

No.

IN THE
Supreme Court of the United States

HOLOCAUST SURVIVORS FOUNDATION USA, INC., *ET AL.*,
Petitioners,

v.

UNION BANK OF SWITZERLAND, *ET AL.*,
Respondents.

(A complete list of the parties continues on the inside cover)

*On Petition for Writ of Certiorari
to the United States Court of Appeals for the Second Circuit*

PETITION FOR WRIT OF CERTIORARI

EDWARD LABATON
LABATON RUDOFF &
SUCHAROW, LLP
100 Park Avenue
New York, NY 10017
(212) 907-0700

Of Counsel

ERIK S. JAFFE
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

SAMUEL J. DUBBIN
Counsel of Record
DUBBIN & KRAVETZ, LLP
701 Brickell Avenue,
Suite 1650
Miami, FL 33131
(305) 371-4700

ARTHUR J. ENGLAND, JR.
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, FL 33131
(305) 579-0500

Counsel for Petitioners

Dated: April 3, 2006

Continuation of Caption

Additional Petitioners are:

G.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, L.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, F.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, David Schaecter, individually and as President of the Holocaust Survivors Foundation-USA, Inc., Leo Rechter, individually and as President of the National Association of Jewish Holocaust Survivors {NAHOS}, National Association of Jewish Holocaust Survivors, David Mermelstein, Individually and as President of the New American Jewish Club of Miami and President of the South Florida Holocaust Survivors Coalition, New American Jewish Club of Miami, South Florida Holocaust Survivors Coalition, Alex Moskovic, individually and as Co-President of the Child Survivors/Hidden Children of the Holocaust, Inc., Child Survivors/Hidden Holocaust Survivors, Fred Taucher, individually and as President of the Survivors of the Holocaust Recovery Project {SHARP}, Survivors of the Holocaust Recovery Project {SHARP}, Nesse Godin, individually and as President of the Jewish Holocaust Survivors and Friends of Greater Washington, Jewish Holocaust Survivors and Friends of Greater, Henry Schuster, individually and as President of the Holocaust Survivors Group of Southern Nevada, Holocaust Survivors Group of Southern Nevada, Herbert Karliner, individually and as a member of the Holocaust Survivors Foundation-USA, Inc. and the South Florida Holocaust Survivors Coalition, Lea Weems, individually and as President of the Houston Council of Jewish Holocaust Survivors, Houston Council of Jewish Holocaust Survivors, Sam Gasson, individually and as President of the Habonim Cultural Club, Survivors of the Holocaust, Habonim Cultural Club, Survivors of

the Holocaust, Holocaust Survivors of South Florida, Dena Axelrod, individually and as a member of the Child Survivors of the Holocaust, South Florida Group and the South Florida Holocaust Survivors Coalition, Saul Birnbaum, individually and as President of the Holocaust Survivors Club of Boca Raton {Century Village}, and the Holocaust Survivors Club of Boca Raton{Century Village}.

Appellants below.

Additional Respondents are:

Union Bank of Switzerland, Swiss Bank Corp., also known as Swiss National Bank, Banking Institutions #1-100, John Does #1-100, Certain Swiss Bank Accounts described as follows, Swiss Bankers Assoc., Swiss Bankers Association, Bank of International and Bank of International Settlements,

Defendants-Appellees below,

Judah Gribetz,

Special Master below,

Gizella Weisshaus, on behalf of herself and all other persons of all national origins, ethnic groups, races, creeds and colors, similarly situated as victims and survivors of the Nazi Holocaust and Jacob Friedman,

Plaintiffs below,

World Jewish Restitution Organization, South Florida Holocaust Coalition and Thomas Weiss,

Intervenor-Plaintiffs below,

Washington State Insurance Commissioner, Gregory Tsvilichovsky, Matvey Yentus, Sofiya Bloshteyn, Olga Tsvilikhovskya, Larisa Ryabaya, Rosa Yentus, Pavel Aronov, Lubov Starodinskaya, Eliazar Bloshteyn, Plaintiff's Executive Committee Settlement Class,

Interested-Parties below,

Polish American Defense Committee, Inc., a non-profit California Corporation, Irving Wolf, Disability Rights Advocates and Director of International Affairs and Representa,

Movants below,

Pink Triangle Coalition, Karl Lange and Pierre Seel,

Interested Parties-Cross-Appellants below.

Miriam Rubin, Individual Holocaust Survivor, Doris Fedrid, Individual Holocaust Survivor, Helga Gross, Individual Holocaust Survivor, National Federation of the Blind, USA, German Council of Centers for Self-Determined Li, Finist, Russia, Equal Ability Limited, United Kingdom, Through the Looking Glass, USA, Disabled Persons International, Canada, World Institute on Disability, USA, Center for Independent Living, Bulgaria, Disability Rights Education and Defense Fund, US, Center for Independent Living, Berkeley. USA, California Foundation for Independent Living Cen, Independent Living Resource Center San Francisco, Computer Technologies Program, USA, Ragged Edge/Avacado Press, USA, Legal Advocacy for the Defense of People with Di, National Confederation of Disabled Persons, Greece and De juRe Alapitvany, Hungary,

Other Appellants below.

QUESTIONS PRESENTED

This petition arises out of several historic class action suits brought by Holocaust survivors against Swiss banks that, among other things, assisted in laundering and concealing assets looted by the Nazis and misappropriated deposits made by persons who later fell victim to the Nazis. The case was settled for a combined \$1.25 billion, to be allocated among five separate certified classes of Holocaust victims, including the “Looted Assets Class” at issue here. Class members were required to decide whether to opt-out of the settlement prior to being told how Settlement funds would be allocated either between or within different classes. After the opt-out period, the district court concluded that individualized claim determinations would be impracticable and that it would instead endorse a *cy pres*, or “next best,” allocation approach. It rejected a *pro rata* allocation among class members and approved a distribution by country, whose signal feature was that 75% was earmarked for the Former Soviet Union (FSU), where a relatively small portion of the class resides. That division was allegedly based on financial need unrelated to differences in the claims of class members.

Petitioners are Holocaust Survivors and *bona fide* groups of Survivors who are members of the Looted Assets Class and live in the United States. U.S. Survivors constitute 30% of all class members but were allocated only 4% of the Looted Assets Class funds based on the district court’s view of their relatively less pressing financial need. The questions presented by this petition are:

1. Whether the settlement violates the intra-class equity requirements of Federal Rule of Civil Procedure 23 and the Due Process Clause by discriminating among class members with common claims and injuries, based on factors unrelated to such claims or injuries, and denying U.S. Survivors consideration for the release of their claims.

2. Whether the settlement violates U.S. Survivor class members' rights under Rule 23 and the Fifth and Seventh Amendments because their claims were compromised for no consideration, and they did not learn that fact until after the opt-out deadline had passed.

3. Whether Lead Class Settlement Counsel's acquiescence in a distribution adverse to the overwhelming majority of the class, under the structural framework of this case, constituted inadequate representation.

PARTIES TO THE PROCEEDINGS BELOW

The parties to this petition are listed in the caption of the case along with the description of their postures below other than the two parties listed on the cover. As to those two parties, petitioner Holocaust Survivors Foundation USA, Inc. was an Appellant below and participated in the district court proceedings as a representative of the groups of class-members at issue in this petition, and respondent Union Bank of Switzerland was an Appellee in the Second Circuit and a defendant in the district court.

The nongovernmental organizations and corporations who are petitioners are not-for-profit entities and have no stock; therefore no parent or publicly held companies own 10% or more of their stock.

TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDINGS BELOW	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW.....	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT.....	11
I. The Issues Presented Are of National Importance.	11
II. The Second Circuit Erred in Affirming Distribution of Looted Asset Class Funds Unequally Within the Class Based on Criteria Wholly Unrelated to the Claims at Issue.	13
A. This Court and Others Forbid Intraclass Disparities Based on Factors Unrelated to Plaintiffs' Claims.....	15
B. This Court and Other Circuit Courts Forbid Settlements Which Deny Class Members Consideration for the Release of Claims.....	18
C. A Distribution Consistent With Class Members' Current Residence Would Satisfy the Rule that Class Settlement Allocations Must Benefit the Class as a Whole.....	20

III. The Procedures Leading to the Discriminatory Allocations Violated Rule 23 and the Constitution. ...	22
A. The U.S. Survivors Were Denied the Right to Opt Out After Learning That They Would Receive No Benefits from the Settlement.	22
B. The Representational Structure Adopted Below Denied Petitioners Adequate Legal Representation as Required by Rule 23 and Due Process	24
CONCLUSION.....	29

TABLE OF AUTHORITIES

	Pages
 Cases	
<i>Amchem Products, Inc., v. Windsor</i> , 521 U.S. 591 (1997).....	18, 22, 25
<i>Brown v. Ticor Title Ins. Co.</i> 982 F.2d 386 (9 th Cir. 1992).....	23
<i>Crawford v. Equifax Payment Svcs., Inc.</i> , 201 F.3d 877 (7 th Cir. 2000)	19
<i>Crawford v. Honig</i> , 37 F.3d 485 (9 th Cir. 1994).....	26
<i>Gonzalez v. Cassidy</i> , 474 F.2d 67 (5 th Cir. 1973).....	25, 26
<i>Hansberry v. Lee</i> , 311 U.S. 32 (1940).....	26
<i>Holmes v. Continental Can Co.</i> , 706 F.2d 1144 (11 th Cir. 1983)	16, 23
<i>In re Agent Orange Prod. Liab. Litig. MDL No. 381</i> , 818 F.2d 179 (2d Cir. 1987), <i>cert. denied</i> , 487 U.S. 1234 (1988).....	7, 14, 24
<i>In re Airline Ticket Comm’n Antitrust Litig.</i> , 268 F.3d 619 (8 th Cir. 2001)	17
<i>In re Asbestosis Litig.</i> , 90 F.3d 963 (5 th Cir. 1996)	20
<i>In re Ford Motor Co. Bronco II Prod. Liab. Litig.</i> , 1995 WL 222177 (E.D.La 1995).....	18
<i>In re General Motors Corp. Pick Up Truck Fuel Tank Products Litig.</i> , 55 F.3d 768 (3 rd Cir. 1995) , <i>cert. denied sub nom. General Motors Corp. v. French</i> , 516 U.S. 824 (1995).....	16, 18, 28
<i>In re Nissan Motor Corp. Antitrust Litig.</i> , 552 F.2d 1088 (5 th Cir. 1977).....	23
<i>In re Telectronica Pacing Sys., Inc.</i> , 221 F.3d 870 (6 th Cir. 2000)	23

<i>In re Toys “R” Us Antitrust Litig.</i> , 191 F.R.D. 347 (E.D.N.Y. 2000).....	21
<i>Jefferson v. Ingersoll Int’l</i> , 195 F.3d 894 (7 th Cir. 1999).....	23
<i>Mirfasihi v. Fleet Mortgage Corp.</i> 356 F.3d 781 (7 th Cir. 2004)	7, 18, 19
<i>Molski v. Gleich</i> , 318 F.3d 937 (9 th Cir. 2003).....	18
<i>National Super Spuds, Inc., v. New York Mercantile Exchange</i> , 660 F.2d 9 (2d Cir. 1981).....	19
<i>Ortiz v. Fireboard Corp.</i> , 527 U.S. 815 (1999).....	16, 18
<i>Petruzzis, Inc., v. Darling-Delaware Co.</i> , 880 F. Supp. 292 (M.D.Penn. 1995)	16
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985) ...	22, 26
<i>Piambino v. Bailey</i> , 610 F.2d 1306 (5 th Cir. 1980).....	18
<i>Rosner v. United States of America</i> , Case No. 01-1849- CIV-SEITZ, S.D. Fla., Final Order and Judgment, Sept. 30, 2006	21
<i>Six Mexican Workers v. Arizona Citrus Growers</i> , 904 F.2d 1301 (9 th Cir. 1990)	17
<i>Staton v. Boeing Co.</i> , 327 F.3d 938 (9 th Cir. 2003)	16
<i>Stephenson v. Dow Chemical Co.</i> , 273 F.3d 249 (2d Cir. 2001), <i>aff’d by an equally divided court</i> , 539 U.S. 111 (2003).....	26
<i>Twigg v. Sears, Roebuck & Co.</i> , 153 F.3d 1222 (11 th Cir. 1998)	23
<i>West Virginia v. Chas. Pfizer & Co.</i> , 440 F.2d 1079 (2d Cir. 1970), <i>cert denied</i> , 404 U.S. 871 (1971).....	21
Statutes	
28 U.S.C. § 1254(1).....	3
Constitutional Provisions	
U.S. CONST., Amend. V	3
U.S. CONST., Amend. VII.....	3

Rules

FED. R. CIV. P. 23..... passim

Other Authorities

Advisory Committee Notes to Rule 23..... 23
BLACK’S LAW DICTIONARY 269
(6th Abridged ed. 1991)..... 7
Petition for Writ of Certiorari, *Ortiz v. Fireboard Corp.*,
1998 WL 34081053 24
William Rashbaum, “Lawyers \$4.1 Million Fee Angers
Holocaust Survivors,” *The New York Times*, February
25, 2006 6

IN THE
Supreme Court of the United States

HOLOCAUST SURVIVORS FOUNDATION USA, INC., *ET AL.*,
Petitioners,

v.

UNION BANK OF SWITZERLAND, *ET AL.*,
Respondents.

*On Petition for Writ of Certiorari
to the United States Court of Appeals for the Second Circuit*

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

While this case has generated a host of decisions and opinions, the ones relevant to this petition are as follows:

The district court's August 2, 2000 decision approving the fairness of the Settlement prior to any allocation determinations is published at 105 F. Supp.2d 139 and is reproduced herein as Appendix B (B1-B51). The district court's Novem-

ber 22, 2000 decision adopting the Special Master's allocation of Settlement funds is not reported but is available at 2000 WL 33241660 and is reproduced herein as Appendix C (C1-C7). The Second Circuit's July 26, 2001 affirmance of the fairness of the settlement amount and the allocation plan against a different set of challenges brought by other class members is published at 413 F.3d 183 and is reproduced herein as Appendix D (D1-D5).

The district court's September 25, 2002 order adopting the allocation plan for a supplemental distribution of funds to the Looted Assets Class is unpublished but is reproduced herein as Appendix E (E1-E5). The district court's November 17, 2003 order adopting the allocation plan for a further supplemental distribution of funds to the Looted Assets Class is unpublished but is reproduced herein as Appendix F (F1-F5). The district court's March 9, 2004 decision explaining its reasons for rejecting petitioners' objections to and denying motions for reconsideration of the supplemental allocation orders is published at 302 F. Supp.2d 89 and is reproduced herein as Appendix G (G1-G54).

The district court's September 13, 2004 decision explaining the role of Lead Class Counsel in providing an adversarial defense on appeal of the district court's decisions as against objecting class members is not reported but is available at 204 WL 3710212 and is reproduced herein as Appendix H (H1-H4).

The Second Circuit's September 9, 2005 decision affirming the district court's allocation decisions is published at 424 F.3d 132 and is reproduced herein as Appendix A (A1-A30). The Second Circuit's January 3, 2006 denial of rehearing and rehearing *en banc* is not reported but is reproduced herein as Appendix I.

JURISDICTION

The Second Circuit issued its Opinion on September 9, 2005. Petitioners moved for rehearing and rehearing *en banc*,

which were denied on January 3, 2006. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition raises federal questions arising under the Fifth and Seventh Amendments of the United States Constitution and Federal Rule of Civil Procedure 23. The particular provisions of Rule 23 at issue are Rule 23(a)(4): “One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class;” Rule 23(c)(2)(B): “For any class certified under Rule 23(b)(3), the court must direct to class members the best notice [which] must concisely and clearly state in plain, easily understood language: . . . that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and the binding effect of a class judgment on class members under Rule 23(c)(3); Rule 23(e)(1)(A): “The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class;” Rule 23(e)(1)(B): “The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise;” and Rule 23(e)(1)(C): “The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.”

The Fifth Amendment to the United States Constitution provides in relevant part: “No person shall be . . . deprived of life, liberty, or property without due process of law” The Seventh Amendment to the United States Constitution provides: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”

STATEMENT OF THE CASE¹

1. This case involves the distribution of funds paid by various Swiss banks and others in settlement of claims by several classes of victims of Nazi persecution and Swiss-bank complicity. The case settled for \$1.25 billion, to be distributed among five separate certified classes of claimants:

- (A) “Deposited Assets Class” (Nazi persecution victims seeking assets deposited with Swiss financial institutions);
- (B) “Slave Labor I Class” (those forced to work as slave laborers for German entities);
- (C) “Slave Labor II Class” (same for Swiss entities);
- (D) “Refugee Class” (those mistreated when they sought entry into Switzerland or after being admitted); and
- (E) “Looted Assets Class” (persecution victims seeking to recover the value of looted or so-called “cloaked” assets), of which petitioners are members.

This petition involves only the Looted Assets Class of claimants and the distribution of settlement funds allocated to that class. Petitioners are Holocaust Survivors and members of the Looted Assets Class who reside in the United States.² The essence of petitioners’ objections to the allocation is that Looted Assets Class members with identical legal claims have been treated unequally in the allocation of settlement funds because the courts below submerged the interests of class members and of the class as a whole in order to benefit a

¹ Unless otherwise noted, the facts are taken from the Second Circuit’s decision below, attached as Appendix A.

² Petitioners include *bona fide* Survivor groups such as the Holocaust Survivors Foundation USA, Inc., a 501(c)(3) organization formed to give Survivors in the U.S. a united voice in restitution and distribution matters with particular concern for the home and health care needs of poor survivors. JA 7206 (“JA” refers to the Joint Appendix in the Second Circuit).

subset of the class that the courts deemed more deserving based, not on the different quality of their claims or their injuries, but rather on their current “need” unrelated to any differences in their claims. As a result, the vast majority of U.S. Survivors in the Looted Assets Class were denied any benefit in the settlement for the release of their claims. Petitioners also object to the procedural unfairness of being required to make their opt-out decisions prior to being informed of an allocation scheme that leaves most U.S. class members with no recovery whatsoever yet requires them to forfeit their claims in the settlement, and to the inadequate representation provided by Lead Plaintiffs’ Settlement Counsel.

2. Three class action lawsuits were brought by Holocaust survivors in 1996 and 1997 alleging that Swiss banks knowingly retained and concealed the assets of Holocaust victims who had been persecuted by the Nazi regime by genocide, systematic looting of personal and business property, and slave labor.

In August 1998, the parties announced a settlement in principle to pay \$1.25 billion for the benefit of the various plaintiff classes. As noted above, the Settlement created five separate certified classes of beneficiaries, with the Looted Assets Class being the one relevant here.

3. On March 29, 1999, the district court preliminarily approved the proposed settlement, certified the five settlement classes, and approved the Notice with an October 29 opt-out date. JA 4944, JA 5024. On March 31, 1999, the district court appointed a Special Master to recommend an allocation of settlement funds to and among the five settlement classes and provided that the Special Master would circulate a proposed plan of allocation and distribution for comment *after* the opt-out deadline. JA 5028, 5047.

The District Court specifically declined to appoint separate counsel for each of the five recommended classes of

Survivors. *See* JA 4944. Instead, Lead Counsel recommended, and the Court adopted, a “unique” mechanism whereby Class Counsel (most of whom were supposedly working “pro bono”) would represent the “entire class” in connection with the settlement and allocation process.³

In its August 2, 2000 opinion approving the Settlement, the district court discounted concerns over Class Counsel’s “divided loyalty,” noting that “[k]ey members of the plaintiffs’ Executive Committee who negotiated this settlement are providing their services on a *pro bono* basis,” App. B 10, and arguing that the use of a Special Master for allocation and distribution recommendations obviated concerns over adequate representation “because the class members *represent themselves* on this key issue, and have direct access to the Special Master and to me.” App. B18 (court’s emphasis).

The district court similarly rejected the argument that the failure to disclose how settlement funds would be allocated among and within classes rendered the notice and opt-out period inadequate. The court offered the non-sequitur observation that it would be

virtually impossible to provide specific information to individuals about their *precise* recovery prior to the completion of the elaborate claims processes contemplated by the Settlement Agreement, and under consideration by the Special Master.

App. B19 (emphasis added). It then defended having denied class members even the general outlines of the allocation plan prior to the close of the opt-out period by noting that “all class

³ Two months after the Second Circuit affirmed the District Court’s allocation, Lead Plaintiffs’ Settlement Counsel Burt Neuborne, one of the “pro bono” attorneys referenced by the district court, applied for \$4.1 million in fees for a seven year period which included the periods in which the Looted Assets Class allocations were under consideration. *See* William Rashbaum, “Lawyer’s \$4.1 Million Fee Angers Holocaust Survivors,” *The New York Times*, February 25, 2006.

members have been informed of this [bifurcated] process” whereby allocation of funds would be decided later and could have opted out of the process and the settlement. App. B20.

4. On September 11, 2000, the Special Master published his Proposed Plan of Allocation and Distribution.⁴ The Proposal called for the allocation of \$800 million from the \$1.25 billion settlement fund to the Deposited Assets Class, with a notation that much of this fund would likely be unclaimed and need to be reallocated. JA 5698 at 3, 11-12, 15. His report also, for the first time, announced that the Looted Assets Class funds would be limited to \$100 million (\$90 million for Jewish survivors, \$10 million for non-Jewish survivors), and would be distributed through social service agencies according to *cy pres*⁵ principles over a ten-year period.⁶

As a basis for distributing the \$90 million earmarked for Jewish victims, the Special Master proposed a geographical plan of allocation which called for 75% of all moneys to be spent to assist class members in the former Soviet Union (“FSU”), 12.5% to assist class members in Israel, and the remaining 12.5% for survivors in the rest of the world (including the United States) in amounts to be determined by a non-

⁴ The Special Master published his plan thirty-three days after the Fairness decision, three days after the deadline to appeal the fairness decision.

⁵ *Cy pres* is an equitable doctrine to carry out “as near as possible” an objective which cannot be given literal effect. BLACK’S LAW DICTIONARY 269 (6th abridged ed. (1991)). Its utilization has long been and continues to be an accepted methodology for allocating funds received in a class action settlement for the benefit of class members. *In re Agent Orange Prod. Liab. Litig. MDL No. 381*, 818 F.2d 179, 185 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988); *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

⁶ At the time of the class notice in May 1999, Class Counsel had represented that “no subset or segment of Class member is privileged over any other . . . [and] none are excluded from relief or consigned to inferior benefits.” JA 5208, 5230. This proved untrue when the Special Master published his allocation plan.

governmental organization (“NGO”). The explanation for this plan was that FSU class members were the “neediest” members of the Looted Assets Class, due in large part to demographic, political and historical events and the economic problems caused by the collapse of communism. DE 719 at 25-26; *also id.* at 23, 26, 115, 117-18, 120, 122-35. The result of this allocation scheme is that groups serving class members in the United States received 4% of the funds even though U.S. Survivors represent 30% of the class and 20% of the world’s survivor population.⁷

After initial publication of the Special Master’s proposal, a number of U.S. Holocaust survivors (including several of the petitioners) objected, urging that the funds be allocated in proportion to the current residence of all class members. Nonetheless, on November 22, 2000, the district court approved the Special Master’s plan in its entirety. App. C4.

U.S. Survivors and survivor groups from New York, California, and Florida appealed, raising a variety of challenges to the virtual exclusion of U.S. Survivors from the funds compensating for looted property, and to the process that led to such exclusion. JA 5976.

While the appeal was pending, the district court initiated a meeting with counsel for the U.S. Survivors and Lead Settlement Counsel. The court asked the U.S. Survivors to withdraw their appeals because he feared delays would harm needy FSU survivors. Counsel for the U.S. Survivors explained that virtually all U.S. Survivors would be denied any compensation under the allocation, despite the pressing needs of his elderly clients. Eventually Lead Settlement Counsel agreed in writing on May 15, 2001 to support an increased allocation to the U.S. Survivors in subsequent distributions

⁷ The NGO allocated \$193,000 for survivors in the United States out of \$10 million distributed in the first year. Over the first three years of allocations, the total amount disbursed to U.S. social service agencies averaged 4% of the total Looted Assets Class funds distributed each year.

“to assure that the needs of the American survivor community are addressed, with resources *in a fair proportion to their overall numbers, and with due regard for the fact that they have not received significant allocations up to this point.*” JA 6084 (emphasis added). With that promise of direct support from the Plaintiffs’ Lead Settlement Counsel, the U.S. Survivors withdrew their appeals of the initial fairness and allocation orders.⁸

5. In August 2002 and October 2003, the Special Master recommended an additional \$105 million to be distributed for the benefit of the Looted Assets Class, but in the same geographic proportions as in the first distribution.

Petitioners objected to the Special Master’s recommendations and urged a distribution more aligned with the current population of survivors around the world. JA 7031. Petitioners argued that a reallocation of such future distributions in accordance with survivor population rather than alleged “relative need” would address the improper disparate formula used to that point and would provide desperately needed aid to elderly class members in the U.S, Israel, and elsewhere.⁹

The district court adopted the Special Master’s recommendations in two separate orders, on September 25, 2002 and November 17, 2003. App. E, F. Petitioners moved for rehearing under Rule 59 as to both orders.

On March 9, 2004, the district court entered an omnibus order approving the Special Master’s allocation formula, rejecting petitioners’ procedural and substantive objections and

⁸ Under the Special Master’s Proposal, approved by the district court, each subsequent allocation must be independently justified and hence is independently appealable. This petition arises from the appeal of two subsequent allocation orders.

⁹ Contrary to his promise in May 2001, Lead Settlement Counsel failed to support such adjusted allocations, even though he had “no quarrel” with the U.S. Survivors’ assessment of needs in this country and conceded that such needs were greater than was previously assumed. JA 6994.

Rule 59 motions, and, remarkably, also holding that the U.S. Survivors lacked standing either individually as class members, or through their incorporated 501(c)(3) membership organization, to object to allocations adverse to their interests. App. G.

6. On appeal, the Second Circuit affirmed. App. A.¹⁰ The court rejected petitioners' arguments regarding the improper use of a need-based formula unrelated to class claims in the *cy pres* allocation and also rejected petitioners' arguments regarding the procedural flaws in the settlement and class representation process. Regarding the *cy pres* allocation, the court of appeals recognized that,

in a traditional class action brought to remedy an injury that had occurred shortly before the initiation of suit, the amounts allocated among claimants would normally vary primarily by the effect of the injury upon different claimants. But in the circumstances presented by this case, we think the equitable principles of the *cy pres* doctrine permit the geographic variation that the District Court adopted. . . .

App. A25.

Petitioners sought rehearing and rehearing *en banc*, both of which were denied. App. I.

This petition for certiorari followed.

¹⁰ The Second Circuit rejected challenges to petitioners' standing, finding that because at least one appellant, "G.K.," was a poor U.S. Survivor in need of medical assistance who would benefit from a reversal of the allocations below, standing was not an obstacle to its decision on the merits. It declined to address Appellee's arguments that *all* individual class members and *bona fide* Survivor membership organizations lacked Article III and prudential standing to object to or appeal the *cy pres* allocations.

The court of appeals did not address Appellee's argument that the U.S. Survivors' challenges were foreclosed by the withdrawal of their appeal of the initial allocation.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decision below disregards the specific and individual rights of class members to be treated equally with respect to equal claims regarding looted assets, contrary to the decisions of this Court and others requiring intra-class equity and forbidding settlements that deny class members any consideration for the release of their claims. Indeed, the inequitable results are all the more disturbing for having been sprung on the U.S. members of the Looted Assets Class after they had erroneously placed their faith in the courts and after the opt-out period had ended. That the court of appeals condoned such a process and result in a case of such historic significance, dealing with foundational issues of trampled rights of Holocaust victims and survivors, unique and rapidly dwindling class populations, and internationally significant concerns, only heightens the need for review by this Court to assure adherence to the rule of law rather than the social policy predilections – no matter how well-intended – of judges.

I. THE ISSUES PRESENTED ARE OF NATIONAL IMPORTANCE.

To say the issues in the case are of national importance is to grossly understate the matter. Although addressing only one segment of the monumental and vast crimes perpetrated by the Nazis and those with whom they dealt, the events underlying this case arose from perhaps the largest systematic theft in history – the looting of the property and assets of countless victims of Nazi persecution. The Swiss banks that aided and abetted such grotesque thievery by laundering and concealing looted assets have now provided settlement funds for at least a partial restitution for such stolen property. The final disposition of that historic settlement according to the rule of law, rather than through unbridled judicial discretion – however charitable and well-meaning it may be – will reflect

on both the judicial system and the Nation and is thus of tremendous practical, legal, and moral importance.

While petitioners do not deny the tidal pull of wanting to solve a deep and pressing need such as that of the Holocaust survivors in the FSU, this case is not about solving that need or otherwise comprehensively balancing the scales regarding the colossal and varied wrongs of the Holocaust and its aftermath. Rather, it is about at least partially remedying a particular class of wrongs around which the courts can wrap their hands and apply the law: the theft and concealment of property from all members of the Looted Asset Class. While the partial restitution provided by the settlement fund in this case certainly could do much good if put to other uses, it is ultimately up to the rightful owners (the class members) – not a special master, district court, or court of appeals – to make the hard choices brought on by endless need and limited resources.

The supervision of a large class settlement simply does not empower a court to freelance on broad issues of social justice, relative need, or the historic burdens of having been on the wrong side of the Iron Curtain after World War II. Rather, courts are empowered only to remedy the specific legal wrongs in the cases before them. And in class actions, that requires treating equally class members with equal legal claims and injuries, regardless of unrelated differences in circumstances or need. That is the essence of the rule of law, it is required by Rule 23 and the Due Process Clause, and it is vital that such principles be scrupulously applied in a case of this magnitude and importance.

Indeed, the total settlement of \$1.25 billion was one of the largest in history, and the portion allocated to the Looted Assets Class is the largest “*cy pres*” fund in the history of the U.S. court system – exceeding \$200 million. And, the fund is expected to reach \$500 or \$600 million by the time the last

dollar is distributed.¹¹ With so much at stake, the issues presented here are of considerable importance and warrant this Court's attention.

Finally, this Court's involvement now, rather than later, is particularly important given that prior distributions of the fund cannot be recouped and hence for the fund as a whole to be properly distributed, the Court must act concerning the supplemental distributions – such as those challenged here – so that those and expected future distributions will be allocated according to the correct legal principles. There is still time to remedy the improper distribution scheme applied below, but given the continued spending of the funds and the advanced ages of Holocaust survivors, it is essential to address those issues now.

II. THE SECOND CIRCUIT ERRED IN AFFIRMING DISTRIBUTION OF LOOTED ASSET CLASS FUNDS UNEQUALLY WITHIN THE CLASS BASED ON CRITERIA WHOLLY UNRELATED TO THE CLAIMS AT ISSUE.

Having rejected individualized determinations and *pro rata* allocation, the district court held that among the distribution choices, the “more reasonable alternative” would be “targeting the neediest survivors in the Looted Assets Class . . . as the way to most benefit the class as a whole” because (i) compensation efforts since the end of the war have provided less to those survivors in the FSU than to survivors in the United States, (ii) Survivors in the FSU had to suffer through decades of Communism, (iii) Survivors in the U.S. have more “family and community support networks” than

¹¹ According to Class Counsel Robert A. Swift, if the \$205 million fund were a private foundation, it would be the 68th largest in the United States. With the *current level* of assets distributed over a 10 year period, it would be the 53rd largest foundation in the United States based on annual expenditures. (Swift Second Circuit Brief, citing www.fdncenter.org/research/trends).

those in the FSU, and (iv) the economic plight of Survivors in the U.S. is “less pressing”. App. G13-16.

The court of appeals followed the district court’s lead and relied on *In re “Agent Orange” Product Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987) to justify the allocation below.

According to the court of appeals, it had “previously approved a district court’s allocation, pursuant to the *cy pres* doctrine, of settlement funds to those class members ‘most in need of help.’” App. A15, n. 10 (citing *Agent Orange*, 818 F.2d at 158). But, the “need” to which the trial court in *Agent Orange* referred was purely a description relating to the *extent of injury* presumably suffered by plaintiffs from possible Agent Orange exposure. Indeed, the *Agent Orange* court *excluded* benefits to class members where the veteran’s death or disability had extraneous causes, such as traumatic injury unrelated to Agent Orange exposure, thus illustrating that the “need” at issue there was a proxy for injury, not a free-floating equitable consideration.¹² The “need” relied on in this case, of course, has nothing to do with any differential injury *from* Nazi looting or Swiss complicity, but is merely the result of happenstance and geography, as the courts below candidly recognize.

While the Second Circuit below agreed that the factors used here were unprecedented, it upheld them nonetheless:

Appellants further contend that the District Court exceeded its discretion because “[n]o court” has previously allocated settlement funds by consulting the same “factors” the District Court applied here. . . . The “factors”

¹² The *Agent Orange* trial court also rejected a proposal that would have calibrated benefits based on victims’ other sources of assistance such as governmental benefits, private insurance, and family support. These important aspects of the allocation were noted in the Second Circuit’s *Agent Orange* opinion, 818 F.2d at 157-58, confirming that “need” in general has never been considered a valid basis for distinguishing among class members.

in question include the history of previous compensation efforts, material deprivations associated with decades of life under a Communist regime and the effects of that regime's collapse, and access to family and community support networks. . . . Like appellants, we are unaware of any other court that has relied on this particular combination of factors in allocating settlement funds. But unlike appellants, we believe that consideration of these factors, in the circumstances presented, was entirely appropriate and well with the wide discretion afforded to the District Court.

App. A26.

But district court discretion is not unlimited, and does not encompass using legally improper factors such as general "need" to discriminate among class members or approving allocations that deny some class members any benefits in consideration for their release of claims.

A. This Court and Others Forbid Intraclass Disparities Based on Factors Unrelated to Plaintiffs' Claims.

The class certified in this case is defined as victims or targets of Nazi persecution (and heirs, etc.) who have or will assert claims against Swiss banks or companies "relating to or arising in any way from looted assets or cloaked assets." App. B6. As defined, there is no distinction among Looted Assets Class members by reason of any post-Holocaust socioeconomic circumstances.

But it is bedrock class-action law – whether under Rule 23 or the Due Process Clause – that class members with the same claims and legal injuries must be treated the same, and there can be no discrimination among class members unrelated to differences in their claims or injuries themselves. By focusing on the extrinsic circumstances of differential economic need unrelated to differences in claims, the courts below ran

afoul of those basic principles and of numerous cases from this and other courts.

For example, in *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 855, 863, 864 (1999), this Court reversed the settlement structure and remedy approved by the lower courts in part because “the distribution of the fund among class members” failed the test of intra-class equity. *Id.*, at 841. Looking to the antecedents of mandatory class actions, this Court observed that “the simple equity of a *pro rata* distribution provid[ed] the required fairness.” *Id.*; see also *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003) (reversing settlement allocating 51% of monetary award to small portion of the class because “singling out a large group of non-named class members for higher payments without regard to the strength of their claims eliminates a critical check on the fairness of the settlement for the class as a whole.”); *In re General Motors Corp. Pick Up Truck Fuel Tank Products Litig.*, 55 F.3d 768, 808 (3rd Cir. 1995) (“one sign that a settlement may not be fair is that some segments of the class are treated differently than others.”; “[T]he fact that the coupon settlement benefits certain groups of the class more than others suggests that the district court did not adequately discharge its duties to safeguard the interests of the absentees”), *cert. denied sub nom. General Motors Corp. v. French*, 516 U.S. 824 (1995); *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983) (reversing allocation of half the back pay award to eight named plaintiffs where there was no proof such disparity was justified by their unique, individual claims); *Petruzzis, Inc., v. Darling-Delaware Co.*, 880 F. Supp. 292, 299 (M.D.Penn. 1995) (rejecting class settlement because all class members’ claims against defendant were “analytically indistinguishable” but only 50% of them were eligible for certificates; “the same type of injury was purportedly sustained by all class members and all class members have the same rights of recovery against [defendant]. Thus while disparate treatment of class members maybe justified by a demonstration that the favored

class members have different damage claims or greater damages, . . . no such demonstration has been made here.”).

That the district court felt the need to use a *cy pres* distribution mechanism rather than individualized damage determinations or a pro rata distribution does not justify abandoning the basic principles of intra-class equity. Even if it is impossible to give each and every class member an equal but meaningful¹³ recovery, the “next best” approach of equity would still provide class members with an equal *opportunity* to participate in the benefits of the recovery. At a minimum, the next best scheme must benefit the class as a whole, not merely a subset of the class. Here, the class as a whole was not benefited, and the allocation bore no relation to the relative loss of property as between class members being treated differently. *See Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305, 1308 (9th Cir. 1990) (reversing a *cy pres* class allocation; “Even where *cy pres* is considered, it will be rejected when the proposed distribution fails to provide the ‘next best’ distribution.”; “Fluid or ‘*cy pres*’ distribution avoids [the problems of small recoveries that are economically unfeasible to distribute to numerous individual class members] by permitting . . . distribution of unclaimed funds to indirectly *benefit the entire class.*”) (emphasis added); *In re Airline Ticket Comm’n Antitrust Litig.*, 268 F.3d 619, 626 (8th Cir. 2001) (in class action against airlines by travel agents who sold tickets throughout the U.S., *cy pres* allocation to two Minnesota-based groups reversed for a distribution “more closely related to the origin of this nationwide class action case).

¹³ Given that *any* resolution of the claims against the Swiss banks would provide only partial recovery of the assets plundered by the Nazis in total, a fully meaningful – as in “complete” – recovery was never in the cards. But that is not to say that even modest sums distributed to individuals would lack meaning *to them*.

B. This Court and Other Circuit Courts Forbid Settlements Which Deny Class Members Consideration for the Release of Claims.

The error of intra-class discrimination endorsed by the courts below is further compounded by the fact that for most U.S. members of the Looted Assets Class, their rights against the Swiss banks will have been compromised for no consideration whatsoever. Given the exceedingly low relative amounts allocated to agencies for use within the United States, even most of the poorest U.S. class members will have no realistic opportunity to receive benefits, and the remainder of the class in the U.S. will surely get nothing. Such a result conflicts with numerous cases rejecting the notion that class members can be forced to surrender their claims in return for nothing at all. *See Ortiz*, 527 U.S. at 860-61; *Amchem Products, Inc., v. Windsor*, 521 U.S. 591, 612 (1997) (Rule 23 “must be interpreted in keeping with the . . . Rules Enabling Act, which instructs that rules of procedure ‘shall not abridge, enlarge, or modify any substantive right. 28 U.S.C. Section 2072(b)’”); *Mirfashi v. Fleet Mortgage Corp.*, 356 F.3d 781, 783-785 (7th Cir. 2004) (Posner, J.) (reversing settlement where one of the classes “received absolutely nothing, while surrendering all of its claims against” the defendant); *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003) (*cy pres* damages remedy reversed because consent decree released almost half the absent class members’ claims with little or no compensation); *In re General Motors Corp. Pick Up Truck Fuel Tank Products Litig.*, 55 F.3d at 808 (reversing coupon settlement in a case which likely provided no value to many class members, including lower income class members); *Piambino v. Bailey*, 610 F.2d 1306, 1329 (5th Cir. 1980) (invalidating settlement as to class members who received no payments from the settlement fund); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 1995 WL 222177 (E.D.La 1995) (settlement disapproved because claims of plaintiffs who no longer drove

Broncos would be extinguished for safety information of little or no value to them.).

In *Mirfashi*, even where there was a considerable disparity in injury between two subclasses and even where a *per capita* distribution would have been less than 20 cents per person, the Seventh Circuit still overturned the settlement because “[t]he members of the [more injured] class received something in the settlement, but those in the [less injured] class did not.” 356 F.3d at 783; *see also, e.g. Crawford v. Equifax Payment Svcs., Inc.*, 201 F.3d 877, 880, 882 (7th Cir. 2000) (settlement reversed because class members “gain nothing . . . but lose something: the possibility of any collective proceeding for damages.”).

In purporting to benefit the class as a whole, the courts below offered the skewed notion that the entire class would benefit by helping *only* those deemed the “neediest” members of the class, imputing to *all* class members the common intent to donate their stake in the settlement to that particular goal. That is a bold supposition and an odd notion of “benefit,” to say the least. Suffice it to say that such a view of “benefiting” the entire class is not even remotely the law. *See Mirfashi*, 356 F.3d at 783-84 (finding “preposterous” the argument “that the members of the pure information sharing class didn’t really receive nothing in exchange for giving up their claims; they received the emotional satisfaction of knowing that Fleet had been forced to give up its profits.”; “*There is no indirect benefit to the class from the defendant’s giving the money to someone else.*”) (emphasis added).¹⁴

¹⁴ The current disparity in the Looted Assets allocation also runs afoul of the rule articulated by Judge Friendly in *National Super Spuds, Inc., v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981), that a class settlement may not compromise one group of class members’ rights without consideration, even though it confers benefits on other settling class members. It held: “An advantage to the class, no matter how great, simply cannot be bought by the uncompensated sacrifice of claims of members, whether few or many,” *Id.* at 19.

This logic is no more valid than that employed by the Fifth Circuit in *Ortiz*, which drew the condemnation of Judge Smith, in dissent, who characterized the majority's reasoning as holding that "the settlement transformed the claims into something other than *in personam* claims." *In re Asbestosis Litig.*, 90 F.3d 963, 1016 & n. 56 (5th Cir. 1996). This Court agreed with Judge Smith in reversing *Ortiz*.

C. A Distribution Consistent With Class Members' Current Residence Would Satisfy the Rule that Class Settlement Allocations Must Benefit the Class as a Whole.

A proportional geographical distribution is the only one that would satisfy the underlying purposes of the litigation, *i.e.*, to provide a tangible benefit for the class as a whole from the Swiss defendants who profited from the Nazi thefts. It is the closest method possible of achieving a *per capita* payment with these settlement funds.

All members of the Looted Assets Class, who suffered equal injury from Swiss thefts, began the litigation with the same rights to recover and benefit from settlement funds, regardless of where they live today. When the funds are inadequate to provide a meaningful *per capita* cash distribution to *all* class members, the question under the *cy pres* doctrine, must be how to distribute the funds so as to benefit the class *as a whole*.

The only method of distribution that benefits the class *as a whole*, consistent with other federal precedents, is one that seeks to provide *equal opportunity to share in the settlement proceeds*, rather than one that, like the circuit court's approved formula, predictably dooms similarly situated class members because of categorical judgments based on criteria that are irrelevant to the common legal injury suffered by the class as a whole.

Unlike the admittedly unprecedented distribution upheld by the court of appeals, the population-based methodology

urged by U.S. Survivors has precedent in other class settlements. See *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir. 1970) (*cy pres* distribution to states and individual plaintiffs based on relative population percentages and to governmental plaintiffs *pro rata* on the basis of hospital beds), *cert denied*, 404 U.S. 871 (1971); *Rosner v. United States of America*, Case No. 01-1849-CIV-SEITZ, S.D. Fla., Final Order and Judgment, Sept. 30, 2005 (*cy pres* distribution of \$25.5 million class settlement of Hungarian Nazi victims' and heirs' claims for misappropriation of property obtained by the U.S. Government after WWII from the "Hungarian Gold Train," distributed for social services according to current world population of Hungarian Survivors— 42.5% in Israel, 22.7% in Hungary, 20.1% in the U.S., 6.1% in Canada, etc.); *In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347 (E.D.N.Y. 2000) (*cy pres* distribution of toys and educational programs among the governmental plaintiffs on basis of population).

Contrary to such population-based distributions, the allocation formula below leaves thousands of class members in the U.S., who are indisputably in financial need and lacking in adequate human and social services, without any chance of receiving *any benefit* from the settlement.¹⁵

¹⁵ According to data in the record, most Holocaust Survivors in the U.S. today are between 75 and 85 years of age. They are dying at a rate of 5-10% per year. There are between 30,000 and 45,000 U.S. Survivors who live at or below the poverty level, and approximately 20,000 who cannot provide for basic needs such as food, medicine, dental care, eyeglasses, hearing aids, home care, emergency rental and utilities assistance, transportation for vital services, and health care services, and do not receive adequate support from "social safety nets." JA 7385-7424, 7436-7713. Record estimates of the cost to address these needs among U.S. Holocaust survivors ranged from a minimum of \$30 million per year to over \$70 million per year. JA 7608-7615, 7457-7588. Against these needs, the United States will receive approximately \$750,000 of the \$21 million distributed each year.

In sum, until the Second Circuit's decision, federal circuits had universally held that no goal, not even the increase in the total settlement fund, can justify a settlement that eliminates the rights of some class members in order to confer a benefit on other members who suffered the same injury. This rule applies whether the settlement is distributed in cash, in coupons, or, here, under the *cy pres* doctrine. The current allocation scheme violates Rule 23 and the due process rights of U.S. Survivors in the Looted Assets Class.

III. THE PROCEDURES LEADING TO THE DISCRIMINATORY ALLOCATIONS VIOLATED RULE 23 AND THE CONSTITUTION.

A. The U.S. Survivors Were Denied the Right to Opt Out After Learning That They Would Receive No Benefits from the Settlement.

The court of appeals decision also violates Rule 23 and the constitutional guarantee of due process and the right to a jury trial because the U.S. Survivors' rights were extinguished in a process in which the class members were not informed prior to the opt-out deadline that their claims would be compromised for no consideration. Rule 23(b)(3) clearly requires that class members be provided with an opportunity to opt out of a settlement of a Rule 23(b)(3) class action, *i.e.*, one for money damages, and the court below violated this requirement. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812-13 (1985).

This Court and all other circuits in recent decisions have increasingly circumscribed various devices which have attempted to provide defendants with "comprehensive legal peace" by preventing class members from being able to opt out of settlements involving monetary claims.¹⁶ In *Ortiz*, this

¹⁶ In *Amchem Prods. v. Windsor*, 521 U.S. 591, 628 (1997), this Court held that the class notice must provide class members with information "needed to decide, intelligently, whether to stay in or opt out." *See also*

Court reversed a mandatory class under Rule 23(b)(1)(B) which was designed to settle monetary claims of future asbestos claimants, holding that the process violated Rule 23 and plaintiffs' Fifth Amendment due process and their Seventh Amendment jury trial rights by not affording the right to opt out.

This is the consensus in all other courts of appeals except for the Second Circuit. *See In re Telectronica Pacing Sys., Inc.*, 221 F.3d 870, 881 (6th Cir. 2000) (Supreme Court has stressed in interpreting Rule 23 that "principles of sound judicial management and constitutional considerations of due process and the right to jury trial all lead to the conclusion that in an action for money damages class members are entitled to personal notice and an opportunity to opt out."); *Jefferson v. Ingersoll Int'l*, 195 F.3d 894 (7th Cir. 1999) (same); *Brown v. Ticor Title Ins. Co.* 982 F.2d 386 (9th Cir. 1992) (following *Shutts*, *res judicata* not applicable to previous hybrid suit that involved the foreclosure of substantial damage claims because plaintiffs did not have the right to opt out.); *Continental Can Co.*, 706 F.2d at 1155 (reversing due to absence of right to opt out of settlement); *see also* Advisory Committee Notes to Rule 23 ("The opt out right provided by Rule 23(b)(3) is an essential safeguard for the constitutional rights of absent class members claiming monetary damages.").

In the present case, had there been timely public disclosure of the allocation plan which the Special Master later formulated, it was predictable that very large numbers of Looted Assets Class members would have opted out of the class, with two likely effects. The Swiss banks would have had to consider whether they wanted to settle a class action

Twigg v. Sears, Roebuck & Co., 153 F.3d 1222, 1227-28 (11th Cir. 1998) ("the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action") (*quoting In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1103-05 (5th Cir. 1977)).

with a significant number of individuals outside the class, and the Special Master would have been motivated to weight more evenly the needs of *all* survivors in that class. That such information was withheld from the class until after it was too late to opt out essentially vitiated their opt-out rights entirely.

The district court and the court of appeals approved this “bifurcated” procedure under the authority of *In re Agent Orange Product Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987). While it is true that the Second Circuit in *Agent Orange* approved a bifurcated process by which the “fairness” of a settlement amount was approved prior to an allocation plan, there is nothing in Rule 23 that permits such an approach. Where essential matters such as allocation are yet to be resolved, a “bifurcated process” is tantamount to denying the right to opt out and is forbidden.

The bifurcated procedure approved below, on the authority of *Agent Orange*, is no different analytically than the settlement certified in *Ortiz* under Rule 23(b)(2) as a means to avoid the opt-out requirement of Rule 23(b)(3). In *Ortiz*, “Respondent admitted at the fairness hearing that ‘the prospect of having to pay tort judgments to opt-outs not covered by the settlement would have spoiled the Insurers’ hope of ‘total peace’ so the Insurers were adamant that any global agreement here would have to be done on a non-opt out basis.’” Petition for Writ of Certiorari, *Ortiz v. Fireboard Corp.*, 1998 WL 34081053, at 30. This is precisely what happened below to the Looted Assets class, and this Court should curb its abuse for this and future cases.

B. The Representational Structure Adopted Below Denied Petitioners Adequate Legal Representation as Required by Rule 23 and Due Process

Looted Assets Class members were denied adequate representation of counsel in a series of implausible and illogical steps that resulted in the illegal allocations outlined above.

This denial began with the district court expressly choosing to ignore *Amchem* and *Ortiz* at the settlement stage, App. B18, which prevented the class from having non-conflicted counsel who would (a) protect their right to be informed about what the settlement would provide before the opt out deadline, or (b) bargain for a fair portion of the \$1.25 billion settlement fund at a time when they could have insisted on a sufficient allotment to prevent the “scarcity” argument relied on by the district court to shortchange the vast majority of the class. The inadequate representation continued through the allocations process, in which Lead Counsel failed to advocate for class members to correct the disparate intra-class allocations in the second and third distributions, even if he believed they were wrong.

Rule 23(a)(4) provides “One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class” The adequacy analysis “factors in competency and conflicts of class counsel.” *Amchem*, 521 U.S. at 626 n. 20 (citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-158 n. 13 (1982)). Lead Counsel’s failure to advocate for the Looted Assets Class members as noted above, and his decision to back the district court instead, demonstrate inadequacy of representation under the case law and common sense. In *Amchem*, this Court condemned a “global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected . . . and each named party “served generally as representative of the whole, not for a separate constituency.” 521 U.S. at 626; see *Gonzalez v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973) (primary criterion for adequacy is “whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class.”; “failure to appeal prospective-only judgment that denied any relief to injured class members was inadequate representation”); see also *Crawford v. Honig*, 37 F.3d 485,

488 (9th Cir. 1994) (class members were not adequately represented where ban on IQ testing was broadened, without any factual support, to preclude all IQ testing of African American school children diagnosed as learning disabled);

This Court has held that due process requires adequate representation “at all times” throughout the proceedings. *Shutts*, 472 U.S. at 812 (“the Due Process Clause of course requires that the named plaintiff *at all times* adequately represent the interests of the absent class members”) (Emphasis supplied), citing *Hansberry v. Lee*, 311 U.S. 32, 42-43, 45 (1940). *See also Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 260-261 (2d Cir. 2001) (“Due process requires adequate representation ‘at all times’ throughout the litigation,” such that future claimants whose injury from Agent Orange was unknown at time of broad 1984 settlements were not precluded by *res judicata* from bringing independent actions in 1998 and 1999 based on Supreme Court’s holdings in *Amchem* and *Ortiz* that representative structure violated due process), *aff’d by an equally divided court*, 539 U.S. 111 (2003); *Gonzalez v. Cassidy*, 474 F.2d at 72 (court must view the representative’s conduct of the “entire litigation.”)

The district court imposed this unprecedented allocation formula through a process in which allocations among the five separate certified settlement classes and within the Looted Assets Class were recommended to the Court by a “neutral Special Master,” who consulted with “pro bono” class counsel regarding those allocation recommendations. App. B10.

Lead Counsel provided the rationale for the district court’s patently incorrect conclusion. He argued that class members’ due process and Rule 23 rights were adequately protected under the political doctrine of “exit, loyalty, and voice,” wherein the class agreed to commit to a “fair process” guided by the special master and the “financially disinterested” class counsel who would “represent the interests of the entire class,” which thus donned a “veil of ignorance” about

its settlement rights, in reliance on the beneficence of these court functionaries. *E.g.*, JA 7132.

This peculiarity of the representation provided by Lead Counsel, centered on the philosophy of John Rawls instead of the jurisprudence of this Court, was repeated and highlighted in a remarkable colloquy regarding Lead Counsel's loyalties. In response to an inquiry from a Second Circuit clerk, asking who Lead Counsel represented in the appeal, the District Court wrote: "Professor Neuborne does not represent any party in the context of the current appeals. By submitting briefs, Professor Neuborne is simply providing an adversarial defense of my position for the benefit of the Second Circuit. In this sense, his current role is analogous to that of a lawyer who might be appointed to defend a judge's decision after a writ of mandamus." App. H1-2.

Lead Counsel's response was somewhat more nuanced but equally troubling. He wrote: "I . . . take issue with your statement that I do not represent any party in the context of the appeals. . . . [W]hen I accepted your request that I agree to serve as Lead Settlement Counsel, I entered into an intense attorney-client relationship with the class that continues to this day. Thus, when I appear in defense of your rulings, I do not appear solely as a functionary of the Court, but as Lead Settlement Counsel for the plaintiff-classes with a duty to defend your rulings as long as they are supported by law, or rest within your discretion. Letter from Burt Neuborne to the Hon Edward Korman, September 14, 2004.

Lead Counsel simultaneously eschewed any responsibility to advocate for class members injured by court decisions, even if he disagreed with those decisions:

I have sought to facilitate open communication between any member of the class and the Special Master, as well as the Court. I have advised Class members on the best way to present their concerns to the Court. I have provided the Court with personal views on alloca-

tion and distribution decisions. *But, most of all, I have committed myself to defending the results of the process, even when I do not wholly agree with the outcomes.*"

Id. (Emphasis supplied).¹⁷

The court of appeals approved the multiple, conflicting roles played by "Lead Counsel: "Although the Lead Settlement Counsel does not represent any party in the context of these appeals, he has played a number of important roles in this litigation, both as a representative of the plaintiffs and as 'something of a general counsel to the administration of the settlement fund.'" App. A8.

The U.S. Survivors, whose rights were compromised for no benefits through these series of maneuvers, contend that such "representation" is inadequate *per se*. There is no principle that permits "class counsel" to subordinate the interests of the majority of the class in service of a special master and district court's conception of "rough justice." Certainly, such "loyalty" is not contemplated by Rule 23 and the Fifth

¹⁷ Petitioners add that the Lead Counsel's conflicts and inadequate representation, which they raised during the supplemental allocations proceedings below, are even more apparent now. After the Second Circuit's affirmance of the allocation formula, Lead Counsel removed his "pro bono" hat and asked the district court for \$4.1 million for his "post settlement" work – beginning in February 1999 and including the initial allocations phase in which the FSU-based allocation was created, the time he promised to support future allocations to rectify the initial imbalance, and the two supplemental allocations when he fended off the U.S. Survivors' efforts to secure an increased share in the supplemental distributions. Petitioners believed Lead Counsel was conflicted at the time, with his "pro bono" status irrelevant. Now, Lead Counsel's fee request reveals that *all this time* he was harboring expectation of payment from the District Court (contrary to his prior declarations), and provides a lucid explanation for why he determined to "*defend the district court's exercise of discretion*" rather than *advocate for disfavored Looted Assets class members*. See *In re General Motors Corp. Pick Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d at 803-805 (class counsel's simultaneous negotiation of fees and settlement terms created a conflict which violated class members' rights under Rule 23 and due process to adequate representation).

Amendment. Stated differently, the U.S. Survivors as Looted Assets Class members have the right to be protected by the well-established, easy to apply protections of Rule 23 and the Constitution, and not to be stymied in their pursuit of justice by Lead Counsel's invocation of political philosophers to justify the abandonment of these rules.

CONCLUSION

This is a historic lawsuit, which sought monetary restitution and accompanying moral acknowledgement of some of the thefts that occurred during the Nazi Holocaust. This case and its settlement invoked the power of the United States court system and the majesty of its laws including international law to bring a "measure of justice" to the victims of that epic wrongdoing. It will be will be the authoritative statement as to how the legal system may serve to vindicate those rights which, though incapable delivering an adequate remedy for mass murder, do allow victims to obtain material restitution from those who profited from such crimes. The distributions below, however motivated by charitable considerations, nonetheless departed from well-established rules of class action and constitutional law that require like treatment for like injuries. This Petition for Certiorari presents the last chance for the U.S. Courts to fashion a remedy for the Looted Assets Class that satisfies Rule 23 and due process principles, reinforces the moral underpinnings of the litigation, and prevents standardless class action settlements that leave large blocks of plaintiffs with nothing other than a sense that the American courts failed them.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL J. DUBBIN
Counsel of Record
DUBBIN & KRAVETZ, LLP
701 Brickell Avenue,
Suite 1650
Miami, FL 33131
(305) 371-4700

ARTHUR J. ENGLAND, JR.
GREENBERG TRAUIG, P.A.
1221 Brickell Avenue
Miami, FL 33131
(305) 579-0500

EDWARD LABATON
LABATON RUDOFF &
SUCHAROW, LLP
100 Park Avenue
New York, NY 10017
(212) 907-0700

Counsel for Petitioners

ERIK S. JAFFE
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Of Counsel

Dated: April 3, 2006

