RECORD NOS.

11-3696(L);

Consolidated with 11-3883; 11-3729; 11-3834; 11-3908; 11-3910; 11-3916; 11-3965; 11-3970; 11-3972; 11-4061; 11-4064

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARL BLESSING, *et al.,* on behalf of himself and all others similarly situated,
Plaintiffs-Appellees,

v.

SIRIUS XM RADIO, INC.,
Defendant-Appellee,

v.

NICHOLAS MARTIN, *et al.*
Objectors-Appellants.

On Appeal from the United States District Court
for the Southern District of New York, No. 09-cv-10035 (HB) (RLE)

Brief for *amicus curiae* Center for Individual Rights
in support of Objectors-Appellants and in support of reversal

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CORPORATE DISCLOSURE STATEMENT

The Center for Individual Rights is a non-profit corporation. It has no parent or subsidiary corporations.

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INTEREST OF AMICUS CURIAE

The Center for Individual Rights ("CIR") is public interest law firm based in Washington, D.C.[1] It has litigated many discrimination lawsuits, including several in the Supreme Court. It has a particular interest in, and has participated in numerous cases concerning, what it views as unconstitutional racial classifications by government. *E.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 329 (2003); *United States v. Brennan*, 650 F.3d 65 (2d Cir. 2011); *Brennan v. New York City Bd. of Educ.*, 260 F.3d 123 (2d Cir. 2001). CIR has participated as *amicus curiae* in numerous United States Supreme Court cases relevant to the issue in this case. Recently, CIR filed an amicus brief in the Second Circuit appeal in *Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008), in which one of the arguments in that brief was mentioned by a number of the Second Circuit judges after judgment was issued, in various decisions concurring with and dissenting from the decision to deny en banc rehearing. *Ricci v. DeStefano*, 530 F.3d 88, 91 (2d Cir. 2008) (Parker, J., concurring) ("As the dissent is well aware, the plaintiffs did not argue the mixed-motive theory; a non-party raised it in an amicus brief."); *id.* at 89 (Calabresi, J., concurring) (Judge Cabranes "would be precisely right [in arguing that the district court and the circuit panel should have

[1] No counsel for a party authored this brief in whole or in part. No person other than *amicus curiae* (and no party or party's counsel) contributed any money intended to fund the preparation or submission of this brief.

considered whether defendants were influenced by mixed motives] . . . except for the fact that that type of analysis is not available to us in this case . . .[because] [t]he parties did not present a mixed motive argument.") (brackets and second ellipsis added); *id.* at 92 n.2 (Jacobs, J., dissenting) (rejecting the proposition that the court cannot consider matters not presented by the parties as "unsound"); *id.* at 100 (Cabranes, J., dissenting).

STATEMENT OF ISSUE

Did the class certification order in *Blessing v. Sirius XM* imposing race and sex requirements on class counsel violate the Fifth Amendment to the United States Constitution?

ARGUMENT

I. Background

In a class certification order in *In re J.P. Morgan*, Judge Baer first imposed an unprecedented race and gender requirement on class counsel. *In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 277 (S.D.N.Y. 2007). He first noted the broad discretion that Rule 23 gives courts to consider "any other factors relevant to counsel's ability to fairly and adequately represent the interests of the class." *Id.* Then, based only upon a statement that the class "includes thousands of Plan participants, both male and female, *arguably* from diverse racial and ethnic backgrounds" (emphasis added), he went on to explain

> Therefore, I believe it is important to all concerned that there is evidence of diversity, in terms of race and gender, of any class counsel that I appoint. A review of the firm biographies provides some information on this score. Here, it appears that gender and racial diversity exists, to a limited extent, with respect to the principal attorneys involved in this case. Co-lead counsel has met this Court's diversity requirement—i.e., that at least one minority lawyer and one woman lawyer with requisite experience at the firm be assigned to this matter.

Id.

A few years later, in *Spagnola v. Chubb Corp.*, 264 F.R.D. 76 (S.D.N.Y. 2010), Judge Baer was again faced with a large proposed class consisting of homeowners insurance policy holders. He denied class certification based in part

on a finding that the named plaintiffs were not adequate representatives of the class. Before reaching this conclusion, however, he pointed out the lack of information about the race and gender makeup of proposed class counsel:

> Defendants raise no argument to challenge the expertise or competence of [proposed class counsel] to litigate this case. However, it is worth noting that, as this Court has held in the past, because "[t]he proposed class includes thousands of [policyholders], both male and female, arguably from diverse racial and ethnic backgrounds . . . it is important to all concerned that there is evidence of diversity, in terms of race and gender, of any class counsel." Here [proposed counsel] has provided no information—firm resume, attorney biographies, or otherwise—on this score.

Id. at 96 n.23 (quoting *In re J.P. Morgan*, 242 F.R.D. at 277). Later, in *In re Gildan Activewear*, after finding again that the proposed class "includes thousands of participants, both male and female, *arguably* from diverse backgrounds" (emphasis added), and that it is "therefore important to all concerned that there is evidence of diversity, in terms of race and gender, in the class counsel I appoint," Judge Baer ordered class counsel to "make every effort to assign to this matter at least one minority lawyer and one woman lawyer" to the case. Class Action Order, *In re Gildan Activewear Inc. Sec. Litig.*, No. 08 Civ. 5048 (S.D.N.Y. Sept. 20, 2010), available at http://amlawdaily.typepad.com/GildanOrder.pdf.

In the case at bar, Judge Baer again revisited this issue, this time in connection with a class action on behalf of satellite radio subscribers. In the opinion granting class certification, the court again cited to *J.P. Morgan* and stated

as follows:

> In consideration of other matter pertinent to counsel's ability to fairly and adequately represent the class, and in accordance with my previous opinions on this score, [proposed counsel] should ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics. *See In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 277 (S.D.N.Y. 2007).

Opinion and Order , *Carl Blessing et al. v. Sirius XM Radio Inc.*, 09 Civ. 10035 at 14 (March 29, 2011) (hereinafter "Order"). Tellingly, at no point in the case at bar (or in *J.P. Morgan* and its progeny) did Judge Baer state that he had a compelling interest to justify his order.

Judge Baer stands alone among federal judges in this practice. *See* Michael H. Hurwitz, *Judge Harold Baer's Quixotic Crusade for Class Counsel Diversity*, 17 Cardozo J.L. & Gender 321, 327 (2011).

II. The district court's order requiring class counsel to reflect the race and gender metrics of the class violates the equal protection principle.

A. Judicial orders are subject to the equal protection component of the Fifth Amendment.

Although the Fifth Amendment contains no explicit right to equal protection, it forbids discrimination that is so unjustifiable as to violate due process, and the Supreme Court's approach to Fifth Amendment equal protection claims "has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (citing

Schneider v. Rusk, 377 U.S. 163, 168 (1964)); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Thus, if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment had it been implemented by a State, then the same classification, when imposed by a part of the federal government, violates the due process requirements of the Fifth Amendment. *Johnson v. Robison*, 415 U.S. 361, 366 (1974). *See also*, *Richardson v. Belcher*, 404 U.S. 78, 81 (1971). Judicial orders "have long been held to be state action governed by the Fourteenth Amendment." *Palmore v. Sidoti*, 466 U.S. 429, 433 n.1 (1984); *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). *Cf. United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (subjecting race conscious federal court remedial order to strict scrutiny).

B. Racial classifications are inherently suspect and are subject to strict scrutiny.

The central purpose of the equal protection principal is to prevent the government from purposefully discriminating between individuals on the basis of race. *Shaw v. Reno*, 509 U.S. 630, 642 (1993). *See also Palmore*, 466 U.S. at 432 ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."). Racial classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100

(1943). *See also Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (Racial classifications threaten to "stigmatize" and "incite racial hostility."). Race based classifications "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting). Race neutrality is the "driving force of the Equal Protection Clause" and racially based classifications are permitted only as a last resort. *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009). Race and ethnic distinctions of any sort are "inherently suspect" and call for "the most exacting judicial examination." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 (1986) (plurality opinion); *Regents of the University of California v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.). Thus, "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Wygant*, 476 U.S. at 273-74 (plurality opinion); *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980).

The standard of review under the equal protection component of the Fifth Amendment's Due Process Clause ensures that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the

strictest judicial scrutiny." *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 224 (1995). *See also Gratz v. Bollinger*, 539 U.S. 244, 269 (2003) (the standard of review "is not dependent on the race of those burdened or benefited by a particular classification," all are subject to strict scrutiny); *Bakke*, 438 U.S. 265, 295-99 (1978) (opinion of Powell, J.) (The level of scrutiny does not change simply because the classification operates against a group not traditionally discriminated against, or because the classification is benign.).

Strict scrutiny is a two prong test. First, any racial classification "must be justified by a compelling government interest;" second, "the means chosen by the State to effectuate its purpose must be narrowly tailored to the achievement of that goal." *Wygant*, 476 U.S. at 274; *Fullilove*, 448 U.S. at 480. In the case at bar, Judge Baer's requirement satisfies neither prong and, therefore, violates the Equal Protection principle.

Likewise, gender-based classifications are only permitted upon a demonstration of an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. 515, 531 (1996). While slightly less onerous than the standard for racial classifications, the burden to justify a sex classification is demanding and it rests entirely on the State. *Id* at 533 (citation omitted). In order to satisfy this burden, the state must show

> at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Id. (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

C. **There is no governmental interest sufficient to justify race and sex balancing of class counsel.**

The Supreme Court has recognized only two compelling interests sufficient to support racial discrimination: remedying past discrimination and diversity in higher education. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992). *See also Wygant*, 476 U.S. at 276 (societal discrimination is insufficient as a basis for imposing discriminatory remedies). Neither of these is present here. Curiously, neither the present order, nor *J.P. Morgan* or its progeny, identify any compelling governmental interest. In *J.P. Morgan*, the court simply refers to the belief that "it is important to all concerned that there is evidence of diversity, in terms of race and gender" of class counsel. *In re J.P. Morgan*, 242 F.R.D. at 277.

At no point in this case has the district court identified any evidence of prior discrimination in appointing class counsel in that court or any other court. Nor has

the court pointed to any evidence that class counsel in previous cases has failed to fairly and adequately represent class members because of their race or sex. The district court, referring to Rule 23's permissive considerations of "other matter pertinent to counsel's ability to fairly and adequately represent the class," simply ordered the firms involved to staff the case to "reflect the class composition in terms of relevant race and gender metrics." Order at 14, citing *In re J.P. Morgan*, 242 F.R.D.at 277 (S.D.N.Y. 2007).

Since the district court here failed to identify any important governmental objective, let alone a compelling governmental interest, we are left to infer what precise goal Judge Baer sought to achieve. One logical possibility could be that he believes that class counsel that reflects the race and gender metrics of the class will better represent the class. However, the court heard no evidence on this issue and made no findings to that effect. Another possibility is that the court believed that certain members of the class have racial prejudices or biases leading them to prefer class counsel of the same race or sex. Giving effect to these prejudices is constitutionally impermissible. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations . . . . We have little difficulty concluding that they are not.").

D. The order requiring class counsel to reflect the "race and gender metrics" of the class is not narrowly tailored.

Even if this Court determines there is a compelling governmental interest sufficient to impose race and sex requirements on class counsel, the order in this case must be overturned because it is not narrowly tailored. To survive the narrow tailoring inquiry, "the means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). The purpose of the narrow tailoring requirement is to ensure that "the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

The race and sex balancing ordered here has no connection whatsoever to the government's interest in fair and adequate representation for the class or to any inferred interest in diversity. Assuming *arguendo* that some type of diversity results in better representation for the class, the court here made no determination that ordering counsel to reflect the race and gender metrics of the class was necessary in this case in order to achieve that kind of racial diversity. On the contrary, the record contains no finding by the court as to a lack of race and sex diversity prior to imposing its order. *See* Alison Frankel, *Can Federal Judges*

Order Law Firms to Promote Diversity? (2011), http://newsandinsight.thomsonreuters.com/Legal/News/ViewNews.aspx?id=35013&terms=%40ReutersTopicCodes+CONTAINS+%27ANV%27. (suggesting that counsel representing the class was diverse prior to Judge Baer's order). Precisely because an *order* was not needed to achieve Judge Baer's diversity goals, it fails the narrow tailoring inquiry.

Moreover, a race and sex balancing requirement like this could apply indefinitely, ordering class counsel in each case to reflect the precise race and gender metrics of each class, leading to absurd results. In many discrimination cases, the class might itself be all female, Asian, Hispanic, or white. Using Judge Baer's logic, class counsel would have to be equally uniform in its demographics. *See Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 731 (2007) ("An interest linked to nothing other than proportional representation of various races . . . would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture."); *Grutter*, *539* U.S. at 342 (holding that a system of racial preferences "must" have a sunset provision because they are "potentially so dangerous that they may be employed no more broadly than the interest demands," leading to the conclusion that "enshrining a permanent justification for racial preferences would offend this

fundamental equal protection principal."). Here as in *Richmond v. Croson*, 488 U.S. 469, 498 (1989), one of the chief problems with the race and sex formula is that it has no logical endpoint.

III. The district court's order requiring class counsel to reflect the race and gender metrics of the class violates Rule 23.

Upon certifying a class, a court must appoint class counsel, pursuant to Fed. R. Civ. P. 23(g)(1). Rule 23(g)(1)(a) sets out certain factors that the court must consider:

> (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

In this case (as in *J.P. Morgan* and its progeny), neither the defendant nor the court contested the plaintiff's assertion that the mandatory requirements under Rule 23(g)(1)(a) were satisfied. Nonetheless, in this case, as he had done before, Judge Baer proceeded to include race and sex requirements in his certification order and purported to find his power to do so in another subsection of the rule, Fed. R. Civ. P. 23(g)(1)(B). That section permits the court to "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Notably, rather than making any finding as to why appointing a female and

a minority attorney to the class counsel team was "pertinent to counsel's ability to fairly and adequately represent the interests of the class," the court simply referred to its previous decisions, all relying upon a stated belief that "it is important to all concerned" that class counsel is diverse in terms of race and sex. Order at 14; *In re J.P. Morgan*, 242 F.R.D. at 277.

IV. Conclusion

The Supreme Court has wisely recognized that a completely equal society will not, in every one of its spheres, mirror the sex and racial make-up of its inhabitants, and there is no evidence to suggest the government has a compelling interest to make it so here. For the foregoing reasons, the district court's order certifying the class and appointing class counsel should be vacated.

Respectfully submitted,

Dated: January 31, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2012, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Second Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record, with the exception of the following parties, whom I caused to be served by first-class mail.

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