Nos. 16-364, 16-383

In The
Supreme Court of the United States

JOSHUA BLACKMAN,

Petitioner,

v.

AMBER GASCHO, Individually and on behalf of all others similarly situated, et al.,

Respondents.

ROBERT J. ZIK, APRIL ZIK, and JAMES HEARON,

Petitioners,

v.

AMBER GASCHO, Individually and on behalf of all others similarly situated, et al.,

Respondents.

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

BRIEF OF AMBER GASCHO, ET AL. IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Sixth Circuit err in affirming the District Court's approval of class counsel fees that were awarded using a lodestar calculation with a percentage-of-the-fund cross-check and were supported by the District Court's factual determination that the settlement provided significant and substantial cash payments to class members?

2. Did the Sixth Circuit err in affirming the District Court's determination that the class settlement was certifiable under Rule 23(a) and Rule 23(b)(3)?

PARTIES TO THE PROCEEDING

Respondents Amber Gascho, et al., were the class representatives in the District Court and the plaintiffs-appellees in the proceedings below. Respondent Global Fitness Holdings, LLC was the defendant in the District Court and the defendant-appellee in the court below.

In No. 16-364, petitioner Joshua Blackman was an objector in the District Court and appellant in the court below.

In No. 16-383, petitioners Joshua Zik, April Zik, and James Hearon were objectors in the District Court and appellants in the court below.

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INTRODUCTION

In carefully reasoned, fact-driven decisions, the District Court approved—and the Sixth Circuit affirmed—an attorneys' fee award in a class-action settlement. Petitioners err when they state that the Sixth Circuit's decision resulted in a "deep circuit split." Blackman.Pet.1. Courts do not, as Petitioners suggest, decide a settlement's fairness based *solely* on the proportion of the attorneys' fees to the monetary payout. Instead, district courts in all circuits have and use discretion to consider multiple, case-specific factors when assessing counsel's fees. This is especially true when, as here, class members received "significant" and "substantial" relief and the underlying claims implicate state-law fee-shifting statutes. Thus, rather than opening a chasm in attorneys' fee jurisprudence, the Sixth Circuit issued a narrow, case-specific ruling that, viewing the facts as a whole, the lower court's application of the lodestar analysis and percentage-of-the-fund cross-check was not an abuse of discretion "with respect to the case before it." That decision was correct. Moreover, any differences between the circuits' approaches to applying the percentage-of-the-fund analysis in this type of class settlement are neither irreconcilable nor is this case an appropriate vehicle to address them.

Although Petitioners challenge the attorneys' fees as disproportionate to the benefits provided to the class, they do not meaningfully challenge the adequacy of the relief provided to individual class members. Nor can they. The courts below found the relief to be significant, particularly given the considerable obstacles

confronting further litigation. Indeed, recovery here was predicated on payment of a monthly gym membership fee that averaged $26.76. The recovery averaged $31.99 for the class and $41.28 for the largest subclass. This fact alone distinguishes this settlement from the dubious settlements on which Petitioners rely.

Petitioners' challenge to the settlement also hinges on charges of a rigged claims process. But their amorphous contention that the claims-made process was "designed to ensure that over ninety percent of the class receives nothing," Blackman.Pet.1; *see also* Zik.Pet.13, directly contradicts the District Court's findings, which highlighted the process's simplicity and the significant efforts undertaken to reach potential class members. In doing so, the court considered and accepted the reasons why Petitioners' idealized direct-payment method was not workable in this case.

Petitioners' invitation to upset these factual findings in furtherance of their challenge to the reasonableness of the attorneys' fees has no basis in the record and does not present a question worthy of certiorari. The question here is not whether class counsel negotiated a perfect settlement; it is whether the hard-fought settlement negotiations resulted in a compromise that is fair, reasonable, and adequate considering all of the circumstances of the case. On that question, the lower courts correctly and exhaustively applied the appropriate analysis under Federal Rule of Civil Procedure 23(a), (b)(3), and (e) and determined that class counsel had succeeded.

In short, Petitioners have not demonstrated any questions worthy of the Court's review. This case, which was narrowly decided on its specific facts, does not, as Petitioners and amici suggest, pave the way for forum shopping. And the substantial relief provided to class members proves there to be no question whether attorneys' fees negatively affected class members' recovery. Certiorari should be denied.

STATEMENT OF THE CASE

A. The Class Claims and Settlement Terms

This case was one of a series of class actions challenging gym membership fees and related charges imposed on members of fitness centers owned by Global Fitness Holdings, LLC. On behalf of a putative class, Amber Gascho and other named plaintiffs ("Plaintiffs") presented claims for breach of contract, unjust enrichment, and violation of state consumer-protection statutes, including, the Ohio Consumer Sales Practices Act and Prepaid Entertainment Contract Act (the "OCSPA" and "PECA," respectively), Ohio Rev. Code §§ 1345.02, .03, .41-.45, and the Kentucky Consumer Protection Act and Kentucky Health Spa Act (the "KCPA" and "KHSA," respectively), Ky. Rev. Stat. §§ 367.170, .910-.920. Blackman.App.92a-93a.

The claims arose from Global Fitness's uniform practice of charging members various fees, including a biannual $15 facility fee, a $10 cancellation fee, post-cancellation personal fitness contract fees, and

post-cancellation membership dues averaging approximately $26 per member per month. Blackman.App. 113a-115a, 122a; Zik.App.179a-196a. The Kentucky class members also sought contract rescission under state consumer-protection statutes. Zik.App.200a-201a.

Around the same time, two other sets of plaintiffs initiated similar class actions against Global Fitness. One was filed by Robert and April Zik and James Hearon—Zik Petitioners here—and sought damages for post-cancellation dues and fees in Kentucky. Blackman.App.93a-94a. The second was filed by Phillip Robins and other named plaintiffs, and included breach-of-contract, OCSPA, PECA, KCPA, and KHSA claims nearly identical to those alleged in Plaintiffs' complaint. Blackman.App.94a-95a. Before settlement negotiations in this case began, the Northern District of Ohio granted Global Fitness's motion to dismiss for failure to state a claim in the *Robins* case. *Robins v. Global Fitness Holdings, LLC*, 838 F. Supp. 2d 631 (N.D. Ohio 2012).

Robins called into question the very foundation of Plaintiffs' claims. In *Robins*, claims relating to post-membership dues and other fees were dismissed entirely after the court found the charges to be consistent with the contract terms. *Id.* at 642-46. The court also dismissed OCSPA, PECA, KCPA, and KHSA claims on the ground that the contracts (the same as those at issue here) did not violate those statutes. *Id.* at 647-51. Even before *Robins*, the Kentucky plaintiffs faced an uphill battle on their rescission claims because no court had ever granted such relief under the KHSA.

Discovery in this case nevertheless proceeded for nearly two and a half years, and involved more than ten depositions and the exchange of more than 400,000 documents. Blackman.App.126a. The court ruled on five substantive pretrial motions and handled discovery disputes that resulted in twelve pretrial conferences. Blackman.App.126a; R. 36 at 24. The parties also participated in a full-day mediation conducted by an independent mediator, which, along with two months of post-mediation negotiations, resulted in the settlement agreement. Blackman.App.126a; Zik.App.220a-221a.

The settlement agreement provided substantial relief to class members, particularly as compared to their potential recovery in litigation. The settlement established three subclasses: a "Facility Improvement Fee ("FIF") Subclass" for members who were charged a biannual facility fee; a "Gym Cancel Subclass" for members who were charged an additional monthly fee after they cancelled their contracts; and a "Personal Training Cancel Subclass" for members who had and cancelled a personal training contract. Blackman.App.99a-100a. All Class Members who filed a claim would receive $5, plus $20 for members of the FIF Subclass, $20 for members of the Gym Cancel Subclass, and $30 for members of the Personal Training Cancel Subclass. Blackman.App.101a. Members could recover for each subclass they belonged to, creating a maximum individual recovery of $75. Blackman.App.101a. Overall, the average claimant recovered $31.99, and the average Gym Cancel Subclass claimant recovered

$41.28. Blackman.App.48a. Had Plaintiffs opted to continue the litigation, the actual damages likely recoverable for the vast majority of class members ranged from $0 to less than $100 and were largely predicated on one overcharged gym membership payment, which averaged $26.76; a $10 cancellation fee; and, if applicable, a $15 facility fee. *See* Blackman. App.122a-123a.

In exchange for monetary damages, the settlement agreement narrowly released Global Fitness from claims that were "raised or which could have been raised in the Action, and which arose during the Class Period and arise out of or are related to the factual allegations or are based on the same factual predicates as alleged in the Action's Third Amended Complaint." Zik.App.238a.

Notice of settlement went out on October 30, 2013, and was designed to reach as many class members as possible. Class members were identified by the name and address on their contracts, but, given the passage of time, much of the information was outdated at the time of settlement. Blackman.App.154a-155a. Mailed or emailed notices that bounced back were resent to forwarding addresses obtained from the Postal Service or an address search firm. Notice was also published in 13 different newspapers and on an official settlement website. Blackman.App.103a. In the end, the claims administrator determined that 90.8% of the postcard notices were delivered but conceded that, despite efforts to reach as many class members as

possible, he could not say whether notices *actually* reached the intended recipients. Blackman.App.154a.

To maximize the claims, the parties created an open claims process allowing any class member to file even if the member received no direct notice. The short claim form, which could be submitted online or by mail, required only basic contact information and a signature (which could be performed electronically if submitted online), and required no receipts or other proof. *See* R. 97-2 at 1-2, PageID#1526-27. Because of these procedures, hundreds of class members not in Global Fitness's records became approved claimants. R. 140-1 at 2, PageID#2797. Moreover, several thousand class members received subclass membership based on their claim forms and obtained a greater recovery than would have resulted if Global Fitness had simply relied on its own data. R. 140-1 at 2, PageID#2797. In the end, nearly 50,000 class members submitted verifiable claims, totaling $1,593,240 in payouts. Blackman.App. 106a. Amounts not paid from the $15.5 million in available benefits to class members remained with Global Fitness. Blackman.App.11a, 143a.

The parties deliberately did not broach attorneys' fees until after they agreed on the class and subclass relief. Blackman.App.145a; *see also* R. 128-13 at 3, PageID#2431. Ultimately, Global Fitness agreed to pay reasonable attorneys' fees up to $2,390,000 and that it would not oppose class counsel's fee application. Blackman.App.102a. The attorneys' fees are untethered from the class claimants' recovery because the fees did

not come from a common fund and therefore do not affect the payouts to class members. *Id.*

B. The District Court's Decision

After a fairness hearing, the Magistrate Judge issued a comprehensive 79-page Report and Recommendation granting settlement approval. The opinion exhaustively addressed each certification factor under Rules 23(a) and (b)(3), and it considered and rejected each of Petitioners' arguments here.

The court also evaluated the settlement's fairness under Rule 23(e). To support its findings on the absence of collusion, the court cited the two-and-a-half-year litigation history, contested discovery, and the formal mediation that preceded settlement negotiations. Blackman.App.126a. Based on its firsthand experience with the parties, the court accepted counsel's characterization of the settlement negotiations as "vigorous" and "hard fought" because it was "entirely consistent with nearly every aspect of this litigation." *Id*.

Also supporting approval was the fact that Plaintiffs' success in litigation was far from certain. In particular, the court found that "the viability of the bulk of plaintiffs' claims is called into question" by *Robins*, which "alleged facts that 'are the same or similar to the ones alleged in the case at bar' and 'present[ed] similar legal issues to those in the case at bar.' " Blackman.App.128a. The court further noted the "dearth of judicial authority" on Plaintiffs' damages claims, rendering "the likelihood of success on these claims less

certain." Blackman.App.128a-129a. Global Fitness's cessation of business operations and defense counsel's "zealous and thorough defense" cast further doubt on the likely outcome of continued litigation. Blackman.App.129a.

In characterizing the scope of relief made available to class members, the court described the payments under the settlement as "significant" and "substantial." Blackman.App.139a. In particular, the court explained that the average award of $31.99 and $41.28 for the class as a whole and the Gym Cancel Subclass, respectively, was "a significant recovery because it exceeds the $26.76 average monthly fee of a gym membership with Global Fitness" and that "[t]he recovery is also substantial considering the bases of plaintiffs' claims, *i.e.*, improperly charged dues, a $10 cancellation fee, and/or a $15 FIF or CAF." Blackman.App.139a; *see also* Blackman.App.136a (opining that recovery of $5 to $75 with an average recovery of $31.99 was "significant in light of the estimated average injuries allegedly suffered by class members, which are premised on the improper charge of an extra month's dues at an average rate of $26.76 per month").

Regarding the claims process, the court credited the claims administrator's testimony about the reasons for and outcomes of the chosen procedures. Blackman.App.153a-155a. Testimony also indicated that direct-mail-payment settlements are rare and almost invariably involve insurance or employment cases with access to reliable data and current mailing addresses. Blackman.App.153a. That testimony, combined with

the fact that the data "spans a six year time frame and, at best, is current only as of 2012," led the court to conclude that a "claims-made process is appropriate in this case." Blackman.App.155a.

To evaluate counsel's fees, the court used the lodestar method and percentage-of-the-fund cross-check. Blackman.App.164a, 168a. In choosing the lodestar approach, the court noted the substantial results achieved, the extensive time spent on the litigation on a contingency basis, and the fact that "many of plaintiffs' claims involve fee shifting statutes, see [Kentucky Revised Statutes §] 367.930(2); [Ohio Revised Code] § 1345.09(F)(2), the purpose of which is to induce a capable attorney to undertake representation in litigation that may not otherwise be economically viable." Blackman.App.164a-165a. The court specifically rejected Petitioner Blackman's invitation to treat the matter as a common-fund case, saying, "this is not . . . a common fund case because the provision for attorneys' fees . . . is independent of the award to the Class and Subclasses." Blackman.App.164a. The court further explained that, "[w]here, as here, the results achieved are substantial, the interest in fairly compensating counsel for the amount of work done is great" and that "the lodestar method will best ensure that Class Counsel is fairly compensated for their time." Blackman.App.165a. The resulting lodestar calculation had a multiplier of less than one. Blackman.App.167a. Moreover, while Petitioners had ample opportunity to do so, and "despite vigorous objections to other aspects of the settlement, there [was] no objection to the reasonableness of the hourly rates or the

hours expended on the litigation." Blackman.App. 167a-168a.

The court then applied a percentage-of-the-fund cross-check. Based on the nature of the settlement and class recovery, the court valued the settlement at the "midpoint between the available benefit and the actual payments to class members." Blackman.App.169a. The court concluded that the resulting 21% ratio of attorneys' fees to settlement value was "within the acceptable range for a fee award in a class action." Blackman.App.171a.

Finally, the court addressed the objections to the "clear sailing" and "kicker" provisions. Recognizing the possibility for such provisions to signal collusion, the court found them acceptable here given the "immediate and substantial cash payment to class members." Blackman.App.145a. The court found that the risk of collusion was also reduced because the parties did not discuss attorneys' fees until after they agreed on the class relief. *Id.*

Petitioners objected to the Report and Recommendation, but, after reviewing the facts, the District Court adopted it in full, reiterating the Magistrate Judge's thoughtful rejection of the objectors' arguments. Blackman.App.89a.

C. The Sixth Circuit's Decision

The Sixth Circuit affirmed the District Court's approval of the settlement agreement and attorneys' fees.

Blackman.App.5a. Importantly, the Sixth Circuit observed that Petitioner Blackman challenged neither the dollar payout to individual claimants nor the fundamental fairness of the class relief. Blackman.App. 18a. Instead, his objection was premised solely on the amount of attorneys' fees paid in relation to the total class payout. *Id.*

Based on the presence of state fee-shifting statutes and the public-policy interest in inducing competent counsel to undertake otherwise non-viable consumer-protection litigation on a contingency basis, the Sixth Circuit affirmed the use of the lodestar method. But despite the absence of any objections to the reasonableness of the hourly rates or hours expended on the litigation, the Sixth Circuit found it a "close question" whether the submissions regarding billing independently supported the lodestar award, and therefore confirmed the lodestar fee award using the percentage-of-the-fund cross-check. Blackman. App.22a, 24a-25a.

In evaluating the cross-check, the Sixth Circuit favored a case-by-case approach. Blackman.App.36a. Concluding that the District Court did not abuse its discretion under the specific facts presented, the court recognized that "consumer claims also may seek to vindicate rights beyond monetary ones and many of those cases, including this case, raise claims under both common law *and* fee shifting statutes." Blackman.App.36a. The court opined that "[t]he $8.5 million figure the [lower court] selected recognizes that class counsel provided the valuable service of obtaining substantial

relief for each class member who cared to invest the minimal time required to claim it and that in obtaining this relief, counsel undertook a substantial effort for which they deserve compensation." Blackman.App.39a. Accordingly, the court's narrow decision affirmed the lower court's evaluation methodology, explaining that "[g]iven the facts of this case and the well-reasoned opinions concluding that the settlement relief made available was fair to the class, we decide only that the method employed was within the court's discretion with respect to the case before it." Blackman.App.40a.

Turning to the objections regarding the notice and claims process, the court found "every indication that [the claims administrator] diligently attempted to reach each class member." Blackman.App.43a. Moreover, the court concluded that given the typical response rate, "the obvious uncertainty about any class member's address," and the testimony concerning "the robustness of the process," the District Court was within its discretion in approving the claims process. Blackman.App.44a.

The Sixth Circuit also reviewed the District Court's assessment of the other objections, including its treatment of the Zik objectors' contract and KHSA claims, the disparate individual damages, and the "clear sailing" and "kicker" clauses. As to the breach-of-contract and KHSA claims and the overall sufficiency of the recovery, the court concluded that although the Zik objectors were "vocal about the value of the relief attainable under the KHSA, they fail[ed] to provide detail or offer a theory of how the statute would be

applied." Blackman.App.50a. Ultimately, the court concluded that "[h]aving failed to put forth any evidence suggesting that their proposed class's claims and—very importantly—realistic anticipated recovery are significantly different from what was obtained here, we conclude that the district court acted within its discretion when determining that the settlement was fair despite the Zik objectors' assertions." Blackman.App.53a. As to the "clear sailing" and "kicker" provisions, the court noted the heightened scrutiny such clauses engender, but held that the lower court did not abuse its discretion in approving the settlement under the circumstances of this case. Blackman.App.47a.

Although Judge Clay dissented from the majority opinion, citing concerns that have generally been incorporated into Petitioners' arguments, no judge requested a vote on the question whether to rehear the case en banc. Blackman.App.175a-176a.

REASONS FOR DENYING THE PETITIONS

I. The Petitions Identify No Conflict That Is Appropriate for Review.

Seeking to drum up a circuit split, Petitioners grossly overstate the significance of any differences regarding courts' calculation of attorneys' fees in class-action settlements. To the extent that differences exist in the circuits' analyses, such distinctions are immaterial to the present case. Moreover, the cases Petitioners rely on almost uniformly approve or reject settlements

on the specific facts presented, eschewing categorical rules in favor of district court discretion. *See* Blackman.App.27a-28a. Consistent with this approach, the Sixth Circuit's decision was narrowly focused, deciding "only that the method employed was within the court's discretion with respect to the case before it." Blackman.App.40a.

A. Petitioners Overstate the Effect of Any Differences Between the Sixth and Seventh Circuits on Settlement Valuation.

While Petitioner Blackman contends that the Sixth and Seventh Circuits materially differ in their assessment of attorneys' fees in analogous class settlement agreements, the Seventh Circuit decisions Petitioner Blackman cites do not impose a categorical standard. Blackman. Pet.5 (citing *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014)). Contrary to Petitioner Blackman's position, the Seventh Circuit has no hard-and-fast rule governing the proportionality of attorneys' fees to class benefits. Indeed, the Seventh Circuit's recent affirmance of attorneys' fees in a low-value settlement where coupons were returned in exchange for canceled coupons refutes Petitioner's assertion that *Pearson* requires, in all cases, that an attorney award be a fraction of the dollar figure actually paid to the class.

In *Levitt v. Southwest Airlines Co.* (*In re Southwest Airlines Voucher Litig.*), 799 F.3d 701, 705, 711-12 (7th Cir. 2015), the Seventh Circuit upheld a fee award of

$1.65 million in a claims-made settlement of undefined monetary value because it gave class members "essentially everything they could have hoped for." The fee was calculated based on a 1.5 multiplier of the lodestar, and, despite the size of the resulting award, the court was untroubled by the objectors' argument (made by the same counsel representing Petitioner Blackman) that the ratio of fees against the value of the class relief rendered the settlement unreasonable. *Id.* at 712.

Similarly, in *Americana Art China Co. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 245 (7th Cir. 2014), the court affirmed a lodestar-based fee award of $1.15 million in a Telephone Consumer Protection Act class action in which class members recovered only $397,426.66 of the $6.1 million in potential recovery made available under the settlement agreement. The ultimate benefit to class members was one consideration in assigning the award, but it was not the only one. In fact, the court cautioned against "relying *solely* on the degree of success in determining fee awards." *Id.* at 247.

These cases show that the Seventh Circuit's proportionality test is not a categorical rule, particularly when, as here, class counsel obtained significant relief relative to the claims made and the lodestar is the primary method of determining the fee. Petitioners' cases are all distinguishable on these points. Indeed, not one of Petitioners' cases involves an evaluation of attorneys' fees where the settlement provided individual class members substantial relief as measured against the likely recovery in litigation. This distinction is vital

and goes to the heart of Petitioners' assertion that class counsel failed to maximize the benefits received by the class. Blackman.Pet.35.

Pearson, for example, involved a "meager" cash settlement and an injunction that benefited the defendant "by allowing it, with a judicial imprimatur . . . to preserve the substance of claims by making . . . purely cosmetic changes in wording." 772 F.3d at 781, 785. In addition, the claims process was rigged to minimize the number of claims, and the fee award failed the lodestar test, as it amounted to $538 per hour for all attorneys and paralegals. *Id.* at 781, 721.

The facts in *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014), were worse. There, the court characterized the settlement agreement as "inequitable—even scandalous" because it either arbitrarily capped the damages available to class members with claims or required claimants to submit to arbitration that allowed the defendants to assert defenses and defeat the claims. *Id.* at 725. Despite the contingent nature of the relief, the district court approved an $11 million attorneys' fee. *Id.* at 723. On top of that, class counsel was embroiled in ethical proceedings that threatened his law license, likely making him "desperate to obtain a large attorney's fee in this case before his financial roof fell on him." *Id.* at 722. And in *Redman v. RadioShack*, 768 F.3d 622, 638-39 (7th Cir. 2014), the only relief provided to class members was a coupon that, at best, provided a value equal to "10 cents on the dollar" despite the existence of statutory damages of $100-$1,000 per violation.

Here, the lower courts made explicit findings about the considerable class relief, concluding that the recovery ranging from $5 to $75 with an average recovery of $31.99 was "significant in light of the estimated average injuries allegedly suffered by class members, which are premised on the improper charge of an extra month's dues at an average rate of $26.76 per month." Blackman.App.136a. Petitioners have not meaningfully challenged these findings. Indeed, at the fairness hearing, Petitioner Blackman's counsel indicated that the monetary terms for individual class members were perfectly acceptable; the problem was simply that the payout did not go to every class member. *See* R. 139 at 74, PageID#2753; Blackman.App.136a-137a. And while Zik Petitioners protest the award amount, the naked assertion that they could have obtained more under breach-of-contract or KHSA theories flies in the face of the lower courts' reasoned determinations to the contrary. Blackman.App.53a (stating that the Zik objectors "failed to put forth any evidence suggesting that their proposed class's claims and—very importantly—realistic anticipated recovery are significantly different from what was obtained here").

Petitioners point to the Sixth and Seventh Circuits' differing interpretations of a single footnote in *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980), as further evidence of a justiciable issue for the Court. Such differences are immaterial in the context of this case.

While Petitioner Blackman cites to Seventh Circuit cases requiring that the percentage-of-the-fund

analysis set the settlement value at amounts actually paid to class members, that is not an absolute rule. *Pearson* recognized there may be instances where the judgment will be smaller than the agreed-upon attorneys' fee, *Pearson*, 772 F.3d at 782, leaving the door open for settlements in which the attorneys' fee is higher than the numeric value of the payout if other facts support the settlement's fairness. The Seventh Circuit's *In re Southwest Airlines* supports this approach. There, as in this case, the claims process was easy, the relief's adequacy undisputed, and the individual recovery comparable to what could have been achieved through litigation. *In re Southwest Airlines*, 799 F.3d at 711-12. These characteristics sufficed to mitigate concerns that class counsel may have sacrificed the class's recovery for their own, notwithstanding similar objections regarding the proportionality of the fees. *Id*.

With such facts, it is not enough—under either the Seventh's or Sixth Circuit's cases—to look solely at the ratio of fees to class benefit. Accordingly, in evaluating the fee award here, the District Court weighed the facts and circumstances surrounding the settlement and set a value at the midpoint between the funds made available and the amounts paid. That figure—$8.5 million—took into account "that class counsel provided the valuable service of obtaining substantial relief for each class member who cared to invest the minimal time required to claim it and that in obtaining this relief, counsel undertook a substantial effort for which they deserve compensation." Blackman.App.39a.

Even if that analytical starting point differs from the approach espoused in *Pearson*, the District Court's overall analysis was consistent with the reasoning in *Southwest*. Thus, Petitioner Blackman's claim that the Seventh Circuit would have decided this case differently under its precedents is simply wrong. Blackman.Pet.28.

Even assuming, *arguendo*, a relevant split exists between the Sixth and Seventh Circuits with respect to attorney fees determined by a percentage of the fund, this case is not the right vehicle to address it. This case involved the application of the percentage-of-the-fund test solely as a cross-check against the lodestar method. Use of the lodestar calculation was based on the lack of a common fund, the significant cash relief afforded the class, and the presence of state fee-shifting statutes that dictate application of a lodestar approach. *See* Ohio Rev. Code § 1345.09(F); Ky. Rev. Stat. § 367.930(2). Because of the consumer-protection and fee-shifting features of those statutes, the District Court found that preventing the payment of attorneys' fees for work actually performed runs contrary to the public interest, and the Sixth Circuit held that this finding was not an abuse of discretion. Blackman.App.165a, 22a. These conclusions were consistent with this Court's jurisprudence, which provides that counsel should recover fees and costs under applicable fee-shifting provisions when a settlement provides relief comparable to what could have been achieved through litigation. *See, e.g.*, *Maher v. Gagne*, 448 U.S. 122, 129 (1980); *see also Perdue v. Kenny A. ex rel. Winn*,

559 U.S. 542, 552 (2010) (The lodestar calculation "yields a fee that is presumptively sufficient to achieve [fee-shifting's] objective."). Indeed, accepting the Petitioners' proposed categorical rule would eviscerate the application of the lodestar method in well-litigated cases involving small-value consumer claims.

Pearson and Petitioners' other Seventh Circuit cases are silent on how these factors affect the attorneys'-fee analysis. As the Sixth Circuit recognized, cases seeking to vindicate rights under fee-shifting statutes raise a different set of issues, making a categorical rule on fee calculations inappropriate, particularly given the risk that such a rule could disincentivize attorneys from undertaking class representation in cases where fee-shifting statutes would otherwise apply. *See* Blackman.App.36a-37a. The express purpose of fee-shifting statutes is to induce capable attorneys to take cases that may not be otherwise economically viable, and calculating attorneys' fees as a proportion of damages—particularly in cases where individual recoveries are small—runs directly contrary to that purpose. *Perdue*, 559 U.S. at 552. Moreover, cases have questioned whether the *Boeing* fund-valuation principles are even relevant to a case in which fees were calculated first using the lodestar method, which fee-shifting cases tend to be. *See Americana*, 743 F.3d at 248; *Strong v. BellSouth Telecomm.*, 137 F.3d 844, 852 (5th Cir. 1998).

Petitioner Blackman's uncompromising approach lacks a limiting principle that accounts for these nuances. Evaluating such nuances is a task best suited to district courts, which, to the extent necessary, are also

in the best position to further develop the jurisprudence applicable to the fee issues in this case. Moreover, while the Sixth Circuit declined to rest its holding on the lodestar analysis because of a factual question relating to the level of detail in the billing submissions, neither Petitioner ever challenged the rates or hours that fed into the court's analysis. Thus, even if the fee award is reversed under the percentage-of-the-fund test, Respondents will likely win approval under the lodestar method on remand.[1] Class counsel's fee award is already at a below-lodestar rate. Blackman.App.167a-168a; *cf. In re Southwest Airlines*, 799 F.3d at 711-12 (approving a lodestar award with a 1.5 multiplier). And although Petitioner Blackman is correct that a below-lodestar award is not outcome determinative, the cases he cites simply stand for the uncontroversial proposition that a below-lodestar amount does not save a fee that is otherwise unsupported by the record. *Feder v. Frank* (*In re HP Inkjet Printer Litig.*), 716 F.3d 1173, 1177, 1181 (9th Cir. 2013) (rejecting a lodestar calculation as inappropriate for a coupon settlement because it violated the Class Action Fairness Act); *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 177 (3d Cir. 2013) (declining to

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[1] The only criticism of the District Court's application of the lodestar method was that it did not involve a detailed review of class counsel's billing records. Blackman.App.24a. Though class counsel offered to provide voluminous records to the District Court for review, class counsel did not preemptively provide them because, despite the opportunity to do so, no objector contested the hours or fees used in the calculation. R. 144 at 24, PageID#2945.

determine whether fees were reasonable despite a below-lodestar cross-check because there was no record assessing the fees against the benefits to the class); *Jones v. GN Netcom, Inc.* (*In re Bluetooth Headset Prods. Liab. Litig.*), 654 F.3d 935, 944 (9th Cir. 2011) ("From the face of the Fee Order . . . we do not have sufficient information from which to conclude that the district court included a reasonable number of hours in its lodestar 'calculation' or that it 'considered the relationship between the amount of the fee awarded and the results obtained.'" (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). Here, the substantial cash payments in exchange for waiving claims that one district court had already dismissed supported the District Court's lodestar award, and these findings further underscore why this case is a poor vehicle for addressing the questions Petitioners present.

B. Petitioners' Remaining Cases Are Fact-Specific Assessments That Do Not Conflict on the Applicable Law.

Far from establishing a "legal rule" regarding the proportionality of attorneys' fees in relation to class relief, Petitioners' cases from other circuits also apply a case-by-case review similar to what the District Court employed here. In both Ninth Circuit cases Petitioner Blackman cites, the court expressly declined to give an opinion on the fairness of the attorneys' fees, instead resting the judgments on the absence of an adequate record to support proportionately large fee awards. *See Allen v. Bedolla*, 787 F.3d 1218, 1225 (9th Cir. 2015); *In*

re Bluetooth, 654 F.3d at 949-50. Further, the court in *In re Bluetooth* said it had "no business 'substitut[ing] [its] notions of fairness for those of the district judge,'" leaving open the possibility that, on an appropriate record, the district court "may find the $800,000 attorneys' fee award reasonable in light of the hours reasonably expended and the results achieved." *Id*. (first alteration in original) (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 626 (9th Cir. 1982)).

The Third Circuit's analysis in *In re Baby Products Antitrust Litigation* struck a similar chord. There, the court vacated a settlement that provided only $5 in direct damages to class members who had not retained proof of purchase (in contrast to likely damages of $150), while most of the purported relief was eaten up by a *cy pres* fund. The court remanded, not because of disproportionate attorneys' fees, but because the district court had been unaware of the scope of *cy pres* relief and thus had not considered whether there was enough direct benefit to class members. *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 170, 176. In rejecting a proposed categorical rule governing settlement valuation, the court opted to leave "the determination of the appropriate fee award to the District Court, which is more familiar with the performance and skill of counsel, the nature and history of the litigation, and the merits of the lawsuits." *Id.* at 179-80.

In short, while these cases were remanded due to potentially disproportionate attorneys' fees in relation to the benefit provided to the class, the remands were

based on gaps in the factual record, not the application of a "legal rule" on proportionality or the use of an improper method for calculating benefit to the class.

Moreover, while Petitioner Blackman initially suggests that the purported split also implicates the Second and Eleventh Circuits, Blackman.Pet.1, he later concedes that the opinions cited from those circuits do not illustrate a split on the question of settlement valuation under Rule 23(e). Blackman.Pet.27; *see also Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1298 (11th Cir. 1999) (holding only that the district court did not abuse its discretion by basing the attorneys' fee on the total value of the fund despite the likelihood of a lower payout but stating that "[n]othing in this opinion precludes a district court judge in a different case from basing the attorneys' fee award on the actual class recovery or on the gross settlement figure" depending on "the circumstances presented in each case"); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 435, 437 (2d Cir. 2007) (rejecting the district court's analysis of a settlement that credited as class benefits only the amount of claims-made payouts and excluded the amount of *cy pres* relief).

Nor does the other Eleventh Circuit decision Petitioner Blackman cites support the existence of a conflict. After making findings on the benefits of the settlement relief, the court in *Poertner v. Gillette Co.*, 618 F. App'x 624, 630 (11th Cir. 2015), *cert. denied*, *Frank v. Poertner*, 136 S. Ct. 1453 (2016), held that "[g]iven the district court's settlement valuation, which we conclude from the record is not clearly erroneous,

we hold that the district court's approval of class counsel's fees-and-costs award was not an abuse of discretion." *Accord Strong*, 137 F.3d at 852 (where settlement value was calculated based on a per-class-member recovery that was significantly more than face value, the district court did not abuse its discretion in declining to rely on class counsel's proposed common-fund figure).

Taken together, these cases demonstrate that the calculation of attorneys' fees in a class-action settlement is a fact-bound assessment, not a categorical exercise. And rightly so. Long-established precedent holds that district courts, which deal directly with counsel and are thoroughly aware of the facts on the ground, are in the best position to evaluate the reasonableness of a fee award in a class-action settlement. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters."). In short, there is no split of authority that casts doubt on the District Court's decision or warrants review of the Sixth Circuit's affirmance of that decision.

C. There Is No Circuit Split on the Permissibility of "Clear Sailing" and "Kicker" Provisions.

In addition to their settlement valuation claims, Zik Petitioners also suggest that the Sixth Circuit's decision resulted in a circuit split on the propriety of "clear sailing" and "kicker" provisions. Zik.Pet.7. It does not. Nor was the lower courts' review of these clauses deficient in any respect. As the Sixth Circuit explained, the District Court "*did* peer into the relief to the class and the attorney's fees at issue, and found both to be appropriate" given the facts of this case. Blackman.App.46a. That approach was consistent with the law of other circuits, which have advised caution when reviewing these clauses without imposing a per se rule. *See, e.g.*, *Redman*, 768 F.3d at 637; *In re Bluetooth*, 654 F.3d at 949. Indeed, where settlements provide reasonable recovery in light of the litigation risks and are otherwise fair to class members—as the settlement is here—courts readily approve them even in the presence of such provisions. *See, e.g.*, *Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 83 (1st Cir. 2015); *In re Southwest Airlines Voucher Litig.*, 799 F.3d at 712-13; *Blessing v. Sirius Xm Radio, Inc.*, 507 F. App'x 1, 4 (2d Cir. 2012); *cf. In re Bluetooth*, 654 F.3d at 949-50 (expressing skepticism about similar provisions but permitting the district court to find on remand that the fee award was proportionate to the value received by the class, the clear-sailing provision was outweighed by other considerations, and the reversion clause was of no concern in an uncapped claims-made settlement). In

short, while “clear sailing” and “kicker” clauses may sometimes warrant additional scrutiny, the courts here provided it and soundly decided these issues within their discretion.

II. Zik Petitioners Do Not Identify Any Failure To Comply with Rule 23(a) or (b).

Without precisely identifying the errors in the lower courts’ analyses, Zik Petitioners alternatively contend that the lower courts erred by failing to consider the class certification factors under Rule 23. Zik.Pet.14-19. This contention is puzzling given that the Report and Recommendation devoted more than 16 pages to individually evaluating each factor under Rule 23(a) and (b)(3) to determine whether the settlement class could properly be certified. Blackman.App.107a-124a

In conducting this analysis, the lower courts also directly addressed Zik Petitioners’ argument about the disparate nature of claims, the allegedly foregone damages under the KHSA, and Zik Petitioners’ supposedly unique breach-of-contract claims. Zik.Pet.17-18. With respect to the argument that the class claims were too disparate, the District Court considered and rejected arguments that differences in state consumer-protection law should have foreclosed certification. In particular, the District Court concluded that “the claims of the Class Representatives arise from the same policies and practices of defendant that give rise to the claims of other class members and are based on

the same legal theories," and that the interests of the class representatives and absent class members were "sufficiently aligned" to ensure adequate representation. Blackman.App.117a.

Zik Petitioners also point to certain purported disparities as evidence that the settlement class should not have been certified, including the fact that not all class members' contracts charged a FIF and the existence of minor differences in the facts underlying individual plaintiffs' damages claims. Zik.Pet.18-19. Such "disparities" are immaterial to the certification analysis.

Initially, *Amchem Products v. Windsor*, 521 U.S. 591 (1997)—which is the only case Zik Petitioners cite for this argument—shows why the settlement meets the standards of this Court. As *Amchem* directs, this settlement *does* create subgroups, one of which specifically addresses the FIF issue. Zik.Pet.18. Specifically, those class members who were charged the fee became members of the FIF subclass and were entitled to $20 in damages; those who were not charged the fee were excluded from the subclass and received nothing.

As for asserted differences between individual class members' damages, the question is not whether all class members' are identically situated—a standard impossible to meet—but whether class claims predominate over individual ones. At no point have Zik Petitioners even attempted to show that the individual questions the "disparities" implicate predominate over

the class-wide questions premised on the form contracts and procedures that were common to all class members.

Nor is it dispositive that some class members may have had damages the settlement's flat-fee award could not address. As the District Court found, "[c]onsidering the risks of this litigation, the additional costs and delays that would likely result from the need to calculate and verify individual damage awards for each Allowed Claimant, and the difficulty calculating damages for the 343 Allowed Claimants for whom Global Fitness has no record, . . . [the] flat award for membership in each Class or Subclass is appropriate." Blackman.App.139a-140a (citation omitted).

Zik Petitioners are also mistaken that the application of multiple state laws forecloses class treatment. On this point, the District Court correctly explained that, although the class claims were not all governed by the same state law, they were premised on common contracts and policies. Blackman.App.120a-121a. If, for example, Tennessee law prohibits the recovery of payments that are recoverable by one of the subclasses, that fact does not create an irreconcilable disparity among class members; it simply means that class members from Tennessee will not be members of the pertinent subclass. Such differences present no obstacle to certification.

Most of Zik Petitioners' remaining arguments are simply an effort to dismantle the settlement in pursuit of a better one. But these arguments ignore the lower

courts' assessment of the daunting obstacles in the path of any such recovery. Contrary to Zik Petitioners' position, both courts evaluated the longshot potential for damages on Zik Petitioners' breach-of-contract claims and under the KHSA. In doing so, the District Court observed that the damages claims under the KHSA were premised on the same theory as the settled claims, and concluded that another court's dismissal of similar claims, combined with the dearth of relevant statutory authority, made the likelihood of success dubious at best. Blackman.App.128a, 141a (citing *Robins*, 838 F. Supp. 2d 631). The lower courts also each concluded that Zik Petitioners' breach-of-contract claims were subsumed within the claims of one of the subclasses, and that the average payout to a member of the fictional Zik class would have been comparable to what the average *Gascho* class member received. Blackman.App.139a; *see also* Blackman.App.49a (noting that the Zik objectors' average contract damages were "only a few dollars more than the average claimant in the case, and several dollars *less* than the average Gym Cancel Subclass Members, a group in which each member of the Zik objectors' proposed class would necessarily be a part"). Thus, Zik Petitioners ultimately made no showing that their "realistic anticipated recovery" was much different than what class counsel obtained on their behalf. Blackman.App.53a.

As for Zik Petitioners' threadbare contention that the settlement included a "grossly overbroad release," Zik.Pet.19, the District Court addressed that too, concluding that the release was appropriately limited to

claims involving the same factual predicate as those alleged in the third amended complaint, Blackman. App.157a-159a. Zik Petitioners cite not a single case and provide no reasoned argument to show why that determination was wrong.

In short, Zik Petitioners have not explained how any of the lower courts' findings were legally erroneous; nor have they addressed the additional facts in the record that supported the lower courts' rejection of their claims. Instead, Zik Petitioners simply restate positions that were presented to and properly rejected by the courts below. Such arguments provide no basis for certiorari. *Graver Tank Mfg. Co. v. Linde Co.*, 271 U.S. 271, 275 (1949) (stating that the Court is not "a court for correction of errors in fact finding"); Sup. Ct. R. 10.

III. Zik Petitioners' Request for Direct Notice Is Unsupported in Law or Fact.

Zik Petitioners also have not identified an issue worthy of certiorari in their request for a categorical rule requiring direct payment of class claims.

Zik Petitioners maintain it was Plaintiffs' burden to prove why direct payments to *any* class members were infeasible but provide no legal support for their position. Zik.Pet.13. This is hardly surprising given that (1) no court has imposed this requirement and (2) acceptance of the proposal would create an extraordinary burden, forcing claims administrators to sift out which class members could receive direct payments

and which could not regardless of the costs of such efforts.

Moreover, although *Pearson* and *Eubank* each rejected inherently flawed processes designed to minimize class members' claims, neither establishes an inflexible rule requiring direct payments, and both are distinguishable from the present case. *See Pearson*, 772 F.3d at 783-84 (criticizing a notice process that was "bound to discourage filings" due to the inclusion of "needlessly elaborate documentation," "threats of criminal prosecution," and the myriad documents and forms required to submit a claim and opining that a better—though not a mandatory—approach would have been to send checks to 4.72 million class members identifiable through "pharmacy loyalty programs and the like"); *Eubank*, 753 F.3d at 725-26 (rejecting a claims process that required claimants "to submit a slew of arcane data" on claim forms "so complicated that [the defendant] could reject many of them on the ground that the claimant had not filled out the form completely and correctly" but saying nothing about direct payments to class members). These flaws were not present in the process utilized here.

Zik Petitioners also have it wrong on the facts. Plaintiffs *did* show why direct payments were unworkable: the data's staleness and uncertainties in identifying individual class members made the approach unfeasible, as confirmed by the claims administrator's considerable experience. Blackman.App.153a. Plaintiffs also demonstrated that the process was designed to reach as many class members and to provide as

streamlined a submission process as possible. Blackman.App.41a-42a. Zik Petitioners have not challenged these fact findings.

And although Zik Petitioners represent that it is undisputed that the notice reached 90% of the class, this is simply not true. While 90% of notices were delivered to *an* address associated at one time with a potential class member, the claims administrator testified that it was impossible to say whether the notices ultimately reached the intended class member. Blackman.App.154a. The District Court did not abuse its discretion in crediting and relying on these facts to approve the claims process, and Zik Petitioners' invitation to revisit these factual issues should be rejected. *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari" (alterations in original) (citation omitted)).

IV. This Case Is Not an Appropriate Vehicle for Addressing Class-Action Standards.

Petitioner Blackman's characterization of this case as "an ideal petition" relies on the flawed premise that proportionality alone dictated the outcome in the cases he cites. As shown above, this is not the case. It also ignores the District Court's application of the lodestar approach, which would provide an independent basis for approval on remand. These alone are reasons to deny certiorari.

Petitioner Blackman's other justifications for granting certiorari are similarly meritless. With respect to his warnings of forum shopping, cases like *In re Southwest Airlines*, *Americana*, and even *Pearson* show that the Seventh Circuit imposes no categorical rule. In appropriate cases, each circuit permits the type of fact-intensive inquiry that the District Court engaged in here, and his concerns about "gamesmanship" are therefore unwarranted. Blackman.Pet.32.

Moreover, Petitioner Blackman cites no authority to support the assertion that certain circuits are "favorite destinations" of class actions. Blackman.Pet.11. And despite citing a string of recent settlement approvals in the Eleventh Circuit as evidence of forum shopping, he offers no basis by which to determine whether there truly is any disparity between the class settlements in the Eleventh Circuit versus elsewhere. Indeed, far from demonstrating a trend toward "rubber-stamping," the court in *Lee v. Ocwen Loan Servicing, LLC*, No. 14-CV-60649, 2015 U.S. Dist. LEXIS 121998 (S.D. Fla. Sep. 14, 2015), approved a settlement in which relief *exceeded* what most class members could have obtained at trial, and the court in *Montoya v. PNC Bank*, *N.A.*, No. 14-20474-CIV, 2016 U.S. Dist. LEXIS 50315, at *55 (S.D. Fla. Apr. 13, 2016), approved a settlement that provided "near-complete [monetary relief]" and required the defendants "to cease the key practices at the core of Plaintiffs' complaint." These facts do not suggest instances where class counsel engaged in self-dealing at the class's expense. And given the strong recoveries, it simply is not true that these

cases would have been decided differently in another jurisdiction.

Petitioner Blackman's claim that the information regarding the claims rate renders this case unique is also wrong. Blackman.Pet.28. Petitioner Blackman's counsel recently made the same argument unsuccessfully in another case that presented a nearly identical question for review, directly undermining Petitioners' arguments. Pet. for Writ of Certiorari, *Frank v. Poertner*, No. 15-765 (filed Dec. 11, 2015), *cert. denied*, 136 S. Ct. 1453 (2016). In any event, judicial findings on claims rates are hardly unheard of and have been cited in numerous class cases. *See, e.g.*, *Shames v. Hertz Corp.*, No. 07-CV-2174-MMA(WMC), 2012 U.S. Dist. LEXIS 158577, at *48-49 (S.D. Cal. Nov. 5, 2012) (citing cases).

Petitioners' arguments about the need to maximize class benefits also miss the mark. In light of the lower courts' findings on the substantiality of the relief to individual class members and the serious risks of further litigation, Petitioners' position on maximizing class benefits presents a false choice. The fact that a better deal is perhaps imaginable says nothing about *this* deal's fairness. Moreover, there is simply no support for Petitioners' claim that a reduction in attorneys' fees would have accrued to the class's benefit. This is not a common-fund case; the attorneys' fees constituted a separate payment from the class relief and were negotiated *after* that relief was determined. Furthermore, the cases Petitioners point to as support for their claim that reducing attorneys' fees creates

greater incentives to maximize class benefits all involve both a burdensome claims process and a facially deficient class recovery. *E.g.*, *Pearson*, 772 F.3d at 781. Neither occurred here. Indeed, Petitioner Blackman did not challenge the lower courts' conclusion that the class recovery was fair and substantial on a per-class-member basis, and Zik Petitioners have not meaningfully done so.

Although Petitioner Blackman suggests that a direct-claims process would have produced a better result, Blackman.Pet.25, there are good reasons why that process was not used, and Petitioner Blackman has not challenged the factual findings that supported the lower courts' conclusion in that regard. Moreover, Petitioner Blackman's *Acme* hypothetical is a straw man. The question before the District Court was not whether a better deal was conceivable; it was whether the settlement at hand was fair, reasonable, and adequate. And while there is undoubtedly a theoretical concern about not subverting class interests to those of their attorneys, that concern is not implicated here. Both the District Court and the Court of Appeals considered Petitioner Blackman's arguments and *under the particular facts of this case* properly dismissed them as meritless.

Finally, Petitioner Blackman laments the breakdown in the adversarial process that results from class actions generally. The reduced adversarial posture in class settlements, however, is nothing new; in fact, it is the reason why courts—as the courts did here—undertake heightened scrutiny to ensure that a settlement

is fair to absent class members. *See Amchem*, 521 U.S. at 620. Simply put, Petitioner Blackman is unwilling to trust district courts to properly exercise their duty to review and deny inadequate settlements.

In sum, while Petitioners present this case as illustrative of self-dealing, out-of-control class counsel fees, and disregarded fiduciary responsibilities, the truth is more mundane. "Although some judges, media people, and the defense bar have characterized attorney fees in class actions as a source of abuse and a stain on the escutcheon of the administration of civil justice, in reality there is a virtual absence of any empirical data showing any significant incidence of excessive fees." 7B Charles Alan Wright et al. *Federal Practice and Procedure* § 1803.1, at 339-40 (3d ed. 2015). This case rests in the quiet majority of settlements that resulted in a strong recovery for the class without any evidence of collusion or impropriety in the negotiation of counsel's fees. In short, while Petitioners' dire warning about misaligned incentives and unearned fees may be true in some cases, Petitioners have not shown it to be true in this one. This settlement provided substantial relief to class members in proportion to what was obtainable in litigation. Because the Sixth Circuit's fact-bound affirmance was both correct and consistent with other circuits' treatment of similar issues, this case presents no viable issue for review.

CONCLUSION

The Petitions should be denied.

Respectfully submitted,

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