No. 20-1349

In the Supreme Court of the United States

RACHEL THREATT,

Petitioner,

v.

RYAN THOMAS FARRELL, ET AL., ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

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

BRIEF OF THE ATTORNEYS GENERAL OF ARIZONA, ALABAMA, ARKANSAS, IDAHO, KENTUCKY, LOUISIANA, MISSOURI, MONTANA, OHIO, TENNESSEE, TEXAS, AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici are their respective states' chief law enforcement or chief legal officers and hold authority to file briefs on behalf of their offices.[1]

Amici's interest arises from two responsibilities. *First*, as chief law enforcement or legal officers, amici have an overarching responsibility to protect their States' consumers. *Second*, amici have a responsibility to protect consumer class members under CAFA, which prescribes a role for state Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715; *see also* S. REP. 109-14, 2005 U.S.C.C.A.N. 3, 6 (requirement "that notice of class action settlements be sent to appropriate state and federal officials," exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens."); *id.* at 34 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements"; "Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.").

Amici submit this brief to further these interests, speaking for consumers who will benefit from the Court hearing this case and providing uniform guidance on the use of a lodestar cross-check when awarding fees in class action settlements.

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[1] Pursuant to Rule 37.6, amici certify that no parties' counsel authored this brief and only amici or their offices made a monetary contribution to the brief's preparation or submission. Counsel of record for all parties received notice of amici's intent to file at least ten days prior to this brief's due date and have given written consent.

SUMMARY OF ARGUMENT

In light of their unique role under the Class Action Fairness Act of 2005 ("CAFA"), state attorneys general are repeat players in the class action settlement context, identifying concerns with parties and courts about class action settlements that negatively affect their respective resident class members. A coalition of state attorneys general filed an amicus brief in the Ninth Circuit below, addressing the question presently before the Court.

The question here—whether a district court must employ a lodestar cross-check in awarding reasonable attorneys' fees—is important for the protection of absent class members. The lodestar cross-check functions to ensure that class counsel has not received a windfall, especially at the expense of the class. Absent class members are already disadvantaged in the class action settlement context, and courts must act in a fiduciary-like role to protect the interests of those class members.

This case presents an opportunity to speak to this issue, clarifying the diverging standards that have emerged in the courts of appeals. The district court chose not to perform a lodestar cross-check, despite the settlement being comprised of not only a cash fund, but also debt forgiveness and injunctive relief, which are not readily quantifiable.

The Court should grant certiorari to address this recurring question and provide guidance to lower courts on the necessity of a lodestar cross-check when awarding class action settlement attorneys' fees based on a percentage of the fund.

ARGUMENT

I. State Attorneys General Frequently Weigh In When A Settlement Is Structured In A Way That Harms Absent Class Members.

Due to their unique role under CAFA, state attorneys general are keenly aware of the types of class action settlements that can harm the interests of absent class members. When Congress enacted CAFA, it prescribed a unique role for state attorneys general by mandating that class action defendants notify the "appropriate State official of each State in which a class member resides" after a proposed settlement is filed with the court. *See* 28 U.S.C. § 1715. The state attorneys general are the default State officials to be notified. *See id.* § 1715(a)(2). Within 10 days of filing a settlement agreement in court, defendants must serve the state officials with notice of the settlement, and must include important information such as the settlement agreement itself, information about any scheduled hearings, and any notification being sent to the class members. *Id.* § 1715(b).

This regular stream of settlement notices puts state attorneys general in a prime position to recognize provisions in settlements that are harmful to consumer class members and raise those concerns with parties and the courts. *See* S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 6, 35 (discussing reasons for notifying state officials).

Indeed, state attorneys general, seeking to protect the interests of their resident consumers, have repeatedly raised concerns about improperly structured settlements in federal courts across the country. Some of the most harmful types of

settlements flagged by state attorneys general include those comprised of only *cy pres* awards, which actively divert the negotiated settlement funds to third-party organizations instead of to the class members whose claims are being released;[2] those with illusory or valueless injunctive relief;[3] those awarding coupons to class members, but failing to comply with CAFA's mandates regarding attorneys' fees in coupon settlements;[4] and settlements containing harmful fee arrangements.[5] These efforts

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[2] *See, e.g.*, Brief for the Attorneys General of Arizona et al. as Amici Curiae Supporting Petitioners, *Frank v. Gaos*, No. 17-961 (July 16, 2018); Brief of the Attorneys General of Arizona et al. as Amici Curiae in Support of Petitioners, *Frank v. Gaos*, No. 17-961 (Feb. 7, 2018); Brief for Thirteen Attorneys General as Amici Curiae Supporting Objector-Appellant, *Joffe, et al. v. Google, Inc.*, No. 20-15616, Dkt. 21 (9th Cir. Aug. 19, 2020); Amended Brief for Thirteen State Attorneys General as Amici Curiae Supporting Objector-Appellant, *In re: Google Inc. Cookie Placement Consumer Privacy Litig.*, No. 17-1480 (3d Cir. July 10, 2017).

[3] *See*, *e.g.*, Brief for Thirteen Attorneys General as Amici Curiae Supporting Objector-Appellant, *Briseno v. Conagra Foods*, No. 19-56297, Dkt. 18 (9th Cir. Apr. 10, 2020); Brief for State Attorneys General as Amici Curiae Opposing Final Approval, *Allen v. Similasan Corp.*, No. 12-cv-376, Dkt. 219 (S.D. Cal. July 28, 2016).

[4] *See, e.g.*, Brief for Nine State Attorneys General as Amici Curiae Supporting No Party, *Chambers v. Whirlpool Corp.*, No. 16-56666, Dkt. 58 (9th Cir. Sept. 13, 2017); Brief for Thirteen State Attorneys General as Amici Curiae Supporting Objector-Appellant, *In re: EasySaver Rewards Litig.*, No. 16-56307, Dkt. 21 (9th Cir. May 8, 2017).

[5] *See, e.g.*, Brief of State Attorneys General as Amici Curiae Urging Reduction of Attorneys' Fee Requested by Class Counsel, *In Re: Apple Inc. Device Performance Litig.*, No. 5:18-md-02827-EJD, Dkt. 564-1 (N.D. Cal. Nov. 27, 2020); Amended Brief for Nine Attorneys General as Amici Curiae Supporting

by state attorneys general have produced meaningful results for class members.[6]

A coalition of state attorneys general raised the very issue at hand with the court below, addressing the district court's failure to perform a lodestar cross-check. *See* Brief of Seven State Attorneys General As *Amici Curiae*, *Farrell v. Bank of Am.*, No. 18-56272, Dkt. 37 (9th Cir. Apr. 1, 2019) ("… concerns of fundamental fairness … require that a court examine both [the lodestar method and the percentage-of-recovery method] against one another through a cross-check before approving a settlement agreement and award of attorneys' fees.").

It is in light of this experience and repeat involvement in the class action settlement process that this coalition of state attorneys general urges the Court to grant certiorari and take this opportunity to provide guidance on an important and

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Objector-Appellant, *In Re: Samsung Top-Load Washing Machine Mktg. Sales Practices & Prods. Liab. Litig.*, No. 20-6097 (10th Cir. Sept. 22, 2020).

[6] *See, e.g.*, *Chambers v. Whirlpool Corp.*, 980 F.3d 645, 658 (9th Cir. 2020) (vacating the fee awarded by district court because the award failed to follow CAFA's coupon strictures); *In re: EasySaver Rewards Litig.*, 906 F.3d 747, 758 (9th Cir. 2018) (vacating the fee awarded by district court because the award failed to account for the settlement's vouchers as coupons under CAFA); *In re: Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 321 (3d Cir. 2019) (approval of *cy pres*-only settlement vacated and remanded for further consideration); *Allen v. Similasan Corp.*, No. 12-cv-376, Dkts. 219, 223, 257, 261 (S.D. Cal.) (after a coalition of State Attorneys General filed amicus and district court rejected initial settlement, revised deal was reached, increasing class's cash recovery from $0 to ~$700,000).

repeating question that arises in the class action settlement approval context.

II. A Lodestar Cross-check Protects Absent Class Members, Who Are Inherently Disadvantaged In The Class Action Settlement Process.

A. Cross-checks Are Necessary To Determine The Reasonableness Of Attorney Fee Awards.

After a district court arrives at an award of attorneys' fees, a cross-check (against either a percentage of the fund or a lodestar calculation) ensures that the method used to calculate fees provides a "reasonable" fee award. *See In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 930 (9th Cir. 2020); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 n.40 (3d Cir. 1995) ("[A] court can use the lodestar method to confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate; similarly, the percentage of recovery method can be used to assure that counsel's fee does not dwarf class recovery."). In particular, a lodestar cross-check informs the reasonableness inquiry by looking at whether a windfall has been awarded to class counsel. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) (when "the lawyers' investment of time in the litigation … is minimal, as in the case of an early settlement, the lodestar calculation may convince a court that a lower percentage is reasonable."). A cross-check ensures that attorneys are not being overcompensated, especially at the class's expense.

Furthermore, the need for a lodestar cross-check becomes particularly salient when a district court uses the percentage of the fund method to calculate a fee award but the value of the fund is not easily calculated. Nonmonetary relief (e.g., coupons, injunctive relief, and debt forgiveness) is frequently a component of a class's award. But nonmonetary relief is not readily quantifiable. This leaves courts to wrestle with the appropriate dollar value to assign to that relief.

For example, a settlement may contain a small monetary award to class members, but also contain a slew of injunctive provisions. The parties may value the nonmonetary portion of the award at millions upon millions of dollars, and subsequently base their "percentage of the fund" fee request largely upon that assigned value. But that nonmonetary relief may be excessively overvalued; it may be of such little actual value to the class members that it can hardly be said to add anything to the value of the settlement, let alone millions. Or the relief may be nothing more than an illusion. *See, e.g.*, *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718, 721 (6th Cir. 2013) (finding the "medley of injunctive relief" afforded to the class illusory while class counsel received "preferential treatment" of $2.73 million in fees).

When this occurs, the nonmonetary relief can function to inflate the value of the settlement, and in turn inflate the amount of attorneys' fees—affording a windfall to attorneys at the expense of the class's relief.

B. Courts Must Protect The Interests Of Absent Class Members.

Protections such as a lodestar cross-check become especially important given that class members are inherently disadvantaged in the class action settlement process.

While the interests of class members and class counsel are aligned in obtaining a large settlement fund, when it comes to dividing the fund those interests diverge.[7] There is an ever-present risk of conflict between class counsel and the class because counsel has an incentive to obtain the maximum possible fee award, which invariably comes from class members' pockets. *See In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013) ("[C]lass actions are rife with potential conflicts of interest between class counsel and class members[.]"). Ultimately, "[a]lthough under the terms of each settlement agreement, attorney fees technically derive from the defendant rather than out of the class' recovery, in essence the entire settlement amount comes from the same source."

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[7] Additionally, consumers face procedural hurdles, including being only indirectly represented, having to make interest-based determinations with limited notice documentation, and facing burdens in raising concerns with the court. *See, e.g.*, *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1163–64 (9th Cir. 2013) (incentive awards undermine adequacy of class representatives); *In re Dry Max Pampers Litig.*, 724 F.3d at 722 (discussing class representatives' failure to protect absent class members' interests); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 198 (5th Cir. 2010) (notice failed to provide "interested parties with knowledge critical to an informed decision as to whether to object[.]").

Johnston v. Comerica Mortg. Corp., 83 F.3d 241, 246 (8th Cir. 1996).

And defendants are not incentivized to correct this conflict. "[A] defendant who has settled a class action lawsuit is ultimately indifferent to how a single lump-sum payment is apportioned between the plaintiff's attorney and the class." William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813, 820 (2003); *see also Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) ("The defendant cares only about the size of the settlement, not how it is divided between attorneys' fees and compensation for the class"); *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003) ("the allocation between the class payment and the attorneys' fees is of little or no interest to the defense"). To a defendant, the fee and class award "represent a package deal," *Johnston*, 83 F.3d at 246, with a defendant "'interested only in the bottom line: how much the settlement will cost him.'" *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712 (7th Cir. 2015).

Exacerbating this conflict is the reality that consumers are virtually powerless to monitor a class action settlement negotiation and effect meaningful change on their own. Each class member on an individual basis has "such a small stake in the outcome of the class action that they have no incentive to monitor the settlement negotiations or challenge the terms agreed upon by class counsel and the defendant." *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014).

It is in light of these disadvantages that courts are meant to serve the interests of consumer class members in the class action settlement process. *See Staton*, 327 F.3d at 972 n.22 (it is the district court's duty to police "the inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees."). This entails fulfilling a fiduciary-like duty. *See, e.g.*, *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 319 (3d Cir. 2011) ("'trial judges bear the important responsibility of protecting absent class members,' and must be 'assur[ed] that the settlement represents adequate compensation for the release of the class claims'"); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002) (at the settlement phase, the district judge is "a fiduciary of the class," subject "to the high duty of care that the law requires of fiduciaries"); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d at 785 ("the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members.").

III. This Case Provides The Court With An Opportunity To Answer A Pressing Question On Which the Circuits Have Split.

The Circuits have provided varied and diverging instructions to their district courts on when and if a lodestar cross-check must be performed. *See* Pet. at 11-18. The existence of diverging standards not only leaves some classes without the full protection of a cross-check, but it also provides ample opportunity for forum shopping.

This case presents a vehicle for the Court to address this important question because not only did

the district court here refuse to conduct a cross-check (despite the urgings of objectors), it provided no reason for this failure other than the Ninth Circuit precedent leaving that decision to the discretion of the district court. Pet. App. at 38a-39a. ("Here, the Court has discretion to not apply the lodestar cross check. … The Court therefore finds it proper to exercise this discretion and not apply the lodestar cross check."); *see also* Pet. App. at 15a (Kleinfeld, J., dissenting) (the district court's "only stated justification for avoiding this cross check was that controlling law did not require cross checking against the lodestar; it did not claim that the lodestar cross check would be uninformative or unhelpful."). The district court cited no obstacles to performing a lodestar cross-check, nor any reason why a cross-check would have been inappropriate in this case. Instead, the district court merely stated that performing a cross-check was not required. Pet. App. at 38a. And the Ninth Circuit followed suit, affirming based on the Ninth Circuit's previous "refus[al] to adopt a crosscheck requirement[.]" Pet. App. at 4a (citing multiple Ninth Circuit cases).

Yet this case is a prime example of why a lodestar cross-check should be required. This settlement involves a mixture of concrete and inchoate relief—cash, debt relief, and prospective injunctive relief. The $14.5 million attorneys' fee award is over 38% of the cash common fund. Yet the district court based its award on not only the $37.5 million cash fund but also on the estimated $29.9 million in debt forgiveness and the purported value of the injunctive relief, the values of which were strongly contested by the objector. Given that much of the relief in this case is not easily quantified and of uncertain value,

this case is a paradigm of why a lodestar cross-check should be required.

And there is a real risk that failure to cross-check here led to an improper fee approval. This fee award represents more than 10 times the estimated lodestar.

But even if failure to conduct a cross-check in this case would prove to be harmless error, the district court's failure to conduct a cross-check gives this Court an opportunity to provide guidance to the lower courts on this important issue. The district court's procedural failings in arriving at the fee award without an appropriate comparison to the lodestar amount is an error warranting guidance by this Court in order that future courts not replicate the same error.

* * *

Given the importance and recurring nature of this question, the Court should grant certiorari and provide guidance on the use of a lodestar cross-check when awarding class action settlement fees.

CONCLUSION

The petition for certiorari should be granted.

April 26, 2021

Respectfully submitted,

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