id.* 10a, including the generalized "suggestion that there were disabling intraclass conflicts," *id.* 14a.

It is thus plain that other courts of appeals would have decided this case differently. This conflict moreover prototypically calls out for resolution by this Court. Nationwide class actions like this one are often resolved through the federal multidistrict litigation process, under which actions may be transferred to, and consolidated in, "any district" (28 U.S.C. 1407(a)) in the nation. Absent class members, in turn, may attempt to challenge the adequacy of class representation outside the circuit in which the class was certified. Both rules create the substantial prospect of forum shopping. It is therefore manifestly inappropriate for the different courts of appeals to employ conflicting rules on the question whether a collateral attack may be instituted.

II. The Court of Appeals' Decision Is in Direct Conflict with Decisions of This Court.

1. The Due Process Clause has long been understood to implement our "deep-rooted historic tradition that everyone should have his own day in court." *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989) (citation omitted). Thus, "[a]ll agree that '[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Ibid*. (quoting *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940)). The Due Process Clauses of the Fifth and Fourteenth Amendment, accordingly, prohibit the enforcement of a judgment against a party not properly bound to it in accordance with that established tradition. *Hansberry*, 311

U.S. at 41. See*, e.g.*, *Baker* v. *GMC*, 522 U.S. 222, 238 & n.11 (1998).

These principles permit, but also restrict, the use of class actions as a device for the settlement of large numbers of related claims. *Hansberry*, 311 U.S. at 41-42. While class actions often provide a benefit to class members, as well as to defendants and to courts, they also pose substantial risks of abuse and a denial of the essential elements of due process. The risk is particularly acute in the case of a settlement, in which a judge's only involvement in the final disposition of rights is the approval of the settlement agreement. Settlements can give rise to the possibility of, and incentives for, collusion among defendants and class representatives and their lawyers.[4] That is precisely why this Court has warned

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[4] See, e.g., RICHARD POSNER, AN ECONOMIC ANALYSIS OF LAW 570 (4th ed. 1992) (no one has stake in size of class action judgment except defendant, who has interest in minimizing it; class counsel will be tempted to settle with defendant for small judgment and large fee; and lawyers largely control court's access to information); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 412 (2000) ("The literature indicates that courts all too often have had little ability or incentive to insure that absent class members are treated fairly.") (summarizing literature); see also Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1056 (1996) ("We agree with those who argue that lawyer abuse in class actions is rampant and that the current system, far from keeping this abuse in check, is set up to shield lawyers from the consequences of their misdeeds."); Susan P. Koniak, *How Like A Winter? The Plight Of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1797-98 (2004) ("There is a trade to be made here: a settlement offer with clear sailing on substantial fees for class counsel in exchange for a chintzy settlement for a large class and a wide release. But that deal is at the expense of the group not at the table: the absent class. Indeed, the requirement that a judge approve any class settlement is largely, if not completely, a recognition of the serious likelihood of just such collusion. * * * But the judge is not actually at the table,

that the requirements of Rule 23 "demand undiluted, even heightened, attention in the settlement context." *Amchem*, 521 U.S. at 620. Moreover, when – as in this case and in *Amchem* – a class is composed of individuals with diverse and competing interests, there is a substantial risk that the interests of some members will be sacrificed in the interests of others. See *id.* at 625-26.

For that reason, the constitutionality of binding absent class members to a judgment depends on the adequacy of representation in the prior proceeding. See, *e.g.*, *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 388 (1996) (Ginsburg, J., concurring in part and dissenting in part) ("In the class-action setting, adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members."); see also, *e.g.*, CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4455, at 485 (2002) ("It has long been the general understanding that only adequate representation can justify preclusion against nonparticipating class members."). Indeed, the court of appeals acknowledged as much, noting that there "must be a process by which an individual class member or group of class members can challenge whether these due process protections were afforded them." Pet. App. 6a.

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and is not actually privy to all the give and take. The judge is thus at a distinct disadvantage, not having been present at the table every step of the way. She has no reliable way to discern in which nook or cranny (of usually quite complex deals) evidence of collusion may lie. She may not even know what she should be looking for, i.e., what a non-collusive deal would provide. By and large she knows just what she is told."); John Leubsdorf, *Co-opting The Class Action*, 80 CORNELL L. REV. 1222, 1225 (1995); John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1348 (1995) ("If not actually collusive, non-adversarial settlements have all too frequently advanced only the interests of plaintiffs' attorneys, not those of the class members.").

2. The court of appeals erred, however, in concluding that this requirement was satisfied when the district court determined, without any participation by the absent class members, that the representation provided by subclass counsel was adequate. Courts have consistently permitted litigants to defend against the preclusive effect of another court's judgment by demonstrating that the prior judgment was issued in violation of the requirements of the Due Process Clause. See, *e.g.*, *Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982) ("A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment."); *Griffin* v. *Griffin*, 327 U.S. 220, 228-29 (1946) (judgment not binding against party who lacked notice required by due process); *Michaels* v. *Post*, 88 U.S. (21 Wall.) 398, 426-27 (1874) ("Hence the rule that whenever a judgment or decree is procured through the fraud of either of the parties, or by the collusion of both, for the purpose of defrauding some third person, such third person may escape from the injury thus attempted by showing, even in a collateral proceeding, the fraud or collusion by which the judgment was obtained.").

The same has long been true of judgments purporting to bind absent class members without having provided adequate representation, in violation of the Due Process Clause. Thus, in *Hansberry*, *supra*, this Court reversed the decision of the Supreme Court of Illinois which had held the plaintiffs' claims barred by the res judicata effect of a prior class action judgment without allowing the plaintiffs in the second case to contest the adequacy of representation in the first action. 311 U.S. at 39-46. Enforcing a judgment against a party not properly bound to it, the Court observed, "is not the due process which the Fifth and Fourteenth Amendment require." *Id*. at 41. And while the Constitution ordinarily prohibits binding a person to "a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process," *id*. at 40, there is a

limited exception for class action suits, so long as the absent parties "are in fact adequately represented," *id*. at 43. The lower court had erred, this Court held, in refusing to consider the petitioners' collateral challenge to the prior proceeding for lack of adequate representation. Like the class action in this case, the prior class action in *Hansberry* charged the class representatives with representing the hopelessly conflicting interests of a disparate collection of absent parties. *Id*. at 43-44. Noting the "opportunities it would afford for the fraudulent and collusive sacrifice of absent parties" to permit such a class judgment to bind the present petitioner, the Court reversed. *Id*. at 45-46.

Until the Ninth Circuit's decision in *Epstein* v. *MCA, Inc*., 179 F.3d 641 (1999), the lower courts uniformly understood *Hansberry* to permit an absent class member to defend against the preclusive effect of a prior class judgment by demonstrating inadequate representation in the first action. See, *e.g.*, *Van Gemert* v. *Boeing Co.*, 590 F.2d 433, 440 n.15 (CA2 1978) (a "[j]udgment in a class action is not secure from collateral attack unless the absentees were adequately and vigorously represented"), aff'd, 444 U.S. 472 (1980); *Shults* v. *Champion Int'l Corp*., 35 F.3d 1056, 1058-59 (CA6 1994) ("[C]lass members may indirectly challenge the validity of a judgment in a class action by mounting a collateral attack on the adequacy of the class representation."); *Williams* v. *Gen. Elec. Capital Auto Lease, Inc*., 159 F.3d 266 (CA7 1998) (addressing due process considerations of prior class action settlement on collateral attack); *Twigg* v. *Sears, Roebuck & Co.*, 153 F.3d 1222, 1226 (CA11 1998) ("Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process, and an absent class member may collaterally attack the prior judgment on the ground that to apply claim preclusion would deny him due process."); *Crawford* v. *Honig*, 37 F.3d 485, 488 (CA9 1994) (finding that when absent class members were not adequately represented in a

post-settlement modification of a class-wide injunction, "res judicata did not bar them from collaterally attacking the [modification] proceedings") (citation omitted)); *Gonzales* v. *Cassidy*, 474 F.2d 67, 72 (CA5 1973) ("To answer the question whether the class representative adequately represented the class so that the judgment in the class suit will bind the absent members of the class requires" among other considerations "a review of the class representative's conduct of the entire suit—an inquiry which is not required to be made by the trial court but which is appropriate in a collateral attack on the judgment"); see also *State* v. *Homeside Lending, Inc.*, 826 A.2d 997, 1016-17 (Vt. 2003) (explaining that "there is a disagreement in the post-*Shutts* decisions whether adequacy of representation can be raised by collateral attack" but opining that such attacks should be permitted "because adequacy of representation is 'the quintessence of due process in class actions'") (citation omitted); *Aide* v. *Chrysler Fin. Corp.*, 699 N.E.2d 1177, 1180 (Ind. App. 1998) (class judgment not entitled to full faith and credit unless requirements of due process, including adequate representation, are met).

This uniform view of the circuit courts was reflected as black letter law in basic treatises and law reviews as well. See, *e.g.*, WRIGHT ET AL., *supra*, § 1789.1 ("Thus, an absent class member, even when specifically identified in the judgment, will not be bound if the absentee can establish that to do so would result in the deprivation of property without due process of law, either because the class was inadequately represented or because of a failure to give adequate notice." (footnotes omitted)); *id.* § 4455 ("The principle that divergent interests disqualify a putative representative from conducting a class action ordinarily is applied in determining whether to certify the action and in defining any class that is certified. The question remains open to redetermination in a subsequent action, however, since nonparties can be bound only if some party adequately represented their interests."); RESTATEMENT (SECOND) OF JUDGMENTS § 41, cmt. a, at 394 (1982) (in case

of inadequate class representation, "the represented person may avoid being bound either by appearing in the action before rendition of the judgment or by attacking the judgment by subsequent proceedings"); MOORE'S FEDERAL PRACTICE § 130.07[3] (3d ed. 1997) ("If the class did not receive adequate representation in the court rendering the class action judgment, that issue may be raised on collateral attack."); 1 Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 1625, at 16-133 (3d ed. 1992) ("due process of law would be violated for the class judgment" to be held binding "unless the court applying res judicata could conclude that the class was adequately represented in the first suit"); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation In Class Suits*, 79 TEX. L. REV. 383 (2000); Henry Paul Monaghan, *Antitrust Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1162-78 (1998) (arguing that collateral review of adequacy is necessary).

It is thus unsurprising that this Court has repeatedly relied upon and reaffirmed the central holdings of *Hansberry* for the past sixty years. See, *e.g.*, *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 848 n.24 (1999) ("reiterat[ing] the constitutional requirement articulated in *Hansberry* v. *Lee*, 311 U.S. 32 (1940)"); *Richards* v. *Jefferson County*, 517 U.S. 793, 800 (1996) (quoting *Hansberry*, 311 U.S. at 43, and holding that challengers to a county occupational tax could not constitutionally be bound by a prior adverse decision, where they did not participate in, or receive adequate representation in, the prior lawsuit).

The consistent holdings of this Court and other courts reflect the broader principle, specifically recognized by the drafters of Rule 23, that "the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action." Advisory Committee Note to Rule 23(c)(3) (1966) (citing Restatement of Judgments); see also RESTATEMENT (SECOND) OF

JUDGMENTS § 41, cmt. a, at 394 (1982); Charles A. Wright, *Class Actions*, 47 F.R.D. 169, 181 (1970).

3. This approval of collateral challenges to the adequacy of representation in class actions reflects a recognition that the availability of such review is a vital component of the collection of procedures that, together, make class action litigation sufficiently protective of individual rights to satisfy the requirements of due process. It is true that in order to certify a class action, the trial court must determine that the representatives "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). But that determination, ordinarily made at the outset of the litigation, is a wholly predictive judgment. The Due Process Clause, on the other hand, "of course requires that the named plaintiff *at all times* adequately represent the interests of absent class members" before a class judgment may bind absent members. *Phillips Petroleum* v. *Shutts*, 472 U.S. 797, 812 (1985) (emphasis added); see also *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 848 n.24 (1999) (same); *Hansberry*, 311 U.S. at 42 (noting that decision to proceed with class action involves different "considerations" than "whether such an adjudication satisfies the requirements of due process").[5]

Moreover, even when a court examines the adequacy of class representation at the time a settlement is approved, the risk of an erroneous determination is substantial, as the adversarial posture of the parties will, by that time, have collapsed and with it, the court's most significant structural protection against erroneous fact finding. See *Amchem*, 521 U.S. at 621 (noting risk that parties "may even put one over

[5] Accordingly, even in a case in which the district court reviews the class representatives' representation at the time of a settlement "fairness hearing," that determination at most can review only the adequacy of representation up to that point in the litigation, and does not consider whether the class representatives adequately represented the absent members during any subsequent proceedings.

on the court, in a staged performance") (quoting *Kamilewicz* v. *Bank of Boston*, 100 F.3d 1348, 1352 (CA7 1996)). Indeed, the academic literature well documents the risk that collusive and grossly unfair settlements will nonetheless be approved by busy courts deprived of the benefits of adversarial presentations. See *supra* at 12-13 n.4. As one commentator has described the problem:

> Constrained by the institutional requirements of neutrality and passivity set by the adversary system on the one hand, and lacking sufficient adversity between the defendant and the class attorney whenever attorney fees and proposed settlements are concerned on the other, courts have been left, by and large, uninformed about the parameters necessary to effectively regulate class attorneys. Taking into account their constrained resources and overburdened dockets, it is not surprising that courts have failed to adequately monitor class actions.

Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 45 (2002). This risk of error and collusion are constitutionally acceptable only because the error is amenable to correction before it compromises the rights of absent parties.

4. That the original class action provided notice and an opportunity for class members to participate or opt out is immaterial. Due process requires actually adequate representation, *Shutts*, 472 U.S. at 810, not simply a chance for the exceedingly prescient to extricate themselves from inadequate representation in advance, see *Matsushita*, 516 U.S. at 397 (Ginsburg, J., concurring in part and dissenting in part) ("Due process demands more than notice and an opportunity to opt out; adequate representation, too * * * is an essential ingredient. Notice * * * cannot substitute for the thorough examination and informed negotiation an adequate

representative would pursue."). Indeed, it is the requirement of actually adequate representation that makes the class actions device an effective mechanism for adjudication of mass claims. Class members can decline to incur the expense for themselves, and the complication for the court, that follows from direct participation, "content in knowing that there are safeguards provided for his protection," *Shutts*, 472 U.S. at 810, including the due process requirement that "the named plaintiff at all time adequately represent the interests of the absent class members," *id*. at 812.

Accordingly, in *Martin* v. *Wilks*, 490 U.S. 755 (1989), this Court held that an absent party's notice of a pending lawsuit purporting to resolve his rights was ineffective to subject him to the judgment, even though he had an opportunity to intervene and was warned that failure to do so would prevent a collateral attack on the judgment. Quoting Justice Brandeis, the Court explained that the "law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger * * *. Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." 490 U.S. at 763 (quoting *Chase Nat'l Bank* v. *Norwalk*, 291 U.S. 431, 441 (1934)). The same principle applies in this case – in the absence of adequate representation, an absent class member is a stranger to the suit and its conclusion can have no effect upon his rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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