No. 10-157

IN THE

Supreme Court of the United States

SPRINT SPECTRUM L.P. D/B/A SPRINT PCS,

Petitioner,

v.

CHRISTOPHER W. HESSE AND NATHANIEL OLSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Ninth Circuit correctly apply state-law preclusion principles in holding that respondents' claims were not barred by a prior class action settlement involving claims that had a materially different factual predicate?

2. Was the Ninth Circuit correct in concluding, alternatively, that respondents' claims could not be precluded because the class representative in the prior action, who did not possess respondents' claims, did not adequately represent respondents with respect to those claims?

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INTRODUCTION

Petitioner Sprint Spectrum has asked this Court to review issues relating to whether, or when, a federal court may engage in "collateral review" of a state court's approval of a class action settlement. Specifically, Sprint seeks to have this Court decide whether a federal court may determine that a settlement does not bar subsequent claims that were not brought in the settled case because the class representatives did not possess those claims and therefore did not adequately represent the subsequent claimants in purporting to release them, as due process requires.

Astonishingly, however, Sprint does not acknowledge that the Ninth Circuit's decision that respondents' claims were not precluded by the state-court settlement did not, ultimately, rest on due process grounds. Rather, the court held that wholly "apart from due process concerns," Pet. App. 14a, the Kansas claim-preclusion doctrines that would be applied by the Kansas state courts that approved the settlement would permit respondents' current claims to proceed because they do not rest on the same "factual predicate" as the claims asserted in the state-court action. *See* Pet. App. 14a-19a. In so holding, the court relied on nonconstitutional claim-preclusion principles that are widely accepted by both federal and state courts.

Sprint does not even mention this holding, let alone argue that it is worthy of review by this Court (or even that it is erroneous). Because the decision rests on the court of appeals' prediction of how Kansas state courts would apply principles of Kansas preclusion law, it is by nature unfit for review by this Court, which has no more authority than a lower federal court to render a definitive decision on the con-

tent of state law. And because the state-law preclusion issue will determine the outcome of this case regardless of the resolution of the due process adequacy-of-representation issues that Sprint prefers to discuss, there is no reason for this Court to take on those issues in this case even if, in the abstract, they might otherwise warrant this Court's attention in a case where they controlled the outcome.

In any event, Sprint's due process arguments would not merit this Court's review even if due process were the dispositive question in the case. Whatever their theoretical disagreements on the exact scope of collateral review of class action settlements, there is broad agreement among the lower courts (based on controlling precedents of this Court) that an absent class member is not bound by the resolution (by settlement or otherwise) of a class action unless he was afforded due process in that action. Therefore, a court in a subsequent action brought by such a class member must inquire whether the earlier class proceedings comported with due process before holding the class member bound by their outcome. Adequacy of representation is, of course, an element of due process. And there is also general agreement (even, as this case illustrates, in the Ninth Circuit, where collateral review is available only under very narrow circumstances) that when the court in the earlier class action *did not decide* whether the named class representatives adequately represented the interests asserted by the absent class member in the later action, the court in the later action may, and indeed must, decide the question of adequacy of representation.

Here, the Ninth Circuit reviewed the decisions in the earlier state-court action and found that the Kan-

sas courts had *not* resolved the question of whether the named plaintiff adequately represented the interests of Washington class members as to their claims that Sprint's attempts to pass through Washington state taxes violated Washington law. Although Sprint disagrees with that conclusion (based largely on documentary material never presented to the courts below), the fact-bound question of what the Kansas courts decided is plainly not worthy of review by this Court. Nor is the equally fact-bound question of whether the Kansas class representative in fact adequately represented the very different interests of Washington class members in recouping the entirely distinct improper charges collected by Sprint from them but not from the named representative and other class members residing outside of Washington State. And because the consensus of the lower courts permits collateral attack on a class settlement in such narrow circumstances, there would be no reason for this Court to address the due process issue in the circumstances of this case even if the question were ultimately outcome-determinative.

STATEMENT

1. The District Court Proceedings. Respondents Christopher Hesse and Nathanial Olson filed separate class actions in state court in Seattle in March and July of 2006. ER 193, 205.[1] Respondents alleged that Sprint's practice of charging its Washington customers a surcharge for the Washington business and occupation tax ("B&O tax") violated the state B&O tax statute, Wash. Rev. Code § 82.04.500,

[1] "ER" refers to the Excerpts of Record in the Ninth Circuit.

and the state Consumer Protection Act, Wash. Rev. Code § 19.86.030 (CPA), and asserted common-law claims of breach of contract and unjust enrichment. *See* ER 199-200.[2]

Sprint removed both cases to federal court, and they were consolidated. On respondents' motion, the court certified a class consisting of "all current and former Washington state wireless service customers of Sprint, who have been charged and paid to Sprint a 'Washington State B&O Tax Surcharge.'" ER 17.

After obtaining a partial dismissal on preemption grounds,[3] Sprint moved for summary judgment, arguing for the first time that a nationwide settlement it reached in February 2006 in an unrelated class action in Kansas (*Benney v. Sprint Int'l Communications Corp.*, Case No. 05-1422, Pet. App. F) precluded the respondents' claims in this action. The district court granted the motion and dismissed all of the respondents' claims based on the preclusive effect of the *Benney* settlement. Pet. App. 30a, 21a.

2. The *Benney* Settlement. The *Benney* case involved claims challenging Sprint's nationwide practice of billing certain federal "regulatory fees" on its monthly invoices. *See* ER 43. Mr. Benney sought to

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[2] Washington State charges the B&O tax on all businesses operating within the state "for the act or privilege of engaging in business activities." Wash. Rev. Code § 82.04.220. The law forbids businesses to treat this tax as a tax on their customers, because it is considered "a part of the operating overhead." Wash. Rev. Code. § 82.04.500.

[3] The partial dismissal rested on the theory that respondents' statutory claims were preempted by a provision of the Federal Communications Act, 47 U.S.C. § 332(c)(3)(A), which denies states authority to regulate cell phone "rates." ER 29.

represent all Sprint customers "who were charged a fee or surcharge for 'USA Regulatory Obligations Fee' and/or a wireless number portability and number pooling fee in addition to their regular cellular telephone bill every month." *Id.* Naturally, Mr. Benney, a Missouri resident, asserted no claims regarding Sprint's Washington B&O tax surcharge. Although he originally filed his suit in 2002, no litigation class had been certified at the time of the settlement in late 2005. ER 85-86.[4]

As part of the settlement, the Kansas state court certified a settlement class, represented by Mr. Benney, to include all Sprint customers in the United States during the period from December 1, 2000, to the settlement's effective date whom the company had charged "Regulatory Fees," as defined in the settlement agreement. Pet. App. 71a. Consistent with Mr. Benney's complaint, the settlement agreement defined "Regulatory Fees" to include only federal fees Sprint imposes on all its customers in the United States. The Kansas court found Mr. Benney to be a typical representative of all Sprint's customers on these claims because he personally was charged these Regulatory Fees. Pet. App. 79a-80a.[5]

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[4] The *Benney* settlement involved several other class actions in addition to Mr. Benney's, but his case was the only one that involved Sprint's billing practices; all of the others involved what were described as "Coverage and Capacity" issues. *See* Pet. App. 69a.

[5] The settlement provided that class members who submitted claims could receive benefits that ranged in value from $19 in invoice credits (spread over four months) to a Sprint phone card worth $2.50. ER 89-90. Of the estimated 42 million class members, about 425,000 submitted claims. ER 98.

However, the settlement agreement purported to extinguish a broader set of claims against Sprint, including claims related to any "surcharges, regulatory fees, or excise taxes, including but not limited to the Regulatory Fees." Pet. App. 5a. The actual release incorporated in the judgment approving the settlement, by contrast, appears narrower, applying only to liability "arising from or relating to any and all claims that were or could have been alleged in the *Benney* matter." Pet. App. 6a n.2.[6]

In this Court, Sprint contends for the first time that, following notice, several class members objected to the adequacy of representation by Mr. Benney "in light of the scope of the release." Pet. 8-9. These objections, which Sprint appends to its Petition, Pet. App. G-K, were not presented to the Ninth Circuit or the district court, were never considered by those courts, and are not part of the record before this Court. Moreover, the objections largely consisted of conclusory allegations regarding adequacy of representation and in no way put the state court on notice of respondents' claims. *See* Pet. App. 141a, 146a, 158a, 159a, 174a. In any event, the state court did not expressly consider the substance of these objections or make any findings regarding the scope of the release or its application to unrelated claims against Sprint. *See* Pet. App. 89a.

Indeed, Sprint does not contend, and there is no reason to believe, that anyone involved in the *Benney* settlement ever considered the Washington B&O tax

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[6] As explained *infra* at note 7, the more qualified release contained in the Kansas court's judgment is controlling for purposes of claim preclusion.

surcharge, or intended to resolve claims about that surcharge. Even Sprint considered the *Benney* case to be completely unrelated to the allegations in this case. Thus, before Sprint raised the *Benney* settlement, respondents asked Sprint to produce documents relating to any other litigation involving Sprint surcharges. ER 69. Sprint objected to this request and produced no documents, claiming that this information was "neither relevant nor reasonably calculated to lead to discovery of admissible evidence *in that it seeks the disclosure of lawsuits ... unrelated to the disclosure or non-disclosure of a B&O tax surcharge.*" *Id.* (emphasis added).

3. The Ninth Circuit's Decision. The Ninth Circuit reversed the district court's decision to dismiss respondents' claims. With respect to the district court's preemption ruling, the court of appeals relied on its recent decision in *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1058 (9th Cir. 2008), which construed the scope of preemption of state "rate" regulation more narrowly than had the district court.

As for the claimed preclusive effect of the *Benney* settlement, the court of appeals began by recognizing that, under *Matsushita Electrical Industrial Co. v. Epstein*, 516 U.S. 367 (1996), federal courts must give full faith and credit to a state-court class action settlement by according it the same preclusive effect it would receive in the courts of the rendering state, subject to the limitation that no court may give effect to a constitutionally infirm judgment. *Kremer v. Chem. Constr. Co.*, 456 U.S. 461 (1982).

The court noted that under its decision on remand in the *Matsushita* case, *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999), broad "collateral review" of

whether class members received due process in an earlier action is generally not available in the Ninth Circuit, which limits itself to examining whether class members had a full and fair opportunity to raise any claims and whether the court in the first action made findings that the requisites of due process (including adequate representation) were satisfied. Thus, "[n]ormally we will satisfy ourselves that the party received the requisite notice, opportunity to be heard, and adequate representation by referencing the state court's findings." Pet. App. 10a.

However, the court of appeals also recognized that where the court in a prior action has failed to make findings establishing that a class settlement satisfies the minimal requirements of due process, a subsequent court must go further. In this case, the court found that the Kansas courts in *Benney* had *not* made findings that the class representative was an adequate representative of persons with claims such as respondents'. The court thus examined adequacy of representation for itself and stated that, because Mr. Benney did not have claims similar to respondents' state-law claims, he had made no pretense of protecting those claims and, indeed, was in a conflict-of-interest position with respect to class members who had such claims. Thus, the court stated, he had not provided adequate representation to respondents.

Ultimately, however, the court rested its judgment on a different ground—namely, that "Kansas law" did not "allow the *Benney* judgment to release the Washington Plaintiffs' claims related to the B & O Tax Surcharge." Pet. App. 14a. The court concluded that Kansas courts, as a matter of their own preclusion law, would follow the principle that a class action set-

tlement release must be limited to claims that share a common factual predicate with those of the class representative. In this case, the Ninth Circuit held, the factual predicate was entirely different, as respondents' claims involved different charges, imposed to recoup different costs, which were unlawful for a different reason from the claims in *Benney*. Thus, the court concluded in the end that respondents' claims "were not released by the *Benney* settlement" as a matter of Kansas state law. Pet. App. 19a.

REASONS FOR DENYING THE WRIT

I. The Ninth Circuit's Holding That Kansas Claim-Preclusion Law Does Not Bar Respondents' Claims Does Not Merit Review.

The Ninth Circuit determined that entirely "apart from due process concerns," Pet. App. 14a, the settlement of the Kansas action did not bar respondents' claims because they were not based on "the identical factual predicate" as the claims asserted in the Kansas action. Properly recognizing that, under this Court's decision in *Matsushita*, class action settlements are subject to the rule that "the preclusive effect of a state court judgment in federal court is based on state preclusion law," Pet. App. 17a (quoting *Howard v. America Online, Inc.*, 208 F.3d 741, 748 (9th Cir. 2000)), the court of appeals expressly stated that "we apply Kansas law in determining [the settlement's] preclusive effect." Pet. App. 17a.

The court went on to conclude that Kansas would follow the large body of precedents holding that a class action settlement may resolve claims not asserted in the action (including claims over which the court entertaining the class action would lack subject-matter jurisdiction), but only if they are based on the

same factual predicate as the claims in the action. *See id.* Here, the court held that respondents' claims were not based on the same factual predicate as the Kansas action: "The claims underlying the *Benney* Settlement dealt exclusively with specific nationwide surcharges to recoup the costs of compliance with federal programs, whereas the claims at issue in the present case involve Sprint's statewide surcharge to recoup the cost of the Washington B & O Tax allegedly in violation of a Washington statute." Pet. App. 18a. In short, the cases involved "different surcharges, imposed to recoup different costs, that were alleged to be improper for different reasons." Pet. App. 19a. Because the claims did not rest on the same factual predicate, the court concluded, they were not precluded by the settlement.

This holding, which was sufficient by itself to dispose of the appeal in respondents' favor, does not remotely merit review by this Court. As a state-law holding, it is inherently ill-suited for review by this Court, which cannot authoritatively determine state-law questions. *See Murdock v. City of Memphis*, 87 U.S. 590 (1874). Thus, this Court "do[es] not normally grant petitions for certiorari solely to review what purports to be an application of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996). Sprint points to no reason, such as a conflict among the circuits over the point or the exceptional importance of the issue, that might conceivably justify review of the Ninth Circuit's holding on the application of state-law preclusion principles to the facts of a particular case. Indeed, Sprint either does not recognize or has chosen not to acknowledge that the lower court's opinion rested on this state-law ground, which is entirely distinct from

the due process issues that Sprint wishes the Court to address.

Moreover, there is nothing extraordinary about the court of appeals' prediction that the Kansas courts would adopt the "identical factual predicate" test to determine the limits of the preclusive effect of a class action settlement. The test is commonly used by the federal courts of appeals to determine the permissible scope of a release (and hence the scope of preclusion) in class settlements. *See, e.g.*, *McGowan Investors LP v. Meyer*, 2010 WL 3199722, *5-*6 (3d Cir. Aug. 12, 2010); *Thomas v. Blue Cross & Blue Shield Ass'n*, 333 Fed. Appx. 414, 417 (11th Cir. 2009); *Olden v. Gardner*, 294 Fed. Appx. 210, 220 (6th Cir. 2008); *Williams v. Boeing Co.*, 517 F.3d 1120, 1133-34 (9th Cir. 2008); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 747-48 (9th Cir. 2006); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 107 (2d Cir. 2005); *Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 59 (1st Cir. 2004); *Monaco v. Mitsubishi Motors Credit of Am., Inc.*, 34 Fed. Appx. 43, 45 (3d. Cir. 2002); *Howard v. America Online*, 208 F.3d at 747; *Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 273-74 (7th Cir. 1998); *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1044 (1st Cir. 1996); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992); *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 336 (2d Cir. 1985); *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982).[7]

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[7] Many of the cases applying the standard involve settlements of federal-court class actions, whose preclusive effect is determined by federal common law. *See Semtek Int'l, Inc. v.*

(*Footnote continued*)

Similarly, a number of state courts, most notably in Delaware, have adopted the "identical factual predicate" formulation to determine the preclusive effect of a class action settlement. *See In re Philadelphia Stock Exch., Inc.*, 945 A.2d 1123, 1146 (Del. 2008); *Nottingham Partners v. Dana*, 564 A.2d 1089, 1106 (Del. 1989); *see also Cox v. Microsoft Corp.*, 850 N.Y.S.2d 103, 103-04 (N.Y. App. Div. 2008); *Froeber v. Liberty Mut. Ins. Co.*, 193 P.3d 999, 1005-06 (Or. Ct. App. 2008); *Milkman v. Am. Travellers Life Ins. Co.*, 2002 WL 778272, *10 (Pa. Ct. Common Pleas April 1, 2002). Indeed, in *Matsushita*, this Court recognized this limitation on the preclusive effect of a class settlement under Delaware law. *See* 516 U.S. at 376-77.

Unlike Delaware courts, Kansas courts have not expressly adopted the "identical factual predicate" doctrine. *See* Pet. App. 17a. In such circumstances this Court has endorsed the Ninth Circuit's resort to general principles of Kansas preclusion law to answer the question before it. *Matsushita*, 516 U.S. at 375-76 ("Where a judicially approved settlement is under consideration, a federal court may consequently find guidance from general state law on the preclusive force of settlement judgments.") (*citing Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 382-83 (1985)).

Given the wide acceptance of the "identical factual predicate" limit on the permissible scope of a release in a class action settlement, the Ninth Circuit's prediction that the Kansas courts would adopt the rule as

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Lockheed Martin Corp., 531 U.S. 497 (2001) (preclusive effect of a federal judgment is determined by federal common law). Others apply it as a matter of state law.

a matter of Kansas claim-preclusion law is unremarkable. As the Ninth Circuit noted, Kansas preclusion principles are broadly consistent with those of state and federal jurisdictions that have adopted the "identical factual predicate" formulation to limit the effect of their own judgments. *See* Pet. App. 17a-18a. Indeed, the Kansas Supreme Court has repeatedly stated that "Kansas law does not appear to differ significantly from the federal law regarding the preclusion doctrines." *Rhoten v. Dickson*, 223 P.3d 786, 797 (Kan. 2010) (quoting *Stanfield v. Osborne Indus., Inc.*, 949 P.2d 602, 608 (Kan. 1997)). In particular, Kansas claim preclusion law incorporates the concept of the transaction or occurrence, or "nucleus of operative fact," to define the scope of claim preclusion, *see id.*; *Honeycutt v. City of Wichita*, 836 P.2d 1128, 1134 (Kan. 1992), and it is this same concept that forms the basis of the "identical factual predicate" formulation. *See, e.g., McGowan Investors*, 2010 WL 3199722 at *5-*6; *Reppert v. Marvin Lumber*, 359 F.3d at 58 n.4; *Class Plaintiffs v. Seattle*, 955 F.3d at 1287-88.

Thus, there is little reason to doubt the correctness of the Ninth Circuit's view that the Kansas courts would follow the broad judicial consensus in holding that the "identical factual predicate" standard governs the scope of a class action settlement's preclusive effect. There is still less reason for this Court to review the Ninth Circuit's application of that standard to the particular facts of this case. As a general matter, this Court does not grant certiorari to correct a claimed "misapplication of a properly stated rule of law." S. Ct. R. 10. Sprint has not, in any event, asserted that the Ninth Circuit erred in applying the "identical factual predicate" standard—it could hardly do so given its failure to acknowledge that aspect of

the court's holding. Even if Sprint did contend that the court of appeals erred in this respect, any such claim would not only be fact-bound, but also meritless. As the Ninth Circuit pointed out, respondents' claims and the claims asserted in the *Benney* class action had no common nucleus of fact: They involved challenges to different types of charges by Sprint, imposed at different times on different sets of customers, and they were unlawful for different reasons.

II. Sprint's Arguments About the Limits of Due Process "Collateral Attacks" on Class Settlements Do Not Merit Review.

A. The Due Process Issue Is Not Outcome-Determinative in This Case.

The Ninth Circuit's conclusion that precluding respondents' claims based on the Kansas settlement would deny them due process because they were not adequately represented by the named plaintiff in that case with respect to their Washington B&O tax claims is not appropriate for review because the court of appeals' decision did not turn on the due process issue. Even if the lower court's observations about due process were held to be erroneous, the result of the case would be unchanged: Respondents' claims would remain viable because, as the Ninth Circuit held, they are not barred under Kansas preclusion law because they do not rest on the same factual predicate as the claims in the earlier class action. Because that holding, as just explained, does not itself merit review, Sprint's challenge to the Ninth Circuit's due process analysis presents only a theoretical issue that cannot justify review of this case. As this Court has noted, "review of one basis for a decision supported by another basis not subject to examination would

represent 'an expression of an abstract opinion.'" *Mills v. Rogers*, 457 U.S. 291, 305 (1982) (quoting *United States v. Hastings*, 296 U.S. 188, 193, (1935)). After all, the Court's "power is to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

Beyond the state-law preclusion ground relied on by the Ninth Circuit, there are additional alternative grounds for affirmance that the Ninth Circuit did not reach but that also obviate the need to delve into issues of due process in this case.

First, the release incorporated in the judgment in the Kansas class action, by its own terms, does not cover the claims at issue. The release approved by the Kansas trial court and incorporated in its order approving the settlement provides:

> Sprint is hereby released and discharged from any liability to each and every *Benney* Class Plaintiff and Settlement Class members [except opt-outs] *arising from or relating to any and all claims that were or could have been alleged in the Benney matter,* including but not limited to claims which relate in any way to allegations that, on or before the Effective Date as defined in the Settlement Agreement, Sprint failed properly to disclose or otherwise improperly charged for surcharges, regulatory fees or excise taxes, including but not limited to the Regulatory Fees, as set forth in Paragraph 22(a)(1) of the Settlement Agreement.

Pet. App. 89a-90a (emphasis added). As the release language states, the claims released are limited to

those that could have been asserted in the Kansas action.[8] Respondents' claims concerning Washington taxes *could not* have been asserted in the Kansas action because the named plaintiff in that case did not possess any such claims, and Kansas law does not permit a class representative to assert claims of other class members that he or she lacks standing to make. *See Chamberlain v. Farm Bureau Mut. Ins. Co.*, 137 P.3d 1081, 1088 (Kan. Ct. App. 2006).

Second, the Kansas release only barred claims based on improper charges on or before the effective date of the settlement agreement. Sprint continued to collect the Washington taxes from respondents and similarly situated Washington customers after the effective date of the settlement, and respondents sought to recover for such charges in this action and to enjoin Sprint's wrongful conduct. It would be extraordinary to interpret the release contained in the settlement to give Sprint a free pass to engage in unlawful conduct after the date of the settlement. Thus, even if the agreement had some preclusive effect with respect to past claims involving Washington taxes, and even if the Kansas class representative had adequately represented respondents as to those Washington-specific claims, the district court's order dismissing this action would still have to be reversed.

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[8] Sprint relies on language contained in paragraph 22(a)(1) of the settlement agreement itself, rather than the language of the state court's judgment. Yet the asserted legal basis for enforcing the *Benney* settlement here is the doctrine of res judicata, which requires a final judgment. *See Matsushita*, 516 U.S. at 371-72 (quoting final judgment).

B. Sprint's Due Process Arguments Would Not Merit Review Even If the Judgment Below Rested on Due Process Grounds.

1. This Case Does Not Present a Conflict Over the Permissible Scope of Due Process-Based "Collateral Attack" on a Class Settlement.

Even if the due process issue were properly presented, there would be no reason for review by this Court. Although the question of the proper scope of "collateral attack" on a class action settlement is a much-debated issue, *this* case is not a proper one for entering into that debate because the court of appeals' due process analysis reflects only the sort of limited review of due process in the settlement court that the lower courts broadly agree is appropriate—even the Ninth Circuit, which takes a very narrow view of when a collateral challenge may proceed. Sprint's attempt to portray the decision below as reflecting a conflict with this Court's decisions or those of other appellate courts is meritless.

To begin with, Sprint's assertion that the decision below conflicts with this Court's decision in *Matsushita* is patently wrong. *Matsushita* held only that state law governs the preclusive effect of a class action settlement approved by a state court even as to federal claims over which the state court lacked subject matter jurisdiction (and that the relevant state-law preclusion principles barred class members from asserting the federal claims they sought to advance in *Matsushita*). 516 U.S. at 373-87. Nothing in *Matsushita* suggested that the power of a state court to bind absent class members is not subject to the demands of due process; indeed, the Court explicitly noted that

due process permits a class action judgment to bind absent class members only if "the named plaintiff at all times adequately represent[s] the interests of the absent class members." *Id.* at 379 (quoting *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985)). Moreover, the *Matsushita* Court expressly declined to decide whether the earlier state-court proceedings at issue in that case had comported with due process, as that question had not been decided by the lower court and was outside the scope of the question presented. *Id.* at 379 n.5. Because it did not address the due process question, the Court in *Matsushita* had no occasion to consider whether or under what circumstances a due process challenge to adequate representation in a settled class action may be asserted by plaintiffs in a subsequent case who contest the preclusive reach of the settlement.

In the wake of *Matsushita*, both federal and state appellate courts have continued to recognize that at least *some* limited due process review must be undertaken by a court in a case in which the defendant contends that the plaintiffs' claims are precluded by a class settlement. This principle follows from, among other things, this Court's holding in *Kremer* that state-court proceedings must "satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law," and that neither state nor federal courts may give preclusive effect to a "constitutionally infirm judgment." 456 U.S. at 481, 482. Thus, there is broad agreement that, as in other types of cases, courts asked to give full faith and credit to a judgment in a settled class action must inquire into whether the court that approved the settlement provided the basic requisites of

due process—which, as this Court taught in *Shutts*, 472 U.S. at 811-12, include notice and opportunity to be heard, adequate representation by the named plaintiff, and, in some types of cases, the opportunity to opt out.[9]

There has, to be sure, been debate over whether a class member raising a subsequent due process challenge may be bound by the settlement court's specific findings with respect to such matters as adequacy of notice or representation. Thus, some courts (especially the Ninth Circuit) have emphasized the limits of the later court's inquiry into due process in the settlement court, and have held that a plaintiff in a later case may be bound by an express determination by the court in the earlier case that a particular claim of inadequate notice or representation was unfounded. *See, e.g., Reyn's Pasta Bella*, 442 F.3d at 746 (prohi-

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[9] *See, e.g., McGowan Investors*, 2010 WL 3199722 at *7-*8; *In re Johns-Manville Corp.*, 600 F.3d 135, 150-58 (2d Cir. 2010); *Wolfert ex rel. Estate of Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165, 170-72 (2d Cir. 2006); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 431 F.3d 141, 145-47 (3d Cir. 2005); *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800, 804-05 (8th Cir. 2004); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 257-60 (2d Cir. 2001), *aff'd by equally divided court*, 539 U.S. 111 (2003); *Grimes v. Vitalink Commun. Corp.*, 17 F.3d 1553, 1558 (3d Cir. 1994); *Epstein*, 179 F.3d at 648-49; *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 32-33 (1st Cir. 1991); *Simmermon v. Dryvit Sys., Inc.*, 953 A.2d 478, 486-88 (N.J. 2008); *Moody v. Sears Roebuck & Co.*, 664 S.E.2d 569, 579-81 (N.C. Ct. App. 2008); *Lamarque v. Fairbanks Cap. Corp.*, 927 A.2d 753, 760-67 (R.I. 2007); *Wilkes ex rel. Mason v. Phoenix Home Life Mut. Ins. Co.*, 902 A.2d 366, 380-83 (Pa. 2006); *Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co.*, 591 S.E.2d 611, 619-20 (S.C. 2004); *State v. Homeside Lending, Inc.*, 826 A.2d 997, 1017-18 (Vt. 2003).

biting collateral attack where plaintiff appeared and objected in rendering court); *Epstein*, 179 F.3d at 648; *cf. Stephenson*, 273 F.3d at 258 (permitting collateral attack where rendering court did not consider adequacy of representation as to specific claims or injuries).

In this case, however, the Ninth Circuit examined the record that the parties offered concerning the state-court proceedings and found that the Kansas courts had *not* determined that the named plaintiff in the settled case provided adequate representation to class members who, like respondents but unlike the Kansas class representative, possessed claims that Sprint had improperly charged them for Washington state taxes in violation of Washington law. As the Ninth Circuit pointed out, the Kansas courts had found only that the class representative's claims were typical of those of class members to whom Sprint had passed through federal regulatory charges, and had not made any finding that the class representative was an adequate representative as to claims that Sprint had made improper charges that were unrelated to the federal regulatory fees at issue in the litigation and that the class representative had not ever incurred. *See* Pet. App. 79a.

Decisions holding that absent class members may be precluded from relitigating whether their particular interests were adequately represented when that issue was expressly considered and decided by the court that approved the settlement (*e.g.*, *Grimes*, 17 F.3d at 1558; *Epstein*, 179 F.3d at 651 (Wiggins, J., concurring)) are thus not on point here. Rather, as the decision below reflects, even courts that, like the Ninth Circuit, have taken a very limited view of the

due process inquiry that a later court may make into a class action settlement will allow adequacy of representation to be examined when the court that approved the settlement did not consider the adequacy issue raised in the later case. As the Second Circuit explained in a decision that similarly reconciled the situations in which a later challenge is allowed and those where it is barred:

> As with most issues arising under the Due Process Clause, the ultimate test of whether an adequacy-of-representation ruling by a class action court precludes a collateral attack turns on whether fundamental fairness was lacking. In the class action context, if the class action court ruled only in general terms that representation was adequate, without any adversarial consideration of the claim now advanced ..., it would be manifestly unfair to preclude [a] collateral attack. On the other hand, if, in the class action, a defendant opposing class certification or an objector to the settlement had made a serious argument that a sub-class was required because of claims substantially similar to [those of the plaintiff in the later action], and that argument had been considered and rejected by the class action court, it would not be unfair to preclude collateral review of that ruling ....

Wolfert, 439 F.3d at 172. Sprint has not demonstrated a conflict of authority on this point.

Indeed, the hollowness of Sprint's claim of conflict among the lower courts is demonstrated by its own primary reliance on other Ninth Circuit cases, most notably *Epstein*. A claimed intracircuit conflict is, at best, a weak reed on which to base a request for re-

view by this Court, *see* S. Ct. R. 10(a), but here there is not even a conflict. To be sure, the decisions Sprint cites illustrate that the Ninth Circuit has been among the courts that have stressed the limits on collateral due process review of class settlements, but they are not inconsistent with the due process analysis in this case. The distinguishing feature is that in *Epstein*, the exact adequacy of representation issue that the absent class members sought to relitigate had been "fully and fairly litigated and necessarily decided" by the court that approved the settlement. *See* 179 F.3d at 651 (Wiggins, J., concurring); *see also Matsushita*, 516 U.S. at 378 ("The claims are clearly within the scope of the release in the judgment, since the judgment specifically refers to this lawsuit."). That is plainly not the case here.

Thus, the Ninth Circuit precedents Sprint cites only prove in the end that even the most limited collateral review of due process issues may in some cases encompass the issue of adequacy of representation. That respondents' due process arguments received credence even in a court that has been as inhospitable to collateral challenges as the Ninth Circuit demonstrates that this case is the poorest possible vehicle for addressing the limits of collateral due process review of class action settlements. Put another way, Sprint's position is not a winning one even under the rule of law it appears to endorse: the *Epstein* standard, which remains the law in the Ninth Circuit and which the Ninth Circuit held did not support Sprint in this case.

Sprint contends that the settlement court in Kansas *did* decide that the class representative adequately represented class members in respondents' position (that is, class members who had additional claims not

possessed or advanced in any way by the class representative). Whether the Ninth Circuit was correct in reading the record before it and the Kansas courts' decisions, however, is a factbound question that does not itself require review by this Court. Moreover, as noted above, the evidence upon which Sprint now relies for its claim that adequacy was actually litigated in *Benney* was not even presented to the courts below and is not properly considered here. Having defaulted on making a fact-specific claim in the lower courts, Sprint should not be permitted to make it for the first time in this Court.

In any event, Sprint's claim that the Kansas court addressed this issue is entirely unconvincing. As the Ninth Circuit pointed out, nothing in the Kansas court's orders even remotely indicated that they considered whether the class representative was an adequate representative with respect to claims relating to different types of charges that he had not paid. The Kansas court's analysis was limited to stating laconically that his claims were typical of those of the class because he had paid the same federal regulatory fees that were the subject of the action, and rejecting all objections in conclusory fashion. Pet. App. 79a, 89a. And even the objections belatedly proffered by Sprint to this Court were not based on the contention that the *Benney* class representative failed to provide adequate representation to persons possessing respondents' claims.[10]

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[10] Sprint makes much of the fact that one objector was a Washington resident, but his objection did not assert claims of inadequate representation based on claims such as those advanced by respondents. *See* Pet. App. G. Other objectors con-

(*Footnote continued*)

Indeed, as the Ninth Circuit observed, there is no indication that the Kansas courts even contemplated that the settlement would extinguish claims that had an entirely different factual predicate, and therefore the Kansas courts would not have seen any reason to consider whether the class representative was adequate with respect to such claims. But whatever the reason, the record lacks any convincing support for the idea that the Kansas courts, *sub silentio*, considered and decided whether the named representative fairly represented respondents as to their Washington claims. Under such circumstances, the Ninth Circuit's willingness to consider adequacy of representation as part of a limited inquiry into the due process afforded respondents creates no division of authority among the lower courts.

2. The Ninth Circuit's Factbound Determination That the Kansas Class Representative Did Not Adequately Represent Washington Class Members with Different Claims Does Not Merit Review.

The Ninth Circuit applied settled law holding that a class representative may be inadequate if his interests do not coincide with, or conflict with, those of a subset of the class because of differences in the types of claims they possess. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625-27 (1997). Here, the Ninth

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tested the scope of the release as to certain claims (unrelated to respondents') that they asserted against Sprint (Pet. App. J), but the release specifically excluded those claims, so the court had no occasion to address adequacy of representation with respect to the claims. Pet. App. 91a.

Circuit found such inadequacy based on the undisputed fact that the named class representative in the Kansas action had no interest in seeking recovery of charges for Washington state B&O taxes because he had not been charged for such taxes (or any comparable state taxes) and accordingly had prosecuted the Kansas action *solely* in the interest of recovering an entirely different set of charges. Even if the Ninth Circuit's adequacy-of-representation finding were case-dispositive (which, again, it is not because of the court's ultimate reliance on Kansas preclusion law to hold respondents' claims not barred by the settlement), there would be no reason for this Court to review such a factbound and facially valid ruling.

Sprint, however, contends that the Ninth Circuit somehow concocted a "new" standard of adequacy of representation that is contrary to this Court's recent ruling in *Reed Elsevier, Inc. v. Muchnick,* 130 S. Ct. 1237, 1242-43, 1249 (2010). Sprint asserts that *Reed Elsevier* "reiterated that named plaintiffs are permitted to negotiate the release of claims that differ from those that the named plaintiffs themselves possess." Pet. 30.

This characterization of the holding of *Reed Elsevier* will undoubtedly come as a surprise to the Court. Other than mentioning the circumstance that the class representatives in the case all had registered their copyrights while other class members had not, the Court's opinion did not say *anything* about, let alone express any holding regarding, the authority of named class plaintiffs to negotiate settlements of claims that differ from their own claims. It held only that registration of a copyright is not a jurisdictional prerequisite to a suit for copyright infringement, and

thus that a federal court does not lack *jurisdiction* to approve a settlement of infringement claims involving unregistered copyrights. *See id.* at 1241, 1248-49. Indeed, in granting certiorari, the Court rewrote the question presented to ask *only* "whether 17 U.S.C. § 411(a) restricts the subject-matter jurisdiction of the federal courts over copyright infringement actions." *Id.* at 1243. Beyond reversing the court of appeals' determination that the district court lacked subject-matter jurisdiction, the Court did not address the fairness or adequacy of the settlement, the appropriateness of class certification, the definition of the class, or whether the class representatives adequately represented absent class members with different types of claims. *See id.* at 1249.

Beyond its mischaracterization of *Reed Elsevier*, Sprint suggests somewhat obliquely that the Ninth Circuit's decision conflicts with other appellate decisions holding that a class representative may settle claims that are not asserted in the class action, including claims that could not be asserted in the action because of limits on the jurisdiction of the forum court. Pet. 30-31 n.17.

Again, however, Sprint's claims of conflict are untrue. The Ninth Circuit has repeatedly agreed with the other courts of appeals that a class settlement may bar claims that were not presented, and even claims that *could not have been presented*, in the underlying action. *See Williams v. Boeing Co.*, 517 F.3d at 1133-34; *Howard v. America Online Inc.*, 208 F.3d at 747; *Class Plaintiffs v. City of Seattle*, 955 F.2d at 1287. Indeed, one of the cases Sprint cites is another Ninth Circuit decision, *Reyn's Pasta Bella*, 442 F.3d at 748. *See* Pet. at 31 n.17. And in this very case, the

Ninth Circuit expressly acknowledged that "[a] settlement agreement may preclude a party from bringing a related claim in the future 'even though the claim was not presented and might not have been presentable in the class action,'" Pet. App. 16a, subject to the requirement that the claims arise from the same "factual predicate." *Id.*

What Sprint fails to recognize is that whether a class representative can settle claims that he has not formally asserted (including claims that cannot be brought for jurisdictional reasons in the forum he has chosen) is an entirely different question from whether he is an adequate representative of other class members with respect to claims that he does not even possess and in which he has no conceivable interest. The latter is the question that the Ninth Circuit discussed in this case. Sprint cites no authorities of any kind holding that a court may not consider a class representative's complete lack of interest in claims arising from wholly different factual circumstances than his own as part of the basis for concluding that the class representative was an inadequate representative with respect to those claims. Absent some such basis for contending that the Ninth Circuit's standard was legally flawed, Sprint's challenge to the court's finding of lack of adequate representation is nothing more than a factbound and unconvincing challenge to the court of appeals' application of law to the particular facts of this case.

III. Sprint's Policy Arguments Provide No Basis for Granting Review in This Case.

Sprint argues at length that review by this Court is urgently needed to serve two policy goals: promoting comprehensive class settlements, and enforcing a

supposed "obligation" on the part of absent class members to opt out or object if they are not adequately represented by class representatives who have negotiated a settlement that purports to bind them. Neither policy supports review of this case.

As for the promotion of comprehensive class settlements, Sprint overlooks that the very cases on which it relies uniformly hold that the policy is served by the exact rule applied by the Ninth Circuit in this case (as a matter of Kansas preclusion law): A settlement agreement may broadly release class claims, including claims not formally asserted in the underlying action (and even claims beyond the jurisdiction of the court in that action), but only if those claims arise from the same factual predicate as the claims in the case. *See, e.g., Grimes*, 17 F.3d at 1564 (recognizing that "a state court class representative cannot release federal claims arising from a different factual predicate than that before the state court"); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 326 n.82 (3d Cir. 1998) (favorably citing Ninth Circuit precedent for the proposition that "the weight of authority holds that a federal court may release claims which are not in the complaint provided they are based on the 'same factual predicate'").

Indeed, in the Second Circuit's influential *TBK Partners* opinion, which articulated the "identical factual predicate" standard, the court expressly justified the standard as promoting broad (but not overbroad) class settlements:

> [I]n order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the iden-

> tical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action.

675 F.2d at 460. As the many cases applying the standard illustrate, it typically results in the *enforcement* of broad settlement agreements against class members in subsequent cases. *See supra*, at 11-12. That its application may occasionally, as in this case, result in a ruling that claims wholly outside the scope of the original action are not precluded hardly suggests that it does not, on the whole, promote class settlements.

As for the supposed "obligation" of class members to opt out or object, Sprint's petition is notable for its failure to cite any cases holding that absent class members have any such "obligation" if they wish to preserve claims that are outside the scope of preclusion or as to which they have not been afforded minimal due process in the settlement court. Moreover, Sprint's assertion that class members who neither opt out nor object have no other recourse fails to come to grips with the fact that, as this Court held in *Shutts*, the minimal requirements of due process include not only notice and opt-out rights, and the right to appear and object, but also adequate representation by the named plaintiff throughout the proceedings. 472 U.S. at 812. If the ability to object or opt out was by itself sufficient to provide absent members with due process, this Court would not have included adequate representation as an independent requisite.

Nor does the decision below give absent class members too much incentive to "sandbag" by refraining from opting out and withholding objections to the fairness of a settlement. Plaintiffs who neither opt out

nor object take a substantial risk because their failure to do so substantially limits their ability to avoid preclusion in a later case. To do so, they must either (1) show that the the class settlement does not foreclose their claims under ordinary preclusion law principles (a claim that they obviously need not opt out or object to preserve), or (2) carry the heavy burden of showing a violation of their constitutional rights in the settlement court—a burden that is particularly heavy in courts that, like the Ninth Circuit, emphasize the limits on such review and hold class members to the settlement court's resolution of due process issues that were actually litigated and resolved in that court.

Sprint's policy arguments, moreover, neglect entirely that there is another side of the coin. The interest in promoting settlement must be tempered by the recognition that class actions are not supposed to be means by which defendants, in cooperation with complaisant class representatives, extinguish substantial claims outside the scope of the class action without any consideration. Thus, as the Second Circuit recognized in *TBK Partners*, "special care must be taken to ensure that the release of a claim not asserted within a class action or not shared alike by all class members does not represent an 'advantage to the class ... by the uncompensated sacrifice of claims of members, whether few or many.'" 675 F.2d at 461 (quoting *Nat'l Super Spuds, Inc. v. New York Merc. Exch.*, 660 F.2d 9, 19 (2d Cir. 1981)). That concern is particularly acute where, as here, precluding claims of absent class members would effectively allow "a class representative not sharing common interests with other class members" to "throw the others' claims 'to the winds.'" *Id.* at 462.

In the end, however, the discussion of policy is largely beside the point in this case. Because the result below turned on the application of state preclusion law, the balancing of policy considerations is, in the first instance, a matter for the relevant state court. The Kansas courts remain free, if they believe that the "identical factual predicate" standard is too permissive, to adopt a more stringent preclusion standard (which might then have to be tested against the demands of due process). Policy arguments, however, do not justify review by this Court of a holding based on the court of appeals' prediction of how Kansas courts would apply Kansas preclusion principles.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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