No. 16-364

IN THE
Supreme Court of the United States

JOSHUA BLACKMAN,
Petitioner,

v.

AMBER GASCHO, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,
Respondents.

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

BRIEF OF PROFESSOR LESTER BRICKMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MATTHEW A. FITZGERALD
Counsel of Record
KENNETH W. ABRAMS
NICHOLAS J. GILES
McGuireWoods LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-4716
mfitzgerald
@mcguirewoods.com

ANDREW J. TRASK
McGuireWoods LLP
1800 Century Park East,
8th Floor
Los Angeles, CA 90067
(310) 315-8200
atrask
@mcguirewoods.com

Attorneys for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

Amicus Lester Brickman was a member of the founding faculty of the Benjamin N. Cardozo School of Law, where he continues to serve as a professor of law emeritus. [1] For more than four decades, Professor Brickman has written extensively on legal ethics and on the professional obligations of attorneys. His focus has long been on examining and exposing the ways in which attorney fee arrangements breed fraud and subvert justice. To that end, he has published scores of articles, in legal journals as well as popular media, including the seminal *Contingent Fees without Contingencies: Hamlet without the Prince of Denmark?*, 37 UCLA L. Rev. 29 (1989). He is also the author of LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA (2011), in which he devotes four chapters to class actions, focusing on how class counsel game fee-setting at the expense of class members. Professor Brickman also participates as *amicus* in state and federal courts across the country.

As this case reveals, class action litigation—with its promise of generous attorneys' fees awards—

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[1] No counsel for a party to this case authored this brief in whole or in part. Other than *Amicus* Professor Brickman and his counsel, no individual or entity contributed financially to the brief's preparation or submission. Counsel for Professor Brickman has timely notified all parties of his intent to file this brief, and all parties have provided their consent in return. Professor Brickman previously served on the board of the Center for Class Action Fairness, until the Center merged with the Competitive Enterprise Institute, which is counsel for Petitioner in this action.

has become emblematic of the waste and self-dealing Professor Brickman has sought to stamp out. Consequently, *Amicus* has a strong interest here both in highlighting larger trends in class action settlement practices that merit the Court's attention, and in exposing the impermissible aims that drive those practices.

SUMMARY OF THE ARGUMENT

Observers have long recognized that because of the size of the potential fees and the absence of most of the interested parties, class action settlements are peculiarly vulnerable to abuse. As a result, a number of courts have explicitly declared that class counsel owe a fiduciary duty not just to their immediate client, but also to the absent members of the class they seek to represent. But while that duty has been expressly recognized, it has been only haphazardly enforced.

The settlement below offers a potent example of why this Court should take the opportunity to establish uniform guidance on the duty class counsel owes to a class. That settlement awarded class counsel $2.39 million in fees, while class members ultimately received only $1.6 million in settlement payments—a ratio of fees to settlement payments that has become increasingly prevalent.

There are several reasons for the disparity between the relief actually received and the size of the fee, none of which justify the final result. The settlement was structured to pay only those class members who filed a claim, while the attorneys' fees were based on the initial pot made available to the

class (estimated at roughly $15 million) rather than the meager final payout. Moreover, the settlement was negotiated with a "kicker" clause that ensured that any reduction in the requested attorneys' fee would be returned to the defendant rather than going to those class members who had filed claims. Finally, the courts below justified the size of the fee based on the "lodestar" class counsel submitted, a record of the work they had done to recover $1.6 million for their clients.

Petitioner's brief details the numerous failings of this settlement that justify review. *Amicus* will focus on only one: the presence of the "kicker" clause, which ensured that any reduction in the fee would go to the defendant rather than the class, was evidence that class counsel had not met their duty to bargain in the class's financial interest instead of their own. Granting *certiorari* in this case would allow this Court to clarify the duty that class counsel owes to absent class members when engaging in settlement negotiations.

ARGUMENT

I. This Court Should Accept Review to Make Clear the Scope of Counsel's Fiduciary Duty to the Class When Negotiating Attorneys' Fees.

A. *Class Counsel Owe a Fiduciary Duty to Maximize Relief to the Class and to Subordinate Their Fees to Class Relief.*

"Loyalty [is an] essential element[] in the lawyer's relationship to a client." Model Rules of Prof'l Conduct r. 1.7 cmt. 1. It is essential because the client relies on the attorney's professional judgment about what services are actually necessary to protect her interests. Since the attorney has superior knowledge about whether—and how much—of his services are actually necessary, the duty of loyalty protects the client from the attorney's temptation to engage in self-dealing.

Most courts ensure this loyalty by recognizing it as a fiduciary duty the lawyer owes to his client. "As a matter of law, the attorney-client relationship is a fiduciary relationship." *Evanston Ins. Co. v. Riseborough*, 5 N.E.3d 158, 171 (Ill. 2014) (citing *In re Schuyler*, 434 N.E.2d 1137 (Ill. 1982)); *see also Goyal v. Gas Tech. Inst.*, 732 F.3d 821, 825 (7th Cir. 2013) ("An attorney owes a fiduciary duty to all her clients—even the difficult ones."); *Pride v. Peterson*, 173 N.W.2d 549, 555 (Iowa 1970) ("This attorney-client relationship created a fiduciary relationship between the parties with respect to the matter in

which defendant was acting for plaintiff . . . as a matter of law." (citing *Wilder v. Secor*, 33 N.W. 448, 449 (Iowa 1887))). Because a lawyer acts as a client's fiduciary, he "may not merely serve his own preferences, moods, or tastes." *Nat'l Sec. Counselors v. CIA*, 811 F.3d 22, 30 (D.C. Cir. 2016) (citing *In re Gonzalez*, 773 A.2d 1026, 1031 (D.C. 2001)). Instead, the lawyer "is legally and ethically required to be loyal to client interests, as distinct from his own." *Id.*

Therefore, that duty of loyalty requires counsel to place their clients' interests first, even (or especially) when they conflict with counsel's own financial interests. Herbert Newberg & Alba Conte, *Newberg on Class Actions*, § 15.03 (3d ed. 1992); *United States v. Mouzin*, 785 F.2d 682, 703 (9th Cir. 1986) (noting that lawyers placing their own financial interests above the interests of their clients "presents the worst sort of conflict of interest; attorney deception and self-interest surely destroy the fiduciary relationship with the client"). Put simply, "[a]ttorneys are duty-bound to put their client's interests above their own." *Donson Stores, Inc. v. Am. Bakeries Co.*, 60 F.R.D. 417, 420 (S.D.N.Y. 1973). Like all lawyers, class counsel owe their clients a fiduciary duty "of loyalty, care, and obedience, whose relationship with the client must be one of 'utmost trust.'" *Towery v. Ryan*, 673 F.3d 933, 942 (9th Cir. 2012) (quoting *Webb v. Gittlen*, 174 P.3d 275, 279 (Ariz. 2008)).

The difficulty with class actions, however, is that class counsel claim to represent not just the named plaintiffs who have formally retained their services, but also a class of similarly situated people

who have never met the lawyers, may never see the inside of a courtroom, and yet may relinquish their rights to litigate based on the outcome class counsel achieves.

As a result, courts have long recognized that, "[b]eyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) (citing 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 11.65 at 11-183 (3d ed. 1992)). This fiduciary duty is particularly important in the class context because "[c]lass counsel rarely have clients to whom they are responsive. The named plaintiffs in a class action, though supposed to be the representatives of the class, are typically chosen by class counsel; the other class members are not parties and have no control over class counsel." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014). This lack of involvement in, let alone control over, the settlement process heightens the "acute conflict of interest between class counsel, whose pecuniary interest is in their fees, and class members, whose pecuniary interest is in the award to the class." *Id.* Thus, "'[t]he responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel.'" *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1465 (9th Cir. 1995) (citation omitted).

The fiduciary duty class counsel owes to the class serves to protect absent members from counsel

who settle claims in ways that maximize their own fees at the expense of the class's recovery. *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) (noting that "class actions are rife with potential conflicts of interest between class counsel and class members"). In determining whether class members have standing to challenge a fee award to class counsel as a result of class settlement, the Ninth Circuit explained that "[t]he principles of agency are useful to illustrate how a class member has an interest in attorneys' fees." *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1326-27 (9th Cir. 1999). When class counsel settles claims on behalf of a class, they receive their attorneys' fees from the defendant. *Id.* at 1327. This creates a potentially serious breach of counsel's fiduciary duty "because the money may be an inducement to serve the third party's rather than the principal's interests." *Id.* That is, a "client who employs a lawyer to litigate against a third party has a legitimate interest in having his lawyer refrain from taking the third party's money in exchange for throwing the fight." *Id.*

Class counsel breach their fiduciary duty to the class they represent when they "agree[] to accept excessive fees and costs to the detriment of class plaintiffs." *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000). Put another way, "[i]f fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have obtained." *Staton v.*

Boeing Co., 327 F.3d 938, 964 (9th Cir. 2003) (citing *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 266 (1985)). As a result of this conflict of interest between class counsel and the class itself, "'district judges presiding over such [class] actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole.'" *Eubank v. Pella Corp.*, 753 F.3d 718, 723 (7th Cir. 2014) (quoting *Mirfasihi*, 356 F.3d at 785).

In the class action context, courts only haphazardly enforce this fiduciary duty. While some courts—like the Seventh and Ninth Circuits in the cases already discussed—evaluate settlements using this duty as a guiding principle, others, like courts in the Sixth Circuit and the Circuit for the District of Columbia, explicitly rely on class counsel's opinion of whether the settlement is fair, reasonable, and adequate. *See, e.g., In re Fed. Nat'l Mortg. Ass'n Sec., Derivative & ERISA Litig.,* 4 F. Supp. 3d 94, 107 (D.D.C. 2013) ("The opinion of experienced counsel 'should be afforded substantial consideration . . . in evaluating the reasonableness of a proposed settlement.'" (citation omitted)); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.,* No. 08-65000 (MDL 2001), 2016 U.S. Dist. LEXIS 130467, at *34-35 (N.D. Ohio Sep. 23, 2016) (approving settlement with kicker clause because "the Court has no reason to second-guess Class Counsel's conclusion that the settlement reached . . . is fair, reasonable, adequate, and in the best interest of the class").

B. *Settlement Agreements Containing "Kicker Clauses" Plainly Violate This Fiduciary Duty, and are Per Se Unreasonable as a Result.*

In part because of this haphazard enforcement, violations of this elemental duty are commonplace among class counsel. Indeed, the pursuit of settlements that maximize class counsel's financial benefit—at the expense of the class itself—is the most forceful driver of class action litigation today. As *Amicus* has elsewhere demonstrated, class counsel routinely negotiate "abusive settlements" designed only "to raise their fees and avoid close scrutiny of their fee requests." Brickman, *Lawyer Barons* 335-60. Emboldened by a lack of accountability—from either client or court—counsel game the fee system by "colluding with the defendant" to line their own pockets. *Id.* at 345. Courts too have noted "the temptation" for class counsel "to prosecute or settle the case in a way that maximizes their own fees rather than the class's recovery." *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 187 (3d Cir. 2005).

A "kicker" clause—like the one in the settlement below—is a common and powerful example of how attorneys succumb to this temptation. Rather than negotiating a total settlement amount on behalf of the class and later seeking a portion of that fund in fees, class counsel negotiate their fee with defendants directly. The fee, they agree, will be paid separately from the class settlement and will not affect the settlement amount. To be sure, both

the settlement and the fee remain subject to judicial approval. But—and this is the "kicker" itself—if the court ultimately awards less in fees, the balance reverts to the *defendant* rather than to the class. *See* Pet. App. 4a. This arrangement has been a favorite of class action lawyers for decades. See *Prandini* v. *Nat'l Tea Co.*, 585 F.2d 47, 49 (3d Cir. 1978) (describing a class action settlement under which "two 'funds' were created, a 'damages fund' payable in full to the plaintiffs, and an 'attorneys' fees fund' payable as approved by the court to the attorneys," and which made clear that "[t]o the extent the 'attorneys' fees fund' exceeded the amount awarded as reasonable by the district court, that excess would revert to the defendants").

Structuring settlements in this manner advances two goals. The first is to drive up the fee award at the expense of the class. To a defendant, the settlement calculus is simple: what is the total cost, and is a classwide release worth that amount of money? Compartmentalizing that cost into damages and attorneys' fees does not alter the defendant's bottom line by a penny. As Judge Posner has written, "we know that an economically rational defendant will be indifferent to the allocation of dollars between class members and class counsel." *Pearson*, 772 F.3d at 786; *see also In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011) ("Ordinarily, a defendant is interested only in disposing of the total claim against it, and the allocation . . . is of little or no interest to the defense.") (internal quotations omitted).

In other words, the fees class counsel negotiate for themselves come from funds the defendant would otherwise have been willing to pay to the common class fund under a more traditional common-fund arrangement. Class counsel would seek and receive fees from such a common fund, but the amount awarded would likely be less than the figure separately negotiated with the defendant. In a case like this—where the class received $1.6 million in relief while the attorneys received $2.39 million in fees—a non-compartmentalized common fund would have made even *requesting* a 149% attorney fee unthinkable.

"[T]he kicker," therefore, "deprives the class of [its] full potential benefit if class counsel negotiates too much for its fees." *Id.* The defendant, after all, is rightfully indifferent to the division, and class counsel faces powerful temptation to negotiate in their own interest rather than the class's. *See* Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va. L. Rev. 1051, 1111–12 (1996) (noting that defendants are both "well-positioned and well-motivated to propose a deal that gives class counsel a huge slice (high attorney's fees) of a small pie (a low overall settlement for the class)").[2]

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[2] Indeed, class counsel frequently accompany a "kicker clause" with an express agreement by the defendant not to challenge the amount of fees claimed—a so-called "clear sailing provision." This confirms—in black and white—the "defendant's . . . willingness to pay," *In re Bluetooth*, 654 F.3d at 949, a willingness class counsel then exploits for their personal gain. Moreover, this covenant not to challenge fees, which inures no benefit to the class itself, undoubtedly comes at a *(cont'd)*

The second goal of the "kicker clause" is to shield the fee award from any scrutiny. As one commentator has noted, establishing a "separate pot" from which attorneys' fees may be drawn is simply "a strategic effort to insulate a fee award from attack." Charles Silver, *Due Process and the Lodestar Method: You Can't Get There from Here*, 74 Tul. L. Rev. 1809, 1839–40 (2000). When class counsel stipulates that "moneys taken from a fee pot will revert to a defendant instead of being paid to [the] class," they discourage any potential fee challenge: "cutting the fee provides no obvious benefit to the class," making the fee "more difficult to attack." *Id.* at 1840.

Even when objectors *do* challenge fees under these conditions, the kicker clause discourages the court from looking too closely at the arrangement. This is precisely what happened in *In re Bluetooth*: the trial court declined to examine class counsel's fee request—not even taking the preliminary step of looking at counsel's lodestar fee—because "any amount not awarded by the court would be retained by the defendants rather the benefiting class members." Brickman, *Lawyer Barons* (quoting Brief for Objectors-Appellants, *In re Bluetooth Headset*

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price. *See Malchman* v. *Davis*, 761 F.2d 893, 908 (2d Cir. 1985) (Newman, J., concurring), *abrogated on other grounds by Amchem Prod., Inc.* v. *Windsor*, 521 U.S. 591 (1997) (noting that a "clear sailing" provision "creates the likelihood that plaintiffs' counsel, in obtaining the defendant's agreement not to challenge a fee request within a stated ceiling, will bargain away something of value to the plaintiff class," and "[t]hat something will normally be at the expense of the plaintiff class").

Prods. Liab. Litig., No. 09–56683 (9th Cir. Apr. 26, 2010), at 20). No rational client would negotiate away their right to challenge an overcharge, and no faithful counsel would include a clause that prevented their client from doing so.

Prioritizing one's own financial interest in this manner is as clear a violation of counsel's fiduciary duty as one could find. As the Ninth Circuit has observed, "there is *no* apparent reason"—other than counsel's financial self-interest—that "the *class* should not benefit from [any] excess allotted for fees." *In re Bluetooth*, 654 F.3d at 949 (emphases added); *see also Lobatz*, 222 F.3d at 1148 (cautioning that "[s]uch an agreement has the potential to enable a defendant to pay class counsel excessive fees and costs, in exchange for counsel accepting an unfair settlement on behalf of the class").

Though the specifics vary, the response of lower courts has been uniformly inadequate. Some, like the court below, have proven content to all but ignore the problems inherent in kicker clauses, provided "relief to the class" is otherwise "substantial and . . . [class counsel's] fee request" is otherwise "appropriate." Pet. App. 46a; *see also Blessing* v. *Sirius XM Radio Inc.*, 507 F. App'x 1, 4 (2d Cir. 2012) (rejecting objectors' argument "that the clear-sailing and reversionary provisions suggest improper collusion" because "the district court independently inspected applicable time and expense records" and "the record supports a finding that the $13 million award was reasonable"). Others are equally unfazed where the record lacks *direct* evidence of collusion. *See Poertner* v. *Gillette Co.*, 618 F. App'x 624, 630

(11th Cir. 2015) (dismissing objectors' concern over kicker clause as "belied by the record" given that "the parties settled only after engaging in extensive arms-length negotiations moderated by an experienced, court-appointed mediator"). But the kicker clause is not problematic because it is evidence of collusion with the defendant, it is problematic because it is evidence that class counsel has breached its duty of loyalty by placing their own interests above that of the absent class members.

Still other courts have expressed some concern. The Ninth Circuit, for instance, has noted that "a kicker arrangement reverting unpaid attorneys' fees to the defendant rather than the class amplifies the danger of collusion." *In re Bluetooth*, 654 F.3d at 949. And the Seventh Circuit has correctly labeled such an arrangement a mere "gimmick for defeating objectors," while noting that "at the very least there should be a strong presumption of its invalidity." *Pearson*, 772 F.3d at 786-87; *see also* Pet. App. at 73a (Clay, J., dissenting) (criticizing the district court for "overlook[ing] the extent to which the inclusion of [the kicker clause] may have been the product of compromised representation by class counsel who were willing to deprive their clients of Defendant's full set-aside for fees, so long as they themselves were paid off").

As Petitioner demonstrates, this deep rift among the courts of appeals alone demonstrates the need for this Court's guidance. But this Court should grant the petition for an even more pressing reason: no appellate court has gone far enough. Indeed, each fails to recognize that the mere existence of a kicker

clause by itself demonstrates that class counsel has already violated its duty of loyalty to the class. First, those courts that have dismissed objectors' concerns as unfounded—the Second and Eleventh Circuits, as well as the court below—have plainly failed to discharge their duty to ensure fairness. Even when the relief available to the class is reasonable, the very presence of the kicker clause confirms that it *could* be greater, by at least the amount of any fee reduction the court might order. *That* is the salient point these courts ignore. And second, even those courts that have counseled caution—the Seventh and Ninth Circuits—have not taken the necessary step of invalidating a class settlement as unfair due to the presence of a kicker clause in the agreement. *See In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712–13 (7th Cir. 2015) (reiterating "deep skepticism about [kicker] clauses, which seem to benefit only class counsel and can be signs of a sell-out," while "stop[ping] short of [a] *per se* rule" invalidating them due to "[t]he possibility of exceptional cases").

This case presents a critical opportunity for this Court to correct the course of the lower courts. Courts play a significant role in ensuring class settlements are fair to largely absent plaintiffs. Indeed, the judge is a "fiduciary of the class" herself, "subject therefore to the high duty of care" that attends such a designation. *Reynolds* v. *Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002). A "judge asked to approve the settlement of a class action is not to assume the passive role that is appropriate when there is genuine adverseness between the parties." *Redman* v. *RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014). When courts

ignore the pernicious effect of "kicker clauses" and other tactics resorted to by class counsel in elevating their self-interest over the classes' interest, they fail to carry out this vital duty. And it is the absent members of the class who bear the consequences.

This Court should grant the petition, reverse, and deliver courts of appeals the wake-up call they need. When courts struggle to even "think of a justification for a kicker clause," *Pearson*, 772 F.3d at 786-87, the time has come to restore class counsel's duty of loyalty to the class by kicking the clause out of class action practice entirely.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Matthew A. Fitzgerald
Counsel of Record
Kenneth W. Abrams
Nicholas J. Giles
McGuireWoods LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-4716
mfitzgerald
@mcguirewoods.com

Andrew J. Trask
McGuireWoods LLP
1800 Century Park East,
8th Floor
Los Angeles, CA 90067
(310) 315-8200
atrask@mcguirewoods.com

Counsel for Amicus Curiae

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