1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - - - - - - - - - - - - X

3 ROBERT J. DEVLIN, :

4 Petitioner, :

5 v. : No. 01-417

6 ROBERT A. SCARDELLETTI, ET AL.:

7 - - - - - - - - - - - - - - - - X

8 Washington, D.C.

9 Tuesday, March 26, 2002

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United

12 States at 11:08 a.m.

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1 APPEARANCES:

2 THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on

3 behalf of the Petitioner.

4 LAURENCE S. GOLD, ESQ., Washington, D.C.; on behalf of

5 the Respondents.

6 PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor

7 General, Department of Justice, Washington,

8 D.C.; for the United States, as amicus curiae,

9 supporting respondents

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 next on 01-417, Robert J. Devlin versus Robert A.

5 Scardelletti. Spectators are admonished, do not talk

6 until they leave the courtroom. The Court remains in

7 session. Mr. Goldstein.

8 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

9 ON BEHALF OF THE PETITIONER

10 MR. GOLDSTEIN: Mr. Chief Justice and may it

11 please the Court: This is a case about the right to take

12 an appeal. Over Petitioner's objections, the district

13 court confirmed a class action settlement that

14 substantially reduces Petitioner's individual pension.

15 The Fourth Circuit held that Petitioner nonetheless may

16 not appeal to argue that the district court abused its

17 discretion in rejecting his objections. Our principal

18 submission is that, as Justice Kennedy explained in oral

19 argument in the Felzen case, Rule 23 class members such as

20 Petitioner are bound by the district court's judgment and

21 thus are parties to that judgment with the right to appeal

22 from it. Because the Government, although seated at the

23 opposite side of the table, actually agrees with us that

24 class members are bound by the judgment, that objector

25 appeals identify important legal errors, and that they

1 also deter collusive settlements, I will leave to the
2 Solicitor General's representative any arguments to the
3 contrary that my friend Mr. Gold may make.
4 QUESTION: Can I test your thesis that u are
5 bound by a judgment, you are a party to it? I mean, there
6 are cases where someone who has allied with a party and
7 has used the same attorney and has maybe had some input
8 into trial strategy, that that person will be bound by the
9 judgment, but as far as I know, we have never allowed, no
10 court that I know of has ever allowed such a person to
11 take an appeal on the ground that well, since you would
12 have been bound, you are a party.
13 MR. GOLDSTEIN: Justice Scalia, I think it
14 depends on what we mean by bound. There are different,
15 more expansive notions of collateral estoppel and res
16 judicata. What I'm talking about here is that the
17 judgment operates directly upon the class member. And let
18 me be clear that our position is not to move beyond that.
19 Our position is not that it's sufficient to be a party,
20 but that it is a necessary condition. It is also
21 necessary, and this is an important point for the
22 distinction between appealing from an approved settlement
23 and for appealing a litigated judgment.
24 QUESTION: You say that the judgment operates
25 directly upon the class member, as if we are talking about

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1 some sort of physical thing, but how is that operation on
2 the class member different from, say, what might be res
3 judicata or collateral estoppel in some other case?
4 MR. GOLDSTEIN: Mr. Chief Justice, the
5 difference is that while you can have an application of
6 collateral estoppel or res judicata that extinguishes a
7 right to pursue an action, what I'm talking about here and
8 let me put it in very practical terms. The Petitioner had
9 a pension and that pension went down 40 percent when the
10 district court in this case approved a settlement that
11 said the COLA provisions of the pension plan are null and
12 void, and that's the kind of direct operation I'm talking
13 about.
14 Now, there is an unsettled area of the law
15 stretching to precedents dating from the 1850s, the
16 so-called quasi-party cases. We don't think it's
17 necessary to apply those here because unlike a Rule 23.1
18 class member in the context of a derivative action, we are
19 directly bound by the action. We are not talking about
20 extinguishing a right of ours, for example, to sue on
21 behalf of a corporation.
22 QUESTION: You are bound because a judge
23 determined that you had an adequate representative. I
24 agree with you that every person in that class is equally
25 affected and indeed there is no opt out of this class that

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1 we are dealing with. But the determination has been made
2 that you are represented by someone who is an adequate
3 representative of all members of the class who will fairly
4 and adequately represent the class. So as long as the
5 representative will fairly and adequately represent the
6 class, why isn't it the end of it?
7 MR. GOLDSTEIN: Well, that's a good entry into
8 the purpose and function of Rule 23(e). What happens is
9 that at the point that it's acknowledged by the
10 Respondents here that at the point settlement is agreed
11 to, the class representative and be opposing named parties
12 joined forces to oppose objections, and that continued at
13 the stage of the case where you have to decide whether or
14 not to take an appeal.
15 QUESTION: Well, Rule 23 what?
16 MR. GOLDSTEIN: 23(e).
17 QUESTION: And where do we find that?
18 MR. GOLDSTEIN: That would be in the appendix of
19 the Council of Institutional Investors, Mr. Chief Justice.
20 QUESTION: It's not in your brief?
21 MR. GOLDSTEIN: No, Mr. Chief Justice.
22 QUESTION: Whereabouts in the Constitution of
23 Institutional Investors?
24 MR. GOLDSTEIN: (A)(4) of the appendix to that
25 brief.

1 QUESTION: Thank you.

2 MR. GOLDSTEIN: And I'll read it very briefly

3 for the Court's benefit. A class action shall not be

4 dismissed or compromised without the approval of the court

5 and notice of the proposed dismissal or compromise shall

6 be given to all members of the class in such manner as the

7 court directs. Now, let me detour for just a moment. The

8 Court will notice it noticed in the Felzen case that this

9 rule doesn't actually explicitly provide for objections.

10 The advisory committee notes make clear that that was the

11 intent of this provision, and in fact amended Rule 23(e)

12 which will go into effect next year explicitly provides

13 for the right to state objections.

14 To return to Justice Ginsburg's question, what

15 happens is that this rule recognizes that the class

16 representative is not speaking on behalf of the objectors

17 at the point an objection is taken. They in fact litigate

18 actively for the settlement. Mr. Gold here is on behalf

19 of the class representative in this case and goodness

20 knows, he will argue that we have no right to take an

21 appeal.

22 The rule, 23(e), provides an opportunity for us

23 to come in, advise the district court of a problem with

24 the settlement. Our point is that nothing in these rules

25 contemplates that the objector's role would be

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1 extinguished at the district court, that someone uniquely
2 in the context of a class action, who is bound directly by
3 the judgment and participates as of right in the district
4 court, would only participate at the district court.
5 QUESTION: But do you agree that you must
6 intervene in the district court, or do you say you don't
7 even do that?
8 MR. GOLDSTEIN: Mr. Chief Justice, we say we do
9 not have to do that, that there is nothing about this
10 Court's precedents --
11 QUESTION: Why not? That is, if this is open
12 under the language, it seems to me there is no real
13 difference between the parties as a practical matter,
14 except you want to say the person all the time, no matter
15 what, can bring an appeal, and they want to say what you
16 should do is intervene and that gives the district judge a
17 chance to act in an unusual situation as a kind of
18 safeguard to make sure that it is fair.
19 I mean, this person could be anybody under the
20 sun. It could muck up the litigation for everybody else.
21 The extra time involved might be important, and it might
22 be totally unfair, given the prior history, to allow this
23 individual to bring the appeal. So all they are saying is
24 that the judge should have a chance as a gatekeeper to
25 make that determination.

1 Now why not, if it's open under the language,
2 say there is a little more conservative position, gives us
3 a chance to not get things mixed up?
4 MR. GOLDSTEIN: Well, let me, there are two
5 parts to the question. The first is, is it open under the
6 rules and second, why wouldn't it be a good idea to adopt
7 it if it were? As to the first, it is not open under the
8 rules, and let me take you again to the particular rule in
9 question. That would be, it's suggested, rule 23(d)(2),
10 and this rule says that the district court may in
11 appropriate circumstances --
12 QUESTION: Where are you reading, where are you
13 reading from?
14 MR. GOLDSTEIN: I'm going to read from (a)(3) in
15 the carryover to (a)(4) of the same appendix of the
16 Council --
17 QUESTION: And where are you starting on (a)(3)?
18 MR. GOLDSTEIN: At the bottom of the page D,
19 orders and conduct of actions. Your Honors, it says in
20 the conduct of actions to which this rule applies, the
21 court may make appropriate orders and then I'm going to
22 jump to 2. This is the suggestion of the other side:
23 requiring for the protection of the members of a class or
24 otherwise for fair conduct of the action that notice be
25 given. So there is a suggestion, where it follows, notice

1 be given, and then there is a class that says -- I'll just
2 continue to read it:
3 In such matters the court may direct to some or
4 all members, of any step in the action or of the proposed
5 extent of the judgment, or of -- and this becomes critical
6 -- the opportunity of members to signify whether they
7 consider the representation fair and adequate. And then
8 the clause: to intervene and present claims or defenses
9 or otherwise come into the action.
10 Our point is as follows, or is several fold.
11 The first is that this is a different notice from the
12 23(e) notice. This is a discretionary notice that courts
13 can employ in some cases, and I think it deserves to be
14 emphasized that in the 35 years since 1966, not a single
15 court has read this provision in the way that's suggested
16 by the other side, that it's mandatory that there be an
17 intervention for a screening function. The particular
18 reason is that this (d)(2) notice refers to intervening to
19 present claims or defenses, and that the not what an
20 objector seeks to do.
21 An objector says there is a settlement on the
22 table, I have a legal objection to it, it's either
23 unlawful, as in Amchem, or it's unfair as in this case,
24 and so it's a different kind of intervention. So I don't
25 think it's open and no court has ever suggested that it's

1 how the rule should be interpreted. Now, assume the Court
2 disagrees with me, Justice Breyer, why isn't it a good
3 idea? It doesn't accomplish anything.
4 What happens is this. You move to intervene,
5 the intervention motion is denied, so you appeal that, so
6 you haven't really gained anything. What you have done is
7 turn the objection into the application of the abuse of
8 discretion standard. You just added another layer on top
9 of it because then the court of appeals has to decide
10 well, did the judge get the intervention motion wrong? If
11 that was an abuse of discretion, then we'll reach the
12 merits.
13 QUESTION: What if the court grants your motion
14 to intervene?
15 MR. GOLDSTEIN: Mr. Chief Justice, then you
16 haven't accomplished anything either. All you have done
17 is permitted an appeal that under our theory would be
18 permitted anyway.
19 QUESTION: Could we, could we go back just one
20 step. You don't have to intervene to be an objector.
21 That's very clear, isn't it?
22 MR. GOLDSTEIN: Yes.
23 QUESTION: And I thought that your basic
24 argument was whatever your status is in the district
25 court, that's what your status is on appeal. If you can

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1 go into a district court, which is extraordinary, usually
2 the district court doesn't let anybody come in without
3 having intervened, but to object to a settlement, you
4 don't have to do anything except say judge, I'm an
5 objector. You don't have to be an intervenor. And I
6 thought that your basic argument was whatever status you
7 have in the district court, that you can come in and
8 object, then you have that same status on appeal.
9 MR. GOLDSTEIN: Yes. I had taken an implicit
10 premise to Justice Breyer's question that I'll come back
11 to. This case will illustrate your point, Justice
12 Ginsburg. In this case, we objected to the settlement.
13 We moved to intervene. That intervention was denied. It
14 is perfectly clear that if that intervention is properly
15 denied, and as to our attempt to come in and take
16 discovery, disqualify class counsel, that's not within the
17 question presented. It's not here at the court. We would
18 not have that power as an objector.
19 As an objector, we have only the right to pursue
20 our individual objections, which is the distinction I take
21 it you are drawing. Justice Breyer, I took the implicit
22 premise of his question to be well, why don't we intervene
23 for that limited purpose? And that's I think what I took
24 Justice Breyer to be getting at. He is saying what's the
25 big deal. Can't the district judge maybe help us out in

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1 some cases where we might have a lot of different
2 objectors and give you a limited intervention right. That
3 is akin to the rule that is applied by the Seventh
4 Circuit, and that is preserved by the question presented
5 within the petition.
6 Now, the Government adds a patina on top of that
7 that Justice Breyer referred to, and that is don't merely
8 have pro forma intervention, but allow the district judge
9 to actually do something and screen out the people we
10 don't want appealing. So I came back to Justice Breyer
11 and I said I don't think it will actually --
12 QUESTION: You have gained something. I mean,
13 normally the judge would grant it, but let's say he
14 didn't. It would be some pretty good reason. Maybe it
15 would be very unfair, etcetera and you say well, he will
16 just appeal that. That's true. But it's quite a
17 different matter as an appellate court to decide whether
18 the judge abused his discretion there than to have to go
19 through what could be 15 years' worth of litigation to
20 figure out whether this settlement nor the circumstances
21 is a fair one.
22 MR. GOLDSTEIN: Justice Breyer, let me draw a
23 distinction. My point is not that in an extraordinary
24 case, that a district judge is faced with dozens upon
25 dozens of objectors; the case has become completely

1 unmanageable; this is an important settlement to implement
2 immediately; that a district court couldn't in that case
3 exercise discretion under the broad language of subsection
4 23(d). My point is that in the mine run of class actions,
5 in every case, we don't need to be doing this.
6 QUESTION: Well, what discretion would the
7 district court have if your theory is right, Mr.
8 Goldstein, that an objector doesn't even have to
9 intervene? I mean, in a very complicated case the objector
10 simply says I object, I'm not a party. What can the
11 district court judge do?
12 MR. GOLDSTEIN: Well, I believe that under the
13 language of the rule --
14 QUESTION: Of what rule?
15 MR. GOLDSTEIN: Of subsection D, and let me
16 return to the introductory clause, Mr. Chief Justice.
17 There is a, sort of the broad phrasing because we have all
18 kinds of class actions. Justice Ginsburg pointed out we
19 don't have opt outs here but in D 3 cases we might. Just
20 in the broad phrasing in the conduct of actions to which
21 the rule applies, the court may make appropriate orders.
22 And I think the court of appeals would be very sympathetic
23 to a district judge faced with an extraordinary
24 circumstance of lots of adverse objectors. But I think --
25 QUESTION: So you are saying that I am reaching

1 out and bringing you into the case in spite of the fact
2 you haven't moved to intervene?
3 MR. GOLDSTEIN: I apologize, Mr. Chief Justice.
4 No. What I'm reacting to is Justice Breyer's suggestion
5 that if there are actually a lot of objectors in the case,
6 and it's become a mess, we have a district judge who says
7 look, what in the world is going to happen with this case
8 on appeal. I'm going to try and help the court of appeals
9 out. My point is that I do believe that the district
10 judge in that circumstance would have the discretion to
11 say to the intervenors -- excuse me, the objectors, say to
12 the objectors, look, if you all are going to take an
13 appeal, we are going to have to handle this here and try
14 and create some organization.
15 QUESTION: How does he give jurisdiction over
16 people that are simply on the outside; they are not
17 parties; all they are doing is objecting?
18 MR. GOLDSTEIN: I apologize, Mr. Chief Justice.
19 They are parties. This is a rule 23 class action under
20 Sosna vs. Iowa. At the point of class certification, they
21 have come, they are both bound by the judgment and they
22 have availed themselves of the court by appearing and
23 making an objection.
24 QUESTION: Okay. Let's assume we agree with
25 you. What does the judge then do? Does he say I'm going

1 to let X and Y speak for the rest of you, and I will not
2 hear separate objections from the others?
3 MR. GOLDSTEIN: Well, no. I think the judge
4 clearly is going to hear objections from everyone. The
5 question is is the district judge going to exercise some
6 gatekeeping determination about who goes up on appeal.
7 But Justice Souter, I could not agree more.
8 QUESTION: How -- how can -- I'm lost. How does
9 he exercise gatekeeping on who appeals?
10 MR. GOLDSTEIN: Justice Souter, that is our
11 fundamental point, is that, let me just distinguish again
12 with the Court whose position is what. We don't agree
13 with this suggestion. It wasn't employed here. We think
14 it's entirely unnecessary. I'm trying to achieve --
15 QUESTION: No, but you are suggesting it as an
16 alternative to Justice Breyer's suggestion that maybe to
17 avoid chaos, you ought to have discretionary intervention,
18 permissive intervention, and if you've got to avoid the
19 chaos, then I assume the judge has got to be able in
20 effect to limit what some parties objecting can do in
21 favor of what other parties, letting other parties
22 objecting speak.
23 MR. GOLDSTEIN: Justice Souter, I agree with
24 you. I don't know exactly how this is supposed to work.
25 It has never come up in 35 years since the rule was

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1 amended fundamentally in 1966. So far as we can tell,
2 neither a federal district judge for a state trial court
3 decided that he or she was presented with such an
4 extraordinary case. I don't endorse this proposal --
5 QUESTION: Mr. Goldstein, I was very surprised
6 to hear you say you agree with Justice Souter when he used
7 the word permissive intervention. I mean, even the
8 Government agrees with you that if you must intervene, you
9 would be an intervenor of right, not a mere "permissive,"
10 because you are bound by the judgment.
11 MR. GOLDSTEIN: Justice Ginsburg, I didn't focus
12 on that word in Justice Souter's question.
13 QUESTION: I retract my adjective.
14 MR. GOLDSTEIN: And so that's quite right. Now,
15 let me just put on the table, Your Honors, the fact that
16 we, here at the Supreme Court, the brief suggests oh, this
17 will be so easy. District judges will always allow these
18 sorts of interventions. This Court's opinion in Crown,
19 Cork & Seal makes quite clear that isn't true. This judge
20 said look, here's what's happening. And this is Chief
21 Judge Motz in our case, said, I'm not going to let you
22 intervene but if I'm wrong in rejecting your objections,
23 you have got an appeal. That's how it has worked in
24 several circuits without any difficulty at all, with the
25 court of appeals having been confronted with any need for

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1 the district judges to act as a gatekeeper.

2 And let me pick up, Justice Souter, if I might,

3 on the specific problem that you identified and that is

4 the district judge picking out one appellant versus

5 another. There is the grave difficulty that in one

6 appellant goes up and the others are not permitted to

7 intervene in appeal, what happens when that person

8 dismisses their appeal? This is an entirely untested rule.

9 QUESTION: Under your theory, any objector can

10 appeal, I take it.

11 MR. GOLDSTEIN: Yes, Mr. Chief Justice.

12 QUESTION: And no matter how complicated the

13 case in the district court, they don't have to intervene.

14 You are going to have 15 or 20 appeals.

15 MR. GOLDSTEIN: But it has never happened. The

16 courts -- that there would be that many separate briefs,

17 for example, or separate appeals. Let me tell you how the

18 courts of appeals deal with this problem. They deal with

19 it here like they do in all multiparty litigation. They

20 require consolidation. For example, in the Second

21 Circuit, there can only be one appellant's brief. The

22 people have to get together.

23 In addition, the Rules Advisory Committee has

24 made a very specific point that I would like to draw to

25 the Court's attention with respect to the amended rule

1 23(e) that will come into place in 2003, and the court
2 says that once -- and I apologize: The advisory committee
3 note, Mr. Chief Justice, this isn't reproduced anywhere,
4 because it's a new rule that will come into play next
5 year. But the advisory committee writes, once an objector
6 appeals, control of the proceeding lies in the court of
7 appeals. The court of appeals may undertake review and
8 approval of a settlement with the objector perhaps as part
9 of the appeal settlement procedures or may remand to the
10 district court to take advantage of the district court's
11 familiarity with the action in the settlement. There is a
12 great deal of flexibility built into the process.
13 QUESTION: How, in the Second and Third Circuits
14 has, has the procedure been you can object, everybody lets
15 you object, but you can then appeal without having
16 intervened?
17 MR. GOLDSTEIN: In excess of several decades,
18 Your Honor, and it stretches in the Ninth Circuit back to
19 1979, for example. And so let me point to the Court the
20 language that is quoted against us from another court of
21 appeals is the Guthrie decision from the Eleventh Circuit,
22 1985, in which that court predicted that there would be
23 administrative difficulties, Mr. Chief Justice, with a
24 system that allowed objectors to appeal. But it has been
25 the rule in those other courts that Justice Ginsburg

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1 identified for several decades, and they have not
2 complained a whit about this.
3 QUESTION: Will your rule hold for certiorari
4 petitions as well, so if, let's say, a named class member
5 takes an appeal, but then the class petitions for
6 certiorari, that any non-named class member can petition
7 for certiorari?
8 MR. GOLDSTEIN: No, Justice Kennedy. This
9 court's rule as I understand it is that you had to have
10 been a party in the court of appeal, and so the failure to
11 pursue your individual objection in the court of appeals
12 would require, would mean that you drop out.
13 QUESTION: Well, but your rule is that you are a
14 party.
15 MR. GOLDSTEIN: You are a party to the case, to
16 the district court's judgment. That's correct. But this
17 Court's cert proceedings turn on not whether you are a
18 party in the district court but whether you are a party in
19 the court of appeals, and I can --
20 QUESTION: But under your philosophy you are a
21 party to the court of appeals because you are bound by the
22 judgment.
23 MR. GOLDSTEIN: No, Justice Kennedy. Our point
24 is this. When you appeal as an objector, as opposed to
25 the class representative, you appeal in your individual

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1 capacity to pursue your individual objections. That is
2 our position why the Fourth Circuit had it wrong in saying
3 that we were going to take over the case, usurp the role
4 of the class representative. That's not correct.
5 We come into the court of appeals, Mr. Devlin
6 does, on behalf of himself and when his, he is the only
7 objector appellant that was in the court. It is true that
8 he represents an organization, but his individual
9 objections are the only ones that are in the court of
10 appeals.
11 QUESTION: What you are saying then is not that
12 he ceases to be a party, that the nonobjecting class
13 member ceases to be a party in the court of appeals, but
14 the nonobjecting class member has waived the right to be
15 separately represented by himself, isn't it?
16 MR. GOLDSTEIN: Yes.
17 QUESTION: Yes.
18 QUESTION: And the objection, of course he
19 couldn't petition for cert because all he can do, he can't
20 question anything else in the case except his objections
21 to the settlement. That's all he can pursue.
22 MR. GOLDSTEIN: That's right. That's what rule
23 23 sets up. It gives him a formal and important role in
24 the process. And it's important not to let go of the
25 reason that exists, and that is that the Rules Advisory

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1 Committee notes that, and, understood that these
2 objections are an important part of the process of
3 identifying legal errors as in Amchem; deterring collusive
4 settlements is another important role that they further.
5 Let me identify an additional difficulty and a
6 reason why you should not have an intervention rule, and
7 it applies, I'm trying to advise the court about rules
8 that intersect its decision and rules that are going to
9 come into place in 2003. In 2003, assuming the rules as
10 proposed to be amended are actually implemented, there is
11 going to be a real problem with the Respondent's
12 suggestion and opt-outs. Right now, in a (b)(3) class
13 action, we don't have the right to opt out, which I think
14 is a point in our favor, as Justice Ginsburg noted, but in
15 a (b)(3) class action you can opt out at the point of
16 class certification.
17 Under the amended rule, there is going to be a
18 second opt-out opportunity at the point of settlement.
19 Our concern is that if you tell an objector, your role in
20 the case may be cut off, if the district judge makes a
21 terrible legal error, and the district judge then is a
22 screen and gets to decide whether or not you are going to
23 get to appeal, all that person is going to do is get out
24 of the case and go litigate on their own by opting out.
25 The one thing this Court I would hope doesn't

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1 want is to spread out all the parties. The point really
2 is to keep everybody within the individual judgment. The
3 premise of the Respondent's position, it seems to me, is
4 fundamentally that we want a class action to be settled
5 and over with, just the way a lawsuit of me against
6 another person would be over.
7 With respect, I think that asks too much of rule
8 23. We, this is a case involving hundreds upon hundreds
9 upon hundreds of people, and it's not surprising that it
10 can't just be settled by one person or another.
11 QUESTION: Well, what's wrong with the
12 Government's position, which is you have the right to
13 intervene for purposes of appeal? Indeed you don't even
14 have to file your motion to intervene until after the
15 settlement has been entered as a judgment of the court.
16 Just to make it clear that you are not someone who isn't
17 even a part of this class, isn't even legitimately part of
18 this class, you are not just somebody that walked in off
19 the street. Why isn't that a problem?
20 MR. GOLDSTEIN: Because the judge already knows
21 that. The only people contemplated by the Government's
22 intervention proposal and screening function are those who
23 have already stated objections at the fairness hearing,
24 and we know who those people are. If they weren't members
25 of the class and they weren't proper appellants, we would

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1 argue no.

2 My point about all the different hypotheticals

3 spun in a couple of pages in the government's brief where

4 it discusses the screening function is that it doesn't

5 actually add value and it does create collateral

6 litigation. There will be a motion to intervene; there

7 will be mandatory disclosures; there will be the

8 opposition to the motion to intervene; it will be

9 litigated and then it will appeal.

10 I could see, if the courts of appeals were

11 actually experiencing a problem, that the advisory

12 committee would revisit this issue and would interpose the

13 district judges as a screen, but that hasn't happened.

14 QUESTION: The advisory committee could solve

15 this either way, couldn't they, the Rules Committee?

16 MR. GOLDSTEIN: It actually could. And it

17 hasn't. The amended rule the advisory committee notes,

18 note the circuit split, and suggest --

19 QUESTION: Well, why hasn't it? Why hasn't it

20 decided this?

21 MR. GOLDSTEIN: I think there is one good reason

22 and that is that the advisory committee goes through, in

23 cycles, of course, it revisits particular rules. Rule 23,

24 rule 24. Rule 23 we believe has no role to play, as

25 Justice Souter suggested, in screening appellants. That's

1 the rules of appellate procedure and so it's not
2 surprising in amended rule 23 that they didn't take this
3 on. If I could reserve the balance of my time.
4 QUESTION: Very well, Mr. Goldstein. Mr. Gold,
5 we'll hear from you.
6 ORAL ARGUMENT OF LAURENCE S. GOLD
7 ON BEHALF OF THE RESPONDENTS
8 MR. GOLD: Mr. Chief Justice and may it please
9 the Court: The well settled rule that we begin from and
10 that the Petitioners accept is that only parties to a
11 lawsuit or those that properly become parties may appeal
12 an adverse judgment. The basic point of the Petitioners,
13 the point from which everything else springs, is that the
14 unnamed class members are parties to a class action suit.
15 That premise is wrong. In a rule 23 case, the only
16 litigating persons before the court are the persons who
17 initiate and prosecute the case as parties opposing the
18 class, the persons who are served with process and defend
19 the lawsuit as representative parties, and the persons who
20 move to intervene and are granted intervention. The very
21 point of the class action is to provide for representative
22 party suits where the class is so numerous that joinder of
23 all the unnamed class members is impractical.
24 QUESTION: But couldn't any member of the class
25 say judge, you looked like a representative. I'm not

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1 adequately represented and at the point at which I'm not
2 adequately represented, I have the right to come in and
3 speak for myself. And isn't that exactly what's going on
4 here? A representative of my class is fine, until the
5 representative is together in a deal with the other side,
6 and at that point, when I object to the deal, I'm not
7 adequately represented.
8 MR. GOLD: The -- to the extent that that is
9 your point, and you move to intervene to replace the
10 representative party, that's a motion that has to be dealt
11 with. The, the "fairness hearing" and the process of the
12 district court --
13 QUESTION: Mr. Gold, may I go back to the
14 statement, you said something, you moved to intervene. If
15 you have seen class actions in the Seventh Circuit and the
16 Third Circuit, you can come in and object without
17 intervening.
18 MR. GOLD: But that wasn't --
19 QUESTION: And that, you come in and object and
20 you say I object to the settlement. This representative
21 is not adequate to represent me to the extent of the
22 settlement.
23 MR. GOLD: Well, but you are not saying that the
24 representative is not adequate to represent you for
25 purposes of the settlement. Your objection is that the

1 settlement is not fair, proper and adequate.

2 QUESTION: Well, then let me put it in your

3 terms, and I'm reading from page 30 of your brief. Once a

4 proposed settlement is reached, it is axiomatic that the

5 named representative party who has negotiated the

6 settlement does not adequately represent either the

7 interests or the viewpoint of those class members opposed

8 to the settlement. You say it's axiomatic and I was just

9 saying well, you said yourself it's axiomatic that they,

10 the representative at that point does not adequately

11 represent the class member who is opposed to the

12 settlement.

13 MR. GOLD: In -- in the sense, Your Honor, what

14 we are saying is not that the class representative in fact

15 has not properly and adequately represented the class. It

16 is that the individual can, has a proper argument for

17 intervention on that theory. It isn't that the, the

18 individual in making objections is necessarily challenging

19 the propriety and adequacy of representation.

20 QUESTION: But Mr. Gold, if he is challenging

21 the representative's fee, I think he is, which often is

22 what the minority member of the class objects to, the

23 large fee that the class representatives, the lawyers get.

24 You can't say there is not a conflict there.

25 MR. GOLD: I'm not arguing that there is not a

1 "difference of opinion" or conflict. If --

2 QUESTION: Well, you are certainly not arguing

3 that the lawyer adequately represents the person who is

4 objecting to his fee either, are you?

5 MR. GOLD: No. I am not. No. But I am arguing

6 that the making of objections, whether it is by a class

7 member or the, a nonclass member who is interested and

8 affected by the class action and the class action

9 settlement, as was the case in Marino, by making an

10 objection is not entering the case and litigating in the

11 case. That is, as a party. That is the very point of the

12 court's opinion in Marino vs. Ortiz.

13 QUESTION: That was somebody who was not a

14 member of the class, right?

15 MR. GOLD: That is correct.

16 QUESTION: Here you are talking about members of

17 the class and even in this case, people who are made to be

18 members of the class even if they don't want to be because

19 they can't opt out.

20 MR. GOLD: Well, they are the members of the

21 class but they are not parties to the lawsuit. That is

22 the whole --

23 QUESTION: They don't want to be. All they want

24 to do is to say, as Justice Stevens suggests, you made the

25 settlement deal and the lawyers are getting the lion's

1 share of it and I want to object to that, why can't they
2 say that?
3 MR. GOLD: There is no argument here that you
4 made a deal and the lawyers are getting the lion's share.
5 Here the lawyers were paid on --
6 QUESTION: But we're are not dealing with the
7 merits of it. We are dealing with first you have a right
8 to come in and object, and you have agreed that you do
9 have a right to come in and object. Now, the question is,
10 what more? And what I took to be the principal difference
11 between your position and the Government's is the
12 Government is very clear that there is a right to
13 intervene. The objector would have a right to intervene
14 for the limited purpose of pursuing the appeal.
15 You seem to hedge on it. First you say it's
16 axiomatic that there is a, no longer an identity of
17 interest, but then I can't tell, and maybe you can tell
18 me. The Government says of course they have a right to
19 intervene, but we want them to be orderly so they make a
20 motion, which must be granted. What is your view?
21 MR. GOLD: I don't understand the Government to
22 argue that the motion must be granted, and I'll --
23 QUESTION: Do you understand the Government to
24 say it is intervention of right, not permissive
25 intervention?

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1 MR. GOLD: It's intervention of, of right, but
2 not automatic. Intervention of right is not a, a motion
3 that has to be granted without a showing. Intervention of
4 right is intervention of, to file, to participate in the
5 litigation by doing something. And it's our view that
6 since we are talking about a status to take an appeal in a
7 representative action, it's a motion to press a case into
8 court, into the court of appeals and to litigate the case
9 in the court of appeals as, for the class and
10 unnecessarily on behalf of the class.
11 The point of appeal --
12 QUESTION: I'm sorry. I'm sorry, Mr. Gold, I
13 really don't understand what you are trying to convey
14 because there are two kinds of intervention, intervention
15 of right and permissive intervention. Intervention of
16 right if you meet the terms, and in this case it would be
17 when you claim an interest, which is the subject matter of
18 the action, and you're so situated that the disposition of
19 the action may as a practical matter impaired your ability
20 to protect your own interests. So I give you one example
21 is, well, this case. I will lose -- my pension is going
22 to be, the COLA is going to be dead and gone, so I want to
23 protect that interest, which the settlement takes away.
24 Isn't that, wouldn't that be, whether I have a
25 good case on the merits is another question, but wouldn't

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1 I have a right to intervene?

2 MR. GOLD: You would, you have a right to

3 intervene, but your -- what you are doing if you seek to

4 intervene to take an appeal is to proceed on behalf of the

5 class and to invalidate and have vacated the, the

6 settlement agreement which is not an agreement which

7 either cuts your COLA, the trust, having acted --

8 QUESTION: The, the Government as I understand

9 it says yes you have a right to intervene and you have a

10 right to appeal to the limited extent that you are

11 contesting the settlement. That's the Government's

12 position. And you are saying that's a wrong position. Is

13 that --

14 MR. GOLD: No. I am not saying that that is a

15 wrong position. I am saying that it is our view first of

16 all that it is a right position. And secondly, we would

17 suggest that the, the standard for showing intervention is

18 not simply that you are a class member, and that you have

19 objections to the settlement, but also, a showing that you

20 have colorable objections and that in, in pressing those

21 objections, you are going to do so for and on behalf of

22 the interests of the class. Now, that's our view of the

23 proper standard for the proper showing on behalf of the

24 intervention. We think that that standard is exactly the

25 correct standard for maintaining the integrity of the

1 class action.

2 QUESTION: Mr. Gold, that's not the standard

3 that applies to the right of a class member to participate

4 in the district court proceeding, is it?

5 MR. GOLD: It isn't -- it is; it would be the

6 standard for a class member to intervene as --

7 QUESTION: To intervene. I'm just asking to

8 participate in the district court objecting to the

9 settlement. Don't he have an absolute right to do that?

10 MR. GOLD: He has an absolute right to

11 participate in the, in the fairness hearing. But that is

12 not a litigating right. He is, objectors advise the court

13 on their views of why the settlement is --

14 QUESTION: But he has that right, whether or not

15 the district court may view his objections as colorable or

16 frivolous.

17 MR. GOLD: That is true, Your Honor. But the

18 making of objections is not coming into the action to

19 litigate, but as if your objection is a motion, which the

20 court passes on or not. The court is considering a

21 question posed by the litigating parties, whether the

22 settlement agreement is fair and proper in order to be

23 approved. Objectors have the right to state their views

24 for the court's consideration. The courts also --

25 QUESTION: And to have the court rule on the

1 objection.

2 MR. GOLD: No. Not to have the court rule on

3 the objection.

4 QUESTION: Oh, you don't think that, they can

5 file an objection, the court doesn't have to rule on?

6 MR. GOLD: No. The court rules overall, having

7 considered --

8 QUESTION: Even approving the settlement in the

9 face of an objection is the ruling that the objection is

10 without merit. It seems to me. I don't know. Maybe you

11 know something --

12 MR. GOLD: No. The objections can be of all

13 shapes and sizes, Justice Stevens. They can be that the

14 settlement doesn't provide enough for the X or Y class and

15 the judge doesn't say that that's precisely what the X or

16 Y class ought to get, and I reject that as an objection.

17 The judge's role is, is the settlement fair,

18 proper and adequate? And the point is, our basic point is

19 if a class member wishes to go further and take the case

20 to another stage where he is litigating on behalf of the

21 class, he ought to be an intervenor and a party, not

22 simply someone who is not a party. We think that that's

23 proper, whatever the right standard on intervention is,

24 and we believe that the standard I have articulated makes

25 sense in the class action.

1 QUESTION: You disagree with anything the
2 government said in its brief about the objector has a
3 right to intervene, he can do so even after judgment
4 within the time allowed?
5 MR. GOLD: We think definitely that an objector
6 or even a class member who hasn't participated in the
7 objection process can intervene to take an appeal and to
8 forward the objections made in the objection process by
9 anyone, but we think that --
10 QUESTION: Then you are disagreeing with the
11 Seventh Circuit. Seventh Circuit, as I understand it,
12 says you have a right to intervene, but you must exercise
13 it when you know about the settlement, and it's too late
14 after judgment. So you are disagreeing with that?
15 MR. GOLD: Well, the Government -- neither, I
16 don't believe the Seventh Circuit has passed on the, the
17 propriety of intervention after judgment. Our only point
18 is --
19 QUESTION: It has. It has. It --
20 MR. GOLD: -- that only parties can -- no, they
21 said that you can intervene after.
22 QUESTION: No. The Seventh Circuit has said; it
23 has dismissed. It said you have a right to be here, but
24 you should have intervened when you knew that you were
25 objecting to the settlement. It's too late to do so after

1 the judgment.

2 MR. GOLD: Well, the Government doesn't take

3 that position. We don't take that position.

4 QUESTION: Thank you, Mr. Gold. Ms. Millett,

5 we'll hear from you.

6 MS. MILLETT: Mr. Chief Justice, and may it

7 please the Court. We agree with Petitioners that

8 objectors who have expressed objections to settlement

9 agreements have important interests and often should be

10 allowed to appeal. Our disagreement is on the mechanism

11 by which someone gets to the court of appeals.

12 QUESTION: Is that a purely formal disagreement,

13 or are there some distinct practical advantages that you

14 can tell us to your rule so that the district judge, I

15 assume, can give some shape and direction to the appeal?

16 Is that the point?

17 MS. MILLETT: There is a practical significance

18 to this process. I think it's important to keep in mind

19 that class actions can come in many forms and shapes and

20 can involve up to, as this Court knows from the asbestos

21 cases, tens of thousands of people, any one of whom can

22 express an objection. And it is actually incorrect and we

23 disagree with the argument that you will know at the

24 objection stage whether in fact that person even really is

25 a member of the class action, who has a live claim that is

1 covered by the class. So what the intervention motion
2 process allows is, we don't think a merits determination
3 on the value of the objection, but we think it allows a
4 district court in the first instance to make a record and
5 address whether someone is a member of the class.
6 I mean, you could have a class action that's not
7 as discrete as this one here, but the definition of the
8 class is everyone employed by X corporation for a period
9 of 10 years.
10 QUESTION: Beyond the determination that they
11 are members of the class, are there any further purposes
12 served by the intervention rule you propose?
13 MS. MILLETT: Whether or not there is stale
14 claim. But it, you could have objections that really
15 simply don't have any relevance to the issue that will be
16 presented on appeal. For example, in this case, I think
17 as Mr. Gold said, objections come in many shapes and
18 sizes. And if I could refer the Court to Joint Appendix
19 page 125, we have an objection that says please consider
20 this letter my objection. That's it. It gives no
21 elucidation to anyone on the basis for appeal. Now, how
22 the court can deal with this, this deprives the district
23 court of any opportunity to address this concern as a part
24 of the settlement.
25 QUESTION: You think under Petitioner's view

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1 that person would be able to appeal?

2 MS. MILLETT: That's my understanding of

3 Petitioner's view, without having given the district court

4 any opportunity, or the attorneys who are representing

5 that person at that point, to address this concern is part

6 of the fairness hearing.

7 QUESTION: Well, what is the practical

8 difference? I mean, you take the position that

9 intervention is of right, is that correct?

10 MS. MILLETT: Yes.

11 QUESTION: All right. Then the practical

12 difference is that if they move to intervene, they simply

13 have to come physically before the court, so the court can

14 flush out the objection, as opposed to merely filing an

15 objection saying I object in which case the court may not

16 see them? Is that the difference?

17 MS. MILLETT: They don't have to be there

18 physically, in person, but there is motions practice in

19 district courts, and a district court would decide whether

20 or not they want someone there in person or not. But

21 intervention rights --

22 QUESTION: Well, why cannot the same thing be

23 accomplished by saying flush out your objection?

24 MS. MILLETT: There is two answers to that.

25 First of all, intervention of right doesn't mean the

1 district court doesn't have some final say. But when we
2 need to understand, objections are coming before a
3 settlement has been approved, and it may well be even if
4 this objection is very vague, I have got enough other
5 objections that in fact would capture what that person is
6 concerned about without them having told me. And if they
7 object -- the objection process, the fairness hearing is
8 very flexible and informal at this point and allows the
9 district court to gather information and make a decision
10 whether to approve the settlement agreement.
11 It would be very unworkable, and I think unwise
12 to adopt a rule that turns the fairness hearing, which is
13 supposed to focus on the settlement agreement and dealing
14 with serious objections, I think that's what courts want
15 to do, into a fairness hearing/qualifications for appeal,
16 where I have got to spend all my time not just deciding
17 whether I should approve this settlement agreement or not,
18 so that you would even be aggrieved, but in advance I have
19 to decide whether you are part of the class and someone
20 who could --
21 QUESTION: Ms. Millett, I would be very
22 impressed with the argument you are making now about
23 having the thing run neat and tidy, but for two things.
24 Are you aware of any experience in the Second or Third
25 Circuit that creates these, this pandemonium that you are

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1 now describing? And second, when did the Government find
2 out about the pandemonium? Because in Felzen, as I recall,
3 you took the position that the objector can come in,
4 object to the settlement, and can appeal for the limited
5 purpose of challenging the settlement without intervening.
6 What happened between Felzen and this case, and are you
7 basing your prediction of pandemonium on any experience in
8 the Second and Third Circuit that allowed objectors to
9 appeal for years?
10 MS. MILLETT: Concrete evidence of pandemonium,
11 no, there is no concrete evidence that intervention is a
12 difficult barrier in the five circuits that have required
13 -- in fact, the seven circuits that require this
14 intervention motion. So our position is based on analysis
15 of the rules. We have an established mechanism in the
16 rules for dealing with deciding who will be a litigating
17 party, not one of the 10,000 on the sideline, but a
18 litigating party in a case.
19 Now at the time of Felzen, we didn't have as
20 much experience with the limited intervention option for
21 purposes of appeal. And it seems that now when we focus
22 on the --
23 QUESTION: When was Felzen? How long ago was it?
24 MS. MILLETT: It was -- I'm sorry. I don't
25 know. About seven years. But in the intervening time,

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1 there have been some decisions from the Seventh Circuit
2 that have propounded this notion, in particular, Seventh
3 Circuit, that have propounded, and the Eighth Circuit,
4 too, that have propounded this notion of limited
5 intervention for purposes of appeal. And I have to say we
6 have also just reviewed and reconsidered our position, and
7 looking at the text of the rules, we have an answer to
8 this problem.
9 QUESTION: Felzen was three years ago. I was --
10 MS. MILLETT: I'm sorry. But the point is that
11 we have an answer, our position is that there is an answer
12 in the rules to this problem and it's limited intervention
13 for purposes of appeal. And the alternative is to make up
14 an ad hoc rule cut out of out of whole cloth. That seems
15 to collect a variety of factors that happen to have been
16 present in this case --
17 QUESTION: May I ask you, because your time is
18 so limited, could you tell us what is the difference
19 between your view of this case and Mr. Gold's view of this
20 case?
21 MS. MILLETT: I think, well, putting aside, we
22 think there is more, we don't think that the objectors are
23 parties but we are somewhat more sympathetic to the notion
24 that they have the same interests as quasi parties, I
25 think, than Mr. Gold is. Secondly, and I don't want to

1 put words in his mouth, but my understanding of their
2 brief and argument here is that they would have some more
3 rigid scrutiny of the intervention as a right motion, and
4 in fact would require the person to demonstrate that they
5 can represent the interests of the class.
6 QUESTION: May I ask you under your view of the
7 requirement of an intervention for purposes of appeal,
8 could the district judge in this case, in response to the
9 intervention motion that was actually filed, have granted
10 that relief?
11 MS. MILLETT: The intervention for purposes of
12 appeal?
13 QUESTION: Yes.
14 MS. MILLETT: Could it have, I guess the
15 district court would have had the power contingently to
16 reserve judgment. Because, remember that motion was made
17 before the settlement was even distributed and notice was
18 given, so it would have been odd to grant intervention for
19 a settlement judgment that had not yet been entered and
20 the judge hadn't heard objections or had a fairness
21 hearing. I mean district court can only say I'll reserve
22 judgment and I will renew or revisit this question for
23 limited purposes of appeal after I have judgment, if you
24 are still interested, if your concerns are not addressed.
25 In this case, the intervention was, again,

1 before the settlement was even distributed to members of
2 the class, and it was joined with a motion that asked to
3 strike class counsel for preliminary injunction. And so I
4 think, and it hasn't been contested that the district
5 court was well within its discretion to deny.
6 QUESTION: But you could deny it in court. You
7 could say to the extent that they wanted to intervene to
8 contest the settlement, fine, to the extent that they want
9 to take discovery, it's not fine. But to say that because
10 they asked for too much they are not entitled to anything,
11 is, I would think the Government would say the judge was
12 right to say they can't engage in discovery. The judge
13 was right to say they are not entitled to an injunction.
14 But to say that they can't intervene --
15 MS. MILLETT: The district court never said that
16 they can't intervene for purposes of appeal because they
17 were never --
18 QUESTION: It denied the motion to intervene,
19 which had many parts.
20 MS. MILLETT: Well, it just said to intervene.
21 The motion itself just says to intervene and then was
22 accompanied with this, other motions asking --
23 QUESTION: So, should not the proper ruling have
24 been yes, you can intervene, but only for this limited
25 purpose, instead of saying motion denied?

1 MS. MILLETT: Well, I think if this Court would
2 adopt the rule and recognize that limited intervention for
3 purposes of appeal is appropriate in this context,
4 district courts will know that that's an option and be
5 able to address it or raise it with attorneys. But the
6 important thing here is I think --
7 QUESTION: This district judge certainly thought
8 that his wording on the objection, he twice said if you
9 don't agree, appeal it. And the "it" was his appeal of
10 the settlement.
11 MS. MILLETT: He said that. He also twice told
12 him that he wasn't a party to the case, as well. I think
13 -- the point is, you may have thought he would ask, but
14 our interest in this case is less the particular, we gave
15 the court our best judgment of how the record --
16 QUESTION: Do you disagree with the Seventh
17 Circuit, which would require the motion to intervene to be
18 made prejudgment?
19 MS. MILLETT: If that's how one reads -- I
20 assume you are talking about the Navigant opinion?
21 QUESTION: Yes.
22 MS. MILLETT: I think there is a prior opinion
23 and I'm sorry, the name, escapes me from, which Judge
24 Easterbrook also wrote, which we think adopted our
25 position.

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1 QUESTION: Thank you, Ms. Millett.
2 MS. MILLETT: Thank you.
3 QUESTION: Mr. Goldstein, you have five minutes
4 remaining.
5 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN
6 ON BEHALF OF THE PETITIONER
7 MR. GOLDSTEIN: Thank you, Mr. Chief Justice.
8 If I could make four points, please, about the
9 Government's proposal starting with its applications to
10 this case, because Justice Stevens and Justice Ginsburg
11 wanted to know whether we do here, assuming what happened
12 in the district court, assuming we were going to adopt the
13 Government's position, the Government does not press, so
14 far as I understand, any further whether or not it's
15 presented in this court. We have the cert petition
16 identifying the motion to intervene, the discussion of the
17 Seventh Circuit's position. The question is what we did
18 in the district court.
19 The argument, as I understand it, the textual
20 basis for the Government's rule is that under subsection
21 (d)(2) of rule 23 you move to intervene, and the language
22 of the rule is that the district court can condition your
23 right to intervene.
24 And Justice Ginsburg, if you would adopt the
25 Government's suggestion, I think that's what you would

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1 have to say was the appropriate result in this case, that
2 the district judge should have seen our intervention
3 motion and because he clearly did believe we had the right
4 to take an appeal, he should have conditioned it.
5 So my principal point is that whatever the Court
6 does in terms of its rule, we prevail.
7 QUESTION: Is that still before us, I mean, the
8 denial of the intervention motion?
9 QUESTION: I don't think that was properly
10 raised.
11 MR. GOLDSTEIN: Mr. Chief Justice, let me
12 explain why I disagree. There are, the cert petition, and
13 I need to distinguish between intervention for all
14 purposes and intervention for purposes of taking an
15 appeal. In the cert petition, the question presented
16 flags the fact that we move to intervene and discusses at
17 some length the Seventh Circuit's role which we are
18 discussing here both in the petition and in the required
19 brief, and to that extent it clearly --
20 QUESTION: But that's not, I don't think a fair
21 interpretation of the question that you have presented.
22 The question is whether you have standing to appeal.
23 MR. GOLDSTEIN: Justice Kennedy, the reason we
24 used that formulation is because it's the formulation that
25 the Fourth Circuit used. It's just picked up from the

1 court of --

2 QUESTION: Well, we'll decide that another time.

3 MR. GOLDSTEIN: I understand. The only other

4 point, I would make, Mr. Chief Justice, about what's

5 fairly included in the question presented is I ask the

6 court to look at the question as the Government frames it,

7 which it only could do if it believed our position was --

8 QUESTION: Well, we take it the question you

9 presented and your petition for certiorari, that's what we

10 granted.

11 MR. GOLDSTEIN: Yes, Mr. Chief Justice. Now,

12 the second is, I'd like to address, Justice Ginsburg, with

13 respect, I don't think that you got a comforting answer on

14 the question of whether or not this has been a problem in

15 the Second or Third circuits, i.e., is there a problem out

16 there that requires the rules to be construed --

17 QUESTION: Why is it, has there been a problem

18 the other way? The seventh circuits that have gone the

19 other way?

20 MR. GOLDSTEIN: But they don't, Justice Breyer.

21 Our point is that no circuit applies the Government's

22 rule. It's a little unfair to say that I can't identify a

23 problem with their rule, since no court has ever adopted

24 or even suggested it.

25 Now, it is a problem to the extent that there

1 are circuits that require full party intervention. That
2 you have to come in, you have to be a litigant in order to
3 take an appeal. The problem is not an administrative one
4 so much as that it cuts off appeals, appeals that are
5 perfectly legitimate. The rule as we understand it under
6 this Court's precedents is not that only named parties can
7 take an appeal. That's why someone who sanctions can
8 appeal and that's why it's uncontested that the denial of
9 our motion to intervene gives us a right to appeal. It is
10 persons who are directly affected by the judgment,
11 directly bound by something that the district court did,
12 and then what they can do is they can appeal to the extent
13 that the arguments that they properly presented to the
14 district court.
15 Now, someday, will there be unusual class
16 actions that require a further screen? Perhaps. Our point
17 is that in an appropriate case a district court could
18 employ the Government's suggestion, but why we would want
19 to add the burden of this intervention requirement in
20 every single class action in order to avoid the
21 hypothetical possibility, that again has never been
22 suggested by any court, State or Federal, so far as we or
23 the Government have been able to identify.
24 The other point I would like to make, just to,
25 although again we believe we prevail under the

1 Government's suggestion, is to take you back to the text
2 that's supposed to require this intervention, and I think
3 a fair reading of the text is otherwise. There are two
4 different provisions for notice that we are talking about.
5 The one is the D provision that I quoted midway through
6 the argument, and the other is E, which is the settlement
7 notice. The point to recognize is that under (d)(2),
8 which talks about intervening to present claims or
9 defenses, there is no intervention requirement when it
10 comes to presenting objections.
11 And we are not intervening to present any claims
12 or defenses. There is just no textual hook here. To the
13 extent the Court did want to look at subsection D, with
14 respect, we think it's the end of that clause that says
15 intervene to present claims or defenses or otherwise to
16 come into the case. There is nothing in the text of the
17 rule, there is nothing in the advisory committee notes
18 that indicates that anyone contemplated the intervention
19 to appeal.
20 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
21 Goldstein. The case is submitted.
22 (Whereupon, at 12:08 p.m., the case in the
23 above-entitled matter was submitted.)
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