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

REPLY BRIEF OF PETITIONERS

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REASONS FOR GRANTING THE WRIT

As the *White* Plaintiffs explained in their Petition, this Court should grant *certiorari* in this case for two reasons.

First, the Ninth Circuit's decision, under which materially conflicted counsel can be found to have "fairly and adequately represent[ed] the interests of the class" within the meaning of Fed. R. Civ. P. 23(a)(4) so long as they negotiated a "fair" settlement, conflicts with the decisions of numerous other circuits, including the Second, Third, Fourth, Fifth, Seventh and Eleventh Circuits, all of which hold that that rule bars such conflicted counsel from representing a class.

Second, the Ninth Circuit's decision is irreconcilably inconsistent with this Court's decisions in both *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999), both of which hold that the adequacy of representation requirement must be satisfied independent of any assessment of the fairness of a class settlement.

Specifically, in its decision below, the Ninth Circuit held that "by opting to repay its debt to the class in new benefits rather than deducting the costs of renotice 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 (emphasis added)). The Ninth Circuit nonetheless chose not to reach the issue of whether the conflict Settling Counsel had fomented was properly characterized as a "current" or "material" conflict—or otherwise to assess its impact on the fitness of Settling Counsel to represent

the class. Why? Because, in the Ninth Circuit's view, it did not matter. That is, according to the Ninth Circuit, Rule 23(a)(4) permits a district court to overlook the existence of any conflict between counsel and the class—no matter how serious—so long as it finds that the settlement they negotiated was "fair" and "provide[d] adequate relief to the class." (App.5a.)

Respondents' opposition to the Petition turns entirely on a mischaracterization of the Ninth Circuit's holding in this case. Specifically, Respondents assert that the Ninth Circuit found that this case involved "only . . . the possibility of a conflict of interest" between Settling Counsel and the class (Opp.24)—adding the emphasis on the word "possibility"—and, correspondingly, that the Ninth Circuit "found no fundamental conflict" between the interests of Settling Counsel and those of the class. (Opp.3).

As set forth more fully below, a cursory review of the Ninth Circuit's decision reveals that Respondents' description of its holding is patently disingenuous. Far from finding "only the possibility of a conflict of interest," the Ninth Circuit found that "[a]t the very least, the structure of the attorneys' fee award in this case created the possibility of a conflict of interest with the class." (App.5a (emphasis added)). And, far from then going on to find that there was, in fact, "no fundamental conflict", as Respondents represent that it did (Opp.3), the Ninth Circuit made no finding as to the fundamentality of the conflict at all. Indeed, it did not even attempt to characterize the nature of the conflict.

That is because the Ninth Circuit erroneously held that Rule 23(a)(4) creates a "flexible standard" that left it free to rule that Settling Counsel had "ably

represented the class" (App.5a) based on its post-hoc conclusion that "the settlement provide[d] adequate relief to the class" (App.5a) and irrespective of whether any fundamental conflict existed between Settling Counsel's interests and those of the class.

Once the shroud is lifted over Respondents' misleading characterization of the Ninth Circuit's decision, the rest of their opposition to the Petition crumbles like a house of cards. That is, Respondents do not—and, indeed, cannot—dispute that the Ninth Circuit's decision cannot be reconciled with *Amchem* and *Ortiz*, wherein this Court held that the issue whether counsel have a disabling conflict with the class and are, therefore, unable to meet Rule 23(a)(4)'s adequacy of representation requirement must be satisfied independent of and prior to the adequacy of any class settlement. Nor can Respondents dispute that the Ninth Circuit's decision conflicts with those of multiple other circuit courts which have held that counsel whose interests are in material (or fundamental) conflict with those of the class cannot fairly and adequately represent its interests.

I. THE NINTH CIRCUIT DID NOT FIND THAT THIS CASE INVOLVED "ONLY" A POTENTIAL AND IMMATERIAL CONFLICT BETWEEN SETTLING COUNSEL AND THE CLASS.

In their briefing before the Ninth Circuit, *White* Plaintiffs argued that Settling Counsel's insistence that they could honor their obligation to pay off their $6 million notice debt to the class by taking that amount out of the settlement pot created a material conflict between their interests and those of the class. Specifically, *White* Plaintiffs argued that Settling

Counsel's overriding goal in any negotiation was not to maximize the class's recovery, but rather to procure an additional $6 million in relief so that they could avoid having to pay that debt out of their own pockets—even if all or most of that additional relief took the form of phony non-monetary benefits that Settling Counsel could pretend was worth the equivalent of $6 million in cash.[1]

White Plaintiffs further pointed out that through no coincidence, that is exactly what happened: Settling Counsel concluded a settlement in which Defendants agreed to pay $1 million in new money and certain non-monetary benefits that the district court valued at $5.5 million, but that, in reality, had zero or near zero value to the class.[2] *White Plaintiffs* posited that

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[1] Contrary to Respondents' assertion (Opp.21-23), *White* Plaintiffs' argument that Settling Counsel's interests conflicted with those of the class is not rooted in California law. Rather, *White* Plaintiffs merely cited two California authorities as support for the unremarkable proposition that, by virtue of their having breached their fiduciary duty to the class, Settling Counsel were obligated to pay the cost of that re-notice. Far from rejecting this proposition, the Ninth Circuit agreed that Settling Counsel were so obligated (App.6a) and found that their effort to pay that debt out of the settlement fund "[a]t the very least . . . created the possibility of a conflict of interest with the class." (App.5a.). Whether the Ninth Circuit's finding that such counsel can nonetheless satisfy Rule 23(a)(4)'s adequacy requirement conflicts with decisions of this Court and multiple circuit courts is manifestly a question of federal law.

[2] *White* Plaintiffs argued that the district court got to this valuation by assigning arbitrary values of (1) $2 million to the Settlement's provision of an online credit-reporting brochure based on nothing more than Settling Counsel's rank speculation that each of an estimated two million website visits to that brochure was "worth two lattes at Starbucks"—or about $10 cash, Supplemental Excerpts of Record ("SER") 133, (2) $1 million for

Settling Counsel did so not because they thought the class would be better off, but for the obvious reason that this valuation gave them a $5.5 million credit against their notice debt (not to mention an additional $1.1 million in contingency fees).[3]

Respondents' characterization of the Ninth Circuit's decision notwithstanding, it did not reject *White* Plaintiffs' argument that Settling Counsel's attempt to pay its notice debt out of the class's recovery created a material conflict of interest. To the contrary, the Ninth Circuit found (1) that Settling Counsel were, indeed, "duty-bound to reimburse the class for the waste of settlement funds caused by the ethical conflict in *Radcliffe I*" (App.6a), (2) that honoring that duty required that Settling Counsel "pay the full

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the Settlement's offer of free credit reports/scores, despite that in a previous decision denying preliminary approval of an earlier settlement in this matter the district court had accepted Settling Counsel's position that this benefit should be attributed zero cash value, Excerpts of Record ("ER") 346-47, and (3) $2.5 million for the benefit of obtaining two class notices, despite Settling Counsel's admitted obligation to pay the full cost of the second such notice.

[3] As part of their effort to deflect attention from their own ethical transgressions, Settling Counsel seek to paint the two original *White* Counsel (Daniel Wolf and Charles Juntikka) as greedy, inexperienced and misguided lawyers—variously accusing them (Opp.1-2, 4-6) of having no interest in injunctive relief, being fixated on "an unachievable billion-dollar recovery," and sabotaging a settlement opportunity that did not meet that demand to the detriment of the class. *White* Plaintiffs will not waste space responding to these *ad hominem* and wholly irrelevant allegations about their abilities, motives and conduct, which as set forth in *White* Counsel's declarations and the many exhibits in support thereof (Reply Excerpts of Record ("RER") 6-25), are all demonstrably false and misleading.

[$6 million] cost of re-notice" out of their own pockets by deducting that cost from their fee award or, presumably, paying it upfront (App.6a), and (3) that, by instead seeking to pay that $6 million debt out of the settlement fund, Settling Counsel had "[a]t the very least . . . created the possibility of a conflict of interest with the class." (App.5a (emphasis added)).

In other words, contrary to Settling Counsel's "reading" of the Ninth Circuit's decision, the Ninth Circuit did not find that Settling Counsel had "only" (Opp.24) or "mere[ly]" (Opp.33) created "the possibility of a conflict of interest with the class."

Rather, as is apparent from its use of the vital prefatory words "at the very least"—words that Settling Counsel somehow omit on each of the eight occasions they cite the Ninth Circuit's "possibility of conflict" language—the Ninth Circuit found that the conflict could most charitably be described as a possible conflict, meaning that it might well be fairly characterized in much harsher terms.

To be sure, the Ninth Circuit did not say whether the potential conflict Settling Counsel had created had, in fact, matured into a current conflict or whether it regarded that conflict as material (or "fundamental") or not—albeit it is difficult to comprehend how a conflict that arises when counsel has interests that are at odds with those of a class in maximizing its recovery can be described as anything other than material and fundamental. But again, contrary to Respondents' contention, that is not because the Ninth Circuit had found otherwise.

Rather, the Ninth Circuit did not determine how concrete or serious the conflict in this case was because,

to the Ninth Circuit's way of thinking, it simply did not matter. That is because, according to the Ninth Circuit, the district court's finding that Settling Counsel had negotiated a "fair" settlement that "provide[d] adequate relief to the class," *ipso facto*, establishes that they "ably represented the class" within the meaning of Rule 23(a)(4). (App.5a). As is apparent from its full discussion of the issue, the Ninth Circuit's decision does not admit of any contrary interpretation:

> At the very least, the structure of the attorneys' fee award in this case created the possibility of a conflict of interest with the class. That said, multiple factors counsel restraint. Most importantly, given that Rule 23's flexible standard governs this dispute, we conclude that the settlement is fair and that Settling Counsel ably represented the class.
>
> [* * *]
>
> This long-standing dispute has cost the parties a great deal already. Further time spent litigating will serve only to devour more and more of the settlement fund, which would be better spent providing relief to injured parties. . . . We are satisfied that the settlement provides adequate relief to the class.

(App.5a).

This Court cannot let stand a holding that the need to end a "long-standing dispute" that has "cost the parties a great deal already" can justify refusing even to make a determination whether a case involves

the kind of conflict that will render counsel inadequate under Rule 23(a)(4).

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *AMCHEM* AND *ORTIZ*.

As set forth in *White* Plaintiffs' Petition, the Ninth Circuit's decision in this case is irreconcilably inconsistent with this Court's decisions in both *Amchem* and *Ortiz*.

Specifically, in each of those cases, this Court held that the determination of whether representative plaintiffs and their counsel satisfy the requirements of Rule 23(a)(4) must be made prior to and independent of any assessment of the fairness of a class settlement under Rule 23(e). *Amchem*, 521 U.S. at 621; *Ortiz*, 527 U.S. at 858-59. Consequently, in both *Amchem* and *Ortiz*, this Court concluded that the representative plaintiffs and their counsel—whose interests conflicted with those of certain subgroups of the class—could not fairly and adequately protect the interests of those subgroups, irrespective of any "determination at post-certification fairness review under subdivision (e) that the settlement is fair in an overriding sense." *Ortiz*, 527 U.S. at 858; *see also Amchem*, 521 U.S. at 621.

Respondents do not dispute that *Amchem* and *Ortiz* prevent a court from doing exactly what the Ninth Circuit did here, namely basing its adequacy of representation determination on its post-hoc finding that the settlement was "fair" and "provide[d] adequate relief to the class." Instead, Respondents argue only (Opp.2) that *Amchem* and *Ortiz* are inapposite because in each of those cases, this Court found that the interests of the representative parties were "fundamentally opposed" to those of certain subgroups of

the class that they sought to represent, whereas in this case, the Ninth Circuit found "only the possibility of a conflict" between the interests of Settling Counsel and those of the class. As that characterization of the Ninth Circuit's decision is patently incorrect for the reasons set forth in Point I above, *Amchem* and *Ortiz* cannot be distinguished on grounds that the conflict in those cases was less severe than it is here. Accordingly, this Court's decision in those cases unquestionably command reversal of the Ninth Circuit's decision.

The only other argument that Respondents make in opposition to *White* Plaintiffs' argument that the Ninth Circuit's decision cannot be reconciled with *Amchem* and *Ortiz* is that *White* Plaintiffs "failed to cite *Amchem* and *Ortiz* "in their court of appeals briefing". (Opp.22). Respondents' contention—as well as its unstated implication that *White* Plaintiffs did not properly preserve their *Amchem/Ortiz* argument—is misleading and incorrect.

The only reason why *White* Plaintiffs did not mention *Amchem* and *Ortiz* in their merits briefs before the Ninth Circuit is that Respondents never argued that the conflict they had created could be overlooked because they had negotiated a settlement that provided fair and adequate relief to the class. Rather, Respondents' defense to *White* Plaintiffs' conflict of interest argument was only that Settling Counsel had never made an unconditional promise to reimburse the class for the costs of re-notice and, hence, that there was no conflict between them and the class.

The contention that the conflict with the class that Settling Counsel had created could be overlooked because the settlement was fair and reasonable was

made for the first time by the Ninth Circuit, *sua sponte*, in its memorandum decision. Accordingly, there was no occasion for *White* Plaintiffs to raise their *Amchem/Ortiz* argument in their briefing below and that argument is thus properly presented to this Court.

III. THE NINTH CIRCUIT'S DECISION CREATES A CIRCUIT SPLIT WITH MULTIPLE CIRCUIT COURTS OVER WHETHER MATERIALLY CONFLICTED COUNSEL CAN EVER REPRESENT A CLASS.

As set forth in *White* Plaintiffs' Petition, the Ninth Circuit's decision stands in stark contrast to the decisions of numerous other circuit courts, all of which hold that counsel whose interests are in material conflict with those of a class are incapable of representing that class under Rule 23(a)(4).

Settling Counsel do not dispute *White* Plaintiffs' characterization of the law outside of the Ninth Circuit. To the contrary, Settling Counsel agree that the rule in all such circuits is that counsel cannot represent a class when their interests are fundamentally conflicting (Opp.23, 25-26) and cite both *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014), and *Rodriguez v. West Publishing Co.,* 563 F.3d 948 (9th Cir. 2009), for the proposition that "'[a]n absence of material conflicts of interest . . . is central to adequacy [of counsel]'" under Rule 23(a)(4). (Opp.28).[4]

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[4] Respondents assert (Opp.22) that the commission of ethical transgressions do not by themselves bar counsel from satisfying Rule 23(a)(4)'s adequacy requirement. Be that as it may, that rule prohibits counsel from representing the class when such transgressions give rise to material conflicts of interest between counsel and the class.

Settling Counsel argue (Opp.23-26), however, that the Ninth Circuit's decision does not represent a departure from this rule, again because it supposedly found that the conflict in this case was merely "possible" and "not fundamental." And again, the truth is that the Ninth Circuit did not so hold and, in fact, instead held that it did not need to determine whether there exists a material or fundamental conflict between Settling Counsel and the class because counsel who have negotiated a settlement that is deemed fair and adequate to the class have, *ipso facto*, satisfied the requirements of Rule 23(a)(4). As such, the Ninth Circuit's decision creates a clear split with every other circuit court that has considered the issue.[5]

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[5] Respondents point out that the Petition incorrectly describes *In re "Agent Orange" Products Liability Litigation*, 818 F.2d 216 (2nd Cir. 1987), as having vacated the class settlement in that case when, in fact, it only vacated the fee agreement. We apologize for this inadvertent error. However, it is noteworthy that, like so many of its sister circuits, the Second Circuit has, post-*Amchem/Ortiz*, embraced the bedrock principles that adequacy of representation requires that "no fundamental conflict exist" between the representative parties and the class and that the adequacy determination must be made "independently of the fairness of the settlement." *Charron v. Wiener*, 731 F.3d 241, 249 (2013).

CONCLUSION

For the aforementioned reasons, this Court should grant the Petition for a Writ of Certiorari and either summarily reverse the Ninth Circuit's decision under Rule 16.1 or set this case for briefing and oral argument.

Respectfully submitted,

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