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 UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

PAUL F. NOVAK
MILBERG LLP
One Penn Plaza
New York, NY 10119
(212) 594-5300

JAY W. EISENHOFER
Counsel of Record
JAMES J. SABELLA
SHELLY L. FRIEDLAND
GRANT & EISENHOFER P.A.
485 Lexington Avenue
New York, NY 10017
(646) 722-8500
jeisenhofer@gelaw.com

CHRISTOPHER B. HALL
P. ANDREW LAMPROS
COOK, HALL & LAMPROS, LLP
Promenade Two, Suite 3700
1230 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 876-8100

Counsel for Respondents Carl Blessing, Edward A. Scerbo, John Cronin, Charles Bonsignore, Andrew Dremak, Todd Hill, Curtis Jones, Joshua Nathan, James Sacchetta, David Salyer, Susie Stanaj, Paul Stasiukevicius, Scott Byrd, Glenn Demott, Melissa Fast, James Hewitt, Ronald William Kader, Edward Leyba, Greg Lucas, Kevin Stanfield, Todd Stave, Paola Tomassini, Janel Stanfield, Brian Balaguera

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Does a class member suffer an injury-in-fact necessary to have standing to appeal an order appointing class counsel that requests that class counsel's staffing on the case reflect the gender and racial diversity of the class, where

- There is no contention or showing that class counsel's selection of lawyers to work on the case was in any way affected by the order;
- There is no contention or showing that any other law firm was discriminated against by reason of the order, since no law firms other than those appointed as class counsel even moved for appointment as class counsel;
- There is no contention or showing that the services provided by class counsel were inadequate or were negatively impacted by the presence of women or minority lawyers working on the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: PAGE

INTRODUCTION

This is an antitrust class action arising out of the merger that created Respondent Sirius XM Radio Inc. ("SXM"). After 18 months of hard-fought litigation, including full fact and expert discovery, and motions to dismiss, for class certification, and for summary judgment, the case settled on the eve of trial. The settlement was approved by the District Judge (App. 36a) and affirmed by a unanimous Court of Appeals for the Second Circuit in a non-precedential, summary order. App. 1a.[1] Out of some 15 million class members, only one—Nicolas Martin—asks this Court to review the case.

Martin does not ask this Court to review the fairness of the settlement or the award of attorneys' fees to class counsel—which have now been approved by four federal judges.[2] Rather, the issue

---

[1] Citations in the form "App. ___" are to the Appendix to the Petition for Writ of Certiorari ("Pet."). Citations in the form "CCA __" are to the joint appendix in the Court of Appeals.

[2] The settlement involved, *inter alia*, a five month freeze on the subscription prices charged by SXM. The linchpin of Martin's objection was his assertion that he obtained his subscription from SXM at a discounted price of $3.99 per month—well below the $12.95 base subscription price—and that, therefore, freezing the list price was worthless. Martin's assertion lacked any evidentiary support, as it was based solely on his counsel's statement in his objection. CCA at 821. Martin never moved to supplement the record, but rather filed a declaration in the Court of Appeals purportedly pursuant to 28 U.S.C. § 1653. But that section, permitting amendment in the Court of Appeals of allegations as to jurisdiction, was not applicable, as the defect in Martin's objection did not go to jurisdiction but to the merits of his

on this Petition involves Martin's standing to appeal from the order appointing class counsel, in which District Judge Harold Baer expressed his desire that class counsel's staffing on the case reflect the gender and racial diversity of the class. App. 35a.[3] Relying on well-settled law, the Court of Appeals held that, in the unique facts of this case, Martin lacked standing to complain about the class certification order because he did not show that he suffered any injury-in-fact from such order. App. 7a.

This case does not satisfy this Court's exacting standards for the grant of a writ of certiorari. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons"). As set forth below:

> 1. This case is an inappropriate vehicle for examining the question that Martin presents, because the factual predicate needed for proper consideration and adjudication of the purported issue is absent here. In particular, there is no basis for any belief that the provision in the order

---

objection. In any event, Martin never presented any proof that any significant portion of the class could or did receive SXM for $3.99 per month. SXM's financial reports belie any such contention, and if such discounts were readily available to all class members, then the FCC engaged in a meaningless act when it insisted on a three-year price freeze as a condition to approving the license transfers necessary for the merger. App. 39a. The District Court acted well within its discretion in approving the settlement, and the affirmance by the Court of Appeals likewise was clearly appropriate.

[3] Contrary to the misleading insinuations in the Petition (*e.g.* Pet. at 5), the order did not purport to impose quotas or anything of the kind.

that Martin challenges had any discriminatory impact whatsoever. Martin did not contend and did not demonstrate that any lawyer was assigned or not assigned to the case because of that provision in the order. Furthermore, no law firm other than those appointed moved for appointment as class counsel, so there can be no suggestion that any firm was denied appointment because of that provision in the order. There simply was no discrimination, and hence no injury, from the order.

2. The Petition raises questions neither advanced nor passed upon below, which therefore are inappropriate for a petition for certiorari. Specifically, the arguments in the Petition concerning whether Martin has either first-person standing or third-person standing were not set forth in his briefs on the appeal and were not addressed by the Court of Appeals.

3. The holding of the Court of Appeals that standing requires injury-in-fact does not conflict with any decisions of other Courts of Appeal or of this Court.

4. The issue that Martin wants this Court to address arises extremely infrequently.

Therefore, the Petition should be denied.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR EXAMINING THE PURPORTED QUESTION PRESENTED

A. The Case Does Not Present the Question of Whether a Class Member Can Ever Appeal a Class Certification Order

This case does not present the broad issue of whether a class member "has standing to challenge the class-certification order." Pet. at i. No party below briefed or argued whether a class member lacks standing to appeal a class certification decision, and the Court of Appeals did not hold that a class member never has standing to appeal a class certification order. What the Court of Appeals held was that on the unique facts of this case, discussed below, Martin lacked standing to appeal the class certification decision because he did not claim or demonstrate any injury-in-fact from the class certification order. App. 7a. That is hardly a controversial holding and does not merit this Court's attention.

B. The Case Does Not Involve any Contention or Showing That Lawyers at the Firms Appointed as Class Counsel Were Chosen to Work on This Case on the Basis of Race or Gender

Martin argues that by allegedly requiring the case to be staffed with women and minority lawyers, the class certification order adversely impacted other attorneys working at class coun-

sel's firms who were not chosen to work on the case. Pet. at 22.[4] This case does not present this issue, however, because there are no facts to support Martin's argument. Martin never contended, let alone demonstrated, that class counsel's staffing of the case was affected in any way by the District Court's request that such staffing reflect the diversity of the class. Class counsel employ a significant number of women and minority lawyers and assembled the best legal team they could, which (even before the District Court's class certification order) included women and minorities. Martin did not contend or show that their selection of lawyers to work on the case was influenced in any way by the provision in Judge Baer's order that Martin asks this Court to review.

C. The Case Does Not Involve a Situation Where Any Other Law Firm Was Excluded From Appointment as Class Counsel Because of the Provision in the Class Certification Order That Martin Challenges

Nor was any other lawyer impacted by the order. The Petition complains that the firms chosen as class counsel were "inappropriately appointed" on the basis of race or gender (Pet. at 7), and that other firms were "exclude[d] from working as class counsel." Pet. at 10-11. Once again, there is no factual predicate for this argument. Contrary to the suggestion in his Petition, Martin never contended, let alone demonstrated,

[4] Martin then claims that he has standing to appeal based on such injuries allegedly suffered by other persons. This argument is discussed below at pp. 9-11 *infra*.

that any other law firm was denied appointment as class counsel because it could not or would not put women and minority lawyers on the case. The fact is that no other law firm, other than the three firms appointed as class counsel, ever sought for appointment as class counsel. Since no other firm sought appointment, the case does not present a situation where any firm was discriminated against by virtue of Judge Baer's order appointing class counsel.

D. The Case Does Not Involve a Situation Where the Services Rendered by Class Counsel to the Class Were Negatively Impacted Because Class Counsel's Staffing of the Case Included Women and Minority Lawyers

Martin also never challenged the adequacy of class counsel. Thus, he never contended, let alone demonstrated, that class counsel's representation in this case was inferior in any way, or that such representation would have been better had the case been staffed exclusively with white males, as Martin apparently would have preferred.

To the extent Martin complained below that the settlement was inadequate, he never purported to link such inadequacy to the fact that class counsel had some women and minority lawyers working on the case, and, in any event, he does not pursue the alleged inadequacy of the settlement as a question for this Court's review. Rather, he acknowledges in the Petition (at 25) that his objection to the settlement was "substantively distinct" from his complaint about the diversity aspect of the class certification order, which was the last of seven

argument points in his appeal brief. *See Blessing v. Sirius XM Radio Inc.*, No. 11-3883 (2d Cir.), Doc. No. 52 at 44-46. In any event, Martin does not pursue the alleged inadequacy of the settlement as a question for this Court's review. As the District Court found, "class counsel did well to reach a settlement at all in view of the questionable liability in this case." App. 38a. The Court of Appeals likewise held that "[t]he record . . . supports a finding of substantive fairness." App. 3a.

II. THE PETITION RAISES QUESTIONS NEITHER ADVANCED NOR PASSED UPON BELOW, WHICH ARE THEREFORE INAPPROPRIATE FOR A PETITION FOR CERTIORARI

A. Martin's First-Party Standing Argument Provides No Basis For Granting Certiorari

The Petition claims that Martin was personally injured by the class certification order because the order "restricts the terms on which the class and class counsel may interact." Pet. at 18-19. This fanciful claim was neither pressed nor passed upon below, and as such it may not be raised here. Nor did Martin show that any of his "interactions" with class counsel were impacted in any way by the class certification order.

The rule followed in this Court "precludes a grant of certiorari . . . when 'the question presented was not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 41 (1992); *see Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec.*, 549 U.S. 443, 455 (2007) ("we ordinarily do

not consider claims that were neither raised nor addressed below"); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) (refusing to consider an issue "raised for the first time in the petition for certiorari"); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) (dismissing writ of certiorari as improvidently granted and noting: "We cannot decide issues raised for the first time here").

Even if this issue were appropriate for review, Martin fails to identify any conflict between the Circuits or any conflict with any decision of this Court regarding this issue. Martin does not cite any case in any Court of Appeals or in this Court holding that an order appointing class counsel that addresses how the case should be staffed injures class members by allegedly restricting their ability to interact with lawyers at class counsel's firm.

In any event, Martin's argument provides no basis for standing. A class member has no basis to complain that he or she was prevented from interacting with any particular lawyer employed by class counsel, because class members have no right to choose what lawyers class counsel will assign to a case, and class members have no right to interact with whatever employee of the firms representing a class they choose. The facts here simply bear no relation to those in *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942), the case principally relied on by Martin.

Similarly deficient is Martin's position that he has first-party standing because the class certification order makes him "an involuntary participant in a discriminatory scheme." Pet. at 19. That

argument also was not made or addressed below, nor is there any other decision by a Court of Appeals or this Court holding that an order appointing class counsel that addresses what lawyers can work on a case injures class members by making them involuntary participants in a discriminatory scheme.[5]

B. Martin's Third-Party Standing Argument Provides No Basis for Granting Certiorari

The Petition raises the question of whether Martin has "third-party standing," i.e., standing "to raise the equal-protection rights of class counsel" who supposedly were discriminated against by the class certification order. Pet. at 22. This is not an appropriate basis for certiorari.

First, the issue of whether standing to appeal a class certification order can be based on "third-party standing" was neither raised by Martin in his briefs on the appeal, nor was it addressed by the Court of Appeals (or the District Court).[6]

---

[5] *Barrows v. Jackson*, 346 U.S. 249 (1953), relied on by Martin, presented "peculiar circumstances" bearing no relation to those in this case. *Id.* at 257. In *Barrows*, a white homeowner was sued for violating a restrictive covenant barring sale of real property to non-Caucasians. This Court understandably held that the homeowner could defend the lawsuit on the ground that the restriction was unconstitutional, even though the homeowner was not the person discriminated against. The lawsuit there obviously caused an injury-in-fact to the homeowner, whereas Martin can point to none here, as the Court of Appeals held.

[6] Martin did raise the question of third-party standing in his petition for rehearing in the Court of Appeals, but that is irrelevant since new arguments are inappropriate in a

Therefore, as set forth above, it cannot be presented for the first time in a petition for certiorari. *See* pp. 7-8 *supra*.

Second, Martin fails to identify any conflict between the Circuits or any conflict with any decision of this Court regarding this issue. Martin does not cite any case in any Court of Appeals or in this Court holding that a class member has third-party standing to assert claims on behalf of lawyers working at the firm appointed as class counsel, who were not assigned to the case.

Third, this purported basis for standing is meritless. Third-party standing is a "limited exception[ ]" to the "fundamental" rule that "a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410 (1991). Martin claims he is asserting the interests of lawyers whom the order "excludes from working as class counsel" (Pet. at 10-11), but he ignores that there were *none*. There is no lawyer who was purportedly discriminated against by the class certification order. Nor has Martin undertaken to show there was such a lawyer. There is no contention or showing that class counsel's staffing decisions were in any way influenced by the order, and no other law

---

petition for rehearing in the Court of Appeals. *See, e.g., Easley v. Reuss*, 532 F.3d 592, 593 (7th Cir. 2008); *Holley v. Seminole Cnty. School Dist.*, 763 F.2d 399, 401 (11th Cir. 1985); FED. R. APP. P. 40(a)(2). Given that this was Martin's only assertion of his third-party standing argument in the Court of Appeals, the Petition's assertion that "The Second Circuit Improperly *Ignored* Martin's Claim to Third-Party Standing to Assert Injuries to Counsel" (Pet. at 20) (emphasis added) is unfair to the Second Circuit.

firms applied for appointment as class counsel and were rejected.

Fourth, third party standing can only be invoked if the litigant has suffered some injury-in-fact. *Powers*, 499 U.S. at 426-27 (Scalia, J., dissenting). Since Martin suffered no injury-in-fact himself, his reliance on third-party standing must fail.[7]

III. THE COURT OF APPEALS' HOLDING THAT STANDING REQUIRES INJURY-IN-FACT DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS OR OF THIS COURT

Just this past term, this Court reiterated that the doctrine of standing "requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). *Hollingsworth* cited and relied on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), which stated:

> [O]ur cases have established that the irreducible constitutional minimum of

[7] Wide of the mark is Martin's reliance on cases involving racial discrimination in jury selection, where courts have held that it is not necessary to prove that the discrimination actually affected the outcome of the trial. Pet. at 23-26. Here, not only is there no showing that class counsel was inadequate, there is no showing of any discrimination at all, since there is no contention that any lawyer or any law firm was denied the opportunity to work on the case by reason of the provision in Judge Baer's order concerning diversity.

> standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, *see* [*Allen* v. *Wright,* 468 U. S. 737, 756 (1984)]; *Warth* v. *Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club* v. *Morton*, 405 U.S. 727, 740-741, n. 16 (1972); and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" [*Whitmore* v. *Arkansas,* 495 U. S. 149, 155 (1990)] (quoting *Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983)). Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.*, at 38, 43.

Id. at 560-61 (footnote omitted).

The Second Circuit's articulation in the opinion below of the requirements for standing is consistent in all respects with this Court's decisions. The Second Circuit held as follows:

> To establish standing to bring a claim, a plaintiff must show (1) injury-in-fact, (2) causation, and (3) redressability. *Town of Babylon v. Fed. Hous. Fin. Agency*, 699 F.3d 221, 228 (2d Cir. 2012). An injury-in-

> fact is a ""concrete and particularized' harm to a 'legally protected interest.'" *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 89 (2d Cir. 2009); *see also W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 107 (2d Cir. 2008) ("[P]laintiff must have personally suffered an injury.").

App. 7a.

Thus, Martin cannot argue that the Second Circuit's articulation of the law regarding standing, and in particular its holding that standing requires injury-in-fact, is inconsistent with this Court's decisions.

Rather than challenging the Court of Appeals' ruling on any question of law, at most Martin is challenging the Court of Appeals' application of these settled principles of law to the unique facts presented in this case. However, "certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." SUP. CT. R. 10.

IV. THE ISSUE IS NOT ONE THAT ARISES FREQUENTLY

The frequency with which an issue arises is a critically important indicator of its significance. Robert L. Stern, SUPREME COURT PRACTICE, at 228. Here, there does not appear to be any other District Judge, other than Judge Baer, who has included in orders appointing class counsel an expressed desire that the lawyers working on the case reflect the race and gender diversity of the class. *See* Pet. at 5, where Martin acknowledges

that the provision here at issue appears only in orders in actions "before this judge." And there does not appear to be any decision by any Court of Appeals other than the decision here to address such a provision. This approach of one lone District Judge does not present the kind of issue of national importance affecting numerous litigants that might justify a grant of certiorari. And the fact that the Court of Appeals' order is non-precedential—and that the ruling at issue was an application of bedrock principles of standing recently re-articulated by this Court—further underscores both the unimportance of the issue and the lack of need for Supreme Court review.

CONCLUSION

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

Respectfully submitted,

PAUL F. NOVAK
MILBERG LLP
One Penn Plaza
New York, NY 10119
(212) 594-5300

JAY W. EISENHOFER
Counsel of Record
JAMES J. SABELLA
SHELLY L. FRIEDLAND
GRANT & EISENHOFER P.A.
485 Lexington Avenue
New York, NY 10017
(646) 722-8500
jeisenhofer@gelaw.com

CHRISTOPHER B. HALL
P. ANDREW LAMPROS
COOK, HALL & LAMPROS, LLP
Promenade Two, Suite 3700
1230 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 876-8100

Counsel for Respondents Carl Blessing, Edward A. Scerbo, John Cronin, Charles Bonsignore, Andrew Dremak, Todd Hill, Curtis Jones, Joshua Nathan, James Sacchetta, David Salyer, Susie Stanaj, Paul Stasiukevicius, Scott Byrd, Glenn Demott, Melissa Fast, James Hewitt, Ronald William Kader, Edward Leyba, Greg Lucas, Kevin Stanfield, Todd Stave, Paola Tomassini, Janel Stanfield, Brian Balaguera

CERTIFICATE OF COMPLIANCE

Case No. 13-169

Caption: Martin v. Blessing, et al.

As required by Supreme Court Rule 33.1(h), I certify that the document contains 3,347 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 20, 2013.

Louis Bracco
Record Press, Inc.

Sworn to before me on

August 20, 2013

NADIA R. OSWALD HAMID
Notary Public, State of New York
No. 01OS6101366
Qualified in Kings County
Commission Expires November 10, 2015

Notary Public

Record Press Inc., 229 West 36th Street, New York, N.Y. 10018•
Tel: (212) 619-4949• Fax No. (212) 608-3141

60477

STATE OF NEW YORK,)
SS:
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE

Howard Daniels being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on the 20th day of August 2013 deponent served 3 copies of the within

BRIEF IN OPPOSITION

upon the attorneys at the addresses below, and by the following method:

BY FEDERAL EXPRESS NEXT BUSINESS DAY DELIVERY

THEODORE H. FRANK
CENTER FOR CLASS ACTION FAIRNESS
1718 M St. NW, No. 236
Washington, DC 20036
(703) 203-3848

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Ave. NW, Suite 200
Washington, DC 20036
(202) 669-5135

Counsel for Petitioner

TODD R. GEREMIA, ESQ.
Jones Day
222 East 41st Street
New York, NY 10017
212-326-3429
Counsel for Defendant Sirius XM Radio Inc

I, Howard Daniels, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, executed on August 20, 2013, pursuant to Supreme Court Rule 29.5(c). All parties required to be served, have been served.

_____
Howard Daniels

Sworn to me this

August 20, 2013

RAMIRO A. HONEYWELL
Notary Public, State of New York
No. 01HO6118731
Qualified in Kings County
Commission Expires November 15, 2016

Case Name: Martin v. Blessing

Docket/Case No. 13-169

_____
Notary Public