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SENATE JUDICIARY COMMITTEE

QUESTIONNAIRE

APPENDIX 16e

Supreme Court Filings

1996 WL 656278 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

STATE OF WASHINGTON, et al., Petitioners,
v.
Harold GLUCKSBERG, M.D., et al., Respondents.
Dennis C. VACCO, et al., Petitioners,
v.
Timothy E. QUILL, M.D., et al., Respondents.

Nos. 96-110, 96-1858.
October Term, 1996.
November 12, 1996.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Second Circuits

BRIEF AMICUS CURIAE OF THE AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF PETITIONERS

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*1 INTEREST OF THE AMICUS CURIAE

Amicus curiae, the American Hospital Association ("AHA"), respectfully submits this brief in support of Petitioners in State of Washington v. Glucksberg, No. 96-110, and Vacco v. Quill, No. 96-1858. [1]

***2** Founded in 1898, the AHA is the primary organization of hospitals in the United States. The AHA's mission is to advance the health of individuals and communities. AHA leads, represents, and serves health care provider organizations that are accountable to the community and committed to health improvement. Its membership includes 70% of the Nation's 5,000 hospitals, health systems, and other providers of care. Over 38,000 health care professionals hold individual memberships in the AHA.

The AHA has played a significant role in the ongoing debate concerning end-of-life decisions. It has worked vigorously through the legislative and judicial processes to help secure the right of patients, in consultation with their families and their physicians, to forego life-sustaining medical treatment. [2] And it regularly publishes policies and ethical guidelines addressing the roles of patients, families, guardians, physicians, and hospitals involved in termination-of-care decisions.

The AHA and its members have a vital interest in the outcome of Glucksberg and Quill. If a constitutional right to physician-assisted suicide is recognized, AHA members will be called upon to assist in the suicide of patients on a daily basis in hospitals across the country. In the view of the AHA, recognition of such a right would create an administrative nightmare for hospitals and other health-care providers as courts struggle to define the parameters of this new right. For this and other reasons described below, the AHA joins virtually every medical association and governmental panel to study the issue in opposing the creation of a constitutional right to physician-assisted suicide.

*3 SUMMARY OF ARGUMENT

The American Hospital Association supports the right of every patient to choose whether or not to accept medical treatment. This right includes the right to forego even life-sustaining medical treatment, including artificially delivered food and water. Patients, in consultation with their families and their physicians, should be able to make such determinations free from government interference. The right of a patient to accept or reject medical treatment is in keeping with a doctor's well-recognized obligation not to force treatment on an unwilling patient. It is also consistent with this Court's precedents and with the deeply-rooted traditions of this country.

A right to physician-assisted suicide, by contrast, finds no basis in the text or structure of the Constitution or in this Court's precedents. Nor is such a right so "deeply rooted in this Nation's history and tradition," Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977), that it may be deemed "fundamental" or "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937). To the contrary, physician-assisted suicide has long been illegal and continues to be so in the vast majority of states.

The American Hospital Association does not endorse state statutes criminalizing physician-assisted suicide. But the AHA cannot accept the assertion that the Constitution precludes such statutes. Under our system of government, democratically-elected officials should be able to grapple with this difficult issue free from "a background of federal constitutional imperatives that are unknown because they are being newly crafted from Term to Term." Cruzan v.

Missouri, 497 U.S. 261, 293 (1990) (Scalia, J., concurring). Hospitals, medical associations, individual physicians, and their patients and communities should all be able to take part in shaping public policy on this issue based on ethical, medical, and political considerations. The Constitution does not preempt such informed dialogue.

***4** Accordingly, the AHA believes that the Ninth Circuit decision being reviewed by this Court is both wrong and profoundly damaging to our constitutional scheme. The AHA also believes that the Second Circuit erred in failing to recognize a rational distinction between assisted suicide and the right to refuse medical care, which the AHA has long-championed.

ARGUMENT

I. THERE IS NO CONSTITUTIONALLY-PROTECTED LIBERTY INTEREST IN PHYSICIAN-ASSISTED SUICIDE

A. A Constitutionally-Protected Liberty Interest in Physician-Assisted Suicide Has No Basis in the Text or Structure of the Constitution or in This Court's Precedents

This Court has been understandably reluctant in recent years to expand the range of substantive due process rights protected by, though not mentioned in, the Constitution.

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional laws having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986).

***5** The Ninth Circuit does not suggest that there is any basis in the language or design of the Constitution for a right to physician-assisted suicide. Rather, the court of appeals attempts to base its decision on two prior decisions of this Court, neither of which will bear that weight. See Compassion in Dying v. State of Washington, 79 F.3d 790, 812-16 (9th Cir. 1996) (relying on Cruzan and Planned Parenthood v. Casey, 505 U.S. 833 (1992)).

In Cruzan, 497 U.S. at 278, the Court correctly recognized that its prior decisions supported "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." At common law, every individual had a right to "bodily integrity," to be free of any physical intrusion without consent. Any unconsented to touching was a battery. Out of this right to be free of battery grew the doctrine of "informed consent" and its "logical corollary," which is that "the patient generally possesses the right not to consent, that is, to refuse treatment." Id. at 269-70. The right to refuse treatment was universally recognized in state law cases and in a series of Due Process Clause decisions leading up to Cruzan. Id. at 269-78.

In Cruzan, the Court assumed without deciding that "under the general holding of our cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person's liberty interest." Id. at 279. In other words, the Court assumed that the long-recognized right to refuse medical treatment includes the right to refuse even treatment necessary to sustain life. The Ninth Circuit has taken that assumption, which was well-grounded in the Court's precedents, and run with it into a wholly "uncharted area" where the "guideposts for responsible decisionmaking ... are scarce and open-ended." Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

***6** The Ninth Circuit claims that "Cruzan, by recognizing a liberty interest that includes the refusal of artificial provision of life-sustaining food and water, necessarily recognizes a liberty interest in hastening one's own death." 79 F.3d at 816. From there, the court of appeals finds that if an individual has a right to commit suicide, he must have a right to assistance in committing suicide. Otherwise, "the state's prohibition on assistance [would] unconstitutionally restrict[] the exercise of that liberty interest." 79 F.3d at 801 (citing Roe v. Wade, 410 U.S. 113 (1973)). And from a right to physician-assisted suicide, the Ninth Circuit--acknowledging that the question is not even before it, but apparently unable to contain its momentum--proceeds to a right to physician-administered suicide (i.e., voluntary euthanasia). Id. at 831.

By this series of little or not so little steps, a complete perversion of the Court's holding in Cruzan is effected. The ultimate basis for the right to decline medical treatment recognized in Cruzan lies in the common law of battery. Unwanted medical care is an unconsented to touching, and it is in that sense that it implicates the liberty interest protected by the Due Process Clause. But physician-assisted suicide has nothing to do with an unconsented to touching. It involves making it possible for the patient himself to take a voluntary action. Neither touching (i.e., the actual administration of medicine) nor a lack of consent is involved. The protection of bodily integrity from unwanted physical invasions is simply not implicated by physician-assisted suicide.

As discussed in more detail below, there is a legitimate and important policy distinction between a patient's decision to decline all treatment and a doctor's decision to prescribe drugs for the express purpose of inducing the patient's death. For present purposes, however, it is enough to recognize that a right to physician-assisted suiccide finds no conceivable support in the common law of battery and in the informed consent and related cases ***7** upon which the Cruzan Court relied. Torn from its moorings in history, the right championed by the Ninth Circuit is a free-floating derelict that can only wreak havoc on our constitutional structure.

A right to physician-assisted suicide finds even less support in Planned Parenthood v. Casey. The Ninth Circuit leans heavily on a single paragraph plucked out of the Casey plurality's 30-page opinion, a paragraph moreover that discusses only in the most general terms the constitutional significance of "intimate and personal choices" that are "central to personal dignity and autonomy." Casey, 505 U.S. at 851. From this the Ninth Circuit remarkably concludes that the Supreme Court has provided an "almost prescriptive" mandate requiring recognition of a fundamental liberty interest in assisted suicide. 79 F.3d at 813 (citations omitted).

But Casey was never intended to be read so broadly. In the first place, the plurality's opinion rests at heart upon stare decisis principles, upholding the abortion right largely because of the need to protect and respect prior court decisions in the abortion field extending back to Roe v. Wade. See Casey, 505 U.S. at 854-69. Indeed, the plurality's reliance on stare decisis in Section III of its opinion was entirely sufficient to decide the controversy before the Court in Casey. Consequently, the very general autonomy discussion found earlier in Section II upon which the Ninth Circuit so heavily relied is no more than dicta of a mere plurality of the Court.

Even if Casey is read as a re-approving (and not just declining to overrule) a due process right to abortion, the two contexts are entirely different. As Judge Noonan noted below, "[i]t is commonly accounted an error to lift sentences or even paragraphs out of one context and insert the abstracted thought into a wholly different context." Compassion in Dying v. State of Washington, 49 F.3d 586, 590 (9th Cir. 1995). This Court has concluded that abortion does not involve the taking of a human life, ***8** because a fetus is not a "person" under the Fourteenth Amendment. Roe, 410 U.S. at 157-58. But no one could claim that physician-assisted suicide is not the deliberate taking of a human life, and that fact gives rise to legitimate state interests in preventing physician-assisted suicide that are not implicated in the abortion context.

The Ninth Circuit's reading of Casey's autonomy discussion goes too far in other respects as well. If the Constitution protects as a fundamental liberty interest every "intimate" or "personal" decision, as the Ninth Circuit suggests, this Court must acknowledge frankly that Bowers v. Hardwick, 478 U.S. at 191, is no longer the law (something the Ninth Circuit strongly hints should happen). And it must be prepared for future automony-based constitutional challenges to laws banning any private consensual act of significance to the participants in defining their "own concept of existence." Casey, 505 U.S. at 851. As Judge O'Scannlain queried: "If physician-assisted suicide is a protected 'intimate and personal choice,' why aren't polygamy, consensual duels, prostitution, and, indeed, the use of illicit drugs?" Compassion in Dying v. State of Washington, 85 F.3d 1440, 1444 (9th Cir. 1996) (dissenting from denial of rehearing en banc by the full court).

Finally, even if the Court could somehow restrict the right of "intimate and personal choice" to physician-assisted suicide, it would still be enmeshed in endless problems of line drawing of the sort that have plagued the Court's abortion jurisprudence. As the Ninth Circuit itself conceded, the federal courts will have to determine what "appropriate, reasonable, and properly drawn safeguards" states are permitted to devise to control physician-assisted suicides. 79 F.3d at 833. Once again, states will be legislating "against a background of federal constitutional imperatives that are unknown because they are being newly crafted from Term to Term." Cruzan, 497 U.S. at 293 (Scalia, J., concurring).

***9** This process of uncertainty will place a severe burden on hospitals and other health care providers that will be called upon to provide physician-assisted suicide. They will be acting against a background of uncertainty and potential liability for years to come. Moreover, they will be under great pressure to provide a service that some providers consider antithetical to the integrity of their profession and their own sense of ethics. The patient's right to abortion has been distorted by at least one court into an obligation placed on a private hospital--deemed "quasi-public" in part because of its acceptance of some public funding, but primarily because "[t]he hospital was the only one serving the community"--to make its facilities available for non-therapeutic (elective) abortions. Mat-Su Coalition for Choice v. Valley Hosp. Assoc., No. 3PA-92-1207, slip op. 11 (Alaska Super. Ct. Feb. 9, 1993). If the courts feel free to override the conscience of health care providers in that context, there is a danger they will do so here as well.

Justice O'Connor stated in Casey that abortion is "unique" in American constitutional jurisprudence. See 505 U.S. at 852 (concurring). Given the problems of legitimacy and line-drawing inherent in the Court's abortion rulings, it would be a "great misfortune" if the Court were to embark on a comparable venture here. Cruzan, 497 U.S. at 293 (Scalia, J., concurring).

B. A Constitutionally-Protected Liberty Interest in Physician-Assisted Suicide Is Not So Rooted in Our Traditions That It May Be Deemed "Fundamental"

Before it recognizes any new liberty interest, the Court has required that the asserted interest be "so rooted in the traditions and conscience of our people as to be ranked as fundamental." [3] Far from being rooted in our traditions, ***10** physician-assisted suicide has long been illegal and continues to be so in the vast majority of states.

Forty-five states and the District of Columbia currently forbid assisted suicide. [4] At the time of the adoption of the Fourteenth Amendment in 1868, "twenty-one of the thirty-seven states, and eighteen of the thirty ratifying states prohibited assisted suicide." Thomas J. Marzen, Mary K. O'Dowd, Daniel Crone & Thomas J. Balch, Suicide: A Constitutional Right?, 24 Duquesne L. Rev. 1, 76 (1985). Moreover, "most States that did not explicitly prohibit assisted suicide in 1868 recognized, when the issue arose in the 50 years following the Fourteenth Amendment's ratification, that assisted and (in some cases) attempted suicide were unlawful." Cruzan, 497 U.S. at 295 (Scalia, J., concurring) (citing Marzen et al., 24 Duquesne L. Rev. at 77-100).

At common law, assisted suicide was also forbidden. As a prominent 19th century treatise explained, the consent of the victim is "wholly immaterial to the guilt of the person who causes [his death]." [5] Court after Court reached the same result. [6]

***11** Moreover, neither the common law nor any statutory proscription of assisted suicide has ever made any distinction based on the physical condition of the suicide or the time left to him. That the suicide was about to die anyway, or would have had a more painful natural death than the one provided him by the assistant, has been treated as no defense to assisted suicide. Thus, in Black-burn v. State, 23 Ohio St. 146 (1872), the Ohio State Supreme Court explicitly remarked that

> [t]he lives of all are equally under the protection of the law, and under that protection to their last moment. The life of those to whom life has become a burden--of those who are hopelessly diseased or fatally wounded--nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live.

Id. at 163. See also People v. Roberts, 178 N.W. at 693 (same); Commonwealth v. Bowen, 13 Mass. 356, 360 (1816) (prisoner who persuaded another to comimt suicide can be tried for murder, even though the suicide was scheduled for imminent execution; it is irrelevant "that but a small portion of [the suicide's] earthly existence could in any event remain to him.").

In short, the supposed right to assisted suicide recognized by the court below is unprecedented in the law of this Nation and in our common law origins. Under the circumstances, such a right can hardly be said to be so rooted in our traditions as to warrant constitutional recognition.

*12 C. States Have Compelling Reasons to Ban Physician-Assisted Suicide

Even if the Court were to find some sort of liberty interest in assisted suicide, states can still ban the practice if they have compelling reasons to do so. Cruzan, 497 U.S. at 280 ("'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests'") (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982)).

Petitioners and their other amici describe in detail the various state interests underlying a ban on physician-assisted suicide. The AHA will not repeat that discussion here. Nor does the AHA endorse any conclusion that the balance of considerations, as a policy matter, favors criminalizing physician-assisted suicide. But, as a matter of constitutional law, it should be clear that the various state interests are sufficient to allow a state, if it so chooses, to override any alleged liberty interest of the patient in obtaining assistance to commit suicide.

Herein lies the most offensive aspect of the Ninth Circuit's decision. The court arrogantly and disdainfully dismisses the state interests supporting a ban on assisted suicide simply on the grounds that it disagrees with them. See 79 F.3d at 816-32. But there is no single right answer to such a difficult issue as assisted suicide. There are instead a whole series of counterveiling considerations that tug policy makers first in one direction, then in another. Different states, forced to make a choice, will diverge in their approaches.

The Court's suggestion in Cruzan that any liberty interest must be balanced against relevant state interests could not have been intended to suggest that there is only one right answer to such questions, much less that the answer lies in the sole possession of the judiciary. As long as a state can articulate compelling policy justifications ***13** for banning the practice, the Court cannot substitute its own policy analysis for that of the state. As Judge Kleinfeld explained below:

"The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary."79 F.2d at 858.

II. THERE IS A RATIONAL BASIS FOR THE DISTINCTION BETWEEN ASSISTED SUICIDE AND THE REFUSAL OF MEDICAL TREATMENT

"It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 33 (1973). Yet that, of course, is precisely what the Second Circuit has done in concluding that the State of New York cannot allow patients to refuse life-sustaining medical treatment while, at the same time, forbidding physician-assisted suicide. The Second Circuit, just like the Ninth, has taken the right of a competent adult to refuse medical care and blown it up into a general right to "hasten death," which it then concludes must rationally embrace the right to physician-assisted suicide.

Under this Court's precedents, New York need only establish that the statutory distinction at issue is "rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985). This New York can easily do. Physician-assisted suicide by definition involves an intention on the part of both doctor and patient that the patient die. The withdrawal of care, though it may also result in death, need involve no comparable intent on the part of the physician or even the patient. That difference provides ample support for the statutory distinction drawn by New York.

Under New York penal law, and the law of virtually all other jurisdictions, a person is guilty of assisted suicide ***14** only if he "intentionally aids another person to commit suicide" (emphasis added). [7] Suicide itself has always been understood as an intentional act. [8] Thus, to be guilty of the crime of assisted suicide, one must intentionally aid another person who intends to kill himself. [9]

New York's assisted suicide law is absolute and creates no classifications on its face. All intentional acts of aiding another intentionally to kill himself are proscribed. Nonetheless, the Second Circuit reasons that New York treats similarly-situated classes of persons differently because it ***15** recognizes a patient's right to withhold or withdraw life-sustaining medical treatment while at the same time it refuses to allow "self-administr[ation] [of] prescribed [lethal] drugs" to "hasten death." Quill v. Vacco, 80 F.3d 716, 729 (1996).

This reasoning overlooks a key distinction. In all cases where the physician prescribes and the patient administers a lethal dose of drugs to hasten death, the intent of both doctor and patient is to see the patient die. Indeed, if the patient continues to live by accident, that represents a frustration of the patient's and physician's will, and to effectuate their plans the parties will have to try again. [10] By contrast, in refusal of care cases, the physician and patient may know that removing the respirator or stopping the feeding tube will result in death, but they need not intend it. If the patient somehow manages to live without the rejected care, it may actually be a cause for celebration, not regret or frustration. [11]

***16** Even where death is inevitable, the decision not to prolong life at the cost of invasive care is not the same as the intent to cause death. It has become increasingly common for patients either to refuse "basic" life-sustaining care such as feeding or hydration tubes, or to leave behind "living wills" requiring that such treatment not be given. No intent to die is necessarily involved in such instructions. To the contrary, the intention is usually to avoid the discomfort and perceived indignity such care involves. [12]

If a soldier accepts death in battle to avoid dishonor in running away, he does not commit suicide, and the general who orders him into battle does not murder him. Similarly, if a patient accepts death to avoid the pain and indignity of continued treatment, he does not commit suicide, and the doctor who respects his wishes does not murder him. "To call these judgments [to refuse or withdraw treatment] 'intending' death distorts what actually happens.... [I]f I stop shoveling my driveway in a heavy snowstorm because I cannot keep up with it, am I thereby intending a driveway full of snow?" Daniel Callahan, The ***17** Troubled Dream of Life: Living with Mortality, 77-78 (1993). [13]

In the course of recognizing the right to refuse medical care, New York State has explicitly recognized that withdrawing medical care need not involve any intent to kill and, thus, in no way sustains or supports a right to assist suicide. See Eichner v. Dillon, 426 N.Y.S.2d 517, 544 (1980) ("the withdrawal of the respirator evinces only an intent to ... allow the processes of nature to run their course"). Court after court across the country has likewise found that because the patient and physician at issue sought to discontinue medical care without intending death, their actions did not constitute suicide or implicate laws banning assisted suicide. [14]

***18** The State surely has a legitimate interest in choosing not to wade across the moral Rubicon that has always separated intentional killings from unintentional ones. See, e.g., New York State Task Force at 112 ("[f]or many, the prohibition against actively and intentionally killing innocent persons represents a basic moral and social norm. Diverse philosophical and religious perspectives affirm this view."); House of Lords, Report of the Select Committee on Medical Ethics 53 (1994) ("[t]o disinguish between murder and 'mercy killing' would be to cross the line which prohibits intentional killing, a line which we think essential to preserve."). And this interest is not diminished by the fact that--in some class of cases involving the refusal of care--the waters of that river may appear muddy.

CONCLUSION

For the reasons stated above, the judgments in Glucksberg and Quill should be reversed.

Footnotes

1 The AHA has the written consent of Petitioners and Respondents in both cases to the filing of this brief. Letters indicating their consent have been filed with the Clerk of the Court.

2 See, e.g., Brief of the AHA as Amicus Curiae, in Support of Petitioners in Cruzan v. Director of Missouri Dep't of Health, No. 88-1503 (S. Ct. Sept. 1, 1989) (urging recognition of right to refuse medical treatment).

3 Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (requiring proof that the asserted interest is "deeply rooted in this Nation's history and tradition"); Michael H. v. Gerald D., 491 U.S. 110, 123 (1989) (plurality opinion) (insist[ing] that the asserted liberty interest be rooted in history and tradition").

4 See Edward R. Grant and Paul B. Linton, Relief or Reproach?: Euthanasia Rights in the Wake of Measure 16, 74 Ore. L. Rev. 449, 462 (1995) (citing state statutes).

5 Sir James Fitzjames Stephen, 2 A History of the Criminal Law of England 16 (1883).

6 See, e.g., Wharton's Criminal Law § 46, at 232-33 (Charles E. Torcia, ed. 1978); Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 477 (2d ed. 1986); Gospodareck v. State, 666 So. 2d 835, 842 (Ala. Crim. App. 1993); State v. Fuller, 278 N.W. 2d 756, 761 (Neb. 1979); State v. Mays, 307 S.E.2d 655 (W. Va. 1983); State v. Cobb, 625 P.2d 1133 (Kan. 1981); Turner v. State, 108 S.W. 1139 (Tenn. 1907); People v. Matlock, 336 P.2d 505 (Cal. 1959 (en banc)); State v. Bouse, 264 P.2d 800 (Ore. 1953); People v. Roberts, 178 N.W. 690 (Mich. 1920).

7 N.Y. Penal Law § 125.15 (McKinney 1987); see also id. at § 120.30 ("A person is guilty of promoting a suicide attempt when he intentionally ... aids another person to attempt suicide.").

8 See, e.g., Model Penal Code and Commentaries § 210.5, comment 1, at 91-92 (1980) (common law crime of suicide "consisted of intentional self-destruction by a person of sound mind and body"); John Bouvier, Law Dictionary and Concise Encyclopedia 3178 (3d ed. 1914) ("To be guilty of [[suicide], the deceased must have had the will and intention of committing it, or else he committed no crime."); Sir Matthew Hale, 1 Pleas of the Crown at 411 (1847) (crime of felo de se requires proof that suicide "voluntarily kill[ed] himself"); E. Wingate, Justice Revisited: Being the Whole Office of a County Justice of the Peace 61, 88 (1661) (the crime of felo de se requires proof that a person "destroy[ed] himself out of premeditated hatred against his own life"); Sir William Blackstone, Commentaries on the Laws of England 189 (1769) (act must be undertaken "deliberately" or as part of an "unlawful malicious" act).

9 The intent component of assisted suicide and suicide has always been critical to prevent overinclusiveness problems. If the mental element required were "knowledge" that death would result, many martyrs would be "suicides" and those who aided them guilty of assisted suicide. And the same would hold with soldiers who went ashore at Normandy and those who supported them. Several hundred years ago Hale illustrated the absurdities that would result if intent were not part of the very definition of suicide: "If A., with an intent to prevent gangrene beginning in his hand doth without any advice cut off his hand, by which he dies [bleeding to death], he is not thereby felo de se, for tho it was a voluntary act, yet it was not with an intent to kill himself." Hale, 1 Pleas of the Crown, at 412.

10 See "If the Drink Does Not Work, The Syringe Is At Hand", Nederlands Dagblad (July 6, 1994) (quoting Dutch physician) (translated from the Dutch: "Als het drankje niet werkt, dan ligt de spuit al klaar").

11 The Second Circuit muddies the waters by suggesting physicians assisting suicide intend only to relieve suffering. See Quill, 80 F.3d at 730 ("[a]nd what business is it of the state to require the continuation of agony"). But the physicians-respondents in both the Second and Ninth Circuit cases themselves concede they intend to see their patients die (if only as a means to their further intention of relieving suffering). See, e.g., id. at 719 (physicians conceding that they wish to violate New York law banning intentionally aiding in suicide). And, indeed, they must make that admission: if they lacked the intent to help kill they would by definition be innocent of assisting suicide and lack standing to pursue this claim. Physician-respondents readily concede, in sum, that they intend to kill, even if they are motivated by a further intent to stop suffering. See New York State Task Force on Life and the Law, When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context, at 61 (May 1994) ("it is significant that intent does not mean motive, and does not imply an evil state of mind. The fact that the physician acts benevolently, out of compassion for the patient, would not be a defense to liability [for assisted suicide]").

12 See, e.g., New York State Task Force at 146 ("[i]n many cases, the patient must also be physically restrained to accept treatment"); Alan Meisel, The Right to Die 98 (1992 Supp.) (noting that up to 53% of patients require physical restraints to keep them from removing feeding and hydration tubes); id. (noting that feeding and hydration tubes can cause substantial pain and discomfort since tubes inserted directly into the stomach necessitate a surgical procedure which "may lead to leakage of acidic stomach contents, causing sores and infections"); Jacquelyn A. Beatty, Comment, Artificial Nutrition and the Terminally Ill: How Should Washington Decide? 61 Wash. L. Rev. 419, 425 (1986) (nasogastric tubes can "painfully irritate the patient, causing bleeding and ulceration. Tubes can be misplaced, which may lead to infection and death. Aspiration-included pneumonia is a frequent complication").

13 It is commonplace for Jehovah's Witnesses or Christian Scientists to refuse blood transfusions or life-saving surgery and die as a direct result, yet we hardly call these acts of suicide because no intent to die is involved. Death may be accepted as a consequence, but it is not purposely sought.

14 See, e.g., McKay v. Bergstedt, 801 P.2d 617, 625-26 (Nev. 1990) (holding refusal of life-sustaining care not tantamount to suicide since "Kenneth harbored no intent to take his life ... he did not seek his own destruction. Unlike a person bent on suicide, Kenneth sought no affirmative measures to terminate his life ... he asked no one to shorten the term of his natural life free of the respirator"); Application of the President & Directors of Georgetown College, 331 F.2d 1000, 1009 (D.C. Cir. 1964) (Skelly Wright, J.) (in case where patient refuses blood transfusion, "[t] he Gordian knot of this suicide question may be cut by the simple fact that Mrs. Jones did not want to die."); Satz v. Perlmutter, 362 So. 2d 160 (Fla. App. 1978) ("The testimony of Mr. Perlmutter ... is that he really wants to live, but to do so, God and Mother Nature willing, under his own power. This basic wish to live plus the fact that he did not self-induce his horrible affliction, precludes his further refusal of treatment from being classed as attempted suicide."); In re Claire C. Conroy, 486 A.2d 1209, 1224 (N.J. 1985) (declining life-sustaining treatment distinguishable from suicide because it "merely allows the disease to take its natural course"); Bouvia v. Superior Court, 225 Cal. Rptr. 297, 306 (Cal. App. 1986) (a "decision to allow nature to take its course is not equivalent to an election to commit suicide with ... parties aiding and abetting therein").

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1997 WL 367008 (U.S.) (Appellate Brief)
Supreme Court of the United States.

LEXECON INC., et al., Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, A Partnership, et al., Respondents.

No. 96-1482.
July 3, 1997.

On Writ of Certiorari to the United States Court of for the Ninth Circuit

BRIEF FOR THE PETITIONERS

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***i** QUESTION PRESENTED

Whether a district court, to which a case has been transferred solely for "consolidated pretrial proceedings" under the federal multidistrict litigation statute, 28 U.S.C. § 1407(a), may transfer the case to itself for purposes of trial, notwithstanding section 1407(a)'s explicit command that every such case "shall be remanded" at the conclusion of pretrial proceedings "to the district from which it was transferred."

***ii** PARTIES TO THE PROCEEDING BELOW

The following persons or entities were parties to the proceeding in the court of appeals:

Lexecon Inc.

Daniel R. Fischel

Milberg Weiss Bershad Hynes & Lerach

Cotchett, Illston & Pitre

Patrick Coughlin

William S. Lerach

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Melvyn I. Weiss

Patricia Hynes

Michael C. Spencer

Stephen R. Steinberg

Joseph Cotchett

Susan Illston

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Lexecon Inc. is a privately held corporation that has no parent companies or subsidiaries that have issued shares to the public.

West Headnotes (1)

Federal Courts Multi-District Litigation;Transfer for Pre-Trial Proceedings

When case has been transferred to district court solely for consolidated pretrial proceedings under federal multidistrict litigation statute, may that district court transfer case to itself for purposes of trial, notwithstanding statute's command that every such case "shall be remanded" at conclusion of pretrial proceedings to district from which it was transferred? 28 U.S.C.A. § 1407(a).

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*1 OPINIONS BELOW

The opinion of the court of appeals (J.A. 28-80) is reported at 102 F.3d 1524. The district court's opinion granting summary judgment in part is reported at 884 F. Supp. 1388; the district court's decision granting defendants' motion to dismiss in part is reported at 845 F. Supp. 1377. The district court's order staying consideration of the remand issue (CR 311 [1]) is unreported, as is the court's later decision denying petitioners' request for remand and transferring this case to itself for all purposes, including trial (J.A. 20-21). The decision of the Judicial Panel on Multidistrict Litigation (J.A. 17-19) ***2** transferring this case to the District of Arizona for coordinated pretrial proceedings is also unreported.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on December 20, 1996. Lexecon Inc. and Daniel R. Fischel filed a timely petition for certiorari on March 18, 1997. This Court granted certiorari on May 19, 1997, limited to the first question presented in the petition. 65 U.S.L.W. 3766.

STATUTES INVOLVED

The federal multidistrict litigation statute, 28 U.S.C. § 1407(a), provides in pertinent part:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

The federal transfer statute, 28 U.S.C. § 1404(a), provides in relevant part:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

*3 STATEMENT OF THE CASE

This case presents a straightforward issue of statutory interpretation.

The federal multidistrict litigation statute authorizes the Judicial Panel on Multidistrict Litigation ("JPML" or "panel") to transfer cases only "for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). The statute further provides that "[e]ach action so transferred *shall be remanded* by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." *Id.* (emphasis added).

Despite this plain statutory command, a divided panel of the Ninth Circuit ruled that an action transferred under section 1407(a) need *not* be remanded at or before the conclusion of consolidated pretrial proceedings. Instead, the majority concluded, a transferee court may use the general federal transfer statute—which authorizes transfer only "to any *other* district or division where it might have been brought" (28 U.S.C. § 1404(a) (emphasis added))—to override the mandate of section 1407(a) and to "transfer" a case to *itself* for all purposes, including trial.

A. Background and Prior Proceedings.

The Parties' Dispute. Lexecon is one of the nation's leading law and economics consulting firms. Daniel Fischel is a principal of Lexecon and the Lee and Brena Freeman Professor of Law and Business at the University of Chicago Law School. Professor Fischel frequently testifies as an expert in complex class action securities cases.

The respondents—two law firms (Milberg Weiss Bershad Hynes & Lerach ("Milberg") and Cotchett, Illston & Pitre ("Cotchett")) and certain individual members of those firms—are plaintiffs' class action lawyers. They have, in recent years, brought numerous, highly-publicized class action securities lawsuits. Professor Fischel provided what was characterized by the Wall ***4** Street Journal and other commentators as decisive testimony for the defense in a number of those suits, thereby costing the respondent law firms millions of dollars in contingency fees.

Angered by this succession of costly losses, respondents engaged in a wide-ranging effort to ruin Lexecon's reputation and, as one of the respondents put it, to "destroy" Professor Fischel. CR 127, Amended Complaint ¶¶ 1-6. The first step in respondents' scheme was to name Lexecon as a defendant in *Shields v. Keating,* a case heard in the District of Arizona as part of MDL No. 834, *American Continental Corporation/Lincoln Savings & Loan Litigation.* Respondents, who were class counsel in that case, knew that Lexecon had engaged in no wrongdoing, but nevertheless falsely accused Lexecon of complicity with Charles Keating in one of the most notorious financial scandals of this century. Respondents repeatedly acknowledged, even boasted, to third parties that the suit against Lexecon was without merit, but was being pursued as a vendetta against Lexecon and Professor Fischel. CR 127, Amended Complaint ¶¶ 39, 63, 67.

Respondents then used their *Lincoln Savings* complaint against Lexecon in courtrooms around the country, in the press, and with Lexecon's clients and business associates to portray Professor Fischel as a "crook" and a "racketeer" and Lexecon as a firm whose expert credentials could no longer be trusted. CR 127, Amended Complaint ¶¶ 36-37, 46, 56-57, 93-98. In furtherance of their scheme, respondents knowingly used fabricated evidence, attempted to extort perjured testimony, defrauded the courts, and engaged in wholesale document destruction. *See, e.g.,* CR 127, Amended Complaint ¶¶ 43, 69-73, 110.

Lexecon was dismissed from the *Lincoln Savings* case in August 1992. As a result of respondents' misconduct, however, Lexecon lost millions of dollars in fees, and both petitioners suffered significant damage to their reputations. CR 127, Amended Complaint ¶¶ 46-48, 50-55, 103, 117.

***5** The Filing of this Action and Pretrial Proceedings in Chicago. On November 25, 1992, Lexecon and Professor Fischel (hereinafter jointly "Lexecon") filed the instant action in the United States District Court for the Northern District of Illinois, Lexecon's principal place of business and a forum in which many of the alleged wrongful acts occurred. Lexecon sought damages for respondents' malicious prosecution of the *Lincoln Savings* case, abuse of process, tortious interference with petitioners' existing and prospective client relationships, defamation, and commercial disparagement. The case was assigned to Judge James B. Zagel.

After Lexecon filed its complaint in Chicago, Judge Richard M. Bilby, who had presided over the earlier *Lincoln Savings* case in Arizona, somehow obtained a copy and read it. On December 31, 1992, Judge Bilby—although he had no live dispute involving Lexecon before him at the time—*sua sponte* issued an "order" purporting to "clarify" the basis on which Lexecon had been dismissed from the *Lincoln Savings* case. *See* J.A. 33 n. 2. In his order, Judge Bilby expressed his view that, contrary to the allegations in Lexecon's complaint and what Judge Bilby himself said at the time he dismissed Lexecon as a "non-settling defendant," the *Lincoln Savings* litigation had not terminated favorably to Lexecon. [2] Judge

Bilby proceeded to recount his own understanding of various off-the-record events relating to the dismissal in order, he explained, to give "the judge in Chicago ... something to rely on." Milberg 9th Cir. Excerpts of Record at 441. Judge Bilby recognized that his recollection of these events made him a potential witness in the Lexecon case in Chicago, but stated, "that ain't going to happen." *Id.* at 437.

***6** Respondents argued to Judge Zagel that Judge Bilby's order was somehow "preclusive," and that Judge Zagel should stay all proceedings in Chicago. CR 23, at 10. But Judge Zagel indicated that he did not agree with that analysis. Judge Zagel noted that if Judge Bilby had relevant factual knowledge concerning the events, he could be a witness, but that, even if "Judge Bilby's order was written in stone and can never be erased, its effect here based on the law as I currently understand it is likely not to be preclusive." *Id.* In subsequent rulings, Judge Zagel rejected defendants' challenges to the court's jurisdiction, compelled discovery over defendants' objections, and indicated his disagreement with respondents' argument that the Arizona tort of malicious prosecution was unconstitutional. *See* CR 107, at 3, 10; CR 120, at 64-67.

The Transfer of the Case to Arizona. Seeking to avoid Judge Zagel's unfavorable rulings, respondents filed a motion with the JPML pursuant to 28 U.S.C. § 1407 to transfer this case to Judge Bilby and to consolidate it with the *Lincoln Savings* litigation. Before the JPML could rule on defendants' motion, however, Judge Bilby sent a letter to the JPML recusing himself because his; "involvement" in the resolution of the underlying case would make it "improper" for him to act as a judge in this case. CR 149, Exh. A, at 1.

Notwithstanding Judge Bilby's recusal, respondents renewed their motion to transfer, asking the JPML to send this case to any other judge in Arizona. Lexecon objected to that motion because none of the other Arizona judges had any experience with the *Lincoln Savings* litigation. Moreover, the few remaining *Lincoln Savings* cases did not involve common questions of fact and either had already been tried or had settlements pending approval, making coordinated *pretrial* proceedings impossible. There was no reason to believe, therefore, that a transfer would "promote the just and efficient conduct of such actions" through "coordinated or consolidated pretrial proceedings." *See* 28 U.S.C. § 1407(a).

***7** In spite of these objections, in June 1993 the JPML granted respondents' motion to transfer. In the panel's view, transfer was appropriate because: (1) there was an extensive "document depository" in Arizona; (2) there might be some opportunity for coordination with an unfinished settlement involving one of the *Lincoln Savings* defendants; and (3) the Ninth Circuit was hearing an appeal that "m[ight] be relevant to the *Lexecon* claims." J.A. 18-19.

Proceedings in Arizona. Following the transfer, the case was assigned to Judge John M. Roll, who had no prior familiarity with this matter or with any of the *Lincoln Savings* cases. No coordinated or consolidated pretrial proceedings of the sort envisioned by the JPML ever ensued. The "document depository" was never used, and was in fact shut down in July 1993; there was no coordination with the unfinished *Lincoln Savings* settlement, pending before a different judge, which was completed in February 1994; and the Ninth Circuit appeal that the JPML thought "m[ight] be relevant" was dismissed in June 1993.

Nor were there any identifiable efficiencies in the pretrial process: there were no joint depositions and no coordinated document production. The documents produced in discovery—more than a million pages—were all kept in Illinois, and only one of the 42 deponents and potential deponents identified by the parties resided in Arizona. Indeed, once they got the case transferred out of Chicago, respondents did not even propose any coordinated or consolidated pretrial proceedings. The net effect of the transfer, therefore, was to supplant the judge in petitioners' home district who had spent six months working on the case with a new judge thousands of miles away who knew nothing of the matter and had to start from scratch.

By August 1994, the case had been pending in Arizona for more than a year without any coordinated or consolidated pretrial proceedings. Moreover, as noted, the three ***8** factors identified by the JPML as supporting the transfer no longer existed. Accordingly, on August 5, 1994, petitioners moved—pursuant to the procedures specified by the JPML (*see* JPML Rule 14(d))—for the district court to refer the case back to the JPML for remand to the Northern District of Illinois. *See* CR 288. Respondents opposed the suggestion of remand, not because any consolidated or coordinated pretrial proceedings were planned, but rather because merits discovery had not yet been completed *in this case.* Judge Roll deferred decision on the remand issue until the end of discovery. CR 311, at 1. But he offered no justification for continuing to hold onto the case notwithstanding section 1407(a)'s requirement that all such cases "shall be remanded" at or before the conclusion of coordinated pretrial proceedings.

When discovery ended in November 1994, petitioners again asked Judge Roll to comply with the statute and return the case to the JPML for remand to Illinois. Respondents objected to the request, and at this point urged the court to transfer the case to itself for all purposes pursuant to 28 U.S.C. § 1404(a).

Judge Roll once more declined to rule on the motion for remand, or to offer any justification for keeping the case after there was no longer even a pretense of coordinated pretrial proceedings. Instead, he proceeded to make dispositive rulings on virtually all of petitioners' claims. For example, on December 15, 1994, having previously accepted respondents' argument that the Arizona common law tort of malicious prosecution was unconstitutional (the precise argument rejected by Judge Zagel), Judge Roll denied with prejudice petitioners' motion for leave to amend their complaint to comport with his ruling. CR 481, at 1. And, on April 24, 1995, Judge Roll granted summary judgment in favor of respondents on all remaining claims, except for one aspect of Lexecon's defamation claim. *See* 884 F. Supp. at 1397.

On May 5, 1995, the Arizona district court denied petitioners' motion to remand and simultaneously granted ***9** respondents' request that it transfer the case permanently to itself. J.A. 20-21. Without mentioning the language of Section 1407, the court stated that there was "[s]ubstantial authority" establishing that section 1407 does not require a case to return to its original district after coordinated pretrial proceedings are complete. J.A. 20. The court further concluded, again without mention of the relevant statutory language, that 28 U.S.C. § 1404 gave it the "power to transfer this action to itself." *Id.*

Lexecon's Petition for Mandamus. Lexecon believed that the district court's order denying remand and transferring the case to itself violated sections 1404 and 1407 and subjected the company to potentially irreparable harm—forcing it to go to trial in a forum thousands of miles from home where "there was much popular feeling" against entities that, like Lexecon, were alleged to have been involved in the Charles Keating/Lincoln Savings scandal. J.A. 74 (Kozinski, J., dissenting). Lexecon thus petitioned the Ninth Circuit for a writ of mandamus.

The Ninth Circuit held oral argument on the mandamus petition, but eventually determined that extraordinary relief was not warranted. J.A. 23-25. The two-judge majority acknowledged that the text of section 1407 provided an apparently "clear statutory mandate" and that the court "might well" decide on direct review that the district court's transfer decision was unlawful. J.A. 24, 25. Ultimately, however, the majority accepted respondents' argument that mandamus was unnecessary because Lexecon could seek review of the denial of remand and the self-transfer on direct appeal following a final judgment. J.A. 23.

Judge Kozinski dissented. He would have issued the writ to correct the district court's "egregious" error in "disregard[ing] the statutory mandate" of sections 1404 and 1407. J.A. 25, 25-26 (Kozinski, J., dissenting). In Judge Kozinski's view, it was "hard to imagine a clearer statutory ***10** command" than that contained in section 1407, and mandamus should be granted to "say [ ] loud and clear that the Multidistrict Panel assigns cases only for pretrial proceedings." J.A. 25, 26 (Kozinski, J., dissenting). "When it comes to conducting a trial (and resolving other dispositive matters)," Judge Kozinski stressed, "plaintiffs retain their ancient right to select the forum." J.A. 27 (Kozinski, J., dissenting).

Trial. Trial on the remaining defamation issue—which was governed by Illinois law—then went forward in the District of Arizona. The Milberg respondents prevailed in a jury trial, and the district court entered final judgment. CR 681, 684. [3]

B. The Decision Below.

On appeal, a different and sharply divided panel of the Ninth Circuit affirmed the district court's transfer rulings in all respects. Judge Kozinski was the only member of this panel who had also ruled on the mandamus petition.

The majority, relying on "longstanding practice and the efficiency arguments" (J.A. 40), found no flaw in the district court's refusal to remand and its decision to transfer this case to itself. Such transfers, the majority stated, are authorized by the JPML's rules and by a series of court of appeals and district court decisions. J.A. 39 & n. 3 (collecting cases). The majority further concluded that, in multidistrict litigation, the judicial interest in "efficien[t]" disposition of cases "trump[s]" the "usual deference to a plaintiff's choice of forum." J.A. 40 & n. 5. Finally, the majority suggested that section 1407 is concerned only with the powers of the JPML and thus does not disturb ***11** the "traditional powers of the district court to which a case has been transferred." J.A. 41.

Judge Kozinski again dissented. Expanding on his earlier opinion, he stressed that self-transfer conflicts with the plain language of section 1407 and with Congress's explicit refusal to authorize multidistrict transferee courts to conduct trials. J.A. 57-58 (Kozinski, J., dissenting). Nor could self-transfer be justified by reference to section 1404(a), whose text states "in plain and simple terms" that a case may be transferred only to " 'any *other* district or division where it might have been brought.' " J.A. 68-69 (Kozinski, J., dissenting) (quoting section 1404(a)). This language, Judge Kozinski explained, cannot be read "to authorize a district court to transfer a case to itself." J.A. 69 (Kozinski, J., dissenting). Accordingly, Judge Kozinski would have reversed the judgment below and vacated all the district court's rulings issued after August 1994, when Lexecon first sought a remand and it was clear that "all coordinated and/or consolidated pretrial proceedings —to the extent there ever were any—had come to an end." J.A. 79 n. 22 (Kozinski, J., dissenting).

SUMMARY OF ARGUMENT

The lower federal courts have illegitimately converted the multidistrict litigation statute into a mechanism for shuttling entire cases off to far-flung districts for trial in forums that plaintiffs would never have chosen. As Judge Kozinski explained, Congress intended the multidistrict litigation statute to preserve plaintiffs' choice of forum, while "tak[ing] advantage of consolidated or coordinated discovery with other cases having a common factual nucleus." J.A. 57 (Kozinski, J., dissenting). Since the law was enacted, however, federal judges have "develop[ed] proprietary feelings toward the cases entrusted to them" and have "routine[ly]" refused to relinquish them at the end of consolidated pretrial proceedings. J.A. 58 (Kozinski, J., dissenting). Thus, in multidistrict litigation, plaintiff's choice of forum—which, under traditional principles, ***12** "should rarely be disturbed" (*Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508 (1947))—has "devolved to the significance of a tailbone or an appendix." J.A. 71 (Kozinski, J., dissenting).

This practice of "self-transfer" cannot be reconciled with the language of either section 1407 or section 1404. It is directly contrary to all evidence of congressional intent and to the historical right of plaintiffs to choose their forum for trial. And it has been criticized as a usurpation of legislative authority by a host of scholarly commentators—including Professor Charles Alan Wright, who has filed a brief in this Court supporting petitioners.

A. Congress has said in language "clear as sunlight" (J.A. 57 (Kozinski, J., dissenting)) that multidistrict transfers are only for "coordinated or consolidated pretrial proceedings." No later than the conclusion of such proceedings, these cases "shall be remanded" to the original districts from which they were transferred. 28 U.S.C. § 1407(a).

Accordingly, a transferee court has no authority to retain a case after its congressionally-granted power to oversee coordinated pretrial proceedings has expired. At that point, the statute's plain terms require that the case be returned to the district court originally chosen by the plaintiff. The practice of "self-transfer," endorsed by the Ninth Circuit here, defies this unambiguous statutory command and is thus unlawful.

The general federal transfer statute, 28 U.S.C. § 1404(a), provides no basis for circumventing the mandate of section 1407(a). The transferee court's entire authority over the case derives from section 1407(a) and is therefore circumscribed by its terms. The transferee court may not, in the exercise of a limited power to conduct coordinated pretrial proceedings, claim permanent jurisdiction over the entire case. Indeed, the recognition of such a power would render section 1407's express requirement that cases "shall be remanded" at the conclusion of consolidated pretrial proceedings ***13** utterly meaningless. Under such a theory, remand would not be mandatory at all, but, rather, would be entirely within the discretion of the transferee court. That result cannot be squared with the plain text of section 1407.

Furthermore, section 1404(a) itself states—again in remarkably direct language—that a court may transfer a case only to some "*other* district," not to itself. There is simply no reasonable way to infer from the plain English of that provision that Congress intended to permit self-transfer.

B. The legislative history of section 1407(a) confirms what its language so plainly states. Congress understood that it was authorizing transfers solely to ease pretrial burdens; at or before the conclusion of coordinated pretrial proceedings, the case must return to the forum where the plaintiff chose to file suit.

Indeed, the federal judicial report that provided the basis for the new legislation offered express assurances that the proposed statute would not disturb the plaintiff's choice of forum for trial. And the House Report accompanying the legislation confirmed that section 1407(a) was not to "affect the place of trial in any case"; subsequent "amendments" to the statutory language would be necessary to permit multidistrict transfers for all purposes.

C. The clear meaning of the federal statute, reinforced by unequivocal legislative history, cannot properly be ignored on the strength of past practice or judicial judgments as to wise policy. Congress established the relevant policy—a balance of efficiency and respect for plaintiffs' historical right to choose their forum—in the text of section 1407(a). And, as the Court recently made abundantly clear in *Amchem Products, Inc. v. Windsor,* No. 96-270 (U.S. June 25, 1997), the judiciary may not alter that balance, no matter how deeply entrenched its practices nor ***14** how strong its beliefs as to the advisability of an alternative scheme.

In any event, the Ninth Circuit's policy analysis is misguided. Permitting self-transfer encourages forum-shopping under the guise of limited multidistrict transfers, is unnecessary to achieve efficient results in appropriate cases, and will often (as here) lead to grossly inefficient transfers that would never have been justified under the standards of section 1404.

ARGUMENT

THE MULTIDISTRICT LITIGATION STATUTE AUTHORIZES TRANSFERS ONLY FOR "COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS" AND REQUIRES THAT A CASE BE REMANDED TO THE PLAINTIFF'S CHOSEN FORUM AT OR BEFORE THE CLOSE OF THOSE PROCEEDINGS.

A. The Plain Language of the Multidistrict Litigation Statute Requires Remand When Consolidated Pretrial Proceedings Are Complete.

1. The most fundamental of all rules of statutory interpretation is that courts must adhere to the plain language—the "ordinary English"—of the laws that Congress has enacted. *Barnett Bank of Marion County, N.A. v. Nelson,* 116 S. Ct. 1103, 1111 (1996). Indeed, no principle is more central to this Court's jurisprudence than that "courts must give effect to the clear meaning of statutes as written." *Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 476 (1992). As this Court recently admonished: " 'Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words ... in search of an

intention which the words themselves did not suggest.' " *United States v. Gonzales,* 117 S. Ct. 1032, 1036 (1997) (quoting ***15** *United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.)).

This bedrock rule of adjudication is dispositive here. The language of section 1407(a) is clear. The statute authorizes transfers only for "coordinated or consolidated pretrial proceedings." 47 U.S.C. § 1407(a). If a case has not been concluded by the time such consolidated proceedings are complete, it *must* be returned to the district where the case was initially filed: "Each action so transferred *shall be remanded* by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." *Id.* (emphasis added).

One does not "have to stare very long at that statutory language" to divine its meaning. J.A. 57 (Kozinski, J., dissenting). Congress granted multidistrict transferee courts only the carefully circumscribed authority to preside over consolidated pretrial proceedings, and a case transferred under section 1407(a) must be returned to the plaintiff's chosen forum at or before the time when such proceedings are over—unless the case has been "terminated" during consolidated proceedings.

In contrast, when Congress wanted to permit transfer for all purposes, including trial, it did so expressly. *See* 28 U.S.C. § 1407(h) ("the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, *for both pretrial purposes and for trial,* any action brought under section 4C of the Clayton Act") (emphasis added). Here, Congress unequivocally required a remand no later than the conclusion of coordinated pretrial proceedings. As Professor Wright has explained, the "explicit" and "mandatory" language of section 1407(a) "leaves no room for the transferee court or the [JPML] to exercise discretion whether to remand the case." Brief of Charles Alan Wright as *Amicus Curiae* ***16** Supporting Petitioner 3-4 (Apr. 11, 1997) (filed in support of Lexecon's petition for a writ of certiorari). [4]

2. Although the Ninth Circuit's decision on this issue was grounded largely in the majority's policy preferences—a mode of statutory analysis that we address below—the court did make some attempt to address the language of section 1407(a) and to wring a different meaning out of its text. In particular, the court of appeals suggested that the duty to remand cases applies only to the JPML, not the transferee court. On this theory, a transferee court is free to transfer a case to itself for all purposes pursuant to 28 U.S.C. § 1404(a) without regard to the JPML's express duty under section 1407(a) to remand the case back to the original district before trial. *See* J.A. 41-42. This argument is fatally flawed in at least three respects.

First, in ruling on a motion to remand, the transferee court exercises authority *delegated* by the JPML itself. *See* JPML Rule 14(d). In executing that delegated authority, the district court has no more discretion to refuse to remand a case at the end of coordinated pretrial proceedings than the JPML itself would have if it were to handle such a request itself in the first instance. The ***17** JPML cannot alter or broaden its authority by delegating it. [5]

Congress provided only one exception to the JPML's mandatory duty to remand the case at the end of consolidated proceedings: where the case has been "terminated" during pretrial proceedings. 28 U.S.C. § 1407(a). The Ninth Circuit's interpretation would create a second exception that appears nowhere in the statute and that would swallow the rule. Under the court of appeals' reading, Congress's unequivocal command that a case "shall be remanded" would be transformed into a meaningless suggestion that the case "shall be remanded unless the transferee court decides it should not be." But courts have no power to add exceptions to the ones that Congress has expressly provided. *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 109 (1980); *Continental Casualty Co. v. United States,* 314 U.S. 527, 533 (1942). Much less may they imply an exception that would render a specific and mandatory duty meaningless. *See Walters v. Metropolitan Educ. Enterprises, Inc.,* 117 S. Ct. 660, 664 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect"); *Lane v. Peña,* 116 S. Ct. 2092, 2100 (1996) (no statutory provision should be understood to be superfluous).

Second, the plain language of section 1407 *does* specically limit the transferee court's own authority over a case. ***18** Section 1407 "authoriz [es] transfers only for pretrial purposes." *See In re Korean Air Lines Disaster of Sept. 1, 1983,* 829 F.2d 1171, 1174 (DC.Cir.1987) (R.B. Ginsburg, J.) (emphasis added), *aff'd on other grounds sub nom. Chan v. Korean Air Lines, Ltd.,* 490 U.S. 122 (1989). Section 1407(a) provides:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district *for coordinated or consolidated pretrial proceedings.*

28 U.S.C. § 1407(a) (emphasis added). Similarly, section 1407(b) explains:

Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multi-district litigation.

28 U.S.C. § 1407(b) (emphasis added).

A transferee court has no authority to expand its powers beyond what Congress has granted it under the express terms of the statute, and the statute makes clear that the transferee court's authority is limited to the conduct of coordinated pretrial proceedings. Accordingly, a transferee court has no proper alternative but to relinquish a multidistrict case at the end of such consolidated pretrial proceedings. *See generally Finley v. United States,* 490 U.S. 545, 547 (1989) (" 'courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction' ") (quoting *Ex Parte Bollman,* 8 U.S. (4 Cranch) 75, 93 (1807) (Marshall, C.J.)).

Indeed, if the Ninth Circuit were correct, the specific legislative compromise that is at the heart of section 1407 would be completely undone. The text of section 1407 makes plain that Congress was willing to allow plaintiffs to be sent to far-off—and potentially very inconvenient—forums, but only for the limited duration of coordinated ***19** pretrial proceedings. At the end of those proceedings, plaintiffs are guaranteed that their cases will be returned to the forum they originally selected. Under the Ninth Circuit's interpretation, that carefully crafted legislative compromise, embodied in the unambiguous text of section 1407, is entirely defeated. A transferee court could use the general federal transfer statute to do exactly what Congress prohibited in section 1407: convert its circumscribed authority to supervise *only* consolidated pretrial proceedings into a boundless license to preside over the entire case. It is well-established, however, that courts cannot construe general statutory provisions in a way that would negate more specific ones. *See Crawford Fitting Co. v. Gibbons, Inc.,* 482 U.S. 437, 445 (1987) ("a specific statute will not be controlled or nullified by a general one"); *Morales v. TWA,* 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general").

Third, and finally, even if section 1407 could somehow be construed to allow transferee courts to entertain section 1404(a) transfer motions, the Ninth Circuit's approval of "*self*-transfer" would still crash head-on into the language of section 1404(a).

Section 1404(a) states that "[f]or the convenience of parties and witnesses, in the interest of justice, *a district court* may transfer any civil action *to any other district or division* where it might have been brought" (emphasis added). The only linguistically reasonable interpretation of that language is that the "other district court" that may receive the case stands in contrast to the "district court" that "may transfer" it. *See* J.A. 68-69 & n. 9 (Kozinski, J., dissenting). Section 1404(a), accordingly, contemplates transfers to any district where venue would be proper "*other* " than the one where the case is pending. It provides no authority for a court to transfer a case to itself.

It is no answer to suggest that, in ruling on a transfer motion, the transferee court somehow "stands in the shoes" ***20** of the transferor court, thus making the transferee court itself an "other" court for purposes of section 1404. This "Rube Goldberg argument" (J.A. 69 n. 9 (Kozinski, J., dissenting)) finds no support in the text of section 1407. Nothing in that section suggests that a transferee court is merely a surrogate for the transferor court when it is presiding over consolidated pretrial proceedings. Indeed, for section 1404 to authorize self-transfer under this theory, one would have to imagine that the transferee court *becomes* the transferor court for the purposes of effectuating the transfer, and then—somewhere between the subject and object of the sentence—suddenly transforms itself back into the transferee court for the purpose of being the "other" district court that may accept the transfer. The language of section 1404(a) provides no support for such a metaphysically challenging transformation. And surely nothing in that provision suggests that Congress intended such metaphysics to override section 1407's unequivocal remand requirement.

Indeed, the drafters of section 1404(a) could not possibly have meant to authorize self-transfers. Section 1404(a) long predates section 1407. Thus "the possibility that a district court would be in a position to transfer a case to itself was not something anyone at the time could [even] have anticipated," much less intended to authorize. J.A. 69 (Kozinski, J., dissenting). In the words of Professor Wright, "[a] 1948 statute cannot be given a meaning it could not have had when it was adopted in order to provide a result under a 1968 statute that Congress specifically considered and expressly rejected." *Amicus* Br. of Charles Alan Wright at 6. [6]

***21 B. The Legislative History Confirms That Multidistrict Transferee Courts May Only Conduct Consolidated Pretrial Proceedings.**

For the reasons we have discussed, the language of section 1407(a) is clear and dispositive. No further inquiry is required. *See Estate of Cowart,* 505 U.S. at 475 ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished"). If, however, one looks beyond the plain text of section 1407 to its drafting history, that inquiry only reinforces the plain terms of the statute. As Professor Wright explains, "[t]he legislative history is unambiguous. Congress knew that it was authorizing transfer for pretrial proceedings only and that when those proceedings were ended, the action was to be remanded to the transferor court." *Amicus* Br. of Charles Alan Wright at 4.

Section 1407 had its genesis in a federal judicial report by the Co-Ordinating Committee on Multiple Litigation. The Committee's Report emphasized that the proposed statute was designed to address "the additional litigation costs which are engendered in multi-district litigation through overlapping and conflicting discovery," and thus would affect "only the pre-trial stages in multi-district litigation." *In re Plumbing Fixture Cases,* 298 F. Supp. 484, 499 (J.P.M.L. 1968) (reprinting Committee Report). The Report stated unequivocally that the proposed legislation "would not affect the place of trial in any case" and, accordingly, that "[t]he major innovation proposed is transfer solely for pre-trial purposes," which would achieve "efficien[cy] and econom[y] ... without losing the benefits of local trials in the appropriate districts." *Id.* The ***22** Committee stressed that these limitations on the scope of multidistrict transfers would "maximize the litigant's traditional privileges of selecting where, when, and how to enforce his substantive rights or assert his defenses while minimizing possible undue complexity from multi-party trials." *Id.*

Senator Tydings, the primary Senate sponsor of the bill, evinced the same understanding of the proposal's limited scope. "[F]or purposes of this legislation," he emphasized, "we are not talking about the jury trial—we are talking about the pretrial proceedings, the depositions and discoveries. And under this bill, when ... deposition and discovery is completed, then the original litigation is remanded to the transferor district for trial." *Multidistrict Litigation: Hearings on S. 3.815 and S. 159 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* Part II, 90th Cong., 1st Sess. 109-10 (1967).

The same intent to authorize only limited multidistrict transfers is evident in the House Report accompanying the bill that became section 1407. The Report states unequivocally that the proposed legislation "would not affect the place of trial in any case." H.R. Rep. No. 90-1130 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900. As the Report explained:

> The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings.

1968 U.S.C.C.A.N. at 1901.

The House Report gives three reasons for restricting transfers to coordinated pretrial proceedings. First, "[t]he experience of the Coordinating Committee [on Multiple Litigation] was limited to pretrial matters and the committee considers it desirable to keep this legislative proposal ***23** within the confines of that experience." Second, "trial in the originating district is generally preferable from the standpoint of the parties and the witnesses, and from the standpoint of the courts it may be impracticable to have all cases in mass litigation tried in one district." Finally, "the committee recognizes that in most cases there will be a need for local discovery proceedings to supplement coordinated discovery proceedings." *Id.* at 1901-02. *Accord* S. Rep. No. 90-454, at 5 (1967) (emphasizing the same points in nearly identical language).

The House Report, moreover, expressly noted that if "future experience" were to demonstrate that "consolidation and coordination for trial purposes" was desirable, Congress would have to enact "amendments to the present language." 1968 U.S.C.C.A.N. at 1902. *Accord* S. Rep. No. 90-454, at 5 (similarly emphasizing that "amendments" would be necessary to allow section 1407 cases to be consolidated for trial). [7]

Congress, in short, did not understand either plaintiffs' historical prerogative to choose the forum for the litigation or the efficiency benefits of local trials to be a minor ***24** concern that could be cast aside at the whim of a transferee court. Rather, these considerations were central to Congress's deliberations on section 1407 and led directly to its decision to authorize only *limited* multidistrict transfers. Section 1407 was thus the result of a considered congressional judgment that the interests of the parties and the courts would best be served by *not* permitting the transferee court to retain the case after the conclusion of consolidated pretrial proceedings. The courts have no choice but to abide by that congressional judgment.

C. The Ninth Circuit's Policy Arguments Do Not Justify a Different Result.

The Ninth Circuit favors a different balance from the one struck by Congress in section 1407. But, contrary to the Ninth Circuit's evident belief (J.A. 42), the practice of self-transfer cannot be justified by respect for longstanding practice or by efficiency concerns. This Court's decisions make clear that neither of those considerations provides any reason to ignore the clear meaning of a federal statute, buttressed in this instance by unequivocal legislative history.

Beyond this, the Ninth Circuit's policy analysis is itself misguided. Permitting self-transfer is not necessary to achieve efficient results in appropriate cases, it encourages forum-shopping, and it will often (as here) lead to transfers that could not possibly be justified under the standards of section 1404.

1. The court of appeals majority stated that a key factor in its decision was that the Arizona district court's self-transfer decision comported with "longstanding practice." J.A. 39-40 & n. 3. Citing its "[r]espect for our brethren," the majority was unwilling to "accuse the JPML of violating the statute that created it" or to second-guess the many courts that had engaged in self-transfer. J.A. 41 n. 7.

***25** We do not dispute that the lower court decisions addressing this issue accord with the Ninth Circuit's conclusion. [8] Nor do we contest that the JPML Rules—which, unlike the Federal Rules of Civil Procedure, are not reviewed by this Court prior to becoming effective—codify this district court practice. [9]

Those facts, however, are beside the point. As Professor Wright has so aptly explained, the federal courts obtain their authority by Act of Congress, not by "adverse possession." *Amicus* Br. of Charles Alan Wright at 8. Past practice, therefore, is no excuse for ignoring a clear congressional command: " 'Age is no antidote to clear inconsistency with a statute.' " *Metropolitan Stevedore Co. v. Rambo,* 115 S. Ct. 2144, 2149 (1995) (quoting *Brown v. Gardner,* 115 S. Ct. 552, 557 (1994)).

This Court has accordingly reversed erroneous statutory interpretations even where they were supported by precedents from *every* circuit court. *See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 114 S. Ct. 1439 (1994) (overturning practice upheld by ***26** every federal circuit); *Finley v. United States,* 490 U.S. 545 (overturning district court practice that had been approved by overwhelming consensus of lower court judges); *Brown v. Gardner, supra* (invalidating 60-year-old agency interpretation). And there is no reason at all to perpetuate such an error where, as here, the relevant court decisions reveal "a remarkable lack of critical attention to th[e] issue." J.A. 60-61 (Kozinski, J., dissenting) (noting that the Second Circuit's 1971 *Pfizer* decision "with its one page of analysis, is the only court of appeals opinion that seriously addresses the issue").

In fact, when self-transfer has been subjected to disinterested critical analysis, the practice has been widely condemned as an unlawful attempt to "do [ ] by judicial fiat what Congress refused to do by statute in 1969: amend section 1407 to allow transfers for trial." Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation,* 70 Cornell L. Rev. 779, 809 (1985). A host of commentators have determined that self-transfer "does not comport with the express language of section 1407 or section 1404 or with section 1407's legislative history." Ross D. Cooper, *The Korean Air Disaster: Choice of Law in Federal Multidistrict Litigation,* 57 Geo. Wash. L. Rev. 1145, 1159 (1989). [10]

***27** Nor does the existence of a JPML rule permitting self-transfer transform an unlawful practice into a lawful one. Congress expressly provided that the JPML's rules must be consistent with its enabling statute and, indeed, all of federal law. *See* 28 U.S.C. § 1407(f) ("The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure"). *See also Johnson v. Manhattan Ry.,* 289 U.S. 479, 503 (1933) (invalidating local court rule that was inconsistent with powers granted by Congress).

JPML Rule 14(b) violates that fundamental requirement. As discussed above, section 1407 states that a transfer is only for "coordinated or consolidated pretrial proceedings" and that each case "shall be remanded" following pretrial proceedings "unless it shall have been previously terminated." 28 U.S.C. § 1407(a). The JPML rule, on the other hand, states:

> Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, *unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406.*

JPML Rule 14(b) (emphasis added). The italicized language simply rewrites the JPML's enabling statute and ***28** adds an excuse for failure to remand that the statute does not recognize and does not permit. The rule is therefore flatly inconsistent with section 1407's plain text and provides no basis to affirm the Ninth Circuit's determination.

2. Nor can self-transfer be justified on the theory that it "strongly promotes judicial efficiency." J.A. 42. That argument is both irrelevant and wrong.

a. The initial point is, again, an obvious one. The federal courts must adhere to the language of the statutes that Congress has enacted and cannot disregard that language no matter what their own views of wise policy may be. Indeed, this Court recently reiterated this point in the plainest possible terms. In *Amchem Products, Inc. v. Windsor,* the Court acknowledged that the kind of class action settlement approved by the trial court might well be "the most secure, fair, and efficient means of compensating victims of asbestos exposure." *Amchem,* slip op. at 35. The complete answer to that argument, however, was that "Congress ... has not adopted such a solution." *Id.* The issue of "overriding importance," therefore, was not the judiciary's view of prudent policy, but, rather, what "Congress [has] ordered." *Id.* at 26.

Finley v. United States is to the same effect. As in *Amchem,* the *Finley* Court acknowledged that the exercise of so-called pendent-party jurisdiction over state claims resulted in "efficiency and convenience" by allowing for the consolidation of related issues in a single proceeding. 490 U.S. at 555. Nevertheless, because the plain meaning of the relevant statutes demonstrated that Congress had not granted federal courts any such authority, the Court held that they lacked the power to hear such pendent-party claims. *See id. See also Pavelic & LeFlore v. Marvel Entertainment Group,* 493 U.S. 120, 126 (1989) (Court is not free to pursue policy objective at expense of "unnatural" textual interpretation; "[o]ur task is to apply the text, not to improve upon it"); ***29** *Touche Ross & Co. v. Reddington,* 442 U.S. 560, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law.").

This repeatedly enunciated principle applies with full force here. Congress balanced the relevant policies when it enacted section 1407. It decided that potential cost savings justified sending plaintiffs to distant forums for purposes of coordinated discovery. Congress further concluded, however, that when such proceedings were over, competing policies dictated a mandatory remand to the plaintiff's chosen forum. *See* 1968 U.S.C.C.A.N. at 1900 (emphasizing, among other things, that "trial in the originating district is generally preferable from the standpoint of the parties and the witnesses" and that "local discovery proceedings" will generally be necessary). The judiciary is not free to strike a different balance. It may not "trump" (J.A. 40 n. 5) the plain language of sections 1404 and 1407 based on its own notions of wise judicial administration.

b. In any event, even on its own terms, the Ninth Circuit's policy-based reasoning fails to support its conclusion. Contrary to the Ninth Circuit's analysis, there is no need to disregard the plain language and evident intent of section 1407 to obtain, in appropriate cases, the benefits of transfers for all purposes, including trial.

Litigants who believe that a case should proceed in a venue different from where it was first filed have a choice. They may (1) petition the JPML for a section 1407 transfer for coordinated pretrial proceedings or (2) ask the district court where the case was filed for a section 1404 transfer for all purposes, including trial. [11] Thus, in this ***30** case, if respondents were convinced that the sensible course of action was to hold the trial—not just coordinated pretrial proceedings—in Arizona, the proper course was to file a section 1404 motion with the Chicago court. They never did so, and for good reason. [12] That strategic decision, however, does nothing to diminish the evident fact that, if respondents could have satisfied well-established section 1404 standards—that transfer to Arizona accorded with "the convenience of parties and witnesses" and was "in the interest of justice"—they could have obtained precisely the benefits that the Ninth Circuit emphasized.

Indeed, this case illustrates the danger of distorting section 1407 to allow for transfers for all purposes. Armed with the knowledge that courts will "routine[ly]" (J.A. 58 (Kozinski, J., dissenting)) "self-transfer" cases once they obtain them under section 1407, respondents—who were unhappy with their trial court judge—had every incentive to seek a section 1407 transfer even though they had no genuine interest in "coordinated or consolidated pretrial proceedings." And they fought to keep the case in Arizona ***31** even after any possibility of consolidated pretrial proceedings had vanished.

If this Court were to affirm the Ninth Circuit, the decision would lead to an onslaught of flimsy section 1407 transfer motions motivated solely by an illegitimate interest in having a different judge preside over dispositive motions and, if necessary, a trial. By contrast, a clear statement by this Court that section 1407 means what it says—that cases are transferred *only* for coordinated pretrial proceedings and must be remanded no later than the end of such proceedings—will ensure that section 1407 is not abused. Instead, motions will be filed only when litigants have a genuine interest in obtaining "coordinated or consolidated pretrial proceedings," and not when they are simply trying to obtain a section 1404 transfer by improper means.

In sum, Congress balanced potentially competing efficiency and policy concerns by authorizing only *limited* multidistrict transfers for consolidated pretrial proceedings, while allowing for broader transfers in those instances where the *transferor* court concludes that they are appropriate under established standards. Certainly, there are other ways of handling these complex cases, and the judiciary may well be able to devise a different system that it believes would be more beneficial. If it does, it may (as it has in the past) petition the legislature for enactment of that scheme. *See* 15 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3866, at 620 (2d ed. 1986) ("If the experience in handling multidistrict litigation indicates that maximum efficiency can be obtained by allowing some cases to be transferred for consolidated trial, as well as pretrial management, then the statute should be amended to specifically so provide.").

In the meantime, however, the text of section 1407(a) requires remand at or before the time when consolidated pretrial proceedings are complete. Because the court below ***32** ignored that explicit statutory requirement and thus allowed this case to be adjudicated in an unlawful venue, its judgment must be reversed. *See Olberding v. Illinois Central R.R.,* 346 U.S. 338, 340 (1953); *Schnell v. Peter Eckrich & Sons, Inc.,* 365 U.S. 260, 264 (1961); *Leroy v. Great Western United Corp.,* 443 U.S. 173, 184-85 & n. 18 (1979). *See also Amicus* Br. of Charles Alan Wright at 8 ("Venue differs from subject-matter jurisdiction in that it is waivable. But absent waiver, it is as much for Congress to say in which federal court a case shall be tried as it is for it to say whether a case can be heard at all by the lower federal courts.").

CONCLUSION

The judgment of the Ninth Circuit should be reversed and the matter remanded with instructions to vacate all district court orders after the conclusion of consolidated pretrial proceedings and to return this case to the Joint Panel on Multidistrict Litigation for remand to the Northern District of Illinois.

Footnotes

1 CR or "Clerk's Record" refers to the docket number of the document in the record below.

2 Under Arizona law, favorable termination is a necessary element of a malicious prosecution claim. Accordingly, in its complaint, Lexecon detailed the circumstances leading up to its dismissal from the *Lincoln Savings* suit and explained why those circumstances demonstrated that the suit terminated favorably to Lexecon.

3 Shortly before trial, on June 7, 1995, the district court entered a final judgment in favor of the Cotchett Respondents, who were not implicated in the defamation count. CR 602. Lexecon filed a timely appeal from that judgment, and that appeal was consolidated with Lexecon's later appeal from the final judgment for the Milberg respondents.

4 Even respondent Milberg has recognized the force of this language. In a brief filed in May of this year, as counsel in another proceeding, Milberg declared unequivocally that the language of section 1407 "*mandates* that a transferee court remand a transferred action for trial once consolidated pretrial proceedings are complete and its authority under section 1407(a) has thus ended." Class Plaintiffs' Memorandum in Opposition to the Motion to Transfer the Trial of the Kayne Action to the Eastern District of New York, *In re MTC Elec. Technologies Shareholder Litig.,* No. CV-94-1763 (JG) (E.D.N.Y. May 2, 1997), at 3 (emphasis added). Milberg further explained that any attempt to retain a case after such proceedings were complete would "ignore[ ] the plain mandate of 28 U.S.C. § 1407(a)." *Id.* For the convenience of the Court, Lexecon has lodged copies of this document with the Clerk's office.

5 For this reason, it is bizarre for the Ninth Circuit to suggest (J.A. 43) that Lexecon should have sought relief directly from the JPML and that its failure to do so somehow left the district court with no choice but to transfer the case to itself "to avoid the absurdity of indefinitely suspended litigation, the pretrial proceedings of which have come to a close." Under the JPML's rules, the proper practice was for Lexecon to bring its section 1407 argument to the transferee district court, and not the JPML, in the first instance. *See* JPML Rule 14(d). That makes sense since it is the transferee court that will know when consolidated pretrial proceedings have ended. In carrying out that delegated responsibility, however, the district court must adhere to the same statutory limitations as the JPML in deciding the remand issue.

6 An additional reason for not reading section 1404(a) as an expansion of section 1407(a) is that the standards for an all-purpose section 1404(a) transfer are different from those for a limited section 1407(a) transfer. Although both provisions allow

transfers "for the convenience of parties and witnesses," only section 1407(a) allows transfers to "promote the just and efficient conduct" of cases. The lower courts, like the Ninth Circuit here, generally rely on judicial efficiency to justify using section 1404(a) to evade section 1407(a)' s remand requirement. But section 1404(a), unlike section 1407(a), does not recognize judicial efficiency as a basis for a transfer. It is therefore a perversion of congressional intent to use the former to expand the latter.

7 The Ninth Circuit incorrectly cited the House Report in support of its conclusion that Congress contemplated the use of self-transfer. J.A. 41-42. The court's analysis, however, rests on highly selective quotations from passages in which Congress noted that the statute did not do away with other mechanisms for transfer, such as section 1404(a). *Id.* As Judge Kozinski explained (J.A. 66-68 n. 8), the quoted passages, when read in context, clearly refer to the possibility of transfer by the court in which the case was filed, *not* by the transferee court. Only that understanding is consistent with the House Report's repeated statements that section 1407(a) would not affect the place of trial in any case and that further statutory amendments would be necessary to allow a transferee court the authority to keep a case for trial. *See* 1968 U.S.C.C.A.N. at 1902: *see also* Report of the Co-Ordinating Committee on Multiple Litigation, 298 F. Supp. at 499 (proposed statute would not "exclude transfer under other statutes [such as 28 U.S.C. § 1404(a)] *prior to or at the conclusion of* pre-trial proceedings") (emphasis added).

8 *See, e.g., Pfizer, Inc. v. Lord,* 447 F.2d 122, 124-25 (2d Cir.1971); *In re Fine Paper Antitrust Litig.,* 685 F.2d 810, 819-20 & n. 7 (3d Cir.1982), *cert. denied,* 459 U.S. 1156 (1983); *In re Tax Refund Litig.,* 723 F. Supp. 922, 924 (E.D.N.Y.1989); *In re The Dow Co. "Sarabond Products" Liab. Litig.,* 664 F. Supp. 1403, 1403-04 (D.Colo.1987); *In re Caesars Palace Sec. Litig.,* 360 F. Supp. 366, 374 (S.D.N.Y.1973); *In re Aircrash Near Duarte, Cal.,* 357 F. Supp. 1013, 1015 (C.D.Cal.1973); *Greyhound Computer Corp. v. I.B.M. Corp.* 342 F. Supp. 1143, 1145 (D.Minn.1972); *In re Viatron Computer Systems Corp. Litig.,* 86 F.R.D. 431, 432-33 (D.Mass.1980); *In re Master Key Antitrust Litig.,* 70 F.R.D. 23, 28 (D.Conn.1975); *In re Penn Central Commercial Paper Litig.,* 62 F.R.D. 341, 345 (S.D.N.Y.1974), *aff'd sub nom. Shulman v. Goldman, Sachs & Co.,* 515 F.2d 502 (2d Cir.1975).

9 *See* JPML Rule 14(b) ("Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district.").

10 Trangsrud, 70 Cornell L. Rev. at 809 ("The reasoning in these cases is demonstrably wrong."); Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking,* 140 U. Pa. L. Rev. 711, 734 (1991) ("[A] transferee court's use of § 1404(a) sets Congress's carefully crafted plan for multidistrict litigation on its head."); Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts,* 40 Fordham L. Rev. 41, 64 (1971) (the language and legislative history of section 1407(a) are so clear that it "originally appeared to be a futile exercise for a 1407 transferee court to rule on a 1404 transfer motion."); John F. Cooney, Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act,* 39 U. Chi. L. Rev. 588, 606 (1972) ("[T]he apparently mandatory nature of the remand clause ... implies that transferee courts lack this jurisdiction [to grant a section 1404 motion]."); George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts,* 96 Yale L.J. 1099, 1102-03 (1987) ("[C]onsolidation for trial almost certainly defies both the letter of section 1407 and the intent of its drafters.") (internal footnote omitted); *Report of the America Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in California v. ARC American Corp.,* 59 Antitrust L.J. 271, 302 (1990) ("The use of Section 1404(a) transfers to consolidate multidistrict cases for trial is of dubious legal validity."); Mike Roberts, *Multidistrict Litigation and the Judicial Panel, Transfer and Tag-Along Orders Prior to a Determination of Remand: Procedural and Substantive Problem or Effective Judicial Public Policy?,* 23 Mem. St. U.L. Rev. 841, 866 (1993) ("It is a leap in logic to conclude that causes of action not terminated upon dispositive motions should be retained in the transferee court under the rubric of § 1404(a), when the statutory language of § 1407 explicitly directs remand to the transferor court.").

11 Indeed, in appropriate cases, they may even file a section 1404 motion in the transferor court, after the case has been remanded pursuant to section 1407, seeking to return the case to the multidistrict transferee court for all purposes. *See* Report of the Co-Ordinating Committee on Multiple Litigation, 298 F. Supp. at 499.

12 As Judge Kozinski explained, under normal section 1404(a) standards, a venue transfer for trial "from Chicago to Arizona would never have been granted." J.A. 72 (Kozinski, J., dissenting). Neither the parties, the witnesses, nor the lead trial attorneys resided in Arizona, and the relevant documents were being kept in Chicago. Moreover, the Arizona court, unlike the Chicago court, could not be expected to have any expertise in the Illinois common law that governed at trial. Indeed, the only reason for holding the trial in Arizona was, perversely, that Lexecon had already endured enormous cost and inconvenience in litigating in that forum. The trial court reasoned essentially that, since Lexecon had already been "dragged hundreds of miles from [its] home district" and forced to remain in that remote district even after there was no possibility of benefitting from "common proceedings" or "coordinated discovery," there was no sense in turning back at the trial stage. J.A. 27 (Kozinski, J., dissenting). While there may be some "warped logic" (*id.*) to that reasoning, the Arizona proceedings certainly could not be rationalized as necessary to promote efficient judicial administration.

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1998 WL 34112179 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM and
FLORIDA STATE BOARD OF ADMINISTRATION, Petitioners,
v.
Paul FELZEN, et al., Respondents.

No. 97-1732.
October Term, 1997.
April 21, 1998.

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

Petition for a Writ of Certiorari

Mark C. Hansen, Counsel of Record, Neil M. Gorsuch, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1801 K Street, N.W., Suite 1000 West, Washington, D.C. 20005, (202) 326-7900, Counsel for Petitioners.

***i** QUESTIONS PRESENTED

1. Whether a nonparty shareholder who appears, in response to notice provided under Federal Rule of Civil Procedure 23.1, to present objections to a proposed dismissal or settlement of a derivative action may appeal an adverse decision even though the shareholder has not been formally made a party to the action.

2. Whether a court of appeals may apply only prospectively a decision reversing settled precedents concerning its jurisdiction, where retroactive application would permanently foreclose appeal by a party who had reasonably relied on the prior precedents.

***II PARTIES TO THE PROCEEDINGS BELOW**

The following persons or entities were parties to the proceedings in the court of appeals:
California Public Employees' Retirement System

Florida State Board of Administration

Paul Felzen

Louise Laskin Trust

Sandra Esner

Dwayne O. Andreas

Ralph Bruce

John H. Daniels

Howard G. Buffett

Lowell W. Andreas

James R. Randall

Michael D. Andreas

H.D. Hale

O. Glenn Webb

Martin Andreas

Margaretta Rockefeller

F. Ross Johnson

Ray A. Goldberg

Gaylord O. Coan

John K. Vanier

Shreve M. Archer, Jr.

M. Brian Mulroney

Robert S. Strauss

Archer Daniels Midland Company

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

California Public Employees' Retirement System and Florida State Board of Administration are governmental pension funds that have no parent companies or subsidiaries that have issued shares to the public.

***iii** TABLE OF CONTENTS

***iv** TABLE OF AUTHORITIES

Cases

***1** California Public Employees' Retirement System ("Cal-PERS") and Florida State Board of Administration ("SBA") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 134 F.3d 873. The trial court's judgment and order approving the derivative suit settlement (Pet. App. 11a-15a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

*2 RULES INVOLVED

The judgment of the court of appeals involves Federal Rule of Civil Procedure 23.1 and Federal Rule of Appellate Procedure 3. These provisions are set forth at Pet. App. 18a-21a.

STATEMENT OF THE CASE

This case presents two distinct circuit splits, both of which were expressly acknowledged by the Seventh Circuit. As Judge Easterbrook wrote for the panel, "[c]ourts have disagreed for several decades" over whether nonparty shareholders must formally intervene in order to appeal a derivative suit settlement. Pet. App. 2a. Reversing prior Seventh Circuit decisions on point, and disagreeing with the Third and Tenth Circuits, the panel held that formal intervention is an indispensable prerequisite to appeal. The panel also noted courts are in open "disagree[ment]" over whether decisions overruling jurisdictional precedents must always be applied retroactively. *Id.* at 10a. Again departing from prior Seventh Circuit law and contradicting the holdings of other circuits, the panel held that such decisions must be applied retroactively.

The Seventh Circuit's prohibition of appeals by nonparty shareholders eliminates a critical safeguard against collusive derivative suit settlements that benefit only plaintiffs' attorneys and defendant. [1] The court's view that it ***3** was required to apply its decision retroactively ignored the important policies that encourage litigants to rely on settled law. Here, petitioners conformed their conduct to settled Seventh Circuit precedents only to have their appeal dismissed because the panel decided thereafter to change the law. [2]

These two holdings are also wrong as a matter of law. The Seventh Circuit reasoned that *Marino v. Ortiz,* 484 U.S. 301 (1988) (*per curiam*), requires nonparty shareholder intervention. But this Court in *Marino* suggested only that complete strangers to a class action should intervene before being permitted to appeal; it nowhere indicated that persons who are already privies to the proceedings--such as class members under Rule 23 or shareholders under Rule 23.1--need do so. In fact, nonparty privies *are* routinely permitted to appeal adverse decisions affecting their interests.

The court of appeals suggested that *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 379 (1981), and *Budinich v. Becton Dickinson & Co.,* 486 U.S. 196, 203 (1988), require retroactive application of its decision to limit its appellate jurisdiction because "a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists." Pet. App. 9a (citation omitted). But those decisions involve statutory limits on judicial authority. The Court did not decide that purely discretionary, self-imposed restrictions on jurisdiction, such as the one imposed by the panel below, must be applied retroactively. Indeed, courts creating new and purely prudential rules narrowing their jurisdiction can and should apply such rules in a manner that is equitable.

***4** A. Background and Prior Proceedings

At midnight on June 27, 1995, more than a hundred Federal Bureau of Investigation ("FBI") agents raided ADM corporate headquarters and the homes of ADM top executives. The next day, ADM issued a press release announcing that three separate federal grand juries were investigating whether the company's officers had conspired with rivals to fix artificially high prices for citric acid, high fructose corn syrup, and lysine. The evidence the government amassed proved overwhelming: the FBI had obtained audio tapes, video tapes, and documents establishing that ADM executives had conspired with at least three foreign companies to set prices and production quotas. On October 15, 1996, ADM pleaded guilty to criminal antitrust charges and paid a $100 million criminal fine, the largest criminal antitrust fine ever imposed and the subject of national media attention. Settling three civil antitrust lawsuits filed by ADM competitors cost the company another $90 million.

Petitioners CalPERS and SBA are two of the largest public pension funds in the United States. They have combined assets of nearly $200 billion and are among the largest shareholders of ADM stock. SBA owns over 1.7 million ADM shares; CalPERS owns over 2.9 million shares.

In response to the demands of institutional shareholders like CalPERS and SBA and waves of negative publicity, ADM commissioned a report to propose new, more stringent corporate governance measures. Much of ADM's troubles, in the view of shareholders and the public, lay in the personal, professional, familial, and financial connections between the members of the company's board charged with management oversight. Indeed, in October 1995, CalPERS awarded ADM a grade of "F" for its lack of corporate governance principles.

The report ADM eventually issued and adopted in January 1996, however, did little to alleviate shareholder ***5** concern. For instance, while it required (for the first time) that ADM's board include at least a majority of independent members, even persons having obvious and substantial financial ties to ADM could qualify under the new rules as "independent." To remedy that defect and avoid a return to the corporate cronyism that resulted in ADM's criminal plea, CalPERS and SBA submitted a shareholder proposal that no one with personal or financial ties to the company could serve as an "independent" director. They modeled their proposal on accepted standards for corporate independence developed by the Council of Institutional Investors (the "Council").[3] The Council is an association of more than one hundred corporate, public, and union pension funds devoted to addressing their members' investment concerns and promoting responsible corporate governance rules and procedures. Although vehemently opposed by management, the shareholders' proposal still won 41.6 percent of the vote at the 1996 shareholder meeting.

Unsurprisingly, in the wake of the federal criminal probe and continuing publicity, plaintiffs' lawyers dashed to the courthouse to file shareholder derivative actions against ADM directors.[4] Various actions were filed in two states, and all were eventually consolidated in the Central District of Illinois. The consolidated suit alleged that ADM directors had breached their fiduciary duties to stockholders by failing to supervise company employees properly, and sought recovery of the $190 million the company had ***6** been forced to pay in criminal fines and civil settlements. Indeed, plaintiffs' attorneys touted in writing to the Council that "a primary goal of our litigation is to recover for ADM as much of the wasted $190 million as is realistically and reasonably possible." Objections of CalPERS and SBA to Proposed Settlement of Derivative Action (July 2, 1997), Exh. A at 2 (attaching letter).

Plaintiffs' counsel, however, did almost nothing to prosecute the case. Nearly two years after filing, they still had not fully litigated defendants' motion to dismiss. By their own admission, they had also neglected to seek any meaningful discovery. In fact, plaintiffs' lawyers focused what little energy they expended on settlement with the insurance company for ADM's executives. In the resulting agreement ("Settlement"), reached on May 29, 1997, plaintiffs' attorneys agreed to release "any and all causes of action" against ADM and the director defendants in return for a mere $8 million settlement fund--less than 4.3 percent of the sought-after $190 million.

The parties then went on to allocate the fund *exclusively* to pay attorneys' fees. Half was earmarked for paying the attorneys bringing suit.[5] The other half was designated for payment of future legal fees incurred by ADM in attempting to reform itself.[6] Not one dime was returned to the corporation for shareholders who lost $190 million in value as a result of their fiduciaries' misconduct.

***7** The Settlement also endorsed the "reform" measures voluntarily adopted by ADM a year earlier. Though plaintiffs crowed that they had "extracted" concessions beyond ADM's self-imposed reforms, fine-print details revealed the opposite; for instance, plaintiffs did almost nothing to address the question of director independence, the single most important reform measure and the one that had nearly passed at the previous shareholder meeting over management opposition.

After executing the Settlement, and without notice to shareholders, the parties appeared before the district court and obtained an order on May 30, 1997, tentatively approving their agreement. Pursuant to the last sentence in Rule 23.1, the district court at that point invited "[a]ny shareholder of record of ADM" to "appear and show cause, if he, she or it has any [reason] why the proposed settlement of the derivative claims ... should or should not be entered thereon." Order Preliminarily Approving Settlement and Providing for Notice at 3 (May 30, 1997). [7] The court set a deadline of July 3, 1997, for written objections and scheduled a final settlement hearing for July 7, 1997.

In response to the court's invitation, petitioners filed written objections, accepted by the district court, and appeared at the July 7 hearing. Petitioners asked the court to reject the Settlement on the ground that the cash benefit to plaintiffs' lawyers was disproportionately high and the corporate governance "concessions" provided no material benefit to shareholders beyond what ADM had itself adopted a year earlier. Alternatively, petitioners asked the court to order the parties to show cause why corporate governance provisions should not be revised to require truly independent directors. Nevertheless, at the ***8** conclusion of the hearing the district court approved the Settlement. Petitioners appealed to the Seventh Circuit.

B. The Decision Below

The panel refused to hear petitioners' appeal, left them unable *ever* to appeal the collusive ADM settlement, overruled several circuit cases in the process, and expressly recognized that its decision created two direct conflicts with the considered decisions of other circuits.

1. In *Tryforos v. Icarian Development Co.,* 518 F.2d 1258 (7th Cir. 1975), *cert. denied,* 423 U.S. 1091 (1976), then-Judge Stevens held that "[t]he law is clear that a non-party shareholder who appears, pursuant to a Rule 23.1 notice, to present objections to a proposed dismissal or settlement of a derivative action may appeal an adverse decision even though he has not been formally made a party to the action." *Id.* at 1263 n.22. This view has been endorsed by other circuits. *See, e.g., Bell Atlantic Corp. v. Bolger,* 2 F.3d 1304 (3d Cir. 1993) (Scirica, J.); *Gottlieb v. Wiles,* 11 F.3d 1004, 1011 (10th Cir. 1993) (McKay, C.J.). It has been approved by leading commentators. [8] And some courts have even expressed displeasure at shareholder motions to intervene. *See, e.g., Webcor Elecs. v. Whiting,* 101 F.R.D. 461, 463 (D. Del. 1984) (complaining that motion to intervene was "superfluous procedural question" since nonparty objector already had standing to appeal).

With *Tryforos* as direct on-point authority guaranteeing nonparty objectors' right to appeal, and with so many other authorities in concurrence, petitioners did not seek ***9** leave to intervene in the trial court. The Seventh Circuit panel, however, expressly overruled *Tryforos,* disagreed with the Third Circuit's decision in *Bell Atlantic,* and held formal intervention to be an absolute prerequisite to appeal. Pet. App. 1a-4a. [9]

The panel based its ruling almost entirely on a gloss of inessential language from this Court's intervening *per curiam* opinion in *Marino.* There the Court commented that it is "better practice" to require nonparties to intervene formally before allowing them to appeal. 484 U.S. at 304. From that single aside, the court of appeals inferred that both nonparty class members under Rule 23 and nonparty shareholders under Rule 23.1 *must always* intervene in order to appeal.

The panel stated that its conclusion required it to overrule *Tryforos* and split with other recent circuit decisions. Pet. App. 6a-7a (acknowledging that Third Circuit "has held, despite *Marino,* that a shareholder need not become a party in order to appeal from the final decision in derivative litigation"); *id.* at 2a ("[c]ourts have disagreed for several decades about whether class members (and shareholders, their counterparts in derivative actions under Rule 23.1) must intervene"); *id.* at 4a ("we now formally overrule ... any ... case in this circuit ... that permits non-parties to appeal").

2. The court of appeals next turned to the question whether to apply its decision retroactively to petitioners. The court acknowledged that retroactive application of its intervention requirement would preclude petitioners from *ever* appealing the ADM settlement--and would do so despite the fact that they had followed all proper procedures under settled Seventh Circuit law at the time they appealed. *Id.* at 7a-10a.

***10** The court concluded that it was bound to apply its new intervention requirement to CalPERS and SBA, unfairness notwithstanding, because of language in *Firestone* (and subsequently reiterated in *Budinich* and *Christianson v. Colt Industries Operating Corp.,* 486 U.S. 800, 818 (1988)): "A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." *Firestone,* 449 U.S. at 379. Because this case "concern[ed] jurisdiction[al]" prerequisites to appeal, Judge Easterbrook reasoned, the court's new rule had to be applied retroactively to bar the appeal of CalPERS and SBA. Pet. App. 8a-9a.

The panel acknowledged that this second holding also overruled a Seventh Circuit precedent (*Snyder v. Smith,* 736 F.2d 409 (7th Cir.), *cert. denied,* 469 U.S. 1037 (1984)) and created another direct circuit split--this time with the Ninth Circuit's decision in *George v. Camacho,* 119 F.3d at 1399. Pet. App. 10a ("overrul[ing] *Snyder* and disagree[ing] with *George*"). Just last year the Ninth Circuit, sitting *en banc,* held that nothing in *Firestone* or its progeny required retroactive application of new jurisdictional rules where such application would bar appellants from ever raising their issues on appeal. *George,* 119 F.3d at 1399. Until this case, the Seventh Circuit had taken the same view, stating that *Firestone* "did not address the issue of whether an appellate court must dismiss the appeal where a party who relies on a jurisdictional ruling is, under a subsequent decision, foreclosed from ever raising his issues in the appellate court." *Snyder,* 736 F.2d at 415.

*11 REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUITS DECISION CEMENTS A CIRCUIT SPLIT OF SIGNIFICANT IMPORTANCE TO ALL SHAREHOLDER DERIVATIVE SUITS, REFLECTS CONFUSION AMONG THE LOWER COURTS OVER THIS COURTS DECISION IN *MARINO v. ORTIZ,* UNDERMINES THE PURPOSE AND DESIGN OF RULE 23.1 TO ENCOURAGE SHAREHOLDER PARTICIPATION, AND IGNORES TRADITIONAL COMMON LAW AND FEDERAL PRACTICE

As Judge Easterbrook noted, the lower federal courts are irreconcilably split over whether nonparty shareholders must intervene as parties in order to appeal adverse judgments. Pet. App. 2a. This split has substantial consequences for all nonparty shareholders and the vitality of the shareholder derivative suit process itself. It leaves objecting shareholders uncertain of their rights, effectively prevents *any* shareholder appeals in the Seventh Circuit, and invites forum shopping.

The Seventh Circuit reasoned that its ruling was compelled by this Court's *per curiam* decision in *Marino v. Ortiz,* 484 U.S. 301 (1988). But Judge Easterbrook acknowledged that the Third Circuit disagrees. Pet. App. 6a-7a (conceding disagreement with Third Circuit's view of *Marino*). The Third Circuit's view is correct. The court's decision below undermines the purposes of Rule 23.1, diverges from traditional common law and federal practice, and finds no support in *Marino,* which dealt only with the right of complete outsiders to contest a class action settlement between willing class members and the defendants.

A. The panel below virtually invited certiorari, noting at the outset of its opinion that "[c]ourts have disagreed for several decades about whether class members (and shareholders, their counterparts in derivative actions under Rule 23.1) must intervene as parties in order to appeal from adverse decisions." Pet. App. 2a. Resolution of ***12** lower court disputes over questions of federal law is a central function of this Court's certiorari jurisdiction.

Nor can the split of authority be reconciled. The Third, Tenth, and (until now) Seventh Circuits have all approved nonparty shareholder appeals. *See, e.g., Bell Atlantic Corp. v. Bolger,* 2 F.3d 1304; *Gottlieb v. Wiles,* 11 F.3d 1004; *Rosenbaum v. MacAllister,* 64 F.3d 1439 (10th Cir. 1985); *Tryforos v. Icarian Dev. Co.,* 518 F.2d 1258. The Seventh Circuit now demands formal intervention, in express "disagree[ment]" with these courts. Pet. App. 7a. [10]

The fracture has been compounded by a lone paragraph in *Marino. See* Pet. App. 1a-2a. Some courts, like ***13** the Seventh Circuit, read this passage as confirming (and even mandating) their decision to bar nonparty shareholder appeals. *See id.* Others see this language as horatory and not addressed to nonparty shareholders. *See, e.g., Bell Atlantic,* 2 F.3d at 1307, 1308 & n.6 (noting that *Marino* purported to describe "better practice" regarding appellants who were not even members of the affected class); *Gottlieb,* 11 F.3d at 1011 (adopting *Bell Atlantic*). [11] The intercircuit dispute over the effect of *Marino* provides further grounds for granting certiorari. [12]

B. The circuits' split over intervention has tremendous practical consequences for all nonparty shareholders and the integrity of the shareholder derivative suit process.

In some courts, nonparty shareholders have an absolute *right* to appeal any collusive settlement. In others, like the Seventh Circuit, their ability to appeal now turns on a purely *discretionary* decision by the trial court. [13] The ***14** federal courts rarely disagree over a question so central to the administration of justice as the right to appellate review for an entire class of persons.

A key procedural safeguard against collusion and abuse is also at stake in the lower court's split. In all derivative litigation, strong economic incentives tempt plaintiffs' counsel and defendants to "structure a settlement such that the plaintiffs' attorneys' fees are disproportionate to any relief obtained for the corporation." *Bell Atlantic,* 2 F.3d at 1310. [14] Courts and commentators have long considered participation by nonparty shareholders in the judicial settlement review process to be a key procedural countermeasure for exposing and preventing such corruption. [15] ***15** Replacing nonparty shareholders' longstanding *right* to appeal a settlement on the merits with a discretionary *chance* to appeal reduces their ability to serve that monitoring function. It also raises the costs (and thus reduces the likelihood) of their participation. Simply to provide their views on the fairness of a settlement, nonparty shareholders are faced with the substantial added financial burden of litigating an intervention motion (and possibly an appeal of the district court's denial of leave to intervene). ***16** They are faced, too, with all the costs and inconveniences associated with party status, including wide-ranging automatic disclosure obligations and the obligation to respond to interrogatories, appear for deposition, and answer virtually unlimited demands for documents. Increasing barriers to (and costs of) nonparty participation concomitantly increases the parties' incentives to collude--as well as the likelihood that flawed settlements will survive judicial scrutiny. [16]

Resolution of this split is important for other reasons. Under current law, whether intervention is required differs from jurisdiction to jurisdiction, leaving shareholder litigants uncertain of their appellate rights and the procedures they need to follow to preserve those rights. Failing to bring a formal motion to intervene is a fatal error in some courts; in others, such a motion is treated as an unwelcome and wasteful formalism. *Cf. Webcor Elecs.,* 101 F.R.D. at 463; *see* p. 8, *supra.* [17] Further, in circuits where nonparties can appeal only after intervening, they are typically notified of their right to object and participate only *after* the parties have reached a tentative settlement. *See* note 7, *supra.* Yet, settled law in the Seventh Circuit and elsewhere strongly *disfavors* intervention after a tentative settlement is reached. [18] As a practical matter, the intervention requirement makes appeal of ***17** a flawed derivative settlement highly unlikely, if not impossible.

Finally, shareholder derivative suits are amenable to jurisdiction almost anywhere in the United States (plaintiffs' attorneys can usually find a shareholder willing to serve as plaintiff in the jurisdiction of choice). The current, chaotic state of the law encourages a perverse form of forum shopping. Those seeking quick, quiet (and collusive) derivative settlements that benefit them--and not the company--will have a strong incentive to file where intervention is required and where appellate review of any collusive settlement is therefore unlikely.

C. The Seventh Circuit's shareholder intervention mandate is wrong as a matter of law. Its error directly affects the quality of the judicial oversight and review process in the many derivative actions handled by the federal courts.

Under Rule 23.1, nonparty shareholders are entitled to appear and contest any proposed settlement; unlike purely private suits, intervention is not required for nonparties to participate in the trial court. Rule 23.1 was deliberately drafted in this manner to encourage maximum nonparty shareholder participation. "[O]bjectors play an important role by giving courts access to information on the settlement's merits." *Bell Atlantic,* 2 F.3d at 1310; *Papilsky,* 466 F.2d at 258 (shareholder participation is "essential in these situations to ensure that the [resolution] of the derivative suit is in the best interests of the corporation and the absent stockholders"); *see also* authorities cited at note 15, *supra.*

The Seventh Circuit's newly fashioned rule is inconsistent with the purposes of Rule 23.1. It raises the costs for nonparties to participate, reduces their ability to appeal, and creates new incentives to collude. It also reduces the likelihood that the court of appeals will have all the information necessary to assess the fairness of a settlement. The Third Circuit expressly refused to mandate intervention for just these reasons. ***18** *Bell Atlantic,* 2 F.3d at 1310 (Rule's goal of preventing collusive settlements "cautions against creating obstacles to challenging derivative action settlement agreements"). *See also Gottlieb,* 11 F.3d at 1011 (same); Duffy, 60 U. Chi. L. Rev. at 951 (requiring intervention is inconsistent with "the rule that encourages settlement to a reasonable degree, and also encourages fair settlements").

The Seventh Circuit's decision is also in tension with common law practice. *See generally* Duffy, 60 U. Chi. L. Rev. at 942. English legal scholar Fredric Calvert argued as early as 1846 that the British common law had already provided unnamed class members the right to appeal for over a hundred years. *See id.* at 94041 (discussing Frederic Calvert, *Observations on Suits in Equity* 38 (William Benning, 2d ed. 1846)). And Calvert himself defended this right at length: "[T]he privilege of appeal [in class action suits] ought to be given in such a manner as to induce the readiest acquiescence in the system of representation during the earlier part of the suit; for which reason every individual ought, as it appears to me, to ... have the power of appealing, whether he has been a suitor ... or by some other person as his representative." *Id.* In America, Joseph Story reiterated Calvert's position in his *Commentaries on Equity Pleadings,* arguing that, where affected individuals are too numerous to appear in court, "they may come in under the decree, and take the benefit of it, or show it to be erroneous, or entitle themselves to a rehearing." *Id.* at 941 (quoting Joseph Story, *Commentaries on Equity Pleadings* 96 (Little, Brown, 2d ed. 1840)).

The Seventh Circuit rested its decision not on any disagreement over the importance of nonparty oversight, any different view about Rule 23.1's purpose, or any contrary understanding of common law practice. Instead, it concluded that three sentences from *Marino* controlled:

The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled. The Court of Appeals suggested ***19** that there may be exceptions to this general rule, primarily "when the nonparty has an interest that is affected by the trial court's judgment." We think the better practice is for such a nonparty to seek intervention for purposes of appeal....

484 U.S. at 304 (citations omitted).

The Seventh Circuit's single-minded reliance on *Marino* is misplaced.

First, the quoted language is unnecessary to *Marino's per curiam* holding. It discusses only “better practice,” and does not set out an exceptionless rule for all cases. Other courts and leading commentators have recognized this point. *See, e.g., Bell Atlantic,* 2 F.3d at 1307; note 11, *supra.*

Second, the nonparties seeking to appeal in *Marino* were not even members of the class at issue, but outsiders with no right to participate in trial court proceedings under Rule 23. They were white police officers seeking to challenge a class action settlement between black officers and the police authorities. Nothing in *Marino* addressed the appellate rights of nonparties who *are* members of the class whose rights *are* directly affected by any judgment entered in the case, and who have an express right under the federal rules to participate in trial court proceedings without intervention. *Bell Atlantic,* 2 F.3d at 1308 n.6.

The lone case cited in the pertinent passage in *Marino* confirms this conclusion. *United States ex rel. Louisiana v. Jack,* 244 U.S. 397 (1917), cited in *Marino,* 484 U.S. at 304, involved a land dispute between a state agency and a landowner; the State of Louisiana sought to participate in the proceedings. The Court held the State not a proper party and explained that “it has long been the law” that “part[ies] *and priv*[*ies*] *to the record”* may appeal an adverse decision, though even to this rule the Court acknowledged some “exceptions.” 244 U.S. at 402 (emphasis added). There is no doubt that nonparty shareholders ***20** are at least “privy to the record” in derivative suits. [19]

Third, if Marino held that “only parties to a lawsuit, or those that properly become parties, may appeal” (484 U.S. at 304), much settled law would have to be overturned. Nonparties affected by trial court judgments are treated, by the federal courts as “de facto” parties and permitted to appeal without intervention in a “surprising range” of circumstances. 15A Wright, *supra,* § 3902.1, at 102. [20] For instance, federal courts routinely permit nonparty appeals from judgments that bind the nonparty by name. *Id.* at 122 (citing cases). [21] They permit nonparty witnesses held in contempt for refusing discovery to appeal on claims of privilege, lack of personal jurisdiction, and other matters. *See* ***21** 15A Wright, § 3902.1, at 124. [22] They regularly allow attorneys and expert witnesses to appeal district court denials of fees. *See* 15A Wright, § 3902.1, at 126 & n.45. [23] And nonparties obligated to reimburse the defendant for amounts paid under the trial court's judgment are also heard on a routine basis. *See* 15A Wright, § 3902.1, at 127 & n.47. [24] There is nothing in *Marino* to suggest that its reference to “better practice” was intended to sweep away such a vast body of federal law. Nor is there any basis in *Marino* or the Seventh Circuit's decision to justify denying injured nonparty shareholders the right to appeal when these other nonparties are routinely heard.

Beyond *Marino,* the only other authority the Seventh Circuit cited for terminating nonparty shareholder appeals is Federal Rule of Appellate Procedure 3(c). Pet. App. 2a. Rule 3(c), the panel emphasized, provides that “[a] notice of appeal must specify the *party or parties* taking the appeal by naming each appellant in either the caption or the body of the notice of appeal.” (emphasis added). ***22** Because no party is taking the appeal here, the Seventh Circuit reasoned, it must be improper under Rule 3(c). *Id.*

This is far too thin a reed on which to rest such a weighty result. The Seventh Circuit's reading of Rule 3(c) would bar not just nonparty shareholder appeals, but *all* nonparty appeals, a distinctly unlikely result given longstanding acceptance of such appeals. *See* notes 21-24, *supra.* Besides, Rule 3(c) hardly purports to delineate what matters are inherently eligible or ineligible for appeal. That is the domain of Article III jurisprudence and 28 U.S.C. § 1291, neither of which purports to restrict appellate jurisdiction to parties alone. [25] On its face, Rule 3(c) is concerned only with the formal “content[s] of the notice of appeal.” It simply ensures that sufficient information appears on the face of the notice for the court of appeals to discern the issues and litigants before it. [26]

The Seventh Circuit also ignored further language in Rule 3(c), which provides that

> [i]n a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as the representative of the class.

Fed. R. App. P. 3(c). This Court has itself held that Rule 3(c) permits Federal Rule of Civil Procedure 23 class members to appeal if the named plaintiff chooses not to do so. *United Airlines, Inc. v. McDonald,* 432 U.S. 385 (1977). Intervention is nowhere discussed in the Rule as a prerequisite to such appeals.

Finally, there is no indication that Rule 3(c)'s drafters ever intended it to preclude any nonparty appeals. To the ***23** contrary, the 1967 Advisory Committee Notes indicate that the Rule "merely restate[s], in modified form, provisions now found in the civil and criminal rules ... and decisions under the present rules which *dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules.*" 28 U.S.C. App. at 589 (emphasis added). The 1979 Advisory Committee Notes reemphasize the same point. *Id.* at 590 ("so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with"). In all events, contrary to the Seventh Circuit's opinion, a nonparty shareholder *can* strictly comply with the Rule's language simply by "specify[ing]" that no party is taking the appeal, and "naming each [nonparty] appellant in either the caption or the body of the notice of appeal."

II. THE SEVENTH CIRCUITS DECISION TO APPLY ITS RULING RETROACTIVELY CREATES ANOTHER CIRCUIT SPLIT, RAISES SIGNIFICANT QUESTIONS OF FEDERAL LAW, AND IS BASED ON A MISTAKEN PREMISE THAT WRONGLY INSULATES FROM APPELLATE SCRUTINY A PLAINLY COLLUSIVE SETTLEMENT IN ONE OF THE MOST SIGNIFICANT SHAREHOLDER DERIVATIVE SUITS

In *Harper v. Virginia Department of Taxation,* 509 U.S. 86 (1993), Chief Justice Rehnquist and Justice O'Connor commented that "[t]his Court's retroactivity jurisprudence has become somewhat chaotic in recent years." *Id.* at 113 (O'Connor, J., & Rehnquist, C.J., dissenting). This case raises a question arising from the Court's "somewhat chaotic" retroactivity jurisprudence that has split the courts of appeals. It is a question, as well, that the Seventh Circuit wrongly resolved in a manner that permanently insulates from appellate scrutiny a derivative settlement affecting millions of shareholders nationwide in an egregious case of criminal corporate behavior. All of these factors further compel this Court's review.

***24** A. In the decision below, the Seventh Circuit took the position that *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. at 379, and its progeny forbid courts from giving purely prospective effect to any new rule "concern [ing] jurisdiction." Pet. App. 8a-9a. Accordingly, the court applied its new rule retroactively against petitioners, dismissing their appeal on the ground that they had not complied with the court's newly formulated intervention requirement. The court did so after acknowledging that petitioners had fully complied with settled Seventh Circuit appellate procedures at the time they appealed, and that retroactive application meant they would *never* be able to obtain appellate review of the ADM settlement. *Id.* at 7a-10a.

Judge Easterbrook noted that the panel's holding is in direct conflict with the Ninth Circuit's recent *en banc* decision in *George v. Camacho,* 119 F.3d 1393. Pet. App. 10a (conceding "disagree[ment] with *George*"). [27] Like petitioners here, the appellant in *George* had relied on settled circuit authority (namely, precedent holding that litigants in the Northern Mariana Islands are afforded a seven-day extension for filing notices of appeal). 119 F.3d at 1395-96. As here, the Ninth Circuit concluded that its prior holding was erroneous. *Id.* But, unlike here, the Ninth Circuit refused to apply its new jurisdictional ruling retroactively to an appellant who had faithfully followed existing circuit law at the time of her appeal. *Id.*

The Ninth Circuit considered *Firestone* but, unlike the Seventh Circuit, found nothing in it mandating retroactivity:

> What underlay the Court's decision in *Firestone* was the need to ensure that litigants would not engage in piecemeal litigation, clogging the circuit courts with interlocutory appeals.... Applying the rule retroactively clearly advanced that objective by postponing consideration of pending interlocutory appeals until ***25** after final judgment. There was thus no question in *Firestone* of forfeiting anyone's right to appeal permanently. The circumstances here are entirely different.

Id. at 1397-98. The majority was joined in this view by two dissenters, Judges Kozinski and O'Scannlain, who agreed that "[a] fair and sensible solution would be to give the benefit of the error to anyone who actually relied on it.... This would balance appellees' interest in finality with the reliance interest of those appellants who followed our misstatement in [the prior case granting a seven-day extension]." *Id.* at 1410. [28]

The Tenth Circuit in *Pettyjohn v. Shalala,* 23 F.3d 1572 (1994), has also held, in conflict with the decision here, that nothing in *Firestone* requires retroactivity in jurisdictional disputes where appellants would be barred from ever raising their issues before a court of appeals. *Id.* at 1575. Before this case, moreover, the Seventh Circuit had taken the same position as the Ninth and Tenth Circuits. Pet. App. 10a ("overrul[ing] *Snyder,*" which had held that *Firestone* simply does "not address the issue of whether an appellate court must dismiss the appeal where a party who relies on a jurisdictional ruling is, under a subsequent decision, foreclosed from ever raising his issues in the appellate court," 736 F.2d at 415).

B. Though the courts of appeals sharply differ over *Firestone*'s scope, they agree that the issue dividing them raises important questions for the administration of justice and access to the federal courts.

If the Ninth and Tenth Circuits (and the Seventh Circuit in *Snyder*) are correct and courts may apply jurisdictional rulings only prospectively, the Seventh Circuit has set itself on a course that will systematically deny ***26** substantive review to valid appeals; litigants relying on settled law overturned in their own cases will be barred from ever arguing their issues on appeal. This result is obviously inequitable to an entire class of litigants, and it directly undercuts the judiciary's strong interest in promoting reliance on settled law. *George,* 119 F.3d at 1397 ("The consequence of such a holding would be that litigants who complied with our rules ... would lose their rights to appeal, ... a result that would appear to be unconscionable to most reasoning persons whether learned in the law or not."); *Snyder,* 736 F.2d at 415 (such a holding would be "obviously unfair"; "'it would be inequitable for an appellate court to decline to hear the appeal"') (citation omitted).

This result also creates a bizarre incentive for litigants to file every conceivable paper and motion--even those already expressly ruled wasteful and superfluous--solely as an insurance policy against a possible change in law. *George,* 119 F.3d at 1404 ("Rules are intended to provide certainty and to guide parties' actions. Making a [jurisdictional] rule ... retroactive [in all cases] is inconsistent with both of these objectives.") (footnote omitted).

By contrast, if the Seventh Circuit is right and *Firestone* mandates retroactive application of all new jurisdictional rules, the Ninth Circuit has lawlessly arrogated power to hear appeals over which it has no valid jurisdiction. Indeed, the Seventh Circuit below chided the Ninth Circuit on precisely these grounds. [29]

C. As a result of the Seventh Circuit's decision, lawyers will keep all of the meager $8 million ADM settlement; the company and its millions of shareholders will receive no meaningful reforms and not one dime from ***27** fiduciaries guilty of gross abuses of trust. All of this will take place, moreover, without any appellate review and as a result of a clear error of law.

The Seventh Circuit rested its decision on the premise that, once a court has determined that it lacks jurisdiction, it is powerless to reach the merits of the case no matter how inequitable that may be. "[A] court may not in any case, even in the interest of justice, extend its jurisdiction where none exists." Pet. App. 10a (internal quotation marks omitted).

That premise, however, is unsupported. The Seventh Circuit plainly *did* have "adjudicatory power" to hear petitioners' appeal. The panel never suggested that it lacked statutory or constitutional authority to entertain nonparty shareholder appeals. Nothing in the language of 28 U.S.C. § 1291 or practice under that section even hints that appeals are limited to formal parties. *See* Pet. App. 22a (text of section 1291); notes 21-24, *supra* (documenting longstanding practice of permitting nonparty appeals in federal appellate courts). Nothing in the Federal Rules of Appellate Procedure precludes nonparty shareholder appeals. *See* Point I.C, *supra.* And it is beyond dispute that petitioners, among ADM's largest shareholders, have standing under Article III. [30]

Given the undisputed *presence* of constitutional and statutory "adjudicatory authority," the Seventh Circuit's ruling below can most generously be described as a *prudential* decision. It reflects a policy decision akin to the judicially created prudential standing doctrine, [31] not any ***28** outside constraint on the courts' authority. There was no reason why the court of appeals could not have at least *considered* whether to apply this purely prudential rule prospectively. The court's suggestion that it lacked "adjudicatory power" to weigh such an option lacks any basis in law or common sense.

In any event, even if the court of appeals' "jurisdictional" ruling had affected the power of the court under statutory or constitutional law, its decision still could not be squared with *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982). There the Court held Congress's grant of jurisdiction to bankruptcy courts *unconstitutional.* Nonetheless, the Court applied *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971). The Court concluded that, because its ruling "could produce substantial inequitable results," *id.* at 106-07, it should apply its decision only prospectively; the bankruptcy courts--though determined to lack any constitutional power--were thus allowed to retain cases already pending before them. 458 U.S. at 88-89 (plurality opinion); *id.* at 91-92 (Rehnquist, J., concurring in the judgment). If the bankruptcy courts could properly hear pending cases over which they had no *constitutional* authority, the Seventh Circuit's conclusion that it is "powerless" to apply *Chevron Oil's* balancing test is hardly convincing. The Seventh Circuit did not address *Northern Pipeline* in its opinion. [32]

***29** The Seventh Circuit rested instead on one of *Firestone*'s recent progeny, *Budinich v. Becton Dickinson & Co.,* 486 U.S. at 203. There the Court did apply a new rule of law retroactively even though doing so meant, as here, "that the losing party could never appeal." Pet. App. 9a. Because the Supreme Court there applied a jurisdictional ruling retroactively in the face of potentially inequitable consequences, the court of appeals reasoned that "*Budinich* ... washes away the distinction we drew in *Snyder*" and any suggestion that the court of appeals remains empowered to consider prospective decisionmaking in cases "concern[ing] jurisdiction." *Id.*

The Seventh Circuit's reliance on *Budinich* is mistaken for three reasons. *First,* and most significantly, the Court in *Budinich* was called upon to render a decision concerning the court of appeals' *statutory* authority under 28 U.S.C. § 1291. [33] Its decision to apply its ruling concerning the courts' *statutory* jurisdiction retroactively has no bearing on the question whether the panel below was bound to apply its *prudential* decision retroactively.

Second, because *Budinich* announced no new rule of law, it was not eligible for purely prospective application. *See Harper,* 509 U.S. at 111 (Kennedy, J., concurring) (a decision cannot be made nonretroactive unless it "overrul [es] clear past precedent on which litigants may have relied" or "decid[es] an issue of first impression whose resolution was not clearly foreshadowed"). Instead, as the Ninth Circuit has pointed out, *Budinich* merely reaffirmed what "should have been apparent from the Court's previous decisions"--namely that a judgment is final and appealable under section 1291 after adjudication on the ***30** merits and does not await determination of attorneys' fees. *George,* 119 F.3d at 1398; *id.*

(*Budinich* "did not change the applicable law"; it "did not conflict with or overrule any previously established law; nor did it subject Budinich to a rule that was different from the rule in effect at the time he acted").

Third, even supposing *Budinich* had effected a change in law, the petitioner in *Budinich* relied on no existing authority and ignored multiple warning signals from the Supreme Court that her position was wrong. Whatever "inequitable results" under a *Chevron Oil* analysis might conceivably flow from retroactive application against the petitioner in *Budinich* simply cannot be compared to those in this case. *See George,* 119 F.3d at 1398 (applying rule prospectively after *Chevron Oil* test and distinguishing *Budinich* because, as here, "the new rule [in *Budinich*] did not wipe out any rights [the petitioner] had established under a former version of the rule"). [34]

CONCLUSION

The petition for a writ of certiorari should be granted.

Appendix not available.

Footnotes

1 *See* 7C Charles A. Wright, *et al., Federal Practice and Procedure* § 1839, at 175 (2d ed. 1986) (nonparty shareholder participation "is intended to discourage the private settlement of a derivative claim under which a shareholder-plaintiff and his attorney personally profit to the exclusion of the corporation and the other shareholders"); *Papilsky v. Berndt,* 466 F.2d 251, 258 (2d Cir.) (Nonparty shareholder participation "is essential in these situations to ensure that the [resolution] of the derivative suit is in the best interests of the corporation and the absent stockholders. More specifically, notice and court approval of settlements under Rule 23.1 discourage private settlements under which the plaintiff-stockholder and his attorney profit to the exclusion of the corporation and nonparty stockholders.") (citations omitted), *cert. denied,* 409 U.S. 1077 (1972); *see* additional authorities cited at note 14, *infra.*

2 *See, e.g., George v. Camacho,* 119 F.3d 1393, 1397 (9th Cir. 1997) (*en banc*) ("The consequence of such a holding would be that litigants who complied with our rules ... would lose their rights to appeal, ... a result that would appear to be unconscionable to most reasoning persons whether learned in the law or not").

3 The Council's independence standards have been adopted by most or many of the nation's largest companies. The Council is a deliberative organization that adopts policies only based on essentially unanimous votes among its institutional shareholder members.

4 "[A]vailable empirical evidence suggests that [derivative] actions regularly follow in the wake of prior proceedings by the SEC or other governmental agencies." John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions,* 86 Colum. L. Rev. 669, 673 n.9 (1986).

5 The parties signed a so-called "free sailing provision" under which defendants agreed not to oppose a fee petition seeking to direct $3.92 million, or 49 percent of the fund, to plaintiffs' counsel (plus interest, coming out of the remaining 51 percent). The average fee award in shareholder derivative suits where no monetary settlement is made (effectively the case here) is $287,000. Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?,* 7 J.L. Econ. & Org. 55, 63 (1991). Even in cases where monetary settlements are made to shareholders, fee awards average no more than 24 percent of the settlement amount. *Id.*

6 Adding to the conflict of interest, plaintiffs' attorneys remained eligible under the settlement to earn these fees as well.

7 Rule 23.1 provides in pertinent part that "[t]he action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."

8 *See, e.g.,* 7C Wright, *supra,* § 1839, at 182 (2d ed. 1986 & Supp. 1997) ("objector to the settlement may appeal the court's approval of the compromise"); 5 James W. Moore, *Moore's Federal Practice* ¶ 23.1.10 [3] (3d ed. 1997) (same); 10 *Federal Procedure, Lawyers Edition* § 25:184, at 260 (1994) ("nonparty shareholder who appears, pursuant to an FRCP 23.1 notice, to present objections to a proposed dismissal or settlement of a derivative action may appeal an adverse decision without having been formally made a party to the action").

9 Pursuant to Seventh Circuit Rule 40(e), the panel overruled its prior precedent by circulating its opinion to all circuit judges in active service prior to its release. Pet App. 10a.

10 This same split is mirrored in the context of Federal Rule of Civil Procedure 23 class actions. Several circuits hold that nonparty class members need not intervene before appealing. *See, e.g., In re PaineWebber Inc. Ltd. Partnerships Litig.,* 94 F.3d 49 (2d Cir. 1996); *Carlough v. Amchem Prods., Inc.,* 5 F.3d 707, 713-14 (3d Cir. 1993); *Ace Heating & Plumbing Co. v. Crane Co.,* 453 F.2d 30, 32 (3d Cir. 1971); *Shults v. Champion Int'l Corp.,* 35 F.3d 1056 (6th Cir. 1994); *Sertic v. Cuyahoga, Lake, Geauga & Ashtabula Counties Carpenters Dist. Council of United Bhd. of Carpenters & Joiners,* 459 F.2d 579 (6th Cir. 1972); *In re Cement Antitrust Litig.,* 688 F.2d 1297, 1309 (9th Cir. 1982), *aff'd sub nom. Arizona v. United States District Court,* 459 U.S. 1191 (1983); *Dosier v. Miami Valley Broadcasting Corp.,* 656 F.2d 1295, 1299 (9th Cir. 1981); *Marshall v. Holiday Magic, Inc.,* 550 F.2d 1173, 1176 (9th Cir. 1977).

Others hold that intervention is required. *See, e.g., Loran v. Furr's/Bishop's Inc.,* 988 F.2d 554, 554 (5th Cir. 1993) ("[W]e have no jurisdiction to consider an appeal by a class member who has not attempted to intervene as a named party."); *Baylor v. United States Dep't of Hous. & Urban Dev.,* 913 F.2d 223, 225 (5th Cir. 1990); *Walker v. City of Mesquite,* 858 F.2d 1071, 1073-74 (5th Cir. 1988); *Croyden Assocs. v. Alleco, Inc.,* 969 F.2d 675 (8th Cir. 1992), *cert. denied,* 507 U.S. 908 (1993); *Shores v. Sklar,* 844 F.2d 1485, 1491, *vacated on other grounds,* 855 F.2d 722 (11th Cir. 1988); *Guthrie v. Evans,* 815 F.2d 626, 628 (11th Cir. 1987).

Whatever result the Court reaches in this case in the context of Rule 23.1 shareholder derivative suits will also provide muchneeded guidance to the lower courts in the context of Rule 23 class actions

11 *See also* 15A Wright, *supra,* § 3902.1, at 122 (2d ed. 1992) ("The justification for recognizing appeal standing in some of these [nonparty] cases is so compelling as to justify putting aside any formal requirement of intervention, though the 'better practice' is to seek intervention in the district court.") (quoting *Marino*); Timothy A. Duffy, *The Appealability of Class Action Settlements by Unnamed Parties,* 60 U. Chi. L. Rev. 933, 946 (1993) ("[L]ower courts have not taken *Marino* as proffering an unqualified command; they have decided that a non-party may sometimes appeal. without prior intervention.").

12 Disagreement over *Marino* has also contributed to the split of authority over intervention in the Rule 23 class action context. *See, e.g., Walker,* 858 F.2d at 1074 (Fifth Circuit refusing nonparty class member appeal because of *Marino*); *Croyden,* 969 F.2d at 679-80 (same holding in Eighth Circuit). Thus, clarifying *Marino's* meaning here will also contribute to resolving the class action split.

13 Under Rule 24(b), "permissive intervention" is expressly left to the "discretion" of the trial court. Fed. R. Civ. P. 24(b). Even if intervention here is considered "of right" under Rule 24(a) (2), the district court is still granted wide discretionary power to determine whether "the applicant is so situated that the disposition of the action may as a practical matter impair or impede" its rights, and whether the applicant's interests are already "adequately represented" by the parties. Fed. R. Civ. P. 24(a)(2). *See also Security Ins. Co. v. Schipporeit, Inc.,* 69 F.3d 1377, 1380 (7th Cir. 1995) (deciding whether to permit intervention "of right" requires trial court to apply four-part balancing test). Worse still, some courts have suggested that objecting shareholders' interests are necessarily "adequately protected" by party shareholders in Rule 23.1 suits. *See, e.g., In re General Tire & Rubber Co. Sec. Litig.,* 726 F.2d 1075, 1087 (6th Cir.), *cert. denied,* 469 U.S. 858 (1984).

14 *See also id.* at 1309 n.8 & 1310 n.10 (citing, *inter alia,* Richard A. Posner, *Economic Analysis of Law* § 21.9, at 570 (4th ed. 1992) (plaintiffs' attorney "will be tempted to offer to settle with defendant for a small judgment and a large legal fee, and such an offer will be attractive to the defendant provided the sum of the two figures is less than the defendant's net expected loss from going to trial"); Romano, 7 J.L. Econ. & Org. at 57 (combination of differential indemnification rights, insurance policy exclusions, plaintiffs' counsel's interest in fees, and individual defendants' risk aversion creates powerful and potentially perverse incentives to settle); Coffee, 86 Colum. L. Rev. at 677 (derivative suits "are uniquely vulnerable to collusive settlements that benefit plaintiff's attorneys rather than their clients")).

15 *See, e.g., Daily Income Fund, Inc. v. Fox,* 464 U.S. 523, 532 n.7 (1984) ("[T]he provision requiring notice and court approval of settlements [is] also intended to prevent shareholders from suing in place of the corporation in circumstances where the action would disserve the legitimate interests of the company or its shareholders."); *Papilsky,* 466 F.2d at 258 ("[n]otice is essential in these situations to ensure that the [resolution] of the derivative suit is in the best interests of the corporation and the absent stockholders") (citations omitted); *Wolf v. Barkes,* 348 F.2d 994, 996 n.2 (2d Cir.) (Friendly, J.) (that ensuring nonparty oversight and participation "was the objective" of the Rule "is indicated by the [1937] Advisory Committee's citation of McLaughlin, Capacity of a Plaintiff-Stockholder to Terminate a Stockholder's Suit, 46 Yale L.J. 421, 430 (1936)," in its commentary to what was then Rule 23(c), now Rule 23(e)), *cert. denied,* 382 U.S. 941 (1965); *Bell Atlantic,* 2 F.3d at 1310 ("objectors play an important role by giving courts access to information on the settlement's merits"); *In re Pittsburgh & Lake Erie R.R. Co. Sec. & Antitrust Litig.,* 543 F.2d 1058, 1069-70 (3d Cir. 1976) (holding that nonparties may appeal where their "equity is being diluted," since their "distinctive interests are as worthy of consideration and protection as [party] shareholders"); *Cohen v. Young,* 127 F.2d 721 (6th Cir. 1942) (nonparty shareholder participation key "in order that the court may have the benefit of that broader information which comes from receiving advice as to the views of all parties concerned");

Craftsman Fin. & Mortgage Co. v. Brown, 64 F. Supp. 168, 178 (S.D.N.Y. 1945) (nonparty shareholder participation key to remedy the "evil" of "private settlements under which the plaintiff stockholder and his attorney got the sum paid in settlement, and the corporation got nothing"); *Stepak v. Tracinda Corp.,* Civil Action No. 8457, 1989 WL 100884, at *1 (Del. Ch. Aug. 18, 1989) (objectors' "ardent[] resist[ance] [to] the settlement" persuaded court "to look more closely at the proposal than would ordinarily be the case"; as a result of objector participation, court concluded there was "no reasonable likelihood that the proposed settlement would be approved as fair and reasonable"), *appeal refused,* 567 A.2d 424 (Del. 1989) (Table); 7C Wright, *supra,* § 1839, at 175 (nonparty shareholder participation "is intended to discourage the private settlement of a derivative claim under which a shareholder-plaintiff and his attorney personally profit to the exclusion of the corporation and the other shareholders"); Note, *Control Over Settlement of Shareholder's Suit,* 54 Harv. L. Rev. 833 (1941).

16 Many commentators have already called on Congress for abolition of derivative suits as too prone to collusion. *See* Pet. App. 6a (citing articles). This view is also expressed in the panel's decision below. *Id.*

17 Worse still, even when shareholders carefully follow all applicable law in jurisdictions that do not require intervention, they risk being whipsawed (like petitioners here) by the court of appeals reversing itself, changing sides in the ongoing split, and foreclosing a shareholder appeal that was proper under prior law.

18 *See, e.g., Farmland Dairies v. Commissioner of New York State Dep't of Agric. & Markets,* 847 F.2d 1038, 1043-44 (2d Cir. 1988); *Jones v. Caddo Parish Sch. Bd.,* 735 F.2d 923 (5th Cir. 1984); *Ragsdale v. Turnock,* 941 F.2d 501, 504 (7th Cir. 1991), *cert. denied,* 502 U.S. 1035 (1992).

19 The Seventh Circuit virtually conceded as much. Pet. App. 7a ("The third circuit conceived of the question as whether the shareholder has standing, which is misleading. Standing means injury in fact, and a reduction in the market price of one's stock is injury.").

20 *See id.* at 122 (collecting examples and commenting that "Nonparties need not always go through a formal intervention procedure to achieve standing to appeal. Appeals have been permitted on showings that range from easy cases in which a nonparty is formally addressed by a court order through less clear cases in which a nonparty is significantly affected.").

21 *See also United States v. International Bhd. of Teamsters,* 931 F.2d 177, 183-84 (2d Cir. 1991); *In re Baldwin-United Corp.,* 770 F.2d 328, 335 (2d Cir. 1985); *Hoxworth v. Blinder, Robinson & Co.,* 903 F.2d 186, 194 n.12 (3d Cir. 1990); *In re Grand Jury Proceedings,* 654 F.2d 268, 270-71 (3d Cir.), *cert. denied,* 454 U.S. 1098 (1981); *Thompson v. Freeman,* 648 F.2d 1144, 1147 n.5 (8th Cir. 1981); *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1277-78 (9th Cir.), *cert. denied,* 606 U.S. 953 (1992) ; *EEOC v. Pan American World Airways, Inc.,* 897 F.2d 1499, 1504 (9th Cir.), *cert. denied,* 498 U.S. 815 (1990); *Hal Roach Studios, Inc. v. Richard Feiner & Co.,* 896 F.2d 1542, 1546-47 (9th Cir. 1989); *SEC v. Wencke,* 783 F.2d 829, 834 (9th Cir.), *cert. denied,* 479 U.S. 818 (1986); *Commercial Sec. Bank v. Walker Bank & Trust Co.,* 456 F.2d 1352, 1354 (10th Cir. 1972).

22 *See also United States Catholic Conference v. Abortion Rights Mobilization, Inc.,* 487 U.S. 72, 76 (1988); *General Ins. Co. of Am. v. Eastern Consolidated Utils., Inc.,* 126 F.3d 215, 218 (3d Cir. 1997); *United States v. Bertoli,* 994 F.2d 1002, 1012 (3d Cir. 1993); *Port Drum Co. v. Umphrey,* 852 F.2d 148, 150 n.2 (5th Cir. 1988); *Petersen v. Douglas County Bank & Trust Co.,* 967 F.2d 1186, 1188 (8th Cir. 1992); *Norwood v. Slammons,* 788 F. Supp. 1020, 1024 (W.D. Ark. 1991).

23 *See also Angoff v. Goldfine,* 270 F.2d 185, 186 (1st Cir. 1959); *Lipscomb v. Wise,* 643 F.2d 319, 820-21 (5th Cir. 1981); *Price v. Pelka,* 690 F.2d 98, 102 (6th Cir. 1982); *Preston v. United States,* 284 F.2d 514, 515 n.1 (9th Cir. 1960); *United States v. Tippett,* 975 F.2d 713, 718 (10th Cir. 1992); *Dietrich Corp. v. Ring Resources Co.,* 596 F.2d 422, 424 (10th Cir. 1979); *James v. Home Constr. Co. of Mobile, Inc.,* 689 F.2d 1357, 1359 (11th Cir. 1982).

24 *See also Fields v. Blum,* 629 F.2d 825, 827 (2d Cir. 1980) (order enjoining reduction of welfare benefits by city official could be appealed by state, since state was legally required to reimburse city for payments and controlled both the activities complained of and the conduct of local officials).

25 In fact, section 1291 never mentions the words "party" or "parties" anywhere in its text. *See* Pet. App. 22a.

26 "(c) Content of the Notice of Appeal.--A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as 'all plaintiffs,' 'the defendants,' 'the plaintiffs A, B, et al.,' or 'all defendants except X.' ..." Fed. R. App. P. 3(c).

27 The majority in *George* included Chief Judge Hug and Judges Browning, Fletcher, Pregerson, Reinhardt, Thompson, and Hawkins.

28 These dissenters simply took issue with whether the appellant in *George* had in fact relied on the court's prior decision or had simply been neglectful. 119 F.8d at 1410. There is no question in this case, and no suggestion in the record, that petitioners have acted in any neglectful fashion.

29 "The proposition that 'a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists' requires us to overrule *Snyder* and disagree with *George.* Jurisdiction means adjudicatory power. Equitable considerations are altogether irrelevant when a court lacks adjudicatory power." Pet. App. 10a (citation omitted).

30 Judge Easterbrook himself conceded that petitioners have constitutional standing in the course of criticizing the Third Circuit's decision in *Bell Atlantic. See* note 19, *supra* (quoting Pet. App. 6a-7a).

31 *See, e.g., Bennett v. Spear,* 117 S. Ct. 1154, 1161 (1997) ("In addition to the immutable requirements of Article III, 'the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.' Like their constitutional counterparts, these 'judicially self-imposed limits on the exercise of federal jurisdiction' are 'founded in concern about the proper-and properly limited--role of the courts in a democratic society,' but unlike their constitutional counterparts, they can be modified or abrogated by Congress.") (citations omitted); *Allen v. Wright,* 468 U.S. 737, 750-51 (1984) (same).

32 The Seventh Circuit also suggested that *Chevron Oil,* 404 U.S. 97, had itself been "overruled" by *Harper,* 509 U.S. 86, and *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529 (1991). Pet. App. 8a. But this is simply not so. The splintered decisions in *Harper* and *Beam* held only that when a court decides to apply a new rule of law retroactively to the parties before it, it must also apply that same rule retroactively to all cases still open on direct review; selectively applying the new rule only to litigants at hand while retaining the old rule for all other pending cases is not permitted. Nothing in these decisions "overruled" a court's ability to consider under *Chevron Oil* whether to apply a new rule of civil law only prospectively.

33 486 U.S. at 199 ("The question before us ... is whether a decision on the merits is a 'final decision' as a matter of federal law under § 1291 when the recoverability or amount of attorney's fees for the litigation remains to be determined.").

34 *See also id.* at 1410 (Kozinski & O'Scannlain, JJ., dissenting) ("A fair and sensible solution would be to give the benefit of the error to anyone who actually relied on it.... This would balance appellees' interest in finality with the reliance interest of those appellants who followed our misstatement in [the prior case].").

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1998 WL 34112079 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM and
FLORIDA STATE BOARD OF ADMINISTRATION, Petitioners,
v.
Paul FELZEN, et al., Respondents.

No. 97-1732.
October Term, 1997.
June 4, 1998.

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

Petitioners' Reply Brief

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***i** TABLE OF AUTHORITIES

***1** Respondents in opposition [1] do not dispute the Seventh Circuit's conclusion that the lower “[c]ourts have disagreed for several decades” about whether nonparty shareholders “must intervene as parties in order to appeal.” Pet. App. at 2a. They do not offer any means of reconciling this split of authority. They do not attempt to respond to petitioners' argument that the Seventh Circuit's decision ***2** was based on a misreading of *Marino v. Ortiz,* 484 U.S. 301 (1988), and Federal Rule of Appellate Procedure 3(c). Pet. at 17-23. [2] Nor do they rebut petitioners' substantial showing that the

Seventh Circuit's new rule imposes a substantial burden on shareholders who seek to contest improper or inadequate derivative suit settlements. [3]

Respondents likewise do not (and cannot) dispute that the court of appeals created a second, independent circuit split with the Ninth Circuit over whether new jurisdictional rules must always be applied retroactively. Pet. App. at 10a (conceding "disagreement" with *George v. Camacho,* 119 F.3d 1393 (9th Cir. 1997)). They do not dispute that the Seventh Circuit's position in this split undercuts the judiciary's interest in promoting reliance on settled law and will have the effect of barring the appeals of an entire class of litigants. Pet. at 25-26. And, again, they do not even purport to defend the merits of the Seventh Circuit's position in this split. *Id.* at 26-30.

1. Instead, respondents spend much of their opposition arguing that, in an opinion issued six weeks before the Rule 23.1 hearing in this case, *In re Brand Name Prescription Drugs Antitrust Litigation,* 115 F.3d 456 (7th Cir. 1997), the Seventh Circuit "removed any doubt" that shareholders must intervene to appeal. BIO at 6. But ***3** even if this procedural history were accurate, it would only underscore the need for certiorari by confirming that the issue presented recurs regularly and the Seventh Circuit is unlikely to reverse course and resolve its split with the Third and Tenth Circuits on its own accord.

In any event, respondents' procedural history is at odds with the Seventh Circuit's own explanation. Judge Easter-brook himself described *In re Brand Name* as holding only that "a class member in an action under Fed. R. Civ. P. 23 who has not become a party may not appeal from an order granting summary judgment." Pet. App. at 2a. Nothing in Judge Easterbrook's opinion, or *In re Brand Name* itself, even remotely suggests that decision also mandated intervention for shareholders seeking to appeal derivative settlements. Indeed, had the panel in *In re Brand Name* decided that nonparty shareholders must intervene, it would have been required to overrule the Seventh Circuit's prior contrary decision in *Tryforos v. Icarian Dev. Co.,* 518 F.2d 1258 (7th Cir. 1975) (Stevens, J.), *cert. denied,* 423 U.S. 1091 (1976), and to circulate its opinion among the entire circuit or seek an *en banc* hearing. The panel in this case could not have declared that *it* was "overrul[ing] *Tryforos* to the extent it permits non-party shareholders to appeal in actions under Rule 23.1." Pet. App. at 6a-7a. It would have had no reason to indicate that *this* decision creates a conflict with the Third Circuit's decision in *Bell Atlantic. Id.* at 7a. It would have had no need to devote several pages of its opinion to the question whether "to defer the effect" *(id.)* of its "new precedent" *(id.* at 7a-8a). And it would have had no need to circulate its opinion among the entire court of appeals for review on the grounds that it "overrules some of our decisions." *Id.* at 10a.

Ultimately, respondents can criticize petitioners only for failing to *predict* the Seventh Circuit's decision here. [4] But ***4** failing to guess that a court of appeals might reverse its own longstanding precedent and create a circuit split is hardly grounds for denying certiorari. Nor was the Seventh Circuit's result so easy to foresee. When petitioners filed their appeal in this case, nonparty shareholder appeals had been expressly endorsed by the Third Circuit only four years earlier, *Bell Atlantic Corp. v. Bolger, 2* F.3d 1304 (3d Cir. 1993), and uniformly praised by recognized authorities on civil procedure. [5] The panel in *In re Brand Name,* moreover, barred Rule 23 nonparty appeals only of summary judgment orders. It nowhere revealed any intent to reverse a prior panel decision-just five years old-that expressly reaffirmed the right of Rule 23 class members to appeal settlement decisions. *VMS Ltd. Partnership Sec. Litig.,* 976 F.2d 362, 367, 368 n.8 (7th Cir. 1992) *("Research Corp.* still controls [the] issue," permitting standing for "an unnamed class member who appeals the approval of a consent decree"). [6]

2. Judge Easterbrook went out of his way to highlight for this Court the Seventh Circuit's "disagree[ment] with ***5** the conclusion of [the Third Circuit in] *Bell Atlantic"* (Pet. App. at 7a). Respondents do not dispute the existence of this split, but nonetheless claim the Court should deny certiorari because the Seventh Circuit's position "is plainly correct and is supported by a well-reasoned opinion." BIO at 9. Yet, one of the primary functions of this Court's certiorari jurisdiction is to resolve circuit splits over questions of federal law; whether the reasoning of the Seventh Circuit or that of the Third (and Tenth) Circuits ultimately proves persuasive is immateral. Petitioners have, moreover, already amply

demonstrated that the Seventh Circuit's decision is based upon flawed interpretations of *Marino* and Federal Rule of Appellate Procedure 3(c). Pet. at 17-23. Tellingly, respondents do not even *attempt* to confront this analysis in their opposition. *See* BIO at 9.

Instead, respondents claim that circuit splits over "procedural rules that ultimately affect a court's jurisdiction" are not worthy of this Court's review because litigants can simply "adjust their conduct" to comply with any circuit's particular view. BIO at 10. But this Court has few duties more important than ensuring consistency in the administration of justice in the federal courts. Permitting open disputes over the federal rules to linger without resolution simply because they are "procedural" invites balkanization of the federal judiciary, undermines the judiciary's interest in promoting reliance on uniform procedures, and allows lower courts to disregard with impunity policies set and approved by this Court and Congress. Unsurprisingly, respondents can cite no authority for the rule of review they posit, nor can they explain the innumerable cases in which the Court *has* reviewed disagreements over the proper interpretation of "procedural" rules. [7]

***6** Besides, the very fact that nonparty shareholders will have to "adjust their conduct" to comply with the Seventh Circuit's new rule *favors* certiorari. Courts and commentators have long recognized the tendency of derivative litigation to lose its adversarial character and result in collusive deals between the company and plaintiffs' lawyers; for just as long, Rule 23.1 and the courts have encouraged unfettered shareholder participation as the key safeguard against such collusion. *See* Pet. at 14, nn.14 & 15. Requiring shareholders to "adjust their conduct" by filing motions to intervene imposes new costs and burdens (and thus decreases the likelihood) of their participation. *Id.* at 10, 14-17. Indeed, the Third Circuit expressly refused to require intervention motions for precisely these reasons. *Bell Atlantic,* 2 F.3d at 1310 (Rule 23.1's goal of preventing collusive settlements "cautions against creating obstacles to challenging derivative action settlement agreements"). *See also Gottlieb v. Wiles,* 11 F.3d 1004, 1010-11 (10th Cir. 1993); [8] Timothy A. Duffy, Note, *The Appealability of Class Action Settlements by Unnamed Parties,* 60 U. Chi. L. Rev. 933, 951 (1993) ("Duffy") (intervention inconsistent with "encourag[ing] fair settlements").

Even those shareholders who are not deterred by the additional burden associated with seeking intervention will, moreover, almost assuredly be denied leave to participate. Under Rule 23.1, shareholders are typically notified ***7** of their right to participate only *after* the parties tentatively reach a settlement, and existing federal law strongly disfavors permitting intervention after a tentative settlement is reached. Pet. at 16 & n.18. Thus, no matter how shareholders may try to "adjust their conduct," the Seventh Circuit's rule will insulate flawed derivative settlements from any appellate scrutiny. [9] Finally, even if shareholders could somehow succeed in intervening, they would face all the duties associated with becoming a party, including duties to comply with automatic disclosure requirements, appear for depositions, answer interrogatories, and produce documents-plainly substantial deterrence to encouraging maximum shareholder participation. Pet. at 15-16. [10]

***8** 3. Instead of defending the Seventh Circuit's express reliance on *Marino* and Federal Rule of Appellate Procedure 3(c) against petitioners' analysis, respondents suggest that the Seventh Circuit's decision is "sound" on an alternative ground. BIO at 12. Permitting individual shareholder appeals would, they argue, unduly "'fragment"' and "'confusedef[]"' derivative suits. *Id.* But this argument, too, only underscores the depth of the disagreement between respondents and courts who believe it is imperative to avoid "creating obstacles" to shareholders' ability to participate in the appellate process as counterweight to the parties' natural tendency to collude. *Bell Atlantic,* 2 F.3d at 1310. *See also Gottlieb,* 11 F.3d at 1010-11; Duffy, 60 U. Chi. L. Rev. at 951. Besides, respondents lack any factual support for their empirical claim: courts, including the Seventh Circuit, have for decades permitted nonparty shareholder appeals without incident. And if allowing individual shareholder appeals *did* somehow create too much confusion, the appropriate remedy would not be to make parties out of individual shareholders but to preclude them from appeal altogether.

Respondents suggest that the Seventh Circuit's decision logically follows the fact that the nonparty shareholders have "no individual right to sue." BIO at 12-13. At best, however, this is another controversial view not shared by the Third

Circuit (or apparently the Tenth Circuit and those commentators who approve of *Bell Atlantic's* holding), and thus another reason favoring certiorari. Besides, while shareholders may not sue in their own names for damage done to the corporation, neither respondents nor the Seventh Circuit suggest that nonparty shareholders lack sufficient injury under Article III or 28 U.S.C. § 1291 to appeal a derivative settlement; to the contrary, the Seventh Circuit expressly recognizes that nonparty shareholders do have standing and criticizes the Third Circuit for conceiving of the issue simply as a standing question. Pet. App. at 7a.[11] Moreover, if any logical presumption ***9** follows, it is that a shareholder expressly allowed to object in the trial court under Rule 23.1 should be permitted to contest the disposition of its objections in the court of appeals. Indeed, the courts of appeals have routinely permitted appeals by an array of injured nonparties, and there is no reason to treat objecting shareholders any differently. Pet. at 20-21.[12]

4. After "overrul[ing] *Tryforos,"* the Seventh Circuit turned to consider whether, out of equity to petitioners, it should "defer the effect" of its ruling and apply its decision only prospectively. Pet. App. at 7a. The court, however, ultimately concluded that it was powerless to apply any new rule "concern[ing] jurisdiction" only prospectively, expressly acknowledging its "disagree[ment]" on this legal question with *George.* Pet. App. at 10a.

Respondents argue against granting certiorari on this second circuit split on the ground that no new rule was announced below. BIO at 15. But this argument (again) requires the Court to ignore the Seventh Circuit's own description of its holding both in this case and in *In re Brand Name. See* pp. 3-4, *supra.* Respondents fleetingly assert that, in any event, the Seventh Circuit's disagreement with the Ninth Circuit rises only to the level of "dictum." BIO at 15. But they never explain or defend this point. And here, too, they are at odds with the Seventh Circuit, which acknowledged that its disagreement ***10** with the Ninth Circuit's decision in *George* is both genuine and pronounced. Pet. App. at 10a; *see also* Pet. at 24-25 (unrefuted explanation of split).

CONCLUSION

The petition for a writ of certiorari should be granted.

Footnotes

1 Only the two individual plaintiffs in this derivative action, whose attorneys are currently slated to receive a substantial portion of the settlement's proceeds, chose to file an opposition to petitioners' certiorari petition. Brief for Respondents in Opposition ("BIO") at 1. Archer Daniels Midland Company and the individual director defendants, though parties to the derivative settlement, have waived opposition. Certain other attorneys for plaintiffs below who themselves opposed the fee amounts granted to counsel for respondents also have waived opposition.

2 Respondents characterize petitioners as representing "less than one percent of the Company's shareholders." BIO at 2. Their combined 4.6 million shares, however, currently represent an investment of nearly $90 million, making them among the largest shareholders of Archer Daniels Midland Company, which respondents themselves elsewhere admit. *Id.* at 1, n.1.

3 Respondents suggest that "petitioners' counsel admitted ... that he had no evidence of any collusion" in this case. BIO at 15, n.10. But, on the contrary, the sole page of the record respondents cite shows petitioners' counsel arguing that "[w]here there is a cash settlement and a large percentage of the cash is earmarked for lawyers, that by itself raises an inference of collusion. * * * In fact, their opening commentator, Mr. Coffee says as much in some of his law review work." BIO App. at 2.

4 In a footnote, respondents question whether petitioners even relied on *Tryforos.* BIO at 7, n.4. But petitioners expressly did so in their brief to the court of appeals, as the Seventh Circuit acknowledged. Pet. App. at 2a-3a ("two shareholders who have appealed from the district court's approval of a settlement in this derivative action ask us to apply *Tryforos").* The court of appeals even considered whether it could "defer the effect" *(id.* at 7a) of its reversal of *Tryforos* out of equity to petitioners, concluding only that it was powerless to do so (id. at 7a-10a).

5 *See, e.g.,* 3B James W. Moore, Moore's Federal Practice, ¶ 23.1.24[3] (1993) (objector's right to appeal derivative suit settlement); *id.* ¶ 23.80 [5] (1993) ("[a] member of the class who appears in response to the court's notice ... and objects to the dismissal or compromise has a right to appeal from an adverse final judgment although he did not become a formal party

of record"); 7C Charles A. Wright, *et al.,* Federal Practice and Procedure § 1839, at 182 (2d ed. 1986) ("[a]n objector to the settlement may appeal the court's approval of the compromise").

6 Even *In re Brand Name's* limited holding in the Rule 23 context was far from stable: at the time petitioners entered this case, *In re Brand Name* was subject to a motion for reconsideration and was later amended twice by the court of appeals.

7 *See, e.g., Henderson v. United States,* 517 U.S. 654, 660 (1996) (Court "granted certiorari to resolve disagreement among lower courts on the question whether Federal Rule 4, which authorizes an extendable 120-day period for service of process, supersedes the Suits in Admiralty Act provision that service on the United States be made 'forthwith'"); *Carlisle v. United States,* 517 U.S. 416 (1996) (certiorari granted to determine whether trial court has authority under Fed. R. Crim. P. 29(c) to grant motion for acquittal even if it is untimely under that rule); *Celotex Corp. v. Edwards,* 511 U.S. 1105 (1994) (granting certiorari to resolve meaning of Fed. R. Civ. P. 66.1); *Pavelic & LeFlore v. Marvel Entertainment Group,* 493 U.S. 120, 122-23 (1989) (certiorari granted to resolve circuit split over interpretation of Fed. R. Civ. P. 11).

8 Contrary to respondents' assertions, *Gottlieb* discussed *Bell Atlantic* approvingly and at length. *Id.*

9 Respondents also cannot dispute that denials of motions to intervene are virtually unreviewable on appeal. Pet. at 13-14 & n.13. Indeed, some courts of appeals have even suggested that objecting shareholders' interests are always already adequately protected by party shareholders in Rule 23.1 proceedings. *See, e.g., id.; In re General Tire & Rubber Co. Sec. Litig.,* 726 F.2d 1075, 1087 (6th Cir.), *cert. denied,* 469 U.S. 858 (1984).

10 Respondents argue that courts may permit shareholders to intervene "solely for the limited purpose of appeal.". BIO at 14, n.9. But this assertion is wholly speculative: there is no federal rule shielding intervening parties from the ordinary duties of parties, and no certainty that the lower courts would manufacture such a rule. In fact, in their very next breath respondents argue *against* granting any such special protections. BIO at 14 (claiming it is "unfair to allow this individual shareholder to 'hold up"' the case without assuming "some responsibility").

The burdens associated with an intervention requirement are illustrated by the facts of this case. On May 30, 1997, the trial court tentatively approved the settlement Only then were shareholders notified by mail of their right to participate (making it presumptively too late to intervene under federal law, *see* Pet. at 16, n.18). They were given just one month, until July 3, 1997, to review the parties' settlement, hire counsel, prepare and submit their objections, and appear before the court. The Seventh Circuit's rule would require shareholders also to prepare and argue a motion to intervene in this same limited amount of time.

11 "Standing means injury in fact, and a reduction in the market price of one's stock is injury. Parties are a subset of injured persons. Equating injury with party status is exactly the approach disapproved by *Marino." Id.*

12 Respondents discount petitioners' argument that leaving this split unresolved encourages forum shopping as "nonsensical and insulting to the federal judiciary." *Compare* Pet. at 17 *with* BIO at 11. In fact, however, the possibility of filing in a jurisdiction where any settlement is virtually guaranteed no appellate scrutiny would surely be an incentive to the plaintiffs' bar. And it is hardly insulting to the federal judiciary to suggest that improper settlements may evade judicial detection without the benefit of adversarial scrutiny that nonparty shareholder participation provides. Indeed, the Third Circuit has itself expressly worried about just this possibility. *Bell Atlantic,* 2 F.3d at 1310.

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1998 WL 784589 (U.S.) (Appellate Brief)
Supreme Court of the United States.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
and Florida State Board of Administration, Petitioners,
v.
Paul FELZEN, et al., Respondents.

No. 97-1732.
October Term, 1998.
Nov. 10, 1998.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

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***i** QUESTION PRESENTED

Whether a shareholder who, pursuant to Federal Rule of Civil Procedure 23.1, is summoned to appear in federal district court and present objections to a proposed dismissal or settlement of a derivative action must also intervene pursuant to Federal Rule of Civil Procedure 24 in order to appeal an adverse decision.

***ii** PARTIES TO THE PROCEEDINGS BELOW

The following persons or entities were parties to the proceedings in the court of appeals:

California Public Employees' Retirement System

Florida State Board of Administration

Paul Felzen

Louise Laskin Trust

Sandra Esner

Dwayne O. Andreas

Ralph Bruce

John H. Daniels

Howard G. Buffett

Lowell W. Andreas

James R. Randall

Michael D. Andreas

H.D. Hale

O. Glenn Webb

Martin Andreas

Margaretta Rockefeller

F. Ross Johnson

Ray A. Goldberg

Gaylord O. Coan

John K. Vanier

Shreve M. Archer, Jr.

M. Brian Mulroney

Robert S. Strauss

Archer Daniels Midland Company

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

California Public Employees' Retirement System and Florida State Board of Administration are governmental pension funds that have no parent companies or subsidiaries that have issued shares to the public.

***iii** TABLE OF CONTENTS

*iv TABLE OF AUTHORITIES

*1 OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a-10a) is reported at 134 F.3d 873. The trial court's judgment and order approving the derivative suit settlement (Pet.App.11a-15a) and the attorneys' fee award (Pet.App.16a-17a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1998. The petition for a writ of certiorari was filed on April 21, 1998, and was granted on September 29, 1998. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

*2 RULES AND STATUTE INVOLVED

This case involves Federal Rules of Civil Procedure 23, 23.1, and 24; Federal Rules of Appellate Procedure 1 and 3; and 28 U.S.C. § 1291. Those provisions are reproduced in the addendum attached to this brief.

STATEMENT OF THE CASE

The Federal Rules of Civil Procedure recognize the unique interest that shareholders have in the terms under which a derivative suit is settled. Unnamed shareholders in a Rule 23.1 derivative suit are notified of any pending settlement and invited to appear and present their objections in district court. It is well established that they need not intervene pursuant to Rule 24 in order to do so. By virtue of their status as shareholders, they are recognized as *de facto* parties to the derivative action, and they have an absolute right to appear and register any objections without undertaking the significant additional cost and inconvenience required by formal intervention.

The question in this case is whether such a shareholder—summoned to court pursuant to Rule 23.1, but not an intervenor under Rule 24—may appeal an adverse decision on his objections to the settlement by virtue of his recognized status as a *de facto* party. The objecting shareholder has this right as a matter of law, and the facts of this case illustrate why that rule is sensible: a right to appeal is a necessary component of Rule 23.1's right to object.

A. Background and Prior Proceedings

ADM's Price Fixing Scheme. At midnight on June 27, 1995, more than 100 FBI agents raided the corporate headquarters of Archer Daniels Midland ("ADM") and the homes of ADM's top executives. The next day, ADM issued a press release announcing that three separate federal grand juries were investigating whether the company's officers had conspired with rivals to fix prices for citric acid, high fructose corn syrup, and lysine.

***3** The government ultimately amassed overwhelming evidence of illegal and anticompetitive activity by ADM. The FBI obtained audio tapes, video tapes, and documents establishing that ADM executives conspired with at least three Asian companies to set prices and production quotas. Top ADM executives were captured on tape telling their competitors that "the competitor is our friend, and the customer is our enemy." Three executives of the other companies pleaded guilty to the conspiracy and testified that they met several times with ADM executives to set lysine prices and market shares.

On October 15, 1996, ADM pleaded guilty to criminal antitrust charges and paid a $100 million fine, the largest criminal antitrust fine ever imposed. It cost the company another $90 million to settle three civil antitrust lawsuits filed by ADM competitors. Three ADM executives—including Michael Andreas, an ADM executive vice president and the son of Dwayne O. Andreas, ADM's chief executive officer since 1970—were subsequently convicted of price fixing.

Many of ADM's troubles, in the view of shareholders and informed observers, derived from the personal, professional, familial, and financial connections between management and the members of the company's board charged with management oversight. The *Wall Street Journal,* for instance, condemned Dwayne Andreas for "stuff[ing] his board with family and friends and company officers and pa[ying] them more than twice the norm [to serve as corporate directors]." [1] A University of Chicago Business School professor similarly decried the fact that ADM had become essentially a "private fiefdom of the Andreas folks." [2] In October 1995, the California Public Employees' ***4** Retirement System ("CalPERS") awarded ADM a grade of "F" based on its lack of adherence to accepted corporate governance principles. [3] *Business Week* rated ADM's board the single worst in America. [4]

In response to these criticisms and the federal criminal probe, ADM commissioned a report to propose corporate governance reform measures. But the report, adopted in January 1996, did little to vouchsafe true board independence. While it nominally required for the first time that the board include a majority of independent members, even persons having obvious and substantial financial ties to ADM could qualify as "independent" under the new rules. Indeed, any director could qualify as "independent" so long as ADM did not, in its absolute discretion, consider his or her relationship with the company to be "material."

Many of ADM's major shareholders, including CalPERS and the Florida State Board of Administration ("SBA"), thought this supposed "reform" inadequate. These shareholders submitted a proposal that no one with *any* personal or financial ties to the company could serve as an "independent" director. That proposal was modeled on standards for corporate independence developed by the Council of Institutional Investors (the "Council"). *See* Exh. A (Council standards) to Declaration of Sarah A.B. Teslik (July 3, 1997) (R.83). [5] Although that independence ***5** policy has been adopted by nearly 85 percent of all S & P 500 companies (*id.* ¶ 7), it was vehemently opposed by ADM management at the 1996 annual shareholder meeting. Nevertheless, the proposal garnered 41.6 percent of the vote. *Id.* ¶ 10.

The Derivative Lawsuit. In the wake of the federal criminal probe, plaintiffs' lawyers dashed to the courthouse to file shareholder derivative actions against ADM's directors. By May 1996, the suits were consolidated in the Central District of Illinois. The consolidated suit accused ADM's directors of "gross mismanagement" by failing to supervise company employees properly. Am. Compl. ¶ 1 (May 17, 1996) (R.28). Plaintiffs specifically condemned the fact that "a majority of [ADM's directors] are interested and/or lac[k] independence" from the Andreas family (*id.* ¶ 28) and charged that Dwayne Andreas "controlled and dominated the process by which each defendant director was selected for nomination or renomination to the ADM Board" (*id.* ¶ 28(a)(1)).

Plaintiffs sought recovery of the $190 million ADM had been forced to pay in criminal fines and civil settlements. Indeed, plaintiffs' attorneys touted to the Council that "a primary goal of our litigation is to recover for ADM as much of the wasted $190 million as is reasonably and realistically possible." Objections of CalPERS and SBA to Proposed Settlement of Derivative Action (July 2, 1997), Exh. A at 2 (Dec. 15, 1996 letter) (R.81). Plaintiffs' expert opined that total damages to the company were even higher—$250 million or more. Declaration of R. Alan Miller ("Miller Decl.") ¶ 11 (June 30, 1997) (R.75).

***6** Plaintiffs' counsel, however, did almost nothing to prosecute the case. In the over two years the case was pending, there is no record of either side issuing interrogatories, seeking or taking depositions, or propounding third-party subpoenas. Plaintiffs did file a three-page motion to compel production of certain documents. See Plaintiffs' Motion to Compel Discovery (July 10, 1996) (R.33). But that motion was never ruled upon and plaintiffs never pressed the issue. *Id.*

What little energy plaintiffs' lawyers expended on this case was in settlement discussions with the insurance company covering ADM and its board members. In the resulting agreement ("Settlement"), reached on May 29, 1997, plaintiffs' attorneys agreed to release "any and all causes of action" against ADM and the director defendants in return for $8 million—just 3.2 percent of the $250 million in claimed damages and less than 4.3 percent of the $190 million ADM paid in fines and compensation to the government and competitors.

Plaintiffs' attorneys, ADM, and the directors then went on to allocate that fund *exclusively* to pay attorneys' fees. Nearly half of the fund was earmarked directly for the attorneys bringing suit. [6] The other half was designated for payment of *future* legal fees to be incurred by ADM in attempting to reform itself. [7] Not one dime was ***7** returned to the corporation for the benefit of shareholders who lost at least $190 million in value as a result of their fiduciaries' misconduct.

Plaintiffs' attorneys claimed that they had extracted corporate governance reform concessions from ADM and that such reforms represented value to shareholders in excess of $158 million. Plaintiffs' Memorandum in Support of Joint Application for Award of Attorneys' Fees and Reimbursement of Expenses at 3, 7-8 (June 30, 1997 (R.73)); Miller Decl. (R.75). In fact, however, plaintiffs' "reform" measures were valueless, simply restating measures ADM had independently adopted a year earlier. For instance, though nominally requiring a majority of "independent" directors, the Settlement, just like the ADM measures adopted a year earlier, permits a director to qualify as "independent" so long as ADM does not consider its relationship with the director to be "material." *See* Declaration of Ann L. Yerger ¶¶ 9-10 (July 3, 1997) (R.81). Plaintiffs' own counsel acknowledged that the Settlement's corporate governance principles were selected precisely because they would not require ADM to change its board *in any way. Id.* [8]

The day after executing the Settlement, the plaintiffs' lawyers and ADM filed an agreed written motion seeking approval from the district court. The very same day, the court heard the parties and tentatively approved their deal. In accordance with Rule 23.1's requirement that "notice of the proposed dismissal or compromise shall be given to shareholders," however, the district court ordered the parties to notify all ADM shareholders of the Settlement by mail and directed them to appear if they had any objections. Order Preliminarily Approving Settlement ***8** and Providing for Notice at 3 (May 30, 1997) (R.62) (notice directing "[a]ny shareholder of record of ADM" to "appear and show cause, if he, she or it has any [reason] why the proposed settlement of the derivative claims ... should or should not be entered thereon"). The court set a deadline of July 3, 1997, for any written objections and scheduled a final hearing for July 7, 1997. *Id.* at 2, 3.

Petitioners, accordingly, had less than four weeks (once they actually received the notice) to review the Settlement notice, hire counsel, obtain and review copies of pleadings in the case, weigh the fairness of the Settlement, draft a brief, and appear in court in Decatur, Illinois. Moreover, plaintiffs did not file their voluminous fee petition until June 30, 1997, leaving petitioners just four days to gain access to, review, analyze, and respond in writing to that document as well.

Petitioners timely submitted their written objections and appeared at the July 7 hearing. They asked the court to reject the Settlement on the grounds that it provided little or no benefit to the corporation: the cash benefit was all to lawyers and was excessive, and the corporate governance "concessions" provided no material benefit to shareholders beyond what ADM had itself adopted a year earlier. [9] Alternatively, petitioners asked the court to order the settling parties to show cause why the corporate governance provisions should not be revised to require adherence to independence standards adopted by 85 percent of major U.S. corporations.

At the conclusion of the hearing—at which no evidence was taken—the district court approved the Settlement. ***9** The court also awarded plaintiffs counsel fees of $3.92 million. [10] Petitioners filed a timely notice of appeal.

B. The Decision Below

Before petitioners could be heard on the merits of their appeal, the named shareholder plaintiffs (not joined by ADM or its director defendants) moved to dismiss the appeal. Though the district court had expressly summoned petitioners to participate in this case pursuant to Rule 23.1, plaintiffs argued that CalPERS and SBA could not appeal without also intervening pursuant to Rule 24.

Seventh Circuit law at that time did not require intervention pursuant to Rule 24 as a condition for appealing. As then-Judge Stevens explained in *Tryforos v. Icarian Development Co.,* 518 F.2d 1258 (7th Cir.1975), *cert. denied,* 423 U.S. 1091 (1976), the law was "clear that a non-party shareholder who appears, pursuant to a Rule 23.1 notice, to present objections to a proposed dismissal or settlement of a derivative action may appeal an adverse decision even though he has not been formally made a party to the action" through intervention under Rule 24. *Id.* at 1263 n. 22.

A panel of the Seventh Circuit, however, used this case as a vehicle for overruling *Tryforos* and holding that Rule 24 intervention is a prerequisite to any appeal by an objecting shareholder. Pet. App. 1a-4a. The panel based ***10** its ruling on language from this Court's intervening *per curiam* opinion in *Marino v. Ortiz,* 484 U.S. 301 (1988). There the Court refused to hear an appeal by nonclass member white police officers concerning a class action settlement between a plaintiff class of black officers and the defendant police administration. In doing so, the Court commented that it is "better practice" to require Rule 24 intervention before hearing such complete strangers to the case on appeal. *Id.* at 304. From that single statement, the court of appeals inferred that shareholders—persons who, unlike the putative appellants in *Marino,* were expressly invited to participate in trial court proceedings under Rule 23.1 and whose rights were necessarily being adjudicated in the derivative action—must always intervene under Rule 24 in order to pursue an appeal.

The Seventh Circuit frankly admitted not only that its decision required reversal of circuit precedent, but also that it was in direct conflict with decisions in other courts of appeals. Pet. App. 2a, 6a-7a. The Third Circuit has rejected the necessity of Rule 24 intervention by shareholders already admitted to the case under Rule 23.1. *Bell Atlantic Corp. v. Bolger,* 2 F.3d 1304 (3d Cir.1993); *see also Rosenbaum v. MacAllister,* 64 F.3d 1439, 1442 (10th Cir.1995); *Gottlieb v. Wiles,* 11 F.3d 1004, 1011 (10th Cir.1993).

SUMMARY OF ARGUMENT

A. The rights of absent shareholders are necessarily adjudicated by any settlement of a derivative action—they are thus, by necessity, *de facto* parties to the case. In recognition of that fact, Federal Rule of Civil Procedure 23.1 mandates that no derivative suit may be settled before all shareholders are notified and given an opportunity to object.

***11** It is undisputed that shareholders may press their objections to a settlement in district court *without* undertaking the burdens associated with intervention. The question here is whether that rule should be turned on its head when a case reaches the appellate level. It should not. The ability of a shareholder to appeal is coterminous with his ability to object in district court. Both stem from the same source—the fact that the shareholder's rights are being adjudicated in the action.

The common law has long recognized that *de facto* parties may appeal without intervening in circumstances like this one. Rule 23.1 was intended to embody, not reject, that common law practice. Indeed, just a few years before the Federal Rules were adopted, this Court expressly concluded that nonparty corporate objectors could appeal a district court's decision in the related context of a receivership. *See Johnson v. Manhattan Ry.,* 289 U.S. 479 (1933). That ruling is bolstered by many federal court decisions both before and after the adoption of the Federal Rules.

B. The Seventh Circuit could identify no constitutional or statutory reason to depart from this established practice, nor does any such reason exist. The circuit court, accordingly, relied nearly exclusively on an extremely broad—and wholly untenable—understanding of a snippet of language from this Court's *per curiam* opinion in *Marino v. Ortiz.* But *Marino* did not involve the rights of shareholders in derivative suits or even of absent class members in the analogous class action context. Rather, it dealt with the rights of strangers to the case who had not been invited to appear in district court and whose rights are nowhere recognized by the Federal Rules. Accordingly, that case does not apply here. Indeed, if the

Seventh Circuit's overreading of *Marino* were correct, *no* nonparty could ever appeal, an extremely dubious result that would overrule countless cases and that even respondents do not defend.

***12** The Seventh Circuit's understanding of Federal Rule of Appellate Procedure 3(c) is equally unpersuasive. The title of that rule makes plain that it is concerned only with the formal "content[s] of the notice of appeal," not, as the Seventh Circuit concluded, with the limits of appellate jurisdiction. Indeed, the Federal Rules of Appellate Procedure elsewhere make plain that they are not intended to limit the courts of appeals' jurisdiction. *See* Fed. R. App. P. 1(b). Finally, as with its understanding of *Marino,* the Seventh Circuit's reading of Rule 3(c) would lead to the highly unlikely result that the scores of cases authorizing nonparty appeals in a variety of circumstances were all wrongly decided and must be overruled.

C. In addition to all its other flaws, the Seventh Circuit's holding undermines the central policy behind Rule 23.1—preventing collusive settlements and providing the federal courts with the information necessary to evaluate the adequacy of any proposed agreement. It is far from clear, as a legal matter, that shareholders would be allowed to intervene in order to object to a settlement. Even if they were, however, intervention involves significant burdens—such as drafting the equivalent of a complaint, submitting to the mandatory disclosure requirements of the Federal Rules, and subjecting oneself to depositions, interrogatories, and document requests. The result would be much less participation by dissenting shareholders at both the trial and appellate levels, and more approvals of inadequate and collusive derivative suit settlements—exactly what Rule 23.1 is intended to prevent.

That unfortunate consequence would not be offset by *any* countervailing benefit. Neither the Seventh Circuit nor respondents have identified a legitimate goal that their proffered rule would advance. There is simply no reason to require objecting shareholders—who appear in response to a specific invitation from the Court to show cause why they should not be bound by a settlement ***13** —to obtain an additional stamp on their passport before proceeding to the court of appeals.

ARGUMENT

SHAREHOLDERS WHO APPEAR IN DISTRICT COURT PURSUANT TO RULE 23.1 TO OBJECT TO A DERIVATIVE SUIT SETTLEMENT ARE ENTITLED TO APPEAL THE COURT'S APPROVAL OF THAT SETTLEMENT.

The shareholder derivative suit is the "chief regulator of corporate management" in American law. *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 548 (1949). It "protect[s] the interests of the corporation from the misfeasance and malfeasance of faithless directors and managers." *Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90, 95 (1991) (internal quotation marks omitted). Derivative suits, accordingly, are designed to serve the twin goals of compensating the injured corporation and shareholders for managerial wrongdoing and deterring such misconduct in the first instance. [11]

Derivative suits, however, "are uniquely vulnerable to collusive settlements that benefit plaintiffs' attorneys rather than their clients." John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions,* 86 Colum. L. Rev. 669, 677 (1986). As Judge Posner has explained, plaintiffs' counsel have a strong economic incentive "to offer to settle with the defendant for a small judgment and a large legal fee." Richard A. Posner, *Economic* ***14** *Analysis of Law* § 21.9, at 570 (4th ed. 1992). On the other side of the table, "such an offer will be attractive to the defendant, provided the sum of the two figures is less than the defendant's net expected loss from going to trial." *Id.* And the shareholder who nominally brought the suit generally has insufficient incentive to police such a settlement. *Id.* This case—where the Settlement represented less than 4 percent of the damage done to the company and all of that money was earmarked for attorneys' fees (*see supra* page 6)—is a paradigmatic example of the problem.

Federal Rule of Civil Procedure 23.1 is the judicial and legislative response to this inherent and widely recognized difficulty in derivative litigation. Rule 23.1—which like all the Federal Rules is promulgated by this Court and reviewed by Congress—provides that, before a district court approves any derivative suit settlement, "notice of the proposed ... compromise shall be given to shareholders."

The Federal Rules thus guarantee all shareholders notice and an opportunity to participate in settlement review proceedings. The rules do so in recognition of the fact that, although a derivative suit may be brought in the name of a single shareholder, absent shareholders are *de facto* parties whose derivative rights will be resolved in the suit as well. *See, e.g., Wolf v. Barkes,* 348 F.2d 994, 996 & n. 2 (2d Cir.) (Friendly, J.) (Rule 23.1's "objective" was to ensure that absent shareholders receive notice and may participate before their rights are adjudicated), *cert. denied,* 382 U.S. 941 (1965).

These absent shareholders also play a critical role in ensuring the fairness of any settlement and deterring collusion and abuse. As Professors Wright, Miller, and Kane have explained, Rule 23.1's invitation for objectors to make their views heard in district court "is intended to discourage the private settlement of a derivative claim under which a shareholder-plaintiff and his attorney personally ***15** profit to the exclusion of the corporation and the other shareholders." 7C Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1839, at 175 (2d ed. 1986 & Supp. 1997) ("Wright, *et al.*"). Because, at the settlement stage, "judges no longer have the full benefit of the adversarial process," "objectors play an important role by giving courts access to information on the settlement's merits." *Bell Atlantic,* 2 F.3d at 1310. [12]

Pursuant to Rule 23.1, absent shareholders have an absolute right to appear and object to a settlement, without separately intervening pursuant to Rule 24. If their objections are rejected, these shareholders may appeal. The right of such *de facto* parties to appeal was well established at common law, and Rule 23.1 was not intended in any way to depart from that practice. To the contrary, a right to appeal is a critical component of the Rule 23.1 right to object, and a necessary counterpart to Rule 23.1's recognition of the shareholders as *de facto* parties.

By contrast, the Seventh Circuit's newly minted requirement that, as a prerequisite to appeal, objecting shareholders undertake the significant burdens associated with formal intervention has no foundation in Rule 23.1. Nor does it have any basis in the Constitution, the federal statutes governing appellate jurisdiction, or this Court's precedents. Such a requirement would, moreover, discourage shareholder participation in the settlement review process and thus undermine the goals of Rule 23.1, without ***16** furthering any countervailing policies. It should be rejected.

A. Rule 23.1, This Court's Decisions, and Long-Standing Common Law Tradition Support Objectors' Right To Appeal Settlement Approvals.

1. As to one crucial point in this case, there is no dispute. It is common ground that Rule 23.1 authorizes shareholders who object to a settlement to appear in *district court* and voice their concerns without undertaking the burdens associated with formally intervening pursuant to Rule 24. That has been the repeated conclusion of the federal courts, [13] and neither the Seventh Circuit, nor the district court, nor any of the respondents here, has suggested that the objectors in this case were required to intervene in order to press their arguments before the district court. On the contrary, respondents expressly *concede* that shareholders "have the option to object [in district court] without seeking to intervene." [14]

***17** This invitation for shareholders to participate in settlement review proceedings is grounded in Rule 23.1's recognition that the rights of all shareholders will necessarily and directly be resolved in the pending derivative suit. Indeed, it is well accepted that the resolution of one derivative action against the corporation precludes any later derivative litigation arising out of the same alleged misconduct? [15] Whether they like it or not, shareholders are *de facto* parties whose rights are being adjudicated by the settlement of any derivative litigation.

Accordingly, objecting shareholders may participate in district court settlement review proceedings simply by responding to the mandatory Rule 23.1 notice; they need not intervene pursuant to Rule 24. Rule 24 is a different mechanism that may give interested shareholders rights to participate as to *other* issues relating to the derivative suit; but intervention pursuant to Rule 24 is not a requirement for those investors to be heard on the specific issue of whether a settlement that would forever bar them from bringing similar claims should be approved.

2. While respondents and the Seventh Circuit concede that Rule 23.1 permits a shareholder to appear and object in the district court—without intervening in the action pursuant to Rule 24—they argue that precisely the opposite is true once a case reaches a federal court of appeals. At the appellate level, in their view, only shareholders who have successfully intervened may seek relief from an erroneous district court decision to approve a derivative settlement.

***18** As other courts of appeals have recognized, however, such a rule would ignore the interests of objecting shareholders that Rule 23.1 was intended to protect. As *de facto* parties whose rights have been adjudicated by a derivative suit settlement, objecting shareholders must have a corresponding right to appeal. *See, e.g., In re Pittsburgh & Lake Erie R.R. Sec. & Antitrust Litig.,* 543 F.2d at 1069-70 (nonparties in derivative suit may appeal where their "equity is being diluted," since their "distinctive interests are as worthy of consideration and protection as [party] shareholders"); *United States v. LTV Corp.,* 746 F.2d 51, 54 n. 5 (D.C.Cir.1984) (nonparties may appeal from consent judgments in derivative cases because "judgments in such cases bind shareholders ... who have received notice of the pendency of the actions"). [16]

The Seventh Circuit's rule, moreover, would reverse centuries of established equitable practice that Rule 23.1 was intended to embody, not overturn. When the Federal Rules were drafted in 1938, the Advisory Committee on Civil Procedure made plain that current Rule 23.1 was based on existing law and was not designed to make any substantive changes in that law. Report of the Advisory Committee on Civil Procedure 60 (1937). [17] ***19** Prior equity practice is thus directly relevant to the issue presented in this case.

Courts of equity long ago recognized that where, as here, a person's rights will necessarily be resolved by an equitable proceeding and the person has been summoned or invited to appear in court in response to an official notice, that person has *de facto* party status. Such a person may participate in trial court proceedings—and appeal—*without* undertaking the additional burdens of becoming a party. *See, e.g., Attorney General v. North Am. Life Ins. Co.,* 77 N.Y. 297, 300 (1879) (policyholders who appeared in response to court notice and objected to corporate receivership "were ... made parties by the notice served on them" and were entitled to appeal even though "[t]here is in strictness no suit to which [they] can be made parties"); *Giffard v. Hort,* 1 Sch. & Lef. 386, 409 (Irish H. Ct. Chy. 1804) (collecting case law establishing that a variety of individuals whose rights were implicated by equitable actions "have been held entitled to re-hear the cause though not parties, because the Decree affected their interest"); *West v. Randall,* 29 Fed. Cas. 718, 723 (C.C.D.R.I.1820) (No. 17,424) (in cases of "general right," every person affected by the decree need not be made a formal party, but rather may be considered "quasi parties to the record" who nevertheless ***20** are entitled to seek relief from the courts "if their rights are jeoparded"). [18]

The English legal scholar Frederic Calvert noted in 1846 that the British common law had already provided unnamed class members the right to appeal for over 100 years. Frederic Calvert, *Observations on Suits in Equity* 38 (London, William Benning, 2d ed. 1846) (citing *Osborne v. Usher,* 6 Brown's Parliamentary Cases 20 (H.Ct.Parl.1721)). Calvert himself defended this right at length: "[T]he privilege of appeal [in class action suits] ought to be given in such a manner as to induce the readiest acquiescence in the system of representation during the earlier part of the suit; for which reason every individual ought, as it appears to me, to ... have the power of appealing, whether he has been a suitor ... or by some other person as his representative." *Id.*

On this side of the Atlantic, Joseph Story similarly noted that, where affected individuals are too numerous to appear in court, "they may come in under the decree, and take the benefit of it, or show it to be erroneous, or entitle themselves to a rehearing." Joseph Story, *Commentaries on Equity Pleadings* 96 (Little, Brown, 2d ed. 1840). In sum, as one commentator recently explained after canvassing the centuries of law on this issue, a requirement that absent class members intervene in order to appeal "*has no historical foundation.*" Timothy A. Duffy, Comment, *The Appealability of Class Action Settlements by Unnamed Parties,* 60 U. Chi. L. Rev. 933, 940 (1993) (emphasis added).

***21** Even more to the point, in a case decided only a few years before the Federal Rules were promulgated, this Court specifically adopted the principle that *de facto* parties' rights include the right to appeal. In *Johnson v. Manhattan Railway,* 289 U.S. 479, the Court concluded that corporate shareholders who received notice of proceedings involving a proposed temporary receivership were "*entitled* " to appear in district court—and to appeal—without taking any other steps. *Id.* at 495 (emphasis added). The Court cited in support of that proposition two lower court cases, both of which held that persons who appear in the district court in response to express court invitations need not intervene in order to appeal. *Id.* at 495 n. 4, citing *Christian v. R. Hoe & Co.,* 63 F.2d 218, 218 (2d Cir.1933) (shareholder and noteholder who objected to receivership "is rightfully here, like a defendant who is summoned by process of court and after an adverse ruling has the right to appeal"); *Mitchell v. Lay,* 48 F.2d 79, 84-85 (9th Cir.1930), *cert. denied,* 285 U.S. 864 (1931) (appellant who did not intervene nevertheless entitled to appear and to appeal when he was "brought into court by the process of the court"). *See also Pianta v. H.M. Reich Co.,* 77 F.2d 888, 890 (2d Cir.1935) ("There is no merit in appellees' contention that the appellant has no standing to appeal because it was not an original party to the suit and has not sought to intervene. The appellant, having appeared in opposition to the order to show cause, is like a defendant who is summoned by process of court and after an adverse ruling has the right to appeal.") (citing *Manhattan Railway* and quoting *Christian*).

In light of the Court's statement in *Manhattan Railway,* it should come as no surprise that, just a few years after the adoption of the Federal Rules, a federal appellate court squarely held that objectors in derivative actions need not intervene to appeal. *See Cohen v. Young,* 127 F.2d at 724 (citing *Manhattan Railway* in holding that objector who did not intervene is nevertheless "entitled as ***22** of right to prosecute the appeal").[19] Indeed, these principles were once so well established that, in 1975, then-judge Stevens, citing both *Cohen* and *Pianta,* stated unequivocally that "[t]he law is clear that a non-party shareholder who appears, pursuant to a Rule 23.1 notice, to present objections to a proposed dismissal or settlement of a derivative action may appeal an adverse decision even though he has not been formally made a party to the action." *Tryforos,* 518 F.2d at 1263 n. 22.

States have also recognized these established common law principles. In particular, both Delaware and New York —States with particular expertise in applying common law principles in the modern corporate context—permit shareholders to appeal a decision approving a derivative suit settlement without intervening. *See Prezant v. DeAngelis,* 636 A.2d 915 (Del.1994); *In re Resorts Int'l Shareholder Litig.,* 570 A.2d 259 (Del.1990); *Geller v. Tabas,* 462 A.2d 1078 (Del.1983); *Posen v. Cowdin,* 44 N.Y.S.2d 842, 843-44 (N.Y.App.Div.1944); *see also Gowdey v. Commonwealth Edison Co.,* 345 N.E.2d 785, 790-91 (Ill.Ct.App.1976); *Simons v. Horowitz,* 151 Cal. App. 3d 834, 842-44 (Cal.Ct.App.1984); *ICSC Partners, L.P. v. Kenwood Plaza, L.P.,* 688 N.E.2d 5, 7-8 (Ohio Ct.App.1996).

B. None of the Seventh Circuit's Arguments Supports a Requirement That Objectors Intervene in Order To Appeal.

1. Given that Rule 23.1 embodies the common law tradition permitting appeals by *de facto* parties such as ***23** objecting shareholders, one would expect that the Seventh Circuit would not have departed from this practice without some compelling constitutional or statutory reason.

Yet no such reason exists. There is certainly no constitutional bar to permitting appeals by objecting shareholders. To have Article III standing, a person must be injured, the injury must be caused by the action at issue, and the injury must be redressable by a favorable judicial judgment. *See United States v. Hays,* 515 U.S. 737, 743 (1995). In this case, shareholders are injured when the value of their investment is reduced. That injury is caused by the district court's decision to approve a settlement that does not obtain sufficient compensation for wrongs done to the corporation. And the injury may be redressed by a court of appeals' decision reversing the district court's judgment. Indeed, Judge Easterbrook, writing for the Seventh Circuit, conceded that petitioners had standing to appeal. *See* Pet. App. 7a ("Standing means injury in fact, and a reduction in the market price of one's stock is injury.").

Nor is there any statutory basis for dismissing this appeal. The federal statute governing appeals from final district court judgments, 28 U.S.C. § 1291, simply provides that: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States." Thus, the relevant federal statute provides no grounds to deprive petitioners of the rights historically granted to them.

2. Unable to find a constitutional or statutory basis for its rule, the Seventh Circuit rested its decision on a vast overreading of language from this Court's *per curiam* opinion in *Marino v. Ortiz,* 484 U.S. 301 (1988)—a decision that did not involve the rights of shareholders or even the related question of the rights of unnamed members of a Rule 23 plaintiff class. In particular, the court of appeals relied on the following three sentences from *Marino:*

***24** The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled .... The Court of Appeals suggested that there may be exceptions to this general rule, primarily "when the nonparty has an interest that is affected by the trial court's judgment." We think the better practice is for such a nonparty to seek intervention for purposes of appeal.

Id. at 304 (citing *United States ex rel. Louisiana v. Jack,* 244 U.S. 397 (1917) and Federal Rule of Appellate Procedure 3(c)); *see* Pet. App. 1a-2a.

The Seventh Circuit's reliance on *Marino* is misplaced. First, unlike Rule 23.1 objectors, the persons seeking to appeal in *Marino* were not members of the plaintiff class at issue, but outsiders to the proceedings with no right to participate in the district court under Rule 23. More specifically, they were white police officers seeking to challenge a class action settlement between black officers and police authorities. Nothing in *Marino* addressed the appellate rights of persons who are members of the class whose rights are directly adjudicated by a judgment entered in the case and who receive a mandatory notice expressly inviting them to participate in trial court proceedings. *See Bell Atlantic,* 2 F.3d at 1308 n. 6. [20]

The lone case cited in the pertinent passage of *Marino* confirms the limited nature of *Marino's* holding—and its inapplicability here. *United States ex rel. Louisiana v. Jack* involved a land dispute between a state agency and a landowner. The State of Louisiana sought to participate in the proceedings. The Court held the State not a proper party and explained that "it has long been the law" that only "part[ies] *and priv[ies] to the record* " may appeal an adverse decision, though even to this rule the Court acknowledged some "exceptions." 244 U.S. at 402 (emphasis ***25** added); *see also Ex parte Cockcroft,* 104 U.S. 578, 579 (1882) (actual parties or ones "treated as such" by trial court may appeal); *Bayard v. Lombard,* 50 U.S. (9 How.) 530, 551 (1850) (parties and privies may appeal). Objecting shareholders are at least "privies to the record" in derivative suits and thus could appeal under the rule stated in *Louisiana* and approved in *Marino. See supra* pp. 19-20 (establishing that at common law such persons have been considered "*de facto* " or "*quasi* " parties).

That the Seventh Circuit's understanding of *Marino* is untenable is further established by the unlikely consequences that would follow from the court of appeals' reading of that case. If *Marino* did *hold* that "only parties to a lawsuit, or those that properly become parties, may appeal" (484 U.S. at 304), an enormous body of settled law would have been overturned by a single phrase in that *per curiam* opinion. Nonparties whose rights are adjudicated by trial court judgments are treated by the federal courts as *de facto* parties and permitted to appeal without intervention in a wide range of circumstances. *See* 15A Wright, *et al., supra,* § 3902.1, at 102 (2d ed. 1992 & Supp. 1998). [21] For instance, federal courts routinely permit nonparty appeals from judgments that bind the nonparty by name. *Id.* at 122 (citing cases). [22] Courts permit nonparty witnesses held ***26** in contempt for refusing discovery to appeal on claims of privilege, lack of personal jurisdiction, and other matters. *See* 15A Wright, *et al., supra,* § 3902.1, at 124. [23] They regularly allow attorneys and expert witnesses to appeal district court denials of fees. *See* 15A Wright, *et al., supra,* at 126 & n. 45. [24] And non parties obligated to reimburse the defendant for amounts paid under the trial court's judgment are also heard on a routine basis. *See* 15A Wright, *et al., supra,* § 3902.1 at 127 & n. 47. [25]

Faced with this enormous body of contrary case law, even respondents have declined to defend the Seventh Circuit's understanding that *Marino* stands for the bald ***27** proposition that "only parties may appeal." Pet. App. 3a. Respondents' alternative understanding of *Marino*—an understanding that has no basis in the text of that decision—is that an ill-defined, but limited subset of nonparties who are "personally addressed" by trial court orders may also appeal. *See* ADM Br. in Opp. 14 n. 6; ADM Directors Br. in Opp. 17. Respondents have cited no decision from any court establishing such a rule, and we are not aware of any.

Indeed, the limited scope of respondents' proffered rule is inconsistent with common law practice permitting unnamed class members to appeal (*see supra*); with this Court's long-standing jurisprudence allowing *all* "priv [ies] to the record" to appeal (*Louisiana,* 244 U.S. at 402); and with federal appellate practice, which has routinely permitted unnamed privy nonparty appeals. *See, e.g., supra* note 25 (unnamed persons legally liable to reimburse defendant for amounts paid in judgment permitted to appeal); 15A Wright, *et al., supra,* § 3902.1, at 122 (named nonparty presents "easiest" but not exclusive case for appeal); *id.* at 126 (though order does not "bind a nonparty by name," the nonparty may appeal when order has "[o]bvious and important effects" on him). [26]

Moreover, even if respondents' rule did have some basis in law, they have thus far failed to explain how it would forbid appeals by shareholders who, like petitioners, have their objections specifically overruled—and thus "personally ***28** addressed"—by the trial court order approving the settlement. [27]

3. Beyond *Marino,* the only other authority the Seventh Circuit cited to support its decision to bar all nonparty appeals is Federal Rule of Appellate Procedure 3(c). Pet. App. 2a. Rule 3(c), the panel noted, provides that "[a] notice of appeal must specify the *party or parties* taking the appeal by naming each appellant in either the caption or the body of the notice of appeal" (emphasis added). Since no party is taking the appeal here, the Seventh Circuit reasoned, it must be improper under Rule 3(c). *Id.*

Rule 3(c) cannot come close to bearing the weight that the Seventh Circuit placed upon it. Again, the Seventh Circuit's reading of Rule 3(c) would bar not just nonparty shareholder appeals, but *all* nonparty appeals—an improbable result that would effectively overrule innumerable decisions, from both before and after Rule 3(c), that had never before been controversial. *See supra* notes 20-26. As noted, that action would be so extraordinary that even respondents do not urge it here.

In any event, contrary to the Seventh Circuit's conclusion (Pet.App.7a), the Federal Rules of Appellate Procedure are *not* intended to limit the jurisdiction of the courts of appeals over appeals from final district court judgments; that is the function of Article III and section 1291, neither of which poses any obstacle to appeal here. Federal Rule of Appellate Procedure 1(b) states in no uncertain terms that "[t]hese rules *shall not be construed to extend or limit the jurisdiction of the courts of appeals* ***29** *as established by law* " (emphasis added). The Seventh Circuit's reliance on Rule 3(c) in this context cannot be squared with the plain language of that Rule.

Consistent with the principle that Rule 3(c) does not limit the courts of appeals' jurisdiction, the language of that provision does not even purport to delineate who is eligible to appeal. Rather, as its title suggests, Rule 3(c) is concerned only with the formal "*content* [*s*] of the notice of appeal" filed by otherwise eligible appellants (emphasis added). Rule 3(c) simply ensures that sufficient information appears on the face of the notice for the court of appeals to discern the issues and litigants before it:

(c) *Content of the Notice of Appeal.*—A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." ...

Fed. R. App. P. 3(c).

Nor is there any indication that Rule 3(c)'s drafters ever intended it to exclude the possibility of nonparty appeals. To the contrary, the 1967 advisory committee notes indicate that the Rule "merely restate[s], in modified form, provisions now found in the civil and criminal rules ... and decisions under the present rules which *dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules.* " Fed. R. App. P. 3(c) 1967 advisory committee note (emphasis added). The 1979 advisory committee notes reemphasize the same point. *See id.* 1979 advisory committee note ("so long as the function of notice is met by the filing of a paper indicating an intention ***30** to appeal, the substance of the rule has been complied with"). [28]

4. The Seventh Circuit's final argument is that the case for allowing appeals from settlement approvals by objecting shareholders in Rule 23.1 actions is weaker than the case (which the Seventh Circuit had already rejected) for allowing such appeals by unnamed class members in Rule 23 actions. *See* Pet. App. 4a-5a.

As an initial matter, the premise of that argument—that objecting class members cannot appeal—is itself wrong. In any event, the unfavorable comparison between objecting shareholders and unnamed class members is directly at odds with the judicial and legislative judgment that the two groups should be granted the same rights. The language of Rule 23.1 tracks the language of Rule 23(e) granting class members the right to object to proposed settlements. [29] Until 1966, when Rule 23.1 was broken out into a separate rule, derivative actions were considered a form of class actions governed by what was then Rule 23(b). 7A Wright, *et al., supra,* § 1752, at 18 (1986). And, as the identity of the language used by Rules 23(e) and 23.1 suggests, that division was in no way intended to grant lesser rights to objecting shareholders than objecting class members. On the contrary, in proposing this change, the ***31** Advisory Committee specifically noted that the "mandatory notice" requirement contained in old Rule 23 "was *primarily directed* to derivative actions by shareholders" and was "continued for such actions by Rule 23.1." Preliminary Draft of Proposed Amendments to the Rules of Civil Procedure 114 (1964) (citing *Cunningham v. English,* 269 F.2d 539 (D.C.Cir.1959)) (emphasis added).

Similarly, the Seventh Circuit's suggestion that individual shareholders, unlike individual class members, are not "injured part[ies]" who are "entitled to litigate" these issues simply reverses the judgment reflected on the face of Rule 23.1. Pet. App. 5a. By explicitly authorizing derivative suits by aggrieved shareholders, Rule 23.1 confirms that shareholders *are* sufficiently injured by corporate action to invoke the jurisdiction of the federal courts. Put differently, what Rule 23.1 does is precisely to grant shareholders an "entitle[ment]" to litigate in federal court, subject only to the specific safeguards enumerated in the Rule itself.

Moreover, because *all* investors will be bound by the result in the action being settled, each investor's rights will necessarily be implicated by a decision to approve the settlement and each investor's entitlement will thus be affected. In this respect, the case for allowing shareholders to appeal is *stronger* than that for class members, because shareholders do not have the option available to many unnamed class members of opting-out of a settlement they do not believe is fair. *See Gottlieb,* 11 F.3d at 1011 (concluding that case for Rule 23.1 nonparty appeals was more persuasive because "there is no opt-out provision in shareholder derivative suits"); *Rosenbaum v. McAllister,* 64 F.3d at 1442 (same). [30]

***32 C. An Intervention Requirement Would Create Significant Disincentives to Objector Participation Without Serving any Countervailing Purposes.**

Objecting shareholders play a critical role in ensuring the fairness of derivative suit settlements. Once plaintiffs' counsel and the defendants have reached a tentative settlement, their strong common interest is in obtaining approval for that settlement. Settlement hearings thus frequently devolve into "jointly orchestrated" "pep rallies" in which no party questions the fairness of the settlement. Jonathan R. Macey and Geoffrey P. Miller, *The Plaintiffs Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform,* 58 U. Chi. L. Rev. 1, 46 (1991).

Only objecting shareholders can give a federal court the benefit of an adversarial presentation as to whether a particular settlement is "fair and adequate" and thus should be approved. *See Bell Atlantic,* 2 F.3d at 1310 ("[o]bjectors play an important role by giving courts access to information on the settlement's merits," especially because "judges no longer have the full benefit of the adversarial process"); *Cohen v. Young,* 127 F.2d at 725 (nonparty shareholder participation is crucial so "that the court may have the full benefit of that broader information which comes from receiving advice as to the views of all parties concerned"). [31]

***33** Objecting shareholders perform this same function on appeal. Requiring intervention as a prerequisite for such appeals would dramatically decrease their number and thereby impair the ability of objecting shareholders to serve the recognized public function of exposing, defeating, and deterring collusive or inadequate settlements. Yet neither respondents nor the Seventh Circuit have identified *any* benefit from such a judicially manufactured rule.

1. There is no question that objecting shareholders serve an important function on appeal. Appellate review is an essential component of shareholder participation because it provides a strong incentive for district courts to consider shareholder objections fully and a direct avenue for correcting district court errors. *See* Hon. Jon O. Newman, *A Study of Appellate Reversals,* 58 Brooklyn L. Rev. 629, 633 (1992) (reporting reversal rate in civil cases of 27 percent); Steven A. Childress & Martha Davis, *Federal Standards of Review: Trial to the Court* § 2.14, at 2-103 (2d ed. 1982) (reporting civil reversal rate of approximately 16 percent for 1988-1989).

Shareholder appeals in particular have yielded tangible benefits for the corporation. For example, the court of appeals in *Rosenbaum, supra,* held that nonparty shareholders could appeal attorney fee awards and remanded for reconsideration of the $2.6 million fee award. "As a direct result," the district court subsequently ordered $1.4 million returned to the corporation. Order, *Rosenbaum v. McAllister,* Civil Case No. 91-B-2164 (D.Colo. Feb. 14, 1997). *See also* ***34** *In re Pittsburgh & Lake Erie R.R. Sec. Antitrust Litig.,* 543 F.2d 1058 (holding that settlement's diversion of value from the corporation to the plaintiffs and their attorneys was so egregiously unfair that district court's approval constituted an abuse of discretion); *Ficalora v. Lockheed California Co.,* 751 F.2d 995, 997 (9th Cir.1985) (remanding case for "reasoned judgment" that the settlement "is not the product of fraud or overreaching by, or collusion among, the negotiating parties").

2. There is also no question that requiring intervention would sharply curtail, if not eliminate, shareholder appeals and correspondingly impair the public functions they serve. The legal hurdles to intervention by objecting shareholders at the settlement phase are daunting. Rule 24(b) requires motions to intervene to be "timely." Under existing case law, there is a presumption that motions made after a tentative settlement has been reached fail that test. [32] And that is not a problem that is within the power of dissenting shareholders to fix. Shareholders are first notified of an ongoing derivative lawsuit under Rule 23.1 only *after* a settlement has been struck. *See* Fed. R. Civ. P. 23.1. [33] "Thus, even if they were to request intervention immediately after learning of the litigation ... the court might very well find their request to be 'untimely.' " Kim, 66 Tenn. L. Rev. at ----.

Unnamed shareholders seeking to intervene under Rule 24(a) must also convince the district court that their interests ***35** are not "adequately represented" by the existing named shareholders. *Id.* at ----. Yet, in allowing the action to proceed pursuant to Rule 23.1, the court has necessarily already found that the named shareholder-plaintiff *does* "adequately represent" the interests of shareholders generally. *Id.* In such circumstances, "representation will be presumed adequate" and intervention virtually impossible. 7C Wright, *et al., supra,* § 1909, at 324; *cf. Sam Fox Publ'g Co. v. United States,* 366 U.S. 683, 691-92 (1961). Indeed, some lower courts have suggested that, as a matter of law, objecting shareholders' interests are "adequately protected" by shareholder-plaintiffs. *See In re General Tire & Rubber Co. Sec. Litig.,* 726 F.2d 1075, 1087 (6th Cir.), *cert. denied,* 469 U.S. 858 (1984).

3 Even if objecting shareholders could (somehow) clear the legal hurdles to intervention, they would still face enormous practical disincentives. Indeed, there are *already* significant financial disincentives to shareholder participation of any sort. Objectors receive no direct financial compensation for their activities, and no guarantee of lucrative attorneys' fees awards even if they succeed in convincing a court not to approve a settlement. They participate in derivative proceedings only for whatever incremental *pro rata* value might accrue to their individual stock holdings as a result of their efforts. *Bell Atlantic,* 2 F.3d at 1309 ("shareholders ... lack the incentive ... to police settlements [because] the costs of policing typically outweigh any *pro rata* benefits to the shareholder"). Meanwhile, objectors shoulder the substantial costs of hiring counsel, analyzing settlement materials, filing written objections, and appearing in court, all within a matter of days or weeks. Even the largest institutional shareholders only rarely have the incentive—and the means—to participate. *See* Remarks of District Judge Vaughn R. Walker, ABA National Securities Litigation Institute at 7-8 (June 5, 1998) ("[I]nstances of institutional investors actively leading a [securities class] litigation effort remain relatively rare .... This is no surprise ... [I]nstitutional ***36** investors have disincentives to becoming [parties] .... Lawsuits are costly in time, money and other resources.").

Requiring intervention would extinguish even the modest incentives that now exist for shareholder appeals. Shareholders wishing to preserve a right to appeal would face the added financial burden of drafting a pleading the equivalent of a complaint (expressly required by Rule 24) and litigating the timeliness of their motion and the adequacy of existing representation. They would also face all the costs and burdens associated with party status, including wide-ranging Rule 26(a)(1) automatic disclosure duties and the obligation to respond to interrogatories, appear for depositions, and answer virtually unlimited demands for documents. [34]

In addition, shareholders who receive notice under Rule 23.1 would be forced to make a snap decision (within four weeks here) not just whether to participate, but also whether to accept the burdens associated with party status. Institutional shareholders—those who are the most likely to have enough at stake to make participation economical—simply cannot make such decisions that quickly, because of the need to consult their boards of directors. *See* Weiss & Beckerman, 104 Yale L.J. at 2100 ("[l]ack of timely notice makes it difficult for institutional investors to participate in class actions"). Indeed, Congress has expressly recognized that such quick ***37** deadlines make institutional shareholders participation unduly and undesirably difficult. [35]

4. Respondents fleetingly suggest that requiring intervention as a prerequisite to appeal serves the purpose of weeding out frivolous appeals, thereby enhancing judicial efficiency. ADM Br. in Opp. 18 n. 12. But they can present no evidence that the courts of appeals are in need of such protection. The substantial costs associated with objecting and appealing *already* deter meaningful shareholder participation in all but the most obvious cases of abuse.

Petitioners have been able to locate in LEXIS, since 1990, only 12 federal derivative suit settlements, not including this one, that attracted one or more objectors in district court. [36] We have been able to locate (again excluding the instant case) only 4 objector appeals from ***38** Rule 23.1 derivative suit settlements since 1990. [37] Despite decades of common law, federal, and state practice permitting objector appeals, petitioners are unable to locate a single court or commentator complaining about the manageability of objector appeals in derivative suits. There simply is no problem to which the Seventh Circuit's proposed rule is a solution.

In fact, mandating intervention would impose *more* work on the federal courts, not less. The district court would have to litigate and resolve a motion to intervene as well as a settlement hearing. *See Webcor Elecs.,* 101 F.R.D. at 463 (complaining that Rule 24 motion to intervene was "superfluous procedural question" since nonparty objector was already an invited Rule 23.1 participant in litigation). If intervention is denied, the court of appeals must still hear an appeal. Its attention is merely shifted to the motion to intervene, and away from the merits of the settlement and the policy goals that objecting shareholder participation was designed to serve.

***39** 5. Some of the respondents have intimated that the disincentives created by an intervention requirement might be alleviated by judicially created rules mandating that intervention motions always be granted in this particular context and excepting shareholder intervenors from *any* of the normal obligations associated with party status. ADM Br. in Opp. 16; ADM Directors' Br. in Opp. 14-15 & n. 2. Shareholders would only need to comply with a procedural formality to protect their right to appeal.

But the Court would have to change Rule 24 intervention law radically for objecting shareholders in order to ensure that an intervention requirement does not undermine the policies of Rule 23.1. The Court would have to make new law on the timeliness of an intervention motion and the adequacy of existing representation. It would also need to absolve shareholders from drafting a pleading the equivalent of a complaint, as well as from Rule 26(a)(1)'s automatic disclosure duties and the various discovery obligations that follow from intervention.

Even if the Court could do all this, the question remains, what would be gained by such a watered-down intervention requirement? The answer is: nothing. No substantive purpose would be served, and the courts would be burdened with needless paperwork, all so that objectors could obtain a stamp on their passport that allows them to proceed to an appellate court. The Court should not take it upon itself to manufacture any such limitation on access to the federal courts of appeals.

There is no constitutional or statutory basis for respondents' proposed intervention requirement. It runs directly contrary to centuries of common law precedent embodied in Rule 23.1 and finds no support anywhere in the Federal Rules or this Court's cases. It would also undermine the important and recognized role of objecting shareholders in exposing collusive settlements. It should be rejected.

*40 CONCLUSION

The Seventh Circuit's order dismissing petitioners' appeal should be reversed.

*1A ADDENDUM

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

***2a Federal Rule of Appellate Procedure 1. Scope of Rules and Title**

(a) Scope of Rules. These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the United States Tax Court; in appeals from bankruptcy appellate panels; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.

(b) Rules Not to Affect Jurisdiction. These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.

(c) Title. These rules may be known and cited as the Federal Rules of Appellate Procedure.

Federal Rule of Appellate Procedure 3. Appeal as of Right—How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of subdivision (d) of this Rule 3. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under ***3a** 28 U.S.C. § 1292(b) and appeals in bankruptcy must be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

(b) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Content of the Notice of Appeal.—A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent. In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. Form 1 in the Appendix of Forms is a suggested form for a notice of appeal.

(d) Serving the Notice of Appeal.—The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record ***4a** (apart from the appellant's), or, if a party is not represented by counsel, to the party's last known address. The clerk of the district court shall forthwith send a copy of the notice and of the docket entries to the clerk of the court of appeals named in the notice. The clerk of the district court shall likewise send a copy of any later docket entry in the case to the clerk of the court of appeals. When a defendant appeals in a criminal case, the clerk of the district court shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date when the notice of appeal was filed and, if the notice of appeal was filed in the manner provided in Rule 4(c) by an inmate confined in an institution, the date when the clerk received the notice of appeal. The clerk's failure to serve notice does not affect the validity of the appeal. Service is sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.

(e) Payment of Fees.—Upon the filing of any separate or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States, the latter to be received by the clerk of the district court on behalf of the court of appeals.

***5a Federal Rule of Civil Procedure 23. Class Actions**

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (I) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other ***6a** available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.
(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the

member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members ***7a** of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise ***8a** shall be given to all members of the class in such manner as the court directs.

Federal Rule of Civil Procedure 23.1. Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Federal Rule of Civil Procedure 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant ***9a** claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shill state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the ***10a** attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

Footnotes

1 Roger Lowenstein, *Corporate Governance's Sorry History,* Wall St. J., Apr. 19, 1996, at C2.

2 Martha Irvine, *Guilty Verdict May Change Plans for Top Management at Agribusiness,* Assoc. Press, Sept. 20, 1998 (quoting Professor Sam Peltzman).

3 Greg Burns, *A Grain of Activism at Archer Daniels Midland,* Bus. Wk., Nov. 6, 1995, at 44 (Exh. H to Declaration of Steven F. Benz (“Benz Decl.”) (July 3, 1997) (R.82). For the Court's convenience, citations to record materials are identified by title and the corresponding numerical designation on the district court's docket sheet, *e.g.,* R. 82.

4 John A. Byrne, *The Best and the Worst Boards,* Bus. Wk., Nov. 25, 1996 (Exh. B to Benz Decl. (R.82)).

5 The Council is an association of more than 100 corporate, public, and union pension funds devoted to addressing their members' investment concerns and to promoting responsible corporate governance rules and procedures. “The first and probably the most central of the Council's policies is its requirement that a majority of a corporation's directors” be independent from *any* potentially compromising relationships to the company they serve. *Id.* ¶ 4.

6 The parties signed a so-called “free sailing provision” under which defendants agreed not to oppose a fee petition seeking as much as $3.92 million, or 49 percent of the fund, to plaintiffs' counsel. The average fee award in shareholder derivative suits where no monetary settlement is made (effectively the case here) is $287,000. Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?,* 7 J.L. Econ. & Org. 55, 63 (1991). Even in cases where monetary settlements are made to shareholders, fee awards average no more than 24 percent of the settlement amount. *Id.*

7 Adding to the conflict of interest, plaintiffs' attorneys remained eligible under the Settlement to earn these fees as well.

8 Even two attorneys whose law firms provide legal services to the company and two executives whose companies or their affiliates do business with ADM qualified under plaintiffs' measure as “outside” directors. *Id.*

9 Petitioners first asked the court to delay the hearing on the ground that petitioners had not been afforded sufficient time to prepare their objections. The court denied that request.

10 Even some of the plaintiffs' attorneys conceded that the fee award was excessive. *See* Memorandum on Behalf of Delaware Plaintiffs in Support of the Proposed Settlement and Award of Fees and Expenses at 1(June 30, 1997) (R.68) (seeking fee

award totaling 33 1/3 percent of common fund instead of 49 percent) Hearing Tr. at 98, 102 (July 7, 1997) (R.103) (plaintiffs' counsel arguing that "[w]e don't endorse" "award of up to 49 percent of the fund"; criticizing 49 percent fee award and stating "I think if a notice went out that said that plaintiffs' counsel will apply for what is normally almost understood to be up to a third, you would have a lot fewer objections, maybe CalPERS would have elected not even to object to the fee").

11 *See* Susanna M. Kim, *Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits?,* 66 Tenn. L. Rev. ... ----, ---- (publication expected Dec. 1998); John C. Coffee, Jr. & Donald E. Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Reform,* 81 Colum. L. Rev. 261, 302-08 (1981).

12 *See also Papilsky v. Berndt,* 466 F.2d 251, 258 (2d Cir.), *cert. denied,* 409 U.S. 1077 (1972); Note, *Control over Settlement of Shareholder's Suit,* 54 Harv. L. Rev. 833 (1941); 2 George D. Hornstein, *Corporation Law and Practice* § 727 (1959); *cf. Daily Income Fund, Inc. v. Fox,* 464 U.S. 523, 532 n. 7 (1984) ("[T]he provision requiring notice and court approval of settlements [is] also intended to prevent shareholders from suing in place of the corporation in circumstances where the action would disserve the legitimate interests of the company or its shareholders.").

13 *See, e.g., In re Pittsburgh & Lake Erie R.R. Sec. & Antitrust Litig.,* 543 F.2d 1058, 1067 (3d Cir.1976); *Girsh v. Jepson,* 521 F.2d 153, 157, 160 (3d Cir.1975); *White v. Auerbach,* 500 F.2d 822, 828 (2d Cir.1974); *Cohen v. Young,* 127 F.2d 721, 724 (6th Cir.1942); *Saylor v. Bastedo,* 594 F. Supp. 371, 373, 375 & n. 3 (S.D.N.Y.1984); *Ackert v. Ausman,* 217 F. Supp. 934, 936 (S.D.N.Y.1963); *Webcor Elecs. v. Whiting,* 101 F.R.D. 461, 463 (D.Del.1984); *Levin v. Mississippi River Corp.,* 59 F.R.D. 353, 367, 373 (S.D.N.Y.), *aff'd mem.,* 486 F.2d 1398 (2d Cir.1973) (Table).

14 Felzen Br. in Opp. 11. *See* ADM Directors Br. in Opp. 14 (similarly conceding that shareholders need not intervene in order to object in district court, but contending that, "[i]f a nonparty shareholder seeks involvement beyond that stage, intervention is the obvious next step"); ADM Brief in Opp. 17 ("Shareholder procedural rights have been provided and delineated in Rule 23.1, Federal Rules of Civil Procedure .... Objectors *who wish to appeal* need only intervene.") (emphasis added).

15 *See, e.g., Nathan v. Rowan,* 651 F.2d 1223, 1226 (6th Cir.1981); *Goldman v. Northrop Corp.,* 603 F.2d 106, 109 (9th Cir.1979); *Cramer v. General Tel. & Elecs. Corp.,* 582 F.2d 259, 268 (3d Cir.1978); *Reiter v. Universal Marion Corp.,* 299 F.2d 449, 452 (D.C.Cir.1962); *Stella v. Kaiser,* 218 F.2d 64, 65 (2d Cir.1954). *See also Matsushita Elec. Indus. Co. v. Epstein,* 516 U.S. 367, 379 (1996).

16 The same basic rationale permits appeals by objecting class members in a Rule 23 class action. *See, e.g., Marshall v. Holiday Magic, Inc.,* 550 F.2d 1173, 1176 (9th Cir.1977) (as class members, appellants "legal rights are affected by the settlement" and they may appeal). If anything, the case for the appellate rights of objectors is stronger in the derivative suit context because absent shareholders (unlike absent class members) have no ability to optout of the suit. *See infra* pp. 30-31.

17 Courts and commenters have uniformly recognized that Rule 23.1 was intended to ratify, not change, common law practice. *See Daily Income Fund, Inc. v. Fox,* 464 U.S. at 530 ("[w]hen the Federal Rules were promulgated in 1937," prior law pertaining to derivative shareholder actions was "substantially restated"); *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. at 548 (construing Rule 23.1 in light of prior equity rules); *Papilsky v. Berndt,* 466 F.2d 251 (same); *In re Pittsburgh & Lake Erie R.R. Spec. & Antitrust Litig.,* 543 F.2d at 1065 (same); 7C Wright, *et al.,* § 1821, at 9 (2d ed. 1986) ("The modern shareholder derivative action had its origins in equity and the content of Rule 23.1 can be traced to a number of nineteenth century decisions."); 5 James W. Moore, *Moore's Federal Practice,* § 23.1 App. 100, at 7 (Matthew Bender 3d ed. 1997) ("The principles of Rule 23.1 are not ... new to federal practice. Indeed, the principles of the rule reach back well into the 19th century, thus predating the passage of the Civil Rules by several decades. When the rules were promulgated in 1937, the provisions of the Equity Rules relating to derivative actions were carried forward as original Rule 23(b).") (footnotes omitted) (citing Equity Rule 94 (1882)).

18 *See also Cockburn v. Thompson,* 16 Ves. Jun. 321, 326-27, 33 Eng. Rep. 1005, 1007 (Ct. Ch. 1809) ("where it is impracticable to make parties, and yet the Court can by arrangement afterwards introduce the persons, as Quasi parties, the Court does not require, that they shall be parties on the record"); Frederic Calvert, *Parties to Suits in Equity* 62 (London, William Benning, 2d ed. 1847) ("Courts of Equity, having adopted the principle of representation in the different forms, which have been mentioned, work it out by treating the persons represented, as if they had been parties. These persons are *quasi* parties on record.").

19 *See also* 7C Wright, *et al., supra,* § 1839, at 182 ("objector to the settlement may appeal the court's approval of the compromise"); 10 *Federal Procedure, Lawyers Edition* § 25:184, at 260 (1994) ("nonparty shareholder who appears, pursuant to an FRCP 23.1 notice, to present objections to a proposed dismissal or settlement of a derivative action may appeal an adverse decision without having been formally made a party to the action").

20 Even as to the strangers to the case at issue in *Marino,* the Court merely purported to establish "better practice," not an exceptionless rule. *See* 484 U.S. at 304.

21 *See id.* at 122 (collecting examples) ("Nonparties need not always go through a formal intervention procedure to achieve standing to appeal. Appeals have been permitted on showings that range from easy cases in which a nonparty is formally addressed by a court order through less clear cases in which a nonparty is significantly affected.").

22 *See also Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1277-78 (9th Cir.), *cert. denied,* 506 U.S. 953 (1992); *United States v. International Bhd. of Teamsters,* 931 F.2d 177, 183-84 (2d Cir.1991); *Hoxworth v. Blinder, Robinson & Co.,* 903 F.2d 186, 194 n. 12 (3d Cir.1990); *EEOC v. Pan American World Airways, Inc.,* 897 F.2d 1499, 1504 (9th Cir.), *cert. denied,* 498 U.S. 815 (1990); *Hal Roach Studios, Inc. v. Richard Feiner & Co.,* 896 F.2d 1542, 1546-47 (9th Cir.1989), *cert. denied,* 498 U.S. 815 (1990); *SEC v. Weneke,* 783 F.2d 829, 834 (9th Cir.), *cert. denied,* 479 U.S. 818 (1986); *In re Baldwin-United Corp.,* 770 F.2d 328, 335 (2d Cir.1985); *In re Grand Jury Proceedings,* 654 F.2d 268, 270-71 (3d Cir.), *cert. denied,* 454 U.S. 1098 (1981); *Thompson v. Freeman,* 648 F.2d 1144, 1147 n. 5 (8th Cir.1981); *Commercial Sec. Bank v. Walker Bank & Trust Co.,* 456 F.2d 1352, 1354 (10th Cir.1972).

23 *See also United States Catholic Conference v. Abortion Rights Mobilization, Inc.,* 487 U.S. 72, 76 (1988); *General Ins. Co. of Am. v. Eastern Consolidated Utils., Inc.,* 126 F.3d 215, 218 (3d Cir 1997); *United States v. Bertoli,* 994 F.2d 1002, 1012 (3d Cir.1993); *Petersen v. Douglas County Bank & Trust Co.,* 967 F.2d 1186, 1188 (8th Cir.1992); *Port Drum Co. v. Umphrey,* 852 F.2d 148, 150 n. 2 (5th Cir.1988); *Norwood v. Slammons,* 788 F. Supp. 1020, 1024 (W.D.Ark.1991).

24 *See also United States v. Tippett,* 975 F.2d 713, 718 (10th Cir.1992); *Price v. Pelka,* 690 F.2d 98, 102 (6th Cir.1982); *James v. Home Constr. Co. of Mobile, Inc.,* 689 F.2d 1357, 1359 (11th Cir.1982); *Lipscomb v. Wise,* 643 F.2d 319, 320-21 (5th Cir.1981); *Dietrich Corp. v. King Resources Co.,* 596 F.2d 422, 424 (10th Cir.1979); *Preston v. United States,* 284 F.2d 514, 515 n. 1 (9th Cir.1960); *Angoff v. Goldfine,* 270 F.2d 185, 186 (1st Cir.1959).

25 *See also Fields v. Blum,* 629 F.2d 825, 827 (2d Cir.1980) (order enjoining reduction of welfare benefits by city official could be appealed by State, since State was legally required to reimburse city for payments and controlled both the activities complained of and the conduct of local officials).

26 Federal court practice on this point is so deeply rooted that several courts of appeals have established a three-part standing test governing the general question whether nonparties may appeal. *See, e.g., Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.,* 141 F.3d 490, 496 (3d Cir.1998); *Searcy v. Philips Elecs. N. Am. Corp.,* 117 F.3d 154, 157-58 (5th Cir.1997); *see also Keith v. Volpe,* 118 F.3d 1386, 1391 (9th Cir.1997).

27 *See* Hearing Tr. 79 (July 7, 1997) (R.103) ("All right. The court's ready to rule. Having heard the remarks of the proponents of the settlement and the remarks of those in opposition [*i.e.,* petitioners], the court concludes that the settlement, which is before the court is fair, reasonable, and adequate.").

28 The fact that Rule 3(c) was not intended to preclude appeals by nonparties is further underscored by Rule 3(b), which speaks simply of "*persons* ... entitled to appeal from a judgment or order of a district court." (emphasis added).

29 *Compare* Rule 23(e) ("A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.") *with* Rule 23.1 ("The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.").

30 The Seventh Circuit's suggestion that shareholders can obtain relief by altering the composition of the corporate board of directors (Pet.App.5a) ignores the fact that derivative suits are a mechanism for obtaining relief when a *minority* of shareholders cannot spur a board to act and thus must seek other means of redress. *See* Rule 23.1 (mandating that derivative plaintiff demonstrate that it has made a demand on the board and explain the reason for "plaintiff's failure to obtain ... action" from the board).

31 Objecting shareholders also serve the additional function of providing needed information to financial markets. *Cf. Musick, Peeler & Garrett v. Employees Ins. of Wausau,* 508 U.S. 286, 296 (1993) (explaining that SEC Rule 10(b)(5) serves valuable goals of deterring fraud and "ensur [ing] full disclosure of information material to investment decisions"). Adversarial scrutiny by objectors provides information necessary for market participants to assess rationally the real economic value of any settlement to the company and its stock. For instance, in this case, objecting shareholders exposed the speciousness of plaintiffs' claims that they had added $158 million in value through corporate governance reforms. *See supra* p. 7.

32 *See, e.g., Ragsdale v. Turnock,* 941 F.2d 501, 504 (7th Cir.1991) ("[t]he prejudice to the present parties ... is obvious and substantial"; " 'intervention at this time would render worthless all of the parties' painstaking negotiations' "), *cert. denied,* 502 U.S. 1035 (1992); *Farmland Dairies v. Commissioner of New York State Dep't of Agric. & Markets,* 847 F.2d 1038, 1043-44 (2d Cir.1988); *Jones v. Caddo Parish Sch. Bd.,* 735 F.2d 923, 926 (5th Cir.1984).

33 The settlement in this case had already been tentatively "approved" by the district court before notice was provided. *See supra* p. 7.

34 *Cf.* Joseph A. Grundfest & Michael A. Perino, *The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation,* 38 Ariz. L. Rev. 559, 562 (1996) ("[f]ormal participation and its attendant litigation cost and risk may ... be an unnecessarily complex and expensive means for institutional investors to express their views on the merits of class action or derivative litigation"); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Shareholders Can Reduce Agency Costs in Securities Class Actions,* 104 Yale L.J. 2053, 2103-05 (1995) (discussing barriers imposed by intervention).

35 In the 1995 Private Securities Litigation Reform Act, Congress expressly recognized that institutional shareholders are the most likely to represent the interests of shareholders generally and thus to prevent collusion, and accordingly changed many of the procedural rules associated with securities class actions to make their participation easier. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i) (requiring notice period after filing of Rule 23 securities class action complaint to allow time for potential lead plaintiffs to come forward); H.R. Conf. Rep. No. 104-369, at 34 (1995) (explaining that "[t]he Conference Committee believes that increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions"; decrying fact that "current system often works to prevent institutional shareholders" from participating in class actions; and stating that "the Conference Committee seeks to increase the likelihood that institutional investors will" participate by, *inter alia,* providing sufficiently long notice periods to enable institutional shareholders time to convene their boards and decide to come forward as potential lead plaintiffs).

36 *See Rosenbaum,* 64 F.3d 1439; *Bell Atlantic,* 2 F.3d 1304; *Granada Invs., Inc. v. DWG Corp.,* 962 F.2d 1203 (6th Cir.1992); *Ackerman v. Kassar,* No. 91-56521, 1993 U.S. App. LEXIS 22074 (9th Cir. Aug. 26, 1993); *In re Texaco, Inc. Shareholder Litig.,* No. 96 Civ. 8343, 1998 U.S. Dist. LEXIS 15027 (S.D.N.Y. Sept. 15, 1998); *Osher v. SCA Realty I, Inc.,* 945 F. Supp. 298 (D.D.C.1996); *In re Fleet/Norstar Fin. Sec. Litig.,* 935 F. Supp. 99 (1996), *opinion supplemented on other grounds,* 974 F. Supp. 155 (D.R.I.1997); *In re Chambers Dev. See. Litig.,* 912 F. Supp. 822 (W.D.Pa.1995); *In re First Investors Corp. Sec. Litig.,* No. 90 Civ. 7225, *et al.,* 1993 U.S. Dist. LEXIS 18044 (S.D.N.Y. Dec. 22, 1993); *Fischer & Porter Co. v. Tolson,* No. 91-7822, 1993 U.S. Dist. LEXIS 11481 (Aug. 18, 1993), *amended on other grounds,* 1993 U.S. Dist. LEXIS 14719 (E.D.Pa. Oct. 19, 1993); *Harkness Apartment Owners Corp. v. FDIC,* No. 87 Civ. 7080, 1993 U.S. Dist. LEXIS 10499 (S.D.N.Y. July 30, 1993); *In re Centocor, Inc. Sec. Litig.,* No. 92-CV-1071, 1993 U.S. Dist. LEXIS 7229 (E.D. Pa. June 2, 1993).

37 *See Rosenbaum,* 64 F.3d 1439; *Bell Atlantic,* 2 F.3d 1304; *Granada Invs., Inc.,* 962 F.2d 1203; *Ackerman,* 1993 U.S. App. LEXIS 22074.

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1998 WL 906316 (U.S.) (Appellate Brief)
Supreme Court of the United States.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
and Florida State Board of Administration, Petitioners,
v.
Paul FELZEN, et al., Respondents.

No. 97-1732.
October Term, 1998.
December 29, 1998.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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***1** As petitioners and their *amici* established in their opening briefs, the Federal Rules are properly construed to permit an appeal by objecting shareholders in the circumstances presented here. Pursuant to Federal Rule of Civil Procedure 23.1, those objectors received notice and an opportunity to ""show cause" why a proposed settlement should not be approved; they litigated their objections in district court; and the district court's approval of the settlement, if allowed to stand, will have claim preclusive effect on them. Permitting appeal in such circumstances comports with the decisions of this Court and many others allowing *de facto* or *quasi* parties to appeal without formal intervention. It also strongly furthers the clear legislative and judicial policy behind Rule 23.1--providing ***2** federal courts with the information necessary to root out and deter insufficient and collusive derivative suit settlements.

Respondents complain that petitioners "are claiming a power suddenly to convert themselves into litigants by their own will--without any judicial scrutiny, without any opportunity for other parties to object, and without any district-court determination." ADM Br. 19. But the "power" they find so objectionable is precisely what is granted to all shareholders by Rule 23.1. Rule 23.1 specifically contemplates that objecting shareholders have the right to appear and present argument about whether a settlement should be approved-- in respondents' words, to "convert themselves into litigants"--*without* formally intervening in the suit.

To be sure, by objecting to a settlement, shareholders do not become parties for all purposes. For that they would need to intervene pursuant to Rule 24-- they then would have substantially greater rights (including the right to address other issues in the litigation) and would be subject to the scrutiny that respondents emphasize. But, under the Federal Rules, shareholders who only want to oppose the settlement need not undertake the burden of filing their own complaint, need not subject themselves to mandatory disclosure and discovery obligations, and need not convince the district court of their right to be heard. They are allowed to present their arguments in district court without undertaking such burdens in recognition of the fact that their rights as shareholders are necessarily adjudicated by any proposed settlement. And, if the district court rejects their objections to the settlement, they may make their case--on the same terms--in the court of appeals.

A. This Court's Decisions Uphold the Rights of *De Facto* or *Quasi* Parties To Appeal

1. Respondents spend a great deal of time defending the same simplistic, but plainly incorrect, proposition ***3** adopted by the Seventh Circuit--that only parties may appeal. They claim that this Court has repeatedly held that ""persons may not appeal the judgment of a federal court to which they have not been made or sought to become a party." ADM Br. 8-9; *see id.* at 15-26; ADM Directors Br. 22-24; Felzen Br. 8-10, 13-14.

But, in fact, this Court and many others have long held that persons who are not formal parties to the case but whose rights are necessarily being adjudicated *may* appeal. That is the teaching of *Johnson v. Manhattan Railway,* 289 U.S. 479 (1933), where the Court--consistent with centuries of common law precedent--concluded that shareholders who receive notice and present argument in district court are "entitled" to appeal a receivership ruling without intervening. *Id.* at 495 & n.4. It is also the teaching of *United States Catholic Conference v. Abortion Rights Mobilization, Inc.,* 487 U.S. 72, 76 (1988); *Williams v. Morgan,* 111 U.S. 684 (1884); *Blossom v. Milwaukee R.R.,* 68 U.S. (1 Wall.) 655 (1864), and the multitude of other cases cited in our opening brief and in the Solicitor General's *amicus* brief. *See* Pet. Br. 18-19, 24-27 & nn.21-26; Gov't Br. 7-11 & nn.1-4.

Thus, the rule allowing *de facto* or *quasi* parties to appeal is by no means a novel one; rather, it is moored in centuries of decisions rendered by this Court and many others. As Judge Learned Hand explained, while the general rule is that persons who are not formal parties may not appeal because their rights are "not concluded by the decree, and [they are] not therefore aggrieved by it," this Court's cases demonstrate that where a judgment "affects [that person's] interests, he is often allowed to appeal." *West v. Radio-Keith-Orpheum Corp.,* 70 F.2d 621, 624 (2d Cir. 1934) (citing, *inter alia, Blossom* and *Morgan*). *See also* 15A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and*

Procedure § 3902.1, at 122 (2d ed. 1992) ("Nonparties need not always go through a formal intervention procedure to achieve standing to appeal.").

***4** Indeed, the very cases that ADM highlights (at 22) undermine its broad assertion. In *Karcher v. May,* 484 U.S. 72 (1987), the Court stated that the proposition that only formally admitted parties may appeal was a "*general rule,* " not an exceptionless command. *Id.* at 77 (emphasis added). Both *Bayard v. Lombard,* 50 U.S. (9 How.) 530, 551 (1850), and *United States ex rel. Louisiana v. Jack,* 244 U.S. 397, 402 (1917) (citing *Ex parte Leaf Tobacco Bd.,* 222 U.S. 578 (1911)), state that the category of permissible appellants includes "*privies to the record*"--a class that has been determined to include shareholders that seek review of derivative suit settlements. [1] Other cases cited by respondents similarly confirm that the right to appeal extends to persons treated as parties by the trial court [2] --a category that, if it is to ***5** have meaning at all, must include persons who have received a legally mandated notice of court proceedings, who are entitled to present argument on that question before the trial court, and who will be subject to claim preclusion if a settlement is approved. *See* Pet. Br. 14-19; Gov't Br. 12-15.

Certainly, none of respondents' proffered cases involved persons whose rights were subject to claim preclusion once the case was decided and who were summoned to appear and show cause in trial court proceedings. *See, e.g., Ex parte Cockcroft,* 104 U.S. at 578 (denying appeal by party who "did not make it appear that he had any real interest in the controversy"); *Payne v. Niles,* 61 U.S. (20 How.) 219, 220 (1857) (person who had never sought relief directly against judgment debtor could not appeal judgment); *Connor v. Peugh's Lessee,* 59 U.S. (18 How.) 394, 395 (1855) (tenant who did not contest ejectment prior to judgment could not appeal). [3]

***6** 2. In the end, respondents are forced to abandon the absolutist proposition adopted by the Seventh Circuit. They acknowledge that some persons who are not formal parties may appeal. [4] Having discarded the Seventh Circuit's *reasoning,* however, respondents struggle to save its *result* with a series of newly minted limitations that, in their view, do not authorize objector appeals in this context.

For the reasons we discuss below, respondents' arguments on these points are no more persuasive than their primary submission. For now, however, the crucial point is that respondents' concession that some persons who are not formal parties may appeal fatally undermines their claims (*see* ADM Br. 18, 50) that this Court's cases mandate that *all* persons intervene before appealing and that a revision to the Federal Rules would be necessary to ***7** permit appeals by *de facto* or *quasi* parties in this context. [5] Rather, intervention provides an *alternative* for persons who want the much greater rights associated with full party status--most basically, the right to be heard and to appeal on many issues *other* than the approval of the settlement. *Contrast* Felzen Br. 17 (wrongly suggesting that objectors want to be "super parties" with all the benefits of party status without any of the burdens).

Respondents' admission also fatally undermines any suggestion that *Marino v. Ortiz,* 484 U.S. 301 (1988), and/or Federal Rule of Appellate Procedure 3(c) absolutely bar all appeals by persons who are not parties. [6] The only question before the Court, therefore, is whether there is some *other* basis that the Seventh Circuit did not think of to support that court's conclusion that objecting shareholders may not appeal. As we now explain, there is not.

*8 B. Respondents' Arguments for Denying Objecting Shareholders the Right To Appeal Are Unpersuasive and Reflect a Misunderstanding of Derivative Suits

After grudgingly acknowledging that *some* persons who are not formal parties may appeal, respondents assert that shareholder objectors do not fall within the scope of the decisions permitting such appeals. Respondents proffer two primary distinctions between shareholder objectors and other *de facto* party appellants: (1) shareholder objectors are allegedly not "summoned" into court in the same way these other appellants are; and (2) shareholders do not have a sufficiently "direct" interest to support a right to appeal. Neither argument withstands scrutiny.

1. Respondents contend repeatedly that, unlike the *de-facto* parties that have been permitted to appeal, petitioners were not "summoned" or "haled into court." ADM Br. 26-27, 31-33; ADM Directors Br. 35-37; Felzen Br. 18-19. In fact, petitioners here are in precisely the same position as the appellants in *Manhattan Railway,* in *Christian v. R. Hoe & Co.,* 63 F.2d 218, 218 (2d Cir. 1933) (cited with approval in *Manhattan Railway* for permitting *de facto* party appeal), in *Cohen v. Young,* 127 F.2d 721, 724 (6th Cir. 1942), and in the other cases cited in our opening brief (at 21-22). In those cases, as here, appellants received a court notice informing them of the pendency of proceedings that affected their rights, that would subject them to claim preclusion, and that required them to appear to "show cause" *if they wished to be heard before the matter was finally adjudicated.* Respondents' suggestion that appellants in these cases were "compelled" to appear in some meaningfully different way than here is simply untenable. Respondents do not--and cannot-- seriously claim that the corporate shareholder and bondholder appellants in *Manhattan Railway* and in *Christian* ***9** would have been hauled off by a Federal Marshal or held in contempt if they did not appear in court at the appointed time. In fact, the *Manhattan Railway* appellants did not appear in response to the court's "invit[ation]" to "show cause" (289 U.S. at 495), without any apparent consequence *except* the loss of their right to be heard on the relevant issue. *See id.* [7]

The full implausibility of respondents' argument is demonstrated by their attempts to distinguish *Cohen* on this ground. *See* ADM Br. 26. [8] In fact, *Cohen* involved the exact same situation as this case: the appellant was a shareholder objector who was notified under what is now Rule 23.1 to ""show cause" why a derivative settlement should not be approved and who had appeared in district court to contest the settlement's fairness. *See* 127 F.2d at 724; Order Preliminarily Approving Settlement and Providing for Notice at 3 (May 30, 1997 (R.62)) (directing interested shareholders to "appear and show cause, if he, she or it has any [reason] why the proposed settlement of the derivative claims ... should or should not be entered thereon"). [9]

***10** In sum, like petitioners here, the appellants in all these other cases were "haled into court" in the sense that the court alerted them that their rights would be finally adjudicated in their absence unless they appeared at the appointed time.

The fallacy in respondents' proffered distinction is further demonstrated by the fact that respondents acknowledge that situations exist where *de facto* parties are allowed to appeal even though they appeared in the trial court of their own volition--and thus could not conceivably have been "haled" into the matter. As the Solicitor General has explained in his *amicus* filing, cases such as *Blossom* (which involved bidders at a foreclosure sale) and *Williams* (which involved bondholders who had sought "leave to be heard" in the trial court as to certain trustee charges (111 U.S. at 693)) demonstrate that persons who have participated in the relevant trial court proceedings and whose rights are necessarily implicated by the order at issue may appeal as *quasi* parties, whether or not they have been "haled into" the proceeding against their will. *See* Gov't Br. 7-12. [10] Respondents similarly do not dispute that sureties that particiapte in district court proceedings may appeal in some instances even though they too appear purely on their own initiative. *See* Pet. Br. 26 & n.25.

2. Respondents ultimately retreat to a different, but equally untenable, distinction. They concede that "quasi ***11** parties ... with a direct financial interest in a proceeding" may appeal. ADM Directors Br. 39; *see* Felzen Br. 18. But, because a derivative suit recovers money for the corporation, not the individual shareholders, respondents reason that shareholders' interests in a derivative suit are not sufficiently "direct" to allow them to invoke the authority of an appellate court. *See* ADM Directors Br. 32-34; ADM Br. 25-26; Felzen Br. 15-17.

But the argument that shareholders lack a sufficiently concrete stake in derivative cases to invoke a federal court's authority simply second-guesses the judgment behind Rule 23.1. One might imagine a legal system in which shareholders' interests were understood to be too indirect to invoke a federal court's authority. But that is not our system. On the contrary, Rule 23.1, which largely codifies this Court's earlier decision in *Hawes v. City of Oakland,* 104 U.S. 450 (1881), represents an express judicial and legislative judgment that shareholders *are* sufficiently affected by harms to the corporation's interest that they may sue for a wrong done to the corporation. Accordingly, the question of the "directness" of a shareholder's interest has already been resolved--by this Court and by Congress in promulgating Rule 23.1. As the Solicitor General has explained, under Rule 23.1 "[o]wnership of the corporation's stock ... gives both the objecting shareholder and the plaintiff shareholder a shared interest in the outcome of the case." Gov't Br. 13.

Moreover, as we have emphasized throughout, an objecting shareholder's direct and significant interest in the outcome of the litigation is demonstrated by the specific requirement that all shareholders be provided notice and an opportunity to be heard before a settlement is approved. It is precisely because a settlement would have claim preclusive effect on all shareholders' rights that the Federal Rules require that all shareholders be notified and permitted to present their arguments against a settlement during court proceedings. It is that same interest that permits them to appeal an adverse decision. *See, e.g.,* ***12** *In re Pittsburgh & Lake Erie R.R. Sec. & Antitrust Litig.,* 543 F.2d 1058, 1069-70 (3d Cir. 1976) (shareholders may appeal derivative suit since their "equity is being diluted"; their ""distinctive interests are as worthy of consideration and protection as [party] shareholders"); *LTV Corp.,* 746 F.2d at 53-54 n.5 (objectors may appeal settlement approvals in derivative context because "judgments in such cases bind shareholders"). [11]

Finally, respondents' emphasis on shareholders' supposed lack of a direct interest in the litigation is undermined by their own briefs. Respondents elsewhere stress that, "*a fortiori,*" the decision in this case must apply in the class action context. ADM Br. 39-40. *See also* Pet. Br. 30 & n.29 (discussing the identity of language on objector rights in Rules 23(e) and 23.1). Yet even the Seventh Circuit conceded (Pet. App. 4a) that absent class members have a *direct* stake in the litigation. Accordingly, the alleged ""indirectness" of shareholders' interests cannot provide a basis for resolving this case. *See also* 15A ***13** Wright, *et al., supra,* § 3902.1, at 129 ("[t]he determination whether to permit nonparty appeal does not rest alone on the directness ... of the effects caused by an order").

C. The Policy Reasons Advanced by Respondents for Requiring Formal Intervention Are Unpersuasive

1. Respondents and their *amicus* do not dispute that in derivative litigation plaintiffs' counsel and defendants have strong incentives to settle for a small judgment and a large legal fee. Pet. Br. 13-14. They do not dispute that objecting shareholders help expose and prevent improper derivative settlements in the district court. Pet. Br. 32-33; WLF Br. 18 (citing additional authorities). They do not dispute that objecting shareholders serve this same function on appeal, providing strong incentive for district courts to take seriously shareholder objections and an avenue for correcting district court errors. Pet. Br. 33; WLF Br. 21-23 (citing additional authorities).

Instead, respondents deride these points as "policy arguments" that do not justify "rewriting" the plain language of the Federal Rules. ADM Br. 47-50; Felzen Br. 16-27. The unspoken premise of this argument, however, is that the text of the Federal Rules somehow *compels* intervention in all circumstances. Respondents have not produced--and cannot produce--a shred of support for such a conclusion. On the contrary, for all the reasons we have previously discussed, it is well-established that *de facto* parties may appeal without intervening.

Nor are respondents correct in deriding petitioners' points as mere "policy arguments." The federal courts charged with applying Rule 23.1 have themselves noted not only the absence of any statutory, regulatory, or constitutional impediment to objecting shareholder participation, but also the critical assistance objecting shareholders provide them in assessing the fairness and adequacy of derivative settlements. *See, e.g., Bell Atlantic,* 2 F.3d at 1310; *Gottlieb,* 11 F.3d at 1010-11; Pet. Br. 13-15 (citing additional authorities); Pet. 14-15 n.15 (same).

***14** 2. By contrast, it is respondents who manufacture "policy arguments" without any basis in Rule 23.1's language, history, or practice. They assert that requiring intervention will help deter the "proliferation" of appeals. Felzen Br. 23; ADM Br. 47. But the government, which bears responsibility in assisting in the administration and development of the

Federal Rules, confirms that they "do not evince a concern that [the] limited degree of participation by persons other than the named plaintiff will unduly disrupt the litigation or render it unmanageable." Gov't Br. 28.

Respondents do not cite a single federal court that has ever claimed to be overworked by objecting shareholder appeals. In fact, petitioners have found just four reported objector appeals since 1990. Pet. Br. 37-38. ADM's own research reveals just 25 derivative settlement appeals during the 25-year period 1971-1996. ADM Br. 43. This is hardly evidence that the courts of appeals merit further insulation from a supposed tide of shareholder appeals. By contrast, respondents' rule would undeniably create additional work for overworked federal district courts by requiring them to resolve needless intervention motions. *See* Pet. Br. 38-39.

Respondents argue that requiring intervention would advance the social policy of "encouraging settlement." ADM Br. 45-46. None of respondents' arguments or authority, however, addresses settlement in the shareholder derivative suit context. In this peculiar arena, enormous and undisputed pressures *already* ""encourage settlement"--even to the point of inducing collusive and improper deals. *See* Pet. Br. 13-14. Respondents cannot seriously argue (or cite any authority suggesting) that additional incentives to settlement are necessary or warranted. To the contrary, virtually every derivative suit brought today *is* settled. *See* Interview with Todd Foster, National Economic Research Associates (Dec. 21, 1998) (out of 371 derivative suits between 1975 and 1997, only five were ***15** tried through verdict). Meanwhile, courts and commentators agree that further "hurdles" to objecting shareholder participation should be avoided in order to ensure courts sufficient adversarial information to assess the fairness of such deals. Pet. Br. 13-14 (citing authority); *Bell Atlantic,* 2 F.3d at 1310; *Cohen,* 127 F.2d at 725; WLF Br. 18-19 (citing further authority). [12]

Respondents chide us for lacking sufficient confidence in the trial courts to assess shareholders' objections without appellate oversight. Felzen Br. 25; ADM Br. 42. But respondents' own research reveals that reversals were obtained in fully 20 percent of derivative settlement appeals heard from 1971 through 1996. ADM Br. 43 (5 of 25 reversed). [13] This reversal rate parallels the national average ***16** for all civil cases, underscoring that appellate review and error correction is as warranted here as in any civil setting. Pet. Br. 33 (reporting civil reversal rates of between 16 and 27 percent). It is hardly an indictment of federal trial courts to acknowledge that some improper settlements may evade their detection; the Third Circuit has itself expressly worried about just this possibility. *Bell Atlantic,* 2 F.3d at 1310.

3. Nor is there any doubt that under respondents' rule objecting shareholders would be effectively barred from appealing. Respondents abandon their prior intimations that the Court should rewrite Rule 24 to make shareholder intervention easy and costless. [14] Nowhere in their briefs do they dispute that objecting shareholders' motions to intervene would have a hard time meeting Rule 24's "timeliness" and "adequate representation" tests. Pet. Br. 34-35. To the contrary, ADM offers only the cold comfort that objecting shareholders could bring separate lawsuits against company directors when they can prove outright fraud by the parties in the original derivative litigation. ADM Br. 45. Felzen similarly notes only that objectors would be able to appeal denials of intervention. Felzen Br. 26. Such an appeal would, however, be a fruitless formalism if any intervention motion could be properly denied under Rule 24 as respondents now suggest. [15]

***17** In the end, respondents would have the Court chase the policy goal of ""encouraging settlement" in an arena where virtually all cases already settle-- even if it means extinguishing appeals by objecting shareholders whose rights are directly affected and finally adjudicated, insulating many derivative suit settlements from federal appellate court review designed to ensure that they are not insufficient or even the product of collusion, tolerating an error rate of 20 percent or more, and imposing a new round of motion practice on busy federal district courts. Nothing in the Constitution, federal statutes, or the Federal Rules of Civil Procedure supports such a result, and both this Court's cases and common law tradition point in exactly the opposite direction.

***18 CONCLUSION**

The Seventh Circuit's order dismissing petitioners' appeal should be reversed.

Footnotes

1 Relying on D.C. Circuit precedent (as well as other cases having nothing to do with which persons may appeal), ADM suggests (at 24) that the term "privies" refers only to successors to a property interest. But, in a more recent case that ADM ignores, the D.C. Circuit explicitly concluded that the *precise class of persons at issue here*--shareholders who object to derivative suit settlements--are "privies to the record" that may appeal because "judgments in such cases bind shareholders." *United States v. LTV Corp.,* 746 F.2d 51, 53-54 & n.5 (D.C. Cir. 1984).

Even in the D.C. Circuit case highlighted by ADM, *United States v. Seigel,* 168 F.2d 143 (D.C. Cir. 1948), the court of appeals discussed with approval Judge Learned Hand's earlier conclusion that a creditor who appeared to object to a receivership could appeal because, though not a formal party, "he was actually present and participating in the proceeding below after appearance upon notice duly given him." *Id.* at 145 (citing *West,* 70 F.2d at 623-24). That, of course, is precisely the case here. Moreover, the *Seigel* court approvingly quoted Judge Hand's decision in *West:* "'generally speaking no person, not a party to a suit, may appeal ... [*b*]*ut if the decree affects his interests, he is often allowed to appeal.*"' *Id.* (quoting *West,* 70 F.2d at 623-24) (emphasis added). It is hard to imagine a statement that more directly undermines respondents' absolutist position.

2 *Karcher,* 484 U.S. at 77; *Ex parte Cockcroft,* 104 U.S. 578, 578-79 (1882); *Ex parte Leaf Tobacco Bd.,* 222 U.S. 578, 578 (1911); *Ex parte Cutting,* 94 U.S. 14 (1877).

3 Nor can law review articles plug this gaping hole in respondents' argument. Such articles, of course, cannot trump the decisions of this Court. In any event, the cited articles do not involve objectors under Rule 23.1, and they do not state the exceptionless rule respondents champion. Rather, as the language respondents quote suggests, they generally deal with particular circumstances involving, for instance, the rights of *amici curiae.* Respondents also twice cite Professors Levi and Moore for the statement that someone who "has not intervened, has no right of appeal." Levi & Moore, *Federal Intervention II: The Procedure, Status, and Federal Jurisdictional Requirements,* 47 Yale L.J. 898, 938 (1938). But the key case cited in that article, *In re Trust No. 2988,* 85 F.2d 942 (7th Cir.), *cert. denied,* 299 U.S. 609 (1936), involved an attempt by a bondholder to appeal on matters *other than those* as to which he was entitled to (and did) argue in district court. *See id.* at 943. That case has long been understood to be consistent with the proposition that *de facto* parties could appeal on issues that they were entitled to argue in the trial court. *See In re South St. Bldg. Corp.,* 140 F.2d 363, 367 (7th Cir. 1943) (distinguishing *Trust No. 2988* from instances where a stockholder or credit holder was a "party in interest" and "[f]ormal intervention was not required" for purposes of appeal), *cert. denied,* 322 U.S. 761 (1944); *Rogers v. Consolidated Rock Prods. Co.,* 114 F.2d 108, 110 (9th Cir. 1940).

Professor Kaplan's footnote statement (cited at ADM Br. 14) about the right to appear and "receive papers" under Rule 23 (c)(2)(C) says nothing about the right to be heard on settlements under Rule 23.1. His suggestion (cited at ADM Br. 16) about the inability of non-intervenors to "stop a settlement" by their disagreement says nothing about those persons' ability to object to a settlement in an effort to have a court disapprove it; and his statement about those persons' inability to appeal a case that has been *litigated* to judgment ("entered after contest") is notable for the fact that it does not speak to appeals from approved settlements.

4 *See* ADM Directors Br. 34 (acknowledging cases where "non-parties with genuine, direct interests in the proceedings" were permitted to appeal); ADM Br. 30-36 (discussing appeals by *de facto* parties, by persons who are summoned or ordered, but are not parties, and by "disputants in ancillary proceedings"). The Felzen respondents purport to defend the proposition that only parties may appeal, but do so only by extending that term to include "non-formal" parties, a category that is functionally no different from the category that others have described as non-parties. *See* Felzen Br. 18.

5 That concession also refutes the argument that this Court lacks jurisdiction over any petition that is not submitted by a formal party to the case. *See* ADM Br. 1. In any event, as the appellants in this matter, petitioners *were* parties to the court of appeals proceeding, even if they were not parties in the district court. Indeed, a rule that allowed persons to appeal to the court of appeals under 28 U.S.C. § 1291 (which, as we explained in our opening brief, never mentions party status), but precluded them from petitioning this Court would have the perverse effect of preventing the Court from serving its core function as the final arbiter of federal law.

6 ADM's attempt (ADM Br. 19-21) to defend the Seventh Circuit's reliance on Rule 3(c) is thus ultimately beside the point. In any event, ADM never explains how the Seventh Circuit's understanding of that rule may be squared with Federal Rule of Appellate Procedure 1(b)'s statement that " "[t]hese rules *shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law*" (emphasis added). *See* Pet. Br. 29. The decisions ADM quotes discuss only the need to

comply with Rule 3(c)'s procedural requirements to invoke the court of appeals' jurisdiction; they do not purport to suggest that Rule 3(c) meant to, or does, limit the *kinds* of persons that may appeal. *See Torres v. Oakland Scavenger Co.,* 487 U.S. 312, 318 (1988) (holding that "et al." reference in notice of appeal did not provide sufficient indication that non-named party intended to appeal); *Smith v. Barry,* 502 U.S. 244, 245 (1992) (holding that document intended to serve as an appellate brief may qualify as a notice of appeal).

7 Unable to come up with a legally relevant distinction for *Manhattan Railway,* respondents resort to labeling the case "unusual" (ADM Br. 22 n.22) and suggesting that the Court did not "focus[ ]" on the appellate jurisdiction issue (Felzen Br. 19). In fact, the Court addressed the relevant question and specifically cited cases that squarely authorized *de facto* party appeals *without intervention. See* 289 U.S. at 495 n.4.

8 As respondents note, the Sixth Circuit itself has recently proffered this highly strained reading of *Cohen.* But the court's subsequent reading of that case was influenced by the same misinterpretation of *Marino* that infects respondents' briefs and the Seventh Circuit decision below and which we have shown cannot be squared with this Court's case law. *See Shults v. Champion Int'l Corp.,* 35 F.3d 1056, 1060-61 (6th Cir. 1994) (reading *Cohen* in light of an overly expansive understanding of *Marino*); *Wilkenson v. Hercules Engines, Inc.,* 138 F.3d 608, 611 (6th Cir. 1998) (applying *Shults*).

9 Contrary to ADM's suggestion (ADM Br. 26), the fact that the appellant attempted to intervene played no part in the *Cohen* decision. In fact, the court specifically stated that the failure to appeal the intervention denial was "not decisive" of appellant's right to appeal. 127 F.2d at 724.

10 ADM suggests that these cases are distinct because they involved " "ancillary proceedings." ADM Br. 33. The relevance of that distinction is elusive at best. The bidder appellant in *Blossom,* for instance, was surely not a formal party to the ancillary proceeding, and did not "subject itself to the jurisdiction" (*see id.* at 34) of the trial court to any greater extent than did petitioners here, who appeared at the time appointed by the district court to attempt to persuade the court as to how it should adjudicate their interests.

11 ADM acknowledges that, before this case, *every* court of appeals to address this issue had concluded that shareholders may appeal without intervening. *See Cohen, supra; Tryforos v. Icarian Dev. Co.,* 518 F.2d 1258, 1263 n.22 (7th Cir. 1975) (Stevens, J.), *cert. denied,* 423 U.S. 1091 (1976); *Bell Atlantic Corp. v. Bolger,* 2 F.3d 1304 (3d Cir. 1993); *see also Gottlieb v. Wiles,* 11 F.3d 1004, 1011 (10th Cir. 1993). ADM argues, however, that the case law in the class action context is to the contrary. *See* ADM Br. 28-30. In fact, ADM ignores much case law recognizing the right to appeal in that context. *See, e.g., In re PaineWebber Inc. Ltd. Partnerships Litig.,* 94 F.3d 49, 53 (2d Cir. 1996); *Carlough v. Amchem Prods., Inc.,* 5 F.3d 707, 713-14 (3d Cir. 1993); *In re Cement Antitrust Litig.,* 688 F.2d 1297, 1309 (9th Cir. 1982), *aff'd sub nom. Arizona v. United States District Court,* 459 U.S. 1191 (1983); *Marshall v. Holiday Magic, Inc.,* 550 F.2d 1173, 1175 (9th Cir. 1977). And the cases ADM cites post-date and mistakenly rely upon *Marino* and *Guthrie v. Evans,* 815 F.2d 626, 628 (11th Cir. 1987). As one set of *amici* has explained, *Guthrie* did not even involve a settlement, and it has unfortunately led to incorrect decisions in a few circuit courts. *See* Brief *Amicus Curiae* of Public Citizen, Inc., *et al.,* at 11-17.

12 Felzen argues that the intervention requirement advances the related goal of providing "certainty as to when the litigation is over," noting that "[i]f no objector moves to intervene and the district court approves the settlement and enters judgment, the parties can be certain that the litigation is at an end." Felzen Br. 23. But the case is no more over if objecting shareholders appeal the denial of their intervention motions than if they appeal the denial of their objections to the settlement.

13 ADM claims that of the five reversals, "only one rejected a settlement on the merits." *Id.* This is grossly misleading. In fact, each of these cases illustrates why access to the courts of appeals is essential. Courts variously reversed in these cases because the proposed attorney fees were too high; the parties' proposed settlement was too low; the fairness of the settlement was impossible to determine because the trial court had impermissibly silenced objecting shareholders; or there was compelling evidence of director collusion. *See Rosenbaum v. MacAllister,* 64 F.3d 1439, 1448 (10th Cir. 1995) (remanding $2.6 million attorney fee award, which trial court later reduced by $1.4 million, *see* Pet. Br. 33); *Saylor v. Bastedo,* 623 F.2d 230, 232-33 (2d Cir. 1980) (Friendly, J.) (court ordered reconsideration of settlement earmarking $250,000 for attorney fees and just $57,000 for stockholders when claim had a face value of "many millions" that had "sufficient support ... to prompt this court to observe that 'plaintiff was not far from making a *prima facie* case"DD'); *Girsh v. Jepson,* 521 F.2d 153, 156-60 (3d Cir. 1975) (remanding because trial court denied objecting shareholders participation and, as a result, court lacked sufficient information to assess settlement's fairness) ; *Clark v. Lomas & Nettleton Fin. Corp.,* 625 F.2d 49 (5th Cir. 1980) (vacating and remanding where evidence suggested directors collusively settled suit), *cert. denied,* 450 U.S. 1029 (1981).

14 *Compare* ADM Br. in Opp. 16 *and* ADM Directors' Br. in Opp. 14-15 *with* ADM Br. 18 (arguing compliance with Rule 24 should not be "an empty formality").

15 Felzen dismisses petitioners' "fear of discovery" as mere " "speculation." Felzen Br. 26. But the practical disincentives associated with intervening are wholly beside the point if (as respondents no longer contest) any intervention motion would

be denied as a matter of law. Pet. Br. 34-35. Besides, members of the judiciary have recognized that the practical disincentives associated with accepting discovery obligations can be staggering even for large institutional investors. *See* Pet. Br. 35-36 (quoting District Judge Vaughn R. Walker). To take but one recent example, as soon as the Wisconsin Investment Board assumed the "lead plaintiff" role in a recent securities fraud class action pursuant to the Private Securities Litigation Reform Act of 1995 it was immediately pummeled with irrelevant and harassing demands for all documents concerning the performance of its investments and for depositions of its officers. *See Gluck v. Cellstar Corp.,* No. 3:96-CV-1353-R (N.D. Tex.).

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2002 WL 113883 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

Robert J. DEVLIN, Petitioner,
v.
Robert A. SCARDELLETTI, et al., Respondents.

No. 01-417.
January 24, 2002.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE COUNCIL OF INSTITUTIONAL INVESTORS IN SUPPORT OF PETITIONER

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***i** QUESTION PRESENTED

Whether a class member who, pursuant to Federal Rule of Civil Procedure 23, receives notice of a proposed class action settlement from a federal district court and objects to the settlement in that court must intervene pursuant to Federal Rule of Civil Procedure 24 solely in order to appeal an adverse decision on the merits of his or her objection.

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*1 INTEREST OF THE *AMICUS CURIAE*[1]

The Council of Institutional Investors (the "Council") is an organization of public, Taft-Hartley, and corporate pension funds with over 120 members whose combined assets exceed $1.5 trillion. The Council is recognized as a significant voice for investors on issues of corporate governance, executive compensation, and corporate accountability to shareholders. *See, e.g.*, *In re Wells Fargo Sec. Litig.*, 991 F. Supp. 1193, 1198 (N.D. Cal. 1998). The Council has been a leading proponent of meaningful shareholder participation in major decisions that affect corporate viability.

In the 1995 Private Securities Litigation Reform Act ("PSLRA"), Congress recognized that the Council's institutional shareholder members, with their large holdings in many of the country's leading companies, are especially well-positioned to represent the interests of absent class members in many class action disputes, and to prevent the collusion that frequently occurs between defendants and plaintiffs' attorneys in settling such cases. *See, e.g.*, H.R. Conf. Rep. No. 104-369, at 34 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 733 (explaining that "[t]he Conference Committee believes that increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions"; decrying the fact that the "current system often works to prevent institutional shareholders" from participating in class actions; and stating that "the Conference Committee seeks to increase the likelihood that institutional investors will" participate by, *inter alia*, providing sufficiently long notice periods to enable institutional ***2** shareholders time to convene their boards and decide whether to participate).

The interests of the Council and its members are directly implicated by this case. Two of the Council's members, the California Public Employees' Retirement System ("CalPERS") and the Florida State Board of Administration, fought to preserve objector appellate rights in *CalPERS v. Felzen*, 525 U.S. 315 (1999), and the Council participated as an *amicus curiae.* An affirmance in this case would erect a substantial and unnecessary barrier to participation by objecting institutional shareholders in the review of proposed settlements in class action disputes where their participation is most needed.

SUMMARY OF ARGUMENT

I. The Federal Rules of Civil Procedure ("FRCP") permit objecting class members to appear and object to proposed class-wide settlements in district court proceedings without intervening as parties. Nothing in the Constitution, federal statutes governing appellate jurisdiction, or the Federal Rules of Appellate Procedure ("FRAP") require settlement objectors to intervene simply to take an appeal.

Nor is there any other legal basis for imposing such a requirement. Prior decisions by this Court recognize that all class members *are* parties in interest to a FRCP 23 proceeding. Even (erroneously) presuming that objecting class members are not parties, non-party appeals are common in the federal system and this Court has established a test for determining whether non-parties qualify for appeal, turning on whether: (i) they received notice and an opportunity to be heard in district court proceedings; (ii) they are aggrieved by the district court's rulings; and (iii) they are forbidden by operation of claim or issue preclusion from relitigating their individual claims. Objecting class members meet all of these tests.

***3** II. The Fourth Circuit grounded its decision not on legal principles, but on the *policy* judgment that the federal courts would be overworked without an intervention requirement. Even if such judicial law-making were appropriate, the Fourth Circuit acted without "*any evidence*" suggesting that objector appeals have presented manageability problems in the circuits where they are permitted. Pet. App. A32 (Michael, J., dissenting).

The Fourth Circuit's policy analysis also ignores the fact that an objector appeal provides one of the few checks in a settlement process that otherwise tends toward collusion between class counsel and corporate defendants. When courts of appeals do entertain objector appeals, the result is frequently the rejection or revision of settlements that offer insufficient value for class members; this Court's decision in *Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997), is but one recent example among many.

III. Rule 23.1 derivative suit objectors are as much parties in interest as Rule 23 class members. They also fulfill all of the preconditions for non-party appeals. They receive written notice of any settlement, they have an opportunity to be heard in district court, and they are foreclosed by an adverse decision from pursuing their individual derivative claims. Indeed, the plain language of FRCP 23.1, as well as this Court's decisions, confirm that derivative actions implicate concrete, individual claims belonging to shareholders. Any holding confirming the appellate rights of Rule 23 objectors should be extended to Rule 23.1 objectors; at a minimum, the Court should take care not to foreclose the possibility of appeal by this class of persons.

IV. If this Court is not inclined to permit non-party objector appeals, it should at least ensure that limited intervention for purposes of appeal is a practical possibility under Rule 24(a). Confronted with a substantively inadequate settlement challenged only by a non-party objector, but limited by its own recently-invented rule that only-parties-may appeal, the Seventh Circuit last year rewrote much existing Rule 24 intervention law in that ***4** Circuit to allow an objecting class member to intervene for the sole purpose of appealing. That court's approach seeks to permit objector appeals while recognizing the litigation interests of parties.

ARGUMENT

I. INTERVENTION IS NOT REQUIRED FOR A RULE 23

SETTLEMENT OBJECTOR TO APPEAL A. The Federal Rules and This Court's Precedents Authorize Appeals by Rule 23 Settlement Objectors

1. All class members are entitled — *without* formally intervening under FRCP 24 — to notice and an opportunity to be heard in the district court before any class-wide settlement is entered. Rule 23 expressly prescribes that a class action

"*shall not be … compromised* without … notice of the proposed compromise … to all members of the class." FRCP 23(e) (emphasis added). *See also Advisory Committee Notes to 1966 Amendments* ("[s]ubdivision (e) requires approval of the court, *after* notice, for the … compromise of any class action") (emphasis added). It is long-settled practice, unchallenged in this or any of the cases involved in the current circuit split, that class members, once notified, are entitled to present objections to the terms of the proposed settlement before the district court. Indeed, because a settlement is a final and binding judicial resolution of class members' individual claims (particularly in Rule 23(b)(1), 23(b)(2), and 23.1 cases where class members may not "opt-out"), ***5** failure to allow them to be heard in district court proceedings would offend due process. [2]

There is no question that Rule 23 class members have Article III standing to appeal. *In re Navigant Consulting, Inc. Sec. Litig.*, No. 01-2311, 2001 U.S. App. LEXIS 27164, at *7 (7th Cir. Dec. 26, 2001) (Easterbrook, J.) ("Class members suffer injury in fact if a faulty settlement is approved, and that injury may be redressed if the court of appeals reverses. What more is needed for standing?"). Nor is there any question that appeals by Rule 23 objectors comport with pertinent statutory authority: 28 U.S.C. § 1291 authorizes appeals from any "final decision" without limiting *who* may appeal. And nothing in the Federal Rules of Appellate Procedure precludes objectors from appealing. *See* Point I.B, *infra.* There is, thus, no legal bar to objector appeals.

2. The only question presented by this case is whether, untethered to any constitutional, statutory, or rule-based authority, the Court should require class members to intervene for the limited purpose of obtaining appellate review of a district court decision overruling their objections to a settlement. Some courts of appeals argue in favor of such judicial activism on the ground that "[o]bservance of form has benefits." *Navigant*, 2001 U.S. App. LEXIS 27164, at *8. While perhaps attractive at first blush, this argument rests on the undefended, even unarticulated, premise that absent class members are not already "parties" to Rule 23 proceedings. That premise is false.

***6** When Congress uses common law terms in statutes or rules, it is presumed, absent an express contrary indication, to incorporate common law meanings and definitions. *United States v. Carter,* 530 U.S. 255, 264-66 (2000). By the time the Federal Rules of Civil Procedure were adopted, the terms "class" and "class member" had well-established meanings at common law which included the understanding that members of a class action *are* parties in interest to the suit. As early as 1850, this Court held that

> [w]here the *parties interested in the suit* are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a *portion of the parties in interest* to represent the entire body, and the decree binds all of them the same as if all were before the court."

Smith v. Swormstedt, 57 U.S (16 How.) 288, 301 (1850) (emphases added). Indeed, precisely because absent class members were defined by *Swormstedt* to be parties in interest, this Court found no due process impediment in holding that they may be bound by a class action judgment. *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356, 363 (1921). *Cf. Hansberry v. Lee,* 311 U.S. 32, 42-45 (1940) (class members are "absent parties").

Years before *Swormstedt*, Justice Story, who "is credited with having formulated" the class action in this country, 7A Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 1751, at 10 (2d ed. 1986), explained that, at common law, all class members are entitled to "come in under the decree, and take the benefit of it, or show it to be erroneous, or entitle themselves to a rehearing." Joseph Story, *Commentaries on Equity Pleadings* 96 (1840 ed.). *See also West v. Randall,* 29 Fed. Cas. 718, 722-23 (C.C.D.R.I. 1820) (No. 17,424) (Story, J.) (class members may appear in court "as quasi parties to the record").

***7** In this respect, the Court in *Swormstedt, Ben-Hur*, and *Hansberry*, as well as Justice Story in his writings, followed longstanding English class action practice in which it was understood that "every individual ought … to … have the power of appealing, whether he has been a suitor … or by some other person as his representative." Frederic Calvert, *Observations on Suits in Equity* 38 (2d ed. 1846) (citing *Osborne v. Usher,* 6 Brown's Parliamentary Cases 20 (1721)).

The fact that the Federal Rules of Civil Procedure lack any definition of the term "party," let alone one suggesting that Congress intended to displace common law understandings of the term, only serves to confirm that class members continue to be parties in interest, as they were at common law. *See Carter*, 530 U.S. at 264-66. To the extent that the Rules do cast light on the meaning of the term "party," moreover, they aid petitioner's cause. Rule 23 provides that class actions are brought by named plaintiffs on behalf of themselves individually and as *representatives* for all others similarly situated. And Rule 10 indicates that a complaint "shall include the names of all parties." Typical of class action complaints, respondents' complaint in this case named as parties "Anthony Santoro, Sr. and George Thomas Debar, individually *and as representatives of a class of all persons similarly situated*," whereas it named other defendants only in their individual capacities, not as representatives of an entire party-class. (Emphasis added.)

3. Even if class members were not already parties in interest to the proceedings, the notion that only parties may appeal cannot bear scrutiny. This Court has repeatedly approved appeals by non-parties with a concrete interest in the litigation — persons and entities it has variously labeled "de facto" or "quasi-" parties — so long as certain prerequisites are satisfied. Objecting class members meet each and every prerequisite established by this Court.

In *Blossom v. Milwaukee Railroad,* 68 U.S. (1 Wall.) 655 (1863), the Court asked the question, "Is the appellant so far a ***8** party to the original suit that he can appeal?" *Id.* at 655. In that case, Blossom had made a bid for a property at a foreclosure auction. The sale was suspended and Blossom sought to have the sale completed and confirmed. When the district court refused, Blossom appealed. The railroad moved to dismiss the appeal on the ground that Blossom was not a party to the suit in the district court. This Court rejected the railroad's argument and upheld Blossom's appeal, explaining that it

> seems to be well settled, that after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders …. Sureties, signing appeal bonds, stay bonds, delivery bonds, and receipters under writs of attachment became *quasi* parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgment may be rendered on their [claims]. *Id.* at 655-56.

The Court has endorsed appeals by de facto or quasi-parties in case after case since *Blossom.* [3] The courts of appeals — ***9** including many of the circuits purporting to require a different rule for objecting class members — likewise regularly entertain appeals from a diverse array of quasi-parties aggrieved by a district court ruling. These include appeals by non-parties held in contempt for refusing discovery seeking to pursue claims of privilege, lack of personal jurisdiction, and other defenses [4]; non-party attorneys and expert witnesses complaining that their fees were denied by the district court [5]; and non-parties obligated to reimburse the defendant for amounts paid under a district court's judgment. [6]

***10** Distilled to their essence, the foregoing cases permitting non-party appeals all involve individuals or entities who: (i) had notice of the district court proceedings, (ii) actually appeared and litigated their positions in district court, and (iii) were aggrieved by the district court's decision and barred by the doctrine of claim preclusion from re-litigating their claims elsewhere. As Judge Learned Hand explained: While persons who are not formally parties are usually forbidden from appealing because their claims are "not concluded by the decree, and [they are] not therefore aggrieved by it," where a judgment *does* "affect[] [that person's] interests, *he is often allowed to appeal.*" *West v. Radio-Keith-Orpheum Corp.,* 70 F.2d 621, 624 (2d Cir. 1934) (emphasis added).

Objecting class members indisputably meet all these conditions. They are entitled to notice and an opportunity to be heard, their personal interests are aggrieved, and any claims they might have are extinguished by operation of an adverse judgment. As recently as 1997, this Court reviewed a case that had been appealed to the court of appeals by a Rule 23 objector without pausing for a moment over the objector's purported lack of "party" status. *Amchem*, 521 U.S. 591.

4. It is axiomatic that courts seek to read rules and statutes in ways that harmonize them and avoid incongruous results. Permitting Rule 23 objectors to appeal comports entirely with Article III and does no damage to the relevant statutory framework governing appeals from final judgments in class actions. Meanwhile, a view of Rule 23 requiring objecting class members to intervene would create serious discordance between Rules 23 and 24.

***11** *First*, the proper means for objecting class members to intervene would be under Rule 24(a), as an intervention of right, because the objecting class member's interest "relat[es] to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." FRCP 24(a). But under Rule 24(a), an objecting class member cannot intervene if his or her interest is already "adequately represented by existing parties." *Id.* In any class action or derivative suit, the district court makes just such a finding at the outset of the case, holding that the named plaintiff *does* "fairly and adequately protect the interests of the class." FRCP 23(a)(4).

So, for an objecting class member simply to lodge an objection to the terms of a particular settlement, he or she would have to convince the district court to reconsider its prior ruling and throw out the existing class representative. Much settled law disfavors judicial reconsideration of prior rulings, especially in this context. Once a class representative has been approved, "representation will be presumed adequate." 7C C. Wright, *et al., Federal Practice and Procedure* § 1909, at 324; *cf. Sam Fox Publ'g Co. v. United States,* 366 U.S. 683, 691-92 (1961). Indeed, some lower courts have suggested that, as a matter of law, objectors' interests are "adequately protected" by already-approved representatives. *In re General Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1087 (6th Cir.), *cert denied*, 469 U.S. 858 (1984). *See also National Ctr. for Mfg. v. Department of Defense,* 199 F.3d 507, 511 (D.C. Cir. 2000) (motion for reconsideration will be granted only if new facts "compel" a change in the court's ruling). Interpreting Rule 23 as requiring intervention to appeal, thus, creates a practically unworkable regime: an objector must intervene to appeal, but he or she faces a substantial hurdle in showing that the district court's prior determination that existing representatives are "adequate" should no longer govern.

***12** Though Rule 24(b) would not be the appropriate vehicle for intervention given class members' direct personal stake in the outcome of the case, even if that Rule were applicable it would not solve the problem. Rule 24(b) requires motions to intervene to be "timely." Under existing case law (endorsed by the Fourth Circuit), any motion to intervene made after a tentative settlement has been reached presumptively fails that test. *See* Pet. App. A10-11 (citing cases). Yet, under Rules 23 and 23.1, class members often first become aware of the need to assert their interests only *after* a settlement has been struck. *See* Pet. App. A33-34 (Michael, J., dissenting) ("most unnamed class members do not realize that they might have an objection until they receive notice of the fairness hearing at the end of the litigation"); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 20 (1991) (class members receive little information about their case as it goes along). [7]

Second, even if objectors could (somehow) successfully intervene under Rule 24(a) or (b), imposing such a requirement would be inconsistent with Rule 23's structure. Rule 23 provides class members with notice and a right to appear without taking on the encumberances of party status. It would be at odds with the design of the Federal Rules to absolve class members from ***13** intervening for purposes of raising objections in district court but then require them to intervene *not* for any purpose associated with the district court proceedings (which the Federal Rules of Civil Procedure are designed to govern), but simply to afford "standing" in a *court of appeals. See Kaplan v. Rand,* 192 F.3d 60, 67 (2d Cir. 1999) ("[i]t would make little sense to invite a [class member] to file objections in the manner provided by Rule 23 [] and then deny him the right to challenge the district court's ruling on his objection" unless he becomes a party).

B. There Are No Constitutional, Statutory, or Case Law Impediments to Rule 23 Objector Appeals

It is telling that the Fourth Circuit's decision in *Devlin* neither confronts nor cites any of the foregoing legal authorities. Instead, the Fourth Circuit rests its judgment entirely upon its *policy* assessment that "the need for effective class management and to avoid class fragmentation weighs strongly in favor" of requiring objectors to intervene. Pet. App. A21.

Other courts of appeals, most notably the Seventh Circuit, have decried reliance on policy arguments, offering up various legal theories in support of their view that objecting class members must intervene to appeal. *Navigant*, 2001 U.S. App. LEXIS 27164, at *8. But none of these legal theories has borne scrutiny over time and it is no surprise that the Fourth Circuit abandons them even as it struggles to substitute new policy rationales to salvage its favored result.

1. Some early circuit decisions made much of *Marino v. Ortiz,* 484 U.S. 301 (1988). But a growing number of courts, including the Fourth Circuit, have recognized that such reliance is misplaced. Pet App. A15-16 n. 12. Unlike Rule 23 objectors, the persons seeking to appeal in *Marino* were not members of the class, but outsiders to the proceedings with no right to participate in the district court under Rule 23. More specifically, they were ***14** white police officers seeking to challenge a class action settlement between black officers and police authorities. Nothing in *Marino* addressed the appellate rights of persons who *are* members of the class whose interests are directly adjudicated by a judgment entered in the case and who receive a mandatory notice expressly inviting them to participate in trial court proceedings. *See Bell Atlantic Corp. v. Bolger,* 2 F.3d 1304, 1308 n.6 (3rd Cir. 1993); *Kaplan*, 192 F.3d at 67-68. [8]

The lone case cited in the pertinent passage of *Marino* confirms the limited nature of *Marino*'s holding — and its inapplicability here. *United States ex rel. Louisiana v. Jack,* 244 U.S. 397 (1917), involved a land dispute between a state agency and a landowner. The State of Louisiana sought to participate in the proceedings. The Court held that the State was not a proper party and explained that "it has long been the law" that only "part[ies] *and priv[ies] to the record*" may appeal an adverse decision, though even to this rule the Court acknowledged some "exceptions." *Id.* at 402 (emphasis added). Objecting class members are at least quasi-parties permitted to appeal under the rule stated in *Louisiana* and approved in *Marino. See* pp. 7-10, *supra.* Moreover, reading *Marino* as holding that only parties to a lawsuit, or those that properly become parties, may appeal, would require upsetting an enormous body of settled law on the strength of a single phrase in that *per curiam* opinion. *See* notes 3-6, *supra.* That action would be so extraordinary that even respondents do not urge it here.

2. Beyond *Marino*, some circuit decisions (again, notably not the Fourth Circuit's recent ruling) have sought to justify their result by pointing to FRAP 3(c). *E.g., Felzen v. Andreas,* 134 F.3d 873, 874 (7th Cir. 1998). Rule 3(c) provides that "[a] notice ***15** of appeal must specify the *party or parties* taking the appeal by naming each appellant in either the caption or the body of the notice of appeal." (Emphasis added.) Since no "party" is taking the appeal from the district court, the reasoning goes, it must be improper under Rule 3(c). This argument founders on its undefended premise that class members are not "parties." *See* pp. 5-7, *supra.* Such a reading of Rule 3(c) would also have the unlikely effect of barring not just Rule 23 objector appeals, but *all* nonparty appeals.

The Federal Rules of Appellate Procedure, moreover, are *not* intended to limit the jurisdiction of the courts of appeals over appeals from final district court judgments; that is the function of Article III and 28 U.S.C. § 1291, neither of which poses any obstacle here. FRAP l(b) states in no uncertain terms that "[t]hese rules *do not extend or limit the jurisdiction of the courts of appeals.*" (Emphasis added.) And the language of Rule 3(c) itself does not purport to delineate who is eligible to appeal. Rather, as its title suggests, Rule 3(c) is concerned only with the formal "*contents* of the notice of appeal" filed by otherwise eligible appellants. (Emphasis added.) Rule 3(c) simply ensures that sufficient information appears on the face of the notice for the court of appeals to discern the issues and litigants before it.[9]

3. On occasion, this Court has stated that only a "party" may appeal. In making such statements, however, no decision of this Court has purported to overrule *Blossom* or its abundant progeny. Indeed, in all of these cases, the litigant seeking to appeal lacked ***16** at least one of three characteristics that the Court has imposed (in *Blossom* and its progeny) as a precondition for appeal by a non-party litigant. In six of the cases, the purported appellant lacked notice and the opportunity to be heard in the district court.[10] In two of the cases, the would-be appellant did not even participate in district court proceedings.[11] In other cases, the district court's decision did not bind the appellant by force of claim preclusion.[12] Properly understood, this Court's decisions have never denied a right to appeal by a litigant in the same position as a settlement objector.

*17 II. THE FOURTH CIRCUIT'S POLICY-BASED RATIONALE FOR REQUIRING INTERVENTION IS LEGALLY INSUFFICIENT AND CANNOT WITHSTAND SCRUTINY ON ITS OWN TERMS

The Fourth Circuit did not pretend to rest its decision on any statutory mandate, rule, or controlling case law. It even disparaged prior attempts by its sister circuits to base an intervention requirement on this Court's decision in *Marino.* Pet. App. A15-16 n. 12. The Fourth Circuit instead "balanc[ed]" a series of policy considerations, acting in effect as a mini-legislature. Even assuming the legal sufficiency of such an exercise, the Fourth Circuit's policy rationales are unpersuasive on their own terms.

A. Participation by objectors helps expose and prevent collusive settlements, which are themselves frequent by-products of class action and derivative suit litigation. In Rule 23 and 23.1 disputes, strong economic incentives tempt plaintiffs' counsel and defendants to "structure a settlement such that the plaintiffs' attorneys' fees are disproportionate to any relief obtained for the corporation." *Bell Atlantic*, 2 F.3d at 1310; Pet App. 30-31.[13] Settlement hearings frequently devolve into "jointly orchestrated" "pep rallies" in which no party questions the fairness of the settlement.[14] As a result, courts have long considered objecting ***18** class members to "play an important role by giving courts access to information on the settlement's merits," especially because "judges no longer have the full benefit of the adversarial process." *Bell Atlantic*, 2 F.3d at 1310. *See also* Pet. App. A31; *Cohen v. Young,* 127 F.2d 721, 725 (6th Cir. 1942); *Daily Income Fund, Inc. v. Fox,* 464 U.S. 523, 532 n.7 (1984).

Objectors perform this same function on appeal. The right of appeal provides a strong incentive for district courts to consider objectors' concerns and a direct avenue for correcting district court errors. Pet. App. 32; Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. Legal Stud. 379, 408-26 (1995) ("fear of reversal" "induc[es] trial court judges to make fewer errors"). Of the 44 published objector appeals between 1971 and 2000 that the Council has been able to locate in LEXIS, fully 32% (14) resulted in reversals, a higher percentage than for civil cases generally. *See* Administrative Office of the United States Courts, *2000 Annual Reports*, Table B-5 (courts of appeals' reversal rate in civil cases is approximately 12%). In the Rule 23.1 context, 25% of the appealed settlements identified by the Council (7 of 28) were reversed during the same period.

This Court's decision in *Amchem* illustrates the point. Without the participation of objectors, permitted by the Third Circuit and this Court in that case, a highly flawed settlement that failed to compensate many victims and failed to satisfy Rule 23 as a matter of law would have been thrust upon a class of hundreds of thousands of persons exposed to asbestos. *See* 521 U.S. 591. Objector appeals have yielded similar tangible benefits for class members in other recent cases.[15]

***19** B. Even if objectors could (somehow) surmount the legal hurdles posed by an intervention requirement, *see* pp. 10-13, *supra*, requiring intervention would extinguish the modest incentives that now exist for objectors to fulfill their important public function.

Objectors receive no direct financial compensation for their activities, and no guarantee of lucrative attorney fee awards even if they succeed in convincing a court not to approve a settlement. They participate in class action proceedings only for whatever incremental *pro rata* value might accrue to them as a result of their efforts. *Bell Atlantic*, 2 F.3d at 1309. Meanwhile, objectors shoulder the substantial costs of hiring counsel, analyzing settlement materials, filing written objections, and appearing in court, all within a matter of days or weeks. Even the largest institutional investors only rarely have the incentive — and the means — to participate. *See* Remarks of District Judge Vaughn R. Walker, ABA National Securities Litigation Institute at 7-8 (June 5, 1998) ("[I]nstances of institutional investors actively leading a [securities class] litigation effort remain relatively rare. … This is no surprise. … [I]nstitutional investors have disincentives to becoming [parties]. … Lawsuits are costly in time, money and other resources.").

Requiring intervention would force objectors wishing to preserve a right of appeal to incur the added financial burden of drafting a pleading the equivalent of a complaint (mandated by Rule 24), litigating the timeliness of their motion and the adequacy of existing representation, as well as assuming the responsibility of appearing for depositions and responding to ***20** written discovery. [16] In addition, because notice of a pending class action suit often first arrives with news of a proposed settlement, *see* p. 12 & note 7, *supra*, class members would be forced to make a snap decision whether to seek and accept the responsibilities associated with party status. Even though they are the most likely to have enough at stake to make participation economical and Congress has sought to encourage their participation in class action litigation, institutional class members simply cannot make such decisions that quickly, because of the need to consult their boards of directors. [17] This Court should not adopt a rule at odds with the policy direction Congress has given in this area. *See* pp. 1-2, *supra.*

C. The Fourth Circuit suggests that requiring intervention serves the purpose of enhancing judicial efficiency. But the substantial costs associated with objecting and appealing *already* deter meaningful shareholder participation in all but the most obvious cases of abuse.

***21** The Council has been able to locate in LEXIS just 44 Rule 23 objector appeals during the 29-year period 1971-2000, and just 28 such appeals in the Rule 23.1 context. Despite decades of practice permitting objector appeals in the Second, Third, and Ninth Circuits — circuits where a large proportion of all class actions are initiated — the Council is unable to locate a single court or commentator complaining about the manageability of objector appeals. Indeed, the Fourth Circuit below was not presented "with *any evidence* that objector appeals have gummed up the works in the circuits … where they are expressly allowed." Pet. App. 32 (emphasis added). [18]

In fact, mandating intervention would impose *more* work on the federal courts, not less. The district court would have to litigate and resolve a motion to intervene as well as a settlement hearing. Pet. App. A34 (Judge Michael noting "the intervention alternative … does nothing to take care of [the] concern about "delay[ing] class settlements on appeal"). *See also Webcor Elecs. v. Whiting,* 101 F.R.D. 461, 463 (D. Del. 1984) (complaining that Rule 24 motion to intervene was "superfluous procedural question" since nonparty objector was already an invited participant in litigation).

D. The Seventh Circuit recently criticized the Fourth Circuit's decision below as an example of "policymaking by judges." *Navigant*, 2001 U.S. App. LEXIS 27164, at *6. Yet, besides discredited arguments from *Marino* and Rule 3(c), the Seventh Circuit itself offered only a policy argument for intervention, opining that requiring litigants to take the formal ***22** step of becoming parties "has benefits, such as a reduction in uncertainty and the costs that uncertainty breeds." *Id.* at *8.

The invocation of "uncertainty," without more, is analytically unhelpful. The Seventh Circuit opined that intervention prior to settlement in *Navigant* might have led to additional discovery that, in turn, might have assisted the district court in deciding whether to accept the proposed settlement; by "remaining on the sidelines until after" the settlement, the objectors "hobbled" inquiry into their views. *Id.* at *9. But this argument rests on the erroneous assumption that objectors are typically aware of a pending class action and dissatisfied with existing class representation before a tentative settlement is reached. That is the rare and exceptional case (*see* p.12 & note 7, *supra*), not the norm, and thus (even assuming its legitimacy) can hardly be used as a reliable basis for judicial policymaking.

Nor is there any basis for believing that discovery will aid in resolving all, most, or even any significant number of, settlement objections. It would not have done so in *Amchem* or in similar cases where the objector contends that the settlement agreement is illegal, a question for which no factual inquiry is necessary. [19] Discovery is likewise unnecessary to resolve objector claims that the district court failed to fulfill its own procedural requirements, a frequent basis for appellate reversal. [20] Often, too, objectors attack the size of an attorney fee award in proportion to the results achieved for the class, a question that courts are well-equipped to handle and frequently do so comfortably without burdensome depositions, interrogatories, and the like. *See* p. 18 & note 15, *supra* (citing *Rosenbaum, Kaplan, Zucker*). There is also at least some irony in the fact that the Fourth Circuit would mandate ***23** intervention out of concern for efficiency and reducing the federal court workload, but the Seventh Circuit would mandate intervention to enable "extra discovery," *Navigant*, 2001 U.S. App. LEXIS 27164, at *8, always a time-consuming and contentious task.

III. RULE 23.1 SETTLEMENT OBJECTORS SHOULD ALSO BE PERMITTED TO APPEAL

Rule 23.1 objectors have at least as strong a case for a right to appeal as Rule 23 objectors, and any ruling permitting Rule 23 objector appeals should be extended to the Rule 23.1 context. [21] As with Rule 23 class members, there is no Article III, § 1291, or rule-based bar to Rule 23.1 objector appeals. Nor should the Court manufacture one.

First, Rule 23.1 shareholders are as much parties in interest as class members. Like their Rule 23 counterparts, objecting derivative suit shareholders are *personally* aggrieved by a district court decision approving an adverse settlement. The Federal Rules recognize this point not only by affording objectors with an opportunity to be heard before any settlement is approved, but also by requiring that the lead plaintiff must "fairly and adequately represent the *interests of the shareholders," not* the corporation. FRCP 23.1 (emphasis added).

In the course of developing the derivative suit paradigm, this Court in *Hawes v. City of Oakland,* 104 U.S. (14 Otto) 450 (1881), explained that such a suit is really "two causes of action": it is a claim on behalf of the company against those who allegedly wronged its interests, but it is *also* a claim by shareholders directly against their "own company" for refusing to take ***24** corrective action in response to the shareholders' demands. *Id.* at 452. Similarly, in *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949), the Court held that a lead shareholder plaintiff owes "fiduciary" duties *not* to the corporation, but to "a class comprising all who are similarly situated" — *i.e.*, other shareholders; "[t]he interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity." *Id.* at 549.

Any number of lower courts and respected commentators have similarly recognized the personal shareholder interests at stake in derivative litigation, [22] and so have the Department of Justice and the Securities and Exchange Commission, the federal agencies charged with enforcing the nation's securities laws: "[o]wnership of the corporation's stock … gives both the objecting shareholder and the plaintiff shareholder a shared interest in the outcome of the case." *Felzen* Gov't Br. 13. [23]

***25** *Second*, even supposing that shareholders are not parties, they satisfy all the prerequisites required for non-party appeals. *See* pp. 7-10, *supra.* They are provided with written notice of any settlement, and an opportunity to be heard. [24]

As *Hawes, Cohen*, and Rule 23.1 confirm, an adverse decision affects their personal interests and an adverse judgment subjects shareholders not just to *stare decisis*, but also to claim preclusion. This Court has already expressly held that shareholders who receive notice and present argument in the district court are "entitled," without intervention, to appeal a receivership ruling that aggrieves them. *Johnson v. Manhattan Ry.*, 289 U.S. 479, 495 & n.4 (1933). [25]

***26** Until the very recent emergence of a circuit conflict on this issue, the appellate rights of Rule 23.1 objectors were once so well-established that then-Judge Stevens categorically stated in 1975 that "[t]he law is clear that a non-party shareholder who appears, pursuant to a Rule 23.1 notice, to present objections to a proposed dismissal or settlement of a derivative action may appeal an adverse decision even though he has not been formally made a party to the action." [26] This view of the law remains correct today, as recognized by the Second Circuit, which recently reaffirmed its longstanding precedent permitting Rule 23.1 objector appeals, and did so without a single dissenting vote in the entire circuit. *Kaplan*, 192 F.3d 60 (rehearing *en banc* denied). Indeed, the case for allowing shareholders to appeal is *stronger* than that for many class members because Rule 23.1 provides no mechanism for objecting shareholders to opt out of an unfavorable settlement. *Rosenbaum*, 64 F.3d at 1442 (considerations permitting appeal apply "more clearly" in Rule 23.1 context). [27]

*27 IV. AT A MINIMUM, THE COURT SHOULD MAKE INTERVENTION A PRACTICAL POSSIBILITY FOR OBJECTORS

Faced with a substantively inadequate settlement approved by the district court that it wished to reverse, but saddled with the flawed only-parties-may-appeal rule it forged in *Felzen*, the Seventh Circuit recently sought to rewrite much intervention law in order to make it possible for an objecting class member to appeal. *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 880-81 (7th Cir. 2000) (Easterbrook, J.). The district court in *Crawford* had rejected the objector's attempts to intervene as untimely, noting that the objector's counsel (like petitioner here) had early knowledge of the case but failed to file a motion to intervene. The district court also refused to grant intervention on the ground that to do so it would have to find the objector's interests inadequately represented and, thus, would have to displace the existing class representative, sending the entire case into disarray. The court of appeals rejected both of these arguments, and held that the district court had abused its discretion in denying intervention because objectors should have the right to intervene at least for the limited purpose of appealing. *Id. See also In re Synthroid Mktg. Litig.*, 264 F.3d 712 (7th Cir. 2001) (Easterbrook, J.).

In holding that the district had abused its discretion by failing to allow intervention after the settlement agreement was struck, the Seventh Circuit rejected the untimeliness arguments that the Fourth Circuit in this case and other courts have found persuasive grounds for denying intervention. *See* Pet. App. A10-11 (citing cases). The *Crawford* court even (implicitly) contradicted existing Seventh Circuit authority in *Ragsdale v. Turnock*, 941 F.2d 501 (7th Cir. 1991), which held that "[o]nce the parties have invested time and effort into settling a case it would be prejudicial to allow intervention." *Id.* at 504.

***28** But what the Seventh Circuit appeared to give settlement objectors in *Crawford*, it seemed to take away late last year in *Navigant.* In *Navigant*, the court rejected the notion that a settlement objector has an absolute right to intervene for purposes of appealing, holding that the objector "probably should have intervened *before the settlement was negotiated*," thus apparently reverting to the Seventh Circuit's original rule in *Ragsdale.* 2001 U.S. App. LEXIS 27164, at *3 (emphasis added).

Though the continuing vitality and scope of the Seventh Circuit's decision in *Crawford* permitting intervention for purposes of appealing an adverse settlement is unclear, it remains possible that the court of appeals is inclined to overrule much existing intervention case law in an effort to make it practically possible for at least some objectors to appeal. If this Court is inclined to hold that only parties may appeal, the Council respectfully suggests that it at least attempt to make intervention a practical possibility in the following manner.

Because intervention would properly be a matter of right, *see* p. 11, *supra*, the correct legal vehicle for any new intervention requirement must be Rule 24(a). Currently, the lower courts are loathe to allow intervention under Rule 24(a) because they are required to find the intervenor's interests inadequately represented, which in turn has the cascading effect of forcing them to reconsider their finding, under Rule 23, that the existing class representative adequately represents the interests of all class members. *See* p. 11, *supra.* The Seventh Circuit's position in *Crawford* suggests a view of Rule 24(a) and Rule 23 under which the district court might hold that the objector's views on the terms of a particular settlement are inadequately represented (so that he or she may intervene), but continue to hold that the existing named class representative fairly and adequately represents the class as a whole (so that the existing class representative need not be displaced).

***29** Limiting an objector's right to intervene solely for the purpose of allowing an appeal would also decrease the chance of disruption to existing proceedings and prevent objectors from having to assume the onerous duties associated with party status simply to appeal. Intervention for limited purposes is consistent with the Notes to the 1966 Amendment of Rule 24(a), which indicate that "an intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."

Even if the foregoing presents a workable solution, however, the question remains, what would be gained by such a watered-down intervention requirement? The answer is: nothing. It would require the Court to slice the language of Rules 23 and 24 very thinly indeed — suggesting that the class representative is "inadequate" for some purposes but not others. It would also burden the federal courts with needless motions practice, all so that objectors can obtain a stamp on their passport allowing them to proceed to an appellate court just as they did for decades before the advent of a "party-only" requirement.

The Court should reject the Fourth Circuit's imposition of a new intervention requirement on settlement objectors. There is no constitutional or statutory basis for such a rule. It runs directly contrary to centuries of common law precedent and is inconsistent with the Federal Rules and this Court's cases. It hinders the valuable public functions objector appeals serve while offering no corresponding policy benefits. It should be rejected.

*30 CONCLUSION

The judgment of the court of appeals should be reversed.

*1A APPENDIX

Federal Rule of Civil Procedure 23: Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would

as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

***2a** (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.
(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) ***3a** the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of ***4a** the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

***5a** In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege

(1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and

(2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

***6a** (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to ***7a** intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

Footnotes

FN

* Counsel of Record

1 Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party had any role in authoring this brief, and no persons or entities other than *amicus* made any monetary contribution to its preparation or submission. Pursuant to Rule 37.3, written consent letters from the parties to the filing of this brief are on file with the Clerk of the Court.

2 *Cf. Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985) (unnamed class member has a due process right "to be heard and participate in [class action] litigation"); *Petrovic v. Amoco Oil Co.,* 200 F.3d 1140, 1153 (8th Cir. 1999) (unnamed class member has a due process right to object at the fairness hearing); *Gould v. Alleco, Inc.,* 883 F.2d 281, 284 (4th Cir. 1989) (objector entitled to be heard, to examine witnesses and to submit evidence), *cert. denied*, 493 U.S. 1058 (1990); *Flinn v. FMC Corp.,* 528 F.2d 1169, 1173 (4th Cir. 1975) (same), *cert. denied*, 424 U.S. 967 (1976).

3 *E.g., Williams v. Morgan,* 111 U.S. 684, 700 (1884) (holding that objectors to trustee charges were "quasi parties" entitled to appeal without formally intervening: objectors "had such an interest, and were so situated in the case, that they had a right, by leave of court, to except and object to the charges and allowances presented by the trustees and receivers, and that they had a right to appeal from the decree of the Circuit Court to this court"); *Minnesota Co. v. St. Paul Co.,* 69 U.S. (2 Wall.) 609, 633-34 (1864) ("nominal parties" could not evade appellate review of an order decreed in their favor on the ground that they were not formal parties in the district court); *Hinckley v. Gilman, Clinton & Springfield R.R.,* 94 U.S. 467, 469 (1877) (receiver allowed to appeal from a decree against him even though he was not a party); *Sage v. Railroad Co.,* 96 U.S. 712, 714 (1877) (quasi parties permitted to appeal); *Trustees v. Greenough,* 105 U.S. 527, 531 (1881) (trustees allowed to appeal order awarding costs and expenses to a complainant suing on behalf of a trust fund); *Hovey v. McDonald,* 109 U.S. (14 Otto) 150, 155-57 (1883) (permitting appeal to be brought against a receiver from an order made in his favor notwithstanding receiver's contention that appellant was not a "party" to the underlying suit); *Ex parte Cockcroft*, 104 U.S. 578, 579 (1882) (actual parties or ones "treated as such" by trial court may appeal); *Bayard v. Lombard,* 50 U.S. (9 How.) 530, 551 (1850) (parties and privies may appeal).

4 *E.g., United States Catholic Conference v. Abortion Rights Mobilization, Inc.,* 487 U.S. 72, 76 (1988); *General Ins. Co. of Am. v. Eastern Consol. Utils., Inc.,* 126 F.3d 215, 218 (3rd Cir. 1997); *United States v. Bertoli,* 994 F.2d 1002, 1012 (3rd Cir. 1993), *cert. denied*, 510 U.S. 820 (1993); *Port Drum Co. v. Umphrey,* 852 F.2d 148, 150 n.2 (5th Cir. 1988); *Petersen v. Douglas County Bank & Trust Co.,* 967 F.2d 1186, 1188 (8th Cir. 1992); 15A C. Wright, *et al., Federal Practice and Procedure* § 3902.1, at 124 (compiling cases).

5 *E.g., Angoff v. Goldfine,* 270 F.2d 185, 186 (1st Cir. 1959); *Lipscomb v. Wise,* 643 F.2d 319, 320-21 (5th Cir. 1981); *Price v. Pelka,* 690 F.2d 98, 102 (6th Cir. 1982); *Preston v. United States,* 284 F.2d 514, 515 n.1 (9th Cir. 1960); *United States v. Tippett,* 975 F.2d 713, 718 (10th Cir. 1992); *Dietrich Corp. v. King Resources Co.,* 596 F.2d 422, 424 (10th Cir. 1979); *James v. Home Constr. Co. of Mobile, Inc.,* 689 F.2d 1357, 1359 (11th Cir. 1982); *See* 15A C. Wright, *et al., Federal Practice and Procedure* § 3902.1, at 126 & n.45 (compiling cases).

6 *E.g., Fields v. Blum,* 629 F.2d 825, 827 (2d Cir. 1980) (order enjoining reduction of welfare benefits by city official could be appealed by state, since state was legally required to reimburse city for payments and controlled both the activities complained of and the conduct of local officials); 15A C. Wright, *et al., Federal Practice and Procedure* § 3902.1, at 127 & n.47 (compiling cases).

7 While petitioner in this case had detailed knowledge of the lawsuit prior to settlement, this is unusual. Most individual class members, including many sophisticated institutional investors who are members of the Council, frequently do not have any inkling that their interests are being inadequately represented until *after* a settlement has been reached, as illustrated by the facts of the *Felzen* dispute before this Court three years ago. There, the first written notice of the case was issued to shareholders on May 30, 1997, *after* a settlement had been reached, and it provided objectors with just *four weeks* to prepare for a fairness hearing on a proposed settlement. *See Felzen* Petitioners' Br. 6.

8 Even as to the strangers to the case at issue in *Marino*, the Court merely purported to establish "better practice," not to establish an exceptionless rule. *See* 484 U.S. at 304.

9 The 1967 advisory committee notes indicate that Rule 3(c) "merely restate[s], in modified form, provisions now found in the civil and criminal rules … and decisions under the present rules which *dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules.*" FRAP 3(c) 1967 advisory committee note (emphasis added). *See*

also 1979 advisory committee note ("so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with").

10 *Karcher v. May,* 484 U.S. 72, 77 (1987); *Payne v. Niles,* 61 U.S. (20 How.) 219, 221 (1858); *Ex parte Leaf Tobacco Bd.*, 222 U.S. 578, 581 (1911) (specifically acknowledging that "privies to the record" may appeal); *Ex parte Cockcroft*, 104 U.S. at 578-79.

11 *Ex parte Cutting*, 94 U.S. 14 (1876); *Connor v. Peugh's Lessee,* 59 U.S. (18 How.) 394, 395 (1856).

12 *E.g., Ex parte Cockcroft*, 104 U.S. at 578 (denying appeal by party who "did not make it appear that he had any real interest in the controversy"); *Payne*, 61 U.S. (20 How.) at 220 (person who had never sought relief directly against judgment debtor could not appeal judgment); *Connor*, 59 U.S. (18 How.) at 395 (tenant who did not contest ejectment prior to judgment could not appeal); *Marino*, 484 U.S. 301 (outsiders to a class action, not class members, seeking to appeal). In fact, some state that non-parties bound by the trial court decision *can* appeal. *E.g., Bayard* 50 U.S. (9 How.) at 551 (noting that "*privies to the record*" as well as parties may appeal). *See also Microsystems Software, Inc. v. Scandinavia Online AB,* 226 F.3d 35, 42 (1st Cir. 2000) (individuals in a non-class action suit who only might be affected by injunction entered in a software licensing dispute had only "an indirect and incidental" interest in the outcome) (internal quotation marks omitted).

13 *See also Bell Atlantic*, 2 F.3d at 1309 n.8, 1310 n. 10 (citing, *inter alia*, Richard A. Posner, *Economic Analysis of Law* § 21.9, at 570 (4th ed. 1992) (plaintiffs' attorney "will be tempted to offer to settle with defendant for a small judgment and a large legal fee, and such an offer will be attractive to the defendant provided the sum of the two figures is less than the defendant's net expected loss from going to trial").

14 Macey & Miller, *supra*, 58 U. Chi. L. Rev. at 46. *See also* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 714-20 (1986).

15 For example, the court of appeals in *Rosenbaum v. MacAllister,* 64 F.3d 1439 (10th Cir. 1995), held that non-party shareholders could appeal the $2.6 million fee award and the court ultimately held that award to be excessive. "As a direct result," the district court subsequently ordered $1.4 million returned to the corporation. *Id.* at 1448; Order, Civil Case No. 91-B-2164 (D. Colo. Feb. 14, 1997). *See also Kaplan*, 192 F.3d 62 (reversing award of $1 million in fees because the action provided no substantial benefit to the corporation or its shareholders); *Zucker v. Westinghouse Elec. Corp.,* 265 F.3d 171 (3rd Cir. 2001) (reversing award of $582,443.44 in fees because the action provided no substantial benefit to the corporation).

16 *Cf.* Joseph A. Grundfest & Michael A. Perino, *The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation*, 38 Ariz. L. Rev. 559, 562 (1996) ("[f]ormal participation and its attendant litigation cost and risk may … be an unnecessarily complex and expensive means for institutional investors to express their views on the merits of class action or derivative litigation"); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Shareholders Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053, 2103-05 (1995) (discussing barriers imposed by intervention).

17 *See* 15 U.S.C. § 78u-4(a)(3)(A)(i) (seeking to increase the likelihood of institutional shareholder participation in class actions by increasing notice period after filing of securities class action complaints to afford potential lead plaintiffs time to come forward); Weiss & Beckerman, 104 Yale L.J. at 2100 ("[l]ack of timely notice makes it difficult for institutional investors to participate in class actions"); pp. 1-2, *supra* (quoting PSLRA House Conference Report).

18 The government, which bears responsibility in assisting in the administration and development of the Federal Rules and the enforcement of the securities laws that give rise to many class actions, just three years ago in *Felzen* endorsed objector appeals and represented that it is not concerned "that [the] limited degree of participation by persons other than the named plaintiff will unduly disrupt the litigation or render it unmanageable." *Felzen* Gov't Br., No. 97-1732, at 28.

19 *E. g., In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3rd Cir. 1995), *cert. denied*, 516 U.S. 824 (1996).

20 E.g., *Ficalora v. Lockheed California Co.,* 751 F.2d 995, 997 (9th Cir. 1985); *Holmes v. Continental Can Co.,* 706 F.2d 1144 (11th Cir. 1983).

21 At a minimum, the Court should avoid reaching out beyond the Question Presented, limited to "class action settlements," to extinguish long-held appellate rights of shareholders without the full benefit of the adversarial process.

22 *See, e.g., In re Pittsburgh & Lake Erie R.R. Sec. & Antitrust Litig.*, 543 F.2d 1058, 1069-70 (3rd Cir. 1976) (shareholders may appeal derivative suit since their "equity is being diluted"; their "distinctive interests are as worthy of consideration and protection as [party] shareholders"); *United States v. LTV Corp.,* 746 F.2d 51, 53-54 n.5 (D.C. Cir. 1984) (objectors may appeal settlement approvals in derivative context because "judgments in such cases bind shareholders"); 5 *Moore's Federal Practice* § 23.1.02[3][b] (D. Coquillette, et al. eds., 3d ed. 1997) ("As an owner of securities in the corporation, the suing shareholder, along with all other shareholders, is harmed by an injury to the corporation.").

23 Real world experience teaches, too, that shareholders have concrete and direct interests in the outcome of these cases. In the *Felzen* case before this Court three years ago, objectors took issue with a settlement that returned $8 million in value to the

corporation and its shareholders instead of the $250 million claimed. The difference amounted to 37 cents per share, or better than 2% per share at current share prices. Petitioner CalPERS alone owned over 2.9 million shares of ADM stock at the time, meaning that its *pro rata* loss can be pegged at over $1 million. Other large institutional investors like CalPERS who control the retirement savings of millions of Americans shared *pro rata* losses in the value of their stock holdings almost as large. The Council and its members are increasingly active in Rule 23 and Rule 23.1 cases precisely because of their large and direct stakes in the outcome of these disputes.

24 Until 1966, when Rule 23.1 was broken out into a separate rule, derivative actions were considered a form of class actions governed by what was then Rule 23(b). 7A C. Wright, et al., *Federal Practice and Procedure* § 1752, at 18. As the identity of the language used by Rules 23(e) and 23.1 suggests, that division was in no way intended to grant lesser rights to objecting shareholders than objecting class members. On the contrary, the Advisory Committee specifically noted that the "mandatory notice" requirement contained in old Rule 23 "was *primarily directed* to derivative actions by shareholders." Preliminary Draft of Proposed Amendments to the Rules of Civil Procedure 114 (1964) (citing *Cunningham v. English,* 269 F.2d 539 (D.C. Cir. 1959)) (emphasis added). As in the Rule 23 context, there is an uninterrupted body of law requiring district courts to provide objecting shareholders with an opportunity to be heard at the fairness hearing.

25 *Johnson* cited for support the Second Circuit's decision in *Christian v. R. Hoe & Co.,* 63 F.2d 218 (2d Cir. 1933), which held that a nonparty shareholder who objected to a receivership "is rightfully here, like a defendant who is summoned by process of court and after an adverse ruling has the right to appeal." *Id.* at 218.

26 *Tryforos v. Icarian Dev. Co.,* 518 F.2d 1258, 1263 n.22 (7th Cir. 1975), *overruled by Felzen v. Andreas,* 134 F.3d 873 (7th Cir. 1998), *aff'd by an equally divided Court*, 525 U.S. 315 (1999).

27 All of the remaining arguments that support objector appeals in the Rule 23 context apply equally well here. A rule requiring intervention would render the Federal Rules incoherent because participation is practically impossible under Rule 24's strictures. *See* pp. 10-13, *supra.* Meanwhile, Rule 23.1 objectors help expose collusive settlements; they have produced an impressive rate of appellate reversals, adding real value to shareholders; there have been no manageability problems suggested by the many courts of appeals that allow objecting shareholders to appeal; and requiring intervention would add, not reduce, the workload of the federal courts, by imposing burdensome litigation requirements that do not contribute to resolving the merits of the objectors' concerns about the proposed settlement. *See* pp. 17-23, *supra.*

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2004 WL 2069560 (U.S.) (Appellate Brief)
Supreme Court of the United States.

DURA PHARMACEUTICALS, INC. et al., Petitioners,
v.
Michael BROUDO et al., Respondents.

No. 03-932.
September 13, 2004.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of the Chamber of Commerce of the United States As Amicus Curiae in Support of Petitioners

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***iii** TABLE OF AUTHORITIES

CASES

*1 INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly advocates the interests of its members in court involving issues of national concern to the American business community.

The Chamber has a substantial interest in the issue presented in this case: the proper application of the loss causation principle in securities litigation. Securities class action litigation imposes an enormous toll on the national economy, affecting virtually every public corporation in America at one time or another and costing American businesses billions of dollars in settlements every year. Indeed, recent studies conclude that, over a five-year period, the average public corporation faces a 9% probability of facing *at least* one securities class action lawsuit. *See* Elaine Buckberg et al., NERA, *Recent Trends in Securities Class Action Litigation: 2003 Early Update* 4 (Feb. 2004) ("*2003 Early Update*"). As Congresswoman Anna Eshoo (D-Cal.) has put it, "Businesses in my region place themselves in one of two categories: those who have been sued for securities fraud and those that will be."[2]

Because of pressures unique to securities class action litigation, virtually all claims that survive initial motions practice are settled. With little prospect that their claims will be fully tested by the adversarial process, plaintiffs ***2** have a strong incentive to bring securities class action claims without regard to their underlying merit. By diverting resources away from productive economic uses, meritless securities actions threaten to slow the spread of new investments, reduce the efficiency of capital markets, and limit the competitiveness of the American economy. The membership of the Chamber thus has a strong interest in ensuring that the requirements of the federal securities laws are applied in a correct and uniform manner, weeding out meritless suits as quickly and regularly as practicable, in order to avoid undue harm to the nation's commerce and industry.

SUMMARY OF ARGUMENT

While the statutory and legislative history arguments for reversal are familiar, what may not be so apparent is the practical impact of the Ninth Circuit's ruling in contemporary securities class action litigation. Simply put, the court of appeals' decision, if affirmed, would make what is already a bad situation very much worse.

First, due to pressures unique to American securities litigation, businesses are typically forced to settle even meritless suits. Unless a case can be dismissed through early motions practice, the subsequent threat of class certification forces corporate executives to choose between staking the future of their companies on the outcome of a single jury verdict, or settling even when they may have no legal liability.

Securities class action suits, moreover, often benefit class counsel more than they do class members, with settlement payments simply involving a transfer of wealth from current shareholders to former shareholders, minus, of course, contingent attorneys' fees that typically run between 19% and 45%. As one leading securities class action plaintiff's lawyer has candidly admitted: "I have the greatest practice in the world because I have no clients. I ***3** bring the case. I hire the plaintiff. I do not have some client telling me what to do. I decide what to do." [3]

Second, into this environment the Ninth Circuit's holding introduces a new legal rule that only further encourages plaintiffs to file and companies to settle meritless claims by removing a key safeguard against such suits. Worse still, the Ninth Circuit's rule encourages risky investment behavior, effectively forcing issuers to insure against speculative losses having nothing to do with their own conduct. Under the Ninth Circuit's rule, an investor can file a claim and obtain recovery even when the disclosure of an allegedly fraudulent statement has absolutely *no effect* on the stock price. To estimate damages in the absence of any contemporaneous real world stock price movement, moreover, the Ninth Circuit's rule requires litigants (and courts) to resort to exactly the sort of "junk science" economics this Court has consistently discouraged. And because it permits claims for any allegedly false statement, without respect to demonstrated market injury, the Ninth Circuit's rule has the effect of chilling investment advice and reporting within the securities industry.

By contrast, the alternative loss causation rule endorsed by the Government, petitioners, and four circuits [4] would avoid all of these problems while ensuring full recovery of real losses, consistent with the established tort principle that, although "the consequences of an act go ***4** forward to eternity, ... legal responsibility must be limited to those causes which are so closely connected with the result." W. Page Keeton et al., *Prosser and Keeton on Torts* § 41, at 264 (5th ed. 1984).

ARGUMENT

I. THE PRESSURE TO SETTLE EVEN MERITLESS SECURITIES CLASS ACTIONS IMPOSES AN ENORMOUS TOLL ON THE AMERICAN ECONOMY

This Court has long recognized that securities fraud litigation presents "a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 739 (1975). Because the amount of damages demanded can be so great, corporations are frequently forced to forgo the adversarial process, settling even meritless suits in order to avoid the prospect of bankruptcy. Indeed, studies indicate that, unless a securities class action is dismissed on the pleadings, it is virtually certain to settle. *See* Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053, 2064 (1995); Woodruff-Sawyer & Co., *A Study of Shareholder Class Action Litigation* 25 (2002) (83% of securities fraud cases are resolved through settlement).

So great is the pressure on corporations to settle that, even when defendants *do* succeed in obtaining a trial court dismissal, the risk of losing on appeal can still lead to enormous settlements. By way of example, just earlier this year one securities defendant agreed to settle a pending class action for $300 million even *after* the suit was dismissed on the merits with prejudice in the trial court. [5]

***5** To be sure, Congress has sought to address these problems, passing the Private Securities Litigation Reform Act ("PSLRA") in 1995 and the Securities Litigation Uniform Standards Act in 1998. Despite these efforts at reform, however, the number of securities class actions has not declined. *See* Laura E. Simmons & Ellen M. Ryan, Cornerstone Research, *Post-Reform Act Securities Lawsuits: Settlements Reported Through December 2003* (May 2004) ("*PSLRA Settlements*"). Quite the opposite, in fact, has occurred: in the six years since the enactment of the PSLRA, the mean number of securities fraud suits has risen by an astonishing 32%. *See* Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. Ill. L. Rev. 913, 930. Another published study has concluded that, following the enactment of the PSLRA, public companies now face a nearly 60% *greater* chance of being sued by shareholders. *See 2003 Early Update.* And the dismissal rate of securities fraud lawsuits between 1996 and 2003 averaged only 8.4%, with dismissals in three of the 11 federal circuits averaging *just 4%*, a result that Congress hardly anticipated or intended. *See id.* at 5.

Just as the number of cases continues to rise despite congressional efforts to rein them in, class members all too often continue to find themselves in the unfortunate position of losing regardless of the outcome of these cases. Because payments come out of corporate coffers, securities class actions frequently involve only "a transfer of wealth from current shareholders to former shareholders." Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 Stan. L. Rev. 1487, 1503 (1996). [6] Thus, ***6** to the extent that class members still own shares in the company at the time of the suit (as they often do), "payments by the corporation to settle a class action amount to transferring money from one pocket to the other, with about half of it dropping on the floor for lawyers to pick up." *Id.* As Judge Friendly once remarked, securities fraud litigation carries the risk of " 'large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers.' " *Blue Chip Stamps*, 421 U.S. at 739 (quoting *SEC v. Texas Gulf Sulphur Co.,* 401 F.2d 833, 867 (2d Cir. 1968)).

A recent case against Qwest Communications illustrates the phenomenon. There, plaintiffs' counsel sought to increase the pressure on defendants to settle by moving to freeze approximately $400 million of potential proceeds from a planned sale of a Qwest business unit. [7] The plaintiffs' lawyers claimed that the sale should be enjoined to ensure that the as-yet-to-be certified class (and its counsel) would get paid if they ultimately won the suit. But Qwest badly needed the proceeds from the sale to avoid bankruptcy. [8] The district court eventually denied the motion and expressly found that a freeze would not benefit all putative class members or the company, but only former shareholders and the attorneys. [9] According to the court, entering the injunction sought would likely have bankrupted the company and rendered worthless the stock of thousands of would-be class members who were still shareholders in Qwest. [10]

Securities class actions are also frequently filed so quickly after a stock price decline that any reasonable factual ***7** investigation into the merits is simply impossible. By way of example, one court found it "peculiar that four of the lawsuits consolidated in this action were filed around 10:00 a.m. on the first business day following [the defendant's] announcement" and that "[m]ost of the complaints are virtually identical (including typographical errors)." [11] At the hearing on the defendant's motion to dismiss, the judge inquired "How did you get to be so smart and to acquire all this knowledge about fraud from Friday to Tuesday? … On Friday afternoon did your client suddenly appear at your doorstep and say 'My God, I just read in the *Wall Street Journal* about Travelers. They defrauded me,' and you agreed with them and you interviewed them and you determined that there was fraud and therefore you had a good lawsuit, so you filed it Tuesday morning, is that what happened?" The court noted that "[c]ounsel for the plaintiffs was not responsive to this line of inquiry." [12]

Efforts at reform notwithstanding, virtually all securities class action cases continue to be settled with little or no regard to their underlying merit. As Congress, the courts, and commentators have all observed, "[t]oo frequently, corporate decisionmakers are confronted with the implacable arithmetic of the class action: even a meritless case with only a 5% chance of success at trial must be settled if the complaint claims hundreds of millions of dollars in damages." H.R. Rep. No. 106-320, at 8 (1999).[13] The ***8** magnitude of the continuing pressure to settle even strike suits is perhaps most clearly exposed by the fact that, since the PSLRA's passage, more than 2,000[14] securities fraud cases have been filed in federal court, yet defendants have taken less than 1% to trial.[15] As one observer commented over a decade ago in words equally applicable today, there is simply "*no appreciable risk* of non-recovery" in securities class actions. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 578 (1991).[16] Merely "*[g]etting the claim into the legal system*, without more, sets in motion forces that ultimately compel a multi-million dollar payment." *Id.* at 569 (emphasis added). *Accord Hevesi v. Citigroup Inc.,* 366 F.3d 70, 80 (2d Cir. 2004) (noting "numerous courts and scholars have warned that settlements in large [securities] class actions can be divorced from the parties' underlying legal positions"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 259 F.3d 154, 164 (3d Cir. 2001) (discussing the "inordinate or hydraulic pressure on [securities fraud] defendants ***9** to settle, avoiding the risk, however small, of potentially ruinous liability").

It is well known, too, that the same few law firms bring the great bulk of these claims. One recent study found that, since the passage of the PSLRA, a single firm (recently split into two) has been involved as lead or co-lead plaintiffs' counsel in over 50% of securities class action settlements.[17] In the cases where competition for lead counsel status does emerge, accusations are sometimes exchanged by the plaintiffs' bar that one or another firm has offered to "pay off" competitors to withdraw their applications to serve as lead counsel, leading at least one court to observe that

[w]hile over a dozen law firms participated early on in this litigation, only two filed proposals to represent the class, and only one of these proposals appears serious. This suggests an understanding or collaboration among plaintiff firms engaged in securities class action litigation that many would choose not to bid for this litigation .... The indicia of such cooperation raises serious doubts about the conditions of competition in this segment of the legal services industry.[18]

Commenting on the phenomenon of contemporary securities class action litigation, a Florida court described the whole process as "the class litigation equivalent of the 'Squeegee boys' who used to frequent major urban intersections and who would run up to a stopped car, splash soapy water on its perfectly clean windshield and expect payment for the uninvited service of wiping it off." *Fruchter v. Florida Progress Corp.,* No. 99-6167CI-20, 2002 WL 1558220, at *10 (Fla. Cir. Ct. Mar. 20, 2002).

***10** Simply put, despite Congress's clear intent and two efforts at reform, American business continues to contend with "precisely the sort of lawyer-driven machinations the PSLRA was designed to prevent." *In re BankAmerica Corp. Sec. Litig.,* 95 F. Supp. 2d 1044, 1050 (E.D. Mo. 2000) (criticizing the "outrageous" attempts of plaintiffs' counsel to commandeer the class action for their own benefit), *aff'd*, 263 F.3d 795 (8th Cir. 2001). The drain on the American economy and its global competitiveness is substantial. In the last four years alone, securities class action settlements have exceeded two billion dollars *per year.*[19] And the problem continues to grow. In 2002, the average price of settling a securities fraud claim rose to $24.3 million, a 68% increase from 2001. *See* Laura E. Simmons & Ellen M. Ryan, Cornerstone Research, *Post-Reform Act Securities Lawsuits: Settlements Reported Through December 2002*, at 3 (May 2003). In 2003, the average settlement value for accounting-related securities fraud cases reached $26.5 million. *2003 PricewaterhouseCoopers Securities Litigation Study* (rel. Aug. 2, 2004), *at* http://www.10b5.com/2003_study.pdf.

II. THE NINTH CIRCUIT'S RULE WOULD SIGNIFICANTLY EXACERBATE THE PROBLEMS AND INCREASE THE SOCIAL COSTS ASSOCIATED WITH MERITLESS SECURITIES CLASS ACTIONS

"The economics of sanctions starts from the proposition that the objective of a legal rule is to deter certain undesirable behavior without simultaneously deterring (too much) beneficial behavior." Easterbrook & Fischel, *Optional Damages in Securities Cases*, 52 U. Chi. L. Rev. at 612. The Ninth Circuit's rule disregards this fundamental objective in many notable and problematic respects.

***11** A. Rather than holding companies liable for the damage they inflict, as reflected by actual market events, the Ninth Circuit's rule permits liability to be found and damages to be awarded even when the plaintiff can point to *no actual market price reaction to a corrective disclosure.* By way of example, suppose a plaintiff buys $50 of stock in the defendant corporation. As time passes, the value of the plaintiff's investment declines to $5. *After* this decline, the defendant announces the restatement of an accounting item, yet the plaintiff's shares remain at $5. In most circuits, any subsequent securities class action would be dismissed. By contrast, under the Ninth Circuit's rule, a plaintiff can proceed to trial simply by hiring an expert to render an opinion on how much of the price the plaintiff paid was "inflated" because of the undisclosed accounting issue. Plaintiffs and their lawyers, thus, can obtain a recovery even where investors are not demonstrably hurt by the alleged fraud - including in cases where the plaintiffs sold before the alleged misrepresentation was exposed, or the misrepresentation was never exposed at all, or it was exposed but the market did not respond negatively.

Such a regime serves only to exacerbate the already-intense pressure on companies to settle securities class action suits without regard to their merit. Denying courts any means for weeding out at the pleading stage suits where the alleged fraud had no empirical effect on share price, and thus imposed no demonstrable harm on class members, the Ninth Circuit's rule adds fuel to a fire in which virtually every case is settled, wealth is transferred away from current shareholders and productive economic uses to former shareholders, and lawyers are enriched.

The facts of this case are illustrative. On February 24, 1998, Dura announced a revenue shortfall for the following year, unrelated to any alleged fraud. By the next day, shares in Dura dropped from $39.125 to $20.75 for a one-day loss of 47%. Some *nine months later*, on November 3, 1998, Dura announced for the first time that the United ***12** States Food and Drug Administration had declined to approve its Albuterol Spiros product - an announcement that plaintiffs contend constitutes the first public disclosure of the alleged fraud in this case. Following this announcement, however, Dura shares fell only slightly and briefly. Share prices initially dropped from $12.375 to $9.75, but, within 12 trading days, they recovered to $12.438, ultimately climbing to $14.00 within 90 days of the announcement.

Plaintiffs in this suit, however, never alleged damages based on the brief and shallow $2.625 stock price dip after the November 3 disclosure of the supposed fraud. Rather, they demand recovery based on the much more significant February 24 stock price decline of $19, even though plaintiffs themselves allege no corrective disclosure in that announcement. In short, plaintiffs in this case seek damages based on a decline in share value that occurred nine months *before* the disclosure of the alleged fraud. And it is beyond cavil that a company facing potential liability of $19 per share is in a wildly different posture when it comes to deciding whether to litigate or settle than one facing potential liability of, at most, $2.625 per share.

B. Relatedly, the Ninth Circuit's rule dangerously skews investment incentives. To be sure, speculative investments are a natural - and even beneficial - part of any free and open market: "[I]n stock trading, as elsewhere, speculation serves the salutary purpose of enabling the rapid adjustment of prices to current values." Richard A. Posner, *Economic Analysis of the Law* 458 (6th ed. 2003). Because "[t]he speculator is the eager searcher for undervalued and overvalued securities," information discovered through this search "diffuses rapidly throughout the market." *Id.*

In particular, speculators may be attracted to what economists refer to as "rational bubbles," where a stock's price incorporates all publicly available information without "represent[ing] the true [market] value of the underlying ***13** company." Paul A. Ferrillo et al., *The "Less Than" Efficient Capital Markets Hypothesis: Requiring More Proof from Plaintiffs in Fraud-on-the-Market Cases*, 78 St. John's L. Rev. 81, 114 (2004). Investors might reasonably conclude that an overvalued stock will continue to appreciate during the life of the bubble. *See id.* at 115. These investors realize that "[e]ventually the bubble will burst, of course, but it is always a fair investment until that point." *Id.*

Naturally, the significant potential benefits of speculation also carry a correspondingly high degree of risk. Under the Ninth Circuit's rule, however, much of that risk is transferred away. If the price of a stock investment declines, the speculator can state a claim for relief, and likely obtain a significant settlement, merely by alleging that the defendant made a "misleading" statement - and do so even if the stock failed to decline after a corrective disclosure and moved downward only much later after other news. Such a regime unnaturally encourages risky investments by underwriting speculative losses unrelated to the defendant's conduct, and effectively serves to transform the federal securities laws into "a system of investor insurance that reimburses investors for any decline in the value of their investments." *Robbins*, 116 F.3d at 1447.

C. The Ninth Circuit regime also encourages, and in fact depends upon, a return to the use of "junk science." Because the Ninth Circuit's rule allows recovery where disclosures do *not* prompt any stock price decline, plaintiffs' experts are, by necessity, forced to resort to a grab-bag of speculative theories to estimate damages; and without any negative market reaction to the actual disclosure there is simply no objective way for courts, juries, or opposing parties to check their work. *See Robbins*, 116 F.3d at 1448.

Such a result stands in marked contrast with the Court's repeated attempts to remove precisely this sort of speculation about damages from the federal court system. ***14** *Cf. General Elec. Co. v. Joiner,* 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 579 (1993). Indeed, the same concerns that spurred the passage of the PSLRA in 1995 - including an abundance of frivolous suits, questionable claims of injury, and speculative theories of causation - prompted the adoption of Federal Rule of Evidence 702 and this Court's holding in *Daubert.*

Both *Daubert* and Rule 702 address the need to ensure that the nexus between a plaintiff's injury and the alleged cause of that injury is supported by reliable evidence. Prior to *Daubert*, courts viewed relevancy under a loose standard that tolerated almost any correlation between cause and injury. Without a rigorous examination of the causal nexus underlying the allegations, "marginal or unreliable" theories of causation regularly proceeded to trial. *See* Kenneth R. Foster et al., *Phantom Risk: Scientific Inference and the Law* 433 (1993).

Daubert and Rule 702 provided courts with the tools to screen out scientifically questionable claims in two ways. First, *Daubert* allowed courts to determine whether a claim is based on a proper temporal logic, where the alleged harmful act precedes the alleged injury. Second, *Daubert* required plaintiffs to exclude other factors, beyond the alleged harmful act, that could have caused their alleged injuries. Together, these guideposts "invite[d] courts to take a hard look" at the causal basis underlying a plaintiff's alleged injury and thus to "act with dispatch" in rejecting speculative, unproven, and unprovable damages claims. Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* § 7.17, at 740 (2d ed. 1999).

Loss causation under the PSLRA, as interpreted by other circuit courts, achieves this same goal in the securities context. By subjecting securities claims to the requirement of a decline in stock price close in time to the disclosure of the alleged fraud, courts are able to test for ***15** some reliable indication whether plaintiffs' alleged damages were caused by fluctuations in the marketplace due to causes other than the defendant's putative fraud. Like the gatekeeping function endorsed in *Daubert*, the loss causation requirement helps to screen out securities fraud actions built upon "phantom" injuries - cases involving actual harms producing actual suffering, but for which no single cause can be reliably identified. *See* Foster, *Phantom Risk* 1.

Judge Easterbrook has discussed exactly this point in the class certification context, noting that, unless courts insist on a firm "causal link between non-public information and securities prices," they are left with only a "clash" of experts, a situation that amounts "to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert," leaving defendants subject to damages that have not been - and cannot be - "verified empirically." *West*, 282 F.3d at 938-40.

Such a result, invited by the Ninth Circuit's reasoning, defies the "universal requirement" that any claim sounding in tort must include a sufficient allegation that the defendant's conduct caused the plaintiff's injury, or, stated simply, "[n]o hurt, no tort." *Bastian*, 892 F.2d at 683-84; *see also* Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. Chi. L. Rev. 69, 79 (1975). And without a hard look by the courts to ensure "some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered," Keeton, *Prosser and Keeton on Torts* § 41, at 263, litigants risk being exposed to "infinite liability for all wrongful acts," no matter how loosely connected or unrelated such conduct may be to the actual performance of a shareholder's investment, *id.* at 264. There is no reason to presume that Congress sought to endorse such a rule, so alien to traditional tort principles and this Court's holdings in *Daubert* and its progeny, ***16** when it codified the loss causation requirement in the securities fraud arena.

D. The Ninth Circuit's rule, if permitted to stand, will also serve to chill investment advice and reporting and the free flow of information in our capital markets. To date, securities class actions typically have been aimed at issuers and their executives. But without a requirement that plaintiffs tie any alleged disclosure to a timely market effect, no apparent barrier will remain to prevent future litigants from bolder attempts to expand liability to anyone even remotely connected to an investment decision. So long as the market price of a stock is deemed to take account of the communication at issue pursuant to the efficient market hypothesis endorsed in *Basic Inc. v. Levinson,* 485 U.S. 224 (1988), investor reliance on that communication is presumed and dissatisfied investors are free to bring class action claims on them. *See Bastian*, 892 F.2d at 685. Accordingly, *any* allegedly false investment information from any source - not just issuers - could conceivably become the basis for triggering liability to *all* investors.

For example, media programs with "talking heads" have become a popular feature on cable television. [20] Internet sites such as "The Motley Fool" also regularly praise investments like Dura Pharmaceuticals. And, of course, investment banks make buy and sell recommendations. Without a legal rule limiting the scope of liability to disclosures that bear a close causal link with specific stock price declines, dissatisfied investors could conceivably bring claims against such sources simply by finding some false statement recommending a stock made before a wide public audience. *See Bastian*, 892 F.2d at 685.

***17** To avoid this consequence, corporations - along with investment firm stock analysts, media sources touting stocks, and others - will have a strong incentive to limit their discussions to the narrowest possible scope, or cease publishing information on stocks altogether. Such a result, of course, is inconsistent with the very premise of an open capital market, which depends on the freest possible flow of information. *See* Posner, *Economic Analysis of the Law* 457-58 (explaining that "[i]nformation that may mislead some members of the audience may be valuable to others"); *see also Securities Fraud on the Internet: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Affairs*, 106th Cong. 79-91 (Mar. 22-23, 1999) (testimony of Thomas M. Gardner, founder of The Motley Fool, Inc.), *available at* 1999 WL 8085871 ("We believe that technology, especially the Internet, allows people to obtain information that once was the exclusive property of Wall Street professionals, so that they can make their own financial decisions better than the professionals they previously relied upon.").

CONCLUSION

The decision of the court of appeals should be reversed.

Footnotes

1 Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that they authored this brief and that no entity other than *amicus*, its counsel, or its members made a monetary contribution to its preparation or submission. All parties have consented to the filing of this *amicus* brief, and letters reflecting their consent have been filed with the Clerk.

2 Conference Report on H.R. 1058, Private Securities Litigation Reform Act of 1995, 141 Cong. Rec. H14039, H14051 (Dec. 6, 1995).

3 *See In re Network Assocs., Inc. Sec. Litig.,* 76 F. Supp. 2d 1017, 1032 (N.D. Cal. 1999) (quoting attorney William S. Lerach).

4 The court of appeals below acknowledged that this interpretation of the loss causation requirement differed from the standards articulated by the Third and Eleventh Circuits. *See Semerenko v. Cendant Corp.,* 223 F.3d 165 (3d Cir. 2000); *Robbins v. Koger Props., Inc.,* 116 F.3d 1441 (11th Cir. 1997). The court of appeals did not, however, cite or discuss the additional conflicting decisions of the Second and Seventh Circuits. *See Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.,* 343 F.3d 189 (2d Cir. 2003); *Bastian v. Petren Res. Corp.,* 892 F.2d 680 (7th Cir. 1990).

5 Jonathan Weil, *Win Lawsuit - and Pay $300 Million*, Wall St. J., Aug. 2, 2004, at C3.

6 *See also* Frank H. Easterbrook & Daniel R. Fischel, *Optimal Damages in Securities Cases*, 52 U. Chi. L. Rev. 611, 638-39 (1985); *see also* Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence,* 1992 U. Ill. L. Rev. 691, 698-700; Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 Ariz. L. Rev. 639, 650 & n.48 (1996); Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. Ill. L. Rev. at 921-22.

7 *In re Qwest Communications Int'l, Inc. Sec. Litig.,* 243 F. Supp. 2d 1179 (D. Colo. 2003).

8 Press Release, Qwest Communications, *Qwest Communications Statement In Response to Motion Filed by Milberg Weiss Bershad Hynes & Lerach LLP* (Nov. 4, 2002).

9 *Qwest Communications*, 243 F. Supp. 2d at 1186-87.

10 *Id.* at 1188.

11 *Ferber v. Travelers Corp.,* 785 F. Supp. 1101, 1106 n.8 (D. Conn. 1991).

12 *Id.* (brackets omitted).

13 *See also West v. Prudential Sec., Inc.,* 282 F.3d 935, 937 (7th Cir. 2002) (noting scholarly concerns that "settlements in securities cases reflect high risk of catastrophic loss, which together with imperfect alignment of managers' and investors' interests leads defendants to pay substantial sums even when the plaintiffs have weak positions"); Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. on Legis. 483, 490 (2000) ("For defendants, the risk of participating in a single trial [of all claims], and facing a once-and-for-all verdict is ordinarily intolerable.") (internal quotation marks omitted).

14 *See* Stanford Law School & Cornerstone Research, Securities Class Action Clearinghouse, *at* http://securities.stanford.edu/companies.html.

15 Richard Painter et al., The Federalist Society for Law and Public Policy Studies, *Private Securities Litigation Reform Act: A Post-Enron Analysis* 8 (2003), *at* http://www.fed-soc.org/pdf/PSLRAFINALII.PDF ("*PSLRA Analysis*").

16 As the Second Circuit has observed, "[a]necdotal evidence tends to confirm [Professor Alexander's] conclusion. Indeed, [Melvyn I.] Weiss and his partner William S. Lerach of the Milberg firm have stated that losses in these cases are 'few and far between,' and they achieve a 'significant settlement although not always a big legal fee, in 90% of the cases [they] file.' " *Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 52 (2d Cir. 2000) (quoting *In re Quantum Health Res., Inc. Sec. Litig.,* 962 F. Supp. 1254, 1258 (C.D. Cal. 1997)).

17 *See PSLRA Settlements* at 14 (discussing the Milberg Weiss Bershad Hynes & Lerach firm, now divided into two separate partnerships known as Milberg Weiss Bershad & Schulman, and Lerach Coughlin Stoia Geller Rudman & Robbins); *see also PSLRA Analysis* at 15-16.

18 *In re California Micro Devices Sec. Litig.,* No. C-94-2817-VRW, 1995 WL 476625, at *4 (N.D. Cal. Aug. 4, 1995).

19 *See PSLRA Settlements* at 1. In 2000 alone, the total value of securities fraud cases (adjusted for inflation) was estimated at $4.428 billion. *Id.* Settlements in 2001 were estimated at $2.1 billion, rising to $2.537 billion in 2002, and holding at $2.016 billion in 2003. *Id.*

20 *See, e.g.*, CNN, *CNNfn on TV, at* http://money.cnn.com/ontv; FOXNews.com, *FNC Shows, at* http://www.foxnews.com/business; CNBC, CNBC TV, *at* http://moneycentral.msn.com/cnbc/tv/default.asp.

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2002 WL 32133469 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

UNITED STATES TOBACCO COMPANY, et al., Petitioners,

v.

CONWOOD COMPANY, L.P., Conwood Sales Company, L.P., Respondents.

No. 02-603.
November 20, 2002.

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

Brief for Respondents in Opposition

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***i QUESTIONS PRESENTED**

1. Whether sufficient evidence supported the properly instructed jury's verdict that an admitted monopolist violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by, among other things, systematically removing and destroying hundreds of thousands of competitors' display racks, "point of sale" advertising, and products, and entering into more than twenty thousand contracts that prevented stores from displaying or advertising competitors' products, where the evidence showed that this exclusionary conduct led to higher prices and fewer choices for consumers and where the monopolist conceded that the conduct had no legitimate business purpose.

2. Whether sufficient evidence supported the properly instructed jury's award of $350 million in damages for an admitted monopolist's systematic and successful multi-year campaign to "eliminate competitive distribution" and thereby to preserve "the highest profit margin of any public company," where testimony from multiple witnesses (most of whom were unchallenged by the monopolist) estimated damages between $313 and $488 million.

***ii CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

Respondents Conwood Company, L.P., and Conwood Sales Company, L.P., are neither publicly traded companies nor subsidiaries or affiliates of a publicly owned corporation.

***iii TABLE OF CONTENTS**

***v TABLE OF AUTHORITIES**

***1 INTRODUCTION**

The petition presents only a challenge to the sufficiency of the evidence. USTC does not allege here a single error of law in the month-long trial: no error in the jury instructions - which USTC approved; no error in the admission or exclusion of evidence; and no claim that USTC was restrained in any way from challenging Conwood's witnesses or arguing its version of the facts to the jury. USTC concedes, moreover, that the jury properly found that moist snuff constitutes the relevant market and that USTC, with 77 percent of that market at the time of trial, was a monopolist with the power to raise prices, restrict output, and exclude competition.

The sole basis for USTC's petition is its claim that the evidence - consisting of 66 witnesses and 364 representative documents - was insufficient as a matter of law to support the jury's findings that USTC illegally maintained its monopoly through exclusionary conduct and that Conwood suffered damages thereby of $350 million. The court below carefully reviewed the voluminous trial record and concluded that there was “ample documentary and testimonial evidence” to support the judgment. Pet. App. 30a. This Court does not sit to reweigh evidence that two lower courts have already found sufficient. As to damages, USTC concedes that the jury was properly instructed that it could only find damages due to USTC's antitrust violation. The jury's award was supported by extensive evidence, from varied sources, which USTC admits that the jury could properly consider and which it does not challenge here.

USTC asserts as many as 10 “conflicts” on myriad issues, but the Sixth Circuit itself perceived no conflict with any other court on any issue, and for good reason. The cases that USTC cites as supposedly in “conflict” all involved the application of settled legal principles to completely different factual situations.

*2 STATEMENT

1. For almost a century, USTC was the only U.S. producer of moist snuff. Pet. App. 4a. Respondent Conwood entered the market in the late 1970s and made some initial inroads on USTC's monopoly market share. *Id.* But by the mid-1990s, Conwood's growth had been stopped at approximately 13 1/2 percent. The only other two companies in the market, Swedish Match and Swisher International Group, had shares of 6 and 4 percent, respectively, and were likewise stymied in their efforts to grow. *Id.*

USTC raised its prices approximately 8-10 percent per year between 1979 and 1998. *Id.* at 5a. In 1999, USTC earned nearly $1 billion in profits from its moist snuff business and had “the highest profit margin of any public company in the country.” *Id.* at 4a. Yet there was no new market entrant after 1990, and USTC still controlled 77 percent of the market in 1999. *Id.* at 5a. As Professor Kamien of Northwestern University's Kellogg Graduate School of Business explained, only a monopolist exercising market power can maintain such huge profit margins and impose such consistent price increases (at more than double the rate of inflation), while forestalling entry and maintaining such a large market share. Trial Tr. 609-10.

2. Conwood brought this suit against USTC for, *inter alia*, illegal maintenance of monopoly and attempted monopolization, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The trial evidence established that:

Beginning in the early 1990s, USTC perceived a threat to its monopoly from the innovative products, packaging, and accelerated marketing efforts of Conwood, Swedish Match, and Swisher. USTC's concerns were intensified when, in the mid-1990s, Conwood and Swedish Match introduced “price value” or half-priced brands of moist snuff. USTC believed that competition, and particularly pricevalue competition, was likely to erode its profits.

USTC recognized that it could compete on price and quality. “If we were willing to lower our margins and reduce prices, we could stop the segment share erosion. But ***3** this will create other issues.” C.A. App. 2536 (USTC Strategic Plan). Specifically, USTC feared that if it reduced prices its shareholders would flee the stock as shareholders had fled Phillip Morris when it had embarked on a price war (and produced a dramatic decline in its stock price that became known as “Marlboro Friday”). *See id.* at 2535. USTC thus decided not to compete on price. On quality, too, USTC offered nothing new. Its president testiffed that USTC did not make a single product improvement of any kind, or provide any additional value to the consumer, in the 10 years preceding trial. *Id.* at 875.

Rather than compete on the merits, USTC decided to exercise its "market power" and "[p]rotect [its] market share by creating barriers to competition." *Id.* at 2492 (Steering Committee Outline). *See id.* at 2499 ("UST does not 'deal' on its product's prices, we don't have to."). USTC's senior executives chose to embark on a multi. faceted campaign "to exclude competition from the moist snuff market." Pet. App. 22a.

Legal restrictions severely limit the opportunities for tobacco companies to advertise their products. Accordingly, USTC focused its exclusionary efforts on the point of sale, where moist snuff manufacturers can advertise their wares and alert customers to new product introductions and price promotions. Normally, each manufacturer is allowed by the retail store to place its own rack, with its own "header card" advertising affixed, and gravity-fed slots (called "facings") from which consumers can select a can. "[T]he point at which the buyer makes his purchase decision is the optima] time to convince the buyer to putchase a particular brand of moist snuff." *Id.* at 5a. If the manufacturer is unable to advertise or display its products and price promotions on a rack at the point of sale, it loses the opportunity to compete for the customer's business. *See id.* at 5a-6a.

USTC accordingly used its market power in a number of inter-dependent ways to exclude from stores its competitors' display racks, "point of sale" ("POS") advertising, ***4** and products. For example, USTC sales representatives, while making their sales rounds, "would routinely discard hundreds of thousands of Conwood racks and their accompanying POS." *Id.* at 12a. Conwood's Chairman, William Rosson, testified that Conwood "spent $100,000 a month on replacement racks," *id.*, which represented some 20,000 racks per month. "[A]bout 50 percent of sales representatives' staff time was spent repairing racks destroyed by USTC representatives. Because two to three months would sometimes pass before a sales representative could return to the same store, Conwood lost sales even when it was able to restore racks." *Id.* at 13a. Numerous USTC witnesses admitted that "they removed racks and POS materials without retailer authorization." *Id.* at 15a.

USTC also established a so-called Consumer Alliance Program ("CAP"), which provided inducements for retailers to exclude rival racks, advertising, and products. USTC itself described CAP as "a great incentive . . . for the elimination of competitive products." C.A. App. 2620. "USTC was able to sign 37,000 retailers to the CAP, which represents 80 percent of its overall volume in moist snuff sales." Pet. App. 12a. With more than 21,000 of the most significant retailers, moreover, USTC had express "exclusive vending" contracts that prevented those stores from having any competitors' display racks or POS advertising. C.A. App. 1273-74.

USTC's monopoly power also made it the only plausible candidate to serve in the role of "category manager" for moist snuff. In this capacity, USTC had substantial control over how retailers used store space to display moist snuff and hence USTC could determine whether and how the different brands of moist snuff were displayed. Pet. App. 10a-11a. There was ample space in stores for the small, but highly profitable moist snuff cans; indeed, stores had ample room to stock, and did stock, the far bulkier and less profitable packs of loose leaf tobacco sold by Conwood and others (but not USTC). But USTC ***5** abused its market power by artificially constraining space available to rival moist snuff and by "deliberately provid[ing] false information to stores to exclude competitors from the market." *Id.* at 8a.[1] In particular, USTC sought to "control the number of Price Value product introductions," C.A. App. 2486, and "control the merchandising and the P.O.S. placements, which will make the consumer awareness of the price differential difficult," *id.* at 2656. For USTC, it was "imperative that we continue with this [c]ategory [m]anagement action plan to eliminate competitive products." *Id.* at 2561.

USTC's high-level corporate documents confirmed that USTC planned to "eliminat [e] competitive distribution" through systematic removal of competitors' racks, POS, and facings; implemented that plan through its sales force; monitored progress through periodic reviews of market conditions and annual reviews of salesmen; and tabulated success throughout the United States. Conwood C.A. Br. 17-18 (citing 55 trial exhibits); *see also* Pet. App. 26a (noting that "[m]uch of the evidence Conwood highlights was documentary").

At trial, USTC did not attempt to defend any of these tactics as demand-enhancing or otherwise procompetitive. USTC senior executives readily admitted that there was no shortage of shelf space in the stores and that under ordinary competitive conditions each manufacturer would be permitted to place its own racks and POS advertising in the stores. The executives also admitted that excluding - or inducing stores to exclude - another competitor's products, racks, or POS would be wrong and harmful to competition. *See, e.g.*, C.A. App. 381-85, 392-95, 403-04, 858-59, 879-80, 968. USTC's executives instead ***6** claimed that the company did not engage in the types of conduct alleged by Conwood, and that stores excluded Conwood without any prompting from USTC. *See, e.g., id.* at 84-85, 904-06. The jury found otherwise.

The jury also found that USTC's exclusionary conduct harmed competition by leading to higher prices and fewer choices for consumers. Pet. App. 11a (citing evidence "that USTC's conduct harmed consumers by limiting variety and raising prices"); *id.* (citing regression analysis demonstrating that, "for every 10 percent increase in USTC facings, retail prices for moist snuff rose by $.07"); C.A. App. 2762-63 (chart showing that moist snuff output declined where USTC was able to eliminate rival POS advertising and facings).

The district court heard evidence on Conwood's damages from several different sources. Conwood's national sales manager, Terry Williams, compared the markets where USTC had rack exclusivity, which produced a market share for Conwood "below its national average," with markets where it did not have such exclusivity. Pet. App. 43a. The evidence showed that, "in unimpeded competition, Conwood's market share would have been approximately 25 percent instead of 13.5 percent nationally." *Id.* at 16a. This evidence was confirmed by a number of USTC's own witnesses, who testified that in their sales regions, where Conwood's racks and advertising had not been excluded, Conwood's share was around 25 percent. *See, e.g.*, C.A. App. 1787, 1795-97, 1874, 1995.

Conwood's Chairman William Rosson testified that, "had Conwood not been subjected to USTC tactics, it would have had a national market share of approximately 22 to 23 percent." Pet. App. 15a. This testimony was supported by uncontested evidence that Conwood had rapidly gained market share before USTC began its exclusionary campaign; its approximately 40-percent market share in the most closely related market - loose leaf - where USTC did not offer a product; and by Conwood's performance in moist snuff markets where USTC's tactics ***7** were less effective. It was undisputed that "each additional point (one percent) of market share transtates into approximately $10 million in annual profits." *Id.* Thus, testimony that Conwood lost 10 percent in national market share supported damages, for the four years preceding trial, of approximately $400 million in lost profits.

Rosson also testified that he had long noted a pattern in Conwood's growth: "[i]n places where [Conwood] had a 'foothold,' i.e., a relatively high market share in a given area, it saw its market share increase during the 1990s to a market share above 20 percent." *Id.* In places where Conwood did not have a foothold market share - a share large enough to ensure that customers would complain of Conwood's exclusion and retailers would have incentive to resist - USTC's tactics prevented Conwood from increaslng its market share.

Professor Richard Leftwich of the University of Chicago Graduate School of Business, "who is recognized as an expert on business valuation and lost profits," "tested Rosson's hypothesis." *Id.* at 16a. "Using a regression analysis, Leftwich found a statistically significant difference between states in which Conwood had a foothold and those in which it did not." *Id.* Leftwich first determined that, "in states where Conwood had a market share in 1990 of 20 percent or more, the market share grew on average an additional 8.1 percent from 1990 to 1997." *Id.* "'In contrast, in states where Conwood had a lower market share, the regression predicts that its share would grow very little.'" *Id.* at 16a-17a (quoting district court decision). Leftwich then "considered other factors to rule out the possibility that [the] statistical relationship [he found] was caused by factors other than USTC's conduct." C.A. App. 88 (district court motion in limine opinion). Leftwich examined all possible alternative explanations for which data were available, including every possibility that USTC's expert suggested, and found that no other factor besides USTC's exclusionary conduct could explain ***8** Conwood's stunted growth in non-foothold states. *Id.* at 1104, 1111.

Leftwich accordingly determined that Conwood's low market growth was due to USTC's exclusionary conduct and that "increases in USTC's exclusionary behavior in a state reduced Conwood's share of sales by a statistically significant amount." Pet. App. 17a. Leftwich assessed Conwood's damages from USTC's actions to be in a range from $313 million to $488 million. *Id.* USTC offered no evidence on the amount of Conwood's damages and claimed only that Conwood had sustained no damages. The jury awarded damages of $350 million. *Id.* After statutory trebling, the court entered judgment for Conwood in the amount of $1.05 billion. *Id.* at 48a.

3. On appeal, "USTC d[id] not challenge that it has monopoly power; nor [wa]s there an issue as to the relevant product (moist snuff) and geographic markets (nationwide)." *Id.* at 21a. USTC abandoned its "we didn't do it" defense, arguing instead that "the evidence presented at trial amounted to no more than 'insignificant' tortious behavior and acts of ordinary marketing services." *Id.* at 18a. USTC also argued that the district court abused its discretion by admitting testimony concerning Conwood's damages. *See id.* at 36a. The court of appeals affirmed.

a. Quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985), the court explained that, "'[i]f a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory [or exclusionary].'" Pet. App. 21a. Applying that standard to the evidence adduced at trial, the court found "ample documentary and testimonial evidence" to support the jury's verdict that "USTC's pervasive practice of destroying Conwood's racks and POS materials and reducing the number of Conwood facings through exclusive agreements with and misrepresentations to retailers was exclusionary conduct without a sufficient justification, and that USTC maintained its monopoly power by engaging in such conduct." *Id.* at 30a.

***9** The court first rejected USTC's claim that its acts were "isolated sporadic torts" that did not rise to the level of antitrust violations. *Id.* at 22a-23a. The court noted that USTC itself conceded that tortious activity can form the basis for liability under the Sherman Act as long as "that activity is pervasive and accompanied by other anticompetitive conduct." *Id.* at 18a. The court recited the extensive trial evidence and concluded that, "[c]onstruing the evidence in the light most favorable to Conwood, these incidents were neither sporadic nor isolated." *Id.* at 25a.

The court also rejected USTC's contention that retailers "alone, not USTC, determined and controlled what racks and POS were used in their stores." *Id.* at 26a. The court cited extensive evidence (including USTC's own documents) to support Conwood's allegation that USTC abused its power with retailers, as the monopoly provider of moist snuff, "to control the number of price value brands introduced in stores" (*id.*) and "to place USTC racks exclusively in retail stores and hide competitor products in its racks" (*id.* at 29a). USTC also made outright "misrepresentations to retailers to obtain exclusive vending" (*id.* at 29a-30a), and entered into tens of thousands of contracts that required retailers to eliminate space and advertising for rivals' products (*id.* at 12a).

The court further rejected USTC's complaint that the district court had erred in permitting the jury to consider legal conduct as commingled with illegal conduct: the court noted that "the district court properly instructed the jury that USTC could not be held liable for conduct that was part of the normal competitive process." *Id.* at 28a n.4 (citing *Aspen Skiing*, 472 U.S. at 604-05).

Finally, the court recited the testimony of USTC's Chairman Vincent Gierer, who acknowledged in crossexamination that his company had endorsed a "strategy of eliminating competitive distribution," which earlier in his testimony he had conceded was "not a legitimate goal." *Id.* at 29a. As the court summarized it, "Gierer essentially admitted that the activities about which Conwood ***10** complains, particularly the misrepresentations to retailers to obtain exclusive vending, was not competitive conduct spurred by efficiency. Moreover, USTC has failed to offer any valid business reason for its representatives' pervasive destruction of Conwood racks." *Id.* at 29a-30a. Having found "ample" evidence of exclusionary conduct without any attempt to defend that conduct as efficient, the court upheld the verdict. *Id.* at 30a.

b. The court next rejected USTC's claim that Conwood had failed to prove harm to competition in the national moist snuff sales market. Citing the testimony of Professor Kamien, the court of appeals noted that, "as a result of USTC's exclusionary conduct, the consumer suffered by having to pay higher prices, and that there was less variety in the market." *Id.* at 33a. Kamien further testified that, "had there been true competition in the moist snuff market, USTC's market share, which dropped approximately 1 percent per year between 1979 and 1990, would have fallen much faster." *Id.* at 34a.

c. The court rejected USTC's contention that the district court had abused its discretion in allowing Professor Leftwich to testify on damages under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The court noted that USTC did "not challenge Leftwich's qualifications as an expert, but only his testimony and damages study." Pet. App. 38a. The court then reviewed the *Daubert* factors to determine the reliability and relevancy of Leftwich's analysis. *Id.* at 38a-39a.

The court pointed out that Leftwich had used three methods to test Conwood's claims: a regression analysis, a yardstick test, and a before-and-after test. Those modes of analysis "are generally accepted methods for proving antitrust damages." *Id.* at 40a. The court rejected USTC's complaint that Leftwich had "failed to take into account any USTC 'bad act."' *Id.* at 41a. Contrary to USTC's submission, Leftwich had taken "USTC's expert's own regression model" and used information from "sworn affidavits compiled from 241 Conwood sales representatives ***11** detailing USTC's unethical activity in their areas" to construct "three alternate measures of USTC's bad acts by state." *Id.* The court concluded that Leftwich's regression analysis "accounted for all variables raised by USTC's own expert." *Id.* at 42a.

The court found no merit in USTC's objections to Rosson's damages testimony and to Leftwich's study on the grounds that they were too speculative and unlinked to the evidence of wrongdoing. The court noted that "[t]he jury was instructed that it could not award damages for injuries caused by other factors" and that "it is undisputed that USTC did not object to the jury instructions regarding damages." *Id.* The court thus "reject[ed] USTC's argument that Conwood failed to disaggregate the injury caused by USTC as opposed to that caused by other factors." *Id.* at 42a-43a. Accordingly, the court concluded that "there was sufficient evidence to support the jury's award of damages in this case" and that the jury's award was "well within th[e] range" of the \$313-\$488 million estimated by Conwood's witnesses. *Id.* at 43a.

USTC's petition for rehearing and rehearing en banc was denied. *Id.* at 45a. No judge voted in favor of rehearing or even requested a response.

REASONS FOR DENYING THE PETITION

I. USTC's admitted failure to object to the jury instructions leaves it with only a sufficiency-of-the-evidence challenge. In rejecting that challenge, the court below faithfully applied this Court's well-settled antitrust principles to the facts presented. The court carefully scrutinized a voluminous trial record and found "ample" evidence of USTC's extensive campaign of exclusionary conduct. That fact-bound determination does not conflict with any other court decision.

II. The court of appeals also properly concluded that the damages award comported with well-established antitrust and evidentiary standards. The unchallenged jury instructions required the jury not to award damages for lawful conduct. USTC's argument that the evidence was ***12** insufficient to support a conclusion that the jury could have segregated lawful from unlawful conduct was carefully considered and rejected by the court below. In this Court, USTC largely repeats its attack on Conwood's expert without acknowledging - as the court of appeals pointed out - either that Conwood's expert performed the very analysis that USTC insists was necessary or that there was ample additional evidence (unchallenged by USTC) that supported the jury's award. USTC's factbound challenge presents no circuit conflict.

I. USTC'S SUFFICIENCY CHALLENGE WAS COR-RECTLY REJECTED BY THE SIXTH CIRCUIT, WHICH APPLIED WELL-SETTLED PRINCIPLES OF ANTITRUST LAW TO THE EVIDENCE

USTC frames its first question as whether "misleading 'suggestions' and 'recommendations' to retailers" may be a basis for antitrust liability. Pet. i. But USTC does not dispute that there was extensive evidence of USTC's outright exclusion of its competitors' products and advertislng. Nor does USTC suggest that *this* evidence was insufficient to support the verdict. Moreover, USTC did not object to the admission of evidence regarding its false and misleading statements to stores, and did not request a jury instruction or special verdict on this issue. Accordingly, USTC is left to argue that *part* of the trial evidence was insufficient to support the verdict. That argument falls of its own weight. *Aspen Skiing*, 472 U.S. at 604 (Court "must interpret *the entire record* in the light most favorable" to the prevailing party) (emphasis added). In any event, USTC is wrong to suggest that its fraudulent conduct - which it admitted served no legitimate purpose - was *per se* lawful, or that any court has so held.

A. The Properly Instructed Jury's Finding Of Exclusionary Conduct Was Based On Over-whelming Evidence

USTC concedes that the jury was correctly instructed under this Court's holdings that exclusionary conduct is "conduct that has the effect of preventing or excluding ***13** competition or frustrating or impairing the efforts of other firms to compete for customers." C.A. App. 235 (Jury Instruction No. 2.4). The district court also properly in-structed the jury that USTC could not be held liable simply for "supplying better products or services," or for conduct that "is part of the normal competitive process." *Id.* In reviewing the judgment at trial, the court of appeals expressly followed this Court's direction to "assume that the jury followed the court's instructions." *Aspen Skiing*, 472 U.S. at 604; *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 243 (1993).

As the court below correctly held, ample evidence supported the jury's finding that USTC impaired the opportunities of rivals and prevented competition on the merits. Representative statistics from the trial are illuminating:

- 122 representative USTC documents, many from senior executives, instructed USTC representatives in the field to prevent rival distribution and promotion, and monitored the success of the plan as it was implemented;

- 74 USTC sales representatives admitted in either testimony or trial exhibits that USTC had ordered them to choke rival distribution and promotion as a matter of corporate policy, and that they had followed that policy, often by simply removing competitors' products and displays from the stores;

- 600 specific and representative instances of exclusion from 22 states were admitted into evidence;

- Conwood was required, as a result of USTC's campaign, to replace 20,000 moist snuff sales racks *per month* after 1990 at a cost of $1.2 million annually;

- Conwood's more than 200 salespersons were required to spend *half* their work time attempting to restore Conwood racks, POS advertising, and products after USTC had excluded them from the stores;

- Conwood's presence in stores (measured by the numbet of slots or "facings" occupied by Conwood products) ***14** was reduced on average from 7 facings to only 2 after a USTC representative visited a retail outlet;

- At least 21,000 retailers, including the nation's most significant chain outlets for moist snuff, were covered by USTC contracts that explicitly required exclusion of competitors' racks/POS/products; and

- At least 37,000 retailers, representing 80 percent of USTC's U.S. moist snuff sales, were covered by USTC contracts with features preventing free competition. [2]

That evidence proved USTC's direct exclusion of rivals' racks, products, and advertising, not just "misleading 'suggestions' and 'recommendations' to retailers." Pet. i.

In this Court, USTC contends that the evidence revealed only "legitimate business conduct" consisting of "aggressive nonprice competition that is integral to the everyday competitive process." Pet. 2. But at trial USTC never even attempted to offer "valid business reasons" for any facet of the exclusionary conduct challenged by Conwood, including its misrepresentations to retailers. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483 (1992). *See also Aspen Skiing*, 472 U.S. at 605, 608-09 (excluding rivals on basis other than efficiency is anticompetitive). To the contrary, USTC "essentially admitted that the activities about which Conwood complains, *particularly the misrepresentations to retailers to obtain exclusive vending*, was not competitive conduct spurred by efficiency." Pet. App. 29a-30a (emphasis added). *See also* p. 5, *supra* (collecting cites). Confronted ***15** by the evidence at trial, USTC simply denied that it had committed the acts that Conwood alleged to be illegal. The case was accordingly contested at trial on that basis, and USTC lost. It cannot now attempt to retry its case in this Court, based on an efficiency defense that it never asserted below. [3]

In any event, that defense has no merit. The court of appeals canvassed the evidence detailing the wide range of USTC's anticompetitive acts: entering into agreements that required stores to exclude competition; training its personnel to destroy or remove Conwood's products; misusing its position as category manager to exclude Con. wood's advertising and racks and reduce its product facings; and misleading stores as part of an effort to gain their support for such exclusion. Pet. App. 23a-30a. The court correctly characterized that evidence as presenting "a systematic effort to exclude competition from the moist snuff market," and as sufficient to show that "USTC sought to achieve its goals of excluding competition and competitors' products by numerous avenues." *Id.* at 22a.

"It is not customary for this Court to review the sufficiency of the evidence." *Brooke Group*, 509 U.S. at 230. There is certainly no reason to do so here, where USTC does not even attempt to dispute that the record as a whole provides sufficient evidence of exclusionary conduct, and where USTC never even attempted to offer "valid business reasons" for any facet of that conduct. *Eastman Kodak*, 504 U.S. at 483.

*16 B. The Decision Below Does Not Conflict With Decisions Of Any Other Circuit

USTC asserts that the Sixth Circuit's holding on sufficiency of the evidence conflicts with the decisions of other circuits in two respects: (1) the standards for "nonprice competition" (Pet. 15-19), and (2) the requisite degree of "foreclosure" to support a Section 2 violation (Pet. 19-20). Particularly when viewed through the lens of USTC's failure to challenge the jury instructions and thus preserve an argument that the law requires something more than the existing settled standards under Section 2, the claims of "conflicts" are without foundation.

1. USTC asserts (Pet. 16) that this Court's guidance is needed because of an alleged conflict between the decision below regarding "nonprice competition" and "the analysis" of *Stearns Airport Equipment Co. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999). But USTC did not challenge the jury instructions on this issue and thus cannot complain that the jury was wrongly instructed on the law. The court below simply decided that extensive evidence supported the jury's finding that USTC engaged in exclusionary conduct, based on the many witnesses and exhibits that demonstrated how USTC used its power in myriad ways to exclude its competitors' racks, POS advertising, and products, and because USTC had offered no procompetitive justification for *any* of the conduct challenged by Conwood. The Sixth Circuit found no contrary rule of law in *Stearns*, and there is none.

In *Stearns*, the court did not review for sufficiency an extensive trial record documenting varied forms of misconduct that the monopolist did not even attempt to justify. The Fifth Circuit considered, instead, a grant of summary judgment (for defendant manufacturer of airplane-to-airport gate bridges) where the defendant had allegedly misled airport buyers as part of a bidding competition with the plaintiff. The plaintiff's evidence all involved "fairly simple attempts [by the defendant] to generate sales by 'touting the virtues' of its bridges." ***17** 170 F.3d at 524. *That* conduct, alone, was insufficient as a matter of law for Section 2 liability, the Fifth Circuit held, because even a monopolist can attempt to sell its own products to customers "by vigorously stressing the qualitative merits of its product." *Id.* at 526.

Nothing of the sort is at issue here. Rather than stress the merits of its products, USTC abused its power to prevent others from having the chance to sell theirs. As its executives testified, USTC already had ample room to sell, display, and "tout the virtues" of its own products in stores. C.A. App. 703-04, 941-43, 961, 1592-94. The conduct challenged at trial was not conduct claimed by the monopolist, as in *Stearns*, to be rational, pro-competitive efforts to convince the customer to take its products over the plaintiff's. Nor was it, as USTC now wishes to pretend, mere "recommendations" or "suggestions" as to what stores should do. The evidence showed that USTC itself excluded competitors' racks, POS, and products, and that it either coerced or misled retailers into going along with that exclusion. USTC defended against that evidence by denying that it had engaged in such exclusion; but it freely admitted that this conduct had no legitimate putpose. Pet. App. 29a-30a. Accordingly, the extensive record before the Sixth Circuit was almost the exact opposite of the narrow issue addressed by the Fifth Circuit on review of summary judgment in *Stearns*. Both courts, moreover, reached their conclusions by applying the same standards from *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), and *Aspen Skiing*. *Compare* 170 F.3d at 522-23 *with* Pet. App. 19a-20a. [4]

***18** Nor should this Court depart from its normal certiorari standards to consider USTC's generalized complaint (Pet. 18) that the Sixth Circuit's ruling provides "no standard to guide courts or competing firms on the boundary between lawful competition and illegal exclusionary conduct or the criteria that should be applied in evaluating the dominant firm's marketplace conduct." The jury instructions derived directly from this Court's cases and were accepted by USTC as properly stating the law applicable to this case. USTC did not seek any additional "guidance" for the jury on the line between lawful competition and illegal exclusionary conduct. Nor can USTC plausibly claim any uncertainty by the jury, where it freely admitted that all of the conduct about which Conwood complained - including "misrepresentations to retailers to obtain exclusive vending" as well as the removal of racks, POS, and products - was illegitimate and should not have occurred. Pet. App. 29a-30a. In light of USTC's failure to object to the jury instructions, and its admissions that the alleged conduct had no competitive justification, this case ***19** could not serve as a vehicle for any general exploration of the line between lawful and unlawful nonprice conduct. [5]

2. USTC asserts (Pet. 19) that the court below "relieve[s] plaintiff of any foreclosure requirement" and thus supposedly conflicts with the decisions of four circuits. That contention, however, ignores that USTC sought no jury instruction on its current foreclosure theory, and thus cannot now complain that the jury was not asked to find that a particular percentage of the moist snuff market was foreclosed to competition. *See* Fed. R. Civ. P. 51 ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.").

Nor, in any event, is USTC's view the law. The Sixth Circuit invoked *Aspen Skiing* to explain that, "whether conduct may be characterized as exclusionary, 'it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.'" Pet. App. 21a (quoting 472 U.S. at 605). The jury here was instructed to consider the impact of USTC's campaign on competition and consumer choice. As the court of appeals explained, the evidence not only showed that USTC engaged in "exclusionary conduct without a ***20** sufficient justification," it also demonstrated that "USTC maintained its monopoly power by engaging in such conduct." *Id.* at 30a. USTC does not challenge the jury's finding on that point, which itself was supported by substantial evidence. *Id.* at 33a (citing evidence that USTC's conduct harmed consumers by limiting variety and raising prices). *See also* pp. 4-6, *supra* (citing record sources).

The cases cited by USTC do not establish a foreclosure requirement under Section 2. Curiously, USTC cites *United States v. Microsoft Corp.* But there the D.C. Circuit *rejected* a specific foreclosure threshold. The court explained that a Section 2 violation does not require proof of any particular percentage of foreclosure, but rather that "the monopolist's conduct indeed has the requisite anticompetitive effect." 253 F.3d at 58-59 (citing *Brooke Group*, 509 U.S. at 225-26). *Cf.* Pet. App. 33a (discussing *Brooke Group* in context of exclusionary effects in growing market). It then upheld a claim for monopoly maintenance where the monopolist had engaged in a wide range of anticompetitive acts even though the government could not establish what direct effect any of those acts individually had on foreclosing competition but where the sum total of Microsoft's anticompetitive campaign maintained its monopoly power. [6]

Similarly, in *Barry Wright*, the court upheld a district court's judgment for the defendant, finding that the evidence presented did not establish "exclusion" from contracts that required a *manufacturer* to sell its products at a specially low price in exchange for the buyer's agreement ***21** to take nearly all of its requirements from that seller. 724 F.2d at 236-37. In rejecting a competitor's Section 2 claim, the court explained that the evidence did not establish "the severity of the foreclosure (a fact which, other things being equal, suggests anticompetitive harm)." *Id.* at 237. Thus, in *Barry Wright*, "severity of foreclosure" was simply an evidentiary factor in establishing whether the monopolist had engaged in anticompetitire conduct - it was not a stand-alone requirement for a Section 2 violation, as USTC appears to assert (Pet. 20). And, even if that *is* what the First Circuit intended, USTC failed to preserve this argument through an objection to the jury instructions. *See* Pet. App. 53a-54a.

Nor is the decision below in conflict with *Concord Boat* (207 F.3d at 1044-45). That court held that the alleged predatory conduct was legitimate price competition that helped consumers and that the defendant monopolist did nothing to prevent the plaintiff from offering a better deal. The court further noted that the challenged agreements did not even require exclusive dealings with the monopolist, but rather permitted purchasers to buy up to 40 percent of their requirements from other sellers without forgoing the discount offered by the monopolist. On those facts - without even looking at the share of the total market covered by those agreements - the Eighth Circuit found no exclusion, a factual conclusion that does not conflict in any way with the Sixth Circuit's affirmance of the district court in this case. *See, e.g., United States v. Doe*, 465 U.S. 605, 614 (1984) ("Traditionally, we . . . have been reluctant to disturb findings of fact in which two courts below have concurred."). [7]

***22** II. USTC'S SUFFICIENCY CHALLENGE TO THE DAMAGES EVIDENCE LACKS MERIT AND RAISES NO CONFLICT WITH ANY CIRCUIT

A. USTC Has Failed To Preserve Any Legal Issue Regarding Damages For The Court To Review

In the court of appeals, USTC contended that the district court had erred under *Daubert* by admitting the testimony of Conwood's damages expert, Professor Richard Leftwich. In this Court, USTC has abandoned its challenge to the lower courts' application of *Daubert*, thus conceding that Leftwich's testimony was properly admitted. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 534-38 (1992) (questions not framed in the petition for writ of certiorari are deemed waived).

Instead USTC complains, first, that Conwood failed to "disaggregate" legal from illegal conduct in its proof of damages and, second, that Conwood failed to "link" its antitrust damages to specific antitrust misconduct.

On the first issue, USTC fails to acknowledge that the jury in this case was specifically instructed to separate lawful from unlawful conduct in calculating damages: "[y]ou may not . . . calculate damages based only on speculation or guesswork, and you must remember that you can award Conwood damages only for injuries caused by a violation of the antitrust laws. You may not award damages for injuries or losses caused by other factors." C.A. App. 243 (Jury Instruction No. 4). As the Sixth Circuit recog. nized, a reviewing court "must assume that the jury followed the court's instructions."

Aspen Skiing, 472 U.S. at 604. The jury must, therefore, be presumed to have "disaggregate[d] the injury caused by USTC as opposed to that caused by other factors." Pet. App. 42a-43a.

To the extent USTC suggests that the instruction given to the jury was insufficient and some additional legal instruction should have been given, that argument was not presented to the district court at trial and is, thus, waived. *E.g., Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 573 (1990) (any "possible flaw in the jury's calculation of the ***23** amount of damages would not be an appropriate basis for" overturning verdict in absence of challenge to jury instructions). It is also incorrect. The damages instruction given by the district court was perfectly in keeping with the damages requirements imposed by this Court in other antitrust cases. [8]

On the second issue, USTC asked for no instruction requiring the jury to trace each dollar of antitrust damages to specific instances of antitrust misconduct. Nor could it have; USTC cites not a single case in which a court has accepted such a requirement, much less a dispute about this in the lower courts. USTC cannot ask for review in the Court based on an instruction it did not request and could not properly have gotten.

B. Overwhelming Evidence Supported The Properly Instructed Jury's Damages Award

Because USTC failed to preserve any legal issue concerning the jury instructions (or the admissibility of any damages evidence), the only possible issue before this Court is whether all the evidence, viewed in the light most favorable to Conwood, was sufficient to support the jury's finding. But this Court's cases make absolutely clear that it does not sit to review the sufficiency of the evidence. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). In particular, the Court has stressed that evidence on antitrust damages should not be reweighed on appeal. *Texaco*, 496 U.S. at 573.

***24** In any event, USTC does not even purport to confront *all* the record evidence on damages. USTC criticizes Leftwich's testimony, but it does not contest the other evidence on damages. Moreover, USTC mischaracterizes Leftwich's testimony. As the court of appeals found, Leftwich did carefully rule out causes of Conwood's damages other than USTC's exclusionary conduct. While USTC finds that testimony unpersuasive, the question was properly submitted to a jury, which found the testimony credible.

1. USTC's petition directs its fire on disaggregation solely at the economic study performed by Professor Leftwich. USTC simply ignores (Pet. 21-23) the *other* witnesses on damages, whose testimony the Sixth Circuit found independently sufficient to support the jury verdict. Pet. App. 42a-44a. In "reject[ing] USTC's argument that Conwood failed to disaggregate the injury caused by USTC as opposed to that caused by other factors," *id.* at 43a, the court found that three different witnesses placed the damages range between $313 million and $488 million for the multi-year period in which USTC's illegal campaign harmed Conwood, *id.* at 43a-44a.

As previously explained (pp. 6-8, *supra*), the jury heard evidence from two Conwood executives, each with decades of experience in the smokeless tobacco market, who testified that, absent USTC's unlawful campaign, Conwood's market share would have been in the mid-20s. Pet. App. 15a-16a, 42a-43a. That testimony was based not only on their experience, but also on Conwood's market share growth in the years before USTC commenced its violations, Conwood's performance in the most closely analogous market (loose leaf), and Conwood's performance in local areas where it had a significant presence before USTC began its campaign to exclude. *Id.* This testimony was supported by USTC's own witnesses, who testified that in their sales regions, where Conwood's racks and advertising were not excluded, Conwood's share was around 25 percent. C.A. App. 1787, 1796-97, 1874, 4809. ***25** Based on the undisputed figure of $10 million per market share point in additional profit, *see* Pet. App. 15a, this evidence supported Conwood's claim to at least $400 million in lost profits in the four years preceding trial arising solely from USTC's challenged anticompetitive conduct.

2. Even if USTC could view Professor Leftwich's evidence in isolation, his study plainly did disaggregate lawful from unlawful conduct. Using accepted statistical methods, Leftwich tested Conwood's assertion that its growth had been stymied by USTC in states where it had not established a foothold before USTC began its exclusionary campaign. Leftwich testified that there was a statistically significant difference between Conwood's growth after 1990 (when USTC began its campaign) in foothold and non-foothold states, and that Conwood's diminished growth could not be explained by any factor *except* USTC's challenged anticompetitive conduct.

For example, in his before-and-after test, Leftwich found that, prior to the exclusionary campaign, there was no relationship between Conwood's foothold status and market share growth rate, but that, after USTC's campaign had begun, there was a significant relationship between Conwood's share of the moist snuff market in a state and the rate of growth in that state. *Id.* at 41a.

In his yardstick test, Leftwich disproved claims that aggressive competition by USTC, lack of innovation by Conwood, or advertising restrictions caused the growth differential by comparing Conwood's performance in the moist snuff market to its performance in the closely analogous loose leaf tobacco market. Leftwich noted that, in loose leaf, Conwood competed with the same sales force, there was no more or less innovation, and the same advertising constraints applied in precisely the same stores. Yet in the loose leaf market, where USTC did not compete, Conwood was able to achieve market growth in all states, including those where it did not begin with a relatively high share. *Id. See also* C.A. App. 1106-08.

***26** In his initial regression analysis, Leftwich considered an array of additional hypotheses for Conwood's stunted growth in non-foothold states and found that none could explain Conwood's losses. *See, e.g.*, C.A. App. 1104-09 (testimony), 3517-28 (expert report), 4412-13 (expert rebuttal report). To confirm further that Conwood's losses were attributable to USTC's unlawful conduct, Leftwich performed an additional regression, based on a model developed by USTC's own expert. Pet. App. 41a. As the Sixth Circuit noted, Leftwich employed nationwide sales data and sworn declarations from 241 Conwood sales representatives regarding the extent and relative intensity of USTC's challenged conduct in their territories and used this information "to construct three alternate measures of USTC's bad acts by state." *Id.* Leftwich found that "increases in UST's exclusionary behavior in a state *reduce* Conwood's share of sales in stores in that state by a statistically significant amount." C.A. App. 4415-16 (expert rebuttal report). The Sixth Circuit thus expressly rejected USTC's complaint that Leftwich had "failed to take into account any USTC 'bad act."' Pet. App. 41a.

USTC claims that Leftwich calculated damages as one "ball of wax" and accordingly admitted that he swept legal and illegal conduct alike into his opinion. Pet. 23. In fact, Leftwich testified only that all of the *unlawful* conduct went into his calculation, with no attempt to assign specific figures for separate rack removals, contracted exclusions, or other kinds of exclusion. Because his analysis identified USTC exclusionary conduct of all kinds as the only explanation for Conwood's stunted growth in the non-foothold states, Leftwich did limit his damages estimate to the effect of USTC's unlawful conduct. USTC has cited no authority for its claim that Leftwich was required to disaggregate damages due to each species of unlawful conduct, much less each instance of exclusion.

In short, Leftwich considered and ruled out all of the alternative "explanations that USTC's own expert suggested as possible explanations for Conwood's low market ***27** share," Pet. App. 40a-41a, and proved a direct link between increases in USTC's anticompetitive conduct and Conwood's lost share. His testimony was subjected to vigorous cross-examination, yet USTC offered no contrary evidence (other than to present an expert to argue that Conwood had suffered no damages). It was up to the jury to weigh the evidence, and its award of $350 million was consistent with this Court's decisions. *See, e.g., Zenith*, 395 U.S. at 116-19 (evidence as to what market share would have been in the absence of antitrust injury sufficient to sustain verdict); *Bigelow*, 327 U.S. at 264 (comparison of plaintiff's receipts before and after defendant's unlawful actions was sufficient to support jury's verdict).

USTC complains about the imprecision of the proof regarding the substantial damage caused by its unlawful corporate policy of abusing its power to harm competition without ever having offered a better way to calculate damages. Whatever uncertainty might exist in the calculation of damages, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow*, 327 U.S. at 265. [9]

***28 C. USTC's Suggestion Of A "Conflict" On Damages Is Incorrect**

USTC alleges numerous conflicts on the issue of damages. None is remotely convincing. As an initial matter, most of the cases cited by USTC are *Daubert* cases dealing with the "gatekeeper" function of the court in admitting expert testimony, not with an analysis of the sufficiency of properly admitted evidence. As noted, USTC has waived its *Daubert* challenge in this Court. Moreover, because USTC failed to preserve any legal issue concerning the standard considered by the jury, this case involves only the fact-bound application of undisputed legal principles. USTC cannot identify any controlling legal principie on which the lower courts disagree.

In *Concord Boat*, the expert "construct[ed] a hypothetical market which was not grounded in the economic reality" of the market at issue; assumed that the plaintiffs' products were of the same quality as the defendants' (when they were not); assumed (for no particular reason) that antitrust damages would begin when one firm reached 50 percent; assumed that, in his entirely fictive market, prices would be set in accordance with an academic theory ("Cournot model") that had never been held a valid method for estimating antitrust damages; and, then, from those compounded assumptions - none anchored in the facts - predicted substantial damages. 207 F.3d at 1056. Worse still, the expert's assumptions concededly were contradicted by "inconvenient evidence." *Id.* The expert admitted that he had "failed to account for market events that both sides agreed were not related to any anticompetitive conduct," even though "such facts could have been incorporated into his model." *Id.* Not a single one of those glaring errors can be found in the damages evidence below. Both the Eighth and Sixth Circuits applied the exact same standard to the evidence - in *Concord Boat*, the expert failed to ground his opinion in the facts; in this case, he did. USTC's claimed conflict is therefore illusory.

***29** In *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998), the court specifically noted that the plaintiff made no effort to "segregate damages attributable to lawful competition from damages attributable to Kodak's monopolizing conduct." *Id.* at 1224. Here, the courts below in no way challenged this principle, but simply determined, on this record, that there *was* an adequate basis in the record by which the jury could limit damages to unlawful conduct. Pet. App. 43a. Once again, the courts of appeals are in agreement on the proper standards, and USTC complains only about the fact-bound application of settled law to its case.

The Sixth Circuit's rulings are not at all inconsistent with *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). The Court there concluded that the district court had not abused its discretion in excluding the testimony of experts whose analyses "were so dissimilar to the facts presented in this litigation." *Id.* at 144-45. In this instance, using precisely the same standard of review articulated in *Joiner*, the court of appeals found that the damages restimony was properly tied to the facts of this litigation. Pet. App. 41a-42a.

Nor is there a conflict with Eighth Circuit decisions. In *Blue Dane Simmental Corp. v. American Simmental Associarion*, 178 F.3d 1035 (8th Cir. 1999), the court held that the district court had not abused its discretion in excluding inherently implausible expert testimony, where the expert declined to consider other concededly relevant factots and attributed the entire reduction in price for Risinger cattle in an already falling market to the introduction of 19 head into a purebred market of 138, 169 animals. Here the court of appeals found exactly the opposite: "no reasoned basis" to overturn the district court's admission of Leftwich's testimony. Pet. App. 39a; *see also id.* at 40a-41a. Leftwich was "subject to vigorous cross examination and an opportunity for [USTC] to introduce countervailing evidence of its own." *Id.* at 42a. USTC ***30** simply does not like the results of that process. There is no basis for USTC's assertion that this issue would have been decided differently in the Eighth Circuit. [10]

* * *

USTC asks this Court to undo the verdict of a properly instructed jury in an error-free, month-long trial in which voluminous testimony was adduced on a wide-ranging, comprehensive scheme to exclude Conwood's products from fair competition. Its sufficiency-of-the-evidence challenges, however, present no legal issue in conflict with the decisions of this or any other court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Footnotes

1 *See, e.g.*, C.A. App. 2189 (USTC training document showing how to create false impression about rival sales); *id.* at 703 (testimony that USTC sought to constrain space for competitors' products even though there was room for multiple racks); *id.* at 745 (testimony that USTC sought to control a greater percentage of facings to exclude rival products, even though USTC had “plenty of room” to sell its products).

2 This summary, contained with citations in Conwood's court of appeals brief (at 37-38), was captured in great part by the court of appeals' opinion. *See* Pet. App. 6a-15a, Yet even the court's opinion, rich as it is in reflecting the record in this case, necessarily only references a small part of the evidence presented during a month-long trial. Under the *Aspen Skiing* standard, this Court would be required to review the entire trial record - 6313 pages of testimony and 364 documentary exhibits - and

satisfy itself that no reasonable trier of fact could have found USTC's conduct to violate Section 2 before it could reverse the court of appeals in upholding the district court's judgment for Conwood. *See Aspen Skiing*, 472 U.S. at 604.

3 Even USTC does not seek to offer any business justification for the pervasive and unauthorized rack removals. Instead, USTC suggests that the Court need not address the anticompetitive effect of those "simple torts" because they were improperly aggregated by the court of appeals with "procompetitive conduct." Pet. 18 n. 11. But, as noted, USTC never objected to evidence of any of the conduct that it now strives to label as pro-competitive, never sought to present a business justification for that conduct, and never requested a jury instruction or special verdict on this issue. Accordingly, the exclusionary effect of all that conduct was properly considered by the courts below.

4 USTC is also incorrect (Pet. 17) in asserting a conflict with decisions of the Seventh and Eighth Circuits. Those decisions do not even address "nonprice competition" under Section 2. For example, in *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir.), *cert. denied*, 531 U.S. 979 (2000), the court rejected a claim that price discounting violated antitrust laws because, "[i]n the absence of predatory prices, any losses caused by pricing 'cannot be said to stem from an *anticompetitive* aspect of the defendant's conduct.'" *Id.* at 1061 (foot-note omitted). As the court there stressed, "[a] Section 2 defendant's proffered business justification is the most important factor in determining whether its challenged conduct is not competition on the merits." *Id.* at 1062. The manufacturer's justification for cutting prices in *Concord Boat* - to increase sales of its products - thus contrasts markedly with USTC's unjustified and multi-faceted nonprice campaign, which was designed to prevent competitors from selling *their* products and in particular to prevent price competition from half-priced brands.

Likewise, there is no conflict (*see* Pet. 17) with *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Association*, 672 F.2d 1280, 1288 (7th Cir. 1982), a Sherman Act Section 1 case in which an automobile dealer complained that a local dealer's association refused to admit it as a member. The court rejected the plaintiff's claim because the "plaintiff has made no showing that membership in the defendant Association is necessary (or even desirable) to compete effectively as a Datsun dealer." *Id.* at 1286. And, in *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) (Breyer, J.) (*see* Pet. 16 n. 8), the court rejected a claim that price discounts and noncancellation clauses with "legitimate business considerations" were anticompetitive means of maintaining monopoly power. 724 F.2d at 236.

5 While taking no position on whether USTC engaged in exclusionary conduct in violation of Section 2, *amicus* American Wholesale Marketers Association asks the Court to grant the petition to explain "what trade practices shall be acceptable, reasonable, and appropriate in the convenience store chain of trade" (Br. 2). But (1) this Court does not give advisory opinions; (2) AWMA's suggestion that the Sixth Circuit has called into question such common practices as the use of racks, point-of-sale advertising, category managers, and promotional allowances is blatantly incorrect (*see, e.g.*, Pet. App. 28a); and (3) AWMA fails to recognize the welt-accepted principle that a monopolist exercising market power to exclude competitors without competitive justification may be held liable under Section 2 when a non-monopolist engaged in similar conduct could not. *See United States v. Microsoft Corp.*, 253 F.3d 34, 57-58, 72 (D.C. Cir.) (en banc) (per curiam), *cert. denied*, 122 S. Ct. 350 (2001).

6 In the passage cited by USTC, the court explicitly rejected the claim that the "roughly 40% or 50% share usually required to establish a § 1 violation" based on the "monopolist's use of exclusive contracts" was necessary to "give rise to a § 2 violation." 253 F.3d at 70. Here, in any event, the evidence supported a finding that USTC had contracts that alone - and without reference to the other forms of misconduct proved at trial - prohibited fair competition with retailers accounting for 80 percent of its sales (Pet. App. 12a), which in turn consists of 61.6 percent of the U.S. moist snuff market. Thus, even by section 1 standards, substantial foreclosure was established. 253 F.3d at 70.

7 USTC's reliance (Pet. 20) on *Western Parcel Express v. United Parcel Service of America, Inc.*, 190 F.3d 974, 976 (9th Cir. 1999), is also misplaced. That case concerned whether the defendant had market power (*see id.* at 975) - an issue uncontested by USTC in this case.

8 *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) ("[i]t is enough that the illegality is shown to be a material cause of the injury"); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) (noting the "welt settled principle" that, "in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs").

9 USTC repeatedly notes the size of the damages award, as if that alone were a ground for certiorari. But "[t]he size of the damages award . . . confirms the substantial character of the effect of" USTC's anticompetitive conduct. *Aspen Skiing*, 472 U.S. at 608. USTC's focus on the amount of the award after trebling is inappropriate. Congress has determined that antitrust awards should be trebled, and an attack on the trebled number is an attack on that statutory policy, not on the jury's assessment of injury. Accordingly, the amount awarded prior to trebling, $350 million, is the amount relevant to USTC's suggested analysis.

When viewed from the perspective of 1 percentage point of market share equaling $10 million per year in lost profits, the $350 million awarded is in fact a conservative number (representing the loss of less than 9 market share points over a four-year period preceding trial). Pet. App. 15a. The court below thus reasonably concluded that the jury award was “well within that range” of evidence on damages. *Id.* at 43a. We would also note that USTC itself has characterized the award as “not expected to have a material adverse effect on [USTC's] consolidated financial position.” UST Inc. SEC Form 10-Q (3d Qtr. 2002).

10 Underscoring the absence of any split between the Sixth and Eighth Circuits, in a more recent decision not cited by USTC, *EFCO Corp. v. Symons Corp.*, 219 F.3d 734, 739-40 & n.5 (8th Cir. 2000), the Eighth circuit itself expressly confirmed its traditional view that a damages expert need not rule out all other possible causes of a plaintiff's injuries to be admissible.

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