NO. 19-_____

In the Supreme Court of the United States

ROBERT RADCLIFFE, ET AL.,

Petitioners,

v.

EXPERIAN INFORMATION SOLUTIONS, INC., ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

DANIEL WOLF
LAW OFFICE OF DANIEL WOLF
1220 N STREET, NW, UNIT PH2
WASHINGTON, DC 20005

CHARLES JUNTIKKA
CHARLES JUNTIKKA & ASSOCIATES LLP
30 VESEY STREET, SUITE 100
NEW YORK, NY 10007

GEORGE F. CARPINELLO
COUNSEL OF RECORD
ADAM R. SHAW
BOIES SCHILLER & FLEXNER LLP
30 SOUTH PEARL STREET
ALBANY, NY 12207
(518) 434-0600
GCARPINELLO@BSFLLP.COM

MARCH 16, 2020 *COUNSEL FOR PETITIONERS*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether Fed. R. Civ. P. 23 permits class counsel whose interests are in material conflict with those of the class to represent the class so long as they negotiated a "fair" settlement?

PARTIES TO THE PROCEEDINGS

Petitioners, and Plaintiffs-Appellants Below

- Robert Radcliffe
- Chester Carter
- Maria Falcon
- Clifton C. Seale, III
- Arnold Lovell, Jr.

Respondents and Defendants-Appellees Below

- Experian Information Solutions, Inc.
- Equifax Information Services, LLC
- Transunion LLC

Respondents and Plaintiffs-Appellees Below

- Jose Hernandez
- Robert Randall
- Bertram Robison
- Kathryn Pike

LIST OF PROCEEDINGS

United States Court of Appeals, Ninth Circuit

No. 18-55606

Robert Radcliffe; Chester Carter; Maria Falcon; Clifton C. Seale III; Arnold Lovell, Jr., Plaintiffs-Appellants,
v. Jose Hernandez; Robert Randall; Bertram Robinson; Kathryn Pike; Lewis Mann, Plaintiffs-Appellees,
v. Experian Information Solutions, Inc.; Equifax Information Services, LLC; Trans Union LLC, Defendants-Appellees.

Date of Final Opinion: December 12, 2019

Date of Rehearing Denial: February 7, 2020

United States District Court for the Central District of California

Case No. 8:05-cv-01070

Terri N. White, et al., Plaintiffs, *v.*
Experian Information Solutions, Inc., Defendant.

Date of Final Order: April 6, 2018

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

JUDICIAL RULE

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit was issued on December 12, 2019. (App.1a-6a). The Order of the United States District Court for the Central District of California that was the subject of that appeal was issued on April 6, 2018. (App.7a-63a). These opinions have not been designated for publication.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 2019. A timely petition for rehearing and rehearing *en banc* was filed on January 10, 2020. The order denying the petition for rehearing was entered on February 7, 2020. (App.64a-65a). The jurisdiction of this Court to review the Court of Appeal's judgment is conferred by 28 U.S.C. § 1254(a)(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of Rule 23 of the Federal Rules of Civil Procedure are reproduced in the Appendix. (App.66a-68a).

INTRODUCTION

This Petition involves an appeal of a class action settlement in which for the second time class counsel ("Settling Counsel") violated the ethical rules by creating a material conflict of interest between themselves and the class.

The first such conflict led the Ninth Circuit to vacate an order approving an earlier proposed settlement ("the Original Settlement") in *Radcliffe v. Experian Information Solutions, Inc.*, 715 F.3d 1157 (9th Cir. 2013) ("*Radcliffe I*"), resulting in the waste of over $6 million in notice costs. Despite Settling Counsel's disloyal conduct, the district court issued an order reappointing them as interim class counsel—an order that the Ninth Circuit affirmed on interlocutory appeal in *Radcliffe v. Hernandez*, 818 F.3d 537 (9th Cir. 2016) ("*Radcliffe II*"), but only after Settling Counsel sought "to neutralize the effect of the[ir] ethical violation" by making what both the Ninth Circuit and the district court characterized as an "extraordinary" commitment "to accept the costs of re-notice." *Id.* at 549.

When the $6 million re-notice bill came due, however, Settling Counsel chose not to pay it. Instead, Settling Counsel took the position that the class should shoulder the bill because Settling Counsel had relieved themselves of their obligation to do so when they supposedly made the class whole by securing a second settlement that, according to Settling Counsel, provided the class with a greater recovery that the original—

primarily through non-monetary benefits that cost Defendants nothing and had little or no real value to the class.

On the third appeal and the one that is the subject of this Petition, the Ninth Circuit acknowledged that Settling Counsel created, at a minimum, a potential conflict of interest between themselves and the class when they refused to pay their re-notice debt. (App.5a). The Ninth Circuit held, however, that it was free to overlook that conflict and permit Settling Counsel to represent the class because the settlement they negotiated was "fair" and "adequate". (App.5a).

This Court should grant this Petition for a Writ of Certiorari for two reasons.

First, the Ninth Circuit's decision conflicts with those of multiple other circuits on an important question of federal law, namely whether Fed. R. Civ. P. 23 (a)(4) and (g) permit counsel whose interests are in material conflict with those of the class to nonetheless continue to represent and negotiate for that class so long as the terms of any class settlement they might reach are ultimately deemed fair and adequate.

Second, the Ninth Circuit's decision resolves that important federal question in a way that conflicts with this Court's decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999), holding that the procedural protections afforded by Fed. R. Civ. P. 23(a) must be satisfied independent of—and prior to—any assessment of the fairness of a class settlement under Fed. R. Civ. P. 23(e).

STATEMENT OF THE CASE

The *White* Plaintiffs are five individuals whose debts were discharged through Chapter 7 bankruptcy proceedings, but whose credit reports still showed one or more of those debts as delinquent. In 2005, they filed these three class actions, alleging that the three Defendants (Experian Information Solutions, Trans Union, and Equifax Information Services) employed procedures for reporting the status of pre-bankruptcy debts that were not reasonably designed "to assure maximum possible accuracy" in willful violation of their duties under § 1681e(b) of the FCRA, 15 U.S.C. §§ 1601, *et seq.*[1]

Following approval of an injunctive relief settlement in August 2008, Counsel for the Settling Plaintiffs ("Settling Counsel") concluded the original monetary relief settlement (the "Original Settlement") under which the three Defendants agreed to pay a total of $45 million into a common fund in exchange for the release of all claims, *Radcliffe I*, 715 F.3d at 1162, leaving a net recovery of about $25.5 million for the combined classes (after deductions of about $12 million for attorneys' fees and costs and another $7.65 million for notice and administrative costs). (App.25a; *Order Granting in Part and Denying in Part Motion for Attorneys' Fees for Monetary Relief Settlement*, Case No. 05-1070 (C.D. Cal. July 15, 2011), Dkt. No. 774, at

---

[1] The three *White* class actions were subsequently merged with a parallel class action that plaintiff Jose Hernandez had filed against all three Defendants.

5; *Minute Order*, Case No. 05-1070 (C.D. Cal. Aug. 11, 1070), Dkt. No. 792, at 1).

White Plaintiffs opposed the Original Settlement on grounds, among others, that Settling Counsel had created a conflict of interest that disqualified them from representing the class by conditioning the named plaintiffs' eligibility for $5,000 incentive awards on their supporting the Settlement. In July 2011, the district court issued an order finally approving the Settlement. *White v. Experian Information Solutions, Inc.*, 803 F. Supp. 2d 1086 (2011) ("*White I*").

In April 2013, the Ninth Circuit issued its opinion in *Radcliffe I*, rejecting the Original Settlement on grounds that it had been "corrupted" by the conditional incentive award provision, which gave the class representatives "a $5,000 incentive to support the settlement," 715 F.3d at 1164-65, and thereby "divorced the interests of the class representatives from those of the absent class members." *Id.* at 1167. Consequently, the *Radcliffe I* Court held that Settling Counsel had put themselves in a "[c]onflicted representation," rendering them inadequate to represent the class under Rule 23(a)(4) and "provid[ing] an independent ground for reversing the settlement." *Id.* at 1167.

On remand, *White* Plaintiffs moved to disqualify Settling Counsel from representing the class under California law and Rule 23(a)(4). In a January 2014 order, the district court denied *White* Plaintiffs' motion and re-appointed Settling Counsel as interim class counsel. *White v. Experian Information Solutions, Inc.*, 993 F. Supp. 2d 1154 (2014) ("*White II*").[2] Applying a

---

[2] The term "Settling Counsel" includes both counsel for Settling Plaintiffs who negotiated the Original Settlement (namely, Caddell

"balancing-of-interests analysis," the court held that Settling Counsel could continue to represent the class under both California law and Rule 23, their breach of their duty of loyalty to the class notwithstanding. *Id.* at 1167-68, 1173-74. In making this ruling, the court underscored the "extraordinary steps" Settling Counsel had taken "to neutralize the effect of the ethical violation," including, in particular, "agreeing to accept the costs of re-notice." *Id.* at 1176.

On interlocutory appeal, the Ninth Circuit issued its opinion in *Radcliffe II*, holding that the district court had acted within its discretion in finding that Settling Counsel were adequate to represent the class going forward. 818 F.3d at 548. In so ruling, the *Radcliffe II* Court found that the district court had properly relied on the "extraordinary steps" Settling Counsel had taken "to neutralize the effect of the ethical violation," including again "to accept the costs of re-notice." *Id.* at 549.

Settling Counsel subsequently negotiated a Revised Settlement under which Defendants agreed to pay the class (1) $38.65 million in cash inclusive of re-notice costs (*i.e.*, the $37.65 million remaining in the original settlement fund after payment of the original notice costs plus another $1 million (App.13a), or $6.35 million less than the amount of the Original Settlement, and (2) certain non-monetary "benefits." (App.15a).

& Chapman, Leiff, Cabraser, Heimann & Bernstein, LLP, National Consumer Law Center, Consumer Litigation Associates, P.C. and Callahan, Thompson, Sherman and Caudill) and two other firm that were added to Settling Counsel's team after the *Radcliffe I* decision (namely Francis Mailman Soumilas, P.C. and Public Justice).

In August 2017, Settling Parties mailed and/or emailed notice of the Revised Settlement to over 15 million class members at a cost of about $6 million. (App. 24a, 33a). Subsequently, Settling Counsel sought the district court's approval of an award of fees and costs that was higher than the amount they were awarded under the Original Settlement, without deducting a dime to cover the cost of re-notice. (App.52a; *Notice of Motion and Motion for Attorneys' Fees and Service Awards, Memorandum of Points and Authorities*, Case No. 05-1070 (C.D. Cal. Oct. 30, 2017), Dkt. No. 1096, at 3, 23).

At the final approval hearing, Settling Counsel sought to justify their shifting the re-notice cost to the class on the grounds (1) that their obligation to pay that $6 million cost was contingent on the class not ending up with a recovery lower than the $45 million than it would have received under the Original Settlement, and (2) that the value of the relief afforded under the Revised Settlement was substantially greater than $45 million because, according to Settling Counsel, its non-monetary benefits were worth at least $15 million (or $1 per class member). (App.39a-45a).

In its order approving the Revised Settlement, the district court rejected *White* Plaintiffs' argument that in seeking to pay their $6 million re-notice debt from settlement proceeds that rightfully belonged to the class, rather than out of their own pockets, Settling Counsel had created a conflict of interest between themselves and the class. The court held that Settling Counsel had acted consistent with their promises and ethical obligations by negotiating a new settlement that protected the class "from being penalized for the [Original] Settlement having been overturned." (App.

38a). That is, according to the court, the Revised Settlement did not result in a lower recovery for the class (even though the net amount available for distribution to the class after payment of the re-notice costs was $5 million less than the Original Settlement) because (1) it "conservatively" valued the Revised Settlement's "non-cash benefits" (*i.e.*, the option of receiving free credit reports and scores in lieu of a monetary recovery, the right to read an on-line brochure containing certain credit reporting information, and the added value associated with the receipt of two class notices) as equivalent to $5.5 million in cash (App.52a-53a), and (2) it ultimately cut Settling Counsel's fee request by approximately $2.4 million as a means of partially covering the $6 million re-notice cost. (App.42a-43a, 52a).

White Plaintiffs appealed to the Ninth Circuit, challenging the district court's order on the ground, *inter alia*, that Settling Counsel had, once again, subordinated the interest of the class in attaining the maximum possible recovery to their own by engaging in negotiations with Defendants, the overriding purpose and result of which was to cover their $6 million re-notice debt out of the settlement proceeds.

In its *Memorandum Decision*, filed on December 12, 2019, the Ninth Circuit affirmed the district court's order certifying the class and approving the Revised Settlement, while reversing its order awarding attorneys' fees insofar as it failed to take account of the fact that Settling Counsel were "duty-bound to reimburse the class for the waste of settlement funds caused by the ethical conflict in *Radcliffe I*." (App.6a).

Specifically, the Ninth Circuit found that "by opting to repay its debt to the class in new benefits

rather than deducting the costs of re-notice from the fee award," Settling Counsel had "[a]t the very least . . . created the possibility of a conflict of interest with the class." (App.5a). However, despite the existence of this admitted potential conflict—and the specter of resulting prejudice—the Ninth Circuit held that Settling Counsel could and did adequately represent the class under Rule 23. (App.6a). *Citing Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009) for the proposition that Rule 23 creates a "flexible standard" for determining adequacy of counsel, the Ninth Circuit concluded that Settling Counsel had "ably represented the class" because, in its view, the Settlement "provides adequate relief to the class" and any additional time spent litigating "[t]his long-standing dispute" would "serve only to devour more and more of the settlement fund." (App.4a-5a).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit found that Settling Counsel, by their own conduct had "[a]t the very least . . . created the possibility of a conflict of interest with the class." (App.5a). In other words, at a minimum, Settling Counsel's interest in negotiating a settlement in which their $6 million re-notice debt to the class would be paid out of the settlement fund potentially diverged with the class's interest in obtaining the maximum possible recovery for itself. Implicit in the Ninth Circuit's decision was the acknowledgment that this potential conflict might have already ripened into an actual one. In fact, that conclusion would appear to follow inescapably from the Ninth Circuit's finding

that Settling Counsel were "duty-bound to reimburse the class for the waste of settlement funds caused by the ethical conflict in *Radcliffe I*," but instead negotiated a settlement that was designed to shift Settling Counsel's duty to pay their $6 million re-notice debt to the class—something that was manifestly against the class's financial interests. (App.6a). The Ninth Circuit, however, chose not to reach the issue of whether the conflict Settling Counsel had created is properly characterized as a current conflict or, assuming it is not, to assess the likelihood of their potential conflict becoming an actual one.[3] That is because, to the Ninth Circuit's way of thinking, it did not matter: so long as the settlement provided "fair" and "adequate relief to the class" (App.5a), Settling Counsel could be deemed to have fairly and adequately represented the interests of the class, regardless of whether the conflict of interest they created was potential, probable or actual.

As set forth below, this Court should grant the Petition for Certiorari because the Ninth Circuit's holding that Rule 23 permits conflicted counsel to represent a class (1) creates a split between the country's largest circuit court and multiple other circuit courts that have unequivocally held they cannot, and (2) cannot be reconciled with decisions of this Court holding that the procedural protections afforded by Rule 23(a) must be

---

[3] For instance, the Ninth Circuit did not assess whether the potential conflict that Settling Counsel created had manifested itself when Settling Counsel attempted to load the Revised Settlement with non-monetary benefits, which were not in the Original Settlement. This enabled Settling Counsel to assert that they had "covered" their re-notice debt to the class, even though those benefits cost the Defendants nothing and were of little or no real value to the class.

satisfied prior to and independent of any assessment of the fairness of a class settlement under Rule 23(e).

I. REVIEW SHOULD BE GRANTED TO RESOLVE A CIRCUIT SPLIT ON AN IMPORTANT QUESTION OF FEDERAL LAW, NAMELY WHETHER RULE 23 PERMITS CONFLICTED COUNSEL TO REPRESENT A CLASS.

Under Rule 23(a)(4), a court may certify an action as a class action "only if" it determines that "the representative parties will fairly and adequately protect the interests of the class"—a requirement that has been construed as applying not only to the representative parties themselves, but also to their counsel. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626, n.20 (1997); *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 856, n.31 (1999). Likewise, under Rule 23(g), a court can only appoint class counsel who will "fairly and adequately represent the interests of the class."

As is the case with all other procedural protections afforded by Rule 23(a), the party seeking certification of a class bears the burden of establishing that the representative plaintiffs and their counsel meet that rule's adequacy of representation requirement. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011); *see also London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1254-55 (11th Cir. 2003); *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481-82 (5th Cir. 2001). It is well settled that in order to satisfy this burden, the representative plaintiffs must show (1) that they and their counsel have "the ability and the incentive to represent the claims of the class vigorously," and (2) that "there is no conflict" between their respective interests and "those asserted on behalf of the class." *In re Community Bank of Northern Va.*, 622 F.3d 275, 291 (3d Cir. 2010);

see also Howe v. Townsend, 588 F.3d 24, 36, n. 12 (1st Cir. 2009) ("The duty of adequate representation requires counsel to represent the class competently and vigorously and without conflicts of interest with the class."); *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187-88 (10th Cir. 2002). Thus, under Rules 23(a) and (g), the class is entitled to representation that is both vigorous and "conflict-free." *Ortiz*, 527 U.S. at 863.

Outside of the Ninth Circuit, every circuit court that has considered the issue has regarded the requirement that there be no material conflict between the interests of the representative parties and their counsel, on the one hand, and the interests of the class, on the other, as an inflexible one. That is, class counsel whose interests are materially "divergent or conflicting" from those of the class at large are incapable of adequately representing the class, period. *In re Community Bank*, 622 F.3d at 291; *see also Reliable Money Order, Inc. v. McKnight Sales Co.*, 704 F.3d 489, 498 (7th Cir. 2013) (No doubt, misconduct that . . . creates a direct conflict between counsel and the class requires . . . denial [of class certification]."); *Broussard v. Meineke*, 155 F.3d 331, 338 (4th Cir. 1998).

Indeed, at least three circuit courts have specifically addressed the issue whether conflicted counsel could have provided the class with fair and adequate representation within the meaning of Rule 23 where they negotiated what was later deemed to be a fair class settlement. And, in each of those cases, the answer to that question was a resounding "No."

For example, in *In re "Agent Orange" Products Liability Litigation*, 818 F.2d 216 (2nd Cir. 1987), plaintiffs' counsel negotiated a fee sharing agreement with

each other under which several of those counsel who advanced expenses would be paid three times the amount of their expenditures out of any fee award. According to the Second Circuit, this fee sharing agreement "present[ed] the clear potential for a conflict of interest between class counsel and those whom they have undertaken to represent" by providing those counsel with "an incentive . . . to accept an early settlement offer not in the best interests of the class." *Id.* at 223-24.

Yet, despite the existence of this potential conflict, the district court—like the Ninth Circuit in this case—held that class counsel had fairly represented the class based on their having negotiated a settlement which, according to the district court, was fair and reasonable. *Id.* at 224. In its opinion reversing that holding and vacating the settlement, the Second Circuit made short work of the district court's analysis, explaining that its "retrospective appraisal of the adequacy of the settlement cannot be the standard for review" of the adequacy of class counsel's representation, which must instead be assessed as of the time they placed "themselves in a position that might endanger the fair representation of their clients." *Id.*

Likewise, in *W. Morgan-East Lawrence Water & Sewer Authority v. 3M Co.*, 737 Fed. Appx. 457 (11th Cir. 2018), plaintiffs' counsel settled a class action on behalf of a municipal water authority and a class of individuals who had been adversely affected by the defendants' wrongful conduct in contaminating their water supply. Various objectors opposed the settlement on grounds, among others, that class counsel could not fairly and adequately represent the class under Rule 23(a)(4) because of a fundamental conflict between

the interests of the municipal water authority and those of the class, certain members of which had asserted claims against the water authority for contributing to their injuries. *Id.* at 464. In response to class counsel's contention that they nonetheless met Rule 23's adequacy of representation requirement, the Eleventh Circuit unequivocally rejected "any assertion that the conflict may be overlooked simply because the district court found 'that the Settlement Agreement . . . is fair, just, reasonable, valid, and adequate.'" *Id.* at 464-65. As the Eleventh Circuit explained, that is because "the issue whether class counsel adequately advanced the interests of absent class members" cannot be resolved merely by looking at "whether the result of the negotiations seemed fair." *Id.* at 465 (citing *Amchem*, 521 U.S. at 621). Instead, "it was critical to accurately determine at certification whether potential conflicts of interest could adversely affect the ability of either class counsel or the class representatives to protect the interests of absent class members." *Id.*

Finally, in *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir. 1979) ("*GMC Engine*"), objectors challenged a district court order denying them discovery aimed at determining whether the class counsel who had conducted the settlement negotiations had the authority to do so and whether their interests conflicted with those of the class. *Id.* at 1125. In reversing the district court's refusal to permit discovery on these issues, the Seventh Circuit made clear that the district court's authority to assess the fairness of a class settlement does not provide the class with a sufficient safeguard against disloyal counsel, reasoning that:

> "fairness" may be found anywhere within a broad range of lower and upper limits. No one can tell whether a compromise found to be "fair" might not have been "fairer" had the negotiating [attorney] possessed better information or been animated by undivided loyalty to the cause of the class. The court can reject a settlement that is inadequate; it cannot undertake the partisan task of bargaining for better terms.

Id. at 1125, n. 24.

The Ninth Circuit's decision below stands in stark contrast to the decisions of the Second, Seventh and Eleventh Circuits in *Agent Orange*, *GMC Engine* and *W. Morgan-East Lawrence*, respectively, and to the decisions of numerous other circuit courts holding that Rule 23(a) and (g) prohibit counsel from representing classes whose interests materially conflict with their own. That is, according to the Ninth Circuit, Rule 23 creates a "flexible standard" under which counsel whose interests materially conflict with those of a class can represent the class—whether that conflict is potential or actual and regardless of whether class representatives were informed of the existence of that conflict and/or provided a written waiver thereof.

The Ninth Circuit's holding that conflicted counsel can represent a class just so long as they negotiated a "fair" settlement is but the most recent of three decisions from that circuit eroding the right to fair and adequate representation that Rule 23 was intended to protect. In the first such case, *Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009), which the Ninth Circuit specifically relied on in support of its view that Rule 23 creates a "flexible standard" for

determining the adequacy of conflicted counsel, the Ninth Circuit affirmed a district court order approving a class settlement that had been negotiated by conflicted counsel because the class was also represented by "separate counsel [who] were not conflicted." *Id.* at 955.

Subsequently, in *Radcliffe II*, the Ninth Circuit held that the fact that the original Settling Counsel in this case had engaged in a conflicted representation that was so serious as to mandate the vacatur of the Original Settlement did not prevent them from being re-appointed to represent the same class going forward. 818 F.2d at 548. According to the *Radcliffe II* Court, a district court is free to find that counsel who have fomented a fundamental conflict of interest with the class can nonetheless be trusted to fairly and adequately protect the interests of that class under Rule 23(a)(4) and (g), so long as it determines (1) that that conflict has been subsequently "cured," and (2) that "any fairness or loyalty concerns" their betrayal might have caused are outweighed by their "expertise and experience." *Id.* at 546-47.

Having tired of what it described as a "long-standing dispute [that] has cost the parties a great deal already" (App.5a), the Ninth Circuit has now taken the final step on its path toward eroding the protections that Rule 23 affords a class against representation by disloyal counsel—a step that goes far beyond its earlier decisions in *Rodriguez* and *Radcliffe II*. That is, in its decision below, the Ninth Circuit held that the standard created by Rule 23 is so "flexible" that it permits conflicted counsel to represent a class, even when its interests are not being protected by a

single non-conflicted counsel and even when that conflict remains extant. (App.4a-5a).[4]

The importance of the federal question separating the Ninth Circuit from the multiple circuit courts that have construed Rule 23 as barring conflicted counsel from representing a class cannot be gainsaid. As the decisions of this Court have made clear, Rule 23's adequacy of representation provision, including its requirement that the representative plaintiffs and their class counsel be conflict-free, is rooted in due process concerns. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *see also Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940); *Radcliffe I*, 715 F.3d at 1168; *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996); *Broussard*, 155 F.3d at 338 ("basic due process requires that named plaintiffs possess undivided loyalties to absent class members"). Accordingly, in addition to denying absent class members the rights afforded them under Rule 23, representation by conflicted counsel implicates their rights to procedural due process under the Constitution—the adequacy of any relief that they may have obtained through a settlement negotiated by such counsel notwithstanding:

> Rule 23(a)(4) simply does not permit an attorney to represent a class if he suffers from a conflict of interest. It does not matter whether [the conflicted attorney] negotiated a favorable

---

[4] In its memorandum opinion, the Ninth Circuit failed to explain how its decision could be squared with its earlier decision in *Radcliffe I*, wherein it found that Settling Counsel's representation of conflicting interests compelled the conclusion that they were "inadequate to represent the class" under Rule 23(a)(4) and, hence, that they "could not settle th[is] case" on behalf of that class. 715 F.3d at 1167.

> settlement; rule 23(a)(4)'s concerns are procedural, not substantive. Even if, *arguendo*, the settlement was favorable, an unconflicted attorney might have negotiated a better one.

Flanagan v. Ahearn, 90 F.3d 963, 1010, 149 (5th Cir. 1996) (Smith, J., dissenting), *vacated by*, 521 U.S. 1114 (1997).

Likewise, in this case, there is no way of knowing what relief might have been obtained for the class had the driving force behind the negotiations not been Settling Counsel's desire to cover their $6 million re-notice debt. In this connection, it bears emphasizing that Settling Counsel's financial interest in getting out from under that debt could not have gone unnoticed by their counterparts in the negotiation. Armed with that knowledge, Defendants could easily have calculated that Settling Counsel would not walk away from any deal that covered their $6 million debt, even if by means of dubious non-monetary components, and, hence, Settling Counsel were in no position to secure the maximum attainable relief for the class.

The Ninth Circuit's decision thus deprived the absent class of its right to adequate representation under Rule 23 and the Due Process Clause. Further, to the extent it is followed by other courts either within the Ninth Circuit or without, that decision will eviscerate that fundamental right and give conflicted counsel *carte blanche* to subordinate the interests of absent class members to their own.

In this connection, it bears emphasizing that the fact that the Ninth Circuit's opinion was issued in the form of an unpublished memorandum decision provides no grounds to deny this Petition. On the contrary, as

Justice Thomas noted in his dissent from a decision to deny a writ of certiorari in *Plumley v. Austin*, 135 S.Ct. 828 (2015), far from being a reason to deny review, the fact that a decision is issued in an unpublished form is "disturbing" and provides "yet another reason to grant review." *Id.* at 831. That is because the failure to publish a decision addressing an important question of federal law may have no purpose other than "to avoid creating binding law" and to evade the attention of this Court. *Id.*; *see also Smith v. United States*, 502 U.S. 1017, 1020, n.2 (1991) (Blackmun, J., dissenting) ("[n]onpublication must not be a convenient means to prevent review"). This Court should, therefore, issue a writ of certiorari to resolve the circuit split the Ninth Circuit's decision creates regarding the proper construction of Rule 23's adequacy of representation requirement.

II. REVIEW SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *AMCHEM* AND *ORTIZ* ON AN IMPORTANT QUESTION OF FEDERAL LAW, NAMELY WHETHER THE PROCEDURAL PROTECTIONS AFFORDED BY RULE 23(a) MUST BE SATISFIED INDEPENDENT OF ANY ASSESSMENT OF THE FAIRNESS OF CLASS SETTLEMENT.

Apart from conflicting with the decisions of multiple circuit courts, the Ninth Circuit's holding that the determination of counsel's adequacy to represent a class can turn on an assessment of the adequacy of any settlement they may have negotiated cannot be squared with this Court's decisions in *Amchem v. Windsor Corp.* and *Ortiz v. Fibreboard, Inc.*

In *Amchem*, objectors sought review of a district court order certifying a "sprawling class" and approving a global class settlement that resolved the claims of both (1) current claimants who had already manifested physical injuries as a result of their exposure to asbestos in the workplace, and (2) future claimants who had been exposed to asbestos but who had not yet manifested any physical injuries. 521 U.S. at 607-08, 622. Following an appellate court decision reversing the district court's certification order on grounds that it had improperly taken account of the settlement in finding that both Rule 23(a)'s threshold requirements, including its adequacy of representation requirement, and Rule 23(b)(3)'s predominance requirement, had been met, this Court accepted review "to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification." *Id.* at 619.

This Court's answer to that question was clear and unequivocal. While it found that settlement is relevant to the question of trial manageability under Rule 23(b)(3)—for the obvious reason that a settlement dispenses with the need for trial—this Court held that:

> Other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.

Id. at 621. In so holding, the *Amchem* Court rejected precisely the kind of exercise that the Ninth Circuit conducted in this case in finding that Settling Counsel were adequate to represent the class—that is, an "appraisal[] of the chancellor's foot kind" in which certification becomes "dependent upon the court's *gestalt* judgment or overarching impression of the settlement's fairness." *Id.*

To the extent this Court's decision in *Amchem* left any doubt as to the role class settlement plays in the adequacy of representation determination under Rule 23(a)(4), that doubt was erased by this Court's subsequent decision in *Ortiz v. Fibreboard*. As in *Amchem*, the *Ortiz* Court was called upon to review the propriety of a district court order certifying an "elephantine" class consisting of both present and future victims of asbestos exposure–albeit, unlike *Amchem*, the district court certified that class as a mandatory "limited fund" class under Rule 23(b)(2), rather than as an opt-out class under Rule 23(b)(3). 527 U.S. at 821. And, as in *Amchem*, the district court based its holding that named plaintiffs and their counsel satisfied Rule 23(a)(4)'s adequacy of representation requirements as to all subclasses–despite their "potentially conflicting interests"–on "its *post hoc* findings at the fairness hearing" that the class settlement had protected and advanced their common interests. 527 U.S. at 831-32.

Following its earlier decision in *Amchem*, this Court gave that argument "no weight," observing that, "just as in th[at] case, the proponents of the settlement [we]re trying to rewrite Rule 23," the threshold requirements of which protect "against inequity and potential inequity at the pre-certification stage, quite

independently of the required determination at post-certification fairness review under subdivision (e) that any settlement is fair in an overriding sense." 527 U.S. at 858 (emphasis added). Accordingly, the *Ortiz* Court, like the *Amchem* Court before it, rejected the very assumption underlying the Ninth Circuit's decision in this case, namely that a fairness assessment under Rule 23(e) can "swallow the preceding protective requirements of Rule 23," including, in particular, Rule 23(a)(4)'s adequacy of representation requirement. *Id.* at 858-59.

CONCLUSION

For the aforementioned reasons, the Petition for a Writ of Certiorari should be granted and the case scheduled for briefing and oral argument. Alternatively, given that the Ninth Circuit's decision is so clearly and irreconcilably inconsistent with this Court's decisions in *Amchem* and *Ortiz*, Petitioners respectfully suggest that this case is an appropriate candidate for summary disposition under Supreme Court Rule 16.1.

Respectfully submitted,

GEORGE F. CARPINELLO
COUNSEL OF RECORD
ADAM R. SHAW
BOIES SCHILLER & FLEXNER LLP
30 SOUTH PEARL STREET
ALBANY, NY 12207
(518) 434-0600
GCARPINELLO@BSFLLP.COM

DANIEL WOLF
LAW OFFICE OF DANIEL WOLF
1220 N STREET, NW, UNIT PH2
WASHINGTON, DC 20005

CHARLES JUNTIKKA
CHARLES JUNTIKKA & ASSOCIATES LLP
30 VESEY STREET, SUITE 100
NEW YORK, NY 10007

COUNSEL FOR PETITIONERS

MARCH 16, 2020