No. 01-417

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.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. The Fourth Circuit Erred In Holding That Objectors' Appeals Should Be Forbidden For Reasons Of Policy.

Respondents' contention in this Court (at 28) that petitioner is relying on policy rationales as a "subtext" for reversal is wrong. It was the *majority below* that relied entirely on policy grounds – in particular, that appeals by objectors would be destructive of orderly class action litigation – to hold that objectors may not appeal. See Pet. App. A21-A24. Petitioner's opening brief (at 30-36) simply demonstrated that the Fourth Circuit's policy rationale is fundamentally flawed, and respondents' failure even to attempt to defend the decision below on its own terms is a telling admission.

Thus, there is no serious dispute that appeals by objectors identify important legal errors, as in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997), which respondents studiously ignore. The potential for appeals also deters collusive class action settlements and encourages district court judges to consider objections studiously. The empirical data establishes that district court fairness hearings regarding proposed settlements tend to be perfunctory, and thus do not, standing alone, provide substantial protection to objectors, whose interests will be finally decided by the court's judgment. See generally Pet. Br. 28-41. And this Court's decision in *American Pipe & Products, Inc.* v. *Windsor*, 521 U.S. 591 (1974), and its progeny establish that the Federal Rules should not be construed to as to invite unnecessary, burdensome, and distracting motions to intervene. See Pet. Br. 37-38.

The Solicitor General joins in these points here (at 3-9) just as he did in *Felzen* v. *Andreas*, 525 U.S. 315 (1999) (equally divided court). The government thus explains that

class actions can be abused by class representatives and their lawyers and that allowing objector appeals provides an important safeguard "by assuring that judgments approving [class] settlements are subjected to appellate scrutiny."[1]

Respondents echo the Fourth Circuit's reasoning in only one respect, contending that, if class action objectors may appeal, they will effectively have the power to take over the case. Resp. Br. 22-24. But, just as the class representative has no power to preclude the presentation of objections in the district court under Rule 23, she has no such power on appeal. And on appeal, objectors may press only their objections to the settlement because (a) the appeal lies from that aspect of the district court's decision rejecting his individual objections, and (b) a party may raise on appeal only the issues that he properly pressed below. Objectors may not, for example, contest the district court's rulings on discovery, or granting summary judgment on certain claims, on any number of the many issues that arise during the course of litigation. Objectors thus cannot be said to "usurp" any prerogative of the class representative. Petitioner's position is thus *not* that a class member "is entitled to assume the role of the named representative party." Resp. Br. 21.

Similarly, nothing about petitioner's position implies that objectors could usurp the representative's role in the district court prior to settlement or on appeal from a litigated judgment. Objectors have the right to pursue their individual objections in district court and on appeal only because the

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[1] Nor is there a realistic prospect, unique to class actions, of strategic appeals to gain leverage in the litigation. The only example given of supposedly strategic behavior (*Duhaime* v. *John Hancock Mutual Life Ins. Co.*, 183 F.3d 1, 6 (CA1 1999)) merely speculated regarding the possibility of improper objections and appeals, but found no such impropriety, and in any event the same prospect arises if objectors instead intervene before appealing. The proposed revisions to Rule 23 therefore address the *Duhaime* concern by requiring the court's permission before objections may be withdrawn. 201 F.R.D. 560, 617- 631-32 (2001).

representative no longer acts in the objectors' interests once a settlement has been proposed. Respondents themselves press this distinction: "Once a proposed settlement is reached, it is axiomatic that the named representative party who has negotiated the settlement does *not* adequately represent either the interests or the viewpoint of those class members opposed to the settlement." Resp. Br. 30 (emphasis in original).[2] Absent such a conflict in interests, the representative is the class member's champion, both in the district court and on appeal.[3]

This case, moreover, presents the strongest possible circumstance for permitting an objector to appeal. Petitioner not only properly presented his objections, but the district court entered an *injunction* against Petitioner acting in contravention of its judgment approving the settlement. There cannot be any serious argument that his interests are not sufficiently affected by the proceedings in the district court to take an appeal. J.A. 174-77.

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[2] Indeed, the class representative's counsel would be disabled from acting on the objector's behalf. See, *e.g.*, Model Rule of Prof. Conduct 1.7(b).

[3] The decision invoked by respondents (*Guthrie* v. *Evans*, 815 F.2d 626 (CA11 1987), *quoted at* Resp. Br. 23) is inapposite precisely because it involved an appeal from a litigated judgment that had imposed a permanent injunction. Moreover, in *Guthrie*, the putative appellant had not participated in the district court proceedings from which he sought to appeal. See 815 F.2d at 627. Thus, whether described as a lack of appellate "standing" (*id.*), or as a failure to participate below, the essential problem in *Guthrie* was one of unfair surprise, and thus is akin to the ordinary prohibition against raising on appeal issues that have not been raised in the district court. See *supra*.

II. Class Action Objectors Are Parties To The Judgment And Thus Have The Right To Appeal To The Extent Of Their Objections.

A. Class Action Objectors Have The Right To Appeal As "Parties" Because They Are Bound By A Class Action Judgment.

1. Respondents do not seriously contest the section of petitioner's opening brief (at 16-24) demonstrating that, under this Court's precedents, the right to appeal extends to all parties "*to the judgment*" as opposed to merely "named" parties. Respondents correctly note (at 14-15) that certain provisions of the Federal Rules of Civil Procedure (those identifying the persons who may raise claims or take discovery) generally refer to "parties" as the named plaintiffs and defendants. But the Civil Rules are not determinative of what persons are "parties" for purposes of the right to appeal, as respondents essentially admit by acknowledging (at 22) the many classes of persons who are not named plaintiffs and defendants (and thus cannot state claims or take discovery in the district court) but may nonetheless appeal. See Resp. Br. 22 (discussing, *e.g.*, putative intervenors and sanctioned attorneys).

In any event, the Civil Rules equally assign "party" status to any person on whose behalf the named plaintiff or defendant acts. Rule 17(a) thus provides that persons such as an "executor, administrator, guardian, bailee [or] trustee * * * may sue in that person's own name without joining *the party* for whose benefit the action is brought" (emphasis added). In a class action, the named representative is (as Rule 23(a) provides) a "*representative* party" and must exercise her rights under the Civil Rules not just in her own personal interest, but also in the interest of all the class members, who are equally "parties" on that basis.

2. Respondents therefore principally press the argument that an objecting class member is not a "party" because he is

not bound directly by a class action judgment. This theory of class action judgments, even if accepted, would not change the outcome of this case. However one describes the *manner* in which class members are bound, there is no question that they are in fact bound. As a result, they have an *a fortiori* right to appeal under this Court's long-standing precedents recognizing the right to appeal of quasi-parties – *i.e.*, persons who have the right to appear in the case, do appear, and are directly affected by the judgment. See Pet. Br. 20-22.[4]

But in any event, respondents seriously misunderstand the effect of a class action judgment on the individual class members. Respondents emphasize, and this Court reiterated most recently in *Ortiz* v. *Fibreboard Corp.*, that there is a "due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" 527 U.S. 815, 846 (1999) (quoting *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940)). But respondents simply fail to understand the import of the fact that, as this Court has often repeated, class actions are "'an *exception* to the general

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[4] Respondents assert that, in some of the quasi-party cases, the appellant "intervened." But as the Solicitor General explained in his brief in *Felzen* (at 8 n.3), at the time the quasi-party cases were decided, the term "intervention" did not carry with it the same connotation of a formal appearance as a party for all purposes. Ultimately, the significance of the other quasi-party cases is not the *means* by which various individuals gained access to a case, but rather *the mere fact* that they had gained access and had a final decision rendered on their arguments so presented. Here, petitioner had access as a matter of right, not grace, made use of that access to present his objections, and had a final decision on those objections rendered by the court. He thus has as much a right to appellate review of such decision as do any other participants in a case, whether parties proper or quasi.

rule.'" *Id.* (quoting *Martin* v. *Wilks*, 490 U.S. 755, 762 n.2 (1989) (emphasis added)).[5]

As an "exception" to the general rule, class members are personally bound notwithstanding that they were not named parties in the district court. As *Ortiz* explains, in a class action judgment, "*[t]he legal rights of absent class members * * * are resolved* regardless either of their consent, or, in a class with objectors, their express wish to the contrary." 527 U.S. at 846 (emphasis added). The Court made the same point in *Matsushita Electrical Industries Co.* v. *Epstein*: "[A]ll members of the class, whether of a plaintiff or defendant class, *are bound by the judgment* entered in the action unless, in a Rule 23(b) action, they make a timely election for exclusion." 516 U.S. 367, 379 (1996) (quoting 2 NEWBERG, CLASS ACTIONS § 2755, at 1224 (1977), and citing *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984)).

Respondents err in their reliance (at 17-18) on this Court's determination in *Hansberry* v. *Lee* that a judgment is binding only to the extent that the class representative adequately represented the class members' interests. The relevant point is *Hansberry*'s confirmation that, unless and until there is a successful collateral attack, the class members are "*bound by the judgment*." 311 U.S. at 42. Moreover, *Hansberry* manifestly does *not* turn on any "fundamental *distinction* in the law of judgments" (Resp. Br. 19 (emphasis in original)) between class representatives, who are bound directly by a judgment, and class members, who (supposedly) are not. There is no such distinction. *Hansberry* merely applied the basic principle that any judgment, including a class action judgment, may not be enforced to the extent it was entered in

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[5] There is also a bitter irony in respondents' attempt to invoke the "day in court ideal" to conclude that a class action objector, unlike any other person whose interests are adjudicated in a case, may not have a day in an "appellate court."

violation of due process. Thus, "there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of *absent parties* who are to be bound by it." 311 U.S. at 42 (emphasis added).

The principle announced in *Hansberry* is not, contrary to respondents' argument, peculiar to unnamed class members. Instead, the Court in *Hansberry* relied on the holding of *Tumey* v. *Ohio*, 273 U.S. 510 (1927), that a plaintiff or defendant may not be deemed bound by the result in "a trial by a judicial officer who is in such situation that he may have an interest in the outcome of the litigation in conflict with that of the litigants." 311 U.S. at 45. That basic rule of due process applies to a class representative as well, such that a judgment entered against a named representative would be equally void, and equally subject to collateral attack, if entered without notice and an opportunity to be heard. See, *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) ("It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process." (citing *Hansberry*)); cf. *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 482 (1982) ("A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment.").[6]

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[6] Respondents' reliance on *Hansberry* is particularly surprising because of the natural parallel between that case – which was a successful challenge to a class action settlement approving a restrictive racial covenant – and this one. The *Hansberry* petitioners were unaware of the prior class action, and thus did not object or appeal but rather collaterally attacked the adequacy of the representative party. According to the respondents in this case, however, if the *Hansberry* petitioners had stated objections to the settlement in the prior case, and those objections had

Nor is there merit to respondents' position (at 16-17) that class members are not "parties to the judgment" because they are merely "privies" of the class representatives, or to their related argument (at 24) that, if class members have the right to appeal, then so must every other "privy" who will be bound as a matter of *res judicata*. Respondents completely misunderstand the one case they cite, *Richards* v. *Jefferson County*, 517 U.S. 793 (1996). *Richards* held that a judgment in a prior suit was not *res judicata* as to a suit later brought by different persons as a class action. The question of privity was whether the class was sufficiently in privity with the parties to the first suit, *not* whether the class members were in privity with the class representative.

Respondents latch on to *Richards*' statement that one need not necessarily have been "a party to a judgment in order to be bound by it," including "when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." 517 U.S. at 798. But *Richards* does not equate class members with privies. Rather, it discusses class actions in a separate paragraph, which avowedly sets forth "addition[al]" examples departing from the general rule, and which has nothing to do with privity. *Id.* (discussing not only class actions but also "special remedial scheme[s] * * * expressly foreclosing successive litigation by nonlitigants"). Any ambiguity on this score is resolved by *Hansberry* itself, which explained (311 U.S. at 38) that it was uncontested that the class members in that case were not in "privity" with the named parties, wholly apart from whether they might be bound by the class judgment.

The error in respondents' position is also evident from their immediate retreat from it. Thus, respondents themselves seem to recognize that class members are directly bound by a

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been rejected, they would have been *prohibited from appealing*. There is no warrant for immunizing trial court errors from review in that fashion.

class action judgment, but they rely on this Court's statement in *Martin* v. *Wilks* that the judgment is binding when a class member, "*although not a party*, has his interests adequately represented by someone with the same interests who is a party." 490 U.S. at 762 n.2 (emphasis in Resp. Br. at 17). They similarly invoke the statement in *Hansberry* v. *Lee* that the petitioners in that case "were not parties" to the contested state court judgment. *Wilks* and *Hansberry*, however, involved only the preclusive effect of a judgment on persons who were neither plaintiffs nor defendants in the prior suit, and the Court was accordingly not referring to a "party" in the sense of the right to appeal. The Court just as frequently referred to class members as "absent parties." See *Hansberry*, 311 U.S. at 42, 43, 44, 45; see also Pet. Br. 25-26 (detailing this Court's precedents describing class members as "parties" and "absent parties").

Finally, that petitioner correctly describes the preclusive effect of a class action judgment is readily apparent from the facts of this case, and from respondents' litigation of the case in the lower courts. The settlement agreement embodied in the district court's judgment fundamentally alters the rights and obligations of the respondent trustees with respect to each plan member, including petitioner. The judgment thus leads directly to a substantial reduction in petitioner's individual pension, precluding him from challenging respondents' modification of the plan's terms. On that very basis, respondents successfully secured an injunction prohibiting petitioner *in personam* from acting in contravention of the district court's judgment by litigating related issues in any other forum. See J.A. 174-77. Respondents totally fail to explain how, if they are now correct that petitioner is not bound by the settlement, the judgment in this case adjudicates petitioner's individual rights as the district court held.[7]

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[7] In Part I-C of their brief, respondents attack a straw-man, contending that it is not sufficient for a person merely to "object" to a settlement to

B. Class Members Are "Parties" For Purposes Of The Right To Appeal At The Point The Class Is Properly Certified.

Petitioner's opening brief explained that *Sosna* v. *Iowa* and its progeny hold that, at the point of certification, "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by [the class representative]," because that is the point at which "the decision will bind" all the class members. 419 U.S. 393, 399 & n.9 (1975). *Sosna* thus held that when the class representative's claims become on moot on appeal, the appeal need not be dismissed because a continuing case or controversy exists as to the individual class members, who are equally bound by the judgment. See also Pet. Br. 26-27 (discussing *Sosna*'s progeny). By parity of logic, a member of a certified class is a "party" who can appeal in his own right.

Respondents' answer (at 20-21) is to contend that *Sosna* actually held that, upon certification, the "class" as an *entity* – as opposed to its individual constituent members – has an interest in the judgment. But respondents simply confuse the question whether all the members of the class are bound with the separate question, at issue in *Sosna*, whether the individual class members are bound by the judgment and thus raise a sufficient case or controversy to present the case from becoming moot. Thus, in a class action, only the individual class members (as opposed to the aggregated entity) can have an Article III case or controversy. In turn, "classes" don't appeal; individuals do. Respondents' argument is just an

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have the right to appeal. Petitioner's position is not that an objection is a *sufficient* condition to "party" status, but that it is a *necessary* condition. The objection must be stated by a class member who is, as just explained, bound by the judgment. Respondents' reliance on *Marino* v. *Ortiz*, 484 U.S. 301 (1988) (per curiam), is thus misplaced because, as even the majority below acknowledged, the putative appellants in that case were not members of the class. See Pet. Br. 19-20; Pet. App. a n. .

attempt to undo this Court's repeated holding (see *supra*) that a class action judgment binds each class member individually.

Respondents' description of *Sosna* is thus wrong. *Sosna* explained that the significance of certification was that "all *persons*" in the class would be bound (419 U.S. at 399 n.9 (emphasis added)), and the Court held there was an ongoing controversy because "it is clear that [the appellees] will enforce [the challenged statute] against those *persons* in the class that appellant sought to represent and that the District Court certified" (*id.* at 400 (emphasis added)). The Court then articulated its rule as follows: "The controversy may exist * * * between a named defendant and *a member of the class* represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Id.* at 402 (emphasis added). See also *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 397-98 (1980) (specifically relying on this statement of *Sosna*'s holding). Subsequently, in *Franks* v. *Bowman*, 424 U.S. 747, 756 (1976), this Court applied *Sosna* to hold that an appeal in a Title VII class action was not moot because the appellant class representative could pursue the interests of "[t]he unnamed members of the class involved [who] are *identifiable individuals*, *individually named* in the record" (emphasis added).[8]

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[8] Respondents' further reliance on *Kremens* v. *Bartley*, 431 U.S. 119 (1977), is similarly mistaken. Respondents quote *Kremens* for the proposition that, to avoid mootness, there must be a "proper 'substitution of class representatives with live claims'" (Resp. Br. at 21 (quoting 431 U.S. at 135)), but they omit any mention of the context of that decision. *Kremens* did not overrule *Sosna* and *Franks*, *supra*. Rather, intervening developments in *Kremens* had squarely called the class certification into question, such that it was unclear which individuals actually remained bound by the judgment. In that circumstance, the Court required not merely "substitution" but also "reconsideration of the class definition." 431 U.S. at 134. As the Court explained, but respondents ignore, "The factors which we have just described make the class aspect of this litigation a far cry indeed from that aspect of the litigation in *Sosna* and in *Franks*, where we adjudicated the merits of the class claims

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Because class action objectors are "parties" to the judgment, they have the right to appeal without intervening in the case. For the reasons described *infra*, a more formal intervention requirement is unwarranted.

III. Petitioner Prevails Under A "Pro Forma" Intervention Requirement, Although Such A Requirement Is Unwarranted.

The government argues (at 18-21), and respondents basically acknowledge (at 30), that this Court should adopt the Seventh Circuit's rule that an objector's right to appeal should be contingent on the objector filing a motion to intervene, which the district judge should grant essentially as a matter of course. The government thus asserts (at 21) that a class member who seeks to intervene generally "will satisfy Rule 24(a)'s interest, timeliness, and inadequate representation requirements, and, thus, be entitled to intervene for that limited purpose." According to the government (at 24), the objector need not show that he is an adequate representative for any other member of the class but only "that his own interests will not be fairly represented *on appeal*, a showing that in most cases may be made simply by pointing to the class representative's interest in foregoing an appeal" (emphasis in original). Intervention should be allowed in those circumstances, it maintains, because objectors "belong to the settlement class and will be bound by the judgment" (*id.* at 21), and because "inadequate representation will invariably be present when a class member seeks to appeal approval of a class action settlement over his objection" (*id.* at 23).

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notwithstanding the mootness of the claims of the named parties." *Id.* at 131.

Although petitioner would be entitled to appeal on the government's approach, this Court should reject this invitation to create what amounts to no more than a procedural hurdle to appeals by objectors. Furthermore, to the extent this argument contemplates that district courts would screen objectors' appeals, it lacks any foundation in the Rules of Civil Procedure or the experience of the federal courts.

A. Petitioner Has Properly Presented And Preserved The Argument That He Would Prevail Under A *Pro Forma* Intervention Rule.

It is undisputed that petitioner moved to intervene in this case pursuant to Rule 24 as soon as respondents proposed their settlement. The government and respondents nonetheless argue that, if this Court were to adopt a *pro forma* intervention requirement, the judgment in this case should be affirmed. The Solicitor General presses two arguments (only one of which is joined by respondents), both of which are meritless.

First, the government (at 29) and respondents (at 34) contend that the Question Presented does not encompass the Seventh Circuit's standard. But the *pro forma* intervention rule is not only "fairly encompassed" by the Question Presented in the Petition for Certiorari, it is *explicitly* encompassed by it. The question asks: "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" (emphasis added).

Respondent could not be more wrong in stating (at 35) that "the *certiorari* petition contained *no* argument, or so much as an intimation, that adequate grounds existed for a grant of *certiorari*" on this issue (emphasis in original). The Petition specifically argues that certiorari should be granted because the Fourth Circuit's decision conflicts with the

Seventh Circuit's rule. The Petition states in the introduction (at 2): "petitioner would have been allowed to appeal in the Seventh Circuit." The Reasons for Granting the Writ section then devotes an *entire page* to the issue, explaining, for example: "The Seventh Circuit would permit petitioner to appeal as well, although on a different basis. That court would hold that, although petitioner does not have standing to appeal as an objector, he does have standing to appeal as an *intervenor*" (emphasis in original). The certiorari Reply Brief (at 8) returned to this precise issue, explaining that petitioner would prevail under the Seventh Circuit's standard and that "the relevant point here is that the Fourth Circuit *rejected* the Seventh Circuit's approach – it held that petitioner could not appeal notwithstanding that he had sought to intervene well before the district court approved the settlement" (emphasis in original).

The Solicitor General's contrary position that the Question Presented does not encompass this issue is impossibly confusing, for he repeatedly demonstrates that he does not believe his own argument. The government's brief (at i) restates the Question Presented as "[w]hether, or in what circumstances, a non-named class member who objects to a class action settlement may appeal a district court judgment approving the settlement." See also *id.* at 9 (same); S. Ct. R. 24.1(a) ("The phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents.").

Second, the government contends (at 28) that petitioner did not specifically invoke, and the Fourth Circuit did not specifically reject, the Seventh Circuit's rule in those terms in the proceedings below. To put it charitably, this is nitpicking. Petitioner argued in the Fourth Circuit that he was entitled to appeal either as an intervenor or as an objector, and the court of appeals' entire opinion is devoted to rejecting those

arguments. If nothing else, the Fourth Circuit "passed upon" this issue when it held (Pet. App. A12-A13, A21-A24) that class members generally may *not* intervene once the settlement is proposed because they will interfere with the class representative's administration of the case. Even *respondents* admit (at 34) that the issue was sufficiently resolved below. And, once again, the Solicitor General contradicts himself: if the government really believed that the *pro forma* intervention rule was not passed upon below, it could not ask this Court to adopt it. "This Court's practice is to 'deal with the case as it came here and affirm or reverse based on the ground relied on below.'" S.G. Br. 28 (quoting *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988)).[9]

Finally, it bears emphasizing both that the district court *did* believe that petitioner had satisfied any "screening" criteria that might constrain an objector's right to appeal, and furthermore that respondents consciously led the district court to conclude that petitioner could appeal without intervening. As petitioner's opening brief detailed and respondents notably do not contest, respondents not only *categorically* took the position that it was unnecessary for petitioner to formally intervene to protect his interests, but furthermore secured approval from the district court of a class notice that explicitly contemplated objector appeals. Pet. Br. 6-7. The district court, in turn, rejected petitioner's objections, but stated on

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[9] The government's passing suggestion (at 27, 29) that petitioner's merits brief does not sufficiently present this issue is inexplicable. As even respondents acknowledge (at 33), an entire *section* of petitioner's merits brief (Part IV, at 41-43) is devoted to it. The government's further suggestion (at 28) that petitioner did not properly raise this issue in the district court because "he sought to intervene *not only* to move to oppose the preliminary approval of the settlement, but also to take discovery, secure an injunction, and disqualify class counsel" (emphasis added) contradicts its own proposal (at 14) that objectors should move to intervene and the district court should enter an order under Fed. R. Civ. P. 23(d)(3 that permits them to intervene but then "condition[]"their participation to appealing.

the record that, "if I'm wrong, you got an appeal." J.A. 154. Later, the district court reiterated: "I am perfectly clear that my order approving the class settlement should be appealed, should be reviewed by the Fourth Circuit in due course." C.A. Supp. App. 1240. Respondents are judicially estopped from taking the contrary position in this Court. See *New Hampshire* v. *Maine*, 532 U.S. 742 (2001); *Pegram* v. *Herdich*, 530 U.S. 211, 228 n.8 (2000).[10]

B. A *Pro Forma* Intervention Requirement Is Unwarranted.

In the *Felzen* case, the Solicitor General, on behalf of the S.E.C., argued that this Court's quasi-party precedents firmly established the right of objectors to appeal without intervention, and advised this Court:

> [T]he standards for objecting under Rule 23.1 *are different* from intervention under Rule 24, and it was precisely that point that the [court in the leading case of *Cohen* v. *Young*, 127 F.2d 721 (CA6 1942)] recognized in ruling that an objecting shareholder had a limited right to appeal without demonstrating that the standards for intervention had been satisfied.
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> * * * *
>
> The court of appeals [in *Felzen*] concluded that if the objecting shareholders wished to appeal, they must first intervene as parties. As a practical matter, that conclusion imposes *an unnecessary requirement*. By appealing the district court's approval of the settlement, the objecting shareholders are merely seeking to persuade the court of appeals that the

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[10] Respondents are similarly estopped from asserting their newfound position (at 30) that the class representatives did not provide adequate representation once the settlement was proposed. They strenuously, and successfully, pressed the opposite position below. See J.A. 84-86; Resp. C.A. Br. 41-42.

> district court erred in rejecting the arguments they were required to make if they hoped to avert the imposition of a binding judgment adverse to their interests. Requiring intervention as a party for the purpose of making an appearance in the court of appeals threatens to interpose an *unwarranted obstacle* to what historically has been an essentially automatic right that comparably situated quasi parties have had to pursue their appeals.

Gov't Br. at 24.

With barely a side-long glance at those unambiguous arguments (Br. at 27 n.27), the Solicitor General now takes the opposite view.[11] The government says its new position is the result of "further consideration" (*id.*) but the real reason is transparent. In *Felzen*, the Solicitor General spoke on behalf of the S.E.C. as a regulating entity. Because the decision in this case will apply to all civil litigation, the Solicitor General now advances the government's interest *as a class action defendant* as "a named party in numerous class actions brought under Federal Rule of Civil Procedure 23" (Br. 1) because the decision in this case will apply to all civil litigation. With respect, petitioner submits that the views expressed by the government's *Felzen* brief, which were unadorned with its own litigating self-interest, are more well founded.

The government, unable to find any statutory basis for arguing that class members who are already "parties to the suit" (*American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538,

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[11] The government notes (at 27 n.13) that, in a footnote in its *Felzen* brief, it referred to "a settlement that has yet to be proposed or accepted." But its position in *Felzen* was not limited to intervention prior to the submission of a settlement. Indeed, the case cited by the government in that footnote – *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538 (1974) – stands squarely for the proposition that unwarranted intervention requirements should not be imposed because they simply result in unnecessary collateral litigation.

550 (1974)) must nevertheless intervene, latches on to the 1966 amendments to Rules 23 and 24, which it claims (at 14) "establish intervention as the mechanism by which non-named class members may enter the action when necessary to protect their interests * * *, including with respect to appeals." Not so. Rule 24 does not mention Rule 23 class actions, let alone suggest that class action settlements may be appealed only by a Rule 24 intervenor. For its part, Rule 23 mentions intervention only with respect to class members who may wish "to intervene *and present claims and defenses*." Fed. R. Civ. P. 23(d)(2) (emphasis added). As explained in petitioner's opening brief, that is the principal purpose of Rule 24 intervention: to allow interested persons to litigate claims and defenses that they believe are not being adequately advanced by the named litigants. Objectors such as petitioner seek no such right.[12]

After claiming (at) that the "Federal Rules" "[s]pecify" intervention as the avenue for appeal, the government relies *not* on the text of the Rule itself, but rather on two snippets from the 1966 Advisory Committee Notes, neither of which have anything to do with the question presented here. The Note to Rule 23(d)(2) – a Rule which concerns supplemental forms of court-ordered notice to the class – states that a class action notice may "encourage interventions to improve the representation *of the class*" (emphasis added). Like the Rule itself, that statement in the Note plainly pertains to intervenors who (unlike objectors such as petitioner) wish to *litigate* the underlying action as *representative parties*, and

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[12] Seeking to fit within the scheme of Rule 24, the Solicitor General states (at) that the objector's motion to intervene should include "notice pleading stating his claims or defenses" as required by Rule 24(c). However, an objector is not pursuing "claims or defenses" different from the other class members, but instead seeks only to defeat the class settlement, which simply underscores that the Rule's drafters did not contemplate Rule 24 intervention as procedural prerequisite for objector appeals.

thus the purpose of intervention is to allow a class member to take over the litigation. The same is true of the Note to Rule 24(a)(2), which provides that intervention is appropriate when a trust beneficiary can show that the current trustee is an inadequate representative, and that "similarly a member of a class should have the right to intervene in a class action if he can show the inadequacy of representation of his interest by the representative parties before the court."[13]

Without any support in (or even citation to) the text of Rules 23 or 24, the government turns to case law, which it claims supports the proposition that class members who object to an settlement must intervene to continue their objections in the court of appeals, relying chiefly (at 17) on *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977). In that case, the district court had denied class certification in a Title VII gender discrimination action. As a result of that ruling, the non-named plaintiffs were *not* parties to the action and would *not* be bound by any subsequent judgment of the court. See *supra* at [redacted]. Thus, at that juncture, intervention was the only means for the unnamed class members to participate further in the litigation (if the class representatives did not take further action), because their legal interests had been formally excluded from the litigation. The sole question before this Court was whether a member of the uncertified class, who sought to intervene after judgment to appeal the district court's denial of certification, was a timely intervenor,

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[13] Moreover, if intervention were the method contemplated by the drafters for class members to challenge a class settlement on appeal, that would effectively reduce the merits of the class settlement to one issue – adequacy of representation. See Fed. R. Civ. P. 23(a)(4), 24(a)(2). However, there are many other legitimate bases for overturning a class settlement or its fees component on appeal. See, *e.g.*, *In re General Motors Corp. Pick-up Truck Fuel Tank Litig.*, 55 F.3d 768 (CA3), *cert. denied*, 516 U.S. 824 (1995) (settlement's benefits not fair exchange for release of class members' claims); *Bowling* v. *Pfizer, Inc.*, 132 F.3d 1147 (CA6 1998) (excessive attorney's fees).

and the Court held that she was. Petitioner's situation is exactly opposite to that of the putative appellant in *United Airlines*: Rather than being ousted from the litigation, the district court's decisions in this case certifying the class and approving the class settlement confirmed petitioner's party status and that he would be bound by the judgment just as assuredly as would the named plaintiffs. Thus, intervention would be redundant; it would merely corroborate a status that petitioner had already attained.

Just as important, no provision of the Rules permits a district court to undertake, as the government proposes (at 28), to choose between potential objector appellants or otherwise screen out objectors. Rule 24 permits intervention; once granted, the intervenor has a categorical right to appeal. Rule 23(d), on which the Solicitor General relies, lists a number of devices the district judge may do to manage class actions, but all of them relate to the district court proceedings, and none of them *approach* forbidding a class member from appealing. And the government's proposed approach to intervention invites the pernicious possibility that the objector "chosen" by the district court will not advance certain arguments favored by those objectors who were "rejected" by the district court, or worse still, will settle or voluntarily dismiss the appeal (see Fed. R. App. P. 42; *Duhaime* v. *John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (CA1 1999), *cited in* U.S. Br. 28 n.12), leaving the non-appealing objectors subject to a settlement that they regard as unfair or unlawful, and which they were denied the opportunity to appeal.

Moreover, the examples given by the government as a basis for interposing the district court as appellate gatekeeper make no sense. Each posits a situation in which the objector does not have standing to challenge the settlement *even in the district court*, such as when the objector is not, in fact, a class member or is not entitled to settlement relief. If the defect in the objector's standing can be discerned at all, it will have already become apparent during the course of the Rule 23(e)

fairness hearing process. Any dispute over the objector's status will be resolved at that earlier stage, not in the context of a motion to intervene for the purpose of appeal. The government's supposed concerns rest on a view of class action litigation that is totally imagined. Thus, the Solicitor General does not (because he cannot) cite a single case suggesting either that any of his concerns *ever* arise in practice, or that intervention for the purpose of appeal is an appropriate procedure for addressing those concerns. Nor does he cite a single court that has ever, in the history of the Federal Rules, adopted his proposal; petitioner is aware of none.[14]

The government claims that its intervention requirement would not pose a burden on objectors because the motion would be a formulaic request based on the objector's obvious interest in taking an appeal from a settlement that the named plaintiffs favor. But, as the Solicitor General pointedly argued in *Felzen* (at 24), intervention is nothing more than an "unnecessary requirement." The government (now in its role as a litigating defendant) ignores the burdens imposed by the intervention requirement on objectors, on the district court (which must adjudicate the motions), and on the courts of appeals (because objectors will likely challenge a denial of intervention on appeal). The government's position, like the respondents', also ignores the fact that objectors are often *pro se* and will have no idea that they are expected to seek intervention to preserve their appellate rights.[15]

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[14] As noted *supra*, the Seventh Circuit deems the intervention requirement entirely *pro forma*; the district court has no role in screening objectors' motions to intervene, and certainly does not pick *which* objectors have a right to appeal or use intervention as a tool to determine class membership and the like, as the government now suggests.

[15] The Eleventh Circuit in *Guthrie* v. *Evans*, upon which both respondents and the government rely, also supported its intervention requirement by stating that collateral attack – the filing of a separate, post-judgment lawsuit attacking the validity of the settlement – is a better

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit should be reversed.

Respectfully submitted,

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alternative to appeal. 815 F.2d 626, 628 (1987). But that approach is unfair to class members and undermines the interests of the litigants and the courts in finality. As explained *supra*, an absent class member would be entitled to collaterally attack a judgment approving a class action settlement when due process was the basis for the attack, but would *not* be able to challenge the fairness of the settlement or other legal impediments that generally can be contested on direct review. That being the case, a collateral attack is a poor substitute for a direct appeal that can protect all of the absentees' legal interests. See generally Marcel Kahan & Linda Silberman, *The Inadequate Search for 'Adequacy' in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. Rev. 765, 780 & n.69 (1998) (hailing superiority of comprehensive direct review over collateral attack and criticizing intervention requirement as potential impediment to appellate review). Moreover, regardless of the scope of collateral attack, it is generally preferable to have challenges to a class action settlement heard in the original forum, with direct appellate review, rather than to encourage each class member to file a separate suit, in a distant forum, challenging the *res judicata* effect of a previously entered class action judgment.

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