No. 13-169

In the Supreme Court of the United States

NICOLAS MARTIN,

Petitioner,

v.

CARL BLESSING, *ET AL.,*

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Nicolas Martin respectfully replies to the opposition brief filed by plaintiffs Carl Blessing *et al.* (hereinafter, "Class Representatives") and joined by the defendant Sirius XM Radio, Inc. ("Sirius" and collectively with Class Representatives, hereinafter "Respondents"):

> Sirius XM joins in the Brief in Opposition filed by Respondents Carl Blessing *et al.* As indicated in the attached Waiver, Sirius XM will not file a separate opposition to the petition for certiorari unless one is requested by the Court.

Letter from Todd Geremia to Clerk, U.S. Supreme Court, at 1 (Aug. 21, 2013). Martin adopts the arguments made by *amici curiae* Pacific Legal Foundation ("PLF") and Center for Individual Rights ("CIR") in support of granting the petition for a writ of *certiorari*. With Sirius' having joined the Class Representatives' brief, there is no need to request a separate Sirius brief, as the Court has heard from all parties and two esteemed *amici*. Given the clearly unconstitutional racial taint on these proceedings from the race-conscious class-certification order ("Diversity Order"), Pet. App. 35a, and the numerous ways in which the challenged class-action settlement violates the Class Action Fairness Act ("CAFA"), Pet. at 25-26 n.10, summary *vacatur* and remand are the most appropriate response here.

ARGUMENT

The Respondents raise four arguments against granting the petition for a writ of *certiorari*. All of these arguments are meritless, which highlights the appropriateness of summary disposition here.

As the petition explains, racially tainted judicial proceedings make "the injury caused by the discrimination … more severe because the government permits it to occur within the courthouse itself." *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 628 (1991). Injury in no way requires that discrimination affected the outcome:

> The … unconstitutional state action … occur[s] whether the defendant is white or Negro, whether he is acquitted or convicted. In short, when a grand or petit jury has been selected on an impermissible basis, the existence of a constitutional violation does not depend on the circumstances of the person making the claim.

Peters v. Kiff, 407 U.S. 493, 497-98 (1972) (footnotes omitted); *Batson v. Kentucky*, 479 U.S. 79, 87 (1986) ("race simply is unrelated to [one's] fitness") (internal quotation omitted); PLF Br. at 4-7. Accordingly, this Court has no tolerance for racially tainted judicial proceedings:

> Since the beginning, the Court has held that where discrimination in violation of the Fourteenth Amendment is proved, [t]he court will correct the wrong, will quash the indictment[,] or the panel[;] or, if not, the error will be corrected in a superior court, and ultimately in this court upon review, and all without regard to prejudice notwithstanding the undeniable costs associated with this approach.

Rose v. Mitchell, 443 U.S. 545, 556-57 (1979). This petition calls on the Court to honor the commitment that it made in *Rose.*

I. *EVERY* RACIALLY TAINTED JUDICIAL PROCEEDING IS AN APPROPRIATE VEHICLE TO HONOR THE COMMITMENT THIS COURT MADE IN *ROSE*

Respondents identify four reasons why this case lacks a "compelling reason" for review. Resp. Br. at 2. Taking *Rose* at face value, Martin respectfully disagrees with the principles set out in Respondents' brief. Although they argue that no discrimination occurred as a matter of fact, Respondents nowhere dispute that the district judge imposed the Diversity Order in this case and at least the six others that Martin cites in his petition. Pet. at 8-9 n.5; CIR Br. at 4-7. Judge Baer is well past the zero-tolerance limit. While *vacatur* here will not resolve the six prior instances, it will halt any future ones. Martin now turns to Respondents' four arguments for minimizing this case's importance.

A. Martin Has Standing to Challenge the Class-Certification Order

Respondents first argue that, although *some* class members *may* have standing to challenge *some* class-certification orders, Martin lacks an "injury-in-fact" under "the unique facts of this case," Resp. Br. at 4, presumably meaning that the Diversity Order did not cause inferior representation. *Id.* at 6. To the contrary, class members *always* have procedural standing to challenge non-merit-based restrictions on class counsel in class-certification orders.

Respondents ignore the simple, but revealing, hypotheticals posed by CIR and Martin on whether class members could challenge plainly arbitrary restrictions on class counsel (*e.g.,* restrictions on surnames' first letters or birth year). CIR Br. at 7-8;

Pet at 26-27. These examples demonstrate Martin's procedural standing, even without strict scrutiny.

Rule 23's class-certification procedures facilitate class members' claims in cases like this. As that procedural rule's beneficiaries, class members have *procedural standing* to challenge denial of the procedure, without Article III's otherwise-required immediacy, provided that they also suffer non-procedural, concrete injuries. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992); CIR Br. at 7-11; Pet. at 26-27, 29-30.[1] Like surnames and birth years, race has absolutely nothing to do with counsel's ability to represent the class, and Judge Baer had no basis – either demonstrated or imaginable – to use race as an "other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class" under Rule 23(g). CIR Br. at 8; PLF Br. at 7-8; Pet. at 14-15. The procedural injury was extant the instant the Order was filed, without waiting for inferior representation.

When plaintiffs allege race-based discrimination, they nonetheless retain standing to challenge the same action as merely arbitrary. *Village of Arlington Heights v. Metro. Housing Development Corp.*, 429 U.S. 252, 263 (1977); *McCleskey v. Kemp,* 481 U.S. 279, 292 n.8 (1987). For example, as-applied, race-based challenges to *facially neutral* limits on voting or holding office could proceed *facially* against arbitrary freeholder restrictions, without proving as-applied, race-based impacts. *Turner v. Fouche,* 396 U.S. 346, 362 (1970); *Quinn v. Millsap,* 491 U.S. 95, 103 n.8 (1989). Although *McCleskey, Turner,* and

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[1] *Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (2002), recognizes that undesirable settlements injure class members concretely.

Quinn involved equal protection, not procedural norms, they nonetheless recognize standing to proceed facially against arbitrary government action, without an as-applied analysis. This "facial standing" suffices here because, like freeholding requirements, the Diversity Order lacks any rational basis.

Vacating the flawed class-certification order here will reopen the settlement, preserve Martin's cause of action, and provide opportunities for the class to achieve a better settlement. That is redress enough for Article III. Pet. at 29-30.

B. Martin Need Not Show That Class Counsel Engaged in Racial Balancing

Respondents next argue that Martin must prove that the Diversity Order made class counsel engage in racial balancing, which allegedly did not occur because class counsel "employ a significant number of women and minority lawyers," and the legal team "included women and minorities" "even before the … [class-certification] order." Resp. Br. at 5. Although this unsworn statement *implies* (without actually stating) that class counsel were sufficiently diverse *before* the Diversity Order, accepting that implication would not defeat Martin's ability to press the equal-protection rights of counsel employed by class counsel.[2]

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[2] While not evidence in any event, *Frazier v. U.S.,* 335 U.S. 497, 503 (1948), Respondents' unsworn statement fails to allege that class counsel employed enough women and minorities *before* the Diversity Order to meet the Order's race- and sex-based balancing. The only record evidence is that "Class Counsel assembled a team of approximately 25 attorneys, from 11 firms." Decl. of James J. Sabella, ¶24 (Docket #126), *Blessing v. Sirius XM Radio Inc.,* No. 09-10035-HB-RLE (S.D.N.Y.). If

Even assuming *arguendo* that the legal team was sufficiently diverse *before the Order,* racial balancing still would injure the class by requiring class counsel to *maintain* the balance. Thus, for example, class counsel could not honor fiduciary cost-minimization duties by outsourcing document review to cheaper but racially homogenous nations like India. More importantly for an underperforming legal team like class counsel, the Diversity Order greatly restricted discretion for staffing changes that would upset the balance. With unequal-footing challenges like those presented by competing replacement staffing at class counsel's firms, Article III is satisfied by removing the obstacle (*i.e.,* the racial-balancing mandate), not by proving that an applicant would have gotten the job in the absence of the unequal footing. *Adarand Constr., Inc., v. Pena,* 515 U.S. 200, 211 (1995). That is enough for Martin's third-party standing.

C. Assignment to Judge Baer Excluded Qualified Law Firms and Legal Teams

Respondents next argue that Martin cannot assert the equal-protection rights of counsel at other firms whom the Diversity Order excluded from serving as class counsel because "no other law firm, other than the three firms appointed as class counsel, ever sought for appointment as class counsel." Resp. Br. at 6. Once this case was assigned to Judge Baer, his history preordained the Diversity Order, thereby excluding many able counsel and leanly-staffed firms from serving as class counsel without an expensive fight to challenge the Order, with no certainty of becoming class counsel if that

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anything, the evidence calls into question Respondents' claim that class counsel involved only "three firms." Resp. Br. at 6.

challenge succeeded. Although third-party standing does not strictly require such hindrances, Pet at. 21, that is ample hindrance for Martin to assert the equal-protection rights of counsel outside the class-counsel firms.

D. Martin Need Not Demonstrate that the Inclusion (or Exclusion) of Women and Minority Lawyers Caused Class Counsel to Perform Inadequately

Respondents finally argue that Martin has failed to establish that the "representation would have been better had the case been staffed exclusively with white males, as Martin apparently would have preferred," and he "never … link[ed the settlement's] inadequacy to the fact that class counsel had some women and minority lawyers working on the case." Resp. Br. at 6-7. Martin has never argued that male Caucasians would perform better than females or minorities. Martin contends that race and sex have *nothing to do with lawyers' performance* representing the class and that they are impermissible criteria. As Sections I.A-I.C, *supra,* show, the Diversity Order injured the class under Article III.

Respondents also complain that Martin has not challenged the settlement's adequacy, Resp. Br. at 6, as though Martin were an otherwise-happy client who objects only to racial quotas. To be clear, Martin considers the settlement to violate CAFA, Rule 23, and class counsel's ethical and fiduciary duties to the class. Pet. at 25-26 & n.10; CIR Br. at 7. Martin pursued only the Diversity Order as a basis for review in this Court, based on an assessment of which issues were "cert-worthy." On the day that Martin petitioned this Court, the Sixth Circuit

issued a decision suggesting another basis for challenging the settlement's merits, on which Martin will move to amend the Questions Presented.

II. MARTIN RAISED STANDING BELOW, AND RESPONDENTS' FAILURE TO CONTEST THIRD-PARTY STANDING IN DISTRICT COURT PRESENTS AN OPPORTUNITY TO RESOLVE A SPLIT ON WHETHER PARTIES CAN WAIVE PRUDENTIAL LIMITS ON STANDING

Respondents next argue that Martin failed to present various standing-related issues below, Resp. Br. at 7-11, which precludes raising those standing issues here. *Id.* at 7-8 (first-party standing), 9-10 & n.6 (third-party standing). Not only are Respondents wrong, but the waiver issue cuts precisely the opposite way: Respondents waived their right to challenge Martin's prudential standing.

Significantly, standing's jurisdictional nature means that parties can raise it on appeal, and courts can raise it *sua sponte*. *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990); 28 U.S.C. §1653.[3] But even if that were not the case, Martin *did* raise standing in the Second Circuit, and that is all that this Court requires, even for merits issues:

> We must also reject respondent's contention that the regulatory taking argument is not

[3] Appellate courts recognize exceptions, including a jurisdictional exception, to that general rule that appellants cannot raise new arguments in petitions for rehearing. *Pearson v. Shalala,* 172 F.3d 72, 73 (D.C. Cir. 1999) (Silberman, J., concurring in the denial of rehearing *en banc*); *U.S. v. Lucas,* 499 F.3d 769, 792 (8th Cir. 2007) (*en banc*) (Beam, J., dissenting).

> properly before us because it was not made below. … *Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.* Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate claims. They are, rather, separate arguments in support of a single claim – that the ordinance effects an unconstitutional taking. *Having raised a taking claim in the state courts, … petitioners could have formulated any argument they liked in support of that claim here.*

Yee v. City of Escondido, 503 U.S. 519, 534-35 (1992) (citations omitted, emphasis added). This Court frames its pressed-or-passed-upon-below test in the disjunctive, *U.S. v. Williams,* 504 U.S. 36, 41 (1992), and Martin meets *both* prongs: Martin pressed standing in the Second Circuit (where Respondents belatedly raised it), and the Second Circuit passed upon it. That is all that – even *more than* – this Court requires for Martin's standing arguments.

A. Martin Has First-Party Standing

With respect to first-party standing, Respondents quibble that Martin's theories on *first-party* equal-protection injuries have not been applied in the class-action context, without challenging *objectors'* first-party standing generally. *Compare* Resp. Br. at 7-9 *with* Pet. at 16-17 & n.7 (*citing inter alia Devlin, supra,* establishes first-party standing to challenge the settlement). That concession is fatal: Martin's uncontested, first-party standing under *Devlin*

regarding the settlement's terms anchors his procedural standing (Section I.A *supra*) and third-party standing (Section II.B, *infra*).

B. Martin Has Third-Party Standing

To dispute Martin's third-party standing to assert the equal-protection rights of lawyers whom the Diversity Order injures, Respondents argue that (1) there are no such lawyers, and (2) Martin failed to raise third-party standing until petitioning for rehearing. Resp. Br. at 9-11. Respondents' two arguments are wrong and irrelevant, respectively.

First, as explained in Sections I.B-I.C, *supra,* the Diversity Order discriminated against many lawyers. Second, raising third-party standing for the first time on petition for rehearing presents no obstacle to prevailing on that theory on appeal. *See* note 3 and accompanying text, *supra.* Indeed, as explained in the next section, Respondents' failure to challenge third-party standing in district court presents the opposite question: *did Respondents waive this issue?*

C. Respondents Did Not Attack Martin's First- or Third-Party Standing in District Court, Which Allows Resolving a Circuit Split on Whether Prudential Limits on Standing Can Be Waived

Although Martin challenged the Diversity Order throughout the proceedings below, Respondents did not challenge Martin's standing until the appellate level. While Respondents retain the right to question *constitutional* standing for the first time on appeal, the circuits are deeply split on whether *prudential* standing – *e.g.,* the zone-of-interest test, limits on third-party standing – is jurisdictional or, instead,

may be waived.[4] If prudential limits are waivable, it is Respondents – not Martin – who waived issues of third-party standing. Martin respectfully submits that the Court should resolve the mature split on this major issue of justiciability.

III. THE STANDING ANALYSIS NECESSARILY INVOLVES THE APPLICATION OF FACTS TO PRINCIPLES OF LAW

Respondents' third argument is that the Second Circuit held that appellants require an "injury-in-fact" to establish their standing, which splits with no circuits. Resp. Br. at 11-13. Without sacrificing much granularity, they could well have argued that the Second Circuit required an Article III case or controversy, which also conflicts with no circuits. This 30,000-foot reasoning is as undeniably correct as it is entirely irrelevant. The question presented is never whether an injury-in-fact is required, and that is not the question that Martin presents here.

Instead, the questions presented for standing are whether: (1) the plaintiff alleges *cognizable* injuries, caused by the challenged conduct, and redressable in court, and (2) the plaintiff *prudentially* may assert those injuries. Notwithstanding Respondents' argument against granting *certiorari* in cases involving "misapplication of a properly stated rule of

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[4] *Compare Cmty. First Bank v. Nat'l Credit Union Admin.,* 41 F.3d 1050, 1053 (6th Cir. 1994); *Thompson v. Cnty. of Franklin,* 15 F.3d 245, 248 (2d Cir. 1994); *and Animal Legal Defense Fund, Inc. v. Espy,* 29 F.3d 720, 723 n.2 (D.C. Cir. 1994) (not waivable) *with Bd. of Miss. Levee Comm'rs v. EPA,* 674 F.3d 409, 417-18 (5th Cir. 2012); *Wilderness Soc. v. Kane Cnty., Utah,* 632 F.3d 1162, 1168 n.1 (10th Cir. 2011); *RK Co. v. See,* 622 F.3d 846, 851-52 (7th Cir. 2010); *City of L.A. v. Cnty. of Kern,* 581 F.3d 841, 845 (9th Cir. 2009) (waivable).

law," *id.,* '[i]n many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." *Allen v. Wright,* 468 U.S. 737, 751-52 (1984). As such, many standing cases involve applying properly stated legal principles to the new case's facts. Here, Martin has standing for the reasons set out in Section II, *supra.*

IV. *ROSE* DIRECTS APPELLATE COURTS TO REVERSE *ANY* RACIALLY TAINTED JUDICIAL PROCEEDING, AND THIS COURT COMMITED ITSELF TO DOING SO WHEN LOWER COURTS DO NOT

To narrow the case's importance, Respondents belittle the Diversity Order as the mere "expressed desire" of "one lone District Judge." Resp. Br. at 13-14. In fact, the Diversity Order mandates private parties to engage in racial balancing. PLF Br. at 15-16. That would remain "patently unconstitutional" even if the federal mandate otherwise met strict scrutiny, *Grutter v. Bollinger,* 539 U.S. 306, 330 (2003), which it cannot. CIR Br. at 12-19. In any event, under *Rose* and its progeny, this Court must act, regardless of whether it accepts Respondents' proposed narrowing.

For his part, Martin views the Diversity Order as one of many areas where governments try to divide us along racial lines; contracting and education are two more prevalent arenas. Viewed generally, it is immaterial whether a particular instance arises in a class-certification context versus any other way in which governments act.

But, far from advancing Respondents' cause, narrowing this case to its judicial context runs

squarely into *Rose* and its progeny. Those decisions have zero tolerance for race-based discrimination in judicial proceedings.

Either way, the government's discrimination demands relief to avoid its recurrence.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

September 19, 2013

Respectfully submitted,

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