No. 02-271

IN THE
Supreme Court of the United States

DOW CHEMICAL COMPANY, ET AL.,
Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,

Respondents.

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

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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January 24, 2003

QUESTION PRESENTED

All of the parties acknowledge that respondents Stephenson and Isaacson, like hundreds of thousands of other class members purportedly bound by the judgment at issue in this case, had not yet manifested an Agent Orange-related injury at the time the court approved the Agent Orange settlement. Thus, in amicus curiae Public Citizen's view, before answering the questions presented in the petition, this Court should consider the following jurisdictional question:

Does the judgment approving the Agent Orange settlement lack binding effect on respondents on the ground that claims of future, contingent injury do not meet Article III's case-or-controversy requirement?

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INTEREST OF AMICUS[1]

Public Citizen is a public advocacy, lobbying, and litigating organization with 135,000 members nationwide. It realizes that individuals, acting alone, often cannot obtain legal redress for large-scale corporate or government misconduct. Therefore, Public Citizen works to strengthen the class action device as an efficient means to secure justice. However, class actions can be abused to the detriment of class members. Thus, Public Citizen has represented objectors in more than 30 nationwide class action settlements in which the named representatives and their lawyers were inattentive to the needs and divergent interests of the absent class members whom they were supposed to represent.[2] Public Citizen opposes the result sought by petitioners here because it would eliminate the right to obtain collateral review of a class judgment, which is both a key check on abuse of the class action and a necessary adjunct to its legitimacy.

INTRODUCTION AND SUMMARY OF ARGUMENT

Beneath petitioners' arid, incomplete discussion of the facts of this case and their uncritical praise for class action

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[1]Letters of consent to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, amicus states that no party had any role in writing this brief and that no one other than amicus made a monetary contribution to its preparation or submission.

[2]*See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315 (3d Cir. 2001); *In re Telectronics Pacing Systems, Inc.*, 221 F.3d 870 (6th Cir. 2000); *In re General Motors Corp. Pick-up Truck Fuel Tank Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995); *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1271 (S.D. Ohio), *aff'd*, 102 F.3d 777 (6th Cir. 1996); *see generally* Henry Reske, "Two Wins for Class Action Objectors," 82 A.B.A. Journal 36, 37 (June 1996) (highlighting Public Citizen's work representing objecting class members).

efficiency lies the real question presented in this case: May a class action judgment release "future" claims of persons unaware of those claims, and then deprive the unwitting class members, when or if they ever develop injuries, of their first and only opportunity to be heard by denying collateral review? The answer is no.

To begin with, future claims cannot be released in a class action because such claims do not present Article III "cases" or "controversies" over which a federal court may exercise power. Just as fundamentally, unless collateral review is available to determine whether future claims meet the constitutional requirements for binding absent class members to a judgment—or to review class actions for other endemic abuses—absent class members will have fallen victim to a judicial catch-22: Their right to due process will have been decided in an action that itself may have deprived them of that process. Because class action courts are uniquely able to decide rights in the absence of the litigants they bind, collateral review is a more important protection for absent class members than it is for other litigants; indeed, it is a key mechanism for ensuring that the efficiency benefits of class actions are not achieved at the expense of the absentees.

The Agent Orange class action attempted to litigate claims on behalf of the estimated 2.4 million Vietnam veterans exposed to Agent Orange, an herbicide used to defoliate the Vietnamese countryside during the war. *See In re Agent Orange Product Liab. Litig.,* 597 F. Supp. 740, 756 (E.D.N.Y. 1984). When filed in 1979, it was the largest mass tort class action ever. *See* Peter H. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* 4-6 (Belknap Press 1987). In its first four years, the suit lumbered slowly towards trial. *Id.* Chs. 3-6. Then, in October 1983, Judge Jack Weinstein was assigned to the case, and, to put it mildly, he immediately put

the case on a fast track to settlement. *See id.* at 115-22. He imposed a grueling trial schedule and, on the eve of trial—when plaintiffs' counsel were shockingly unprepared to present their case—he summoned the parties to the courthouse for weekend-long, marathon settlement discussions that resulted in an agreement at 3 a.m. the morning of trial. *Id*. at 115-24, 140-42, 143-68.

In the negotiations, defendants demanded, and got, a release from all future tort claims by Vietnam veterans for Agent Orange exposure. *Id.* at 153. The fact that the Rule 23(c)(2) class notice—which stated that only those "who were injured" by exposure to Agent Orange were included in the class, *Agent Orange*, 100 F.R.D. 718, 732 (E.D.N.Y. 1983)—had already been mailed, and the opt-out deadline had expired, gave the court little pause. The subsequent Rule 23(e) settlement notice stated in passing that the claims of "persons who have not yet manifested injury" would also be released, but no new opt-out period was provided for hundreds of thousands of new class members. *Agent Orange*, 597 F. Supp. at 865.

The settlement provided class members a small amount of compensation for each year between 1971 and 1994 in which they could demonstrate "total disability." *Agent Orange*, 611 F. Supp. 1396, 1410 (E.D.N.Y. 1985). Veterans who manifested injury after 1994, like respondents here, received nothing. *Id.* at 1417. The settlement also provided lump-sum payments for families of veterans who had died from diseases that may or may not have been Agent Orange-related. *Id.* at 1410.

Some veterans, including those currently uninjured, were aware of both the suit and these provisions, and many of them objected to the settlement. Many, however, had no inkling of the suit, much less the ramifications of the

settlement. Respondents Isaacson and Stephenson were among those who knew nothing of the suit. More than a decade after the settlement was reached, they both developed injuries of the kind associated with Agent Orange exposure. In 1996, Mr. Isaacson was diagnosed with non-Hodgkins lymphoma, and, in 1998, Mr. Stephenson was diagnosed with multiple myeloma. When each filed suit, petitioners asserted that the suits were barred by the res judicata effect of the *Agent Orange* class judgment.

A. Article III. At bottom, this case illustrates why including future tort claimants in class action settlements violates the Article III requirement that federal courts adjudicate only "cases" or "controversies." Future, contingent tort claims do not meet the requirements of Article III, and permitting federal courts to adjudicate them undermines the adversarial system that Article III preserves and on which the legitimacy and accuracy of judicial decision-making depends. Moreover, complex mass-tort class actions present particular dangers that courts will overreach, both because of the often well-intentioned desire to provide a broader, quasi-legislative solution to problems burdening the legal system, and because it is precisely in the class action context—where procedural protections replace litigants' adversarial and individual participation—that individual due process is most vulnerable.

B. Res Judicata and Class Actions. At its core, the res judicata problem here is similar to the Article III problem. Class actions are peculiarly subject to abuse because the affected parties are represented vicariously, by representatives whose interests may diverge from those whom they are duty-bound to represent. In such situations, collateral review must be available for putative class members to determine the res judicata effect of a class judgment. It would violate constitutional norms to do as petitioners propose—either

entirely eliminate collateral review for absent class members or substantially defer to the class court's Rule 23(a) determinations—because that would afford absent class members fewer due process rights than other litigants.

Indeed, given the institutional dynamics of class actions and the potential for abuse, absent class members' rights deserve greater scrutiny on collateral review. Denying collateral review to future claimants effectively eliminates their rights before they ever have the chance to exercise them. Thus, if class members' due process rights are to be protected—and if this Court is to adhere to the maxim that the class action is a procedural device that cannot alter substantive rights—collateral review must be available in full force. Only such review can guarantee that the efficiencies of class actions are achieved "'without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 615 (1997) (quoting Advisory Comm. Notes to Fed. Rule Civ. Proc. 23).

ARGUMENT

I. THE ABSENT CLASS MEMBERS' THEN-NONEXISTENT CLAIMS DID NOT PRESENT ARTICLE III CASES OR CONTROVERSIES.[3]

A. Article III Requirements

Article III of the Constitution confines federal judicial power to "Cases" or "Controversies." This limit preserves the separation of powers by confining courts to their proper adjudicative function and preventing advisory opinions that would intrude on the legislative and policy making functions that the Constitution assigns to Congress and the President. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992); *Ashwander v. Tennessee Valley Auth.,* 297 U.S. 288, 345-46 (1936) (Brandeis, J., concurring). Article III also enhances the quality of decisionmaking by ensuring the "'concrete adverseness which sharpens the presentation of issues.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Article III's standing requirement also promotes the effectiveness and legitimacy of the adversarial legal system by ensuring that litigants serve their proper role. *Lujan*, 504 U.S. at 560. The

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[3]In prior cases, the Court avoided the question whether future claims present Article III cases or controversies by resting its decisions on non-constitutional grounds. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999); *Amchem*, 521 U.S. at 612. Constitutional avoidance is not possible here, since all questions presented are constitutional. Moreover, the Article III question is logically first and most basic, because if the *Agent Orange* court never had Article III power to adjudicate the supposed "claims" of the vast uninjured class, it never had power to issue orders that could have res judicata effect on that class. *See Steel Co. v.Citizens for a Better Environment*, 523 U.S. 83, 94-96 (1997) (federal courts must satisfy themselves of Article III authority before deciding merits); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986).

"personal stake" litigants must have in the outcome of litigation, *Shutts*, 472 U.S. at 804 (citation omitted), guarantees that they have adequate incentives to assert their claims and defenses, providing the court with the information and issues on which to base a decision. These incentives also ensure that parties will act to protect their own rights. It is this personal stake in litigation that makes the adversary legal system a fair and effective means of determining individual rights and thus legitimizes the court's power to render binding judgments.

Article III requirements apply no differently in class actions than in ordinary litigation. The class action is a procedural device that cannot alter the separation-of-powers commands of Article III any more than it can alter or confer substantive rights. *Amchem*, 521 U.S. at 613; *Ortiz v. Fibreboard* Corp., 527 U.S. 815, 865 (1999) (Rehnquist, C.J., concurring); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 331-32 (1980); *see also Ortiz*, 527 U.S. at 831 (Rule 23 must be interpreted within Article III constraints) (citing *Amchem*, 521 U.S. at 615). Accordingly, a court may neither certify a class nor render a class judgment with respect to persons whose claims are outside its Article III power.

Cabining the judicial branch and promoting effective and legitimate adjudication serves particularly important needs in the class action context. Article III must be read to require that the claims before the court, especially those of nonparticipating members, constitute cases or controversies appropriate for adjudication. Class actions already lack some of the adversity of nonclass suits because absent members do not prosecute their own claims. *See In re General Motors Corp. Pick-Up Truck Fuel Tank Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir. 1995) (Becker, J.); *Mars Steel Corp. v. Cont'l Illinois Nat'l Bank*, 834 F.2d 677, 678 (7th Cir. 1987) (Posner, J.). This problem is particularly acute in the settlement context.

Amchem, 521 U.S. at 621. Adherence to Article III requirements can ensure that even if the class action suit involves less adversarial testing than the usual suit, it does not lack adversity altogether. *E.g., Ortiz*, 527 U.S. at 823-26 (rejecting settlement based on agreement reached before suit filed); *Amchem*, 521 U.S. at 601-02 (disapproving settlement "not intended to be litigated"); *see also Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 636-38 (3d Cir. 1996) (Wellford, J., concurring) (noting named plaintiffs never intended to litigate their claims), *aff'd sub nom. Amchem*, 521 U.S. 591 (1997).

Morever, even absent class members with real injuries are not expected to closely monitor their class representatives or their attorneys, nor do most have incentives for doing so. *See General Motors*, 55 F.3d at 785; *Mars Steel*, 834 F.2d at 681. Class members who have no real case or controversy may not even suspect that a suit exists that may affect their rights. Just as importantly, even when absentees are aware of the suit, if they have no real injuries, they have even fewer incentives than ordinary class members to care about the result. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 96 Colum. L. Rev. 1343, 1351 (1995) (future contingent claimants are "rationally apathetic" to suit because they probably will not develop injury). Similarly, if the claim is merely hypothetical, absentees will also lack the ability to make rational decisions about their rights. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (due process rights hinge on *meaningful* opportunity to exercise those rights). Thus, permitting class courts to adjudicate non-cases, before the putative litigants can be expected to exercise their rights meaningfully, undermines another important function of Article III by preventing litigants from playing their necessary adversarial role.

Class actions may also present particular temptations for courts to render decisions that exceed their judicial power. Defendants will press for the broadest classes and releases possible, and plaintiffs' counsel have incentives to offer a broad release in exchange for a settlement providing significant attorney's fees, but low value for the class. *See In re American Reserve Corp*., 840 F.2d 487, 490 (7th Cir. 1988); *Mars Steel Corp*., 834 F.3d at 681. Courts also face pressures to approve settlements, including lack of judicial resources to adjudicate massive cases involving many thousands of plaintiffs, the momentum settlement creates, and the fact that once parties agree to settle, the court is deprived of the adversarial relationship needed to produce information about the merits of the settlement. *Amchem*, 521 U.S. at 621; *Mars Steel*, 834 F.2d at 680; Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va. L. Rev. 1051, 1122-33 (1996); Coffee, *supra*, 96 Colum. L. Rev. at 1347-48. Courts have succumbed to these pressures most readily in the mass-tort context, where broad releases of liability permit the court to rid itself of a "litigation albatross[]." *General Motors*, 55 F.3d at 799.

As Judge Becker has pointed out, however, "turning the federal courts into a mediation forum [is] a result inconsistent with their mission and limited resources." *Id.* It is also inconsistent with Article III. *Georgine*, 83 F.3d at 635-38 (Wellford, J., concurring); *see also Kremens v. Bartley*, 431 U.S. 119, 136 (1977) (court may not exceed Article III jurisdiction even if decision of issue would be "'convenient for the parties and the public'") (quoting *Ashwander*, 297 U.S. at 345) (Brandeis, J., concurring)); *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 14 F.3d 726 (2d Cir. 1993) (rejecting asbestos company's suit to erect remedial scheme for all current and future asbestos claims as beyond court's Article III power). This Court resisted the temptation to permit courts to exceed the statutory limits of their power in the *Ortiz* and

Amchem class actions, and it should do so here as well with respect to Article III limits.

B. Future Claimants Lack Standing.

Future tort claims cannot be adjudicated by courts because, before a claimant has any actual injury, they do not meet Article III standing requirements.

The "irreducible minimum" of constitutional standing requires that 1) the plaintiff suffers from a concrete injury in fact; 2) the injury is fairly traceable to the alleged conduct of the defendant; and 3) the injury is likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560. The most glaring problem with "future" (have not occurred) and "contingent" (may never occur) tort claims is that they fail the injury-in-fact test: the invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *See id*. Future claims, such as those of Mr. Stephenson and Mr. Isaacson, do not meet any aspect of this test.

At the time of the settlement, neither Mr. Stephenson nor Mr. Isaacson had any injury that they attributed to Agent Orange. Whether they would develop any injury, much less when or what type of injury, was entirely unknown. Their potential injuries were therefore not "concrete" in either a "qualitative [or] temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Moreover, just as respondents' injuries were not "actual" in 1984, neither were they "imminent." *Lujan*, 504 U.S. at 560. To be "imminent," there must be a sufficient degree of certainty that the injury will exist in the future to eliminate the possibility the court will decide "a case in which no injury will have occurred at all." *Id*. at 564 n.2. In *Agent Orange*, there was no assertion that class members would certainly develop injury, much less that they would do so

quickly. In short, "[a]llegations of possible future injury do not satisfy the requirements of Article III." *Whitmore*, 495 U.S. at 159.

Although some of the class complaints asserted claims for the "increased risk" of developing injuries in the future due to exposure, these claims did not provide standing for future-injury claimants. On the generous assumption that an "increased risk" claim presents a current injury at all—and therefore might confer standing—such a claim is confined to the probability of manifesting disease at the time of the complaint. That kind of claim does not (because it cannot) allege the particular injury that claimants will (or will not) suffer in the future. *See* Coffee, *supra*, 96 Colum. L. Rev. at 1435. Put differently, a past injury, for which there may be standing to pursue relief, does not supply standing for the distinct claim of hypothetical future injury. *See City of Los Angeles v. Lyons*, 461 U.S. 461 U.S. 95, 111 (1983). Therefore, any "increased risk" claims did not provide standing for the court to adjudicate respondents' future claims based on conjectural injuries from Agent Orange.

Respondents' future tort claims also lacked redressibility at the time of the suit. *Whitmore*, 495 U.S. at 155. A damages award for a future-injury claim would be entirely speculative. *See Anderson v. Mt. Clements Pottery Co.*, 328 U.S. 680, 688 (1946) (no recovery for speculative damages claims); *In re UNR Industries, Inc*., 725 F.2d 1111, 1120 (7th Cir. 1884) (Posner, J.) (estimating damages for future tort claimants "would be a quixotic undertaking far beyond the realistic boundaries of judicial competence"). Redressing claims based on "risk" alone would vastly overcompensate those who never developed injury, and vastly undercompensate those who did. *See Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir. 1985). Moreover, an agreement to settle

a class suit that alleges only the increased risk of injury in the future, but does not allege the actual occurrence of those injuries (because they have not yet occurred), does not redress those unalleged injuries. *See* Coffee, *supra*, 96 Colum. L. Rev. at 1435; *cf. National Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 17-18 (2d Cir. 1981) (class action settlement may release claims not asserted in the complaint only if both sets of claims share the same factual predicate); *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1563-64 (3d Cir. 1994) (same).

The intangibility of future, contingent claims presents quandaries for courts and litigants that underscore the Article III problem. Preventing the courts from adjudicating future claims fulfills the core purpose of the case-or-controversy requirement: It limits courts to the consideration of concrete disputes in which the facts are fully developed and the injuries fully understood. Otherwise "every hypothetical chain of future events leading to liability, regardless of how likely or unlikely, might be the basis for a contingent claim." *Schweitzer*, 758 F.2d at 944 (future tort claims not cognizable even under broad definition of "claim" under Bankruptcy Code). Put otherwise:

> If intangible and contingent injuries . . . amount to a concrete injury-in-fact sufficient to confer standing, then it would seem that few meaningful barriers remain. Indeed, on this basis, a settlement class action today might also resolve, consistent with Article III, the future claims of all citizens in the United States who have been exposed to secondary tobacco smoke.

Coffee, *supra*, 96 Colum. L. Rev. at 1426. Relaxing standing requirements to include contingent claims would therefore invite a flood of litigation. *See North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991) ("Plaintiffs would be

tripping over each other on the way to the courthouse if everyone remotely injured by a violation of law could sue to redress it") (Posner, J.). In the modern class action context, this rush to the courthouse would involve not actual plaintiffs but their counsel, egged on by defendants seeking a prospective fix to a problem that, in our system of separated powers and federalism, is the province of Congress or the state legislatures. Coffee, *supra,* 96 Colum. L. Rev. at 1349 ("once a sword for plaintiffs," defendants have discovered mass tort-class actions provide unique means of minimizing liability by obtaining release of future claims).

This Court has twice struck down legislative settlements that attempted to bind massive classes of future damages claimants. *Ortiz*, 527 U.S. 815; *Amchem*, 521 U.S. 591. To prevent class action dynamics from undermining the limits and effectiveness of the judicial branch, the Court should hold that the approval of a class action settlement of future damages claims exceeds the bounds of Article III.

II. COLLATERAL REVIEW IS A CONSTITUTIONALLY REQUIRED CHECK ON THE CLASS ACTION DEVICE.

A. Class Certification Under Rule 23 Is Not A Proper Substitute For Collateral Review.

Under the principle of res judicata, parties may not relitigate issues that were litigated, or could have been litigated, to final judgment in a prior suit. *Richards v. Jefferson Co.*, 517 U.S. 793, 797 n.4 (1996). That principle is limited in two important respects: First, to be bound by the judgment, a person must have been a proper party to the judgment or in privity with a proper party. Second, that person must have received due process in the initial suit, including notice and an opportunity to be heard. *Id*.; *Shutts*, 472 U.S. at 807 (legal

claim is constitutionally recognized property interest that cannot be extinguished without due process).

The law has established the means by which the res judicata effect of a judgment must be tested. First, the preclusive effect of a judgment is determined not in the original proceeding but in a subsequent proceeding. *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *Shutts*, 472 U.S. at 805. Therefore, the res judicata inquiry is, by definition, a retrospective one, because it is performed in a collateral proceeding after judgment becomes final. Second, the preclusive effect of a judgment is determined with respect to a specific party; that is, persons challenging the res judicata effect of a judgment, such as respondents here, are entitled to a determination as to whether the original proceeding accorded *them* due process. *See Restatement (Second) of Judgments* § 42, cmt. a (1982); 7B Wright, Miller & Kane, *Federal Practice and Procedure: Civil* § 1789 at 245 (2d ed. 1987); 3B *Moore's Federal Practice* § 23.11 (3d ed. 1982); *Newberg on Class Actions* §§ 16.24-25 (3d ed. 1992).

These well-established principles apply with full force to class actions. Absent class members are not named parties, but they may be bound by a class judgment if they were adequately represented and otherwise received due process. *Hansberry*, 311 U.S. at 40-42; *see also Shutts*, 472 U.S. at 808, 811-12. Thus, in class actions, the res judicata analysis for class actions merely substitutes "adequate representation" for the "proper party" requirement. *See Hansberry*, 311 U.S. at 41; *Shutts*, 472 U.S. at 808. Putative class members are therefore permitted to challenge the res judicata effect of judgments in collateral proceedings on due process grounds, just as non-class litigants have always been able to raise due process challenges to res judicata. *Richards*, 517 U.S. at 798-99; *Shutts*, 472 U.S. at 811-12*; Hansberry*, 311 U.S. at 40-43; *see also Twigg v.*

Sears, Roebuck & Co., 153 F.3d 1222, 1226 (11th Cir. 1998); *In re Real Estate Title & Settlement Services Antitrust Litig.,*869 F.2d 760, 767 (3rd Cir. 1989); *Nathan v. Rowan*, 651 F.2d 1223, 1227 (6th Cir. 1981) (citing cases); *Taunton Gardens Co. v. Hills*, 557 F.2d 877, 878 (1st Cir. 1977); *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 Tex. L. Rev. 383, 384 n.3 (2000) (citing cases).

Petitioners argue that respondents may not challenge adequate representation and due process because the *Agent Orange* court already determined these issues under Rule 23, so this Court must either disallow the challenge entirely or defer to some extent to the class court's Rule 23 determinations. Yet res judicata principles dictate that, despite overlap between res judicata questions and the Rule 23(a) inquiry, collateral review is a personal due process right separately afforded every litigant.

Rule 23 determinations are part of the class court's initial judgment. The question here is not the merits of the class judgment in general, but whether it violates due process to apply the judgment to respondents. If the two questions were the same, the class court would determine the preclusive effect of its own judgment, a notion expressly disavowed by the drafters of Rule 23. Rules Adv. Comm. Notes to 1966 Amendments to Rule 23, 39 F.R.D. 69, 106 (1966) (Rule 23 "does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action"). "It gets the cart before the horse to reject, as barred by judgment, an effort by the absent class members to show that they were not properly brought into the [] case and therefore are not affected by the judgment." *Kamilewicz v.*

Bank of Boston Corp., 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc).

B. Class Members' Rights To Collateral Review Are Critically Important Because Of The Special Dangers Of Class Actions.

Class actions provide an efficient means of adjudicating large numbers of similar cases by replacing the participation of class members with representative parties and notice. This lower level of individual involvement makes it difficult to ensure that absentees' interests are adequately protected. In addition, the dynamics of class action settlements present potential for abuse that will fall most heavily on absentees because of their less-involved status. Thus, collateral review is necessary to prevent the abuse of class members' rights. Far from weakening the vitality of the class device, that review provides needed procedural protection for absentees and therefore increases the effectiveness and legitimacy of class actions themselves.

Absent class members generally do not monitor their cases because their claims are relatively low in value or because they believe that the named representatives will champion their interests. *See General Motors*, 55 F.3d at 784; *American Reserve Corp*., 840 F.2d at 490; *Mars Steel*, 834 F.2d at 681. Despite the formal requirement to do so, even the class representatives do not generally monitor the class suit, making the lawyers "close to the real parties in interests." *Mars Steel*, 834 F.2d at 679; s*ee also Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1309 & n.7-8 (3d Cir. 1993); *American Reserve Corp.*,

840 F.2d at 490.[4]

In turn, the interests of the class and of plaintiffs' counsel are not always well-aligned. *Mars Steel*, 834 F.2d at 681. This situation presents the potential for abuse of class members' rights. "Because absentees are not parties to the action in any real sense, and probably would not have brought their claims individually, attorneys or plaintiffs can abuse the suit nominally brought in the absentees' names." *General Motors*, 55 F.3d at 785 (citation omitted).

In light of these dynamics, the court overseeing a class action has heightened obligations, in particular towards absentees. *Id.* (court "plays the important role of protector of the absentees' interests, in a sort of fiduciary capacity"). However, because the natural objectors—the putative class members—are absent, the court is often deprived of information it needs to play its fiduciary role. *E.g., Amchem*, 521 U.S. at 62; s*ee also American Reserve Corp.*, 840 F.2d at 490 (courts monitor class actions "often at great cost in time and even then imperfectly"). This problem increases the likelihood that the judgment, even if meritorious generally, will be unfair to specific class members about whom the court knows nothing.

The potential for abusive class actions is exacerbated in the settlement context. When plaintiffs' counsel and defendants broach the possibility of settlement, the interests of plaintiffs' counsel may shift to obtaining large fees in

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[4]As discussed in Part I.A. above (at 8), future claimants particularly lack incentives to monitor a class suit (if they know about it at all) because their "claims" have little value to them unless and until they become concrete injuries. *See* Coffee, *supra*, 96 Colum. L. Rev. at 1432 (future claimants present the "extreme example of lawyers operating without clients").

conjunction with the settlement, in exchange for which they may be willing to sell out the class. *American Reserve Corp.*, 840 F.2d at 490; *Mars Steel*, 834 F.2d at 681. Defendants are interested in obtaining the cheapest settlement possible in exchange for the broadest release of liability. *General Motors*, 55 F.3d at 778. Thus, a class action may become "a vehicle for collusive settlements that primarily serve the interests of defendants—by granting expansive protection from law suits—and of plaintiffs' counsel—by generating fees gladly paid by defendants as a quid pro quo for finally disposing of many troublesome claims." *Id.; see also Bolger*, 2 F.3d at 1310; *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) (noting the inherent "danger that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees"); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 677 (1986) (class actions are "uniquely vulnerable to collusive settlements that benefit plaintiffs' attorneys rather than their clients").

Added to these seemingly inexorable forces, courts are likely to approve settlements because they are subject to abuse-producing pressures of their own. To begin with, a settlement agreement deprives the court of any adversity between the parties (a dynamic already weakened in the class action context) as it prepares to evaluate the settlement. *Amchem*, 521 U.S. at 621. Lead parties bent on approval, moreover, "can be expected to spotlight the settlement proposal's strengths and slight its defects" in presenting it to the court. *Bolger*, 2 F.3d at 1310. To the extent the settlement lacks objectors, courts are deprived of any "independently derived information" about the settlement. *General Motors*, 55 F.3d at 803.

Moreover, courts face enormous institutional pressures to approve even defective settlements. Settlement creates its own momentum that the court may well be reluctant to derail. *Mars Steel*, 834 F.2d at 680; Koniak & Cohen, *supra*, 82 Va. L. Rev. at 1122-33. Courts also have incentives of their own to approve settlements, most notably clearing their dockets of complex cases. *General Motors*, 55 F.3d at 790. A recent study found that courts are pressured to favor settlement by crowded dockets, scarce judicial resources, and a general institutional preference for settlement. Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 91-92 (Rand Institute for Civil Justice 2000). Another major empirical study found that courts approve 90 percent of proposed settlements without substantive changes. Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal District Courts*, 58 (Fed. Judicial Center 1996). As Professor Coffee put it, "[Courts'] deferential attitude is probably best expressed by one recent decision which acknowledged that '[i]n deciding whether to approve this settlement proposal, the court starts from the familiar axiom that a bad settlement is almost always better than a good trial.'" Coffee, *supra*, 86 Colum. L. Rev. at 714 n.121 (quoting *In re Warner Commun. Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985)); s*ee also General Motors*, 55 F.3d at 805.

As a result of these institutional problems, which affect absentees most heavily, a procedural check in the form of collateral review is crucial to ensure absentees' rights are not the high price of class action settlements. "If the court's most powerful sword (namely, its authority to reject the settlement in a class action) will typically remain in its scabbard, the quest for accountability must look to other weapons and remedies." Coffee, *supra*, 96 Colum. L. Rev. at 1348. This Court has recognized that the threats to absentees' rights that class settlements represent demand "undiluted, even heightened"

scrutiny of the Rule 23(a) criteria "designed to protect absentee rights." *Amchem*, 521 U.S. at 620; *see also Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982) (quoting *Johnson v. Georgia Highway Express, Inc*., 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., concurring) (terming as "'most significant' the potential unfairness" of certifying an overbroad class)). Because settlement dynamics affect the rendering court's ability to perform a searching Rule 23 due process review, collateral review is of similarly heightened importance for protecting absentees' constitutional rights. *See General Motors*, 55 F.3d at 799 (it would erode due process protections to allow lower standards for settlement classes in light of "the hydraulic pressures confronted by courts adjudicating very large and complex actions").[5]

Collateral review provides a check on these potential abuses for several reasons. First, a collateral court is not subject to the same dynamics—the "hydraulic" settlement and approval pressures—that affect the parties and court in the class action itself. Further, a collateral proceeding provides individualized review and a chance for absent members, such as respondents, to assert their own rights. Numerous commentators have stressed that determining the preclusive effect of a *class* judgment can only be done with reference to a *specific* party. *Restatement (Second) Judgments* § 42 cmt. a (1982); Wright & Miller, *supra*, § 1789 at 244-45; *Newberg on*

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[5] These concerns are particularly apt here because "[t]he mass tort class action occupies a polar position at the extreme end of the continuum in terms of its relative vulnerability to abuse and exploitation." Coffee, *supra*, 96 Colum. L. Rev. at 1349. Professor Coffee argues that the potential for abuses of future claimants is so intrinsic to mass-tort class actions that such class actions amount to a "new technology" that defendants have learned to use to minimize their liabilities "before [future claimants] even learn of their injuries." *Id.* at 1350.

Class Actions § 16.24 at 16-130-31.

Moreover, a judgment that is generally beneficial may nevertheless be unlawful as to particular class members, which may be revealed only when its application to those individuals is considered. This principle comports with the rule that the overall fairness or benefits of a settlement cannot replace individual fairness. *Amchem,* 521 U.S. at 621; *In re General Motors Corp. Engine Interchange Litig*., 594 F.2d 1106, 1133-37 (7th Cir. 1979) (each sub-group of class is entitled to fair settlement). The retrospective nature of the res judicata inquiry provides additional facts that similarly sharpen the ability of the court to properly adjudicate an individual class member's rights. Particularly in large mass-tort cases, parties may lack information at the time of settlement about the number and types of claims. Medical science may be similarly undeveloped, and the effects of toxins may themselves take years to be revealed. *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 Boston U. L. Rev. 659, 667 (1989); *see also* Coffee, *supra*, 96 Colum. L. Rev. at 1422-33 (impossibility of estimating future claims or predicting future effects of toxins prevents courts from rendering accurate judgments in mass tort class actions that include future claimants).

Petitioners argue that absentees' due process rights cannot be afforded collateral protection because permitting meaningful collateral review would render the class action device useless and would discourage, if not prevent, defendants from settling class suits. Quite the contrary. Collateral review affirmatively supports the legitimacy of the class action process. As Judge Becker has put it:

> Ever since *Hansberry v. Lee* was decided in 1940, collateral attacks have been considered to be a necessary part of the class action scheme. Rather than

> threatening the vitality of the class action mechanism, the fact that some plaintiffs will be able to extricate themselves from class action judgments if subsequent courts find them to be inadequately represented is integral to the constitutionality of the class action procedure. . . .
>
> Moreover, as the Court explains in *Shutts*, it is partly up to the defendant to safeguard the interest of the absent plaintiffs. If the defendant wishes to achieve maximum preclusive effect, it is up to the defendant to ensure that the class is appropriately certified, and the absent members are adequately represented. Far from wreaking havoc on the class action mechanism, we believe that our holding will foster results that most fairly balance the interests of absent class members and defendants alike.

In re Real Estate, 869 F.2d at 769-70 (citations omitted). The efficiencies of class actions do not support giving them automatic preclusive effect. Rather, for the reasons stated above, those efficiencies may be attained only by adhering to, not ignoring, the time-honored and critical protection afforded by collateral review.

III. THE *AGENT ORANGE* JUDGMENT IS NOT RES JUDICATA AS TO RESPONDENTS.[6]

A. The Named Plaintiffs Did Not Adequately Represent Future Claimants.

The representation of respondents was inadequate because none of the named plaintiffs possessed future claims. At its core, "adequate representation" requires that the representatives possess the same claims and the same injuries as the members they represent, so that in asserting their own interests they also act in the absentees' interests. *See Gen. Tel. Co.*, 457 U.S. at 156 (citing *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)); *National Super Spuds*, 660 F.2d 9. Put another way, named plaintiffs may represent the class only to the extent that their claims are typical or representative. *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 692 (1961). Thus, a class judgment is binding only as to those particular claims for which the class member was adequately represented. *National Super Spuds*, 660 F.2d at 17; *see also Cooper v. Fed. Reserve Bank*, 467 U.S. 867 (1984). As Judge Friendly explained in *National Super Spuds*, if the rule were otherwise, named plaintiffs might be "willing to throw to the winds" the claims of other class members that the named plaintiffs did not also possess. *Id*. at 17 n.6. Here,

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[6]The following discussion draws on Rule 23 precedents as well as on cases based on the constitutional due process standard for adequacy of representation. Rule 23(a)'s class certification criteria overlap substantially with constitutional due process, and they are meant to provide at least the constitutional minima. *E.g.,* Rules Adv. Comm. Notes, 39 F.R.D. at 107. Many cases interpreting Rule 23 criteria have expressly relied on constitutional standards. *Ortiz*, 527 U.S. at 831 (Rule 23 must be interpreted in light of Article III constraints) (citing *Amchem*, 521 U.S. at 613); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974); *In re Real Estate*, 869 F.2d at 766.

the class representatives all had presently manifested injuries rather than future claims. Therefore, respondents were not adequately represented with respect to their future claims.

Second, even if the *Agent Orange* named plaintiffs had asserted future injuries, they still could not properly have represented respondents. The Court has held that only legally cognizable claims may be considered for the purposes of certifying a class under Rule 23. *Amchem*, 521 U.S. at 622-23 & n.18.[7] Future claims are not legally cognizable because, for the reasons stated above, they are not justiciable under Article III and could not have been "'raised in courts of law as part of an actual or impending lawsuit.'" *Id.* at n.18 (quoting *Diamond v. Charles*, 476 U.S. 54, 76-77 (1986) (O'Connor, J., concurring in part and concurring in judgment)). Thus, the "futures" claimants in *Agent Orange* could never have been adequately represented. *See id.; see also* Coffee, *supra*, 96 Colum. L. Rev. at 1435 (future claimants' interests differ to extent of differences in injuries they actually develop); Note, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85 Colum. L. Rev. 397, 408 (1985) (speculative nature of future claims makes it impossible to identify future claimants' interests).

Aside from the claims of the named *Agent Orange* plaintiffs, significant conflicts existed *within* the "sprawling" absentee class, *Amchem*, 521 U.S. at 622, because the certification grouped together present and future claimants.

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[7]The Court made this statement with specific reference to "predominance" and "typicality" criteria, *Amchem*, 521 U.S. at 622-23 & n.18, which are "guideposts for determining whether . . . the named respondent's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence" and "therefore also tend to merge with the adequacy-of-representation requirement." *Gen. Tel. Co.*, 457 U.S. at 157 n.13.

This Court has recognized that the interests of present and future claimants are, by their nature, in conflict. *Id.* at 623-26. "Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Id.* at 626. As in *Amchem*, moreover, present and future claimants here were not separated into subclasses with separate representation, and accordingly were not adequately represented. *Id.*

The structure of the *Agent Orange* settlement further reveals that these intraclass conflicts were not conjectural. *Id.* at 626-27 (considering "structural" fairness of settlement to determine whether class members received adequate representation). Compensation under the settlement was available only if a veteran manifested injury between 1971 and 1994. *Agent Orange*, 611 F. Supp. at 1417. Thus, the presently injured received compensation (including compensation retroactive to 1971), while future claimants could obtain compensation, in decreasing amounts, only if they manifested injury before 1994. Future claimants who manifested injury after 1994, like respondents, received nothing. These significant differences reveal that there were conflicts of interests among the different types of claimants in the class. *Amchem*, 521 U.S. at 627.

Judge Weinstein certified the class based on the common issue of causation, 100 F.R.D. at 724, and in approving the settlement found that class members, including future claimants, had a common interest in settlement because of the uncertainties of medical science and the poor chances that plaintiffs would prevail on that common issue. 597 F. Supp. at 795, 857. But *Amchem* rejected the rationale that future claimants all "'have a strong interest in ensuring that recovery for all the medical categories be maximized because

they may have claims in any, or several categories.'" 521 U.S. at 608 (quoting 878 F. Supp. at 726-727 (E.D. Pa. 1994)). As the Court explained, if a "shared uncertainties" rationale provided the necessary commonality for representation purposes, then any intangible claim, or even the lack of a claim, would suffice. *Amchem*, 521 U.S. at 623-24 (exposure alone not enough for commonality among class members). Moreover, settlements are intended to permit parties to escape—for a price—the uncertainties of trials. It is therefore no answer to say that class members are equally well-off when forced to exchange their claims for a settlement that likely will pay them nothing; after all, they are giving up their right to a jury trial that, although it *may* pay them nothing, may also produce a substantial recovery.

In sum, respondents did not receive adequate representation because no named plaintiffs shared their interests and the undivided absent class encompassed groups of claimants with opposing interests. The fundamental conflict within the Agent Orange class will be present in every settlement that attempts to release future damages claims of as-yet uninjured class members.

B. Respondents Did Not Receive Adequate Notice Because They Were Unaware That They Had Anything To Lose, Depriving Them Of Other Due Process Rights.

The class judgment is not res judicata as to respondents for another reason: They did not receive notice of the class suit as due process requires. *See Shutts*, 472 U.S. at 811-12; *Mullane*, 339 U.S. at 314 (notice is a "fundamental requirement of due process in any proceeding which is to be accorded finality"); *Eisen*, 417 U.S. at 176-77.

Notice must be "of such nature as reasonably to convey

the required information." *Mullane*, 339 U.S. at 314. The class notice failed to meet this standard with respect to respondents because it did not by its terms include future claimants in the class. The initial court-approved Rule 23(c)(2) notice, mailed in March 1984, *Agent Orange*, 597 F. Supp. at 756, defined the class as those "who were injured" by exposure to Agent Orange while serving in the military in the Vietnam War. 100 F.R.D. at 732. Class members were required to opt out by May 1, 1984. *Id*.

This class definition was not intended to include future claimants. Only during the settlement negotiations that concluded on the morning of trial, May 7, 1984, did defendants demand to be released from future claims, and plaintiffs' counsel and the court agreed. Schuck, *supra*, at 153-54. The court stated that it would "interpret" the class definition to include future claimants. *Id.* The subsequent Rule 23(e) settlement notice stated that veterans who had been exposed to Agent Orange but had "not yet manifested injury" would now be included in the settlement and their future claims would be released. *Agent Orange*, 597 F. Supp. at 865. Thus, future claimants were not provided with a Rule 23(c)(2) notice regarding class certification or provided the right to opt out, depriving the judgment of any preclusive effect as to the new "futures" class. *Shutts*, 472 U.S. at 811-812; *accord Ortiz*; 527 U.S. at 846-47; *see also General Motors*, 55 F.3d at 791-92 (court that expands class must provide new class members notice and opportunity to opt out).

Due process also requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. This standard requires that personal notice be provided to all class members who can be identified through reasonable effort.

Eisen, 417 U.S. at 173-75. Under these principles, respondents should have received personal mailed notice. The government knew the identity of all Vietnam veterans, a large portion of whom had been exposed to Agent Orange. *E.g., Agent Orange*, 506 F. Supp. 762 (E.D.N.Y. 1980) (Pratt, J.) (suggesting personal notice would be mailed to all Vietnam veterans). There is no reason, other than cost, *Eisen*, 417 U.S. at 177 (cost not a permissible consideration), that individual notice could not have been mailed to all veterans rather than only those individuals who had already filed claims with the court and individuals on the government's Agent Orange registry. *Agent Orange*, 100 F.R.D. at 729. Publication notice was provided in only a handful of national publications, *id.*, and was thus hardly "reasonably calculated" to reach the 2.4 million exposed U.S. veterans and their families scattered across the country. As a result, neither Mr. Stephenson nor Mr. Isaacson was actually aware of the class suit while it was proceeding, or at any time before they discovered their own injuries and filed their own suits, because they did not receive constitutionally adequate notice.

Whether they were actually aware of the suit, however, is not determinative, for as class members with no manifest injury, respondents could not have been provided with meaningful notice. *E.g., Barry v. Barchi*, 443 U.S. 55, 66 (1979) (opportunity to be heard must be at *meaningful* time and in *meaningful* manner). The Court suggested in *Amchem* that "futures" class actions present potentially incurable notice problems, and this case illustrates why that is so. Even if uninjured veterans were aware of the suit, they still had no "claim" and therefore no reason to believe that they had rights being adjudicated that required protection. Given that courts will not normally accord a legal remedy for speculative damages claims, *see Anderson*, 328 U.S. at 688; *In re UNR Industries*, 725 F.2d at 1120, courts should not expect class

members to make important decisions with regard to future injuries, including placing a value on them for the purposes of evaluating settlement. *See* Coffee, *supra*, 96 Colum. L. Rev. at 1351. As this Court put it:

> Many persons in the exposure-only category may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may or may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.

Amchem, 521 U.S. at 628.

Here, the value of any potential claim was particularly difficult to evaluate given the uncertainty of medical science, the range of diseases potentially caused by Agent Orange, the different severities of injury, and long latency periods, not to mention the unknown risk of developing injury at all. That class members may be unable, through no fault of their own, to make decisions intelligently demonstrates that they were unable to exercise their rights in a meaningful way. As *Mullane* counsels, "when notice is a person's due, process which is a mere gesture is not due process." 339 U.S. at 315. In sum, because respondents could not be provided with constitutionally adequate notice, they did not receive due process and are not bound by the class judgment.

CONCLUSION

The decision of the court of appeals should be affirmed.

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January 24, 2003