No. 05-1275

IN THE

Supreme Court of the United States

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

Petitioners,

v.

UNION BANK OF SWITZERLAND, *ET AL.*,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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

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

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

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

Counsel for Petitioners

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Respondents' Brief in Opposition (BIO) does not seriously dispute the requirements, as set forth by this Court and multiple courts of appeals, of intraclass equity, consideration for all class members relinquishing their claims, adequate information to decide whether to stay in or opt out, and adequate representation for all classes and subclasses by non-conflicted counsel. Nor does the BIO meaningfully dispute that the *cy pres* distribution scheme below fails to satisfy those requirements. Instead, it argues that this historic settlement is so unique that it should be exempt from traditional Rule 23 and due process requirements. But *especially* in an historic case such as this, there is a particular need for scrupulous application of this Court's established precedents, making certiorari here a valuable use of this Court's resources.

STANDING AND APPELLATE JURISDICTION

Respondents make several procedural arguments to create the illusion of a jurisdictional bar to Supreme Court review, based on alleged "standing" deficiencies and "untimeliness."

A. Petitioners Have Standing.

As Respondents now acknowledge and the Second Circuit held, Petitioner G.K., a Holocaust Survivor and class member, has standing. *See* BIO 1 n. 1; Pet. App. A23 n. 13. Her individual standing makes it unnecessary even to consider whether other Petitioners have standing, as the Second Circuit recognized in proceededing to the merits. *Id.*

To the extent Respondents attempt a further roadblock by attacking other Petitioners' standing, the argument that any Looted Assets Class member lacks standing to appeal is frivolous under *Devlin v. Scardeletti*, 536 U.S. 1 (2002). [1]

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[1] For example, Petitioner Leo Rechter, who appealed both individually and as President of the National Association of Jewish Holocaust Survivors (NAHOS, based in New York City), is a Looted Assets Class member whose family perished at the hands of the Nazis. [JA 7319-7326.]

The organizational Petitioners, represented in the Petition by their class-member officers and/or in their own name, are membership groups of Survivors (as their names make clear), and they likewise have standing given that their members are class members with standing, their purposes include securing proper restitution of stolen assets for their members, and the resolution of the allocation objections does not require individual members' participation. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). Petitioner Holocaust Survivors Foundation-USA, Inc. (HSF) is an umbrella organization whose members include individual Survivors and Survivor groups including those listed as Petitioners (and others). HSF has standing to the same extent as the individual Survivors and groups of which it is formed.[2]

B. This Appeal Was Timely and the Second Circuit Had Appellate Jurisdiction.

Equally without merit is Respondents' argument that the "need-based" distribution scheme challenged in the supplemental distributions was finally determined by the district court's initial allocation order of November 22, 2000, rendering this appeal from the subsequent order adopting that scheme for additional allocations untimely. BIO 2 n. 1.

First, contrary to Respondents' claims, BIO 5, 14-15, the Second Circuit did not previously uphold the *cy pres* distribution formula against the challenges raised by this Petition. Rather, the Second Circuit's 2001 opinion, Pet. App. D, only approved the use of *cy pres in general*, not the specific use of "need" as a factor or the flawed procedures leading up to that distribution scheme. *See* Pet. App. D3-D4.

Second, the distribution of each supplemental allocation of funds is a separate transaction that must be independently

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[2] HSF is a Delaware not for profit corporation approved under Section 501c3 of the Internal Revenue Code. Rechter Affidavit, at 4 and Exhs. 3-5. [JA 7322, 7347-68.] HSF member organizations include over forty groups from throughout the United States. [JA 7322-23, 7373-75].

justified and subject to independent objection and review. The Special Master's Report called for future allocations to be independently justified. *See* Special Master's Proposed Plan of Allocation and Distribution, September 11, 2000, at 136-37. [JA 807-08.] The District Court adopted the Special Master's recommendations in its November 22, 2000 order. Pet. App. C.[3] In fact, Respondents' claim that the Cross-Petition is unripe as to future allocations, Cross-BIO 12, flatly contradicts their claim in the initial BIO that subsequent allocation decisions such as the ones challenged here were predetermined by the initial allocation decision.

Because Petitioners correctly and timely appealed from the March 9, 2004 decision denying their Rule 59 motions, making the September 2002 and October 2003 allocation orders final, the Second Circuit had appellate jurisdiction.

REASONS FOR GRANTING THE WRIT

I. THE ISSUES PRESENTED ARE OF NATIONAL IMPORTANCE.

Rather than disputing the obvious national significance of this case, Respondents take the erroneous position that it is so "unique" it is simultaneously not constrained by prior precedents and not worthy of this Court's attention. BIO 16.

The *only* truly unique aspect of this case is that Petitioners are the victims of history's greatest crime against humanity – the Holocaust. For Respondents to argue that *Holocaust Survivors* have *less* protection under the Constitution and Federal

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[3] *See also* Brief Opposing the Holocaust Survivors Foundation USA, Inc.'s Opposition to the District Court's Allocation of the Settlement Fund, (Neuborne CA2 Brief), at 36 ("In connection with the subsequent application of the formula to interest earned on the settlement fund on September 25, 2002 and November 17, 2003, Chief Judge Korman invited and considered objections from interested persons, including Mr. Dubbin and HSF."); *id.*, at 26, 29-30 ("Special Master has carefully left open the prospect of an alteration in the allocation formula.").

Rules of Civil Procedure than would victims of securities fraud, antitrust violations, or consumer scams, is untenable.

Further, Respondents' attempt, BIO 11 & n. 8, to downplay the significance of the Petition by claiming that there will be "little or no residual funds" from the Deposited Assets fund to supplement the Looted Assets fund is another disingenuous diversion. To begin with, the $105 million supplemental allocations that are the immediate subject of this Petition are significant enough, standing alone, to warrant review, even if they are the last funds to be distributed.

And, despite Respondents' claims to the contrary, there is a substantial likelihood that more funds will be allocated to the Looted Assets Class in the future. Respondents' own exhibits demonstrate that there is an additional $425 million available for re-distribution to the Looted Assets Class, excluding interest. BIO App. M. Respondents' latest claim, Cross-BIO 5-6, that those excess funds will simply be given to members of the Deposited Assets Class who were *already* paid by re-valuing their claims upwards is speculative at best. The recommendation for such a sudden transparent scheme to burn through assets that would otherwise be allocated to the Looted Assets Class has not been accepted by the court, is subject to challenge in any event, and would exacerbate the due process concerns of the inadequate representation by Lead Counsel. The prospect of this Petition having substantial future effects, in addition to its substantial current impact, thus heightens the importance of granting certiorari.

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

Respondents would side-step Petitioners'Rule 23 and due process claims by arguing that none of this Court's and other circuits' conflicting decisions Petitioner cites involved class settlements distributed "based on need." *See, e.g.*, BIO i, 1. Such a tautological exercise hardly justifies the decision be-

low. The very questions presented by this Petition concern whether *need* is a permissible excuse for avoiding the intra-class equity and consideration principles set forth by this Court and numerous other courts. Pet.15-20.

The Looted Assets Class settlement fund is not a pool of money to be used for charitable purposes at the discretion of the district court, but rather is partial compensation for the looted and laundered *property* of all class members. Distribution based on current "relative need" unrelated to plaintiffs' legal claims is an important issue for this Court to resolve because it has potential applicability to *cy pres* distributions of virtually any class settlement, and is in conflict with well-established intraclass equity and consideration requirements.

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

Respondents' circular argument that Petitioners cite no cases involving a *cy pres* distribution to the neediest members of a class simply begs the question. It also ignores the *cy pres* cases cited by Petitioner that forbid distributions benefiting only some class members and not others where the basis for class-members' claims are the same, *regardless* of which alternative and unrelated criteria are used to create the inequality. *See* Pet.17-18 (citing *cy pres* cases).

Respondents further argue that Petitioners "agreed" that the Looted Assets Class funds "should be distributed *cy pres* to the neediest class members." BIO 2, 21. But Petitioners *never* accepted that the Looted-Assets allocations were to be distributed to the "poorest" class members. *See* HSF Reply Brief in Appeal No. 04-1899, at 13-14 (record "confirms that the U.S. Survivors always asserted that *all* members of the Looted Assets Class have the same rights to recover and benefit from those funds. [Citations to Record]").

To be perfectly clear, it is and has been Petitioners' position that distribution of funds based on current need, unrelated to the claims being resolved, is unlawful. Period. Pet. i, 10,

14-15, 26-27. Petitioners do not endorse current need as a distribution criterion, whether applied across or within national boundaries.[4] They proposed various solutions such as having state insurance commissioners use settlement proceeds to fund an insurance policy that would be available to *all* survivors, not just the needy. Petitioners' position was and remains that the funds belong equally to all Looted Assets Class members. [JA 6571-74, 7263].

As only 4% of the Looted Assets funds were distributed for class members in the U.S., where 20% of the world's Holocaust Survivors and 30% of all Looted-Assets-Class members reside, the inequality of that distribution is obvious.[5]

B. This Court and Other Circuit Courts Forbid Settlements that Deny Class Members Consideration.

Respondent makes no effort to dispute that most class members in the U.S. will receive no consideration at all for the release of their Looted Assets claims. They candidly admit that once "relative need" became the sole criterion for distributing funds, it became "inevitable that most members of the looted assets class as a whole would not receive tangible benefits from the fund." BIO 21. It is not disputed, then, that the cases the Petition cites at 18-20 conflict with the decision below and support certiorari.

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[4] Any consideration of need by HSF went to the *timing* of distribution, not legal entitlement or total amount. Indeed, at the district court's and lead counsel's urging, U.S. Survivors withdrew their appeals of the initial allocation so as not to delay distribution of the shares for Eastern Europeans with urgent needs. [JA 7262-63.] But they did so on the understanding that the remainder of the class members who initially received considerably less than their proper share, including the U.S., would be brought back to parity with the proceeds from the next allocations.

[5] Respondents wrongly accuse Petitioners of claiming that "30% of all Holocaust survivors" reside in the U.S., BIO 17. The Petition accurately states that 30% of *class members* (including heirs) reside in the U.S. and that 20% of living *survivors* reside in the U.S. Pet. 8.

C. Distribution According to Class Members' Current Residence Would Benefit the Class as a Whole.

Contrary to the Second Circuit's and Respondents' suggestion, BIO 3 (quoting Second Circuit), Petitioners do not seek to benefit only a "'small group of needy survivors within a large nationwide survivor population,'" but rather seek an *equal* benefit for *all* class members, including those in the U.S. Under Petitioners' proposal for distributing Looted Assets Class funds according to the Survivors' current residence, the *entire class* or the *class as a whole* would have a greater opportunity to share in the settlement benefits.

III. THE PROCEDURES VIOLATED RULE 23 AND THE CONSTITUTION.

Despite the Second Circuit's approval of the procedures employed below, they conflict with established Supreme Court and circuit court precedents. As explained in the Petition, at 22-24, the bifurcated process denied class members the information needed to make an informed opt-out decision and then denied them any recovery after the opt-out deadline had passed. And, Lead Settlement Counsel's decision to redefine himself as counsel to the district court and the special master, thus abandoning his required loyalty to all class members, including those in the U.S., denied Petitioners adequate representation. Pet.24-29.

Respondents' claims of direct estoppel, issue preclusion, and laches, BIO 22, do not bar the claims here because the supplemental $105 million in allocations being challenged presented discrete causes of action from the initial allocation decision. *See supra* at 3-4. *Federated Department Store v. Moitie*, 452 U.S. 394 (1981), thus is not applicable here as that case involved the same cause of action, not a new one. The more apt authority is *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), where this Court held that *res judicata* does not bar a subsequent action based on different facts even if it arises out of the same course of conduct.

"That both suits involved 'essentially the same course of wrongful conduct' is not decisive. Such a course of conduct – for example – an abatable nuisance – may frequently give rise to more than a single cause of action." *Id.*, at 328. The subsequent allocations of funds appealed here were not part of the initial settlement and final approval order and are no different than the successive claims this Court in *Lawlor* held were not barred by *res judicata* or collateral estoppel.[6]

The obvious reason neither the opt-out issue nor the inadequate representation issue was pursued in the 2001 appeal was because Lead Plaintiffs Settlement Counsel agreed, in writing, to support increased funding for Survivors in the United States when additional funds became available "with due regard for the fact that they had not received significant allocations up to [that] point." [JA 7284-85.] The appeals were withdrawn as a result of Lead Counsel's commitment. [JA 7044, 7322-23, 7262, 7450-54, 7854-58.]. Petitioners had every right to believe their objectives would be achieved without the need to pursue their appeals.[7]

Respondents' laches argument, BIO 23, also misses the mark. This case does not have any effect on prior distributions for which no objections were preserved or timely ap-

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[6] Even if the subsequent allocations were not separate transactions, *res judicata* would be defeated by the inadequate representation below. Pet. 24-29. As Justice Harlan observed: "The judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation." *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 691 (1961); *see also Stephenson v. Dow Chemical Co*, 273 F.3d 249, 260 (CA2 2001) ("Res judicata generally applies to bind absent class members except where to do so would violate due process. * * * Due process requires adequate representation 'at all times' throughout the litigation, notice 'reasonably calculated * * * to apprise interested parties of the pendency of the action,' and an opportunity to opt out."), *aff'd in relevant part*, 539 U.S. 111 (2003).

[7] Because none of the issues here were actually litigated and decided in the previously dismissed appeal, they cannot constitute collateral estoppel either. *Lawlor*, 349 U.S. at 867-68.

pealed. There is thus no possibility of undoing anything that has come before in any of the *other* classes. The only matters at stake now are the timely challenged supplemental allocations and any future allocations to the Looted-Assets Class.

Respondents argue that separate representation for each class would have been "economically wasteful" and "socially ruinous." However, there is no such exception under Rule 23, *Amchem*, and *Ortiz,* to the adequate representation requirement. This Court has held that due process requires adequate representation "at all times" throughout the proceedings. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("the Due Process Clause of course requires that the named plaintiff *at all times* adequately represent the interests of the absent class members") (emphasis added).

Respondents also contend that Lead Counsel's loyalty to the special master and the court, as opposed to the Class, does not constitute a conflict under *Amchem.* This argument only sharpens the need for certiorari review by this Court. According to class action scholar Linda Mullenix, courts are in need of guidance from this Court as to the parameters of the conflicts proscribed in *Amchem* and *Ortiz*. Linda Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1743 (2004) ("[C]ourts need to develop more consistent jurisprudence concerning conflicts of interest that serve to disable a proposed class counsel or class representative from representing the class."). The dispute over whether Lead Settlement Counsel was conflicted here is precisely the type of uncertainty regarding adequacy of representation requiring resolution by this Court.

Finally, Respondents' repeated attempts, BIO 27-29, to distract from the gravity of the Petition by maligning the Survivors who have petitioned and the thousands of U.S. Holocaust Survivors they represent, as well as their counsel of re-

cord, are both inaccurate and irrelevant.[8] In contrast to Respondents' improper attacks on Petitioners and their counsel, Petitioners' citation to Lead Counsel's inadequate representation and misleading claims to *pro bono* status *are* relevant to the procedural questions raised in the petition. Pet. 27-30, and n. 17.[9]

CONCLUSION

This case is important given the historic nature of the claims, the magnitude of money involved, and the recurring significance of the legal questions and conflicts it presents. Moreover, this case will reflect profoundly upon the American court system's ability faithfully to apply the law to a case of such historic and moral importance. This case is eminently worthy of this Court's review.

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

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[8] Petitioners' counsel will not take Respondents' bait and engage on the spurious attempts to impugn him and his Survivor clients. Petitioners note, however, that prior to the district court's March 9, 2004 Order denying the U.S. Survivors' objections to the supplemental allocations, Respondents' counsel and the district court viewed Petitioners' counsel as playing a constructive role in the case. *See* Letter from B. Neuborne to S. Dubbin, May 15, 2001 (committing to support increased future allocations to U.S. Survivors and praising efforts of Dr. Weiss) [JA 7284-85]; Neuborne Declaration in Support of Fee Request, July 21, 2003 (noting that Mr. Dubbin's insurance objections materially benefited the class). [JA 6861-63]. The subsequent and current attacks are thus best viewed as retaliation, not as meaningful reflections of reality.

[9] The fact that Judge Korman has now recused himself from Mr. Neuborne's fee request seems to *confirm* the conflict raised by Petitioners yet hardly *cures* that conflict as it affected Lead Counsel's *prior* behavior.

Respectfully submitted,

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

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

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

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

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