No. 16-364

# In the Supreme Court of the United States

JOSHUA BLACKMAN,

*Petitioner*,

v.

AMBER GASCHO, ON BEHALF OF HERSELF AND ALL OTHERS SIMILIARLY SITUTATED, *ET AL.*,

*Respondents*.

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

**BRIEF OF THE ATTORNEYS GENERAL OF ALABAMA, ARIZONA, ARKANSAS, COLORADO, GEORGIA, INDIANA, LOUISIANA, MICHIGAN, NEBRASKA, NEVADA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, TEXAS, WISCONSIN, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

MARK BRNOVICH
*Attorney General*
ORAMEL H. SKINNER
*Counsel of Record*
PAUL N. WATKINS
BRUNN W. ROYSDEN III
DANA R. VOGEL
OFFICE OF THE ARIZONA ATTORNEY GENERAL
1275 W. Washington St.
Phoenix, AZ 85007
(602) 542-5025
o.h.skinner@azag.gov

*Counsel for Amici Curiae*

[Additional Counsel Listed on Inside Cover]

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

LUTHER STRANGE
*ALABAMA ATTORNEY GENERAL*
P.O. Box 300152
Montgomery, AL 36130

LESLIE RUTLEDGE
*ATTORNEY GENERAL OF ARKANSAS*
323 Center Street, Suite 200
Little Rock, AR 72201

CYNTHIA H. COFFMAN
*ATTORNEY GENERAL OF COLORADO*
1300 Broadway, 10th Floor
Denver, CO 80203

SAMUEL S. OLENS
*ATTORNEY GENERAL OF GEORGIA*
40 Capitol Square, SW
Atlanta, GA 30334

GREGORY F. ZOELLER
*ATTORNEY GENERAL OF INDIANA*
302 W. Washington Street
Indianapolis, IN 46204

JEFF LANDRY
*LOUISIANA ATTORNEY GENERAL*
P.O. Box 94005
Baton Rouge, LA 70804

BILL SCHUETTE
*MICHIGAN ATTORNEY GENERAL*
P.O. Box 30212
Lansing, MI 48909

DOUGLAS J. PETERSON
*ATTORNEY GENERAL FOR NEBRASKA*
2115 State Capitol
Lincoln, NE 68509

ADAM PAUL LAXALT
*ATTORNEY GENERAL OF NEVADA*
100 North Carson Street
Carson City, NV 89701

E. SCOTT PRUITT
*ATTORNEY GENERAL OF OKLAHOMA*
313 N.E. 21st Street
Oklahoma City, OK 73105

HERBERT H. SLATERY III
*ATTORNEY GENERAL AND*
*REPORTER OF TENNESSEE*
425 5th Avenue North
Nashville, TN 37202

ALAN WILSON
*ATTORNEY GENERAL*
*FOR SOUTH CAROLINA*
P.O. Box 11549
Columbia, SC 29211

KEN PAXTON
*ATTORNEY GENERAL OF TEXAS*
P.O. Box 12548 (MC 059)
Austin, TX 78711

PATRICK MORRISEY
*ATTORNEY GENERAL*
*OF WEST VIRGINIA*
State Capitol, Bldg 1
Room E-26
Charleston, WV 25305

BRAD D. SCHIMEL
*ATTORNEY GENERAL OF WISCONSIN*
17 W Main Street
P.O. Box 7857
Madison, WI 53703

PETER K. MICHAEL
*ATTORNEY GENERAL OF WYOMING*
2320 Capitol Avenue
Cheyenne, WY 82002

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**



**OTHER AUTHORITIES**

## INTEREST OF AMICI CURIAE[1]

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

Amici's interest arises from two responsibilities. *First*, amici have an overarching responsibility to protect citizens in their roles as chief law enforcement or chief legal officers. *Second*, amici have a responsibility to protect consumers who are members of class actions under the Class Action Fairness Act of 2005, 28 U.S.C. § 1711 *et seq.*, which envisions a role for Attorneys General in the approval process of proposed class action settlements. *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," is there "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 on behalf of citizen consumers who will be harmed if the rule established below (and the circuit split it lays bare) stands.

---

[1] Pursuant to Rule 37.6, amici certify that no parties' counsel authored this brief, and no person or party other than named amici or their offices made a monetary contribution to this 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

Certiorari is warranted because the issue raised relates to a broad category of cases under numerous state and federal statutes. Establishing a highly deferential standard of review, the Sixth Circuit held that in the class action settlement context it was permissible for class counsel fee awards to be almost twice the size of the payout made to class members. The Sixth Circuit concluded that money from a common settlement fund that was never disbursed to class members (but instead reverted to the defendant after the claims period) nonetheless was a sufficient monetary class benefit to count in the balancing of the class counsel fee award's reasonableness.

The Court's guidance is needed because this is an independently important issue that is core to properly resolving class actions across the country. Moreover, the Court's involvement here and now is of heightened importance because the Sixth Circuit's approach is (1) in direct contravention to the Seventh Circuit's approach and (2) out of step with the growing recognition that courts must take a more active role in policing common fund class action settlements to ensure that the threat of economically rational collusion between defendants and class counsel (whether overt or tacit) does not reduce class awards in favor of attorneys' fees.

The Sixth Circuit's approach places consumers nationwide at risk (including citizens in states represented by amici) by laying bare a split amongst the circuits and blessing a class action fee arrangement that allows class counsel and defendants to reach a mutually beneficial settlement arrangement to the

detriment of class members. Given the nature of nationwide class action litigation, and the ability of class counsel to forum shop cases, even one circuit applying an under-protective standard to class action settlements will detrimentally affect consumers across the nation and undercut any efforts (by amici or others) to protect consumers in other circuits.

The petition presents an ideal vehicle for the Court to address the important question presented. The record is clear, the legal conclusions straightforward, and resolution of the circuit split will control as to the validity of the settlement. Moreover, there is urgency because the circuit split, if left unresolved, threatens to harm citizens nationwide by leaving them susceptible to attorneys bargaining away their rights and claims for insufficient return in districts far from their home, where inadequate judicial scrutiny may be applied on their behalf.[2]

[2] Amici's interest is limited to the attorneys' fees issue and its effect on their states' citizens and the overall fairness of the settlement; amici take no position on the merits of the underlying claims. Furthermore, amici speak only to the issue presented: how to weigh fees in connection with purely monetary, claims-made settlements. Amici do not address the alternative settlement scenarios wherein courts determine that valuable injunctive relief warrants a greater attorneys' fee award or settlement funds are non-reversionary.

## ARGUMENT

### I. THE QUESTION PRESENTED IS IMPORTANT AND AFFECTS FEDERAL LITIGATION UNDER NUMEROUS FEDERAL AND STATE STATUTES

#### A. The Decision Below Goes To A Fundamental Consideration—Appropriate Division of Proceeds Between the Class and Class Counsel—That Is Relevant To Resolution of Class Actions Nationwide

The issue presented by Petitioner—proper calculation and approval of attorneys' fees out of claims-made common fund settlements—goes to the core of how class action litigation under almost any statute (state or federal) should proceed and conclude. Class actions are largely resolved through settlement. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1285 (2002) (noting that "most class action suits settle," and gathering supporting sources as to same). And in dividing the proceeds of such settlements, the interests of class counsel and class members sharply diverge. *See infra* Section II.B. Class counsel has an incentive to obtain the maximum possible fee award, but that fee almost invariably comes directly out of the class members' pockets. Ultimately, "[a]lthough under the terms of each settlement agreement[] attorney[s'] fees technically derive from the defendant rather than out of the class' recovery, in essence the entire settlement amount comes from the same source." *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996).

Defendants are no help in policing these deals or counterbalancing the conflict between class counsel and the class. "[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). To a defendant, the fee award and the class award "represent a package deal," *Johnston*, 83 F.3d at 246, with the defendant ultimately "'interested only in the bottom line: how much the settlement will cost him,'" *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 712 (7th Cir. 2015).

Therefore, given the conflicts inherent in the settlement process and the economic considerations present, setting the appropriate judicial dividing line between proper compensation of class counsel and unjust enrichment at the expense of the class is a crucial issue of broad and paramount importance. Exacting judicial standards for review of class action fee arrangements and robust application of such standards are the key judicial safeguards that ensure just resolution of cases and the proper protection of class members' rights.

## II. THE COURT'S GUIDANCE IS NEEDED TO RESOLVE CONFUSION AMONG THE LOWER COURTS

### A. The Sixth Circuit Confirmed A Clear Circuit Split

In approving the settlement below (in which class counsel obtained $2.4 million against a $1.6 million payout to class members) and establishing a relaxed standard of review for future attorneys' fee awards in common fund claims-made settlements, the Sixth Circuit put itself squarely at odds with the Seventh Circuit's mandate on the same issue. Contrary to the Sixth Circuit's approach, the Seventh Circuit, largely through the opinions of Judge Posner, has taken a hard line against counting any money not directly provided to a class member in the calculation of allowable class counsel fee awards. It is well established in the Seventh Circuit that "[t]he ratio that is relevant [to the review of the class counsel fee award] … is the ratio of (1) the fee to (2) the fee plus what the class members received." *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014); *see also Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014); *In re Capital One Telephone Consumer Protection Act Litig.*, 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015); *Gehrich v. Chase Bank USA, N.A.*, No. 12-5510, --- F.R.D. ---, 2016 WL 806549, at *1, *14 (N.D. Ill. Mar. 2, 2016).

Indeed, in rejecting the exact approach taken by the Sixth Circuit below, Judge Posner and the Seventh Circuit have explained that, in a similarly structured settlement, "attorneys' fees represented not 9.6 percent of the aggregate value [disbursed] but an outlandish 69 percent." *NBTY*, 772 F.3d at 781. Had the case below

proceeded in the Seventh Circuit, class counsel would have been limited to an award closer to $800,000 or $1 million, instead of receiving approval for a multi-million dollar fee award. *Cf. id.*

The Ninth Circuit recently echoed the Seventh Circuit in addressing a similar settlement. Explicitly examining the proposed attorneys' fee award "in terms of 'economic reality,'" the Ninth Circuit determined that a $1.25 million award, which "represent[ed] 25% of the fund created by the settlement," could not stand in the absence of valuable injunctive relief and a searching review by the district court because "at most $373,675" was to "be disbursed to the class in monetary relief," meaning the proposed fee award "exceed[ed] the maximum possible amount of class monetary relief by a factor of three." *Allen v. Bedolla*, 787 F.3d 1218, 1224 n.4, 1224-1225 (9th Cir. 2015).

As experts in the field of class actions have noted, there is a divide amongst courts and commentators on this important issue of how to measure class action settlements and review fee awards where the common fund ultimately reverts to the defendant. *See, e.g.*, 5 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 15:70 (5th ed. 2014) (noting open divide amongst courts and commentators); 7B Wright & Miller, *Federal Practice & Procedure* § 1803.1 (3d ed.) (noting divergent approaches). The Sixth Circuit's approach is in direct conflict with the Seventh Circuit and in tension with the Fifth and Ninth Circuit approaches. Meanwhile, other courts have taken positions that fall on both sides of the issue. *See, e.g.*, *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 179 (3d Cir. 2013) (noting importance of looking to the actual "distribution of funds that will result from the claims

process"); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) (noting "split of authority" amongst courts; agreeing with treating whole fund as basis for fee); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1297 (11th Cir. 1999) (applying a case-by-case standard of review and approving treatment of entire fund as basis for fee award). This divide will continue unabated "until the full Supreme Court resolves the issue." NEWBERG § 15.70 (5th ed. 2014).

### B. The Sixth Circuit's Approach Is On The Wrong Side Of The Split And Out Of Step With The Tide Of Case Law

"[T]he Rule 23(e) inquiry protects unnamed class members from unjust or unfair settlements agreed to by fainthearted or self-interested class representatives." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 594 (1997). "Courts have long recognized that 'settlement class actions present unique due process concerns for absent class members.'" *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011); *see also Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (Rule 23 protections are "grounded in due process"). Indeed, while "[c]lass counsel are duty bound to represent the best interests of class members," "the interests of class members and class counsel nearly always diverge[.]" *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013). It is for this reason that, "[i]n approving a proposed class action settlement, the district court has a fiduciary responsibility to ensure that 'the settlement is fair and not a product of collusion.'" *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 22 (2d Cir. 1987); *see also Silber v. Mabon*, 957 F.2d 697, 701 (9th Cir. 1992); *Reynolds v.*

*Beneficial Nat. Bank*, 288 F.3d 277, 279-280 (7th Cir. 2002); *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001).

Heeding this obligation, the tide of opinions across the country has been toward more searching and skeptical review of class action settlements that appear to serve defendants and class counsel over the interests of the class. *See, e.g.*, *Allen*, 787 F.3d at 1224 ("vacat[ing] final settlement approval and 'remand[ing] so that the district court may conduct a more searching inquiry" in light of indications that settlement was product of "possible implicit collusion"); *NBTY*, 772 F.3d at 787 (noting shift in recent years toward more skepticism of class action settlements as "judges have accrued much more experience with class actions and have learned that class action settlements are often quite different from settlements of other types of cases"); *In re Bluetooth*, 654 F.3d at 938 ("remand[ing] so that the district court may conduct a more searching inquiry into the fairness of the negotiated distribution of funds," given "that the disparity between the value of the class recovery and class counsel's compensation raises at least an inference of unfairness").

Wholly out of step with this tide in the case law, the framework established by the Sixth Circuit below reduces scrutiny of class action fee awards. In lieu of taking a more realistic look at the value of the settlement to class members (as other courts are doing), the Sixth Circuit's approach accepted the synthetic value arguments propounded by class counsel and the defendant. By diverting in this way from the growing tide of case law in other courts and approving a settlement that awarded class counsel the vast majority of the settlement payout, the Sixth Circuit's

approach sends a clear message to class counsel and defendants across the country and an open invitation for forum shopping.

### C. A Circuit Split On This Issue Is Particularly Harmful To Consumers

If left unchecked, the conflicting approaches taken by the circuits toward this fee calculation issue will result in significant harm to consumers nationwide. Class actions are often national in scope. Therefore, there is significant risk that class counsel will forum shop cases into the Sixth Circuit or other circuits that take less rigorous approaches to the review of fee awards in claims-made common fund settlements. This will undermine the protections usually afforded by our system of divided appellate jurisdiction. By choosing a forum favorable to their own interests (rather than their class clients' interest) class counsel will be able to obtain a favorable set of fee review standards. At the same time, by using the class action mechanism, class counsel will lock in class members from across the nation, including those residing in circuits with substantially more robust protections for class members (e.g., the Seventh and Ninth Circuits).

As advocates on behalf of their citizen consumers (and likely future class members), especially in the class action settlement context, amici respectfully urge the Court to grant certiorari and establish a uniform standard on this issue. Amici cannot adequately protect their citizens when certain circuits split with the prevailing trend of the law by lowering the standard being applied to claims-made common fund settlements, thereby opening the floodgates for potentially class-harming litigation tactics.

## III. THE COURT SHOULD ESTABLISH A UNIFORM STANDARD THAT ALIGNS WITH THE EXACTING APPROACH APPLIED IN THE SEVENTH CIRCUIT

Upon granting certiorari, the Court should mandate that lower courts look beyond the maximum theoretical common fund distribution in claims-made settlements, and instead calculate the validity of attorneys' fees off of disbursements actually made to the class.

This approach will not just best recognize the conflicts inherent in these settlements; it will also lessen the burden on the entire class action system (including the courts) by better aligning the interests of class counsel and class members. Incentivizing class counsel and defendants to settle these cases in a way that maximizes disbursements to the class will lower the risk of economically rational collusion (explicit or implicit) between class counsel and defendants. This will help alleviate one of the chief concerns courts historically have had with such settlements. *See supra* Section II.B. While putting in place these formal limits on settlement

> may not instantaneously or completely resolve the problems that currently inhere in this type of litigation, tying the award of attorneys' fees to claims made by class members is one step that judges can take toward repair. This approach will not only encourage more realistic settlement negotiations and agreements, but also will drive class counsel to devise ways to improve how class action suits and settlements operate.

*In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 406 (D. Mass. 2008); *see also NBTY*, 772 F.3d at 781 ("Basing the award of attorneys' fees

on [the ratio of fees to the fees plus what class members actually receive] … gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class").

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

MARK BRNOVICH
*Attorney General*
ORAMEL H. SKINNER
*Counsel of Record*
PAUL N. WATKINS
BRUNN W. ROYSDEN III
DANA R. VOGEL
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
1275 W. Washington St.
Phoenix, AZ 85007
(602) 542-5025
o.h.skinner@azag.gov

*Counsel for Amici Curiae*