No. 03-10623

IN THE SUPREME COURT OF THE UNITED STATES

LILLIE B. AYERS, PETITIONER

v.

BENNIE G. THOMPSON, UNITED STATES CONGRESSMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly approved the settlement agreement in a class action challenging segregation in Mississippi's system of higher education.

2. Whether the district court correctly denied objecting class members' motion to opt out of the class at the settlement stage.

3. Whether the district court correctly refused to allow counsel for petitioner independently to seek attorney's fees when the settlement agreement set aside an amount for attorney's fees to be shared by class counsel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A22) is reported at 358 F.3d 356. The district court's order and opinion denying the motion to opt out of the class (Pet. App. A56-A67), its order conditionally approving the settlement agreement (Pet. App. A42-A51), and its order approving the settlement agreement and entering final judgment (Pet. App. A24-27) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 2004. A petition for rehearing was denied on February 20, 2004 (Pet. App. A2). The petition for a writ of certiorari was filed on

May 20, 2004. A motion for leave to file an amended petition was filed on June 30, 2004.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1975, a group of private individuals filed suit against the State of Mississippi, the Governor of Mississippi, and the Mississippi Board of Trustees of the Institutions of Higher Learning ("Board"), seeking to compel the desegregation of Mississippi's system of higher education.[2] Plaintiffs claimed that Mississippi's system violated, inter alia, the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. The United States intervened in support of plaintiffs. The district court certified a class of "[a]ll black citizens residing in Mississippi * * * who have been, are, or will be discriminated against on account of race in receiving equal educational opportunity and/or equal employment

[1] The motion for leave to file an amended petition was not opposed and remains pending. Accordingly, we address petitioner's contentions both in the original petition (Pet.) and in the proposed amended petition (Amended Pet.).

[2] That system comprises five historically white universities and three historically black universities. The historically white universities are the University of Mississippi, Mississippi State University, Mississippi University for Women, the University of Southern Mississippi, and Delta State University. The historically black universities are Jackson State University, Mississippi Valley State University, and Alcorn State University. Pet. App. A6 n.3.

opportunity" in Mississippi's public universities. Pet. App. A5, A6 & n.2.

2. After a lengthy trial, the district court ruled in favor of defendants, holding that defendants were discharging their duty to dismantle de jure segregation in the Mississippi higher-education system by adopting race-neutral policies in admissions and other areas. Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987). The court of appeals affirmed. 914 F.2d 676 (5th Cir. 1990) (en banc).

This Court vacated and remanded. United States v. Fordice, 505 U.S. 717 (1992). The Court rejected the lower courts' conclusion that defendants could disestablish Mississippi's de jure segregated system simply by adopting race-neutral policies, and instead held that defendants were obligated to "eradicate[] policies and practices traceable to its prior de jure dual system that continue to foster segregation." Id. at 728. The Court identified four, non-exclusive "remnants" of the prior system that, while facially neutral, were constitutionally suspect: "admissions standards, program duplication, institutional missions assignments, and continued operation of all eight public universities." Id. at 733. The Court warned that "Mississippi must justify these policies or eliminate them." Ibid. In conclusion, the Court rejected the proposition that it should "order the upgrading of [Mississippi's historically black universities] solely so that they

may be publicly financed, exclusively black enclaves by private choice." Id. at 743. The Court reasoned that "[t]he State provides these facilities for all its citizens and it has not met its burden under Brown to take affirmative steps to dismantle its prior de jure system when it perpetuates a separate, but 'more equal' one." Ibid.

3. After another lengthy trial, the district court ruled in favor of plaintiffs and entered a remedial decree. Ayers v. Fordice, 879 F. Supp. 1419 (N.D. Miss. 1995). In that decree, the court adopted the Board's proposal for new, uniform admissions standards, which remain in effect today. Id. at 1477-1479, 1494. Those standards base admission not only on an applicant's score on the American College Test (ACT), but also on the applicant's high school grades. Id. at 1477-1478. Moreover, an applicant who does not meet those standards can gain admission by participating in a spring screening program or completing a summer remedial program. Id. at 1478-1479. The court also required additional funding and new academic programs at two of Mississippi's three historically black universities, Jackson State and Alcorn State, but refused to adopt the Board's proposal to merge the third historically black university, Mississippi Valley State, with Delta State. Id. at 1492, 1494-1496.

The court of appeals affirmed in part, vacated in part, and remanded. 111 F.3d 1183 (5th Cir. 1997). The court largely

affirmed the district court's adoption of the Board's proposed admissions standards, but instructed the district court to monitor the effectiveness of the spring screening and summer remedial programs and to consider whether the use of ACT cutoffs in awarding scholarships should also be eliminated. Id. at 1193-1209. The court likewise substantially affirmed the district court's decision to require additional funding and new academic programs at the historically black universities, but ordered the district court to require the Board to consider additional new programs, and also instructed the district court to assess disparities in equipment funding across universities. Id. at 1209-1225.

This Court denied certiorari. 522 U.S. 1084 (1998).

4. On remand, the district court issued a series of orders on various subjects. The court ruled that it would no longer consider the merger of Delta State and Mississippi Valley State, and instead directed the Board to consider new programs at Mississippi Valley State. The court noted that the Board was no longer using ACT scores as the sole criterion in awarding scholarships, but ordered the Board to defend its new policy of using ACT scores as one factor in its scholarship decisions. Finally, the court concluded that the Board had complied with its remedial obligations concerning Jackson State. By early 2001, therefore, most of the outstanding issues in the litigation had been resolved. The only remaining issues were (i) further review

of the uniform admissions standards, the spring screening and summer remedial programs, and the use of ACT scores in awarding scholarships; (ii) investigation of new academic programs at Mississippi Valley State and Alcorn State; and (iii) assessment of equipment funding. Pet. App. A9-A10.

5. On March 29, 2001, following extensive negotiations, the parties reached a settlement. The settlement agreement was signed by Congressman Bennie G. Thompson, who had been designated lead plaintiff by the district court; the Governor and Attorney General of Mississippi and the President of the Board; counsel for the United States; counsel for the defendants; and all counsel for the plaintiffs except counsel for petitioner. The agreement provided for the establishment, enhancement, and continuation of a variety of academic programs at the historically black universities, at a cost of more than $245 million over 17 years. The agreement also authorized $75 million in capital improvements at those universities. The agreement provided $6.25 million over ten years in additional financial aid for participants in the summer remedial program. Further, the agreement established a publicly funded endowment, to consist of $70 million over a 14-year period, and a privately funded endowment, with a goal of $35 million over a seven-year period, with the income for the endowments to be used for the recruitment of non-black students and for the academic programs provided by the agreement. Under that provision, upon

maintaining a non-black enrollment of 10% for a three-year period, each university is entitled to assume control over its share of the principal of the endowment, and thereafter to use the income from the endowment for any sound academic purpose. Finally, the agreement set aside $2.5 million for all attorney's fees and costs. The agreement obligated the Board to report annually to lead counsel for the plaintiffs and counsel for the United States concerning the agreement's implementation, and required any subsequent dispute concerning the agreement to be submitted to the district court. Pet. App. A255-A280.[3]

6. a. The day after the settlement was reached, a group of 99 class representatives and members, represented by counsel for petitioner, moved to opt out of the class. After a two-day evidentiary hearing, the district court denied the motion. Pet. App. A56-A67. The court noted that, because the original complaint sought only injunctive and declaratory relief, the class had been certified under Federal Rule of Civil Procedure 23(b)(2). Id. at A58-A59. Unlike members of a Rule 23(b)(3) class, the court continued, members of a Rule 23(b)(2) class have no automatic right to opt out. Id. at A59-A62. The court reasoned that it was

[3] In addition, the agreement settled a collateral dispute concerning the Board's proposal to expand programs at the University of Southern Mississippi's Gulf Coast campus. Pet. App. A277. That dispute is currently before the Fifth Circuit and has been stayed pending disposition of the instant petition. See id. at A1.

inappropriate to allow movants to opt out because the instant case was a "pure Rule 23(b)(2) class action in which the claims alleged and proved are claims for which only classwide relief may be granted." Id. at A62. The court proceeded to reject movants' claim that they were inadequately represented at the settlement, noting that neither movants nor their counsel had objected to the designation of the lead plaintiff or lead counsel, id. at A63, and adding that "the allegations of inadequate representation of class members [were] wholly unsubstantiated," id. at A65. The court concluded by stating that "[t]here is no evidence in the record of collusion in the settlement negotiations," ibid., and that "[t]here is no legal basis for the asserted right of each class member to directly participate in settlement negotiations," id. at A66.

b. A group of class representatives and members also objected to the proposed settlement. After a three-day fairness hearing, the district court issued a preliminary order conditionally approving the settlement agreement. Pet. App. A42-A51. Because the settlement would cost Mississippi over $400 million, the court requested evidence that the Mississippi Legislature would agree to fund the settlement. Id. at A50.

After the Mississippi Legislature endorsed the proposed settlement, the district court issued an order approving the settlement and entering final judgment. Pet. App. A24-A27. The court recognized that the settlement went further than the court-

ordered remedial decree then in place. Id. at A25. The court reasoned, however, that "[i]t is not illegal to do more than that required by the Constitution," even if "[i]t does raise the question of how the policymakers of the State choose to allocate the State's resources." Ibid. The court concluded that, as a result of the commitments made in the settlement, "the defendants * * * are in full compliance with the law." Id. at A27.

7. A group of class representatives and members appealed from the district court's orders. The court of appeals affirmed. Pet. App. A3-A22.

a. Concerning the district court's denial of appellants' motion to opt out of the class, the court of appeals reasoned that members of a class certified under Rule 23(b)(2) were "[t]ypically" allowed to opt out of the class only if the case was a "hybrid" class action, in which individual monetary relief was being sought in addition to classwide injunctive or declaratory relief. Pet. App. A20. Because appellants had failed to demonstrate the existence of distinct individual claims, the court concluded that there was no basis for allowing appellants to opt out of the class. Id. at A21. Moreover, the court rejected appellants' claim that they were entitled to opt out of the class under Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), because Mississippi law provided them with the right to proceed separately. Pet. App. A21. The court reasoned that Erie was inapplicable because the court had

federal-question, rather than diversity, jurisdiction, and added that, even were it applicable, Erie would not affect the application of a federal rule of civil procedure in federal court. Ibid.

b. Concerning the district court's approval of the settlement agreement, the court of appeals reviewed the fairness and adequacy of the settlement under the six-factor test set out in its earlier decision in Parker v. Anderson, 667 F.2d 1204 (5th Cir. 1982). Pet. App. A14. First, the court of appeals rejected appellants' "vague assertions of collusion" in the settlement process, reasoning that the district court had found appellants' allegations of collusion to be unsupported and that appellants pointed to no evidence that contradicted that finding. Id. at A15. Second, the court observed that the settlement would reduce the risks and burdens of continued litigation and that prior proceedings in the case had "largely resolved the controlling legal issues." Ibid. Third, the court rejected appellants' contentions that the relief provided by the settlement was inadequate. Id. at A15-A18. With regard to appellants' claim that the settlement provided insufficient funding and new programs for the historically black universities, the court concluded that "[e]ach of [a]ppellants' contentions has been addressed by prior court rulings." Id. at A16. With regard to appellants' challenge to the provision of the settlement requiring the historically black

universities to achieve 10% non-black enrollment before taking full control of their newly created endowments, the court reasoned that "[t]his provision will not encourage the historically black universities to discriminate in admitting students because the current admissions standards are uniform across the state-university system." Id. at A17. "Instead," the court noted, "the ten-percent threshold will provide the historically black universities with a legitimate incentive to recruit and to attract other-race students." Ibid. The court concluded that "[r]ejection of the settlement and further litigation is unlikely to lead to greater relief for the [plaintiff] class." Id. at A18.

Fourth, the court of appeals reasoned that the mere fact that class members opposed the settlement was an insufficient basis for rejecting it, and found that the record did not support appellants' claim that approximately 4000 class members opposed the settlement. Pet. App. A18 & n.26. Fifth, the court determined that the class was adequately represented during settlement negotiations, noting that "[a]ppellants have not shown that any record evidence supports their inadequate-representation allegation." Id. at A18-A19. Sixth, the court, citing various decisions from this Court, concluded that it was not inappropriate for attorney's fees to be negotiated at the same time as the rest of the settlement. Id. at A19-A20.

c. Finally, the court of appeals rejected counsel for petitioner's contention that he was entitled to have his fee determined separately, rather than according to the provision for attorney's fees in the settlement agreement. Pet. App. A21-A22. As a preliminary matter, the court reasoned that counsel's claim was not ripe because the district court had not yet entered an order distributing the allocated amount for attorney's fees among class counsel. Id. at A21. Moreover, the court noted that counsel "provide[d] no authority for the proposition that he should be allowed to file a subsequent claim for attorneys' fees when the district court has approved a settlement that contains an agreement as to fees." Ibid. Citing authority from this Court, the court of appeals reasoned that the "preferred view" was that a claim for attorney's fees under the relevant fee-shifting provision, 42 U.S.C. 1988(b), was a claim possessed by the client, and could therefore be settled by the client along with the rest of the case. Ibid.[4]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of

[4] Of the four individuals listed on the petition for certiorari, only one, Lillie B. Ayers, appears to have been listed as an appellant before the court of appeals, and therefore to be a proper petitioner in this Court. Compare Pet. i with Pet. App. A3.

appeals. The petition for a writ of certiorari should therefore be denied.

1. Regarding the court of appeals' affirmance of the approval of the settlement agreement, petitioner does not contend that the test applied by the court of appeals for evaluating the fairness and adequacy of the proposed settlement conflicts with the tests employed by other courts. Instead, petitioner challenges several of the court of appeals' subsidiary determinations concerning the fairness and adequacy of the settlement. Further review of those case-specific determinations is not warranted.

a. Petitioner first contends (Pet. 22; Amended Pet. 10) that the court of appeals' determination that the relief provided by the settlement was adequate conflicts with this Court's earlier decision in United States v. Fordice, 505 U.S. 717 (1992), on the ground that "this Court never said that [historically black universities] cannot be made equal in appropriate circumstances" (Amended Pet. 10). In Fordice, however, this Court did not hold that it was either necessary or sufficient for historically black universities to receive the same level of funding as historically white universities. To the contrary, the Court expressly rejected the proposition that historically black universities should be upgraded "solely so that they may be publicly financed, exclusively black enclaves by private choice," 505 U.S. at 743, and instead held that policies and practices traceable to a State's prior

system of de jure segregation should be eliminated to the extent they continue to have segregative effects and have no educational justification, id. at 731. In affirming the district court's approval of the settlement agreement, the court of appeals reasoned that "[r]ejection of the settlement and further litigation is unlikely to lead to greater relief for the [plaintiff] class, particularly since most of the relief sought by [a]ppellants has been foreclosed by our 1997 decision in this case." Pet. App. A18. The court of appeals concluded, moreover, that "the targeted programmatic enhancements provided for in the agreement are intended to promote desegregation at the historically black universities." Ibid. Nothing in the court of appeals' decision is inconsistent with this Court's decision in Fordice.

b. In a related vein, petitioner suggests (Pet. 22; Amended Pet. 10) that the court of appeals' determination that the relief provided by the settlement was adequate conflicts with the decisions of other courts of appeals concerning "the educational soundness of open admission at [historically black universities]." In the decision under review, however, the court of appeals did not revisit the district court's earlier decision requiring Mississippi to adopt a uniform admissions policy for all of its universities, see Ayers v. Fordice, 879 F. Supp. 1419, 1477-1479, 1494 (N.D. Miss. 1995), but instead merely upheld the provision of the settlement requiring historically black universities to achieve 10%

non-black enrollment before taking full control of their newly created endowments. It did so on the ground that the provision "will not encourage the historically black universities to discriminate in admitting students," because those universities "lack discretion to deny entry to those applicants who meet the uniform criteria." Pet. App. A17. Instead, the court concluded, the provision "will provide the historically black universities with a legitimate incentive to recruit and to attract [non-black] students." Ibid.

The portion of the court of appeals' decision discussing that provision does not conflict with the decisions from other circuits on which petitioner relies. In Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994), the court did not address admissions policies at all, but instead held (in the portion of the opinion cited by petitioner) that Alabama's allocation of land-grant funds between historically white and historically black universities was traceable to de jure segregation for purposes of Fordice. Id. at 1546-1552. In Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986), the court upheld a consent decree requiring Tennessee's professional schools to pre-enroll a specified number of black undergraduates for a five-year period. Id. at 802-803, 810. Those cases do not suggest that it is constitutionally impermissible for a State to create incentives for historically segregated

institutions to recruit more diverse student bodies, without in any way altering the race-blind criteria for admission.

c. Petitioner asserts (Pet. 38-40; Amended Pet. 30-32) that the court of appeals erred by determining that the class was adequately represented during settlement negotiations. As a preliminary matter, the question of adequate representation pertains not to the fairness and adequacy of the settlement itself for purposes of Federal Rule of Civil Procedure 23(e), but rather to the discrete requirements for class certification in Rule 23(a). See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620-621 (1997). In any event, petitioner provides no reason to disturb the lower courts' determination that the class was adequately represented. The district court found that neither the objecting plaintiffs nor their counsel had challenged the designation of the lead plaintiff or lead counsel, Pet. App. A63; that "the allegations of inadequate representation of class members [were] wholly unsubstantiated," id. at A65; and that "there [was] no evidence in the record of collusion in the settlement negotiations," ibid. The court of appeals affirmed those findings, id. at A15, A19; noted that counsel for petitioner had been kept informed of the settlement negotiations, id. at A15; and added that "[the fact] [t]hat counsel for the United States was personally involved in the settlement negotiations gives us an additional reason to conclude that the class was adequately represented," id. at A19 & n.29. Like the

court of appeals' other determinations concerning the settlement agreement, the court's fact-bound determination that the class was adequately represented thus does not merit further review.

2. Regarding the court of appeals' affirmance of the denial of the motion to opt out of the class, petitioner seemingly does not challenge the court of appeals' holding that the objecting class members were not automatically entitled to opt out of a class certified under Rule 23(b)(2). Instead, petitioner contends (Pet. 34-36; Amended Pet. 19-27) only that the court of appeals should have held that the objectors were entitled to opt out under Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), because Mississippi law provided them with the right to proceed separately. It is true that Mississippi, unlike most States, has no provision for class actions in its courts. See, e.g., USF&G Ins. Co. v. Walls, No. 2002-IA-00185-SCT, 2004 WL 1276971, at *5 (Miss. June 10, 2004). As the court of appeals explained, however, Erie is inapplicable here for the simple reason that the district court exercised federal-question, rather than diversity, jurisdiction over this case. Pet. App. A21. Moreover, as the court of appeals also noted, in applying Erie, this Court has never voided the application of a federal rule of civil procedure in federal court in the face of a directly conflicting state rule. Ibid.; see Hanna v. Plumer, 380 U.S. 460, 470 (1965). Petitioner cites no authority for the novel proposition that class members in federal

class actions must be allowed to opt out whenever the law of the forum State disfavors or does not recognize the class-action mechanism for state-court litigation. Accordingly, further review on this claim is not warranted.[5]

3. Finally, regarding the court of appeals' ruling on attorney's fees, petitioner renews the contention (Pet. 36-38; Amended Pet. 27-30) that counsel is entitled to have his fee determined separately, rather than according to the provision for attorney's fees in the settlement agreement. As the court of appeals noted, however, counsel's claim was not ripe because the district court had not yet entered an order distributing the attorney's fees allocated by the settlement agreement to class counsel. Pet. App. A21. Moreover, as the court of appeals also noted, this Court has indicated that a claim for attorney's fees under 42 U.S.C. 1988(b) belongs to the client, and can therefore be settled by the client together with the client's substantive claims. Ibid.; see Evans v. Jeff D., 475 U.S. 717, 730 & n.19 (1986). Petitioner cites no contrary authority suggesting that an attorney is permitted to seek fees separately notwithstanding the existence of a fee provision in an otherwise valid and binding

[5] Petitioner also hints (Amended Pet. 21) that Rule 23(b)(2), as applied in this case, is invalid under the Rules Enabling Act, 28 U.S.C. 2072. Because petitioner failed to demonstrate the existence of any distinct individual claims, however, the application of Rule 23(b)(2) here cannot be said to "abridge, enlarge or modify any substantive right." 28 U.S.C. 2072(b).

settlement agreement. And to the extent that counsel for petitioner is merely challenging the allocation among class counsel of the attorney's fees provided by the settlement agreement (Amended Pet. 29), that fact-bound and unripe claim, like petitioner's other claims, does not merit this Court's review.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Petitioner also contends (Pet. 30; Amended Pet. 16) that certiorari is warranted to determine "[w]hen and under what circumstances" a reviewing court must conduct an "independent analysis" of the remedy in a desegregation case under Title VI, rather than the Equal Protection Clause. That claim fails, however, because "the reach of Title VI's protection extends no further than the Fourteenth Amendment." Fordice, 505 U.S. at 732 n.7.

Finally, petitioner asserts (Amended Pet. 32-34) that this Court should grant certiorari to consider her challenge to the provision of the settlement agreement resolving the collateral dispute over the Board's proposal to expand programs at the University of Southern Mississippi's Gulf Coast campus. Petitioner, however, did not challenge that provision in the court of appeals, and petitioner's claim is therefore waived.