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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

U.S. CONSTITUTION

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTRODUCTION

The problem that the Seventh Circuit identifies, the Sixth Circuit majority ignores, and that none of the Respondents dispute, is that settling parties can predict – as they did here – claims rates and payouts with actuarial certainty. This case thus presents questions not of collusion or lodestar calculations under Rule 23(h), but of self-dealing and settlement fairness under Rule 23(e). If district courts have the discretion to adjudicate the fairness of these settlements not by referencing the actual recovery, but by relying on *alternative facts* about a hypothetical-but-never-realized recovery, such decisions give class counsel *carte blanche* to self-enrich at the expense of the class. It was this problem that *Pearson* recognized, and it was *Pearson*'s solution, which in fact protected the interests of absent class members under Rule 23(e), that the Sixth Circuit explicitly rejected. Both the majority opinion and the dissent recognized that *Pearson* dictated a different result than was reached below.

Respondents attempt to distract the Court from this inescapable conclusion by addressing the adequacy of the settlement in complete isolation from the attorneys' fee award, and citing precedents about fees in litigated cases. But as *Redman* recognizes, Rule 23(e) requires that the consideration to the class must be not only adequate, but also "*fair*." There is nothing fair when class counsel take 60% of the money the defendants are willing to provide, while leaving over 90% of the class uncompensated. It is telling that not one of the Respondents' four proposed "questions presented"

bothers to mention Rule 23(e) and its requirement that a settlement be fair to the class. This standard is the crux of Blackman's petition, and the basis for vacatur of the settlement approval. Respondents can only attempt to defend the Sixth Circuit's decision by defending it with standards irrelevant to this case. In analogous contexts, the Court has recognized that class counsel may not benefit themselves by artificially capping the class's recovery, thus manipulating the class-action system at the expense of their putative clients. *Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345, 1349 (2013) (citing *Back Doctors Ltd. v. Metropolitan Property & Cas. Ins. Co.*, 637 F.3d 827, 830-31 (7th Cir. 2011) (Easterbrook, J.)); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

If the Court follows the rule set by the district court, and advanced by Respondents, then the following two incongruous settlements would be legally identical:

- Despite the fact that the settling parties have already ascertained the identities and mailing addresses of 600,000 class members, they *still* use a claims-made process, which they *anticipate* will allow them to pay out less than $1.6 million in cash to the class. App. 44a, 58a.
- The settling parties ascertain that there will be 600,000 class members, and rather than using a claims-made process, directly hand-deliver $14.17 in cash to each member for a total payout of $8.5 million.

App. 11a (accepting district court's conclusion that first settlement was "worth" $8.5 million). If a district court has the discretion to treat these two settlements identically, class counsel will have the perverse incentive to follow the former route, by minimizing payment to the class and maximizing its own fees. (Even if the district court eventually exercises its discretion to reject the self-serving option as unfair, class counsel is no worse off than if it had done the right thing to begin with.) *Pearson* forbids courts from relying on alternative facts about a hypothetical-but-never-realized recovery. *Gascho* urges the judiciary to instead shrug at reality.

The Court should grant certiorari to resolve this acknowledged circuit split, and ensure a consistent application of Federal Rule of Civil Procedure 23(e)(2).

I. Both The Sixth Circuit Majority And Dissent Agree That This Case Squarely Conflicts With The Seventh Circuit.

Respondents deny the existence of a circuit split, and claim *Gascho* and *Pearson* can be reconciled. PBIO14; DBIO4. These arguments are facially flawed. Both the majority opinion and the dissent acknowledged that the Sixth Circuit's decision squarely contradicted *Pearson*. Further, the majority opinion expressly rejected *Pearson* because it disagreed with the Seventh Circuit's narrowing of *Boeing*. Blackman Pet. 18-20; App. 32a-34a, 63a-69a. *Pearson* provides a "simple,

common-sense rule," which the *Gascho* majority refused to adopt. App. 64a-65a.

Respondents' efforts to cabin *Gascho* as a "narrow, case-specific ruling" are belied by multiple lower-court decisions that have already relied upon *Gascho*'s alternative-facts approach in approving dubious settlements and accompanying fee awards. *Zink v. First Niagara Bank, N.A.*, 2016 U.S. Dist. LEXIS 179900 (W.D.N.Y. Dec. 29, 2016) (retreating from previous decision that valued settlement based upon amount of actual claims); *Walls v. JPMorgan Chase Bank, N.A.*, 2016 U.S. Dist. LEXIS 142325 (W.D. Ky. Oct. 13, 2016) (making no effort to determine actual recovery).

Likewise, Respondents' effort to make *Pearson* appear factbound simply ignores its reasoning and disregards the fact that the Seventh Circuit used the same analysis in previous cases such as *Eubank* and *Redman*. Indeed, as a testament to *Pearson*'s and *Redman*'s broad applicability, several lower courts in other circuits have relied on these precedents. *E.g.*, *Bodon v. Domino's Pizza, LLC*, 2015 U.S. Dist. LEXIS 82039 (E.D.N.Y. Jun. 4, 2015); *Fitzgerald v. Gann Law Books*, 2014 U.S. Dist. LEXIS 174567 (D.N.J. Dec. 17, 2014); *Myles v. AlliedBarton Sec. Servs., LLC*, 2014 U.S. Dist. LEXIS 159790 (N.D. Cal. Nov. 12, 2014).

Furthermore, *Levitt v. Southwest Airlines Co.*, means exactly the opposite of what Respondents say: it *affirms* that *Pearson*'s requirement of examination of whether a settlement is "self-serving" is the general

rule. 799 F.3d 701, 712-13 (7th Cir. 2015). *Levitt* approved the settlement at issue precisely because it was "distinctive" and "exceptional," with unique facts that readily distinguish it from *Pearson*'s domain. In that case, there was no evidence in the record about the size of the class or the number of involuntarily revoked (as opposed to voluntarily-discarded) coupons. Nor was there any indication that any class members suffered a revocation of a coupon that they wished to use, but went uncompensated. *Levitt* thus relied on the district court's factual finding that the class was entirely "made whole." *Id.* at 715. Here, however, there is no dispute that over 90% of the class went uncompensated.

Despite these factors in favor of settlement approval, the proposed Southwest settlement faced disapprobation because of the "'clear sailing' and 'kicker' clauses . . . which seem[ed] to benefit only class counsel and can be signs of a sell-out." *Id.* at 712-13. The settlement only passed muster because, despite the attempt to shield the fees from scrutiny, "the district court carefully scrutinized – and significantly reduced – the fee request." *Id.* at 713. In contrast, the Sixth Circuit and district court failed to give scrutiny to a clear-sailing clause and instead rubber-stamped counsels' disproportionately high fee request. App. 60a-62a.

Respondents claim that *Americana Art China v. Foxfire Printing* bears on the circuit split over Rule 23(e). 743 F.3d 243 (7th Cir. 2014). This is simply wrong. In *Americana* – which predates *Pearson*, *Eubank*, and *Redman* – class counsel appealed *ex parte*

from a district court's Rule 23(h) award, seeking augmentation. *Id.* at 745. Not a single class member objected to the attorney award on appeal. Due to the settlement's clear-sailing clause, there was not even an appellee who argued in *Americana*. *Id.* Here, the Seventh Circuit held that class counsel was lucky to get as much as the district court awarded. *Id.* at 245-47. The panel in *Americana* did not have the opportunity to, nor did it, make any judgment on settlement fairness under Rule 23(e). Its approval of a fee that outstripped class relief reflects this case's distinct procedural posture, and does not serve as an endorsement of an abusive settlement.

Respondents argue that this case fits within *Pearson*'s acknowledgment that it may sometimes be appropriate to award an "attorneys' fee [] higher than the numeric value of the payout." PBIO19. But their argument simply highlights *Gascho*'s conflict with *Pearson*, as the latter focused on the possibility of a limited exception where "unforeseeable developments result in a judgment smaller than the agreed-upon fee, or even in a judgment for the defendant." 772 F.3d at 782. Here, of course, nothing about the claims rate was unforeseeable. App. 58a n.3, 63a-64a. To the contrary, the anticipated claims rate was entirely foreseeable, and was calculated with actuarial certainty.

The Sixth Circuit majority posited that the resolution of these issues should *always* be left to the discretion of the district court. App. 36a; PBIO38. As a general matter, this Court's precedents take the opposite position, as they routinely create legal *rules* that

cabin district court's discretion in class actions and fee awards. *E.g.*, *Perdue v. Kenny A.*, 559 U.S. 542 (2010) (reversing award of premium to lodestar); *Burlington v. Dague*, 505 U.S. 557 (1992) (25% premium to lodestar); *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598 (2001) (district courts do not have discretion to award fees for work catalyzing change in defendant behavior); *cf. also Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2560 (2011) (rejecting Rule 23(b)(2) certification to protect absent class members); *id.* at 2561 (Ginsburg, J., concurring in part and dissenting in part) (same). Moreover, Respondents' argument further highlights *Gascho*'s square split with *Pearson*. The Seventh Circuit directly criticized the view – adopted by the Sixth Circuit majority – that courts should not intervene to protect the rights of absent class members in a negotiated settlement. 772 F.3d at 787. District courts, however, are constantly faced with an inherent "disadvantage in evaluating the fairness of the settlement to the class" due to the lack of substantive adversarial presentation. *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014); *see also* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 829 (1997); Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 411 (2011). A bright-line rule that protects absent class members can reliably and consistently solve this problem.

Ultimately, much of Respondents' arguments reduce to the truism that no two class-action settlements are factually identical. Obviously. If this were a reason

to deny Blackman's circumscribed petition, however, then this Court could *never* weigh in on the meaning of Fed. R. Civ. P. 23(e). *Pearson* laid down a pellucid rule; *Gascho* explicitly rejected that rule; Blackman requests that this Court mend the schism.

II. Respondents' Miscellaneous Arguments Against Granting The Writ Are False.

Global Fitness asserts in passing that Blackman "has no real stake in this case." DBIO4. As a threshold matter, the district court expressly rejected this argument when Global Fitness moved to strike Blackman's objection, and Global Fitness did not challenge the finding on appeal. App. 79a-80a, 106a-107a. Blackman's injury is concrete and redressable by this Court. "As a member of the [] class, petitioner has an interest in the settlement that creates a 'case or controversy' sufficient to satisfy the constitutional requirements of injury, causation, and redressability." *Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (2002). Specifically, Global Fitness determined that the claims of Blackman's class were worth at least $4 million to settle, and then acceded to class counsel self-dealing 60% of that recovery for itself. If this Court vacates the settlement, Blackman and similarly situated class members stand to gain a greater payout. *E.g.*, Blackman Pet. 35-36 (giving examples of how class members benefit when courts rule based on analysis of actual recovery).

Further, obfuscating allegations about standing are but mere window dressing. Global Fitness's real argument, at bottom, is that Blackman – a member of the "cancelled" class – is not a typical class member because his claim to damages is putatively weaker than the claims of other class members. Thus, defendant effectively argues, the district court improperly certified the very class that Global Fitness and Gascho proposed. If that premise is true for Blackman, then it is also true for many others in the "cancelled" class. In effect, this argument is a reason to vacate the district court's approval of the settlement altogether, rather than affirm it. In any event, Global Fitness forfeited the factual argument by both arguing for class certification and by failing to challenge the district court's factual finding on appeal. Failure on the merits – and only a purported failure on the merits at that – does not equate to a lack of jurisdiction. *Bovee v. Broom*, 732 F.3d 743, 744 (7th Cir. 2013) (Easterbrook, J.) (citing *Bell v. Hood*, 327 U.S. 678 (1946)); *see also Bond v. United States*, 131 S.Ct. 2355, 2361-62 (2011) (Article III limitations are on those initiating proceedings, not on those defending themselves from consequences of proceedings); *cf. Kohen v. Pacific Investment Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) (allegation that some class members lack standing does not affect class certification or Article III status of class).

Respondents further defend the settlement by flagging the lack of evidence of collusion. PBIO38. While the absence of collusion is a *necessary* condition to approve a settlement under Rule 23(e), however, the

mere absence of evidence is not *sufficient*. Even where there is no smoke, there can be fire. Indeed, no explicit collusion in smoke-filled rooms is necessary where the settling parties' mutual self-interest is to tacitly agree to a resolution that benefits themselves at the expense of the absent class members. Blackman Pet. 3. It is "naïve" for a district court to "bas[e] confidence in the fairness of the settlement" on the existence of "arms-length negotiations by experienced counsel." *Redman*, 768 F.3d at 628; *Pearson* (reversing settlement without mentioning "collusion" once).

Respondents make much of the lodestar calculation, but the fact that the lodestar might have been appropriate in a Rule 23(h) determination after judgment says nothing about Rule 23(e) allocational fairness with respect to the settlement. "[H]ours can't be given controlling weight in determining what share of the class action settlement pot should go to class counsel." *Redman*, 768 F.3d at 635. A settlement may even be unfair when the attorneys receive less than lodestar if the fees are disproportionate to actual class recovery. *E.g.*, *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 179-80 & n.14 (3d Cir. 2013).

Similarly, the difficulty of the litigation or the adequacy of the settlement (DBIO7) should not affect its allocational fairness under Rule 23(e). Perhaps this litigation was so meritless that the 600,000 class members were actually entitled to less than $3 each on their claims, and Global Fitness overpaid by agreeing to lay out $4 million. But Rule 23(e) fairness requires that

the windfall created from any overcompensation for litigation value should be shared proportionally with class counsel's clients. (Any alternative rule – like the Sixth Circuit's here – would have the perverse effect of providing greater rewards for class counsel who bring meritless litigation that settles for nuisance value.) Here, *Redman* is directly on point. One appellant in that case challenged the settlement's adequacy, arguing that RadioShack should have been required to pay more. The Seventh Circuit, however, affirmed the district court's finding that the low settlement value was adequate. 768 F.3d at 632-33. Nevertheless, *Redman* still reversed the district court's settlement approval because of the allocational mismatch: class counsel received 55% of the proceeds, which is even less than the 60% payout in this case. *Id.* at 635.

Respondent Gascho asserts that "there is simply no support for Petitioners' claim that a reduction in attorneys' fees would have accrued to the class's benefit" because "[t]his is not a common-fund case." PBIO36-37. But this argument presumes that the defendant would prefer to pay $2.4 million to the attorneys and $1.6 million to the class (a total of $4 million) instead of $1 million to the attorneys and $3 million to the class (the same $4 million total). There is no reason to think that defendants are economically irrational like that. Every court to consider the question agrees that defendants are indifferent between these options – the former inuring to the benefit of counsel and the latter to the benefit of the class. Blackman Pet. 8 (citing cases).

For obvious reasons, Respondents cannot acknowledge that class counsel in fact breached its fiduciary duty to the class by setting up a kicker structure instead of a common fund. Yet, their decision to do just this resulted in a smaller fraction of the settlement proceeds going to the class, which now had weaker protection from an abusive attorney fee. To say that the lack of a common fund excuses this unfair result is *chutzpah* of the sort in the legendary tale of the man who murders his parents and then asks a court for mercy because he is an orphan. *See* Alex Kozinski and Eugene Volokh, *Lawsuit, Shmawsuit*, 103 YALE L.J. 463 (1993). It is *because* of Respondents' decision to use a segregated reversionary fund instead of a common fund, that the disproportionate fee is especially unfair. *Cf. In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 947-49 (9th Cir. 2011).

Finally, Respondents assert that there is no empirical evidence to suggest that courts are permitting excessive attorneys' fees. PBIO38. But this gap simply reflects the fact that so many district courts simply refuse to inquire into *actual* recovery amounts. Blackman Pet. 31-32 and n.1. Unsurprisingly, plaintiffs' attorneys and defendants keep settlement structures opaque when they hide how little benefit class members in fact receive. As a result, scarce data is available for academics to study this question. Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (2013) (analyzing every federal class-action settlement in a single year and finding only six where claims-rate data was available).

The fact that Respondents rely on *Poertner v. Gillette Co.*, 618 F. App'x 624 (11th Cir. 2015) (PBIO25-26), a case where 94% of the pecuniary recovery went to the attorneys, gives lie to their assertion – equally lacking in empirical evidence – that attorney self-dealing is not a problem in class actions. Accordingly, the press has taken note of this unfortunate phenomenon. Blackman Pet. 30.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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