No. 01-____

IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al*.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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September 6, 2001

QUESTION PRESENTED

Whether a class member who, upon receiving notice of a proposed class action settlement, objects and moves to intervene has standing to appeal the district court's approval of the settlement?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Robert J. Devlin was an appellant below. The Retired Employees Protective Association was also an appellant below.

The respondents in this Court, appellees below, are: Robert A. Scardelletti, Frank Ferlin, Jr., Joel Parker, and Don Bujold, as Trustees of the Transportation Communications International Union Staff Retirement Plan; and George Thomas Debarr and Anthony Santoro, Sr., individually and as representatives of subclasses of all persons similarly situated.

Other persons named in the court of appeals' caption, but who neither participated in the court of appeals nor are respondents here, are: Donald A. Bobo, R.I. Kilroy, F.T. Lynch, and Frank Mazur, Defendants; and A. Meaders, James H. Groskopf, Thomas C. Robinson, Doyle W. Beat, Miriam E. Parrish, Robert A. Parrish, Desmond Fraser, James L. Bailey, Dorothy Deerwester, Thomas J. Hewson, Clay B. Wolfe, Kenneth B. Lane, Brian A. Jones, and Charles O. Swasy, Parties in Interest.

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Petitioner Robert J. Devlin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

Petitioner seeks to appeal a judgment approving a class action settlement. The district court's orders denying petitioner's motion to intervene, approving the settlement, and entering a final judgment (Pet. App. B1, C1-C3) are unpublished. The Fourth Circuit's opinion (per Williams, J., joined by Anderson, D.J., sitting by designation; Michael, J., concurring in part and concurring in the judgment) (*id.* A1-A35) holding that petitioner lacks standing to appeal the settlement because he was not a named party in the district

court is designated a precedential opinion but is not yet published in the Federal Reporter.

JURISDICTION

The Fourth Circuit entered its opinion on July 27, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

STATEMENT OF THE CASE

This petition arises from a class action lawsuit. Respondents are the plaintiffs as well as the named representatives of the defendant class who were selected by the plaintiffs. Respondents have agreed among themselves to settle the suit.

Petitioner is a member of the defendant class who unsuccessfully sought to intervene in the suit to oppose the proposed settlement. Petitioner also filed timely objections to the settlement. The district court, however, denied petitioner's motion to intervene, rejected his objections, and approved the settlement.

The question presented is whether petitioner may appeal the district court's approval of the settlement. The Fourth Circuit held that petitioner does not have standing to appeal, expressly recognizing that petitioner would have been allowed to appeal in the Second, Third, and Ninth Circuits. The courts of appeals are now divided six-to-three on that precise issue.

1. The suit underlying this petition involves the ERISA-governed retirement plan for the staff of the Transportation

Communications International Union. Petitioner was a full-time employee of the Union from 1963 until his retirement in 1983, at which time he began receiving retirement benefits under the Plan.

At the time of petitioner's retirement, the Plan provided for a one-time, ten-percent cost of living adjustment ("COLA") effective five years after retirement. In early 1991, the Plan's trustees adopted a plan amendment ("the 1991 Amendment") to provide a more substantial COLA to offset the substantial reduction in retirees' effective benefits that had been caused by inflation. The 1991 Amendment provided that, every three years, beneficiaries would receive a COLA equivalent to the rate of inflation for that period, up to a maximum of ten percent per COLA ("the 1991 COLA").

Later in 1991, the Plan elected new trustees. Those trustees determined that the financial projections underlying the 1991 Amendment were incorrect, and in 1993 they eliminated the 1991 COLA for all subsequent retirees. The trustees determined, however, that as to persons (such as petitioner) who had already retired and were receiving benefits under the 1991 Amendment, the COLA was an "accrued" benefit that could not be eliminated through a plan amendment. See 29 U.S.C. § 1054(g)(1).

To recoup the costs of this accrued benefit to the Plan, the new trustees sued the old trustees, seeking damages for breach of fiduciary duties. The district court agreed that the old trustees had breached their fiduciary duties in approving the 1991 COLA based on faulty financial assumptions. The district court also initially agreed with the new trustees that the COLA was an accrued benefit for persons who had retired, see *Scardelletti* v. *Bobo*, 897 F. Supp. 913 (D. Md. 1995), but subsequently reversed itself, see *Scardelletti* v. *Bobo*, No. JFM-95-52, 1997 U.S. Dist. LEXIS 14498 (D. Md. Sept. 8, 1997). Petitioner was not a party to that litigation, and no party appealed from the district court's decision.

2. In response to the district court's decision, the new trustees sought to eliminate the 1991 COLA for all past and future retirees and to confirm their right to do so through litigation. That suit led to the settlement between the new trustees and the class representatives that petitioner seeks to appeal.

a. To confirm their right to eliminate the 1991 COLA, the new trustees brought this defendant class action in the District of Maryland against all participants and beneficiaries of the plan, approximately 700 persons in total. The district court subsequently divided the defendant class into subclasses of retired plan beneficiaries and active plan participants.

Petitioner is a member of the retiree subclass. He is also the president of the Retired Employees Protective Association ("REPA"), a group composed of a majority of Union retirees, which seeks to preserve the retirees' benefits under the plan. The new trustees originally named petitioner as a class representative, but he declined to serve in that capacity. The trustees subsequently named a new class representative as a defendant in their suit.

The plaintiff trustees subsequently reached a proposed settlement with the class representatives. The details of the settlement are not relevant here, but in broad outline it abrogates the 1991 Amendment and essentially eliminates the 1991 COLA. The settlement thus has a very substantial negative financial effect on approximately 400 retirees such as petitioner, drastically reducing the retirement benefits that they had been receiving.

b. Upon learning the terms of the proposed settlement, petitioner formally moved to intervene in the case. As a party intervenor, petitioner sought to take discovery, sought an injunction against eliminating the 1991 COLA, and sought to disqualify the class counsel. The district court denied the motion to intervene. Pet. App. B1. Because petitioner therefore lacked status as a party, the district court also denied

as moot his motions for discovery, for an injunction, and to disqualify. *Id.*

Pursuant to Fed. R. Civ. P. 23(e), petitioner also received a notice approved by the district court directing class members to present all objections to the proposed settlement.[1] Petitioner properly filed timely objections on behalf of himself individually and also on behalf of REPA. Petitioner argued, for example, that the settlement was unlawful because (as the new trustees had *themselves* maintained in their prior suit against the old trustees) the 1991 COLA was in fact an accrued benefit under ERISA for pre-1991 retirees. Based on the district court's earlier, unappealed ruling to the contrary, respondents disagreed.

Petitioner also maintained that the district court should not approve the settlement because it was unfair. In petitioner's view, the plan could afford to maintain the COLA at least in part by requiring active employees to make pension contributions, just as petitioner had done for many years before the plan became entirely employer funded. Respondents disagreed, arguing that the retirees had already recouped the value of their individual contributions. Respondents also argued that the settlement fairly reflected the risks to all parties in litigating the case to judgment.

The district court agreed with respondents and rejected petitioner's objections to the settlement. The district court advised petitioner's counsel, "if I'm wrong [in rejecting the objections], you got an appeal." C.A. App. 2585; see also C.A. Supp. App. 1240 ("I am perfectly clear that my order

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[1] C.A. App. 973-74 ("Any member of the Class who does not make his or her objection to the matters described in the Notice in the manner provided herein shall be deemed to have waived all objections and opposition to any and all matters to be considered at the Hearing and any and all subsequent hearings on these matters."); Fed. R. Civ. P. 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.").

approving the class settlement should be appealed, should be reviewed by the Fourth Circuit in due course."). The court accordingly entered a final judgment approving the settlement. Pet. App. C1-C3.

3. The trustee respondents subsequently invoked the final judgment to seek an injunction (enforced upon threat of contempt sanctions) prohibiting class members from making any court filing in any other jurisdiction that related to the subject matter of the settlement. According to the trustees, "[a]ll those attacks [on the settlement] really belong, if anywhere, here and in the Fourth Circuit." C.A. Supp. App. 897 (injunction hearing). The basis for the injunction was that each class member was bound to the settlement as a matter of res judicata. The district court agreed and enjoined all class members "from making any filing in any forum against any person * * * that raises issues encompassed within the settlement of this action or that directly or collaterally attacks the settlement of this matter, except in this Court or on appeal from the Orders of this Court." Pet. App. D2.

4. On petitioner's appeal from the district court's final judgment, a panel of the Fourth Circuit held (i) that the district court properly denied petitioner's motion to intervene and denied as moot petitioner's further motions that depended on his status as a formal party, and (ii) that petitioner lacked standing to appeal the district court's approval of the settlement.

a. The Fourth Circuit did not doubt that petitioner had standing to appeal the district court's denial of his motion to intervene, notwithstanding that petitioner was not a formal "party" in the district court. Rather, the Fourth Circuit held that the district court properly refused to permit petitioner to intervene on the ground that his motion was untimely. Pet. App. A10 ("Under either Rule 24(a) or 24(b), the application for intervention must be timely."). Permitting petitioner to intervene at the conclusion of settlement negotiations, the

court concluded, "would have likely resulted in further delay and substantial additional litigation." *Id.* A12. On that basis, the court of appeals also affirmed the district court's denial of petitioner's motions for discovery, for an injunction, and to disqualify, all of which depended on petitioner's status as a formal party. *Id.* A13 n.11. [2]

b. The panel divided on the distinct question whether petitioner nonetheless had standing to appeal the district court's approval of the *settlement*. The majority held that petitioner lacked standing and therefore refused to reach the merits of his appeal. From the outset, the majority recognized the decades-long circuit conflict on this question:

> Courts have divided on whether a class member who objects but is denied intervention has standing to appeal the merits of the class action settlement. Some courts require successful intervention before a non-named class member may challenge the merits of a class settlement on appeal. [collecting decisions of the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits dating to 1987] * * * Other courts, by contrast, broadly permit non-named class members to appeal the merits of a class settlement where they objected or tried to intervene below. [collecting decisions of the Second, Third, and Ninth Circuits dating to 1977].

Pet. App. A14-A17.

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[2] Long before respondents reached a settlement, petitioner had filed letters with the district court seeking to intervene. C.A. App. 469-77, 731-37. Petitioner did so in response to the Second Circuit's conclusion in separate litigation that disputes relating to the COLA should be resolved in the District of Maryland. See *Devlin* v. *Transportation Communications Int'l Union*, 175 F.3d 121, 132 (CA2 1999). The Maryland district court concluded that it had no obligation to consider such letters (in contrast to petitioner's subsequent formal motion to intervene), and the Fourth Circuit agreed. Pet. App. A12. Petitioner does not contest that determination in this Court.

The panel majority initially rejected the view of some circuits that objectors' standing is precluded on the basis of this Court's three-paragraph per curiam opinion in *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988), which states that "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled," and that "the better practice is for such a nonparty to seek intervention for purposes of appeal." *Marino* involved only an attempt to appeal a class action judgment by persons who were neither named parties nor even class members. The majority below therefore agreed with the Second and Third Circuits that *Marino* is properly distinguished because it "did not involve members of a class action who were objecting to a class settlement." Pet. App. A16 n. 12.

Nevertheless, after detailing the circuits' competing rationales, Pet. App. A15-A21, the panel majority "agree[d] with the majority of courts that the need for effective class management and to avoid class fragmentation weighs strongly in favor of limiting the possibility that last-minute 'spoilers' who were not entitled to intervene below might unduly delay class settlement on appeal," *id.* A21. The majority "fail[ed] to see how effective class management can be accomplished if non-named class members who were not entitled to intervene before the district court can nevertheless usurp the role of the class representative and, in effect, act as intervenors by contesting the merits of the class settlement on appeal." *Id.*

c. Judge Michael disagreed. He would have held that petitioner had standing to appeal the approval of the settlement, although he would have sustained the settlement on the merits as within the district judge's discretion to approve. Pet. App. A30-A35. Judge Michael would have adopted what he regarded as the "better reasoned precedent hold[ing] that an unnamed, objecting class member has standing to appeal a district court order approving a class action settlement." *Id.* A30 (citing *In re PaineWebber Inc.*

Ltd. P'ships Litig., 94 F.3d 49 (CA2 1996); *Bell Atl. Corp.* v. *Bolger*, 2 F.3d 1304 (CA3 1993); *Marshall* v. *Holiday Magic, Inc.*, 550 F.2d 1173 (CA9 1977); 7B Charles Alan Wright *et al.*, FEDERAL PRACTICE & PROCEDURE, § 1797 ("Of course, if the class member appears in response to the notice and puts forth his objections, he can attack the dismissal or compromise [of the class action] on appeal from the entry of the final judgment.")).

Judge Michael explained that the right of an objecting class member to appeal dates to early equity practice and is furthermore supported by constitutional and practical considerations. Pet. App. A31 (citing Joseph Story, COMMENTARIES ON EQUITY PLEADINGS § 94 (10th ed. 1892)). Because a class action settlement affects the rights of all class members, refusing to permit non-named class members to appeal raises due process concerns. *Id.* Under the majority's approach, class members will be largely unable to protect their interests because they generally do not learn of their interest in intervening until provided with notice of the proposed settlement by the district court, by which point (under the panel majority's holding) it is too late to intervene and thereby preserve their right to appeal. *Id.* A33-A34.

Judge Michael also maintained that the majority's approach undermines district courts' administration of class actions. The prospect that objectors may appeal provides an important check on collusive settlements by the class representatives and their counsel. Pet. App. A32. Moreover, if prohibited from appealing, objectors will be more likely to opt out from the class or to institute collateral attacks on settlement orders. *Id.* A33 (citing *Walker* v. *City of Mesquite*, 858 F.2d 1071, 1075 (CA5 1988) (unnamed class members may "challenge the adequacy of class representation * * * by filing a separate lawsuit for that purpose")). Alternatively, district courts will be burdened with unnecessary motions to intervene, while courts of appeals, in turn, will be burdened by interlocutory appeals if intervention is denied. *Id.* A34.

Conversely, as demonstrated by the experience of other circuits, there is no substantial risk that objectors will file meritless appeals of settlements, doubtless because in all but the most meritorious cases "the projected expenses will outweigh the potential for convincing the appeals court that the district court abused its discretion in approving a settlement after considering the objector's concerns." *Id.* A32.

d. The Fourth Circuit separately addressed petitioner's appeal from the district court's injunction against class members making any court filing in any other jurisdiction that relates to the subject matter of the settlement. The injunction rested on the fact that the entire class was bound by the settlement as a matter of res judicata. Notwithstanding the court of appeals' holding that objectors could not appeal the settlement, it nonetheless held that they could properly be enjoined from acting in derogation of it. Pet. App. A29. Rejecting petitioner's substantive challenges to the injunction, the court simply remanded the injunction for the district court to reenter it in the form required by Fed. R. Civ. P. 65. *Id.*

5. This petition followed.

REASONS FOR GRANTING THE WRIT

The petition for certiorari should be granted for two reasons.

First, the circuits are irreconcilably divided on this important question of federal law. The Fourth Circuit, and indeed respondents themselves, acknowledged that the Second, Third, and Ninth Circuits would permit petitioner to appeal the district court's approval of the settlement. This Court recently granted certiorari to resolve a closely related circuit split, but the Court divided evenly, leaving both conflicts unresolved.

Second, the decision below conflicts with this Court's precedents holding that "quasi-parties" – persons with a direct

relationship to and interest in a district court judgment, who have a recognized right to participate in the case, and who do in fact participate – have standing to appeal. This Court's precedents also recognize that class members have a due process interest in having an avenue to appeal a settlement that directly affects their rights. The policy arguments underlying the decision below not only do not justify deviating from this precedent, but they are also flawed. For example, the panel majority did not account for the beneficial effect of objectors' appeals in deterring collusive class action settlements.

I. THE CIRCUITS ARE DIVIDED SIX-TO-THREE OVER WHETHER OBJECTING CLASS MEMBERS HAVE STANDING TO APPEAL A CLASS ACTION SETTLEMENT.

The circuit conflict over whether an objecting class member has standing to appeal a district court's approval of a settlement is well recognized, entrenched, and outcome determinative. In rejecting petitioner's claim of standing, the Fourth Circuit avowedly refused to follow the longstanding precedent of the Second, Third, and Ninth Circuits, instead joining five other courts of appeals that hold to the contrary. Pet. App. A21. The trustees and active subclass representative themselves acknowledged below that other circuits would have permitted petitioner to appeal. Holding that petitioner lacked standing, the panel majority refused to reach the merits of his appeal of the settlement. Pet. App. A23-A24.

The importance of the question is demonstrated by *Felzen* v. *Andreas*, 134 F.3d 873 (CA7), *cert. granted*, 524 U.S. 980 (1998), *aff'd by equally divided Court*, 525 U.S. 315 (1999). The Seventh Circuit in *Felzen* created a two-to-one circuit conflict on the narrower question whether an objecting shareholder has standing to appeal the settlement of a *derivative* action. The *Felzen* petition sought certiorari in substantial part on the ground that this Court's decision would

help to resolve the broader conflict – now presented by this case – over the right of objectors' to appeal settlements of non-derivative class actions. The Court granted certiorari, but divided equally, leaving both conflicts unresolved.

As the court below recognized, three circuits allow non-named class members such as petitioner to appeal a district court's approval of a settlement. See Pet. App. A17 (citing *In re PaineWebber Inc. Ltd. P'ships Litig.*, 94 F.3d 49, 53 (CA2 1996) (allowing appeal if class member "objected to the proposed settlement at the Rule 23 hearing"); *Carlough* v. *Amchem Prods*., 5 F.3d 707, 710 (CA3 1993) ("objecting class members will be able to appeal from any final order entered in the district court"); *Marshall* v. *Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (CA9 1977) (allowing appeal by non-named class members and stating that "[a]s members of the class, their legal rights are affected by the settlement and they have standing to sue")); see also *Bell Atl. Corp*. v. *Bolger*, 2 F.3d 1304 (CA3 1993) (finding standing for a non-intervening shareholder to appeal settlement of a derivative suit when shareholder "attended the settlement hearing and voiced before the district court the same objections he now raises before us on appeal"); *In re Cement Antitrust Litig*., 688 F.2d 1297, 1309 (CA9 1982) ("Whatever the rule may be with respect to treating class members as parties for certain procedural purposes, it is clear that class members and parties are treated in substantially the same manner in regard to the substantive benefits and burdens of judgment. * * * [A] class member may appeal from an order approving a settlement to which the member objects."), *aff'd based on absence of a quorum*, 459 U.S. 1191 (1983).[3]

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[3] In dicta, panels of the Ninth Circuit have stated that the question is an open one in that court, *Powers* v. *Eichen*, 229 F.3d 1249, 1253 (2000); *Zucker* v. *Occidental Petroleum Corp*., 192 F.3d 1323, 1326 (1999), *cert. denied*, 529 U.S. 1066 (2000), notwithstanding the clear holdings of prior panels.

The Fourth Circuit expressly rejected the view of those circuits and instead sided with the five circuits that have held that non-named class members may not appeal. See Pet. App. A14-A17 (citing *Felzen* v. *Andreas*, *supra* (CA7); *Cook* v. *Powell Buick, Inc.*, 155 F.3d 758, 761 (CA5 1998); *Shults* v. *Champion Int'l Corp.*, 35 F.3d 1056, 1061 (CA6 1994); *Gottlieb* v. *Wiles*, 11 F.3d 1004, 1008-09 (CA10 1993); *Guthrie* v. *Evans*, 815 F.2d 626, 628-29 (CA11 1987)); cf. *Microsystems Software, Inc.* v. *Scandinavia Online AB*, 226 F.3d 35, 42 (CA1 2000) (in appeal of an injunction binding upon non-parties, court rejects Second Circuit's precedent finding standing and adopts instead approach of *Felzen*, *Shults*, and *Guthrie*).

Subsequent to this Court's equally divided affirmance in *Felzen*, the circuits have firmly adhered to their conflicting positions. The split over objecting class members' standing to appeal thus continues in the derivative, class action, and other contexts. As the Second Circuit explained in *Kaplan* v. *Rand*, 192 F.3d 60, 67 (1999), "While the plaintiffs' attorneys urge us to adopt specifically the no-intervention, no-standing rule of the Seventh Circuit, see *Felzen* v. *Andreas*, 134 F.3d 873 (7th Cir. 1998), *aff'd sub nom California Pub. Employees' Retirement Sys.* v. *Felzen*, 525 U.S. 315, 119 S. Ct. 720, 142 L. Ed. 2d 766 (1999) (per curiam) (4-4 decision), we decline to do so." The Second Circuit then denied rehearing en banc without a single judge calling for a vote. Compare also *Agius* v. *Louisiana-Pacific Corp.*, 178 F.3d 1299 (table), No. 98-15641, 1999 WL 274521, at *1 & n.3 (CA9 Apr. 29, 1999) (unpub.) ("Our case law makes clear that because [the unnamed non-intervening class member] objected below he has standing to bring this appeal." (citing *Marshall* v. *Holiday Magic*, *supra*) (collecting cases reflecting circuit conflict)) with *In re Integra Realty Resources, Inc.*, No. 99-1344, -- F.3d --, 2001 WL 951332 (CA10 Aug. 21, 2001) (denying standing to appeal to unnamed defendant-class members who did not intervene);

Blair v. *Equifax Check Servs., Inc*., 181 F.3d 832, 838 (CA7 1999) (unnamed class members must intervene in order to appeal "because only parties may appeal from an order settling a class action").[4]

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS, UNDERMINES DUE PROCESS, AND RESTS ON FLAWED POLICY RATIONALES.

The district court's final judgment approving the settlement in this case has a substantial personal impact on petitioner, eliminating the 1991 COLA and binding him through res judicata. Because petitioner properly appeared in the district court and stated objections to the settlement, this Court's precedents deem him a "quasi-party" to the litigation with the concomitant right to appeal. Any doubt should be resolved in favor of holding that petitioner has standing to appeal in light of this Court's precedent recognizing the due process right of class members to protect their interests in class action litigation by contesting a proposed settlement. The Fourth Circuit's contrary holding rests entirely on policy arguments that are unmoored from this Court's decisions and

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[4] The decision below also conflicts with the Seventh Circuit's post-*Felzen* precedent, which holds that non-named class members' motions to intervene must be liberally granted in order to permit subsequent appeals, even when intervention is requested (as in this case) only after the named parties have reached a settlement. *In re Synthroid Mktg. Litig*., No. 00-3164, -- F.3d --, 2001 WL 1000713, at *2 (Aug. 31, 2001); *Crawford* v. *Equifax Payment Servs.*, 201 F.3d 877, 880-81 (2000). The Seventh Circuit holds that, if necessary to avoid undue interference with the trial proceedings, the district court may "limit[] the extent of the intervenors' rights to objecting and, if necessary, appealing." *Id.* at 881. Unlike the Fourth Circuit, the Seventh Circuit thus would have held that petitioner had standing to appeal as an intervenor. Accordingly, while petitioner's principal position is that the Fourth Circuit erred in refusing to permit him to appeal as an *objector*, he would also prevail if this Court resolved the question presented by adopting the Seventh Circuit's rule that a class member in petitioner's circumstances must be permitted to *intervene*.

are furthermore flawed. Among other things, the majority below failed to appreciate the substantial benefits of appeals by non-named class members, including their value in deterring collusive class action settlements among the named parties.

a. There is no question that respondents' settlement of this suit, approved by the district court over petitioner's objection, directly and substantially affects petitioner's personal interests. The settlement eliminates the COLA benefits that allow petitioner's pension to keep up with inflation. Absent the settlement, petitioner would continue to receive the increases in his pension mandated by the 1991 COLA. He could furthermore sue to prohibit any effort by the trustees to abrogate the 1991 Amendment.

The notice of the proposed settlement approved by the district court, however, advised petitioner that any objections to the settlement would be waived if not put forward at the court's fairness hearing. See *supra* at 5 n. 1. Petitioner properly filed objections and also appeared at the fairness hearing to press those objections.

When the district court nonetheless approved the settlement, the court's judgment became binding upon all of the class members, including petitioner, by operation of res judicata. See *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367 (1996); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985). If there were any doubt about the preclusive effect of the settlement, it was emphatically put to rest when the new trustees successfully secured an injunction prohibiting any class member from making any court filing in any other jurisdiction that relates to the subject matter of the settlement.

b. The Fourth Circuit's decision that petitioner nonetheless may not appeal the settlement conflicts with this Court's precedents, which have recognized that standing to appeal exists not only for named parties but also for "quasi-

parties" – *viz.*, persons who, like petitioner, are not named as formal parties to the litigation but (i) have a direct stake in the outcome, (ii) have a recognized right to participate in the case, and (iii) do in fact participate.

For example, in *Blossom* v. *The Milwaukee Railroad*, 68 U.S. (1 Wall.) 655 (1863), Blossom had requested that the district court complete a foreclosure sale in which he had bid on the property, but the district court refused. When Blossom subsequently sought to appeal that ruling, the respondents objected that he was not a formal party to the case. This Court answered the question "[i]s the appellant so far a party to the original suit that he can appeal" in the affirmative, explaining that Blossom was entitled to appeal with respect to that part of the case in which he had properly participated. The Court found it clear that Blossom could not "appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid." 68 U.S. (1 Wall.) at 655. But the Court found it equally "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 the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject-matter of the litigation, which the court is bound to protect." *Id.* at 655-56. The Court cited as examples appeals by "[s]ureties, signing appeal bonds, stay bonds, delivery bonds, and receipters under writs of attachment," all of whom "become quasi parties to the proceedings, and subject themselves to the jurisdiction of the court." *Id.*

Subsequently, this Court held that a district court order approving fees for a trustee could be appealed by objectors who had appeared in the trial court but had not formally intervened. *Williams* v. *Morgan*, 111 U.S. 684 (1884). The Court cited *Blossom* and its progeny as sustaining quasi-

parties' right "to come into this court, or to be brought here on appeal, when a final decision of their right or claim has been made by the court below." 111 U.S. at 699. The Court accordingly concluded that the objectors "had such an interest [in the trustee charges], and were so situated in the cause, that they had a right, by leave of the 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." *Id.* at 700.[5]

Thus, in disagreeing with the panel majority in this case, Judge Michael was quite right to state that "[t]he rule that allows an unnamed class member to appeal a settlement order is rooted in early American equity jurisprudence." Pet. App. A31 (citing Joseph Story, COMMENTARIES ON EQUITY PLEADINGS § 94 (10th ed. 1892)). See also *West* v. *Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 624 (CA2 1934) (L. Hand, J.) ("[I]f the decree affects [a non-party's] interests, he is often allowed to appeal."). That remains the view of respected commentators. 7B Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 1797; 3B J. Moore, MOORE'S FEDERAL PRACTICE ¶ 23.80[5].

Under this Court's longstanding precedents recognizing the right of "quasi-parties" to appeal, petitioner is entitled to appeal the district court's approval of the settlement of this case. Petitioner has a direct stake in the settlement's

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[5] *Blossom*'s progeny include *Hovey* v. *McDonald*, 109 U.S. 150, 155-56 (1883) (when non-party receiver received order in his favor, appeal could be brought against him); *Trustees* v. *Greenough*, 105 U.S. 527, 531 (1882) (trustees may appeal award in favor of complainant suing on behalf of a trust fund); *Sage* v. *Railroad Co.*, 96 U.S. 712, 714 (1878) (quasi-parties interested in order confirming a sale may appeal); *Hinckley* v. *Gilman, Clinton & Springfield R.R. Co.*, 94 U.S. 467, 469 (1877) (non-party receiver may appeal order directing him to pay money); and *Minnesota Co.* v. *St. Paul Co.*, 69 U.S. (2 Wall.) 609, 633-34 (1865) (appeal may be brought against persons who were "nominal parties" but not formal parties to the judgment).

elimination of the 1991 COLA, has a right under Fed. R. Civ. P. 23 to state objections to the proposed settlement, and did in fact properly put his objections forward. In fact, even the Fourth Circuit and respondents implicitly recognize the applicability of the "quasi-party" line of cases by not disputing that petitioner had the right to appeal from aspects of the district court's decision. For example, there has never been any question that petitioner had the right to appeal the district court's order enjoining the class members from making an court filing in any other jurisdiction that addresses the subject matter of the settlement. Nor has there been any question that petitioner had the right to appeal the denial of his motion to intervene. Petitioner plainly has standing to appeal those rulings because they affect him directly. But on that very same rationale, petitioner may appeal the district court's approval of the *settlement*, to which he has properly objected, and which directly and profoundly affects his interests.[6]

If anything, petitioner's status as a "party" is far clearer than was true of the appellants in cases such as *Blossom* and *Williams*. Each member of the class in a class action is properly regarded as a "party," for each is fundamentally subject to the judgment as a matter of res judicata. See *supra* at 6, 15. To be sure, the Federal Rules of Civil Procedure do not require that each class member be named in the caption of the complaint. But that rule simply reflects the concern of modern civil procedure for ease of pleading and furthermore seeks to *benefit* class members by not requiring them to bear the costs of participating in the litigation. (Thus, the class members who are named defendants – here, respondents Debarr and Santoro – have that status not merely individually

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[6] Indeed, the decision of this Court cited by some circuits as supposedly prohibiting appeals by non-named class members expressly recognizes a non-party's right to appeal the denial of intervention. *Marino,* 484 U.S. at 304.

but in their capacity as representatives of the other class members. C.A. App. 345.) But the Fourth Circuit's rule perversely turns that benefit into an insurmountable burden on class members' ability to protect their rights by appealing.

c. Petitioner's standing to appeal is also supported by precedents recognizing that class members have a due process right to contest a settlement that may affect their interests. In *Phillips Petroleum Co.* v. *Shutts*, this Court held that the Fourteenth Amendment's Due Process Clause guarantees all class members the right to "receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel." 472 U.S. at 811-12. See also *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (class action must "afford [absent class members] an opportunity to present their objections"). Given the longstanding "due process 'principle of general application'" that only formal parties are bound by a judgment, this Court has concluded that the "burden of justification rests on [those seeking] the exception." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846 (1999).

Due process concerns are only heightened in the context of this defendant class action, for "[t]he inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class." *Ortiz*, 527 U.S. at 846. Because the district court approved this class action under Fed. R. Civ. P. 23(b)(1), petitioner and the majority of retirees who object to the terms of the settlement were forbidden from opting out and litigating their interest in the dispute separately.[7]

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[7] Of note, if the new trustees had affirmatively sought a money judgment from the class members – as opposed to an order permitting them to eliminate the money that they would have received under the 1991 COLA – the Constitution likely would have prohibited the suit altogether. See *Shutts*, 472 U.S. at 812 & n.3 (at least in context of money judgment, due process generally requires that absent party "be provided with an opportunity to remove himself from the class").

Furthermore, unlike plaintiff class actions suits, which are brought for the benefit of the members of a plaintiff class, a defendant class action like this suit is brought to *eliminate* a right held by each class member (here, the right to receive the 1991 COLA) by litigating against class representatives of their own choosing.[8]

Nor are the protections of the Due Process Clause limited to the right to state objections in the district court as opposed to on appeal. Although the Constitution does not mandate a right to an appeal, "it is almost axiomatic that every losing litigant in a one-judge court ought to have a right of appeal to a multijudge court." Robert Leflar, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 4 (1976). The right to appeal an adverse judgment is thus "a fundamental element of procedural fairness as generally understood in this country." ABA Comm. on Standards of Judicial Admin., STANDARDS RELATING TO APPELLATE COURTS § 3.10 cmt., at 18 (1994).

Indeed, a class member's due process interest in pursuing an appeal is at its apex in the context of a settlement. The premise of class action litigation at the district court level is that the named parties will represent the interests of the absent class members. But upon settlement, the named class representatives obviously will not appeal. Indeed, they almost invariably will be obligated to defend the settlement. "It is no secret that in 'seeking court approval of their settlement proposal, plaintiffs' attorneys' and defendants' interests coalesce and mutual interest may result in mutual indulgence.'" *Kaplan*, 192 F.3d at 67 (quoting *Bell Atl. Corp.*, 2 F.3d at 1310). On the Fourth Circuit's view, however, *no person* is permitted to protect the interests of objecting class members by appealing. In the context of this case, that result is fundamentally unfair not only to petitioner,

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[8] Indeed, the plaintiffs paid the attorney's fees of the defendant class representatives on an ongoing basis throughout the litigation.

but also to the majority of the members of the retiree class on behalf of whom he stated objections in the district court.

It is no answer that objectors could intervene, then appeal on that basis. That is not a practical solution. Class members will undertake the costs of intervening – if ever – only once they receive notice of the proposed settlement, because it is only at that time that they will be able to determine whether the settlement is adverse to their interests. But under the Fourth Circuit's holding, a motion to intervene filed when the proposed settlement is disclosed to the class is properly denied as untimely. See Pet. App. A12-A13. Class members also may not intervene as a matter of right unless they can prove that the class representatives are inadequate, see Fed. R. Civ. P. 24(a), which frequently will not be the case prior to the disclosure of an inadequate settlement.[9]

d. The Fourth Circuit's holding that non-named class members lack standing to appeal a district court's approval of a settlement rests not on any precedent of this Court, nor on an evaluation of the constitutional interests at stake, but rather on its perception of what rule would be best for class action litigation. Specifically, the majority below "fail[ed] to see how effective class management can be accomplished if non-named class members who were not entitled to intervene before the district court can nevertheless" appeal the settlement. Pet. App. A21.

Even if the panel majority correctly understood the effect of its holding on class action litigation, its rationale would not justify prohibiting an otherwise proper appeal. No doubt,

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[9] Class members as a practical matter often may not know that the suit even *exists* until they receive the notice of the proposed settlement. Furthermore, class members most often will lack the sophistication or financial interest in the case to retain counsel, file a complaint as an intervenor, and accept the resulting burdens of disclosure and discovery. Cf. *Shutts*, 472 U.S. at 809 (given small individual stakes, as a practical matter class members often would not incur costs of pursuing individual claims).

class actions – like all other suits – could be simplified if fewer appeals were allowed. Indeed, class actions would be far simpler if class members' right to state objections were eliminated altogether. But the Due Process Clause protects the right of objecting class members to pursue their interests, both in the district court and on appeal. Put another way, the question whether petitioner has "standing" to appeal the district court's approval of the settlement is not properly answered merely by determining what result would be most expedient for litigating the case in the district court. Deprivations of due process may often be expedient; but they are no less unconstitutional therefor.

In any event, the majority below profoundly misunderstood the effect of permitting objectors to appeal a district court's approval of a class action settlement. Because an objector lacks the extensive rights of a party or a party-intervenor, he cannot in any sense usurp "the role of the class representative," Pet. App. A21. Rather than contesting the class representatives' conduct of the litigation, an objector can only contest the fairness or legality of the ultimate settlement.

This case illustrates the distinction perfectly. The district court denied petitioner's motion to intervene, and on that basis denied as moot petitioner's motions for discovery, for an injunction, and to disqualify class counsel, all of which rested on petitioner's putative status as a formal party. As an entirely separate matter, the district court rejected petitioner's objections to the *settlement* – for example, that it unlawfully eliminated an accrued benefit of the retiree subclass and unfairly failed to require current employees to make pension contributions. Petitioner's appeal of the district court's approval of the settlement involves only the latter contentions, which do not involve the class representatives' conduct of the litigation.

If anything, the decision below will undermine orderly administration of class actions. Under the Fourth Circuit's

rule, an objector must formally intervene early in the litigation in order to preserve for appeal any objections he may eventually have to a potential settlement of undefined terms that the named parties ultimately may or may not reach. District courts therefore will be burdened with unnecessary protective motions to intervene filed by class members who would otherwise await notice of a proposed settlement in order to determine whether they had any actual objections.

Furthermore, if class members' motions to intervene are granted, the intervenors will have party status with precisely the opportunities to interfere with the class representatives' conduct of the litigation that the majority below sought to avoid. That result would also undermine one of the principal advantages of class action litigation: avoiding the necessity for class members to become involved in the course of the litigation. See *Shutts*, 472 U.S. at 810 (benefit of class action is that "absent plaintiff class members are not subject to other burdens imposed upon defendants. They need not hire counsel or appear. They are almost never subject to counterclaims or cross-claims, or liability for fees or costs.").

Conversely, when motions to intervene are denied, class members may file interlocutory appeals that burden the courts of appeals. Pet. App. A34. As Judge Michael explained in his dissent, class members may also simply opt out in order to protect their interests (at least in class actions brought under Fed. R. Civ. P. 23(b)(3), which permits class members to opt out), or may institute collateral attacks against the class representatives challenging the adequacy of the representation they provided. Pet. App. A33. That result would be directly contrary to a principal purpose of the class action procedures of the federal rules. See Adv. Comm. Note, Fed. R. Civ. P. 24 (objectors "should not be put to the risk of having a judgment entered in the action which by its terms extends to him, and be obliged to test the validity of the judgment as applied to his interests by a later collateral attack. Rather he

should, as a general rule, be entitled to intervene in the action.").

e. Finally, the majority below failed to appreciate that a rule permitting objectors to appeal will deter collusive class action settlements and will thereby protect the interests of all class members. Accord *Bell Atl. Corp.* v. *Bolger*, 2 F.3d at 1310. The attorneys for the class representatives will be more likely to structure a settlement to benefit the entire class if they know that class members' objections will receive a thorough review, including on appeal if necessary.

In addition, the appeals process "induc[es] trial court judges to make fewer errors because of their fear of reversal." Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 408-11, 425-26 (1995). The available data indicates that fairness hearings in district courts tend to be exceedingly brief and generally do not result in changes to settlements crafted by the named parties. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1348 & n.14 (1995) (empirical evidence suggests that "courts have little ability or incentive to resist [proposed] settlements"; data shows median hearing lengths in two districts of 38 and 40 minutes); Federal Judicial Center, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 58 (1996) ("Approximately 90% or more of the proposed [class] settlements were approved without changes in each of the four districts."). Fairness hearings in some courts are "typically pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel" in which the district courts "engage in paeans of praise for counsel or lambaste anyone rash enough to object to the settlement." Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action & Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 46-47 (1991).

Furthermore, objectors can play an important role on appeal in identifying flaws in a proposed settlement, and the courts of appeals' rulings can themselves provide important guidance for later cases. A prime example is this Court's seminal decision in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997) (holding that settlement-only class action must satisfy all requirements of Fed. R. Civ. P. 23). The *Amchem* respondents, who successfully challenged the named parties' settlement on appeal, were permitted to press their objections in the Third Circuit only because that court permits objectors to appeal.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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