No. 19-1180

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

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The district court has presided over this Fair Credit Reporting Act ("FCRA") litigation for over fourteen years. Following intense discovery, litigation, and multiple, lengthy negotiations, the parties achieved the second largest FCRA settlement in history—one which the district court deemed "an excellent result for the Class" and the product of Class Counsel's "skill and persistence" in a "generally less favorable climate for class actions." On appeal, the court of appeals agreed that the Settlement was indeed "fair, reasonable and adequate" and highlighted that "[Class] counsel ably represented the Class," but remanded for a recalculation of attorneys' fees because the record indicated that the district court had not fully accounted for the court of appeals' previous understanding that Class Counsel would pay for the costs of notice out of their attorneys' fee award.

Does remand for the narrow purpose of recalculating the attorneys' fee award require vacating a fair, reasonable and adequate settlement where the court of appeals—consistent with the rule in all circuits—never found a "fundamental conflict"?

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INTRODUCTION

For well over a decade, counsel for Petitioners Robert Radcliffe, et al. (the "White Objectors") have relentlessly sought to upend any reasonable settlement of plaintiffs' class claims for statutory damages under the FCRA. When plaintiffs achieved a $45 million proposed settlement in 2009 ("2009 Proposed Settlement"), White Objectors appealed it as inadequate, insisting instead on a billion-dollar recovery that would have essentially destroyed the country's three largest credit reporting agencies. Because of a mistake in drafting the incentive-award provision in that settlement agreement, the court of appeals did not reach the adequacy of the 2009 Proposed Settlement, but instead remanded the case for further proceedings. *Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157 (9th Cir. 2013) ("*Radcliffe I*").

Through six more years of litigation, including successfully defending their appointment as class counsel under Rule 23(g) against unfounded ethics allegations at the court of appeals and in a petition for certiorari which this Court denied, *Radcliffe v. Hernandez*, 818 F.3d 537 (9th Cir. 2016), *cert. denied*, 137 S.Ct. 620 (2017) ("*Radcliffe II*"), counsel for plaintiffs Jose Hernandez, et al. ("Hernandez Counsel" or "Class Counsel") have now achieved an improved settlement (the "Settlement")—which the district court found to be "an excellent result for the Class" and the product of Class Counsel's "skill and persistence" in a "generally less favorable climate for class actions." App. 24a–25a. The Settlement will deliver the *same* range of

monetary relief promised under the 2009 Proposed Settlement to 200,000 *more* claimants along with additional, valuable non-monetary relief narrowly tailored to the Class's claims. The court of appeals below—in a finding White Objectors do *not* challenge in their Petition—found the Settlement to be "fair, reasonable, and adequate." App. 3a–4a. Because it found, however, that the district court's approximately $3 million reduction in Class Counsel's fees was not sufficient, the court of appeals remanded the case to the district court for recalculation of the fee award.

Instead of allowing the Settlement funds to finally be distributed after 14 years of litigation, White Objectors' counsel, still entranced by the specter of an unachievable billion-dollar recovery, continue their misguided quest to oust Class Counsel from control of this case. As with their two previous appeals, White Objectors make unfounded ethics allegations—which hinge on mischaracterizing the factual record and ignoring the district court's detailed findings. White Objectors have strained to turn what is essentially a state-law ethics attack against Class Counsel into an argument that Class Counsel suffer from a fundamental conflict under the rule of *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

Amchem and *Ortiz*, however, plainly do not apply. These cases require subclassing when a class includes subgroups whose interests are fundamentally opposed. *Amchem*, 527 U.S. at 627–28; *Ortiz*, 527 U.S. at 857. White Objectors fail to cite a single case interpreting

Amchem or *Ortiz* to apply when a case is remanded for recalculation of an attorneys' fee award. Even in one of the cases White Objectors principally rely on—whose holding they misrepresent—the court of appeals held that the correct remedy for a "potential for a conflict of interest"[1] created by a fee agreement was to remand to the district court for recalculation of the fee while affirming the settlement, exactly as the court of appeals did here. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 174 (2d Cir. 1987) ("*Agent Orange I*").

All circuits agree that *Amchem* and *Ortiz* apply only in cases of a "fundamental conflict" going to "the specific issues in controversy." *See*, *e.g.*, *Dewey v. Volkswagen Aktiengesellchaft*, 681 F.3d 170, 184 (3d Cir. 2012). Here, the court of appeals found no fundamental conflict, but rather held that Class Counsel had "ably represented the class." App. 5a. The court of appeals' finding is amply supported in the record, including the district court's findings that Class Counsel had the incentive to and did "litigate aggressively" and "fought hard to secure additional relief for the Class." App. 46a; *see also* ER 72 (finding that Class Counsel are "qualified, experienced, and able to vigorously conduct the proposed litigation on behalf of the Class"); App. 17a (incorporating these findings by reference). Because the court of appeals' decision was correct and consistent with the holdings of all other circuits that a fair, reasonable, and adequate settlement should not

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[1] *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.3d 216, 224 (2d Cir. 1987) ("*Agent Orange II*").

be overturned where no "fundamental conflict" exists, the petition for certiorari should be denied.

STATEMENT

A. The first phase of this litigation produced groundbreaking injunctive relief and a proposed $45 million settlement.

1. Initiation of the Litigation and Organization of Counsel.

In October 2005, Plaintiff Jose Hernandez, with Caddell & Chapman and Leonard Bennett as his counsel, commenced this class litigation in *Hernandez v. Equifax Info. Services, LLC, et al.*, No. 05-cv-03996 (N.D. Cal.), alleging violations of the FCRA and its California counterparts.[2] ER 4; SER 2341. In November 2005, Charles Juntikka and Dan Wolf, two solo practitioners with neither class action nor FCRA experience, along with Lieff Cabraser Heimann & Bernstein, LLC, filed a similar class action in *White v. Equifax Info. Servs., LLC*, 05-cv-7821 DOC (MLGx) on behalf of several plaintiffs. ("White Plaintiffs or Objectors"). ER 4, 112; SER 862, 1964. The *Hernandez* and *White* cases were consolidated and jointly prosecuted in the Central District of California ("White/Hernandez

[2] The White/Hernandez Plaintiffs' claims focused on Defendants' negligent and willful failure to maintain reasonable procedures to assure the accurate reporting of debts discharged in bankruptcy. ER 3, 4, 113. The FCRA provides for statutory damages of $100–$1,000 for willful violations. 15 U.S.C. § 1681n(a)(1)(A).

litigation"). ER 4, 112. Soon thereafter, Caddell & Chapman and Lieff Cabraser, both of whom contributed significant class action and FCRA expertise, agreed to prosecute the consolidated litigation as co-leads along with the National Consumer Law Center and numerous other experienced counsel. ER 112; SER 862.

2. Litigation, Injunctive Relief, and a Proposed Monetary Settlement.

From August 2007 to February 2009, the parties engaged in extensive factual and expert discovery, motion practice, and contentious negotiations, including twelve formal mediations. ER 4, 113; SER 1465, 1577, 1591, 1722–23, 1879, 1939–40. Against the wishes of Mr. Wolf and Mr. Juntikka, who remained fixated on pursuing a billion-dollar statutory damages settlement, the rest of the White/Hernandez team first pressed for much-needed injunctive relief. SER 820–21, 825–26, 866–68. These efforts resulted in the August 2008 Injunctive Relief Settlement, which the district court approved and lauded as "groundbreaking," effecting a fundamental revision of the credit reporting industry's post-bankruptcy reporting practices. ER 4, 5,113, 270; SER 793–95, 826, 868.

During several ensuing negotiations to resolve the Class's monetary claims, Mr. Wolf and Mr. Juntikka grossly underestimated class certification and trial risks. ER 140; SER 820–21. Wolf and Juntikka's insistence that a settlement should exceed a billion dollars

created a permanent divide between them and the rest of the White/Hernandez team and ultimately forced a breakdown in settlement negotiations. ER 221, SER 830–31.

Unable to achieve settlement, on January 26, 2009, the parties proceeded to a hearing on Plaintiffs' Motion for Class Certification. ER 5. Immediately prior to the hearing, the district court issued a tentative ruling denying the motion and directed the parties to make a final attempt to settle the monetary claims. ER 5, 259.

On February 5, 2009, all parties and counsel participated in a court-ordered settlement conference at the courthouse, where the Hernandez Plaintiffs, Equifax, and Experian reached agreement on the principal terms of a monetary settlement (the "2009 Proposed Settlement"). ER 5. TransUnion agreed to join that settlement on February 18, 2009. ER 5. By February 6, 2009, Plaintiff Hernandez and three other plaintiffs decided to support the settlement regardless of any expectations of an incentive award. SER 1128–99.

Also on February 6, Hernandez Counsel informed the White Plaintiffs of the proposed settlement and expressly instructed that any potential incentive award "should absolutely not be a reason for you to support the settlement." ER 114; ER 341–45; SER 1128. On March 9, the White Plaintiffs, through Wolf and Juntikka, expressed their opposition to the settlement. ER 114; SER 1634. At that juncture, Wolf and Juntikka essentially recast themselves as objectors' counsel.

3. The incentive award provision was drafted *after* all Plaintiffs had already voiced assent to, or rejection of, the 2009 Proposed Settlement.

Having agreed on principal settlement terms in February 2009, all Hernandez counsel and defense counsel turned to drafting a settlement agreement, which was near-final on April 10, 2009. SER 869–70. On April 14, one of Hernandez Counsel notified the others that the agreement inadvertently neglected to include an incentive award provision. SER 759–60. As a result, it was not until April 14, 2009—long after *all* plaintiffs had either agreed to or rejected the principal settlement terms—that an incentive award provision was added to the agreement. *Id.*

4. The District Court's Extensive Vetting and Approval of the 2009 Proposed Settlement.

After the district court granted preliminary approval on May 7, 2009, notice was given to the Class. ER 5. Plaintiffs then filed their motion for final approval, which was met with Wolf and Juntikka's various objections. ER 5, 224–40. While Wolf and Juntikka primarily argued that $45 million was woefully inadequate, they also argued that the late-added incentive award provision's wording created a conflict of interest for Hernandez Counsel and the settling plaintiffs. Dkt. 553 (C.D. Cal.) at 11–14; ER 114; *see* ER 224–43; SER 1068–69. After conducting multiple hearings on Wolf and Juntikka's objections, on September 10, 2011, the

district court granted final approval of the settlement and concluded that the incentive award provision did not create the "tell-tale signs of conflict." ER 147–48, 242; *see* SER 1068–26, 1611–23.

5. The White Objectors appealed the 2009 Proposed Settlement.

The White Objectors appealed final approval of the 2009 Proposed Settlement to the court of appeals, which ultimately found that even though the "conflict developed late in the course of representation," the settlement's incentive award provision created an impermissible conflict. *Radcliffe I*, 715 F.3d at 1168. However, never did the court of appeals indicate that Hernandez Counsel or the settlement was inadequate. *See id.* Rather, it expressly left open the possibility that a similar settlement, minus the specific incentive award provision, could be advanced by Hernandez Counsel following remand. *Radcliffe I*, 715 F.3d at 1168. In response to *Radcliffe I*, Hernandez Counsel voluntarily agreed not to seek any fees or expenses for the period of conflict identified by the court of appeals. ER 5–6.

B. Second Phase: Returning to the district court, Hernandez Counsel establish themselves "best able" to represent the Class going forward.

1. White Counsel's effort to disqualify Hernandez Counsel fails, and Hernandez Counsel are appointed to represent the Class.

On May 1, 2014, following White Counsel's effort to disqualify Hernandez Counsel and have themselves appointed to represent the Class, the district court appointed Hernandez Counsel as Rule 23(g) Class Counsel. ER 143.[3] In so doing, the district court concluded that it "[could] find no bad faith in [Hernandez] Counsel's actions" arising from the incentive provision. ER 136. ("The conflict did not become an issue until the eve of settlement" before which counsel had negotiated "far reaching and badly needed injunctive relief" and also "a very high settlement in the face of a tentative order denying certification.") The district court highlighted Hernandez Counsel's candor, emphasizing that the "incentive provision was part of the preliminary settlement papers presented to the [c]ourt, not a hidden agreement entered into privately or later exposed at certification. . . ." *Id.* In finding that Hernandez

[3] Upon remand in 2013, Hernandez Counsel put in place multiple safeguards—with the oversight of an ethics expert—to ensure that the Class's interests were protected, including the presence of newly associated counsel, Public Justice, P.C. and Francis & Mailman, who, in addition to being unconnected to the prior conflict, brought considerable additional class action and FCRA expertise to the table. ER 6.

Counsel were "adequate to represent the class under Rule 23(g)," the district court concluded it had "no basis on which to seriously doubt [Hernandez] Counsel's integrity or loyalty to the class" given that "the record simply does not demonstrate any nefarious, manipulative, or self-serving calculation behind [Hernandez] Counsel's actions." ER 137–38.

Moreover, the district court found that White Counsel "lack[ed] the same depth of class action and FCRA experience" and also considered White Counsel's valuation of the case as a billion-dollar statutory damages case legally untenable. ER 140–41; *see also* ER 218.

2. The court of appeals affirmed the district court's refusal to disqualify Hernandez Counsel and agreed Hernandez Counsel was "best able" to represent the Class.

Hernandez Counsel next successfully defended their appointment to serve as counsel for the Class at both the court of appeals and United States Supreme Court. ER 6; *Radcliffe II*, 818 F.3d at 537, *cert. denied*, 137 S.Ct. 620. On March 28, 2016, the court of appeals unanimously affirmed the district court's denial of White Counsel's disqualification motion and appointment of Hernandez Counsel as "best able to represent the Class." *Id.* at 549. While the court of appeals had previously held in *Radcliffe I* that a conflict was created by the incentive award provision, it also

emphasized that "it is clear we did not believe the district court would be required to disqualify Hernandez Counsel as a result of our holding." *Id.* at 545. It further agreed that the short-lived conflict "was appropriately cured when [it] rejected the settlement agreement" and "was not inherent to the relationship between Hernandez Counsel and the rest of the class," but rather "resulted from a particular provision in an agreement that was later held invalid." *Id.* at 546.

3. The parties achieve a historic and improved settlement.

Following *Radcliffe II* and remand to the district court, the parties resumed both litigation and settlement negotiations, ultimately executing a final Settlement on April 14, 2017. *Id.*

a. The district court concluded the Settlement represents a marked improvement over the 2009 Proposed Settlement.

The Settlement provides both significant monetary and, when compared to the 2009 Proposed Settlement, important, new nonmonetary benefits. ER 8, 12. The addition of non-monetary relief and delivery of benefits to over 200,000 *more* Class members make this Settlement superior to the 2009 Proposed Settlement. ER 14.

i. Monetary Relief Delivered to 22% More Claimants.

The Settlement creates approximately $38.7 million in non-reversionary cash benefits. ER 8. Class members may claim either an Actual Damage Award, a Convenience Award, or a package of Non-Monetary Benefits. ER 8. Importantly, all approved claims submitted in connection with the 2009 Proposed Settlement will be automatically honored. *Id.* As with the 2009 Proposed Settlement, Actual Damage Award Claimants will receive $750 for denial of employment, $500 for denial of a mortgage or housing rental, or $150 for denial of other credit. ER 9. Convenience Award claimants are estimated in the Notice to receive $15–$20, similar to the range estimated in the notice for the 2009 Proposed Settlement. ER 564–65, SER 1667.

In strictly monetary terms, this is the second-largest settlement in FCRA history, which weighed strongly in favor of approval, "particularly in light of the FCRA's goal of awarding statutory damages to deter offenders from improperly reporting consumers' credit history." ER 14. The benefits to be delivered include 3,340 new verified Actual Damage Award claims—22% more than under the 2009 Proposed Settlement—for a total of 18,669 Actual Damage Awards. ER 14–15. The benefits also include 163,397 new, approved Convenience Award claims—22% more than under the 2009 Proposed Settlement—for a total of 917,404 approved Convenience Award Claims. *Id*.

ii. New non-monetary relief, valued conservatively, is both unique and valuable to the Class.

The Settlement also gives Class members the option of claiming, instead of a monetary benefit, an extra copy of their credit reports (beyond the free annual FACTA disclosure) and two free VantageScore Credit Scores. ER 16. Leading credit industry expert John Ulzheimer highlighted that these benefits are provided to Class members without strings, which Mr. Ulzheimer considers "'unique'" in today's environment. *Id.* Ultimately, the district court found the market value of a credit disclosure and two credit scores is $19.95, which "aligns with the roughly $20 Convenience Award that [53,064] class members turned down to instead accept the non-monetary relief, which suggests those Class members valued the credit file disclosure and credit scores at an amount greater than $20." ER 16. Overall, this Settlement will deliver benefits to 989,137 approved claimants, which is 28.6% more claims than were approved under the 2009 Proposed Settlement. ER 15.

As an additional benefit, all Class members can access the Settlement Website to receive information about Defendants' reinvestigation processes and free legal assistance from Class Counsel to resolve inaccuracies in their credit reports. ER 9. Regarding the website, leading credit industry expert John Ulzheimer characterized it as containing "'a wealth of important and accurate information,'" observing that it is "'unique in its breadth and provenance.'" ER 15.

He also praised Class members' ability "to obtain legal assistance to challenge the accuracy of [their] credit reports by leveraging the experience of Class counsel." ER 15–16. Ultimately, the district court estimated approximately 200,000 or more Class members will benefit from the website. ER 16. Notably, while White Objectors claim the foregoing non-monetary relief is somehow "worthless," they failed to provide the district court with *any* valuation evidence contradicting Mr. Ulzheimer's testimony.

Given the foregoing valuation, the district court found that "[o]verall, this Settlement is an excellent result for the Class" (*id.*) and concluded that "[s]etting aside the qualitative improvements in the settlement, the net value to the Class under this Settlement, including the Court's conservative assessment of the value of the non-monetary relief," will be greater than under the 2009 Proposed Settlement. ER 32–33.

b. Class members overwhelmingly supported the Settlement.

Out of over 15 million Class members, only three objections were filed—one from Wolf and Juntikka and two from "serial objectors" (neither of whom appealed). ER 20. At the December 2017 final approval hearing, the district court heard extensive argument, and among other issues, questioned the Settlement valuation methodology reflected in Hernandez Counsel's fee request and Proposed Order. ER 431–32; SER 128–36. Following that hearing, Hernandez Counsel submitted

an Amended Proposed Order attempting to reflect the Court's reasoning as expressed at the hearing and suggesting a $2 million reduction below the fees originally requested. ER 364, 400. On April 6, 2018, the district court entered an order—containing key differences from the Amended Proposed Order—that granted final approval of the Settlement and reduced the requested attorneys' fees further by $331,029.82, for a total fee award of $8,262,848.33. ER 40, 50.

4. The district court found that Hernandez Counsel's fee request was "consistent with their commitment that the Class would receive the same or better relief" under the new Settlement.

a. The fees awarded were well below the value of time expended over the last 14 years.

Over the last 14 years, Hernandez Counsel have expended $22,115,924.60 in attorney and staff time and paid $1,254,740.13 in out-of-pocket expenses. SER 392. Backing out from this total the period of conflict identified by the court of appeals and any lodestar or expenses allocated to obtaining injunctive relief, Hernandez Counsel's lodestar and expenses attributable to achieving the Settlement are $11,830,950.71 and $838,836.94, respectively. *Radcliffe I*, 715 F.3d at 1168; ER 42, 44, Dkt. 839 (C.D. Cal.); *see* SER 392.

Hernandez Counsel initially requested attorneys' fees of $11,161,163.06, which represented 21% of the

total settlement value, based on their proposed valuation, and, when applying a lodestar cross-check, would have resulted in a 0.94 inverse multiplier. Dkt. 1096 (C.D. Cal.) at 9. The district court ultimately awarded $8,262,848.33, representing approximately 20% of the common fund according to the district court's revised valuation. ER 40. The court "conservatively" valued the non-monetary relief at $3 million, which together with the $2.5 million in non-duplicative notice and administration funds expended for the Class's benefit in connection with the 2009 Proposed Settlement and the $38.7 million in cash, created a total common fund of approximately $44.2 million. ER 41–42. This reduced attorneys' fee award resulted in a 0.75 multiplier and made available an additional approximately $2.9 million in cash to be distributed to the Class. *Id.*

b. The district court found the fees comport with Hernandez Counsel's express commitment to protect the Class from being penalized for the 2009 Proposed Settlement.

White Objectors argued below that the fee request violated Hernandez Counsel's "purported commitment" to pay any notice costs associated with the Settlement out of their attorneys' fees. ER 29. In considering this argument, the district court scoured hearing transcripts and found "this is not an accurate characterization of the commitments made by [Hernandez] Counsel." *Id.* Rather, "[Hernandez] Counsel's commitments were (1) [to] deduct the costs of a

supplemental notice conducted in connection with the 2009 Proposed Settlement, which totaled $567,284.91, from their fees; (2) if a new Settlement were not reached, [Hernandez] Counsel would cover any costs of re-notice to inform the class that, in the absence of settlement, Plaintiffs planned to go forward with litigation, and (3) [Hernandez] Counsel would protect the Class from being penalized for the 2009 Proposed Settlement being overturned." *Id.* (citations omitted).

Regarding the first commitment, Hernandez Counsel proposed that the supplemental notice costs be deducted from their fees, thereby reducing their fee request by $567,284.91. *Id.* The second commitment was deemed irrelevant given that a new settlement was indeed reached. *Id.*

As to the third commitment, the district court found that "the structure of this Settlement ensures that, far from being penalized, the Class will benefit from an improved Settlement." *Id.* While the district court considered the White Objectors' view that the current Settlement is somehow less valuable than the 2009 Proposed Settlement and the Class will therefore be penalized unless Hernandez Counsel pays notice costs out of its attorneys' fees, it ultimately concluded that the current Settlement represents an improvement and that Hernandez Counsel had not "failed to follow through on one of [their] prior promises" and had indeed "fulfilled their commitments to the Class." ER 30.

The district court directly quoted from past hearings where Hernandez Counsel confirmed they would reduce their fees should a new settlement not represent an improvement over the 2009 Proposed Settlement. In so doing, the district court described the White Objectors' reference to such statements as a mischaracterization of Hernandez Counsel's express commitment to the Class. ER 30–31.

Following a detailed review of Hernandez Counsel's statements, the district court set forth the ways in which "[Hernandez] Counsel have honored its commitment not to penalize the Class," which include: (1) "ensuring that Actual Damage Claimants will receive awards in the same dollar amounts as would have been paid under the 2009 Proposed Settlement and by making clear from their initial fee application that they did not request any fee that would result in insufficient amounts remaining in the Convenience Award Fund to issue Convenience Awards comparable to what Class members were estimated to receive under the 2009 Proposed Settlement" (ER 31); and (2) Hernandez Counsel "offered to delay any payment of attorneys' fees until it could be assured that Convenience Award Claimants would receive at least $20 each, at the top of the range estimated in the court-approved Notice and similar to the awards originally estimated in the 2009 Proposed Settlement" (ER 31–32; SER 1667). Given the foregoing, the district court noted that Hernandez Counsel "has consistently calibrated their fee request to ensure that the Class members would receive benefits comparable to what they were estimated

to receive under the 2009 Proposed Settlement, fulfilling their commitment that the Class would not be penalized." ER 32.

5. Hernandez Counsel's commitment to the Class is further demonstrated by their offer to pay all notice costs if the district court believed that was warranted, together with a promise not to appeal the district court's decision on attorneys' fees.

Finally (and notably absent from White Objectors' briefing), following the final approval hearing, Hernandez Counsel submitted an amended proposed final approval order that sought to reflect the district court's reasoning as expressed at the hearing. *See* ER 364–410. In this filing, sensitive to White Objectors' insistence that all costs of notice must be absorbed by Hernandez Counsel based on an alleged prior commitment, Hernandez Counsel made clear that should the district court make a finding "that [Hernandez] Counsel unconditionally committed in 2013 to absorb through a reduction in their attorneys' fees the cost of any notice in conjunction with a future settlement, including the present proposed settlement, without regard to whether that settlement resulted in improved benefits for the Class," Hernandez Counsel would *not* appeal "any decision" on fees, including one where their fee request was reduced based on such a finding. *Id.*

C. Third Phase: the court of appeals affirms the Settlement, remanding only for a recalculation of the attorneys' fee award.

The White Objectors appealed the district court's final approval of the Settlement, which the court of appeals affirmed, finding that it was indeed "fair, reasonable and adequate" and that "[Hernandez] Counsel ably represented the class." App. 2a, 5a. However, the court of appeals did remand for reconsideration of the attorneys' fee award given that the district court—in its 2014 order appointing Hernandez counsel as class counsel—generally stated without qualification that "[Hernandez] Counsel would 'accept the costs of renotice' " and the court of appeals "quoted this language in *Radcliffe II* when [it] affirmed the district court's order." App. 2a, 3a. While the district court subsequently made clear—in its 2019 order approving the Settlement—that Hernandez Counsel committed to accept these costs *only* if a new settlement penalized the Class, because "*Radcliffe II* was . . . explicitly predicated on the fact that Settling Counsel would 'accept the costs of renotice,' " the district court's subsequent, detailed findings that the commitment was in fact conditional did not alter the *Radcliffe II* panel's assumption to the contrary. App. 3a. Accordingly, the court of appeals "specifically note[d] *Radcliffe II's* insistence that [Hernandez] Counsel pay the full cost of re-notice" and concluded that "[i]n light of our decision in *Radcliffe II*, . . . , we remand for reconsideration of the attorneys' fee award." App. 6a.

D. White Counsel seek a share of the awarded attorneys' fees.

Notwithstanding their objection to the Settlement, not only did White Counsel never appeal the district court's award of attorneys' fees to Hernandez Counsel, but following final approval, White Counsel actually filed a Motion for Attorneys' Fees and Costs, asking the district court to declare that they were entitled to a share of the attorneys' fees because their "work contributed to the class obtaining the common fund provided for in the [S]ettlement." SER 20.

ARGUMENT

A. Objectors attempt to present their failed California-law argument in a federal guise.

At the court of appeals, White Objectors argued that Class Counsel had a duty to cover the cost of a second notice to the Class under California state law. *See* 18-55606 Doc. 12-3, at 25 (arguing that this obligation existed as a "remedy to the common law torts of attorney malpractice and breach of fiduciary duty"). Relying on California authorities, they argued that this alleged breach of a California-law duty rendered Class Counsel inadequate. *See* 18-55606 Doc. 47, at 3 (citing *Stanley v. Richmond*, 35 Cal. App. 4th 1070, 1086–87, 1097 (Cal. Ct. App. 1995) and *Estakhrian v. Obenstine*, No. 11-cv-3480, 2019 WL 3035119, at *1 (C.D. Cal. Mar. 26, 2019)). The court of appeals did not find any breach of fiduciary duty or of state ethics

rules, instead affirming that Class Counsel adequately and indeed "ably" represented the Class, App. 5a, but remanding the attorneys' fee award in light of the court of appeals' earlier opinion in *Radcliffe II*. App. 6a.

Cognizant that alleged "errors in the application of state law are not a sound reason for granting certiorari,"[4] White Objectors now attempt to recast this same argument while obscuring its California-law foundations. Omitting any citation to the state-law authorities they relied on below, White Objectors instead attempt to shoehorn their state-law ethics allegations into the ill-fitting slipper of *Amchem*, 521 U.S. 591, and *Ortiz*, 527 U.S. 815. Pet. at 3, 19–23. *Amchem* and *Ortiz*, however, deal not with ethical conflicts, but with conflicts caused by representing subgroups of class members with directly opposite interests. *See* Sections B.2 & C, *infra*; *see also* 6 NEWBERG ON CLASS ACTIONS § 19:8 (5th ed.) (noting that "ethical concerns are not *per se* disqualifying" under Rule 23(a)(4) and that "[m]ost courts prefer that ethics complaints be directed to disciplinary authorities rather than settled in the class certification context").

White Objectors' court of appeals briefs cited *Amchem* only for general standards of settlement approval; and *Ortiz*, not at all. *See* 18-55606 Doc. 12-3, at 23; 18-55606 Doc. 47, at 39. Despite having passed on these inapplicable cases in their court of appeals briefing, White Objectors now make *Amchem* and *Ortiz* the

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[4] *Leavitt v. Jane L.*, 518 U.S. 137, 147 (1996) (Stevens, J., dissenting).

centerpiece of their petition for certiorari. Pet. at 3, 19–23. Because White Objectors continue to base their argument on an alleged ethical conflict of interest, however, they cannot escape the centrality of state law. As *Radcliffe II* itself held, "California law governs questions of conflicts of interest." *Radcliffe II*, 818 F.3d at 541; *see Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 967–68 (9th Cir. 2009) ("By virtue of the district court's local rules, California law controls whether an ethical violation occurred." (citing C.D. Cal. L.R. 83-3.1.2)). Because the petition necessarily raises state-law issues, this case is inappropriate for certiorari.

B. With no finding of a "fundamental conflict," the court of appeals' decision does not conflict with any other circuit.

Not only are *Amchem* and *Ortiz* ill-suited to serve as vehicles for federalizing what are in reality state-law issues, all circuits agree that *Amchem* and *Ortiz* create a Rule 23(a)(4) adequacy issue only in cases of "fundamental conflict." *Dewey*, 681 F.3d at 184; *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012); *In re Deepwater Horizon*, 739 F.3d 790, 814 & n.99 (5th Cir. 2014); *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249 (2d Cir. 2011); *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010); *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003). Because the record shows that no fundamental conflict ever existed here, the court of appeals' decision does not conflict with the

law of any other circuit. The petition for certiorari should therefore be denied.

1. Objectors misrepresent the court of appeals' opinion in an attempt to make its reasoning appear inconsistent with other circuits'.

Attempting to manufacture a conflict among the circuits where there is none, White Objectors stand up a straw man. Objectors repeatedly refer to what they misleadingly term a "material conflict" between Class Counsel and the Class. Pet. i, 2–3, 12, 15. That term, however, appears nowhere in the record. The court of appeals never used the term "material conflict" (much less "fundamental conflict"). App. 5a. Instead, it found only that "the structure of the attorneys' fee award in this case created the *possibility* of a conflict of interest with the class." *Id.* (emphasis added). Nothing in the court of appeals' opinion or the record supports that this "possibility" ever matured into an actual conflict, much less a "material" or "fundamental" one. To the contrary, the record shows that Class Counsel's incentive was always to negotiate for the highest possible recovery for the Class and that they in fact did so:

> Not only did Class Counsel have the incentive to do so, they actually did litigate aggressively, moving for leave to file an amended Complaint and proposing a schedule for class certification and trial. . . . Class Counsel even walked away from one unsuccessful mediation and continued to litigate until a second

> mediation ultimately secured a better Settlement for the Class.

App. 46a (citations omitted). The court of appeals agreed that "Settling Counsel ably represented the class." App. 5a.

Referencing its analysis of the Rule 23(a)(4) and (g)(4) adequacy-of-counsel factors in *Rodriguez*,[5] the court of appeals concluded that "[t]he *Rodriguez* factors are present here." App. 5a. As in *Rodriguez*, Class Counsel "vigorously prosecuted the case" and negotiated the settlement at arm's length with the help of an experienced mediator. *Rodriguez*, 563 F.3d at 961; App. 26a. There was "no evidence of collusion." *Id*. The court of appeals therefore concluded that under "Rule 23's flexible standard," the "possibility" of a conflict of interest did not compromise counsel's adequacy. App. 5a.

2. Objectors misstate the law of other circuits, which agree with the court of appeals' flexible adequacy analysis where, as here, no "fundamental conflict" exists.

White Objectors also misstate the law of other circuits, contending that other circuits do not agree with *Rodriguez's* "flexible standard" for the Rule 23 adequacy analysis but instead apply an "inflexible one." Pet. 12. This is simply wrong.

All circuits, consistent with *Rodriguez* and the court of appeals below, agree that "[a] conflict must be

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[5] 563 F.3d at 961.

'fundamental' to violate Rule 23(a)(4)." *Dewey*, 681 F.3d at 184; *see Matamoros*, 699 F.3d at 139 (holding that district court "acted within the realm of its discretion" in holding that no fundamental conflict existed); *In re Deepwater Horizon*, 739 F.3d at 814 & n.99 (holding that no fundamental conflict existed and citing *Rodriguez*); *In re Literary Works*, 654 F.3d at 249 (holding that "the conflict must be 'fundamental' to violate Rule 23(a)(4)"); *Ward*, 595 F.3d at 180 ("For a conflict of interest to defeat the adequacy requirement, 'that conflict must be fundamental.'" (citing *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir. 2003)); *Valley Drug*, 350 F.3d at 1189 ("Significantly, the existence of minor conflicts alone will not defeat a party's claim to class certification: the conflict must be a 'fundamental' one going to the specific issues in controversy.").

Unlike a "possibility of a conflict," App. 5a, created by the structure of an attorneys' fee award, a "fundamental conflict" is one "going to the specific issues in controversy." *Dewey*, 681 F.3d at 184. For example, "[a] fundamental conflict exists where some [class] members claim to have been harmed by the same conduct that benefitted other members of the class." *Id*. (citing *Valley Drug Co*., 350 F.3d at 1189); *see also Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 338–39 (4th Cir. 1998) (class representatives disavowed a remedy that would have benefited half the class). "[S]uch a conflict must go to the 'very heart of the litigation.'" *In re Literary Works*, 654 F.3d at 259 (citing *Cent. States Se. & Sw. Areas Health & Welfare*

Fund v. Merck-Medco Managed Care, L.L.C., 504 F.3d 229, 246 (2d Cir. 2007)). Under this consensus "fundamental conflict" standard, a conflict that is minor or does not "go to the specific issues in controversy"—let alone one that is, as here, a mere "possibility" of a conflict—cannot render class counsel inadequate. *See Dewey*, 681 F.3d at 184 (citing *Rodriguez* for the proposition that "[a] conflict must be 'fundamental' to violate Rule 23(a)(4)"); *see also Reliable Money Order, Inc. v. McKnight Sales Co., Inc.*, 704 F.3d 489, 500 (7th Cir. 2013) (holding that "actions such as occurred here—which do not prejudice an attorney's client or undermine the integrity of judicial proceedings—do not mandate disqualification of counsel"). Unlike in cases where courts have found a "fundamental conflict," Class Counsel here both had the incentive to and did litigate aggressively on behalf of the entire Class. App. 46a.

The Fourth Circuit's recent decision in, *In re Lumber Liquidators Chinese-Manufactured Flooring*,[6] illustrates the common approach circuits have taken when an issue involving attorneys' fees requires remand but does not create a "fundamental conflict." In *Lumber Liquidators*, the district court approved a settlement allowing purchasers of defective flooring to choose between a cash award or a voucher. *Id.* at 477–78. The district court awarded attorneys' fees using the common fund method, including the full face value of the vouchers in the common fund. *Id.* Finding that only

[6] 952 F.3d 471 (4th Cir. 2020).

the redeemed portion, not the full face value, of the vouchers should have been included in the common fund, the court of appeals reversed the attorneys' fee award. *Id.* at 483. While remanding the case for recalculation of the attorneys' fees, the *Lumber Liquidators* court of appeals affirmed approval of the settlement, finding, as did the court of appeals here, that vacatur of the attorneys' fees "does not require us to vacate the Settlement Approval Order." *Id.* at 492.

Belying White Objectors' assertion that courts outside the Ninth Circuit have departed from *Rodriguez's* flexible Rule 23(a) analysis, Pet. 15–17, other circuits not only apply a similar analysis to *Rodriguez's*, but have repeatedly cited *Rodriguez* with approval in doing so. *See In re Lumber Liquidators*, 952 F.3d at 492 (citing *Rodriguez* for proposition that "[o]ur vacatur of the Attorneys' Fee Order therefore does not require us to vacate the Settlement Approval Order"); *In re Cmty. Bank of N. Va. Mortg. Lending Litig.*, 795 F.3d 380, 394 (3d Cir. 2015) (citing *Rodriguez* for proposition that because purported "conflict" would not "pit one group's interest against another. . . . [t]here is thus no fundamental intra-class conflict to prevent class certification"); *In re Deepwater Horizon*, 739 F.3d at 814 n.99 (citing *Rodriguez* for the proposition that "[a]n absence of *material* conflicts of interest between the named plaintiffs and their counsel with other class members is central to adequacy. . . .") (emphasis original). Far from showing an inter-circuit conflict, White Objectors have failed to cite a single case disagreeing with or distinguishing the *Rodriguez* adequacy analysis applied

by the court of appeals here. Because no fundamental conflict existed, the court of appeals' decision affirming that Class Counsel met Rule 23(a)'s adequacy requirements and indeed "ably represented the class," App. 5a, is consistent with law of every circuit.

3. The cases Objectors attempt to rely on confirm that no inter-circuit conflict exists.

Demonstrating the circuits' general accord, White Objectors fail to cite a single case overturning a fair, reasonable, and adequate settlement because of a possible conflict created by the structure of an attorneys' fee award. Pet. 12–15. Unable to find any cases that support their imagined inter-circuit "conflict," they ultimately rely on just three—an unreported decision and two opinions from 1987 and 1979, respectively. *Id.* Of these, only one—*In re "Agent Orange"*—involved conflicts created by the structure of an attorneys' fee award. And, far from supporting White Objectors' argument, the *In re "Agent Orange"* court of appeals actually *affirmed* approval of the settlement, just as the court of appeals did here. "*Agent Orange*" *I*, 818 F.2d at 174 (affirming settlement as reasonable despite conflict created by fee agreement).

White Objectors blatantly misrepresent the holding of *In re "Agent Orange*." *See* Pet. 13. They refer to the "*Agent Orange*" *II* court of appeals' opinion as "reversing that holding [that class counsel had fairly represented the class] and vacating the settlement." *Id*. In

"*Agent Orange*" *I*, however, the court of appeals affirmed certification of the *Agent Orange* class and approved the settlement as reasonable. "*Agent Orange*" *I*, 818 F.2d at 168, 174. While, in "*Agent Orange*" *II*, the court of appeals did decide that a fee-sharing agreement among counsel created "the potential for a conflict of interest," "*Agent Orange*" *II*, 818 F.2d at 226, that decision did not invalidate the settlement. *Id.* To the contrary, the court of appeals concluded that in light of weaknesses in the class's case and the reasonableness of the settlement achieved, the potential conflict *did not* undermine the settlement. "*Agent Orange*" *I*, 818 F.2d at 174. On remand, the district court adjusted the attorneys' fees and distributed the settlement funds in accordance with the court of appeals' decisions. *In re "Agent Orange" Prod. Liab. Litig.*, 689 F. Supp. 1250, 1260 (E.D.N.Y. 1988). *In re "Agent Orange,"* far from supporting the existence of any inter-circuit conflict, is wholly consistent with the court of appeals' decision below.

As for the other two cases out of which White Objectors attempt to concoct an inter-circuit conflict, neither involves attorneys' fee awards. *See* Pet. 13–15. Moreover, both are wholly consistent with the consensus rule that only "fundamental conflicts" undermine the adequacy of class counsel. In *West Morgan-East Lawrence Water and Sewer Authority v. 3M Co.*,[7] class counsel represented class members while simultaneously representing a co-plaintiff water authority which

[7] 737 Fed. App'x 457 (11th Cir. 2018).

"had an interest in maximizing the amount of injunctive relief obtained from Defendants while minimizing the value of (if not undermining entirely) class members' individualized claims for compensatory damages." *W. Morgan-E. Lawrence Water & Sewer Auth.*, 737 Fed. App'x at 464. Such a representation of parties with directly opposite interests—nothing like the facts of this case—could present a "fundamental conflict"; but such a "fundamental conflict" differs both in scope and in kind from a mere "possibility of a conflict" created by class counsel's interest in ultimately earning a fee. Where Class Counsel shared an interest with the Class in obtaining the highest overall settlement recovery, the attorneys' interest in obtaining a fee award need not take away from their zealous advocacy to achieve that shared goal, as it did not in this case. App. 46a.

White Objectors' third and final case, from which they cite a single footnote in support of their supposed inter-circuit conflict, is even less on point. *In re General Motors Corp. Engine Interchange Litigation*[8] concerned whether objectors should have been entitled to discovery into the settling parties' negotiations. *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d at 1123–33. Several cases brought by private plaintiffs and the Illinois attorney general had been consolidated in a multidistrict litigation. *Id.* at 1114–15. After a class was certified, a group of state attorneys general, not including the private plaintiffs, reached a

[8] 594 F.2d 1106 (7th Cir. 1979).

settlement with the defendant. *Id.* at 1116. The settlement would have narrowed the class and released many class members' claims without compensation. *Id.* The private plaintiffs objected to the settlement and sought discovery into the negotiations. *Id.* at 1123. Noting the "seemingly irregular conduct of the negotiations," *id.* at 1124, including "facts suggest[ing] that the representation of the class during the negotiations was less than vigorous," *id*. at 1128, the court of appeals found that denial of this requested discovery constituted an abuse of discretion. *Id.* at 1133.

Notably, even given the irregularities it found, the *In re General Motors* court of appeals did not find that the attorneys general who negotiated the settlement were not adequate to represent the class. *Id.* While generally observing (in the footnote White Objectors rely upon) that information about the settlement negotiations could be relevant to the settlement's fairness, *id.* at 1125 n.24, the court of appeals did "not question in the least the good faith of the group of state Attorneys General who negotiated the settlement." *Id.* at 1141. Nor did it reject the possibility that, despite some irregularity in the negotiation process, a settlement might ultimately prove fair. *Id*. at 1131 (citing *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 429 7th Cir. 1977)). Far from endorsing the "inflexible rule" for which White Objectors attempt to cite it, the *In re General Motors* court explicitly rejected "[p]er se rules rigidly confining the trial court's exercise of its discretion in the supervision of class actions." *Id.* at 1133.

Here, unlike in *General Motors*, the district court did not lack information about the settlement negotiation process. App. 9a, 11a, 26a–27a. Far from revealing anything "irregular," the record showed that these negotiations had been "arm's-length" and "contentious." App. 26a–27a. Thus, applying the *General Motors* court's logic to the facts of this case actually supports affirming the Settlement. Because the court of appeals' decision affirming the Settlement and remanding for a recalculation of attorneys' fees is consistent not only with *General Motors*, but with *Agent Orange*, *Rodriguez*, *Lumber Liquidators*, and the law of every circuit, the petition for certiorari should be denied.

C. The court of appeals' decision was correct.

This Court should also reject White Objectors' argument that the court of appeals' decision is inconsistent with *Amchem* and *Ortiz*. Pet. 19–22. Applying Rule 23(a)'s adequacy requirements consistent with the "fundamental conflict" test, the court of appeals found that the mere "possibility of a conflict" in a matter regarding attorneys' fees did not undermine adequacy or require unraveling a hard-won and valuable settlement. App. 5a. Because, unlike in *Amchem* or *Ortiz*, Class Counsel here never represented subgroups of class members with fundamentally opposed interests, but always had the incentive to and did negotiate for the largest possible recovery on behalf of the entire class, App. 46a, the court of appeals' decision was correct.

1. This case is nothing like *Amchem* or *Ortiz*.

White Objectors' attempt to analogize this case to *Amchem* or *Ortiz* collapses under the faintest scrutiny. Counsel in those cases sought to represent broad classes constructed to resolve the mass-tort asbestos litigation crisis. *Amchem*, 521 U.S. at 601–02; *Ortiz*, 527 U.S. at 821. The classes would have comprised all individuals who had ever been exposed to the defendants' asbestos-containing products and their families. *Amchem*, 521 U.S. at 602; *Ortiz*, 527 U.S. at 870. Some class members, already suffering from severe mesothelioma, had tort claims worth hundreds of thousands of dollars and an interest in large, immediate cash payouts. *Amchem*, 521 U.S. at 604. Others had no present illness, and they had an interest in preserving a fund to pay future claims. *Amchem*, 521 U.S. at 627; *Ortiz*, 527 U.S. at 838–41. The *Amchem* settlement did not adjust any future payments for inflation, a decision which advantaged current claimants at the expense of future claimants. *Amchem*, 521 U.S. at 604, 610–11; *see also Ortiz*, 527 U.S. at 842 (finding that attempting to resolve "future liability in a settlement-only action" raised "serious constitutional concerns"). Because of the divergence in interests between present and future claimants, this Court held that they should have been divided into subclasses with separate counsel and class representatives. *Amchem*, 521 U.S. at 627–28; *Ortiz*, 527 U.S. at 857. Here, by contrast, Class Counsel shared with all Class members an interest in achieving the highest possible recovery. App. 46a.

2. The court of appeals correctly held that remand for a recalculation of attorneys' fees did not require overturning a valuable settlement.

White Objectors contend that, in deciding not to overturn a fair, reasonable, and adequate settlement that will distribute substantial payments to thousands of consumers, the court of appeals neglected Rule 23(a)(4)'s adequate representation requirement. Pet. 19–22. To the contrary, the court of appeals correctly found that Class Counsel "ably represented the class." App. 5a (referencing adequacy factors from *Rodriguez*). It did not find any reason to doubt extensive factual findings by the district court,[9] including that Class Counsel are "'qualified, experienced, and able to vigorously conduct the proposed litigation' on behalf of the class.'" ER 72; App. 17a (incorporating these findings by reference). The district court also found, and the court of appeals did not question, that "Class Counsel has strong FCRA and class-action expertise and has worked diligently on behalf of the class, including "negotiating 'far-reaching and incredibly valuable injunctive relief' on behalf of the class." ER 72; App. 17a. These findings amply support a finding of adequacy under Rule 23(a)(4). *See In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 36–37 (1st Cir. 2009) (affirming district court's finding that class

[9] *See* App. 4a ("The district judge—who knew more about the parties' litigating positions than anybody and, notably, had insight into future rulings on class certification and other issues that would be reviewable only on a deferential standard of review—deemed the settlement adequate.").

counsel was adequate over objectors' unfounded allegations).

Unlike in *Amchem* and *Ortiz*, Class Counsel here did not represent clients with opposed interests.[10] App. 45a–46a. Regarding the structure of the attorneys' fee award, which the court of appeals later found created the "possibility of a conflict," Class Counsel consistently made their fee application contingent on ensuring that Class members would receive awards comparable to what they had been estimated to receive under the 2009 Proposed Settlement. App. 41a (noting Class Counsel's commitment that if required, "Class Counsel will revise their fee request downward in advance of [the] final approval hearing in order to ensure that sufficient funds remain available to pay claims"). Class Counsel further offered to delay any payment of attorneys' fees until after all payments had been made

[10] Cases in which the adequacy of class counsel has been challenged on ethical grounds have generally analyzed the issue not using the *Amchem/Ortiz* standard, but instead asked whether the allegations give rise to a "serious doubt" that counsel will loyally represent the class. *See Creative Montessori Learning Centers v. Ashford Gear LLC*, 662 F.3d 913, 918–19 (7th Cir. 2011); 1 NEWBERG ON CLASS ACTIONS § 3:78 (5th ed.) ("Whether unethical or questionable conduct will bar a finding of adequacy will depend on the seriousness of the violation and the facts and circumstances of the particular case."). Here, White Objectors have not argued that the structure of the attorneys' fee award creates any "serious doubt" that Class Counsel will loyally represent the Class, nor does the record provide any support for such an argument. App. 46a; *see Reliable Money Order, Inc*., 704 F.3d at 500 (holding that ethical allegations against class counsel did "not raise serious doubts about their ability to represent the class faithfully").

to Class members, in order to assure that Class members would receive payments "at the top of the range estimated in the Court-approved notice and similar to the awards originally estimated in the 2009 Proposed Settlement." App. 41a. Further underscoring that they did not seek any fee that would penalize the Class for what they acknowledged was their mistake, Class Counsel committed both orally at the final approval hearing and in writing following the hearing that they would pay the full costs of notice if the district court found they had committed to do so and would not appeal any decision the district court might make regarding attorneys' fees. SER 27, 149.

The district court ultimately concluded that delaying payment of attorneys' fees, as Class Counsel had offered, was unnecessary. SER 155, 260. Instead, the district court chose to account for Class counsel's "debt" to the Class, *see* App. 6a, by cutting the 25% "benchmark" common-fund fee award to 20%. App. 52a. This reduction would make almost $3 million more dollars available to Convenience Award claimants (including the 160,000 new claimants), assuring that they would not be penalized for the 2009 Proposed Settlement having been overturned. *See* App. 39a. Actual Damage Award claimants, including the 3,340 new claimants, would also receive the same amounts they would have received under the earlier proposed settlement. App. 21a

The court of appeals later found that instead of focusing on ensuring that Class members would receive the same amounts as the earlier estimated awards, the

district court should have assured that Class Counsel's fees accounted for what the *Radcliffe II* court had understood to be their unconditional commitment to cover the "full cost of re-notice." App. 6a. While the court of appeals thus disagreed with "the structure of the attorneys' fee award," App. 5a, it did not find that Class Counsel was affected by any fundamental conflict between Class members with interests in obtaining different kinds of relief, such as existed in *Amchem* and *Ortiz*. *Id*.

Given that Class Counsel was incentivized to and did "litigate aggressively," App. 46a, on behalf of the entire Class, it would ill-serve Class members to send this case back to square one—after 14 years—because of the structure of the attorneys' fee award. As every other court of appeals confronted with a possible conflict created by an attorneys' fee issue has done, the court of appeals here decided that remand for recalculation of the fee was the appropriate remedy. *See "Agent Orange" I*, 818 F.2d at 174; *In re Lumber Liquidators*, 952 F.3d at 492; *Rodriguez*, 563 F.3d at 967–68. Because the court of appeals' holding that Class Counsel adequately, indeed "ably," App. 5a, represented the Class was amply supported by the district court's findings, the court of appeals' decision was correct and fully consistent with *Amchem* and *Ortiz*.

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CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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