No. 02-271

IN THE

Supreme Court of the United States

DOW CHEMICAL COMPANY, MONSANTO 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 *AMICUS CURIAE* OF TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF RESPONDENTS

Brent M. Rosenthal
Counsel of Record
Misty A. Farris
Baron & Budd, P.C.
3102 Oak Lawn Ave.
Dallas, TX 75214
(214) 521-3605

Leslie Brueckner
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Ave., N.W.
Suite 800
Washington, D.C. 20036-2001
(202) 797-8600

Attorneys for Amicus Curiae

QUESTION PRESENTED

Amicus curiae Trial Lawyers for Public Justice addresses the following issue:

Whether the failure of the proponents of the Agent Orange class action to issue adequate notice to class members who had only unmanifested, "future" injuries provides an alternative basis for refusing to preclude absent class members with such injuries from pursuing claims for such injuries after they developed.

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INTEREST OF THE *AMICUS CURIAE*

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses.[1] Litigating in the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

As part of its efforts to ensure the proper working of the civil justice system, TLPJ has established a Class Action Abuse Prevention Project dedicated to monitoring, exposing, and preventing abuses of the class action device nationwide. Through this work, TLPJ has become especially concerned about efforts by corporate defendants to use the class action device as a tool for capping their liability in mass tort cases and depriving injured victims of their rights. One means to this end is to expand the scope of a class action to include not just those individuals who have known injuries from contact with the defendant's product, but all individuals who have been exposed to the product, whether or not they have yet manifested any injury or disease.

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

In this case, petitioners seek dismissal of respondents' personal injury claims based on the res judicata effect of a class action settlement reached some nineteen years ago, even though respondents had no known injury at the time of the settlement, were given no effective notice that their unknown, future claims might be decided in the class action, and received no monetary compensation from the settlement. In *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997) – a case in which TLPJ participated as *amicus curiae* – this Court recognized "the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given" to persons without "current afflictions." *Id.* In holding that the class action settlement at issue in this case did not preclude respondents' claim for damages, the Second Circuit cited the Court's observation in *Amchem* but declined to rule "definitively" on the issue, finding that respondents had been inadequately represented in the class action. *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 261 n.8 (2d Cir. 2001). TLPJ files this *amicus curiae* brief to assert, as an alternative basis for affirmance, that the respondents received inadequate notice of the class action, and therefore cannot constitutionally be barred from asserting their common law claims at this time.

STATEMENT OF THE CASE

In 1984, Judge Jack Weinstein of the United States District Court for the Eastern District of New York approved a settlement of a class action brought by military servicemen who alleged that they had sustained injuries as a result of their exposure to the defoliant Agent Orange while in Vietnam. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984). The certification order and the notice to the class defined the class to include "those persons who were in

the United States, New Zealand, or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides . . .." *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 729 (E.D.N.Y. 1984). After the opt-out period expired, and after the class plaintiffs and defendants reached a settlement, the parties agreed that "[t]he Class specifically includes persons who have not yet manifested injury." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. at 865 (quoting settlement agreement). On direct appeal, the Second Circuit affirmed the district court's certification of the class and approval of the settlement. The Second Circuit did not address whether the class notice was adequate to notify persons who had no manifest injury of the pendency of the case, but approved the notice generally, finding that "[a]nyone who believed that he or she had suffered injury as a result of exposure to Agent Orange in Vietnam was on notice of the pendency of a lawsuit and was thus alerted to seek advice from counsel." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

Several years later, two groups of veterans who developed physical injuries after approval of the settlement brought suit against the defendants who had settled the Agent Orange class action. The district court held that the res judicata effect of the class action settlement barred the claims for damages. *Ryan v. Dow Chem. Co. (In re "Agent Orange" Prod. Liab. Litig.)*, 781 F. Supp. 902 (E.D.N.Y. 1991). The Second Circuit affirmed, holding that the veterans were included in the class definition even though they were unaware of any injury at the time of certification. *Ivy v. Diamond Shamrock Chems. Co. (In re "Agent Orange" Prod. Liab. Litig.*), 996 F.2d 1425, 1433-34 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994). The court did not discuss specifically

whether the language of the class notice was sufficient to apprise persons without manifest injury of their membership in the class. The court agreed with the veterans that generally, "providing notice and opt-out rights to persons who are unaware of an injury would probably do little good," 996 F.2d at 1435, but held that the failure of the class proponents to do so did not amount to a due process violation. *Id.*

Four years after the Second Circuit's decision in *Ivy*, this Court considered the propriety of a class action settlement that, like the Agent Orange settlement, purported to resolve "future claims," i.e., claims of persons who had no known physical injury at the time of the settlement. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997). The Court found the settlement improper because the settling parties had not satisfied the prerequisites for class certification. 521 U.S. at 613-28. Although the Court declined to rule "definitively" on the adequacy of notice to future claimants, it noted "the gravity of the question whether class-action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Id.* at 628.

In 1996 and 1998, respectively, respondents Daniel Stephenson and Joe Isaacson developed cancers that their experts have linked to Agent Orange. Because their injuries did not appear until after December 31, 1994, they did not qualify for payment under the class action settlement. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1417 (E.D.N.Y. 1985), *aff'd in part and rev'd in part on other grounds*, 818 F.2d 179 (2d Cir. 1987). Neither Stephenson nor Isaacson received individual notice or otherwise learned of the existence of the Agent Orange class action until after the diagnosis of their cancers.

Stephenson filed suit to recover for his injuries in federal court in Louisiana. He named as defendants the distributors of Agent Orange that settled the Agent Orange class action and are petitioners here. Isaacson filed a similar suit in state court in New Jersey. Petitioners removed Isaacson's case to federal court, and both cases were transferred to the Eastern District of New York, where Judge Weinstein could determine the preclusive effect of the Agent Orange class action settlement on the plaintiffs' claims. Stephenson and Isaacson argued that the class action did not bar their claims because they, and all other class members who developed Agent Orange-related injuries after 1994, received inadequate representation in the class action. They also argued that they could not be bound by the judgment in the class action because the notice of the class action and the opportunity to opt out given to persons without manifest injuries was constitutionally inadequate. Judge Weinstein held that the class action settlement resolved the claims of Stephenson and Isaacson, and ordered the cases dismissed based on res judicata.

The Second Circuit vacated the order of dismissal, holding that "the prior *Agent Orange* settlement does not preclude these plaintiffs from asserting their claims alleging injury due to Agent Orange exposure" because "these plaintiffs were inadequately represented in the prior litigation." *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 261 (2d Cir. 2001). The court observed that "plaintiffs likely received inadequate notice," noting that this Court suggested in *Amchem* that "effective notice could likely not ever be given to exposure-only class members." *Id.* at 261 n.8. The court concluded, however, that it "need not definitively decide whether notice was inadequate" because of its finding that Stephenson and Isaacson were inadequately represented in the class action. *Id.* This Court granted certiorari.

SUMMARY OF ARGUMENT

The inadequacy of the notice of the Agent Orange class action to persons such as Stephenson and Isaacson provides an alternative basis for denying preclusive effect of the class action judgment and affirming the Second Circuit's decision. For a class action judgment to bar the assertion by absent class members of individual claims supposedly encompassed by the judgment, the class action must have provided those class members with due process, including adequate notice and a meaningful opportunity to opt out. And a court considering the res judicata effect of a class action judgment must independently assess the adequacy of the notice provided in the class action. Neither the district court that approved the Agent Orange class action settlement nor the Second Circuit that affirmed the approval considered the defects in the notice urged by Stephenson and Isaacson in this case. It is appropriate for this Court to consider whether Stephenson and Isaacson were provided adequate notice of the Agent Orange class action in determining whether the judgment in that action bars their claims.

It is clear that the notice of the Agent Orange class action did not satisfy due process requirements with respect to persons without any known or knowable physical injury. First, this Court's opinion in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), strongly suggests that, as a general matter, effective and constitutionally adequate notice of mass tort class actions cannot be given to persons who have been exposed to a toxic substance but are unaware of any injury. Both this Court and numerous state courts have held that it is unfair to require plaintiffs without any known harm to take affirmative steps to preserve their ability to bring a tort claim in the future should such injuries develop. In this case, Stephenson and

Isaacson were healthy and unaware that they had any reason for making a claim against the makers of Agent Orange at the time of their constructive receipt of the class notice. It would be intolerably unfair, and constitutionally impermissible, to hold that their failure to opt out to preserve their then-nonexistent claims effectively waived their ability to assert the claims when applicable state law permitted them to do so.

Moreover, the particular language used in the class notice was patently inadequate to alert Vietnam veterans who were unaware of any injury caused by exposure to Agent Orange that their unaccrued, future claims were at issue in the class action. The class notice was directed not to persons who were *exposed* to Agent Orange, but to persons "*who were injured* while in or near Vietnam by exposure to Agent Orange." Neither a layperson nor an expert in the field of toxic torts familiar with the decision of this Court in *Metro-North Commuter R. v. Buckley*, 521 U.S. 424, 432 (1997), would reasonably equate "exposure" with "injury." The fact that the parties to the class action found it necessary – *after the expiration of the opt-out period and settlement of the case* – to make explicit in the settlement agreement that "[t]he Class specifically includes persons who have not yet manifested injury" only highlights the inadequacy of the original class notice. Because the class notice did not sufficiently advise Stephenson and Isaacson of their membership in the class, the judgment in the class action cannot constitutionally preclude them from asserting their claims now.

Contrary to the assertion of petitioners and their *amici*, a decision affirming the Second Circuit's ruling will not impair the appropriate use of class actions to resolve the claims of persons with viable, existing causes of action. It will, instead, deter the abuse of class actions to bind future victims of a mass

tort to a global resolution of all claims without their effective knowledge and consent.

ARGUMENT

THE AGENT ORANGE CLASS ACTION SETTLEMENT CANNOT PRECLUDE THE RESPONDENTS' PERSONAL INJURY CLAIMS BECAUSE RESPONDENTS DID NOT RECEIVE CONSTITUTIONALLY ADEQUATE NOTICE OF THE CLASS ACTION.

I. To Determine The Preclusive Effect Of The Agent Orange Class Action Judgment On Respondents' Claims, The Court Must Independently Assess The Adequacy Of The Class Notice.

A. Class Action Judgment Can Bar Subsequent Litigation Of Class Claims Only If The Class Action Satisfied Constitutional Requirements, Including Notice To Absent Class Members.

Petitioners are correct that a class action judgment, like any other judgment, can be asserted as "res judicata" and preclude subsequent assertion of the same claims by the same parties. *See* Pet. Br. 21. But the preclusive effect of a class action judgment, like that of any other judgment, is limited by the Due Process Clause. *See, e.g., Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940) (prior class action judgment does not preclude subsequent suit by class member when effect of preclusion would be to deprive class member of due process); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) (denial of class members' due process rights would destroy preclusive

effect of class action judgment); *see also Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226 (11th Cir. 1998) (for class action judgment to bar claim of absent class member, "it must be demonstrated that invocation of the bar is consistent with due process, and an absent class member may collaterally attack the prior judgment on the ground that to apply claim preclusion would deny him due process.") (citations omitted). Thus, Stephenson and Isaacson may only be barred by the class action judgment from pursuing their state law tort claims against petitioners if they were afforded due process in the proceeding that generated the judgment.

In *Shutts*, the Court described the "minimal procedural due process protection" required by the Fourteenth Amendment for a state court "to bind an absent plaintiff concerning a claim for money damages or similar relief." 472 U.S. at 811-12.[2] The Court specified that the absent class member "must receive notice plus an opportunity to be heard and participate in the litigation." *Id*. at 812. The notice must be meaningful: it should "describe the action and the plaintiffs' rights in it," *id*., and must be "reasonably calculated, under all the circumstances, to apprise interest parties of the pendency of the action and afford them an opportunity to present their objections." *Id*. (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)). The Court added that "due process requires at a minimum that an absent plaintiff be

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[2] The Fifth Amendment imposes these same due process requirements on the federal courts. *Dusenbery v. United States*, 122 S. Ct. 694, 699 (2002) (right of persons whose property interests are at stake to notice and opportunity to be heard is guaranteed by both Fifth and Fourteenth Amendments); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974) (federal class action is subject to due process requirement of proper notice).

provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id.* Thus, unless Stephenson and Isaacson were provided adequate notice and a meaningful opportunity to opt out of the Agent Orange class action, the judgment entered in that case cannot preclude their actions for damages.

B. Petitioners Cannot Rely On The Prior Judgment Itself To Establish That Absent Class Members With No Manifest Injuries Were Provided Adequate Notice Of The Class Action.

Petitioners argue that this Court need not determine the adequacy of notice of the Agent Orange class action to find the judgment entered in that action binding on Stephenson and Isaacson because the ruling by the Agent Orange class action court that the notice was adequate is itself entitled to preclusive effect. Pet. Br. 35 n.10. But petitioners cite no authority of any kind for the proposition that a finding in a class action that class members have been adequately notified is immune from collateral attack. The proposition conflicts with the observation of the drafters of amended Rule 23 that the rule "does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can only be tested in a subsequent action." Advisory committee note to FED. R. CIV. P. 23(c)(3). It is also inconsistent with the holding in *Shutts* that a class action judgment entered without personal jurisdiction over an absent party (of which notice is an essential component) "has no res judicata effect as to that party." 472 U.S. at 805. Moreover, the notion that a finding of adequate notice cannot be attacked in a subsequent action defies common sense; it would mean that a court could declare generally that notice was adequate in the

absence of the party that should have received it, and then preclude a subsequent challenge to notice by that party as an impermissible collateral attack. As one court has observed, if a certifying court's determination that notice was adequate were to be given preclusive effect, "it would essentially mean that absent class members could never collaterally challenge a class-action judgment as violating their rights to due process, for in entering such a judgment or in previously certifying the class, a court will almost always have determined, as a prerequisite to such, that the members have been provided the appropriate notice, representation, and opt-out rights." *Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499, 1503 n.39 (N.D. Ala. 1991), *aff'd*, 974 F.2d 1279 (11th Cir. 1992), *cert. denied*, 509 U.S. 906 (1993).

The proposition that a class action judgment entered without adequate notice nevertheless carries preclusive effect is further undermined by decisions from several federal circuits sustaining collateral attacks on class action judgments based on the inadequacy of the prior class notice. *See, e.g.*, *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1228 (11th Cir. 1998) ("deficiencies in the notices preclude our allowing the judgment in the prior action to bar Twigg's claims because invocation of the bar would not be consistent with due process"); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (because absent class member was not provided with notice and opt-out rights in prior class action, "*res judicata* will not bar Brown's claims for monetary damages against Ticor" in subsequent suit), *cert. dismissed*, 511 U.S. 117 (1994); *Besinga v. United States*, 923 F.2d 133, 137 (9th Cir. 1991) ("Where the basis for applying res judicata is *FAVDA*'s purported class action status under Rule 23, and where it is clear that the trial court and the parties failed to comply with Rule 23(c)(2)'s mandate that notice be provided to absent class members, it would defy logic

and law to hold that such putative class members are bound by res judicata."); *Wright v. Collins*, 766 F.2d 841, 847-48 (4th Cir. 1985) (class member not precluded from pursuing damages claims encompassed by earlier class action judgment because class notice did not notify class member that subsequent damage claims would be precluded); *Bogard v. Cook*, 586 F.2d 399, 408 (5th Cir. 1978) (prior class action concerning prison conditions did not bar class member from pursuing subsequent suit for damages arising out of the same conditions because class action notice was "insufficient to alert prisoners to the possibility that they could seek individual money damages for personal wrongs"), *cert. denied*, 444 U.S. 883 (1979). In short, the weight of authority establishes that the availability of a collateral challenge to the adequacy of notice is a minimum requirement of due process.

Legal arguments aside, petitioners' factual premise – that the trial and appellate courts have already ruled on the adequacy of notice to "future victims" like Stephenson and Isaacson – is simply wrong. In fact, nothing in either the district court's opinion supporting certification of the Agent Orange class or in the Second Circuit's opinion affirming the certification and order approving the settlement indicates that these courts considered whether the notice was sufficient to apprise *class members without any manifest injury* of "the pendency of the action" or "their rights in it," or whether such claimants had a meaningful and adequate opportunity to remove themselves from the class. On the contrary, the district court's certification opinion – which was issued long before the parties provided in the settlement agreement that the class "includes persons who have not manifested injury" – merely states as a boilerplate conclusion that "[t]he notice provided for in this Order is the best reasonable and practicable notice under the circumstances of this litigation." *In re "Agent Orange"*

Prod. Liab. Litig., 100 F.R.D. 718, 731 (E.D.N.Y. 1983). And, in approving the notice plan, the Second Circuit merely observed that "[a]nyone *who believed that he or she had suffered injury as a result of exposure* to Agent Orange in Vietnam was on notice of the pendency of a lawsuit and was thus alerted to seek advice from counsel." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987) (emphasis added), *cert. denied*, 484 U.S. 1004 (1988). So it cannot be fairly said that the constitutional objections to notice raised by Stephenson and Isaacson below were raised and adjudicated by the district and appellate courts in the Agent Orange class action litigation.[3]

Although the court below did not "definitively decide" whether Stephenson and Isaacson received inadequate notice of the Agent Orange class action, 273 F.3d at 261, this Court may and should consider the issue as an alternative ground for holding that Stephenson and Isaacson are not bound by the judgment in the class action. The Court should therefore examine the notice of the Agent Orange class action issued in 1984 to determine whether application of the bar of res judicata

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[3] In a prior collateral attack on the Agent Orange class action judgment, the Second Circuit did not consider whether the language of the notice adequately alerted persons who had not yet manifested injury of their membership in the class. *Ivy v. Diamond Shamrock Chems. Co. (In re "Agent Orange" Prod. Liab. Litig.*), 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994). The court did, however, reject the contention made by Stephenson and Isaacson here that, as a general matter, constitutionally adequate notice of a mass tort class action cannot be given to persons without currently manifested injuries. Because Stephenson and Isaacson were not even arguably parties to *Ivy*, the Second Circuit's decision in that case is not binding on this Court as res judicata on the notice issue. Petitioners do not contend otherwise.

to the claims of Stephenson and Isaacson would comport with due process.

II. The Notice Of The Agent Orange Class Action Was Constitutionally Inadequate To Inform Persons Without Any Manifest Physical Injury That Their Hypothetical Future Claims Would Be Adjudicated In The Class Action.

A. In A Class Action That Undertakes To Resolve Claims For Latent Personal Injuries, Notice To "Future Claimants" Without Clinically Detectable, Compensable Injuries Is Inherently Deficient.

In *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), this Court considered the constitutional adequacy of notice of a mass tort class action provided to absent class members who, like Stephenson and Isaacson, had no manifest injury at the time of their actual or constructive receipt of the notice. Like the *Agent Orange* class action, the *Amchem* class action purported to resolve future, as well as existing, claims for personal injury against the defendants. The *Amchem* class was defined to include all persons occupationally exposed to asbestos – whether or not they had yet sustained a clinical injury as a result of the exposure – and their families. 521 U.S. at 605. The district court approved a plan for notifying the class by individual notice and publication that this Court described as "elaborate." *Id.* at 606.

Nevertheless, this Court questioned "whether class action notice sufficient under the Constitution and Rule 23 could *ever* be given to legions so unselfconscious and amorphous." *Id.* at 628 (emphasis added). The Court noted that the difficulty of providing adequate notice to future claimants "rendered highly

problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement." *Id.* The Court observed that persons who suffer no clinical injury from a toxic exposure "may not even know of their exposure, or realize the extent of the harm they may incur." *Id.* And, the Court added, "[e]ven if they fully appreciate the significance of the class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out." *Id.* Because the Court rejected the class action settlement for other reasons, the Court did not rule "definitively" that notice to the *Amchem* future claimants was inadequate. *Id.* But the Court's determination to address the issue even though it disposed of the case on other grounds reveals the depth of the Court's skepticism about class actions that purport to resolve the personal injury claims of persons not yet clinically injured.

The Court's discomfort with the notion that an individual could be called upon to take action to preserve a tort claim before he or she has reason to know it exists can be traced to its early embrace of the "discovery rule," which delays the running of the statute of limitations in latent injury cases. In its landmark decision in *Urie v. Thompson*, 337 U.S. 163, 168-71 (1949), the Court rejected the contention that the statute of limitations in a latent injury case governed by the Federal Employers' Liability Act begins to run when the plaintiff sustained exposure to the hazardous substance that ultimately caused the injury. Such a view, the Court reasoned, would lead to the draconian and untenable result that a plaintiff's "failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability." *Id.* at 169. Rather, "the afflicted employee can be held to be 'injured' only when

the accumulated effects of the deleterious substance manifest themselves." *Id.* at 170 (quoting *Associated Indem. Corp. v. Industrial Accident Comm.*, 12 P.2d 1075, 1076 (1932)).

The "discovery rule" applied in *Urie* reflects a nationwide consensus that it is unfair and irrational to adjudicate a personal injury claim before it comes into existence. *See, e.g.*, *Childs v. Haussecker*, 974 S.W.2d 31, 37 & n.2 (Tex. 1998) ("almost every jurisdiction applies some formulation of the discovery rule, either legislatively or judicially, in latent injury and disease cases," citing cases); Susan D. Glimcher, Note, *Statute of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?* 43 U. PITT. L. REV. 501, 517 (1982) ("Most jurisdictions now recognize 'the obvious and flagrant injustice' of barring a cause of action before a plaintiff can become aware of an injury."). The law of Louisiana, where Stephenson developed the cancer upon which this action is based, did not require Stephenson to file his claim until his cancer "manifested itself with sufficient certainty to support accrual of a cause of action." *Cole v. Celotex Corp.*, 620 So.2d 1154, 1156 (La. 1993). Similarly, the law of New Jersey did not require Isaacson to file suit until he "discovered or should have discovered . . . that the physical condition of which he complains was causally related to his exposure" to Agent Orange. *Vispisiano v. Ashland Chem. Co.*, 527 A.2d 66, 72 (N.J. 1987).

By defining the class to include persons with only unknown, "future" injuries, and by purporting to notify those persons that their future claims would be adjudicated, the Agent Orange class action court denied these "future claimants" the benefit of the permissive accrual rules conferred by state law. Put another way, the court effectively accelerated these unripe claims for the sole purpose of binding the claimants to the class

action settlement. How the acceleration of the claims could possibly have benefitted "future claimants" – in light of the "pervasive factual and legal doubt" surrounding the claims at the time and the "nuisance value" of the settlement (*In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 149, 151) – has never been explained by the parties or by any court reviewing the settlement. Moreover, neither petitioners nor their *amici* have ever explained why the defendants in the Agent Orange class action needed, or were entitled to, closure or repose as to these unasserted contingent claims. Although future claimants have a strong interest in notice and a meaningful opportunity to exclude themselves from a class action designed to resolve their future claims, petitioners have shown no countervailing interest – in the absence of inadequate resources to pay all claims – in the need to resolve future claims through a global proceeding. Under such circumstances, the Court should recognize a due process right to opt out of a class action when the injuries become manifest.

In *Shutts*, the Court held that a state court could constitutionally exercise jurisdiction over the claims of an absent class member that had no contact with the forum state because "[a]ny plaintiff may consent to jurisdiction," 472 U.S. at 812, and the Court could reasonably infer consent to jurisdiction from the failure of the class member to execute an opt-out form. *Id.* at 813-14. But, as the Court found in *Urie*, one cannot justifiably infer consent to the jurisdiction of the class action court from an uninjured class member's failure to opt out. To paraphrase *Urie*, in a mass tort class action that includes persons with only latent, undetectable, "future" injuries, the failure of such a person "to diagnose [within the opt-out period] a disease whose symptoms had not yet obtruded upon his consciousness" should not constitute "waiver" of his

due process right to opt out and pursue their tort claims in a proper forum of his or her choice. 337 U.S. at 170.

B. Even If It Were Theoretically Possible To Give Adequate Notice Of A Class Action To Future Personal Injury Claimants, Adequate Notice Was Not Given To Future Claimants In The Agent Orange Class Action.

The Agent Orange class action notice announced the certification of a class consisting of "those persons who were in the United States, New Zealand, or Australian Armed Forces at any time from 1961 to 1972 *who were injured* while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides . . .." *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 729 (E.D.N.Y. 1984) (emphasis added). Although petitioners now claim that the class certified by the district court "expressly was understood [sic] to include both ill and asymptomatic veterans," Pet. Br. 4, this "understanding" was not communicated to absent class members prior to expiration of the opt-out period. Instead, it was only *after* notice had been issued, *after* the opt-out period had expired, and *after* the class plaintiffs and defendants had agreed to a global settlement, that the parties "made express" in the written settlement agreement their "understanding" that the class included persons who had not yet manifested injury. Pet. Br. 7; *see In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 864-65 (E.D.N.Y. 1984). The court then ordered the parties to issue notice to the class of the proposed settlement. *Id.* at 866-67. The first sentence of the notice of settlement advised class members of the settlement and "OF WHAT YOU MUST DO NOW *IF YOU BELIEVE YOU HAVE A CLAIM FOR ADVERSE HEALTH EFFECTS* ALLEGEDLY RELATED TO AGENT ORANGE EXPOSURE IN OR NEAR

VIETNAM." *Id.* at 867 (capital letters in original; emphasis added). The second sentence of the notice of settlement quoted the class definition, indicating that persons "who were injured" by exposure to Agent Orange were included in the class. *Id.* Only after reciting the financial terms of the settlement did the notice of settlement state, "The Settlement Agreement confirms that the class includes persons who have not yet manifested injury." *Id.* at 868. Because the parties published this notice to the class after the expiration of the opt-out period, the hypothetical class member who read the entire notice of settlement and thereby learned for the first time of his or her inclusion in the class had no opportunity to opt out of the class.[4]

In affirming the Agent Orange class action settlement on direct appeal, the Second Circuit found the notice sufficient to alert those persons "who believed that he or she had *suffered injury* as a result of exposure to Agent Orange in Vietnam" of the pendency of a lawsuit potentially affecting their rights. *In re "Agent Orange Product Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987) (emphasis added), *cert. denied*, 487 U.S. 1234 (1988). No reasonable person reading the notice, however, could possibly have understood that the class included persons who had not developed a clinically detectable injury. On the contrary, rather than include all persons exposed to Agent Orange, the class notice merely included those "who were

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[4]Even if the notice of settlement made it sufficiently clear that persons merely exposed to Agent Orange were members of the class, which it did not, "a Rule 23(e) notice of partial settlement is not intended to serve as a Rule 23(c)(2) notice of pendency of the suit. The Rule 23(c)(2) notice of pendency . . . with its options for opting out, is the basis on which [the defendant] can subsequently raise its claims of preclusion." *In re Viatron Computer Systems Corp. Litig*, 614 F.2d 11, 14 (1st Cir.1980), *cert denied*, 449 U.S. 826 (1980).

injured . . . by exposure." Moreover, neither a layperson nor a seasoned toxic tort lawyer would equate "exposure" to a toxic substance with "injury." Mere exposure to a toxic substance itself generally confers no legal rights or obligations on the person exposed. It ordinarily does not support a claim for damages. *See, e.g.*, *Metro-North Commuter R. v. Buckley*, 521 U.S. 424, 432 (1997) (noting that "with only a few exceptions, common-law courts have denied recovery to those who, like Buckley, are disease and symptom free"). And exposure alone does not trigger the statute of limitations on a claim for personal injuries based on the toxic exposure; it certainly did not in Louisiana and New Jersey, where Stephenson and Isaacson resided, respectively. *See* Part II(A) *supra* at 16.

It may or may not be true, as class counsel maintained in defending the expansive interpretation of the class definition in the district court, that mere exposure to a toxic substance may constitute an injury "in the technical law of torts" applied by New York courts. *Ivy*, 996 F.2d at 1433-34 (quoting class counsel).[5] But to bind absent class members, notice cannot be "technical;" rather, it must be delivered in a manner "such as

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[5] *But see Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.) ("subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law"), *cert. denied*, 474 U.S. 864 (1985); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 635-38 (3d Cir. 1996) (Wellford, J., concurring) (arguing that plaintiffs exposed to asbestos but who have not developed clinical injury have no "injury-in-fact" and thus no standing to sue), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); Jeremy Gaston, Note, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Class Actions*, 77 TEX. L. REV. 215 (1998) (same).

one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950); *see also In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104 (5th Cir. 1977) (class notice must deliver "an adequate description of the proceedings written in objective, neutral terms, that, insofar as possible, may be understood by the average absentee class member"); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998) (class settlement did not bar class member from asserting individual claim because notice was "insufficient to notify him that claims like his were being litigated in the action"). The language of the notice in the Agent Orange class action simply did not convey to the average class member that claims for unknown injury could be decided or compromised in the case. The very fact that the class settlement proponents found it necessary to make "express" in the settlement agreement the inclusion of persons with undeveloped injuries in the class demonstrates that the class notice did not adequately inform such persons of their class membership.

By comparison, the notice given to the class of present and future claimants in *Amchem* was far more precise and accurate. The class definition included persons "who have been exposed . . . either occupationally or through the occupational exposure to a household member to asbestos . . .." 521 U.S. at 602 n.5. The district court found the class "somewhat unusual" because it included as members "persons who have not yet been diagnosed with an asbestos-related injury." *Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 333 (E.D. Pa. 1993). Believing it "extremely important that these persons be alerted to their potential membership in the class," the court ordered that "clarifying language be added or made more prominent in some of the notice materials." *Id.* Even with these

clarifications, this Supreme Court questioned the efficacy of the notice to future claimants. 521 U.S. at 628.

"When notice is a person's due, process which is a mere gesture is not due process." *Mullane*, 339 U.S. at 315. In the Agent Orange class action, the notice did not apprise persons exposed to Agent Orange but who had not yet sustained detectable injuries that they were members of the class and that their future claims would be decided in the action unless they opted out. Notice to such persons was nothing more than "a feint" in their direction. *Id.* Because Stephenson and Isaacson did not receive adequate notice of the potential disposition of their claims in the class action, the Due Process Clause does not permit the judgment in that action to serve as res judicata of the claims asserted in this case.

III. A Decision Allowing Respondents To Pursue Their Personal Injury Claims Would Not Be Unfair To Petitioners, Nor Would It Impair Proper Use Of Class Actions.

Petitioners complain that the Second Circuit's refusal to bar the claims of Stephenson and Isaacson is unfair to them, arguing that they entered into the Agent Orange settlement "in good faith," fully performed under the terms of the settlement, and should be entitled "to rely on the finality of an apparently definitive judgment." Pet. Br. 38. But if the defendants that participated in the Agent Orange settlement truly did rely on the judgment in that action to protect them from the assertion of claims in the future that did not exist at the time of the settlement – a doubtful proposition, in light of the $10 million reserved in the settlement to indemnify defendants for

judgments entered in state court[6] – their reliance was unjustifiably optimistic. Even conventional class action judgments are vulnerable to collateral attack: "[e]ver since *Hansberry v. Lee* was decided in 1940, collateral attacks have been considered to be a necessary part of the class action scheme." *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 769 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989). But this judgment had to have been perceived as more vulnerable because of its novelty. It is beyond legitimate dispute that the judgment below was the product of "a new variety of class action" which contained "a novel combination of features," including the inclusion as class members of "future victims, many of whom have yet to suffer a cognizable injury." Sylvia A. Law, *Tort Liability and the Availability of Contraceptive Drugs and Devices*, 23 N.Y.U. REV. L. & SOC. CHANGE 339, 357 (1997). "A class action settlement with these features would have been unthinkable to lawyers of a decade or so ago." *Id.* at 358. The observation by one of petitioners' *amici* that the Agent Orange class action participants "partly wrote the book" on mass tort class actions (Brief of *Amicus Curiae* Defense Research Institute ("DRI Br.") at 26 n.29) only underscores the novelty, and vulnerability, of the closure and repose petitioners attempted to gain through the class action settlement.[7]

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[6] *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 864 (E.D.N.Y. 1984).

[7] Moreover, the fact that the defendants did not craft the distribution scheme (Pet. Br. 45), under which Stephenson and Isaacson collected no compensation, does not protect them from the consequences of participating in a class action settlement that denies some absent class members due process. As this "Court explain[ed] in *Shutts*, it is partly up to the defendant to safeguard the interest of the absent plaintiffs. If the defendant wishes to achieve maximum

Petitioners also complain that affirmance of the Second Circuit's decision will have more widespread "pernicious consequences." Pet. Br. 39. Defendants in class actions, petitioners assert, "would face the prospect of resolving the case and paying out on the judgment, only to confront never-ending litigation brought by innumerable class members many years later." Pet. Br. 39-40. Petitioners' *amici* amplify this concern, arguing hyperbolically that the Second Circuit's ruling "shakes the foundations of every class action decision in this country," DRI Br. 4, confers "a limitless power to collaterally attack a class action settlement by previously bound class members who are willing to do so," *id.*, and "would, in effect, place a question mark after every 'It is so ordered' entered on the Nation's class action docket." Brief of the Product Liability Advisory Council as *Amicus Curiae* in Support of Petitioners at 2.

The concerns of petitioners and their *amici* are wildly overstated and ultimately unfounded. As a practical matter, the typical class action settlement is not vulnerable to collateral attack "many years later" because class members will be barred by the statute of limitations from asserting their claims individually. The Second Circuit's decision in this case leaves vulnerable to collateral attack only those class settlements that purport to resolve the claims of class members who have no current injury or reason to be in court, and who are included in the class only to give the defendants who have committed a

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preclusive effect, it is up to the defendant to ensure that the class is appropriately certified, and the absent members are adequately represented." *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 770 (3d Cir.) (citation omitted), *cert. denied*, 493 U.S. 821 (1989).

mass tort the maximum possible "peace" (DRI Br. 30) – peace to which, under the "discovery rule" followed in virtually all jurisdictions, they are not entitled.

Unlike the typical class action settlement, which seeks to bind only persons with at least some currently viable claim, the Agent Orange settlement sought to bind persons that had no currently actionable claim for personal injury. In contrast, six of the nine class action settlements identified by *amicus curiae* DRI as threatened by the Second Circuit's ruling (DRI Br. 28-29) do not involve claims for personal injuries at all, but instead involve *existing*, *currently viable* claims for financial harm (*Cendent Securities Litigation*, *Airline Ticket Price Fixing, Lucent Technologies Phone Leasing Litigation*), property damage (*Chrysler Minivan Litigation)*, or discrimination (*EEOC v. Western Electric*, *Haynes v. Shoney's Inc.*). DRI cites three class action settlements of personal injury claims. One did not involve latent harm. *See In re Copley Pharm., Inc.*, 158 F.R.D. 485, 490 (D. Wyo. 1994) ("This is not a case with delayed injuries or future risk."). The other two settlements (*Bjork-Shiley Convexco-Concave Heart Valve Litigation* and *Pondimin and Redux Litigation*) gave a "back-end opt-out" to class members who did not request exclusion during the initial opt-out period but who developed serious physical harm later. *In re Diet Drugs Prods. Liab. Litig.*, 2000 WL 1222042, *39 (E.D. Pa. Aug. 28, 2000), *aff'd*, 275 F.3d 34 (3d Cir. 2001); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 170 (S.D. Ohio 1992). Although the details of these settlements may nonetheless make them vulnerable to collateral attack, it is apparent that the DRI's report of the demise of the class action as a result of the Second Circuit's decision is greatly exaggerated.

Affirmance of the Second Circuit's decision will not inhibit settlement of properly certified, properly limited class

actions. But the decision will prevent mass tort defendants from seeking to extinguish future liability by roping into a class action settlement persons without any current injuries who cannot be effectively notified of the need to take action to preserve their future claims. That, contrary to the assertions of petitioners and their *amici*, is good public policy.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Brent M. Rosenthal
Counsel of Record
Misty A. Farris
Baron & Budd, P.C.
3102 Oak Lawn Ave.
Dallas, TX 75214
(214) 521-3605

Leslie Brueckner
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Ave., N.W.
Suite 800
Washington, D.C. 20036-2001
(202) 797-8600

Attorneys for Amicus Curiae