No. 13-_____

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

PETITION FOR WRIT OF *CERTIORARI*

THEODORE H. FRANK
ADAM EZRA SCHULMAN
CENTER FOR CLASS ACTION FAIRNESS
1718 M St. NW, #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
lj@larryjoseph.com

Counsel for Petitioner

QUESTIONS PRESENTED

Under FED. R. CIV. P. 23, district courts "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class," may alter or amend class-certification orders prior to final judgment, and must ensure that class settlements are "fair, reasonable, and adequate" and review any attorney-fee awards. Non-party class members may object to any settlements that require court approval and have standing to appeal settlements based on those objections. Petitioner – a non-named class member – objected not only to this class-action settlement's terms and the attorney-fee award as contrary to the Class Action Fairness Act and Rule 23 but also to the district judge's standard class-certification order requiring class counsel to reflect the racial make-up of the class, *see* Michael H. Hurwitz, *Judge Harold Baer's Quixotic Crusade for Class Counsel Diversity,* 17 CARDOZO J.L. & GENDER 321, 327 (2011), which the petitioner alleges to violate this Court's holdings against racially conscious judicial proceedings. *See Rose v. Mitchell,* 443 U.S. 545, 556-57 (1979). The district judge ignored many of petitioner's objections, including his objection to the class-certification order's race-based requirements. The Second Circuit affirmed, holding that petitioner lacks standing to challenge the order's race-based requirements.

The question presented is whether an objecting class member – whose antitrust claims have been waived by a settlement negotiated by class counsel appointed by a racially conscious class-certification order as described above – has standing to challenge the class-certification order and, through it, the antitrust settlement?

PARTIES TO THE PROCEEDING

Petitioner is Nicolas Martin, a class-member objector to the proposed settlement who participated at the fairness hearing in district court and timely appealed that order to the court of appeals.

The respondents are the defendant and the named plaintiffs certified as class representatives:

- The defendant is Sirius XM Radio Inc., a publicly traded corporation headquartered in New York City, New York.
- The named class plaintiffs are Carl Blessing, Edward A. Scerbo, John Cronin, Todd Hill, Charles Bonsignore, Andrew Dremak, Curtis Jones, Joshua Nathan, James Sacchetta, David Salyer, Susie Stanaj, Scott Byrd, Paul Stasiukevicius, Glenn Demott, Melissa Fast, James Hewitt, Ronald William Kader, Edward Leyba, Greg Lucas, Kevin Stanfield, Todd Stave, Paola Tomassini, Janel Stanfield, and Brian Balaguera.

A third group of potential respondents – the other objectors* – are not involved here. S.CT. RULE 12.6.

* They are Marvin Union, Adam Falkner, Jill Piazza, Ken Ward, Ruth Cannata, Lee Clanton, Craig Cantrall, Ben Frampton, Kim Frampton, Joel Broida, John Sullivan, Sheila Massie, Jason M. Hawkins, Steven Crutchfield, Scott D. Krueger, Asset Strategies, Inc., Charles B. Zuravin, And Jennifer Deachin, Randy Lyons, Tom Carder, John Ireland, Jeannie Miller, Michael Hartleib, Brian David Goe, Donald K. Nace, and Christopher Batman.

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PETITION FOR WRIT OF *CERTIORARI*

Nicolas Martin petitions this Court to issue a writ of *certiorari* to review the judgment of the U.S. Court of Appeals for the Second Circuit affirming the U.S. District Court for the Southern District of New York's approval of a class-action settlement between defendant Sirius XM Radio, Inc. and plaintiffs Carl Blessing *et al.* ("Class Representatives").

OPINIONS BELOW

The Second Circuit's decision is reported at 507 Fed. Appx. 1, and reprinted in the Appendix ("App.") at 1a. The district court's decision is reported at 2011-2 Trade Cases P 77,579 and reprinted at 36a.[1]

JURISDICTION

The Second Circuit issued its decision on December 20, 2012, and denied Martin's petition for rehearing *en banc* on March 5, 2013. App. 45a. By Order dated May 23, 2013, Justice Ginsburg acting as Circuit Justice extended until August 2, 2013, the time within which to petition for a writ of *certiorari.* The district court had jurisdiction under 28 U.S.C. §§1331, 1332(d), 1337, and the Second Circuit had jurisdiction under 28 U.S.C. §1291. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Appendix quotes or excerpts the authorities involved, which fall primarily into three areas:

Constitutional Equal Protection. The Due Process Clause of the Fifth Amendment includes an

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[1] The district court decision also appears at 2011 WL 3739024 and 2011 U.S. Dist. Lexis 94723.

Equal-Protection component equivalent to the Equal Protection Clause. U.S. CONST. amend. V, XIV, §1.[2] Equal-protection principles prohibit Judge Baer's ordering class counsel to "fairly reflect the class composition in terms of relevant race and gender metrics." App. at 35a.

Rule 23. The Appendix excerpts the portions of Rule 23 on approval of settlements and appointment of class counsel. FED. R. CIV. P. 23(c), (e), (g).

CAFA's Coupon-Settlement Criteria. The Appendix includes 28 U.S.C. §1712 and the findings from the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, §2, 119 Stat. 4-5. These authorities relate to valuation of the settlement, which in turn relates to the fairness of the $13 million in legal fees that the district court awarded to class counsel. Although the district court found the settlement to be worth $180 million based on face value, Martin cited CAFA to argue that the face value is illusory in this worthless coupon settlement.

STATEMENT OF THE CASE

Petitioner Martin seeks review of the district judge's requiring class counsel to staff the case to reflect the class on the basis of race and sex, App. 35a, which the Second Circuit held objectors to lack standing to challenge. App. 7a. Although the petition primarily addresses constitutional equal-protection principles and case-or-controversy requirements, the Court requires an understanding of the underlying class-action dispute under CAFA and Rule 23 in

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[2] *See Buckley v. Valeo,* 424 U.S. 1, 93 (1976); *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954). Decisions under the Fifth Amendment apply equally to the states under the Fourteenth Amendment, and vice versa.

order to resolve the constitutional issues presented here and to evaluate the impact of the race-conscious proceedings on Martin's claims.[3]

This litigation consolidates five putative class actions claiming both that the July 28, 2008 merger of Sirius Satellite Radio, Inc. with XM Satellite Holdings, Inc. created a monopoly in the surviving company, respondent Sirius XM Radio Inc. ("Sirius"), and that Sirius, *inter alia,* abused its monopoly power in violation of federal antitrust laws. Court of Appeal Appendix ("CAA"), at 94-96, 102-37.

As the case prepared to go to trial, class counsel and Sirius agreed to a settlement whereby Sirius would freeze its list price for five months and pay class counsel up to $13 million in attorneys' fees without challenging the fee award. Because Sirius widely offered subscriptions well below the stated list price, however, objectors like petitioner Martin argued that the settlement was a worthless "coupon settlement" that enriched class counsel at the expense of class members.

Statutory Background

In CAFA, Congress found that class-action abuse "undermine[s] … the free flow of interstate commerce," *Id.* §2(a)(4), 119 Stat. 5, and that class members "often receive little or no benefit, and are sometimes harmed, where … counsel are awarded

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[3] Although the district judge acted on the basis of both race and sex, this petition focuses on race because courts evaluate it more stringently, and invalidating the challenged order for race discrimination would suffice for the *vacatur* and remand relief that Martin seeks. *See, e.g., MD/DC/DE Broadcasters Ass'n v. FCC,* 236 F.3d 13, 21-23 (D.C. Cir. 2001) (invalidating federal agency's race- and sex-based order by evaluating race only).

large fees, while leaving class members with coupons or other awards of little or no value." *Id.* §2(a)(3)(A), 119 Stat. 4. Congress also found that these manifest abuses "undermine the national judicial system" itself, *id.* §2(a)(4), 119 Stat. 5, as well "public respect for our judicial system." *Id.* §2(a)(2)(C), 119 Stat 4.

Congress enacted CAFA to remedy these negative effects both by ensuring that legitimate class actions go forward to "fair and prompt recoveries for class members" and by "benefit[ting] society by encouraging innovation and lowering consumer prices" through less class-action abuse. *Id.* §2(b)(1), (3), 119 Stat. 5. CAFA's primary remedy was 28 U.S.C. §1712's requirement that courts use coupons' actual redeemed value – not their face value – to assess class counsel's entitlement to fees.

The Market for Satellite Radio and the Merger

Although the Sirius merger partners were the only providers of satellite digital audio radio service, that service competes with a wide range of alternative entertainment: terrestrial radio, portable devices carrying dozens of hours of personalized music playlists and podcasts, and free Internet-based services. CAA at 835, 891-95. Faced with this competition, Sirius regularly discounted its list price substantially. For example, Martin paid only $3.99 per month for his service, notwithstanding the monthly $12.95 list price. *Id.* at 821; *Blessing v. Sirius XM Radio Inc.,* 28 U.S.C. §1653 Decl. of Appellant Nicolas Martin, Nos. 11-3696(L) & 11-3883 (2d Cir.), at 1-2.[4]

[4] After the Class Representatives challenged for the first time on appeal whether Martin had presented sufficient evidence in the district court to demonstrate he was a class

As a condition of approving the merger, the Federal Communications Commission ("FCC") required Sirius to freeze prices for three years, until July 28, 2011. CAA at 834. The FCC considered whether to extend the price freeze, but declined to do so after Sirius successfully argued that it was constrained in the marketplace by existing competition. *Id.* at 834-37, 881-901. The FCC's final decision not to extend the price freeze did not come until July 27, 2011, *Id.* at 881-86, which was the day before the freeze lapsed.

The Lawsuit and the Class Certification

The district court dismissed the plaintiffs' contract and consumer-fraud claims, but certified a class on the antitrust claims, App. 35a, which sought to demonstrate Sirius's allegedly illegal market power with its ability to impose a small but significant and non-transitory increase in price ("SSNIP"). CAA at 129-32. In certifying the class under FED. R. CIV. PROC. 23(g), the district court conditioned appointment of class counsel upon class counsel's staffing the case in proportion with the class' "race and gender metrics." App. 35a (*citing In re JP Morgan Chase Cash Balance Litig.,* 242 F.R.D. 265, 277 (S.D.N.Y. 2007)) (hereinafter, the "Diversity Order"). The Diversity Order is standard for class actions before this judge. *See generally* Michael H. Hurwitz, *Judge Harold Baer's Quixotic Crusade for Class Counsel Diversity,* 17 CARDOZO J.L. & GENDER 321, 327 (2011). Class counsel did not object to or seek an interlocutory appeal of the Diversity Order.

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member with standing to appeal, Martin submitted a declaration pursuant to 28 U.S.C. §1653 with his reply brief.

The Settlement Agreement

As indicated, the settlement paid no cash to class members and instead consisted of an injunction that Sirius would not raise prices from the lapse of FCC's moratorium on July 28, 2011, through December 31, 2011, and would allow class members to use that time to renew their subscriptions at the current list price. *Id.* at 232-33. Class members who were no longer customers would get an explicit coupon for one free month of service without a reactivation fee. *Id.* at 233. Although the settlement would not pay any cash to class members, it would provide a significant cash payment to class counsel, whom the settlement authorized to request up to $13 million. *Id.* at 235-36. The settlement also included a clear-sailing clause (*i.e.,* Sirius' commitment not to challenge the fee request). In addition, a "kicker" provided that any court-imposed reduction in fees would revert to Sirius, not to the class members. *Id.*

The Martin Objections and Responses

Martin, a Sirius subscriber and class member paying under $5 per month for his satellite radio service, objected. *Id.* at 800-33. He argued, *inter alia,* that the settlement was worthless to class members because they already had the ability (like him) to obtain Sirius service below the list price offer that was the only benefit of the settlement, and available equally to class members and non-class-members. *Id.* at 821. As Martin put it, "if you have a class action against Gray's Papaya and it is resolved by giving every class member a coupon that allows them to buy a hot dog for $16, that's worthless." *Id.* at 1320. Moreover, the requirement that consumers do new business with Sirius to obtain any benefit made the

settlement a coupon settlement, but the settlement terms and fee request did not comply with CAFA's restrictions. *Id.* at 830-31.

Martin further challenged the Diversity Order as a constitutional violation that precluded settlement by class counsel who were inappropriately appointed, and thus could not represent the class under Rule 23(g). *Id.*at 828-30. Martin also argued that the settlement would only have a non-zero value to consumers if Sirius had the market power to end its discounting and raise prices, which would mean that the antitrust suit was meritorious and should not be settled on these terms. *Id.* at 816-25.

The Fairness Hearing and Rulings

The court held a fairness hearing on August 8, 2011, *id.* at 1285-1338, and subsequently approved the settlement and attorneys' fees. App. 37-44a. The court held that the settlement was not a coupon settlement because it did not "require class members to purchase something they might not otherwise purchase." *Id.* 40a. It endorsed the settling parties' $180 million calculation of class benefit without any explanation why it was rejecting Martin's arguments that a freeze on list prices was worthless to class members who could obtain the same service for substantially less than list price without the settlement. *Id.* 37a-44a. The district court did not address or acknowledge Martin's challenge to the Diversity Order. Martin and several other objectors appealed.

The Appeal in the Second Circuit

The Second Circuit affirmed the district court's approval of the settlement and fee award, but via a slightly different analysis. It found that the district

court had a sufficient evidentiary basis to support its valuation of the settlement, *id.* 2a-4a, but rejected the objectors' claim that the relief was sufficiently coupon-like to trigger the §1712(a)'s actual-value requirements as irrelevant. The Second Circuit held that because the parties had bifurcated negotiations about class relief from the attorney-fee negotiations (*i.e.,* none of the awarded fees were attributable to class relief), §1712(a) was inapplicable. *Id.* 5a-6a. The Second Circuit neither mentioned nor addressed the objection that class members who accepted the settlement benefit would be about $100 worse off than if they, like Martin, negotiated the widely-available discounted price.

On the Diversity Order, the Second Circuit held that objectors lacked standing because they did not suffer an "injury in fact" – *i.e.,* a particularized injury to a legally protected interest – without suffering "actually inferior" legal service. *Id.* 7a. As such, the Second Circuit held that the objectors lacked standing to challenge the Diversity Order and did not reach its merits. *Id.*

REASONS TO GRANT THE WRIT

While race discrimination should have had nothing to do with this antitrust litigation, the district judge gratuitously introduced his standard class-action diversity requirements in the class-certification order. App. 35a.[5] In ruling that objecting

[5] *Compare id. with Cash Balance Litig.,* 242 F.R.D. at 277; *Spagnola v. Chubb Corp.,* 264 F.R.D. 76, 95 n.23 (S.D.N.Y. 2010); *In re Gildan Activewear Sec. Litig.,* 2010 U.S. Dist. LEXIS 140619, at *3 (S.D.N.Y. Sept. 20, 2010); *In re Dynex Capital, Inc. Sec. Litig.,* 2011 WL 781215, at *9 (S.D.N.Y. Mar. 7, 2011); *Pub. Employees' Retirement Sys. of Mississippi v. Goldman Sachs Group, Inc.,* 280 F.R.D. 130, 142 n.6 (S.D.N.Y.

class members like Martin lack standing to challenge racial discrimination in court proceedings, the Second Circuit conflicts not only with the principle that "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself," *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 628 (1991); *see also Campbell v. Louisiana,* 523 U.S. 392, 307-08 (1998); *Vasquez v. Hillery,* 474 U.S. 254, 262-63 (1986); *Batson v. Kentucky,* 476 U.S. 79, 100 (1986); *Rose v. Mitchell,* 443 U.S. 545, 556-57 (1979) (collecting cases), but also with several other facets of the doctrine of standing. The petition for a writ of *certiorari* should be granted for four reasons:

1. The most compelling reason to grant the writ is that the Diversity Order plainly discriminates based on race with no possible justification for that discrimination, *see* Section I, *infra,* and this Court has directed the appellate courts – and committed itself as the backstop if ever needed – to vacate all instances of race-based discrimination in judicial proceedings. *Rose*, 443 U.S. at 556-57 ("where discrimination … is proved, … the error will be corrected in a superior court, and ultimately in this court upon review"). Under the circumstances, *vacatur* and remand are the only possible ways to cure the taint of racial discrimination from these proceedings. *See* Section II.C, *infra.*

2. The Second Circuit's ruling conflicts with decisions of this Court and the District of Columbia and Ninth Circuits that involuntary participants like Martin in discriminatory schemes have standing to

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2012); *N.J. Carpenters Health Fund v. Residential Capital, LLC,* 2012 WL 4865174, at *4 n.5 (S.D.N.Y. Oct. 15, 2012).

challenge the discrimination, even though they do not themselves suffer discrimination. *Barrows v. Jackson,* 346 U.S. 249, 259 (1953); *Lutheran Church-Missouri Synod v. F.C.C.,* 141 F.3d 344, 350 (D.C. Cir. 1998); *Monterey Mech. Co. v. Wilson,* 125 F.3d 702, 707 (9th Cir. 1997). This Court should recognize that Martin has standing to challenge discrimination visited *on anyone* in the service of Martin's class.

3. In rejecting Martin's *first-party* injuries from the Diversity Order, the Second Circuit declined to address Martin's argument that he could rely on *third-party* standing to raise the equal-protection rights of counsel against whom the Diversity Order discriminates on the basis of race. As Chief Justice Marshall famously put it, "[courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 404 (1821). Indeed, federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist. v. U.S.,* 424 U.S. 800, 817 (1976). Insofar as Martin plainly can challenge the Diversity Order as discriminatory via third-party standing, *see* Section II.B, *infra,* the Second Circuit's refusal to review the issue requires this Court's supervising review.

4. In limiting Martin to the need to have suffered "actually inferior" legal services, the Second Circuit neglected to consider that any trifling burden is enough to establish a case or controversy. *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 689 n.14 (1973). Thus, even if this Court were to hold that Martin cannot assert the equal-protection interests of counsel whom the Diversity Order excludes from working as class

counsel, Martin still could assert the class' interest in being free from the more petty but nonetheless *ultra vires* micromanagement of the class-counsel relationship (*e.g.,* using this lawyer rather than that lawyer, taking time to weigh any staffing decision vis-à-vis the Diversity Order). *See* Section II.A.1, *infra.* That "trifle" is enough for standing under the precedents of this Court and of every circuit.

In addition to the foregoing four reasons why this Court should grant the writ, Martin also establishes that his injuries fall within the relevant zones of interest and that his injuries remain redressable here, notwithstanding that the parties want their settlement approved. *See* Sections II.D-II.E, *infra.* For all the foregoing reasons, petitioner Martin respectfully submits that the Court should grant the writ to review the judicially mandated, race-based discrimination in Judge Baer's Diversity Order. Given the absence of any proffered justification for the discrimination and this Court's commitment in *Rose,* petitioner Martin respectfully submits that summary disposition would be appropriate here.

I. THE DIVERSITY ORDER DISCRIMINATES BASED ON RACE AND IS *ULTRA VIRES*

Although federal courts typically review their jurisdiction before the merits, here the merits arguments against the Diversity Order support Martin's standing to contest that order, which justifies reviewing the merits here. *Land v. Dollar,* 330 U.S. 731, 735 (1947) (review of merits permissible "where the question of jurisdiction is dependent on decision of the merits"). As explained in this section, the Diversity Order is unlawful *on the merits.*

First, the Diversity Order violates the Due Process Clause's Equal Protection component by requiring race-based treatment without the narrow tailoring that strict scrutiny requires. *Grutter v. Bollinger,* 539 U.S. 306, 334 (2003). "Narrow tailoring … requires that the reviewing court verify that it is *'necessary'* … to use race to achieve the educational benefits of diversity" *Fisher v. Univ. of Tex. at Austin,* 133 S.Ct. 2411, 2420 n.9 (2013). To be sure, *Grutter* allowed classroom diversity to qualify for a time as a governmental interest sufficient to justify race-conscious admissions in higher education. *Grutter,* 539 U.S. at 334. Moreover, *Grutter* and *Fisher* focus on the benefit that diversity confers to *students' education,* not to combatting societal discrimination generally. Judge Baer provided no evidence of the need for racially proportional legal representation.

For Judge Baer's Diversity Order to withstand strict scrutiny, therefore, this Court would need evidence that the Diversity Order benefits class counsel's representation of the class. Nothing in Judge Baer's unsupported Diversity Order qualifies as evidence at all, App. 35a (*citing Cash Balance Litig.,* 242 F.R.D. at 277), much less as the type of evidence on which *Grutter* relied and that *Fisher* required:

> Appointment of class counsel is an extraordinary practice with respect to dictating and limiting the class members' control over the attorney-client relationship and thus requires a heightened level of scrutiny to ensure that the interests of the class members are adequately represented and protected. Judge Jack Weinstein of the

> Eastern District has aptly compared the role of class counsel to that of "a judicially appointed fiduciary, not that of a privately retained counsel." The proposed class includes thousands of Plan participants, both male and female, arguably from diverse racial and ethnic backgrounds. Therefore, I believe it is important to all concerned that there is evidence of diversity, in terms of race and gender, of any class counsel I appoint. A review of the firm biographies provides some information on this score. Here, it appears that gender and racial diversity exists, to a limited extent, with respect to the principal attorneys involved in the case. Co-lead counsel has met this Court's diversity requirement--i.e., that at least one minority lawyer and one woman lawyer with requisite experience at the firm be assigned to this matter.

Cash Balance Litig., 242 F.R.D. at 277 (citations omitted). With such preferences, however, "the burden of justification is … demanding and it rests entirely on the [government]." *U.S. v. Virginia,* 518 U.S. 515, 532-33 (1996). While Martin doubts that Judge Baer *could justify* his discriminatory order, Judge Baer clearly did not do so.

In *Castaneda v. Partida,* 430 U.S. 482 (1977), Justice Marshall cautioned against believing that "all members of all minority groups, have an inclination to assure fairness to other members of their group." *Id.* at 503-04 (Marshall J., concurring). He concluded that the Court "has a solemn responsibility to avoid basing its decisions on broad generalizations concerning minority groups" and that

"[i]f history has taught us anything, it is the danger of relying on such stereotypes." *Id.* In ordering race-based counsel, Judge Baer did exactly what Justice Marshall said may not be done; he assumed that sharing the same race would somehow make class lawyers more responsive to class members of that race.

Indeed, in the context of racially gerrymandered voting districts, this Court has held that "[r]ace-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to a criterion barred to the Government by history and the Constitution." *Miller v. Johnson,* 515 U.S. 900, 912 (1995); *cf. Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 276 (1986) (purported benefit to black students of having black teachers as role models does not justify race-based discrimination against teachers). Our history and Constitution equally bar racially gerrymandered appointments of class counsel.

Finally, Judge Baer had no authority to impose his preference for diversity either on the class or on prospective class counsel. Rule 23(g)'s enumerated criteria say nothing of diversity, and the residual authority in Rule 23(g)(1)(B) to "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class" is far too slender a reed on which to impose a disparate-impact standard on counsel's ability to represent a diverse class:

> [D]eference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history. Here, neither the language, purpose,

> nor history of §504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds. Accordingly, we hold that even if [the agency] has attempted to create such an obligation itself, it lacks the authority to do so.

Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 411-12 (1979) (internal quotations and citations omitted). Indeed, insofar as no one has the right to counsel of one's own race, *U.S. v. Burton,* 584 F.2d 485, 489, (D.C. Cir. 1978), even in a criminal prosecution where the clients' rights are stronger, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 498-99 (1982), counsel's race is simply not "pertinent to counsel's ability to fairly and adequately represent the interests of the class," and Judge Baer exceeded his authority under FED. R. CIV. P. 23(g)(1)(B).[6]

II. THE SECOND CIRCUIT'S DENIAL OF STANDING CONFLICTS WITH THIS COURT'S HOLDINGS AND SPLITS WITH THE CIRCUITS

The Second Circuit held that Martin lacked standing to challenge the Diversity Order. App. 7a. The doctrine of standing, of course, derives from Article III's confining federal courts to cases or

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[6] Under the canon of constitutional avoidance, this Court should interpret Rule 23 to avoid calling into question its constitutionality. *See Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2559 (2011); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 103-04 (1981) (holding district court's order forbidding communication between counsel and absent class members violated Rule 23, and thus declining to decide whether such a ban violated First Amendment).

controversies. U.S. CONST. art. III, §2. At its constitutional minimum, standing presents the tripartite test of whether the party invoking a court's jurisdiction raises a sufficient "injury in fact" under Article III: (a) legally cognizable injury, (b) caused by the challenged action, and (c) redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). In addition to the constitutional limits on standing, the judiciary has adopted prudential limits on standing that bar review even when the plaintiff meets Article III's minimum criteria.

As relevant here, these prudential limits include the requirement that the "complaint [must] fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 475 (1982) (interior quotations omitted), and that a plaintiff "generally must assert his own legal rights … and cannot rest his claim to relief on the legal rights … of third parties." *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 955 (1984) (interior quotations omitted). Unlike the constitutional minima, however, these prudential limits are more flexible.

A. The Second Circuit Splits With Its Sister Circuits and Conflicts With This Court on Martin's First-Party Injuries

As explained in this section, Martin easily meets the constitutional minima for standing. At the outset, there is no question whether Martin has standing to appeal the settlement itself. *Devlin v.*

Scardelletti, 536 U.S. 1, 6-7 (2002).[7] Whatever relief that Martin's appeal secures for the class provides sufficient relief for Article III purposes. *See generally SCRAP,* 412 U.S. at 689 n.14. Instead, the question implicitly raised by the Second Circuit was whether Martin had standing to challenge the Diversity Order as an issue separate from the settlement. The following two subsections identify *first-party* injuries that to Diversity Order inflicts on Martin.

By way of background, the Second Circuit held that Martin failed to state an "injury-in-fact" because he did not allege that class counsel's representation was "actually inferior" due to the Diversity Order:

> Although objectors allege that staffing a case with an eye to diversity "may interfere with [counsel's] ability to provide the best representation for the class," they never contend that class counsel's representation was actually inferior. As objectors failed to state an injury-in-fact, we find that they lack standing to challenge the district court's

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[7] *See also Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1183 & n.1 (10th Cir. 2002) (objectors who have objected to entire settlement are entitled to raise all issues relating to settlement fairness with respect to entire class); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 727-32 (3d Cir. 2001); *cf. also Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632 (5th Cir. 2012) (class member has standing to appeal settlement approval even though it had not filed a claim); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011) (ruling on objector-appellant's argument that *cy pres* unfairly directed); *In re Bluetooth Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) (ruling on objector-appellants' argument that $0 settlement directed too much money to attorneys and not enough to *cy pres*).

> diversity request in its class certification order.

App. 7a (alterations in original, citations omitted). Martin respectfully submits that the court erred on the issue of whether class members generally or Martin particularly have suffered *first-party* injury. In any event, as indicated in Sections II.B and II.C, *infra,* Martin also alleges that the circumstances here enable him to assert third-party injuries suffered by class counsel or prospective class counsel affected by the Diversity Order.

1. The Diversity Order Impairs the Class-Counsel Relationship, Wholly Apart from Discrimination

Even if Martin could not challenge the Diversity Order as discriminatory against certain lawyers (*e.g.,* on the basis of third parties' equal-protection rights), Martin still could challenge the Diversity Order as an arbitrary and irrational interference with the class' rights to counsel, which necessarily is impacted by the addition of an arbitrary government overlay:

> Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational [government] actions.

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 263 (1977). Simply by challenging the Diversity Order's arbitrary and irrational effects on the class, Martin can prevail without the need to assert either third-party or equal-protection rights.

Specifically, the Diversity Order restricts the terms on which the class and class counsel may

interact. Thus, notwithstanding any equal-protection injuries that the Diversity Order inflicts on counsel, the injury qualifies as a first-party injury to the class by *directly* impairing its freedom to interact with others. Henry P. Monaghan, Third Party Standing, 84 COLUM. L. REV. 277, 299 (1984) ("a litigant asserts his own rights (not those of a third person) when he seeks to void restrictions that directly impair his freedom to interact with a third person who himself could not be legally prevented from engaging in the interaction"); *FAIC Securities, Inc. v. U.S.,* 768 F.2d 352, 360 n.5 (D.C. Cir. 1985) (*citing* Monaghan, *supra*) (Scalia, J.); *Columbia Broadcasting System, Inc. v. U.S.,* 316 U.S. 407, 422-23 (1942) (broadcasters had standing to challenge regulations that altered the terms on which third-party station owners could interact with broadcasters); *Law Offices of Seymour M. Chase, P.C. v. F.C.C.,* 843 F.2d 517, 524 (D.C. Cir. 1988) (discussing cases) (R.B. Ginsburg, J.). Insofar as even minor burdens qualify to establish standing, *see, e.g., Pub. Citizen v. FTC,* 869 F.2d 1541, 1547-48 (D.C. Cir. 1989); *Nat'l Wildlife Fed'n v. Agric. Stabilization & Conservation Serv.,* 901 F.2d 673, 676-77 (8th Cir. 1990), that is enough for Article III.

2. Racial Discrimination Done In the Name of His Class Injures Martin

When the law makes one an involuntary participant in a discriminatory scheme, prudential concerns pose no barrier to attacking that scheme by raising a third party's equal-protection rights. *Barrows,* 346 U.S. at 259 (Caucasian homeowners could challenge a racially restrictive covenant by asserting rights of minorities to whom they might

sell); *Lutheran Church-Missouri Synod,* 141 F.3d at 350 (employer could challenge affirmative-action requirement by asserting its employees' rights); *accord Monterey Mech. Co.,* 125 F.3d at 707 ("[a] person suffers injury in fact if the government requires or encourages as a condition of granting him a benefit that he discriminate against others based on their race or sex"). Thus, although Martin is not himself a class-action lawyer denied employment under the Diversity Order, Martin nonetheless can assert the equal-protection rights of those discriminated against on behalf of Martin's class and, in essence, in Martin's name.

B. The Second Circuit Improperly Ignored Martin's Claim to Third-Party Standing to Assert Injuries to Counsel

Martin understands that the respondents take the position that the only people with standing to challenge the Diversity Order are attorneys excluded by the Order. If that is their position, respondents are incorrect.

At the outset, permitting objectors to raise appellate issues with respect to the broader interests of other litigation participants in the hopes of reversing a class action judgment is not unique to Rule 23(e): for example, in *Phillips Petroleum Co. v. Shutts*, this Court permitted a defendant to raise the issue of the due process rights of absent class members despite the fact it "d[id] not possess standing *jus tertii*," and was "assert[ing] the rights of its adversary, the plaintiff class." 472 U.S. 797, 803-06 (1985). Similarly, in *Creative Montessori Learning Centers v. Ashford Gear LLC*, 662 F.3d 913, 917-19 (7th Cir. 2011), a *defendant* had

standing to raise a *hypothetical* Rule 23(g) appointment issue. Having class members assert the rights of attorneys deprived of a race-neutral Rule 23(g) process would not be unprecedented, even without Martin's having third-party standing

In any event, third-party or *jus tertii* standing allows plaintiffs to assert the rights of absent third parties under a three-part test: (1) the person attempting to assert a third party's rights suffers a constitutional injury in fact, (2) that person has a close relationship with the third party, and (3) some hindrance prevents the third party's asserting its own rights. *Powers v. Ohio,* 499 U.S. 400, 411 (1991). Martin readily meets each prong of this test.

First, as explained in Section II.A, *supra,* Martin has his own standing. That suffices for meeting the first *Powers* prong. Significantly, when a party with first-party standing invokes third-party standing to other injuries or claims, the first party then has access to additional interests with which to satisfy the zone-of-interests test. *FAIC Securities,* 768 F.2d at 357-61; *Carey v. Population Serv., Int'l,* 431 U.S. 678, 682-86 (1977).

Second, with the fiduciary relationship between class counsel and the class, *Cash Balance Litig.,* 242 F.R.D. at 277, Martin and class counsel clearly have a close relationship. Certainly, that class-counsel relationship is closer than the relationship between a rejected venireperson and defendants in *Powers* or in *Edmonson.*

The third prong is not strictly necessary (*i.e.,* the absence of a hindrance does not preclude third-party standing). *Caplin & Drysdale v. U.S.,* 491 U.S. 617, 624 n.3 (1989). In any event, the third prong is

readily met where the rights holder has "little incentive" to bring suit because "of the small financial stake involved and the economic burdens of litigation." *Powers,* 499 U.S. at 415. Martin easily meets this test through lawyers employed by the class-counsel firms. There is an obvious hindrance "to the third party's ability to protect his or her own interests": any member of class counsel's firm adversely affected by the race-conscious order would risk the ire of his employer and the district court by challenging the order; any prospective injunction achieved years later would be a Pyrrhic victory given the internal consequences at his employer for interfering with a multi-million case.

For these three reasons, Martin has third-party standing to raise the equal-protection rights of class counsel against whom the Diversity Order discriminates on the basis of race.[8]

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[8] The Second Circuit's requirement that class counsel must have provided "actually inferior" legal services for Martin to have standing (App. 7a) is wholly unprecedented. For "unequal footing" cases like this, the question is never the actual receipt of the benefit, but rather the ability to compete for it on an equal footing, free of unlawful discrimination. *Adarand Constructors, Inc., v. Pena,* 515 U.S. 200, 211 (1995). In other words, the injury "is the denial of equal treatment resulting *from the imposition of the barrier,* not the ultimate inability to obtain the benefit." *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 666 (1993) (emphasis added).

C. The Second Circuit's Refusal to Cure the Taint of Racially Biased Proceedings With *Vacatur* and Remand Conflicts With This Court's Precedents

As indicated in note 8, *supra,* the Second Circuit cannot support its requirement for "actually inferior" legal services under equal-protection analysis, but the Diversity Order presented an even more serious flaw in the lower-court proceedings: the unresolved taint of racial prejudice – inserted by an officer of the federal government – into a federal court proceeding.

When *private attorneys* insert discrimination in judicial proceedings, this Court has found not only that that was *per se* actionable, but also that "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself." *Edmonson*, 500 U.S. at 628. Far from something that the courts can excuse if it is not too bothersome, such discrimination requires elimination under this Court's precedents:

> 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, 443 U.S. at 556-57 (internal quotations and citations omitted). Under *Rose* and related cases, this Court should vacate the discriminatory class-

certification order and remand the case for further proceedings.[9]

Significantly, the harms identified in these cases "are not limited to the criminal sphere," and "[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal." *Edmonson,* 500 U.S. at 630. Nor is there any reason to restrict the *Batson/Powers* principle to just petit and grand jurors, rather than all aspects of judicial proceedings. Indeed, *Powers* warned of the danger if "race is implicated" in "the standing or due regard of an attorney who appears in the cause." 499 U.S. at 412. While the right to a criminal or civil jury trial is by itself of constitutional significance, so is the question of the adequacy of representation in a class action. *Phillips Petroleum Co.,* 472 U.S. at 812; *Hansberry v. Lee,* 311 U.S. 32, 44-45 (1940). For that reason, this Court should include race-based

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[9] In *Batson*, a criminal defendant was permitted to allege race-based peremptory challenges. If the defendant could prove "prima facie, purposeful discrimination" without a "neutral explanation" for peremptory challenges, the "conviction must be reversed" (*i.e.,* injury would be assumed). 476 U.S. at 100 (citing cases). In *Vasquez*, 474 U.S. at 262-63, a defendant was found guilty beyond reasonable doubt by an unbiased jury, but the Supreme Court set aside the conviction because of the unlawful exclusion of members of the defendant's race from the grand jury that indicted him, despite overwhelming evidence of his guilt. In *Powers,* this Court rejected the argument that a defendant must show that "the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant." *Powers,* 499 U.S. at 411. Rather, racial discrimination "casts doubt on the integrity of the judicial process" and alone creates injury, *id.* (*quoting Rose,* 443 U.S. at 556), an injury even more severe when it "occurs at the behest of not just the parties but of the court itself." *U.S. v. Nelson,* 277 F.3d 164, 207 (2d Cir. 2002).

discrimination in counsel assignments within the scope of the *Batson/Powers* principle.

Even if this Court were inclined not to extend the *Batson/Powers* principle to racial discrimination in counsel-appointment cases, that principle still should apply to this case. The district judge has a history and interest in ordering conduct that is plainly beyond the power of the federal government to order. Reverse-discrimination complainants are skunks at the diversity picnic in the normal case, but here Martin had it much worse. His sole factfinder was personally invested in the very discrimination that Martin opposed. While his opposition to the Diversity Order was substantively distinct from his very principled objections under CAFA and congressional policies against class-action abuse and appellate class-action decisions that counsel against approving the settlement, the fact remains that Judge Baer – the sole factfinder (*i.e.,* Martin's *entire* jury) – simply ignored several of Martin's meritorious arguments.[10]

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[10] *See, e.g., In re Bluetooth,* 654 F.3d at 947-49 ("clear sailing" and "kicker" clauses are signs "that class counsel have allowed pursuit of their own self interests … to infect the negotiations"); *In re GMC Pick-Up Trucks,* 55 F.3d 768, 821 (3d Cir. 1995) ("private agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a common fund situation into a statutory fee shifting case"); *In re HP Inkjet Printer Litig.,* 716 F.3d 1173 (9th Cir. 2013) (CAFA's requirement to base attorney-fee awards on coupon's actual value applies regardless of what method a court uses to set a fee award); *In re Literary Works in Electronic Databases Copyright Litig.,* 654 F.3d 242, 249-58 (2d Cir. N.Y. 2011) (the existence of distinct, homogeneous subclasses with competing interests – such as those presented by Martin and the subclass of Sirius subscribers with discounts below the list price – requires reopening the class certification to create subclasses); *Synfuel Technologies v. DHL Express (USA),* 463

Under the circumstances, this case would suffer sufficient taint for *vacatur,* even if the typical counsel-appointment case would not.

While no one knows what an individual juror, lawyer, or judge might do, based on his or her race, *Castaneda,* 430 U.S. at 503-04 (Marshall J., concurring), that cannot excuse discriminating on the basis of race in judicial proceedings. To the contrary, in *Rose*, 443 U.S. at 556-57, this Court committed itself to "correct the wrong" where the lower courts would not. This Diversity Order is a recurring issue in this district court, at least,[11] and potentially now in the Second Circuit, and the issue has national importance because it represents race discrimination sponsored – indeed, *mandated* – by the federal government.

As important as this Court's rule against racially tainted judicial proceedings is, a more trivial or petty example perhaps would clarify the availability for relief here. If Judge Baer only appointed class counsel who were born in leap years, clearly the impacted class could seek review of the anti-meritocratic appointment. *See, e.g., Culver v. City of Milwaukee,* 277 F.3d 908, 912-13 (7th Cir. 2002) (describing the indelible relationship between class counsel and adequate representation); *cf. Smyth ex rel. Smyth v. Rivero,* 282 F.3d 268, 280 (4th Cir. 2002) (appellate courts have the general

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F.3d 646, 654 (7th Cir. 2006) (even if settlement relief for a free service is not "identical to a coupon," it should be treated like a coupon when it is "in-kind compensation" that "shares characteristics" with coupons); *In re Mexico Money Transfer Litig.,* 267 F.3d 743, 748 (7th Cir. 2001) ("compensation in kind is worth less than cash of the same nominal value").

[11] See cases collected at note 5, *supra.*

responsibility when reviewing a settlement decree to "examine its terms to ensure they are fair and not unlawful"). That relief is all the more necessary when a district court deviates from its powers under Rule 23 to impose racial discrimination that the Constitution prohibits.

Under the circumstances, Martin respectfully submits that review of the Diversity Order falls under appellate review as plainly unlawful. The entire lower-court proceedings – particularly Judge Baer's findings – are tainted by the entry of the Diversity Order and the refusal to consider or even recognize challenges to it. On the facts of this case, the taint is even worse because Judge Baer similarly ignored other meritorious claims by the same objector. *Vacatur* and remand is the only possible relief that would remedy the taint from this case.

D. Martin's Injuries Fall Well Within the Relevant Zones of Interests

Because Rule 23(e)(5) permits any class member to object to a settlement, and Rule 23(c)(1)(C) allows amending a class-certification order at any time prior to final judgment, the respondents cannot (and the lower courts did not) argue that Martin's injuries fail to satisfy the zone-of-interests test, which requires only that an injury be "*arguably* within the zone of interests to be protected … by the statute.". *See Nat'l Credit Union Admin. v. First Nat'l Bank & Trust, Co.,* 522 U.S. 479, 492 (1998) (Court's emphasis and alteration, *quoting Ass'n of Data Processing Service Org., Inc. v. Camp,* 397 U.S. 150, 153 (1970)). Martin easily meets that test.

But even if the Martin's injuries from the Diversity Order somehow were not even arguably

within Rule 23's zone of interests, he still would satisfy the zone-of-interest test here for the unconstitutional, *ultra vires* Diversity Order. *Haitian Refugee Ctr. v. Gracey,* 809 F.2d 794, 812 (D.C. Cir. 1987). In essence, Martin would only fall outside Rule 23's zone because *Judge Baer acted outside Rule 23's zone.* Under the circumstances, the zone-of-interest test either does not apply or implicates the zone of interests of the overriding constitutional issues raised by lawless government action:

> It may be that a particular constitutional or statutory provision was intended to protect persons like the litigant by limiting the authority conferred. If so, the litigant's interest may be said to fall within the zone protected by the limitation. Alternatively, it may be that the zone of interests requirement is satisfied because the litigant's challenge is best understood as a claim that *ultra vires* governmental action that injures him violates the due process clause.

Gracey, 809 F.2d at 812 n.14; *accord Chiles v. Thornburgh,* 865 F.2d 1197, 1210-11 (11th Cir. 1989). By acting outside its authority, the district court implicates the larger zone of interests of our Constitution, which would not limit standing here, even if the Martin's objections fall outside Rule 23's zone of interests.

E. The Requested Relief Would Redress Martin's Injuries and Is Not Moot

In essence, Martin seeks to wind this case back to the class certification to ensure fairness to the class generally and, if needed, to his uncertified

subclass specifically.[12] Such a "do over" would not only provide the opportunity to cure the serious procedural and substantive flaws of this class settlement under Rule 23 and CAFA but also would cure the Diversity Order's racial taint on the proceedings to date. *See* Section II.C, *supra.* No one can dispute that Martin and the class have *standing* to demand more than the settlement provides through Rule 23(e)(5) objections (*i.e.,* to demand a different and better settlement). Martin's and the class' injuries are thus readily redressable: if the class-certification order is vacated as unconstitutional, the settlement he challenges will similarly fall, and his antitrust claims will not be waived for nothing.[13]

Insofar as Rule 23 allows amending class-certification orders prior to final judgment, FED. R. CIV. P. 23(c)(1)(C), this case is not over in any sense. Indeed, assuming *arguendo* new class counsel, a new judge, or even the same class counsel and same judge return the same settlement and attorney-fee award, that would not make the current case moot because Martin's requested *vacatur* would put the parties into the position they should have been in all along, which provides enough redress, "even though the agency (like a new jury after a mistrial) might later,

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[12] Martin's subclass would be those Sirius subscribers who paid less than the list price and thus would receive nothing – indeed, less than nothing – from Sirius' freezing the list price.

[13] The ability to opt out under Rule 23(b)(3) does not adequately protect Martin's rights because class action settlements preclude future class litigation, and in the case of a small-dollar antitrust claim, "[e]conomic reality dictates" that the case "proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 161 (1974).

in the exercise of its lawful discretion, reach the same result for a different reason." *FEC v. Akins,* 524 U.S. 11, 25 (1998). That a losing party (*i.e.,* an appellant or a petitioner here) may hypothetically lose again on a remand does not deprive them of the right to seek *vacatur* and remand. Under the circumstances, nothing precludes granting the relief that Martin requests.

CONCLUSION

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

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Respectfully submitted,

THEODORE H. FRANK
ADAM EZRA SCHULMAN
CENTER FOR CLASS ACTION FAIRNESS
1718 M St. NW, #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
lj@larryjoseph.com

Counsel for Petitioner