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No. 93-

IN THE

Supreme Court of the United States

October Term, 1993

SHIRLEY IVY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DONALD IVY, DECEASED; CHARLES JARDON AND TONY K. JARDON, INDIVIDUALLY AND AS NEXT FRIEND OF CHARLES JARDON, JR.; ROBIN JARDON, WARREN JARDON AND SHARON JARDON; SHIRLEY ZALEWASKI, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF YEN ZALEWASKI, DECEASED; GARY THOMAS; MARY LEE THOMAS; JAMES L. KENT; EMMA I. KENT; DAWN MARIE INMAN, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF BOBBY JOE INMAN, DECEASED; JAMES DONALD DELOATCH; JOYCE DELOATCH; URSULA MARGOT PARRY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JAMES D. PARRY, SR., DECEASED; JAMES D. PARRY, JR.; JAMES CHRISTOPHER PARRY,

Petitioners,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY; DOW CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY; T H AGRICULTURE & NUTRITION COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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November 24, 1993

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QUESTIONS PRESENTED

This case was brought under Texas law and filed in a Texas state court by Texas plaintiffs against a Texas defendant and other defendants, and could not have been brought originally in federal court. It nonetheless was removed and transferred to a New York federal court for disposition. The judgment below presents the following questions:

1. Whether federal district judges may circumvent the limitations Congress wrote into its seven removal statutes, as the Second Circuit held below, simply by invoking the All Writs Act "to remove an otherwise unremovable state court case," in the discretion of the judge, "when the need arises."

2. Whether, as the Second Circuit held below, already injured named plaintiffs in Rule 23(b)(3) class actions are free, despite the Due Process Clause, to negotiate away the unaccrued future legal claims of absent persons without any notice, without any right to opt out, and without separate class representation, on the ground that such protections are not essential for "unknown plaintiffs," because "providing individual notice and opt-out rights to persons who are unaware of an injury would probably do little good."

In addition to petitioners, the following persons appeared as plaintiffs-appellants in the Second Circuit below:

VERDA WILSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ISAIAH WILSON, JR., DECEASED;

EARL THOMPSON; JUDY L. THOMPSON;

PEGGY SANDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF MARTIN SANDS, DECEASED;

EMILE ANNIBOLLI;

LAURA JENKINS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF EDDIE JENKINS, DECEASED; RONALD L. HARTMAN, KATHERINA H. HARTMAN, AND AS NEXT FRIEND TO JEFFERY ALAN HARTMAN AND ANGELA MARIE HARTMAN, BOTH MINORS INDIVIDUALLY AND AS REPRESENTATIVE OF THOSE SIMILARLY SITUATED.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which affirmed both the district court's refusal to remand the case to state court and its dismissal of petitioners' claims, is reported at 996 F.2d 1425, and is reprinted as Appendix A, at **A1**. (Page references to the appendices bound with this Petition are styled "A__"). The decision and order of the United States District Court for the Eastern District of New York, 781 F. Supp. 902, and an unpublished ancillary order, from which appeal was taken are reprinted as Appendix B (**A26**) and Appendix C (**A60**), respectively.

JURISDICTION

The decision of the court of appeals issued on June 24, 1993. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on August 26, 1993. *See* Appendix D, at **A63**. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty or property, without due process of law."

28 U.S.C. § 1441 provides in relevant part:

> **§ 1441. Actions removable generally**
> (a) [A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

The All Writs Act, codified at 28 U.S.C. § 1651(a), provides:

> **§ 1651. Writs**
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Fed. R. Civ. P. 23 is reprinted as Appendix E, at **A64**.

STATEMENT OF THE CASE

The decision below is the third in a line of cases from the Second Circuit beginning in 1988 that embraces a radical new removal doctrine — and the first squarely to present the issue to this Court. *See* note 32, *infra*. In conflict with decisions of this Court and several courts of appeals, this doctrine permits federal district judges to ignore Congress's seven precise removal provisions and to remove cases from state courts whenever they deem it necessary. In the words of the Second Circuit, the All Writs Act permits district judges "to remove an otherwise unremovable state court case" in the discretion of the judge, "when the need arises." **A8-A9**.

In this extraordinary case, a total of 21 States appeared as *amici curiae* to caution the Second Circuit that the failure to reverse the district court would invite "every federal district court to circumvent the removal statutes and other specific jurisdictional legislation and to transform the All Writs Act into a general grant of federal jurisdiction and a broad license to interfere with state court proceedings." Brief *Amici Curiae* of the State of Alabama, *et al.*, at 16. The 21 States termed this radical doctrine "a breach of the walls of comity and federalism that have been erected by Congress and the Supreme Court to ensure the continued vitality of our nation's parallel state and federal judicial systems," and "an ill-advised erosion of judicial federalism." *Id.* at 16-17.

Unfortunately, this concern for judicial federalism was not heeded. Instead, the Second Circuit reaffirmed its "All Writs removal" doctrine. **A8-A9**. This Court should grant certiorari to address what the 21 States correctly described as "an illegitimate judicial amendment of Congress's removal statute." *Id.* at 18.

Even if federal removal jurisdiction somehow exists in this case, there is a further question worthy of review by this Court: under Fed. R. Civ. P. 23 and due process, in what circumstances (if any) may *already* injured named plaintiffs, in a Rule 23(b)(3) class action for money damages, contract to extinguish the unaccrued *future* legal claims of absent persons? The binding effect of class actions on absent persons is an important issue, as illustrated by this Court's current consideration of the issue in the context of non-opt out, Rule 23(b)(2) class actions, in *Ticor Title v. Brown*, No. 92-1988. This petition presents fundamental aspects of the issue not present in *Ticor Title*, which are worthy of this Court's review regardless of the disposition of that case.

1. Proceedings in Texas.

As the 21 States noted, "[t]his case involves tort claims brought under Texas law in a Texas state court by Texas plaintiffs against a Texas defendant and other defendants." Brief *Amici Curiae* at 1. The case was filed in 1989 by petitioner Shirley Ivy and other plaintiffs in the District Court of Orange County, Texas.[1] Petitioners are Vietnam veterans and members of their families. They allege that they have suffered serious physical injuries as a result of wartime exposure to the chemical herbicide "Agent Orange."[2] As the court below acknowledged, "[t]here is no complete diversity of citizenship, and no federal issue is apparent in the complaints," **A7**, so that a state court was the only forum available to petitioners.[3] The case could not have been filed in federal court.

Nevertheless, respondents removed the case to the U.S. District Court for the Eastern District of Texas, citing two grounds for 28 U.S.C. § 1441 original jurisdiction removal, neither of which was

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[1] Petitioners brought suit on their own behalf, but also sought certification to proceed on behalf of a class of persons similarly situated. Original Petition at 16-18 (Joint Appendix ("JA"), 2d Cir. No. 92-7575, at 63-65). Although petitioners have vigorously represented the interests of the putative class since 1989, they do not assert that a class action is necessarily appropriate for other than limited pretrial purposes. The Texas courts took no action in this case prior to removal, so that all that is currently before this Court are petitioners' claims seeking recovery for their own injuries.

[2] Agent Orange was manufactured by respondents. The complaint alleges that Agent Orange "contained, as a byproduct of the manufacturing process, one of the most toxic chemicals known to man, a compound commonly referred to as TCDD or 'dioxin'" and that while in Vietnam petitioners "absorbed the deadly chemical through the air, through the skin and . . . through water and food." Original Petition at 8 (JA at 55). Petitioners seek damages for deaths and suffering from lymphomas, soft-tissue sarcomas, and other serious diseases that were caused by the veterans' exposure to Agent Orange in Vietnam; their family members seek damages for resulting wrongful death, loss of consortium, economic loss, and other harms. *Id.* at 12-13 (JA 59-60). The complaint arises under Texas statutes and common law, alleging defective design and manufacture, breach of express and/or implied warranties, strict products liability, negligence, failure to warn, breach of warranty, and deceptive trade practices. *Id.* at 8-15 (JA 55-62).

[3] The Second Circuit earlier held that federal law provides no legal remedy against respondents for injury as a result of the wartime use of Agent Orange. *In re "Agent Orange" Product Liability Litigation* (hereinafter "*Agent Orange*"), 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

ultimately accepted.[4] Both courts below upheld removal, however, on the theory that the All Writs Act permits district judges to remove otherwise non-removable cases whenever those judges deem it necessary to do so. **A8-A9**, **A54-A55**.

Simultaneously with filing their answer and notice of removal, respondents successfully urged the Judicial Panel on Multidistrict Litigation, over petitioners' objection, to transfer the case from Texas to the U.S. District Court for the Eastern District of New York. *See In re Ivy*, 901 F.2d 7 (2d Cir. 1990).

2. *Proceedings in the District Court.*

Once the case was in the Eastern District of New York, the earlier *Agent Orange* litigation became the focus of the district

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[4] As the district court below summarized: "[T]he defendants offered two grounds for federal subject matter jurisdiction. First, the court was said to have jurisdiction over this action 'because most of the plaintiffs' claims have already been asserted and adjudicated in federal court and plaintiffs' petition is merely an artful pleading to avoid federal jurisdiction.' Second, the court's jurisdiction was invoked 'pursuant to 28 U.S.C. § 1331 based on the doctrine of complete federal preemption.'" **A45** (quoting Notice of Removal). The district court accepted the "artful pleading" theory, *see Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981), as a ground for removal. **A54**. The Second Circuit reversed, however, holding that the district court's "artful pleading" analysis misread applicable precedent. **A8**. Respondents abandoned their "complete preemption" theory.

Respondents belatedly moved in the district court "to amend their notice of removal to assert removal pursuant to 28 U.S.C. § 1442(a)(1)," on the peculiar theory that when they designed and marketed herbicides containing a deadly poison (which the government ultimately bought for use in Vietnam), they were somehow "persons" acting under a "federal officer" within the meaning of that provision. **A6**. Although neither the district court nor the Second Circuit addressed the theory in this case, **A9-A10**, the issue was resolved against respondents in a companion case involving civilians exposed to Agent Orange. *See Ryan v. Dow Chemical Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992). The court ruled that respondents' challenged actions were not taken pursuant to federal direction, because respondents were "being sued for formulating and producing a product all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants." *Id.* at 950. It also noted that "[t]he government sought only to buy ready-to-order herbicides, not to cause, control, or prevent the production of the unwanted byproduct, dioxin, which is the alleged cause of plaintiffs' injuries." *Id.*

Thus, the sole removal issue before this Court concerns the propriety of removal under the All Writs Act.

court's decision both to uphold removal and to dismiss all of petitioners' claims.

A. The Earlier *Agent Orange* Litigation

Beginning in 1978, thousands of Vietnam war veterans and their families brought state-law tort actions against the present respondents seeking monetary relief as a result of illnesses and other injuries they believed they were suffering as a result of exposure to Agent Orange. **A3**. These lawsuits were consolidated in the U.S. District Court for the Eastern District of New York into a single action known as *In re "Agent Orange" Product Liability Litigation*, MDL No. 381. **A3**. The final complaint alleged that all the named plaintiffs had been exposed to Agent Orange and "were thereby caused to suffer severe and permanent disabling injuries, diseases, physical disorders and disfigurement, and in some cases, death." Supplemental Appendix, 2d Cir. No. 92-7537, 860, 878. None claimed to be uninjured or to have unaccrued future claims.

On December 16, 1983, the district court certified a Rule 23(b)(3) class with opt-out rights in order to address the common issues of general causation and the military contractor defense, and set trial for six months later, on May 7, 1984. **A3-A4**.

As required by Rule 23(c)(2), the district court directed "to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Over respondents' objection, the class was defined to consist of all veterans and their families who had a "subjective" basis for claiming that Agent Orange had harmed them. *Agent Orange*, 100 F.R.D. 718, 728-29 (E.D.N.Y. 1983).[5] Consequently, individual, first-class mail notice was

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[5] The district court held: "The defendants' contention that the class as the court has defined it is unworkable because it is subjective ('all veterans who were injured . . . by exposure to Agent Orange') is a *non sequitur*. Subjectiveness does not affect the applicability of the class trial's findings to members of the class and it does not prejudice the defendants in any way. The class is, therefore, adequately defined and clearly ascertainable." *Agent Orange*, 100 F.R.D. at 728-29 (citation omitted). The Second Circuit denied respondents' mandamus petition to reverse certification of the class as so defined. *In re Diamond Shamrock Chemical Co.*, 725 F.2d 858, 860 (2d Cir. 1984).

On final merits review at the conclusion of the case, the Second Circuit reiterated that this class definition had been proper and that adequate notice had been given to those who subjectively believed that they had been injured by

directed to all persons with a lawsuit pending in federal court, or who had filed a complaint form with the Veteran's Administration's Agent Orange Registry. *Agent Orange*, 100 F.R.D. at 729.[6] The court also mandated notices in major newspapers and veterans' publications alerting veterans that "[i]f you or anyone in your family can claim injury, illness, death, or birth defect as a result of exposure to 'Agent Orange' . . . you are a member of a class in an action brought on your behalf in the United States District Court for the Eastern District Court of New York, unless you take steps to exclude yourself." *Id.* at 734. Limited radio and television notices were also required. *Id.*

The deadline for opting out of the Rule 23(b)(3) class was May 1, 1984. Six days later, on May 7, 1984, the named plaintiffs decided to settle the case rather than commence the trial as scheduled. They received what the Second Circuit characterized as "essentially a settlement at nuisance value," *Agent Orange*, 818 F.2d at 171, in exchange for agreeing that all class members would be forever barred from suing the defendants for injuries from Agent Orange.[7] However, as the courts below ruled, the parties agreed to bind not just the persons identified in the class notice (who subjectively believed that they had suffered injuries and that they

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Agent Orange: "Anyone who believed that he or she had suffered injury as a result of exposure to Agent Orange in Vietnam was on notice of the pendency of a lawsuit and was thus alerted to seek advice from counsel." *Agent Orange*, 818 F.2d 145, 169 (2d Cir. 1987).

[6] The Veteran's Administration had established the Registry in 1978 to help "identify all Vietnam veterans expressing a concern about the possible adverse health effects of their exposure to Agent Orange." *Agent Orange*, 597 F. Supp. 740, 852 (E.D.N.Y. 1984). Notice was also directed to veterans who had expressed concerns about injury to state authorities. The Governor of each State was requested to refer the class notice "to any state organization created by the executive or legislative branches dealing with the problems of Vietnam veterans. 100 F.R.D. at 730-31.

[7] The Settlement created a fund to benefit class members and their families which, as administered, eventually allotted an average of $3200 for death and total disability claims, and nothing for other claims. *See* **A39**. In exchange, the named plaintiffs agreed that respondents would not be "subject to liability or expense of any kind to any member of the Class" with respect to Agent Orange and that "[c]laims against the Fund shall be the exclusive remedy . . . and all members of the Class are forever barred from instituting or maintaining any action against any of the defendants." *Agent Orange*, 597 F. Supp. at 864 (Settlement Agreement ¶ 5).

currently had a claim). Rather, in the settlement the parties expanded the class definition, stating: "The Class specifically includes persons who have not yet manifested injury." *Agent Orange*, 597 F. Supp. at 865 (Settlement Agreement ¶ 8).[8]

The district court approved the settlement despite its modest size, largely on the conclusion that the scientific evidence that existed on dioxin made it "highly unlikely" that any plaintiff whose claims were then pending in the courts could establish causation. *Agent Orange*, 597 F. Supp. at 749.[9] The court of appeals affirmed. *Agent Orange*, 818 F.2d 145 (2d Cir. 1987).

B. The District Court's Removal and Dismissal of the Case

Both the district court's decision to permit removal and its decision to dismiss petitioners' case flowed from its view that the instant action was "a direct challenge to the validity of the settlement" that the named plaintiffs had negotiated with defendants, and which the court approved. **A42**.

Thus, the district court ruled that "removal was proper because the court . . . must enforce its bar on subsequent suits by class members against the defendants." **A48**. The district court relied on a removal doctrine articulated by two earlier Second Circuit decisions (see pp. 23-24, *infra*), holding that the All Writs Act, 28 U.S.C. § 1651(a), "permits a federal court to remove state court actions to federal court [even] in situations where specific statutory removal authority is absent." **A55**. Resort to the All Writs removal doctrine was necessary, the court indicated, "[b]ecause by bringing new suits in state court, the plaintiffs challenge the binding effect of the Settlement Agreement." **A55**. Thus, it concluded, "[t]he removal of these actions to this court is a mechanism for protecting this court's judgment and order." **A55**.

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[8] By accepting this finding of the lower courts for purposes of review in this Court, petitioners do not waive their contract law objections to the lower courts' ruling that this sentence was intended to bind *absent* future claimants.

[9] The district court noted that although "[i]t is, of course, possible that in a few years a sudden increase in diseases associated with Agent Orange will be revealed . . . it appears unlikely that such proof will develop in time to affect this litigation." 597 F. Supp. at 795. *See also Agent Orange*, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd,* 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988) (granting summary judgment against opt-out plaintiffs based on insufficiency of scientific proof).

The district court granted the motion to dismiss, finding that "[t]he terms of the Settlement Agreement . . . bar plaintiffs from proceeding with this action." **A55**. Petitioners argued that as of the opt-out deadline they had been unaware of any injuries from Agent Orange, and thus the named plaintiffs had no authority to bind them.[10] Under the 1984 class definition and class notice, of course, *only* veterans and their families who had a subjective basis for believing, as of May 1, 1984, that they were suffering injuries from Agent Orange exposure were in the class and were required to opt out to preserve their rights to future suit. See pp. 5-6 & note 5, *supra*.

The district court held that this point was "irrelevant" and that the parties to the settlement had legitimately decided (with its approval) *after* the Rule 23(b)(3) opt-out right had passed to expand the class and extinguish the unaccrued future claims of "'persons who have not yet manifested injury.'" **A55** (quoting settlement). Extinguishing such claims, the district court explained, advances "the interests of presently injured plaintiffs as well as defendants in achieving a settlement," by setting "definitive limits on defendants' liability." **A58**.

3. *Proceedings in the Second Circuit*

On appeal, the Second Circuit rejected both petitioners' objection to removal and their due process and other defenses to reading the 1984 settlement as extinguishing their claims.

The court found no basis for removing the case in the removal statute enacted by Congress. Instead, the Second Circuit reiterated

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[10] The uncontradicted record shows that the first symptoms of petitioners' injuries manifested themselves only *after* the opt-out deadline. The complaint specifically recites that "[t]he deaths occurred and the diseases and injuries were manifested only *after* May 7, 1984, when other veterans' actions against these Defendants were settled." Original Petition at 12 (JA 59) (emphasis in original). There is no evidence in the record that any of petitioners "believed that he or she had suffered injury as a result of exposure to Agent Orange in Vietnam" (see note 5, *supra*) or had any basis at that point for believing that he or she "can claim injury, illness, disease death or birth defect" and thus should "take steps to exclude yourself" from the class (see p. 6, *supra*). Indeed, there is no evidence that any petitioners knew that they had been exposed to Agent Orange, or that they had even heard of the *Agent Orange* litigation. *See, e.g.*, **A68-A69** (affidavit of Shirley Ivy).

its view that "a district court, in exceptional circumstances, may use its All Writs authority to remove an otherwise unremovable state court case." **A8**. The "exceptional circumstances" in this case involved an undefined "deleterious effect" of allowing "Agent Orange victims . . . to maintain separate actions in state court." **A8**. The court was concerned that such suits raised the prospect that a state court would have to "decid[e] the scope of the *Agent Orange I* class action and settlement," so that the task would not fall to "[t]he court best situated to make this determination" — namely, "the court that approved the settlement." **A8-A9**. Removal jurisdiction was supposedly necessary to help the district court "guard[] the integrity of its rulings in complex multidistrict litigation." **A9**. The Second Circuit did not explain why an ordinary state court judge could not be trusted to correctly decide the meaning of the settlement negotiated by the parties, and the extent to which Rule 23 and due process might limit its binding effect.

Thus, for the third time (see pp. 23-24, *infra*), the Second Circuit employed the All Writs Act to allow district judges to fashion their own removal jurisdiction "'when the need arises.'" **A9** (citation omitted). Further, it made clear that whether or not "exceptional circumstances" exist to create such jurisdiction is a matter left to the "proper exercise of judicial discretion." **A9** (citation omitted).[11]

After upholding removal, the Second Circuit rejected petitioners' claim that to permit the parties to the 1984 settlement to extinguish petitioners' unaccrued future claims, without notice and opt-out rights, violated Rule 23 and due process. The Second Circuit went even further than the district court to hold that there is no due process barrier *at all* preventing already injured plaintiffs from negotiating away the legal claims of absent persons as long as those persons are not "known" — that is, no one (including them) knows that they will be injured and might wish to sue in the future. **A16**.

The court's rationale for this holding was that in *Phillips*

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[11] As respondents' brief below had noted in considerable detail, the Second Circuit "reviews exercise[s] of authority under the All Writs Act for abuse of discretion, and upholds the lower court's order unless the findings on which it is based were clearly erroneous." Brief for Defendants-Appellants, dated Nov. 16, 1992, at 60 (citations omitted).

Petroleum Co. v. Shutts, 472 U.S. 797 (1985), this Court addressed only the ability of named plaintiffs "to bind *known* plaintiffs" concerning money damages, and "intimate[d] no view concerning other types of class actions." **A16** (quoting 472 U.S. at 811 n.3) (emphasis added). Rather than reading this statement as disclaiming any holding about lawsuits for equitable relief (like the *Ticor Title* case now before this Court), the Second Circuit believed that it somehow would have "to extend *Shutts*" in order to prevent named plaintiffs from extinguishing the unaccrued claims of absent persons to money damages, before they even know those claims exist. **A16**. Refusing to "extend" *Shutts* to provide procedural guarantees to such persons, the court opined:

> [S]ociety's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjectural at best. . . . [P]roviding individual notice and opt-out rights to persons who are unaware of an injury would probably do little good.

A17. The Second Circuit was also unconcerned that "'many genuine conflicts of interest' [can exist] in a situation such as this," so that separate class counsel should have decided whether to extinguish the unaccrued future claims of absent plaintiffs who had not yet suffered injury. **A17** (quoting district court). It opined that a conflict "never materialized" because all veterans became eligible for identical "nuisance value" payments from the Fund. **A18**.[12]

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[12] The Second Circuit suggested here that "ensuring that [persons unaware of their injuries] receive vigorous and faithful vicarious representation" was a constitutionally adequate substitute for the right to notice and to opt out. **A17**. Thus, the court refused to require that uninjured absent persons unaware of their rights have independent class counsel. Nor did the Second Circuit address the inherent conflict revealed by the district court's own rationale for denying notice or opt out: to advance the interests of presently injured plaintiffs and defendants in settlement. **A58**. Instead, the Second Circuit concluded from its own factual review that "[t]he unique circumstances" of this case rendered separate class counsel "unnecessary." **A21**.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DETERMINE WHETHER FEDERAL DISTRICT JUDGES MAY USE THE ALL WRITS ACT, IN THEIR DISCRETION, TO REMOVE AN "OTHERWISE UNREMOVABLE STATE COURT CASE"

The first question presented by this case is whether the Second Circuit is correct in permitting federal district judges to use the All Writs Act, as it put it, "to remove an otherwise unremovable state court case . . . 'when the need arises.'" **A9-10** (citation omitted). This case raises issues of judicial restraint and federalism so serious that a total of 21 States appeared as *amici* below to protest what they termed "an illegitimate judicial amendment of Congress's removal statute." Brief *Amici Curiae* at 18.

Whether removal can ever be effected by means other than the pertinent statutes enacted by Congress is a question on which the lower courts have divided, making review by this Court all the more critical. The Second Circuit, and two district courts in other circuits, have held that there *is* removal power under the All Writs Act.[13] Three circuits have disagreed, holding that only Congress's jurisdictional statutes can authorize jurisdiction in a case.[14] Still

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[13] *Hornsby v. Hornsby's Stores, Inc.*, 1991 WL 33672 (N.D. Ill. 1991) ("[s]tate claims precluded by the res judicata effect of a federal judgment may be removed to federal court" even when there is no basis other than the All Writs Act for removal); *Nowling v. Aero Servs. Int'l, Inc.*, 734 F. Supp. 733, 738 (E.D. La. 1990) ("Other statutes vest federal courts with the authority to exercise [removal] jurisdiction . . . for example, the All Writs Act").

[14] *See Westinghouse Elec. Corp. v. Newman & Holtzinger*, 992 F.2d 932, 937 (9th Cir. 1993) (All Writs Act does not "provide[] an independent source of removal jurisdiction to the district court"); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988) ("The right to remove a case from state to federal court derives solely from the statutory grant of jurisdiction in 28 U.S.C. § 1441"); *Commercial Security Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352, 1355 (10th Cir. 1972) ("Section 1651(a) does not operate to confer jurisdiction"); *Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1972), *cert. denied*, 406 U.S. 945 (1972) ("This statutory provision does not confer original jurisdiction, but rather, prescribes the scope of relief that may be granted when jurisdiction otherwise exists"); *M. Brittingham v. United States Comm'r of Internal Revenue*, 451 F.2d 315, 317 (5th Cir. 1971) ("[The All Writs Act] empowers [courts] to issue writs in aid of jurisdiction previously acquired on some other independent ground"). *See also United States v. Hall*, 583 F. Supp.

other courts have construed their removal power so narrowly that they have not even had occasion to reach the question decided by the Second Circuit. *See* note 15, *infra.*

A. *The All Writs Removal Doctrine Is Constitutionally Indefensible and Should Be Repudiated in Its Entirety*

The grounds for removal of cases from state court are simple enough. They are set out at 28 U.S.C. §§ 1441 to 1452. Seven distinct provisions exist:

(1) § 1441(a) (original jurisdiction removal);
(2) § 1441(d) (removal by a foreign state);
(3) § 1442 (removal by a federal officer or property holder);
(4) § 1442a (removal by a member of armed forces);
(5) § 1443 (removal in civil rights cases);
(6) § 1444 (removal in foreclosure actions against federal government); and
(7) § 1452 (removal of claims related to a bankruptcy case).

This set of provisions is the product of congressional deliberation about how much to restrict "[t]he power reserved to the states under the Constitution to provide for the determination of controversies in their courts." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941).[15] The balance struck by

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717, 718 (E.D. Va. 1984) ("[T]he All Writs Act is not a means by which a district court may extend its authority in areas where it otherwise has no jurisdiction").

[15] The importance of deference to congressional choices in this area has led this Court to caution that "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta*, 292 U.S. 263, 270 (1934). This Court has made the point in the specific context of removal jurisdiction. *See American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 18 (1951) ("To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit . . . would by act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress denied them"). *Cf. Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991) (discussed in note 30, *infra*).

Congress has varied widely over time.

At one end of the spectrum, exhibiting maximum deference to the States, the Judiciary Act of 1789, 1 Stat. 73, 79-80, granted *no* federal question removal at all, and permitted removal in diversity cases in only three limited categories, and then only where substantial sums of money were at stake.[16]

In 1875, Congress went to the opposite extreme: its distrust of the States' judicial systems during the Reconstruction period was so great that Congress "enormously broadened the removal as well as the original jurisdiction," so that "virtually every case removable under Article III was made removable by *either* a plaintiff *or* a defendant."[17] This regime was of particular benefit to defendants,

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Many lower courts have emphasized the need narrowly to construe the removal statute. *See, e.g., United States ex rel. Walker v. Gunn*, 511 F.2d 1024, 1027 (9th Cir.) ("The right of removal being in derogation of state sovereignty, should not be enlarged beyond what is definite and free from ambiguity") (internal quotations and citations omitted), *cert. denied*, 423 U.S. 849 (1975); *Adams v. Aero Services Int'l, Inc.*, 657 F. Supp. 519, 521 (E.D. Va. 1987) ("Removal of civil cases to federal court is an infringement on state sovereignty. Consequently, the statutory provision regulating removal must be strictly applied."); *Mercy Hosp. Ass'n v. Miccio*, 604 F. Supp. 1177, 1179 (E.D.N.Y. 1985) (Weinstein, C.J.) ("The right to removal is a statutory grant to be strictly construed . . . . The defendant seeking removal must base the petition on a specific removal provision and specific grant of original jurisdiction").

[16] *See* P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1767 (3d ed. 1988) (hereinafter "HART AND WECHSLER") (noting that only an alien defendant, an out-of-state defendant sued by a citizen of the forum state, or a party to certain kinds of title disputes, could remove if at least $500 was in dispute). Even *original* jurisdiction for federal question cases was extraordinarily limited in the first Judiciary Act. *See id.* at 961.

The severely limited removal jurisdiction authorized by Congress in 1789 is hardly surprising, given that "[m]any of the Framers of our Constitution felt that separate federal courts were unnecessary and that the state courts could be entrusted to protect both state and federal rights." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 285 (1970). Easing concern about federal courts encroaching on the judicial systems of the States, of course, was an important aspect of the effort to ratify the Constitution. *See, e.g.*, Alexander Hamilton, *The Federalist* No. 82 (C. Rossiter ed. 1961) 493 (explaining that "State courts will be deprived of no part of their primitive jurisdiction further than may relate to an appeal; and . . . in every case in which [state courts] were not expressly excluded" they will have "cognizance of the causes" arising under federal law).

[17] HART AND WECHSLER, *supra* note 16, at 961, 1052, 1767 (emphasis added) (citing Act of March 3, 1875, 18 Stat. 470).

permitting them to remove *merely by asserting a federal defense.* "[T]he answer as well as the complaint would be consulted before a determination was made" on whether a federal issue existed, and "the defendant's petition for removal could furnish the necessary guarantee that the case necessarily presented a substantial question of federal law." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 n.9 (1983).

Although the 1875 Act certainly constituted a "rational jurisdictional system," 463 U.S. at 10 n.9, it also caused a "flood of litigation" into the federal courts, leading Congress a decade later to "pare down the federal question jurisdiction."[18] Congress addressed the overload problem through the enactment of the Judiciary Act of 1887, which established the present pattern of removal jurisdiction.[19] The "key element" of the 1887 Act "was (and is) to tie removal jurisdiction to original jurisdiction," a requirement now found in § 1441(a) and one that "has had a profound impact on the jurisdictional structure."[20]

In light of Congress's "purpose [in the 1887 Act] to restrict the jurisdiction of the federal courts on removal," coupled with "[t]he power reserved to the states," this Court has given the Act a "strict construction." *Shamrock Oil & Gas Corp.*, 313 U.S. at 108. Accordingly,

> it is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987) (emphasis in original) (citing *Franchise Tax Board*, 463 U.S. at 12).

The Second Circuit, however, has not been satisfied to adhere to the jurisdictional structure of the 1887 Act, narrowly construed, which allows much less removal than existed under the 1875 Act.

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[18] HART AND WECHSLER, *supra* note 16, at 963.

[19] *Id.* at 1768 (citing Judiciary Act of March 3, 1887, 24 Stat. 552, corrected by the Act of August 13, 1888, 25 Stat. 433).

[20] *Id.* at 1052-53.

Rather, the Second Circuit has taken the view that Congress's choice in 1887 to restrict the 1875 removal statute can be circumvented by judges based on reference to a *separate* law: the All Writs Act, of all things! That Act has remained substantially unaltered since 1789,[21] and has never been addressed by Congress in setting removal policy during the past two centuries. Yet, according to the Second Circuit, that Act provides an independent source of authority for subject-matter jurisdiction on removal.

Thus, beginning in 1988, the Second Circuit has explicitly permitted district judges to invoke the All Writs Act to justify removal even without "an independent basis for the exercise of jurisdiction under the federal removal statutes."[22] Accordingly, the district court below held that the All Writs Act "permits a federal court to remove state court actions to federal court in situations where *specific statutory removal authority is absent.*" **A55** (emphasis added). The Second Circuit confirmed that district judges "may remove an *otherwise unremovable* state court case . . . 'when the need arises,'" and upheld removal in this case as "appropriate" and "a proper exercise of judicial discretion." **A8-A9** (emphasis added) (citation omitted). Despite an early dissent from the doctrine, it now appears well entrenched in the Second Circuit.[23]

The Second Circuit's All Writs removal doctrine poses a threat to two fundamental aspects of this Court's jurisprudence: judicial restraint and judicial federalism:

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[21] The present version of the All Writs Act originated as § 14 of the Judiciary Act of 1789, 1 Stat. 81-82. *See Pennsylvania Bureau of Corrections v. United States Marshals*, 474 U.S. 34, 40-41 (1985).

[22] *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 865 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

[23] Dissenting in *Yonkers*, Judge Mahoney castigated the Second Circuit's creation of an All Writs removal doctrine to launch "a preemptive strike upon a state court" as "novel and unwarranted," pointedly noting that, like federal judges, state court judges are "sworn to support the Constitution of the United States. Accordingly the state court was entitled to a presumption at the outset" that it would proceed appropriately. 858 F.2d at 875 (Mahoney, J., dissenting). No other Second Circuit judge has ever dissented from use of the doctrine, however, and the suggestion below for rehearing *en banc* attracted no votes. Thus, the doctrine appears to be settled law in the Second Circuit.

For a more detailed description of *Yonkers* and the steadily increasing ambit of the Second Circuit's All Writs removal doctrine, *see* pp. 23-24, *infra*.

First, the doctrine constitutes "an illegitimate judicial amendment of Congress's removal statute," Brief *Amici Curiae* of the 21 States, at 18, that this Court should not permit to stand. It is well settled that "[a]ll federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § I, of the Constitution." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). Thus, whenever an objection is raised to removal, "[t]he fundamental question to be determined is whether the removal . . . from the state court into the Federal court was authorized by any statute of the United States." *Kentucky v. Powers*, 201 U.S. 1, 24 (1906). In resolving such an issue, of course, courts must "scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta*, 292 U.S. 263, 270 (1934).[24]

Despite these principles, the Second Circuit nonetheless permits a district court, in so-called "exceptional circumstances," to "use its All Writs authority to remove an otherwise unremovable state court case." **A8**. There are grave reasons to doubt this construction of the All Writs Act.

The language of the Act hardly suggests that it grants judges the power to *create or define* their own jurisdiction. Rather, it appears to provide tools for judges to use in *exercising* whatever jurisdiction they happen to possess — to "issue all writs necessary or appropriate *in aid* of their *respective* jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (emphasis added). The Second Circuit below refused to accept this limit, even as it quoted the express holding of this Court that the point of the All Writs Act is to "'empower[] federal courts to fashion extraordinary *remedies* when the need arises.'" **A9** (quoting *Pennsylvania Bureau of Corrections v. United States Marshals*, 474 U.S. 34, 43 (1985) (emphasis added)).

This Court was also quite clear in *Pennsylvania Bureau* that the Act must be set aside once Congress has spoken on a subject:

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[24] Since the inception of our federal system, it has been settled that "[c]ourts created by statute can have no jurisdiction but such as the statute confers," *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850). Where jurisdiction is not expressly conferred, it is assumed not to exist. *See Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810). *See also* note 15, *supra*.

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.

474 U.S. at 43.[25] Congress, of course, could hardly have been more exacting in defining removal jurisdiction in 28 U.S.C. §§ 1441 to 1452, and thus it is difficult to see why any judge should be permitted to look beyond those carefully crafted provisions and infer subject-matter jurisdiction in the "exercise of judicial discretion" (**A9**) under the All Writs Act. Indeed, at least two decisions of this Court have resisted far more modest arguments that the Act should be used to supplement the structure of appellate jurisdiction and procedure established for this Court by Congress.[26]

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[25] The facts of *Pennsylvania Bureau* illustrate the limits of judicial authority even when fashioning remedies where jurisdiction itself is clear. This Court refused to allow a federal district court to exercise its All Writs power to compel federal Marshals to share in the financial burden of transporting state inmates to federal courts for litigation in which the state is not involved, where the Marshals' obligations were regulated by a somewhat ambiguous federal statute. 474 U.S. at 37-38, 43. The arguments for permitting district courts to seize "otherwise unremovable" state court cases contrary to a clear federal removal statute are obviously much weaker.

[26] In *Chandler v. Judicial Conference of the Tenth Circuit*, 398 U.S. 74 (1970), District Judge Chandler invoked the All Writs Act, asking this Court to reverse the decision of the judges of the Tenth Circuit to strip him of his judicial functions, in an alleged usurpation of the impeachment power. *Id.* at 75, 82. The Tenth Circuit Judicial Council argued that Chandler was complaining of "purely administrative action" that had "never been reviewed in any court and cannot now be reviewed in an original proceeding under the All Writs Act." *Id.* at 83. The Solicitor General argued that a finding of jurisdiction was proper under the All Writs Act because the action of the Judicial Council could be "analogized" to the Tenth Circuit sitting *en banc*, in an appellate function. *Id.* at 83-84. This Court rejected that argument, explaining that the All Writs Act "authority of this Court to issue a writ of prohibition or mandamus 'can be constitutionally exercised only insofar as such writs are *in aid of its jurisdiction*,'" and holding that review of Chandler's claims would "do[] violence to the constitutional requirement that such review be appellate." *Id.* at 86 (emphasis added) (citation omitted).

Similarly, in *United States v. FMC Corp.*, 1963 U.S. LEXIS 2449 (1963), (Goldberg, Circuit Justice), this Court rejected the Solicitor General's argument that the All Writs Act authorized immediate review in this Court of a district judge's refusal to issue a preliminary injunction against an imminent corporate acquisition. The relevant statute permitted immediate appeal only from *final*

This case is especially suited for testing the outer limits of the All Writs Act, for here the Second Circuit has sought to countermand a considered policy judgment of Congress. The district court upheld removal of petitioners' Texas state court case on the basis of defendants' argument that "the binding effect of the Settlement Agreement" barred petitioners' lawsuit. **A55**. Even assuming that the interpretation of the Settlement Agreement (essentially, a contract negotiated in New York) raised *any* issue of federal law, at most the defendants have a *federal defense* to suit in Texas state court. But more than a century ago Congress barred any such theory for removal, *see* pp. 13-14, *supra*, and has so far rejected all proposals to water down its stance.[27] The Second

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judgments, but the Solicitor General argued that appellate jurisdiction should be found under the All Writs Act "to prevent irreparable change in the economic status quo . . . [that would] frustrate effective public relief." *Id.* Despite these exigencies, the Circuit Justice ruled that the All Writs Act "may not be employed to evade the specific restrictions" of the jurisdictional statute, and that no writ could issue "as a substitute for an authorized appeal."

The course taken by the Second Circuit — to use the All Writs Act to remove state court cases that Congress chose to leave to the state courts — is far more radical than the course suggested by the Solicitor General in either of these cases. By contrast, other lower federal courts have refused to use the All Writs Act even to review *federal* cases outside their direct line of review. *See, e.g.*, *In re Virginia Elec. & Power Co.*, 539 F.2d 357, 365 (4th Cir. 1976); *General Electric Co. v. Byrne*, 611 F.2d 670, 672 (7th Cir. 1978) (*per curiam*) ("We are aware of no statute or decision which would authorize us to issue a writ of mandamus directed to a district judge sitting in another circuit"); *C.P.C. v. Nosco Plastics, Inc.*, 719 F.2d 400, 401 (Fed. Cir. 1983) (All Writs Act does not confer authority to review decisions of a district court over which the appellate court does not have supervisory power).

[27] "Commentators have repeatedly proposed that some mechanism be established to permit removal of cases in which a federal defense may be dispositive." *Franchise Tax Board*, 463 U.S. at 10 n.9 (citing proposals). Unfortunately for defendants, of course, "those proposals have not been adopted." *Id.*

Notably, Congress has rejected some reform proposals a good bit *narrower* than the course taken by the courts below. For example, in 1969, the American Law Institute proposed that federal removal jurisdiction be expanded so as to permit removal if "a substantial defense arising under the Constitution, laws, or treaties of the United States [were] properly asserted." ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, § 1312(a)(2) (1969). Even under the ALI plan, however, this case could not have been removed from state court, because that proposal excluded from removal those "actions in which the only ground for removal [would be a] claim that the suit or relitigation of an issue in the suit is barred by an adjudication from another

Circuit's attempt to serve, to borrow an apt phrase, as "a sort of junior-varsity Congress," *Mistretta v. United States*, 488 U.S. 361, 427 (1988) (Scalia, J., dissenting), should be overturned.

Second, beyond the Second Circuit's circumvention of well-accepted principles of judicial restraint, certiorari is also warranted because its blanket grant of permission to remove cases whenever district judges find "exceptional circumstances" flouts this Court's teachings on judicial federalism and the respect due the coordinate judicial systems of the States.

In explaining the "exceptional circumstances" supposedly requiring that this case be removed, the Second Circuit made little effort to mask its distrust of the abilities of the Texas state courts. Permitting the case to go forward in Texas would have a "deleterious effect," according to the Second Circuit, because the state court would have to "decid[e] the scope" of the 1984 settlement and the associated due process issues. **A8-A9**. The Second Circuit thought it critical that the judge who "approved the settlement" — the judge "*best situated* to make this determination" — decide the preclusive effect of the prior settlement agreement. **A9** (emphasis added). State courts apparently cannot be trusted to "guard[] the integrity of [federal court] rulings in complex litigation." *Id.*

Obviously, the Texas state courts in this case should have been presumed competent to adjudicate the preclusive effect of the 1984 settlement.[28] If state courts are competent to determine federal

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court that the Constitution or laws of the United States require the State court to honor." *Id.* at § 1312(h)(9). *See also* "Multiparty, Multiforum Jurisdiction Act," H.R. 3406, 101st Cong. 2d Sess. (1990) (another proposed jurisdictional expansion much more modest than the court's holding in this case which was rejected by Congress).

[28] As one esteemed scholar of federal courts doctrine incisively observed, there is "nothing more subversive to the judge's inner sense of responsibility than the notion that, to the greatest possible extent, all the important shots will be called by someone else because we don't believe in his or her competence and sensitivity." Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 624 (1981). As an essential feature of comity, state courts are routinely entrusted with the adjudication of federal rights, including federal constitutional rights. *See, e.g.*, *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988) ("Texas state courts . . . are presumed

constitutional rights, then *a fortiori* there is no basis for denying them responsibility for adjudication of the preclusive effect of a settlement. Indeed, one key feature of judicial federalism is that federal and state courts alike are trusted to give appropriate effect to the results of litigation in the other judicial system. *See Kline v. Burke Const. Co.*, 260 U.S. 226, 230 (1922) ("Whenever a judgment is rendered in one of the courts [either federal or state] and pleaded in the other, the effect of that judgment is to be determined by" the second court"); *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964).[29]

As 21 States trenchantly observed in their *amicus* brief below:

> For as long as there has been a common law . . . when a prior judgment of a court in another jurisdiction, whether

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competent to resolve federal issues"). *See also* Bator, at 625 ("If we want state judge to feel institutional responsibility for vindicating federal rights, it is counterproductive to be grudging in giving them the opportunity to do so").

[29] These precedents comport with a fundamental principle of our federal system, that "[a] state court is as well qualified as a federal court to protect a litigant by the doctrines of res judicata and collateral estoppel." *Southern California Petroleum Corp. v. Harper,* 273 F.2d 715, 719 (5th Cir. 1960); *accord Bluefield Community Hospital Inc. v. Anziulewicz,* 737 F.2d 405, 408 (4th Cir. 1984).

Consistent with this principle, in the area of consent judgments it is quite unusual for a court to hold, as the Second Circuit below did, that the individual judge who reviewed and approved a settlement has a special, subjective insight into its meaning. For example, in one prominent case the D.C. Circuit refused to defer to Judge Harold H. Greene's subsequent interpretations of a consent decree provision that *he himself* had drafted in the case that broke up the Bell System, despite Judge Greene's decade of intensive experience with that enormously complicated case. *See United States v. Western Electric Co.*, 900 F.2d 283, 293-94 (D.C. Cir.), *cert. denied*, 111 S. Ct. 283 (1990). The D.C. Circuit ruled that although an appellate court should "take careful account of the explanatory opinion issued by the district judge at the time the decree was entered," *id.* at 294 n.10, it had to "reject [any] suggestion" Judge Greene's later view of the decree "should be afforded some 'special' deference," even though he had a major part in "draft[ing] the pivotal provision" and even though he "had enormous experience overseeing the case and the decree since its inception." *Id.* at 294. *See also Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989) (making clear that "[a] district court's interpretation of a consent judgment is a matter of law and freely reviewable on appeal"). Obviously, if federal appellate courts should not defer to the subjective views of district judges on the meaning of settlements, then state courts need not defer — and cases should not be removed from state courts in an effort to ensure that a particular individual rules on what the parties appear to have intended by a certain settlement.

> state or federal, has been raised as a bar to litigation of a claim, the issue has been decided by the court at hand, not referred back to the court that entered the original judgment.

Brief *Amici Curiae* at 3 (emphasis in original). The States objected that the district court had "supplanted this time-tested rule with a radical new one: when a federal class action judgment is involved, *only* the court that handed down the original judgment is qualified to decide" the preclusive effect of the prior settlement. *Id.* (emphasis in original). They pointed out that this theory is "contrary to common sense" and "destructive of judicial federalism," *id.*, and called the district court's seizure of the case on this theory an "unprecedented, unwarranted, and unwise . . . invasion of state judicial independence and an insult to state courts throughout the nation, which are perfectly capable of deciding whether a state law claim is barred by a prior federal judgment." *Id.* at 18.

The States warned that "[t]o affirm the decision below would be to invite every federal district court to circumvent the removal statutes and other specific jurisdictional legislation and to transform the All Writs Act into a general grant of federal jurisdiction and a broad license to interfere with state court proceedings." *Id.* at 16. Yet the Second Circuit analyzed *none* of these federalism concerns, failing to mention the States' arguments even in passing. Indeed, in the aspect of its opinion most dangerous for judicial federalism, the court made clear that district judges are free to resort to All Writs removal in the "exercise of judicial discretion" whenever they believe "'the need arises.'" **A9**. Thus, *ad hoc* seizure of state court jurisdiction is given no more appellate scrutiny than is afforded garden-variety trial court evidentiary determinations. *See, e.g., Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962) (describing leniency of evidence review standard).

Finally, it should be noted that the Second Circuit's expansive view of removal jurisdiction under the All Writs Act, in derogation of state courts, also contravenes the policies of the Tenth Amendment.[30] Indeed, because what is at issue is a federal

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[30] One of the "powers [reserved to the states under the Amendment] was the maintenance of state judicial systems for the decision of legal controversies." *Atlantic Coast Line R.R.*, 398 U.S. at 285. *See also Pennzoil Co. v. Texaco,*

judicial act, not subject to the "political checks" of federalism, *Garcia v. San Antonio Transit Auth.*, 469 U.S. 528, 549-51 (1985), this Court should be particularly sensitive to the Tenth Amendment interests implicated here.

Certainly, the judgment below cannot be defended on the theory that removal was necessary to protect the district court's continuing jurisdiction. First, a state court must be presumed to be competent to adjudicate the settlement's preclusive effect. *See* notes 28 & 29, *supra*. A federal court obviously cannot assume, as the district court did below, that a state court would incorrectly adjudicate this question and would erroneously permit plaintiffs "to undermine a settlement agreement and set aside a federal court's judgment through new state court suits." **A54**.

Second, in any event, the district court's continuing jurisdiction in this case could not have been threatened by petitioners' Texas action. Their case manifestly was not, despite the district court's assertion, a "challenge[]" to the settlement agreement. **A49**. Rather, petitioners sought to pursue their own suit for money damages, entirely separate from the settlement, on the ground that they were not bound by it. The settlement agreement provided that the district court would retain jurisdiction *only* "over the Fund pending its final disposition," *Agent Orange*, 597 F. Supp. at 866 (Settlement Agreement ¶ 19), with a duty "to assure that the Fund shall earn the maximum interest consistent with safety and that all disbursements are properly made." *Id.* at 864 (Settlement Agreement ¶ 4). Nothing about petitioners' Texas lawsuit affects the

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Inc., 481 U.S. 1, 12-13 (1987) ("This Court repeatedly has recognized that the States have important interest in administering certain aspects of their judicial systems.") Given that the integrity of an important state institution is at stake, this Court should accord review to a judicial interpretation of the All Writs Act that deprives state courts of their traditional authority to resolve the preclusive effect of judgments of another sovereign. Accordingly, in *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), this Court refused to read a federal statute, the Age Discrimination in Employment Act, so as to constrain state judicial systems by forbidding mandatory retirement of state court judges. *Id.* at 2408. *Cf. New York v. United States*, 112 S. Ct. 2408, 2428 (1992) (Tenth Amendment prohibits federal statutes which are interpreted to "infring[e] upon the core of state sovereignty . . . a state's ability to make and *apply* its own laws") (emphasis added). Thus, in light of the Tenth Amendment, federal statutes should not be construed to impinge on fundamental state institutions without a clear statement of congressional intent requiring that outcome. No such clear statement appears on the face or in the legislative history of the All Writs Act.

operation of the Fund. The prospect that respondents may have to invoke, in a Texas forum, the supposedly preclusive effect of the settlement clearly has no bearing on the Fund; on the contrary, ¶ 4 of the Settlement Agreement expressly provides that at this juncture respondents "have no responsibility or obligation with respect to the Fund or distributions therefrom." *Id.* at 864.

Finally, the availability of authority under the All Writs Act to issue *injunctions* "in aid of . . . jurisdiction[]" indicates that there is no power to *remove* a state court action on that basis. Indeed, Congress went so far as to enact an exception to the Anti-Injunction Act using these same words. *See* 28 U.S.C. § 2283 (exception "where necessary in aid of its jurisdiction"). Thus, Congress was careful to vest the federal courts with targeted equitable powers even against state courts; but it also made the deliberate decision not to provide federal courts with sweeping *removal* authority. To ignore the fundamental difference between the two, and to read into the removal statute a power to disrupt state proceedings that Congress has set out only in the context of injunctions, would effectively rewrite Congress's handiwork.

B. Even If the All Writs Act Authorizes Lower Courts to Remove an "Otherwise Unremovable State Court Case" in Some Situations, This Court Should Articulate Clear Limits on the Use of That Power

Although All Writs removal is inappropriate in all circumstances, certiorari would be warranted even if this Court were inclined to reject that contention. At minimum, review should be granted to check the Second Circuit's spiraling pattern of jurisdictional expansion and to clarify the boundary of lower courts' authority under the All Writs Act.

As previously noted, the Second Circuit's All Writs removal doctrine originated in *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989). See p. 15, *supra*. The City of Yonkers had pursued a policy of racial segregation in allocating public housing and, as a result, had violated minority housing residents' federal constitutional and statutory rights. Under the obligation of a federal court order, the city sought to remedy this violation by initiating condemnation proceedings in state court. Although the case was not otherwise

removable, the Second Circuit permitted removal under the All Writs Act because the district court was confronted "both with the need to vindicate the constitutional rights of those . . . who have been denied fair housing and the very real possibility that the City of Yonkers would be subjected to inconsistent orders from the state court and the federal court." *Id.* at 863.

The Second Circuit substantially broadened the doctrine in *United States v. City of New York*, 972 F.2d 464 (2d Cir. 1992), this time upholding All Writs removal even absent the need to vindicate federal constitutional rights. Faced with a state court suit concerning the validity of procedures under a federally ordered sewage disposal plan, the court held that the mere possibility that New York might be subject to inconsistent federal and state decrees alone was sufficient to justify removal. *Id.* at 469.

Unlike the Second Circuit's earlier cases involving its novel removal doctrine, however, this case presents *no* threats to respondents' or third parties' constitutional rights, and *no* possibility that respondents might be subject to conflicting state and federal injunctive orders.[31] In short, this case presents *neither* of the rationales supporting the *Yonkers* or *City of New York* decisions. The courts below nevertheless approved removal yet again, this time of a quintessentially state-law case, finding the existence of "exceptional circumstances" — here, the courts' view that the Texas state courts might rule incorrectly on whether the 1984 settlement precluded suit, whereas the district court here was "best situated" to rule correctly. See pp. 9, 19, *supra*.

Certiorari was not sought in *City of New York*, and the certiorari briefing in *Yonkers* revealed an inappropriate vehicle for review.[32]

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[31] Petitioners' claims seek monetary relief.

[32] *Yonkers* was the Second Circuit's initial use of the All Writs removal theory, and the petition for certiorari presented the issue in nine pages as one involving error on the facts of the case. Petition for Certiorari, *Yonkers Racing Corp. v. City of Yonkers*, No. 88-1029, at 7-15. Indeed, Rex Lee appeared on behalf of the City of Yonkers opposing certiorari, stating that "the decision is sui generis" and that petitioner had "argue[d] only that the decision is 'based upon a misapplication of a recent decision of this Court.'" Brief of Respondent City of Yonkers in Opposition, No. 88-1029, at 12-13 (quoting petition). Finally, although the City agreed that the Second Circuit had erred in using the All Writs Act to remove the case, *id.*, it nonetheless urged: "The error below is, in the

This case thus represents the first real opportunity for scrutiny of the Second Circuit's radical All Writs removal doctrine, and certiorari is warranted to put an end to "an illegitimate judicial amendment of Congress's removal statute." Brief *Amici Curiae* at 18.

II. THIS COURT SHOULD PASS ON THE ACCEPTABILITY OF A QUASI-LEGISLATIVE ANALYSIS FOR DETERMINING WHETHER ALREADY INJURED NAMED PLAINTIFFS MAY EXTINGUISH THE UNACCRUED FUTURE CLAIMS OF ABSENT PERSONS

Even if federal removal jurisdiction somehow existed in this case (or if this Court were to decline to review that question), there would be a further question worthy of certiorari: under Fed. R. Civ. P. 23 and due process, in what circumstances (if any) may *already* injured named plaintiffs, in a Rule 23(b)(3) class action for money damages, contract to extinguish the unaccrued *future* claims of absent persons? This Court is currently considering similar issues in a related context, that of non-opt out, Rule 23(b)(2) class actions, in *Ticor Title v. Brown*, No. 92-1988. But the issues in this case merit review regardless of the outcome in *Ticor Title*.

As illustrated by *Ticor Title* and the several other major class action cases this Court has reviewed, the procedural standards governing the conduct of class actions are extremely important and affect large numbers of litigants. The extent to which federal settlements of Rule 23(b)(3) class actions may bind individuals who are not even aware that they have suffered injury is an issue which this Court has never addressed and which is now of significant and growing importance.[33] This is particularly true in our complex

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circumstances of this case, purely a procedural one. Because the district court clearly was correct in its ultimate conclusion that the City should prevail in the condemnation proceedings, any reversal now would merely delay the ultimate implementation of the district court's remedial orders." *Id.* at 13.

[33] *See, e.g.*, *Carlough v. Amchem Prods., Inc.*, No. 93-1429, 1993 U.S. App. LEXIS 24930 (3d Cir. September 29, 1993) (discussing certification of 23(b)(3) class of future asbestos claimants); *Dante v. Dow Corning Corp.*, 143 F.R.D. 136, at *4 (N.D. Ohio 1992) (conditionally certifying a nationwide 23(b)(3) class of future silicone breast implant claimants); *In re Breast Implant Litig.*, 1992 U.S. Dist. Lexis 10080, at *4 (May 21, 1992, N.D. Ohio)

technological society, in an era when tens of thousands of persons may become injured by toxic substances or dangerous products, but will not manifest observable harm until years later.

The concept of adjudicating or settling through a class action the interests of persons who are completely unaware of any injury, although they have been placed at risk in some manner by a potential defendant, is quite controversial in itself. As the Advisory Committee observed in an oft-quoted Note to the 1966 Amendments to the Federal Rules of Civil Procedure, "[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action" because of the preponderance of individualized issues involved. Although class actions in the mass accident and even mass tort context have won increasing acceptance, they have almost always been limited to class members who have manifested some sort of perceptible injury, know that they may have a legal interest, and thus are in a position intelligently to evaluate whether to be part of a class action.

Binding persons to the results of a class action prosecuted by others when they *do not* know they have been injured and at most have a unaccrued *future* claim for injury is problematic on at least three levels. First is a concern about basic fairness. In the statute-of-limitations context, for example, this Court has been unwilling to foreclose victims' legal interests based on "blameless ignorance," refusing to permit rights to lapse on the theory that people should be "charged with knowledge" of risks to which they have been unknowingly exposed. *Urie v. Thompson*, 337 U.S. 163, 169-170 (1949). This concern is compounded by the unavoidable conflict of interest between already injured plaintiffs and those who will develop illnesses in the future. Even in the absence of venality or corruption, the *former* group of plaintiffs, and their attorneys, have a natural incentive to settle the claims of the *latter* at relatively low value, in order to make a settlement as likely as possible by making the settlement package as attractive as possible for the defendant.

Second is the issue of standing: to the extent that resolution of a class lawsuit depends on the adjudicatory power of an Article III court, it may be illegitimate to include persons who have manifested

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(amending class definition to include "persons who are likely to suffer or are at an increased risk of suffering any adverse medical condition as a result ... of having received a silicone gel breast implant").

no perceptible injury from a possible risk to which they may have been exposed.[34]

Third, beyond the basic "case or controversy" question, the idea that federal judges should supervise the negotiation and final settlement of the substantive legal claims of absent persons before these claims have even accrued strains traditional concepts of the judicial role. An excellent benchmark for evaluating such a role is provided by the dissent in *Hoffman-La Roche, Inc. v. Sperling*, 110 S. Ct. 482, 488 (1989) (Scalia, J., joined by Rehnquist, C.J.). That case upheld somewhat novel "case management" techniques by a district judge in an age discrimination case. The judge assisted the main plaintiff in discovering the names of potential plaintiffs who might wish to join the case, and supervised the notice they would receive. The dissenters argued that even *case management* of such *future* cases, involving known potential plaintiffs who would have to opt in to be bound, was "an extraordinary application of the federal judicial power," at odds with "a system in which courts are not inquisitors of justice but arbiters of adversarial claims." *Id.* at 489, 492. Far more extraordinary, of course, is the practice of judges empowering private parties in a case like this one to *extinguish* the legal claims of absent persons before those claims have accrued.

Such concerns have led a number of commentators to argue that the difficulties inherent in analyzing the interests of those who do not yet know that they are injured, and particularly in notifying them of their rights, should preclude *all* class action settlements that seek to bind such persons.[35] Such an outcome is certainly one

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[34] A hypothetical claim, like those of petitioners' in 1984, *see* note 10, *supra*, would appear not to have a "high degree of immediacy," *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2138 (1992), nor to be "certainly impending"; rather, such a claim seems merely "abstract" and too "conjectural or hypothetical" to confer standing. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (internal quotes and citations omitted).

[35] *See, e.g.*, 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Action* § 17.39, at 17-119 (3d ed. 1992) ("Anytime a mass tort gives rise to injuries that occur over a period of time . . . inevitably there will be claims that arise in the future after an action for his mass tort has been permitted to be maintained an adjudicated as a class action. Those unaccrued future claims will not and cannot be bound by the class action litigation. Toxic torts giving rise to latent illnesses and defective products with latent risks are two examples."); Elizabeth R. Kaczynski, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85

option for this Court's consideration, but the principal attraction of the instant case is that it provides an excellent vehicle for any range of holdings — even a narrow one — in this Court's first consideration of the problem of class action, absent plaintiffs who lack present awareness of any injuries.

The basic due process requirements on which this Court has insisted for Rule 23(b)(3) class actions for money damages have been adequate representation, notice, and a chance to opt out. This Court has long held that, in general, "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." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). In class actions "the Due Process Clause of course requires that the named plaintiff at all times *adequately represent* the interests of the absent class members." *Phillips Petroleum Co v. Shutts*, 472 U.S. 797, 812 (1985) (emphasis added).

Additionally, a class action settlement is not binding on absent class members unless each such class member "receive[s] *notice* plus an opportunity to be heard and participate in the litigation." *Shutts*, 472 U.S. at 812 (emphasis added); *see also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 314-315, 319 (1950) (requiring "notice reasonably certain to reach most of those interested in objecting"). Moreover, due process requires that each absent plaintiff be permitted to opt out of the class. *Shutts*, 472 U.S. at 812.[36]

On the record of this case, *all* these procedural protections were denied. The named plaintiffs to the 1984 *Agent Orange* litigation,

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COLUM. L. REV. 397, 398 n.7 (1985) (the "future members cannot be included in (h)(3) actions.") *Cf.* Marck C. Weher, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 J. OF L. REFORM 374, 374 (1988) ("problem with [Rule 23] is that this binding res judicata effect extinguishes the class member's cause of action, yet there is no assurance that the class member will ever have heard about the action, much less have had influence over its litigation").

[36] Such notice and opt-out rights are critical because they "protect [each] claimant's right to control her litigation." Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1 (1986). *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-33 (1982) (holding that the right to use adjudicative procedures is a species of property protected by the due process clause).

who agreed to the ultimate settlement, all had already suffered "severe and permanent disabling injuries." *See* p. 5, *supra*. These plaintiffs were obliged to sue prior to the expiration of the applicable statute of limitations, despite the paucity of the scientific evidence then available. *See* p. 7 & note 9, *supra*. As the district court acknowledged, the interests of petitioners and others who in 1984 were not suffering from any injury, *see* note 10, *supra*, were directly adverse to "the interests of presently injured plaintiffs as well as defendants in achieving a settlement." **A58**.

The named plaintiffs made no effort to notify absent persons who were not suffering from injury. Rather, over defendants' objection, they and the district court defined, and directed notice to, a class consisting *only* of persons who subjectively believed that they were suffering compensable injuries as a result of Agent Orange. *See* pp. 5-6 & note 5, *supra*. Then, once the opt-out deadline had passed, the named plaintiffs vastly expanded the class that would be bound, to include anyone who might *ever* manifest any injury in the future. *See* pp. 6-7, *supra*. Conceivably, the settlement agreement might have expressly *preserved* the claims of these future plaintiffs; instead, it abolished them. The district court's explanation for the parties' contractual agreement to extinguish the rights of hundreds of thousands of people, none of whom was at the bargaining table, was that the parties at the table were "[c]oncerned with the potential for new actions and recogniz[ed] the need for finality." **A35**. No notice and opt out rights for the new class members were even considered.

Thus, petitioners were denied *all* of the bedrock requirements of Rule 23 and due process at the hands of private parties who negotiated to extinguish petitioners' legal claims before they had even accrued. This "might in another context be a bureaucratic success story," but here it has "serious constitutional ramifications." *Morrison v. Olson*, 487 U.S. 654, 684 (1988).

The Second Circuit was likewise unwilling to enforce the minimum procedural guarantees applicable in the class action context. Despite the conflict of interest that the district court had candidly acknowledged, **A58**, the court below dismissed any concern here, with the assertion that harm from any conflict had "never materialized." *See* p. 10, *supra*. And in a bizarre reading of this Court's decision in *Shutts*, the court below opined that, as long as absent plaintiffs are *unknown*, a court may dispense with

notice and opt-out rights entirely if it deems the benefits of these core protections to be "conjectural" and outweighed by "society's interest" in resolving complex litigation. *See id.*

The Second Circuit's focus on "society's interest" and its disregard for individual procedural guarantees may be acceptable in the legislative arena but cannot be squared with the functioning of a life-tenured judiciary. *Cf. Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 444-45 (1915) ("General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule"). As Judge Patrick Higginbotham cautioned in a similar context, in invalidating an innovative quasi-administrative scheme for trying asbestos cases: "The Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more." *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990).

Thus, at its root, the second question in this case presents the Court with an opportunity to insist that the lower courts apply traditional Rule 23 and due process analysis to the unaccrued future claims of absent plaintiffs, and an opportunity to reject the sort of quasi-legislative analysis relied on by the Second Circuit.

CONCLUSION

For all these reasons, certiorari should be granted.

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November 24, 1993

APPENDICES

APPENDIX A

Decision of the United States Court of Appeals for the Second Circuit, affirming the district court's refusal to remand the case and its dismissal of petitioners' claims, dated June 24, 1993 . . . . **A1**

APPENDIX B

Decision of the United States District Court for the Eastern District of New York, refusing remand and dismissing petitioners' claims, dated October 4, 1991 . . . . **A26**

APPENDIX C

Decision of the District Court denying Rule 59 motion for reconsideration except in part, and denying motion under 28 U.S.C. § 455(a), dated November 12, 1991 . . . . **A60**

APPENDIX D

Order of the Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing *En Banc*, dated August 26, 1993 . . . . **A63**

APPENDIX E

Text of Federal Rule of Civil Procedure 23 . . . . **A64**

APPENDIX F

Affidavits of Shirley Ivy, dated February 22 and 27, 1991 . . . . **A68**

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 92-7537, 92-7573, 92-7575

IN RE "AGENT ORANGE" PRODUCT
LIABILITY LITIGATION,

SHIRLEY IVY, Individually and as Representative of the Estate of Donald Ivy, Deceased; CHARLES JARDON and TONY K. JARDON, Individually and as Next Friend of Charles Jardon, Jr.; ROBIN JARDON, WARREN JARDON and SHARON JARDON; VERDA WILSON, Individually and as Representative of the Estate of Isaiah Wilson, Jr., Deceased; SHIRLEY ZALEWASKI, Individually and as Representative of the Estate of Yen Zalewaski, Deceased; GARY THOMAS; MARY LEE THOMAS; JAMES L. KENT; EMMA I. KENT; DAWN MARIE INMAN, Individually and as Representative of the Estate of Bobby Joe Inman, Deceased; EARL THOMPSON; JUDY L. THOMPSON; JAMES DONALD DELOATCH; JOYCE DELOATCH; PEGGY SANDS, Individually and as Representative of the Estate of Martin Sands, Deceased; EMILE ANNIBOLLI; URSULA MARGOT PARRY, Individually and as Representative of the Estate of James D. Parry, Sr., Deceased; JAMES D. PARRY, JR.; JAMES CHRISTOPHER PARRY; LAURA JENKINS, Individually and as Representative of the Estate of Eddie Jenkins, Deceased; RONALD L. HARTMAN, KATHERINA H. HARTMAN, and as Next Friend to JEFFERY ALAN HARTMAN and ANGELA MARIE HARTMAN, Both minors individually and as Representative of those similarly situated,

Plaintiffs-Appellants,

JAMES WHITE, Individually and as Representative of the Estate of Clarence White, Deceased; CHARLES BROWN,

Plaintiffs-Appellants,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, also known as Diamond Shamrock Refining & Marketing Company, also known as Occidental Electro Chemical Corporation, also known as Maxus Energy Corp., also known as Occidental Chemical Corporation, also known as Diamond Shamrock Co.; DOW CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY; T.H. AGRICULTURE & NUTRITION COMPANY, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of New York

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JUNE 24, 1993

Before: VAN GRAAFEILAND, KEARSE and CARDAMONE,

Circuit Judges.

VAN GRAAFEILAND, *Circuit Judge*:

Two groups of veterans and their family members, who sue both individually and on behalf of others similarly situated, appeal from a judgment of the United States District Court for the Eastern District of New York (Weinstein, J.) dismissing their tort claims against seven chemical companies which manufactured the defoliant Agent Orange. *Ryan v. Dow Chemical Co.*, 781 F.Supp. 902 (E.D.N.Y. 1991). In addition to their claim of

substantive error, appellants contend that the district judge erred in refusing to remand their cases to the state court from which they were removed and in denying their motion that he disqualify himself for conflict of interest or appearance of partiality. For the reasons that follow, we affirm.

These actions are an attempted revival of the massive tort litigation (collectively "*Agent Orange I*"), which arose from the United States Armed Services' use of Agent Orange during the Vietnam War. Because both the history of the litigation and the background of the instant actions have been chronicled in the opinion below, 781 F.Supp. at 904-14, a brief summary will suffice for present purposes.

While serving in Vietnam, several hundred thousand soldiers were exposed to Agent Orange, which contained traces of the chemical 2,3,7,8-tetrachlorodibenzo-p-dioxin ("dioxin"). Following their return home, many veterans complained of illnesses, which they attributed to this exposure. In 1978, these veterans began to seek redress through the courts, suing both the United States and the manufacturers of Agent Orange.

In 1979, the Judicial Panel on Multidistrict Litigation consolidated hundreds of the cases and transferred them to the Eastern District of New York. Subject matter jurisdiction over these cases originally was based on the asserted existence of a question of federal common law, but, after we reversed on this issue, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981), jurisdiction was found to exist on the basis of diversity of citizenship.

In December 1983, the district court certified a Rule 23(b)(3) "common question" class with opt-out rights in order to address the common issues of general causation and the military contractor defense, and a Rule 23(b)(1)(B) "limited fund" class for punitive damage claims. 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984). The Rule 23(b)(3) class was defined as:

> those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides . . . The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

Id. at 729. Notice was provided to class members by mail where feasible and by advertisements in the print and broadcast media. *Id.* at 729-30. The deadline to opt out of the Rule 23(b)(3) class was May 1, 1984; 2,440 potential plaintiffs opted out by the deadline, although all but 282 eventually opted back into the class.

A tentative settlement was reached on May 7, 1984, the day the trial was scheduled to begin. The Settlement Agreement provided for the establishment of a $180 million settlement fund to cover all claims arising out of Agent Orange exposure, and a claim against this fund was made the exclusive remedy for all class members. A $10 million reserve was created to indemnify the defendants for any state court judgments obtained by class members. The Settlement Agreement stated that "[t]he Class specifically includes persons who have not yet manifested injury," and it forever barred class members from instituting or maintaining an action against defendants based on exposure to Agent Orange. *See* 597 F.Supp. 740, 862-66 (E.D.N.Y. 1984) (reprinting Settlement Agreement).

The settlement was approved on September 25, 1984 after extensive, nationwide fairness hearings, *see id.* at 740-862, and the approval was reaffirmed on January 7, 1985, *see* 611 F.Supp. 1296, 1347. On July 9, 1985, the district court granted an order directing consummation of the settlement "in accordance with its terms," dismissing all class members' claims, permanently barring class members from instituting or maintaining future actions arising from Agent Orange exposure, and retaining jurisdiction over the maintenance, administration

and distribution of the settlement fund. 618 F.Supp. 623, 624-25 (E.D.N.Y. 1985). The court also granted summary judgment against the opt-out plaintiffs based on their failure to prove causation and on the military contractor defense. 611 F.Supp. 1223 and 1267 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). We affirmed the certification, maintenance and settlement of the class action in all significant and relevant respects. 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

The final distribution plan for the settlement fund was announced on July 5, 1988 following the termination of all appeals. 689 F.Supp. 1250. Roughly three-fourths of the fund, which by then had grown to approximately $240 million, was allocated to the Agent Orange Veteran Payment Program. This Program provides payments on the death or disability of class members. By September 30, 1991, it had disbursed over $86 million and had processed more than fifty thousand claims. Twenty-eight percent of the disability claims processed by the fund were for disabilities manifesting themselves after May 7, 1984; more than half of the death claims were for deaths occurring after May 7, 1984. 781 F.Supp. at 910. By September 30, 1992, the Payment Program had disbursed more than $146 million to disabled veterans or their survivors and had processed more than sixty thousand claims. *Report of the Special Master on the Distribution of the Agent Orange Settlement Fund*, Fourth Annual Report, at 11-12.

Most of the remaining quarter of the settlement fund was allocated to the Agent Orange Class Assistance Program ("AOCAP"), which made grants to agencies serving Vietnam veterans and their families. Among the activities assisted by those grants were veteran counselling, aiding the obtaining of Government veterans' benefits, and administering training programs for agencies dealing with Vietnam veterans and their employees. As of September 31, 1992, AOCAP had awarded roughly $33.6 million in grant funds, benefitting more than 101,000 veterans and family members nationwide. *See* Fourth Annual Report, *supra*, at exh. D. That portion of the $10 million indemnity

reserve that will not have been used to satisfy state court judgments by 1994 will revert to this fund. Originally, the district court provided for management of the AOCAP fund by an independent foundation. We reversed on this point and ordered that Judge Weinstein maintain direct oversight of the Program. 818 F.2d 179, 184-86 (2d Cir. 1987). In managing AOCAP, Judge Weinstein consults with an advisory board of Vietnam veterans.

In 1989 and 1990, two overlapping class actions, *Ivy v. Diamond Shamrock Chemicals Co.* and *Hartman v. Diamond Shamrock Chemicals Co.*, were brought in Texas courts. Both alleged that the named plaintiffs or their family members suffered injury as a result of Agent Orange exposure and that the injuries sustained by these plaintiffs did not manifest themselves or were not discovered until after May 7, 1984, the *Agent Orange I* settlement date. Both complaints sounded exclusively in state law and explicitly abjured reliance on federal law. Defendants removed the cases to the United States District Court for the Eastern and Southern Districts of Texas, alleging "artful pleading" of a federal claim or, alternatively, complete federal preemption. The Judicial Panel on Multidistrict Litigation transferred the cases to the Eastern District of New York.

On January 31, 1990, the *Ivy* plaintiffs petitioned this court for a writ of mandamus directing remand. On March 28, we denied the motion, ruling that the question of subject matter jurisdiction should be decided in the first instance by the district court. *In re Ivy* , 901 F.2d 7, 10 (2d Cir. 1990). Plaintiffs then moved in the district court for remand of both cases. The district court heard oral argument on March 6, 1991, and scheduled an additional hearing on the motion to remand and other motions for May 6, 1991, to allow for further briefing. In the interim, defendants moved to dismiss and to amend their notice of removal to assert federal officer removal pursuant to 28 U.S.C. § 1442(a)(1).

The district court remanded the claims of two civilian plaintiffs alleging injury, holding that they were not within the

Agent Orange I class and that federal officer removal was inapplicable. *Ryan v. Dow Chemical Co.*, 781 F.Supp. 934 (E.D.N.Y. 1992). The court denied the motion to remand of the veteran plaintiffs and their family members and dismissed their claims as barred by the *Agent Orange I* settlement and the court's order enjoining future suits by class members. 781 F.Supp. 902, 918-20. Plaintiffs moved for reconsideration of the latter decision and for disqualification of Judge Weinstein pursuant to 28 U.S.C. § 455. The court, in an unpublished order, denied both motions and kept its original decision substantially intact.

FEDERAL JURISDICTION

As a general rule, a state case may be removed to federal court only if federal jurisdiction is evident on the face of the plaintiff's well-pleaded complaint. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). This rule is not satisfied with respect to the complaints herein. There is no complete diversity of citizenship, and no federal issue is apparent in the complaints. Indeed, the complaints explicitly disclaim reliance on federal law. Accordingly, in order to be removable, the *Ivy* and *Hartman* cases must fall within an exception to the "well-pleaded complaint" rule. The district court asserted two such exceptions -- plaintiffs' "artful pleading" of a federal question, and the court's residual authority under the All Writs Act to preserve its jurisdiction. We address these in order.

Ordinarily, a plaintiff is master of his complaint and may elect to proceed solely under state law even if federal remedies are available. *See Caterpillar*, *supra*, 482 U.S. at 392; *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, (1913). However, a complaint which appears to be grounded solely in state law actually may be federal in nature, and thus removable, if its true nature has been disguised by the plaintiff's artful pleading. *See generally* 14A Charles A. Wright *et al.*, *Federal Practice and Procedure* § 3722, at 266-75 (2d ed. 1985). Because state and federal laws have many overlapping or even identical remedies and because generally we respect a plaintiff's

choice between state and federal forums, this exception to the well-pleaded complaint rule is necessarily a narrow one.

The district court justified removal in the instant case on the authority of *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2, (1981), as interpreted by *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 760 (2d Cir.), *cert. denied*, 479 U.S. 885, (1986). Under *Sarkisian's* interpretation of *Moitie*, a state law claim is an artfully-pleaded federal claim if (1) the plaintiff previously had elected to proceed in federal court on a claim expressly grounded on federal law and (2) the elements of the subsequent state law claim are virtually identical to those of the claim previously made. *Id.* However, the instant case was not removable under the *Sarkisian* test, because the prior claim was not expressly grounded on federal law but instead was a diversity claim based on general tort law. The district court interpreted *Sarkisian* to require only that "the elements of the [subsequent] claim . . . be 'virtually identical' to those in the prior federal action," stating that "there is no indication that the Court of Appeals intended to . . . limit its reach" to those cases where the prior federal court action was based on federal question jurisdiction. 781 F.Supp. at 917. This was a misreading of *Sarkisian*, which explicitly requires that the prior claim be "expressly grounded on federal law." 794 F.2d at 760; *see also Ultramar America Ltd. v. Dwelle*, 900 F.2d 1412, 1414-17 (9th Cir. 1990).

Alternatively, the district court found authority for removal in its power under the All Writs Act to issue writs "necessary or appropriate" in aid of its jurisdiction. 28 U.S.C. § 1651. Here, the district court was on sounder ground. A district court, in exceptional circumstances, may use its All Writs authority to remove an otherwise unremovable state court case in order to "effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977).

If Agent Orange victims were allowed to maintain separate actions in state court, the deleterious effect on the *Agent Orange*

I settlement mechanism would be substantial. The parties to the settlement implicitly recognized this when they agreed that all future suits by class members would be permanently barred. It is difficult to conceive of any state court properly addressing a victim's tort claim without first deciding the scope of the *Agent Orange I* class action and settlement. The court best situated to make this determination is the court that approved the settlement and entered the judgment enforcing it. Removal in the instant case was an appropriate use of federal judicial power under 28 U.S.C. § 1651. *See United States v. City of New York*, 972 F.2d 464, 469 (2d Cir. 1992); *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 863-64 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989). In so holding, we are not unmindful of the fact that the All Writs Act is not a jurisdictional blank check which district courts may use whenever they deem it advisable. "Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985). Given the "exceptional circumstances" surrounding the instant case, issuance was a proper exercise of judicial discretion. The district court was not determining simply the preclusive effect of a prior final judgment on claims or issues expected to be raised in subsequent collateral proceedings; it was enforcing an explicit, ongoing order against relitigation of matters it already had decided, and guarding the integrity of its rulings in complex multidistrict litigation over which it had retained jurisdiction.

Appellees contend that the instant case was removable pursuant to 28 U.S.C. § 1442(a), which in pertinent part allows removal of actions against "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office." Although appellees sought to amend their notice of removal to assert this as an additional basis for removal, the district court did not rule on their application to

amend. Because our decision is supported on other grounds, we too decline to reach this question.

Appellants' additional arguments against the district court's assumption of jurisdiction are not persuasive. They contend, for example, that removal in the instant case violates the Anti-Injunction Act, 28 U.S.C. § 2283, which prohibits a federal court from "grant[ing] an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." This contention is without merit. Assuming without deciding that removal of a case from state court to federal court is sufficiently akin to an injunction to come within the Act's ambit, the facts of the instant case bring it squarely within the above-mentioned exceptions to the Act. First, the district court's removal was "necessary in aid of its jurisdiction." Judge Weinstein has continuing jurisdiction over the *Agent Orange I* class action, not only to administer the settlement fund, *see* 818 F.2d at 184-86; 618 F.Supp. at 625, but also to ensure that the Settlement Agreement as a whole is enforced according to its terms. *See Meetings & Expositions, Inc. v. Tandy Corp.*, 490 F.2d 714, 717 (2d Cir. 1974). "In a class action, the district court has a duty to class members to see that any settlement it approves is completed, and not merely to approve a promise . . ." *In re Corrugated Container Antitrust Litig.*, 752 F.2d 137, 141 (5th Cir.), *cert. denied*, 473 U.S. 911 (1985). Second, removal was needed "to protect or effectuate" the district court's *Agent Orange I* judgment. This exception in the statute authorizes a federal court to proscribe state litigation of an issue that actually has been previously presented to and decided by the federal court. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988). A review of the arguments, orders and judgment in *Agent Orange I* makes it crystal clear that the court in fact did determine the central issue of class membership raised here, i.e., that persons who had yet to manifest injury were class members. *See*, *e.g.*, Settlement Agreement ¶ 8, 597 F.Supp. at 865 ("The Class specifically includes persons who have not yet manifested injury.").