IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Appeal No. 11-4201

AMBER BLUNT, on behalf of herself and all others similarly situated; CRYSTAL BLUNT; MICHAEL BLUNT, on their own behalf and THE CONCERNED BLACK PARENTS OF MAINLINE INC; THE MAINLINE BRANCH OF THE NAACP,

Plaintiffs-Appellants,

v.

LOWER MERION SCHOOL DISTRICT; THE LOWER MERION SCHOOL BOARD; PENNSYLVANIA DEPARTMENT OF EDUCATION,

Defendants-Appellees

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:07-cv-3100

APPELLANTS' PETITION FOR REHEARING *EN BANC*

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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court, *i.e.*, the panel's decision is contrary to the decisions of this Court in *In re Prudential Insurance Co. of America Sales Practice Litigation*, 261 F.3d 355 (3d Cir. 2001), and *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764 (3d Cir. 2013), and that this appeal involves questions of exceptional importance, *i.e.*, whether a class settlement can bar claims for conduct occurring after the settlement; and whether an organizational plaintiff that was erroneously dismissed from a multi-plaintiff lawsuit in preliminary stages is required to show that its claim could have survived summary judgment.

/s/ Jennifer R. Clarke
Jennifer R. Clarke

BACKGROUND

This Petition requests that the Court rehear *en banc* two aspects of the panel's decision: (1) whether a 2005 class settlement agreement barred claims for conduct that had not yet occurred at the time of the settlement; and (2) whether Appellant Concerned Black Parents, Inc. ("CBP") should have been required to proffer evidence to prove that it would survive summary judgment, even though it was erroneously dismissed in early stages of the litigation.

REASONS FOR REHEARING

A. The Panel Decision Results in a Broad, Unwarranted Expansion of the Holding of *In re Prudential Insurance Company*.

In 2005, the district court in *Gaskin v. Pennsylvania* approved a settlement agreement that released certain claims "from the beginning of the world to the effective date of the Settlement Agreement," i.e., September 16, 2005. 389 F. Supp. 2d 628, 629 (E.D. Pa. 2005). *Gaskin* was a class action that sought to enforce the "Least Restrictive Environment" requirement that students with disabilities in Pennsylvania be included in regular classrooms with supplementary aids and services to the maximum extent appropriate. (*See* A. 783-84 at ¶ 6 (*Gaskin* Complaint).) It did not raise any race-discrimination or misidentification claims. Ten years before the case settled, the district court had certified a class "consist[ing] of all present and future school age students with disabilities in the Commonwealth of Pennsylvania" who were denied certain rights protected by the

IDEA. *Gaskin v. Pennsylvania*, No. 94-cv-4048, 1995 U.S. Dist. LEXIS 8136, at *3 (E.D. Pa. June 12, 1995).

Focusing on the class definition—and not the language of the release—the panel held that the release barred the claims of all the Appellants against the Pennsylvania Department of Education ("PDE"). Op. at 71; *see also* Dissenting Op. at 1-2. The majority opinion acknowledged that the effect of this holding was to release claims for conduct postdating the settlement. *See* Op. at 75 n.51. The majority supported this aspect of the holding by quoting a statement from *In re Prudential Insurance Co. of America Sales Practice Litigation*, 261 F.3d 355, 366 (3d Cir. 2001): "a judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action. This is true even though the precluded claim was not presented, and could not have been presented, in the class action itself." Op. at 63.

The new precedent established by the panel opinion, which interprets a release to bar claims for future conduct, is contrary to the language of the release as well as controlling precedent of this Court. *See Bowersox Truck Sales & Serv. v. Harco Nat'l Ins. Co.*, 209 F.3d 273, 279 (3d Cir. 2000) ("[T]he general words of the release will not be construed so as to bar the enforcement of a claim which has not accrued at the date of release." (quotation marks and citation omitted)); *see also Geraghty v. Ins. Servs. Office*, 369 F. App'x 402, 406 (3d Cir. 2010)

("Generally, courts will not interpret a release to bar a claim that had not accrued as of the date of signing."). Indeed, at the oral argument during which this issue was discussed, counsel for PDE conceded that "you can't release a potential claim in 2005 that doesn't arise until 2007." (A. 1003.) Public-policy considerations also militate against interpreting the *Gaskin* release as waiving future claims under civil-rights statutes. *See Bolden v. SEPTA*, 953 F.2d 807, 826 n.27 (3d Cir. 1991) (*en banc*) (Alito, J.) ("[R]ights under Title VII and the Fair Labor Standards Act may not be prospectively waived . . . ." (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740 (1981))).

Most importantly, the new precedent, if not overturned, would effect a substantial change to the holding of *In re Prudential*. In that case, the district court had certified a settlement class of people owning Prudential policies from 1982 to 1995 in a suit against Prudential alleging deceptive practices. Pursuant to the settlement, the district court invoked the All-Writs Act and the Anti-Injunction Act to enjoin policyholders from commencing litigation in any jurisdiction pertaining to the same policies. The legal issue in the case was whether that injunction barred a subsequent claim brought in state court by people who had held policies during the class period. It was in that context that this Court observed that "later" claims—that is, claims ***filed*** after a settlement agreement is approved—can

sometimes be barred by the settlement judgment. "Later claims" did not refer to claims based on ***facts*** occurring after the settlement. *See Schwartz v. Dall. Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 578 (E.D. Pa. 2001) (citing *In re Prudential* and rejecting a proposed class settlement on the grounds that "[a]lthough the law permits a release to bar future claims based on the past conduct of the defendant, this release would bar later claims based not only on past conduct but also future conduct" (citation omitted)). *See generally* James Grimmelmann, *Future Conduct and the Limits of Class-Action Settlements*, 91 N.C. L. Rev. 387, 393 (2013) (warning that future-conduct releases "can create serious moral hazard for the released defendant in subtle and surprising ways").

As for claims that "could not have been presented," that phrase in *In re Prudential* refers to claims that are beyond the jurisdiction of the federal courts as a matter of law, such as claims that can be litigated only in state courts. *See In re Prudential*, 261 F.3d at 366 (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268 (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. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982)). It does not apply to claims that could not have been presented because of practical or existential considerations, e.g., the events had not yet occurred or the affected class members had not yet been placed into special education classes.

The panel's holding risks potentially far-reaching and perhaps unintended consequences. PDE is the state educational agency responsible for ensuring that special education services are provided to the more than 250,000 children with disabilities in Pennsylvania. *See* 20 U.S.C. § 1412(a)(11). The language of footnote 51 of the Opinion arguably applies to virtually any claim that PDE has defaulted in any respect on this responsibility.

The holding also had real consequences in this case, because Appellants did assert claims that arose after September 2005. As alleged in the Third Amended Complaint, the following discrete incidents occurred after September 2005:

- LMSD reevaluated Appellant Lydia Johnson in January 2006, gave her misleading advice that spring as to her eligibility for graduation, and failed to meet her individualized education needs during the 2006-07 academic year (A. 491-92 at ¶¶ 22-25);
- In March 2007, LMSD reevaluated Appellant Chantae Hall, failed to address all appropriate areas of concern, and continued to place her in inappropriate segregated classrooms (A. 496-97 at ¶¶ 48-50);
- LMSD reevaluated Appellant Jonathan Whiteman in November 2006 but failed to make indications on his IEP consistent with the findings of the reevaluation report or to implement an effective behavior support plan (A. 497-98 at ¶¶ 54-55);

- Appellant Ricky Coleman was born on March 18, 1999 (A. 502 at ¶ 74), and in 2006-07—his second-grade year—LMSD placed him in racially segregated special education classes (A. 506 at ¶ 92);
- Beginning in September 2006, Ricky Coleman's mother, Appellant June Coleman, began paying $160 per month, out of pocket, for private tutoring because of her dissatisfaction with the services LMSD was providing (A. 507 at ¶ 96).

Because the District Court dismissed all claims against PDE in August 2009 (A. 42.69),[1] none of the Appellants had the opportunity to take discovery of PDE, except very limited discovery related to their motion for class certification, nor did they ever have the opportunity to advance affirmative evidence for their claims against PDE at the summary-judgment or trial stages.

B. The Precedent Established by the Controlling Opinion Accelerates the Timetables for Parties to Submit Affirmative Evidence to Support Their Claims.

On August 19, 2009, the District Court dismissed CBP. (A. 42.69.) The only motion pending was plaintiffs' motion for class certification. At the time of the dismissal, discovery was limited to the issue of class certification. (*See* A. 73-74 (docket entries dated Dec. 29, 2008, Feb. 17, 2009, and Mar. 9, 2009, setting

[1] PDE never filed a motion to dismiss the Third Amended Complaint. Rather, it raised the *Gaskin* preclusion argument as an affirmative defense (A. 573.33) and in its brief in opposition to class certification (A. 640-50).

discovery deadlines related to class certification).) *See also Blunt v. Lower Merion Sch. Dist.*, No. 07-cv-3100, 2009 U.S. Dist. LEXIS 38925, at *4 (E.D. Pa. May 7, 2009) (noting that after the filing of the Motion for Class Certification, the District Court "granted the parties a period of time to engage in discovery with respect to the class action certification issue"). Most of the evidence then in the record was that taken by defendants to oppose the class-certification motion.[2] This dismissal occurred nearly two years before LMSD filed its motion for summary judgment. (A. 3632, dated July 15, 2011.)

A majority of the panel concluded that the District Court had erred in dismissing CBP as a plaintiff. Concurring Op. at 1 (Ambro, J.); Dissenting Op. at 6 (McKee, C.J.). Nonetheless, two members of the panel voted to affirm CBP's dismissal: Judge Greenberg on the (minority) grounds that CBP lacked standing, Op. at 122 n.73, and Judge Ambro on the grounds that even though the District Court dismissed CBP *sua sponte*, at an early stage of the litigation, CBP should have offered affirmative evidence to demonstrate that it would have survived the summary-judgment motions that were filed two years later. Concurring Op. at 1.

[2] Judge Greenberg—in a discussion not joined by the other panel members—wrote that "there was a great deal of discovery" between the initial dismissal without prejudice of CBP on February 15, 2008, the re-adding of CBP through an amendment on August 4, 2008 (A. 486-535), and the final dismissal of CBP on August 19, 2009. Op. at 76 n.52. This discovery, however, pertained only to class certification.

Judge Ambro assumed that because CBP "shared counsel with some of the individual Plaintiffs," the relevant evidence would have been the same. *Id.* Therefore, even though he agreed that CBP had been improperly dismissed for lack of standing, he affirmed the dismissal.[3]

But the evidence supporting CBP's claim was not the same as that of the individual plaintiffs, and CBP never had the opportunity to proffer its *own* affirmative evidence in response to LMSD's motion for summary judgment. *See* Op. at 101 n.65 ("CBP [is] not involved with the summary judgment as the District Court dismissed [its] claims before it considered the motion for summary judgment."). Had the remaining petitioners sought to introduce CBP's evidence about other families' experiences at the summary-judgment stage, that evidence surely would have been excluded as irrelevant. And had CBP sought to introduce its own evidence at the appellate stage, that evidence, not being in the record, would again have been subject to challenge.

Moreover, CBP *would* have proffered additional evidence of its own had it not been dismissed in 2009. It would have offered testimony from CBP leaders who, as part of the organization's activities, accompanied parents of African-American children to meetings with LMSD officials and counseled parents before or after such meetings. This testimony would have demonstrated that the

[3] Chief Judge McKee would have reversed the District Court's order "as to CBP's dismissal for lack of standing." Dissenting Op. at 7.

experiences of the individual plaintiffs were not unique, and that the practices of misidentification continued after the filing of the complaint and amended complaints. Three examples:

- N.L. was in the first grade in April 2010, when LMSD told her parents she likely needed to be in special education classes. CBP helped to arrange for N.L. to be assessed by an outside expert, who concluded that N.L. likely did not need to be in special education. Nevertheless, LMSD pushed N.L.'s parents to place her into special education. N.L. is now in middle school, where she is segregated into special education classes for most of each day.
- In 2010, a highly educated African-American couple with two elementary-age sons relocated to Lower Merion in search of top-quality public schools. LMSD identified both sons as having learning disabilities, and at LMSD's urging, the parents reluctantly agreed for them to enter special education. Their mother reached out to CBP, which reviewed the boys' evaluation reports and helped her to challenge the evaluations. LMSD insisted the boys remain in special education, and last year the parents removed them from LMSD.
- In 2009, CBP President Loraine Carter attended an IEP team meeting with the mother of M.J., who was then in middle school and who had

> been identified as having a specific learning disability and possibly dyslexia. M.J.'s mother explained that he did well in math and foreign language, and she asked that he be placed in an advanced math class. LMSD initially denied that it offered advanced math classes and proposed a class schedule with no foreign language. After Ms. Carter spoke up, LMSD acknowledged that advanced math opportunities existed. The student ultimately entered a private school.

The evidence of this nature that CBP would have been proffered would have raised the material issues of fact needed to defeat a motion for summary judgment. The majority wrote that "given the record we see no way to avoid a finding that each individual student's educational needs were assessed and satisfied through a thorough and individualized process." Op. at 103. Similarly, the majority held that "in order to show that LMSD acted with deliberate indifference, appellants must show that it had knowledge of rights violations." *Id.* The evidence CBP would have presented—showing practices that continued years after the complaints were filed, covering many children in many schools—would have demonstrated such knowledge and deliberate indifference.

The holding in the controlling opinion effectively creates a new standard for a party facing dismissal at early stages of the case (let alone one that was not

responding to a motion to dismiss).[4] It is therefore at odds with this Court's decisions emphasizing the differences between the standards that apply under Rule 12 and Rule 56. As the Court recently explained:

> In short, [b]oth the burden on the non-moving party and the documents available to that party . . . differ significantly under the motion to dismiss and summary judgment standards. Under the standard applied to a motion to dismiss, a defendant need only shoulder a single burden—to show that the complaint fails to state a claim. To combat the motion, the plaintiff typically can rely only on the complaint and selected other documents. Under a summary judgment standard, however, a burden-shifting framework applies, pursuant to which the moving party bears the initial burden of showing that the non-movant has failed to establish one or more essential elements of its case, and, once that initial burden is met, the non-moving party must go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. A party opposing a motion for summary judgment has significantly more material at his disposal than when opposing a motion to dismiss, given that he may cite evidence gained during discovery.

Guidotti v. Legal Helpers Debt Resolution, L.L.C., 716 F.3d 764, 772-73 (3d Cir. 2013) (quotation marks, citations, and footnote omitted) (alterations in original). Here, the controlling opinion has, in effect, required CBP to shoulder the summary-judgment burden, even though CBP was dismissed at the earlier, Rule 12 stage.

[4] Although CBP's dismissal was not pursuant to any motion, we treat the dismissal as if it were under Rule 12 as it was at an early stage and years before summary-judgment motions were filed.

The issue here matters. If not corrected by the Court *en banc*, this precedential decision will introduce a broad, serious inconsistency into the law of the Circuit, with consequences beyond questions of organizational standing. It would impose an untenable burden on future plaintiffs facing motions to dismiss in multi-party cases: they must advance affirmative evidence to oppose a yet-to-be-filed motion for summary judgment; or face losing someday on appeal because the evidence never made it into the record.

Alternatively, even if the holding were not viewed as precedent, but uniquely applied to this organizational plaintiff under these circumstances, valuable principles would be lost. As Chief Judge McKee wrote, "[t]he issue of CBP's standing not only matters, it is of the utmost importance . . . ." Dissenting Op. at 4 (internal quotation marks and alteration omitted). This case falls in "the long line of cases in which organizations have sued to enforce civil rights," *Powell v. Ridge*, 189 F.3d 387, 404 (3d Cir. 1999) (collecting cases), *abrogated on other grounds by Alexander v. Sandoval*, 532 U.S. 275 (2001). The result of this case is that an organization has lost this storied opportunity, not over any substantive ground, but because the unusual and irregular procedures leading to its dismissal prevented its constituents from ever telling their stories.

CONCLUSION

For the reasons discussed above, Petitioners respectfully request the Court rehear these issues *en banc*, lest a precedent remain in force that will allow class settlements to be construed as disposing of claims for conduct that had not yet occurred at the time of settlement, and that will undermine the appeal rights of erroneously dismissed plaintiffs in multi-plaintiff actions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14 point Times New Roman, a proportionally spaced typeface, using Microsoft Word 2007 word-processing software.

2. This brief complies with L.A.R. 31.1(c) because the text of the electronic brief is identical to the text in the paper copies, and a virus detection program, Microsoft Security Essentials version 4.6.305.0, has been run on the electronic file and no virus or risk was detected.

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CERTIFICATE OF SERVICE

I, Jennifer R. Clarke, hereby certify that on this date, I caused a true and correct copy of Appellants' Petition for Rehearing *En Banc* to be served via the Court's Electronic Case Filing system to the following:

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