No. 12-234

IN THE

Supreme Court of the United States

KIMBERLY CRAVEN,

Petitioner,

v.

ELOUISE PEPION COBELL, *et al.*, individually and on behalf of a class of Individual Indian Trust beneficiaries,

Plaintiffs-Respondents,

and

KENNETH LEE SALAZAR, Secretary of the Interior, *et al.*,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF PLAINTIFFS-RESPONDENTS

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QUESTIONS PRESENTED

1. Did the district court abuse its discretion when it applied settled law—consistent in every circuit—in rejecting the argument asserted by a class member objecting to a class action settlement that there was an intraclass conflict sufficient to deny class certification, when she relied *solely* on speculation about the interests of various class members that the district court found was contradicted by the extensive evidentiary record established during 15 years of litigation?

2. Did the district court abuse its discretion in awarding—consistent with the standards adopted by every circuit—a sizeable incentive award to the class representatives in this case, in light of their unprecedented devotion of time and personal monetary contributions to the litigation over 15 years?

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COUNTERSTATEMENT

This landmark class settlement arises out of a painful period in American history. Over a century ago, the United States, in an effort to destroy tribal governments and forcibly assimilate Indians into American society, seized tribal land and divided it into allotments. The government then held those allotments in trust for the benefit of individual Indians. Income derived from the government's sale and lease of those lands was to be comingled, held in the Individual Indian Money Trust ("IIM Trust"), invested in common, and ultimately disbursed to individual Indian beneficiaries of the IIM Trust. Sadly, the government has mismanaged the IIM Trust since its inception.

Plaintiffs brought this class action in 1996 to redress this injustice by compelling the United States to conduct a full historical accounting of all IIM Trust funds, to correct and restate IIM account balances, to fix broken Trust management systems, and to undertake other Trust reform measures to ensure prudent Trust management. This case has now lasted for more than sixteen years, involving over 3,900 docket entries, 250 days of hearings and trials, fourteen appeals, including ten interlocutory appeals, to the D.C. Circuit, and over 80 published opinions of the district court and court of appeals. In December 2009, the parties reached an unprecedented $3.4 billion settlement, approved by all three branches of the government, which includes $1.9 billion in furtherance of Trust reform and $1.5 billion in direct payments to class members. Given the unique nature of the IIM Trust, the unique status of individual Indian trust beneficiaries, and the legislation approving this settlement, there is no other case like this one and there likely never will be.

Petitioner Kimberly Craven objected to the settlement in the district court. The court rejected her arguments and approved the settlement. The Court of Appeals affirmed. Craven now petitions this Court to review the approval of this historic settlement. She contends that the Court of Appeals' decision creates circuit splits regarding intraclass conflicts among class members and the grant of incentive awards to class representatives. But the cases that Craven cites are both consistent with each other and with the decision by the Court of Appeals below. In short, the Court of Appeals applied well-settled class action precedent that was established by this Court and that is uniformly followed by every circuit.

At bottom, because there is no conflict among the circuits on either legal issue Craven identifies, this petition merely seeks this Court's review of the fact-bound question of whether the D.C. Circuit properly applied settled legal principles to the facts of this unique case. Such a question does not warrant review by this Court.

I. HISTORY OF THE INDIVIDUAL INDIAN MONEY TRUST

In the late nineteenth century, the federal government adopted a policy of assimilation for Indians. In furtherance of that policy, the government seized tribal reservation land and, in part, divided it into parcels allotted to individual Indians. *Cobell v. Norton* (*Cobell VI*), 240 F.3d 1081, 1087 (D.C. Cir. 2001); General Allotment Act of 1887, ch. 119, 24 Stat. 388. The United States retained legal title to the allotted lands and, as trustee for individual Indians, exercised complete control over those lands and their resources, including oil, natural gas, coal and timber.

Cobell VI, 240 F.3d at 1087. Individual Indian beneficiaries could not sell or lease their land. *Id.*

Despite the government's obligations and duties as trustee, the history of the IIM Trust is replete with the loss, dissipation, theft, waste, and wrongful withholding of Trust funds. Misappropriation of IIM Trust assets was recognized as early as 1914, and has continued into modern times. *See, e.g.*, Bureau of Mun. Research, 63rd Cong., *Report to the Joint Commission to Investigate Indian Affairs: Business and Accounting Methods Employed in the Administration of the Office of Indian Affairs* 2 (Comm. Print 1915) ("The Government itself owes millions of dollars for Indian moneys which it has converted to its own use."); *Cobell VI*, 240 F.3d at 1089 ("The General Accounting Office, Interior Department Inspector General, and Office of Management and Budget, among others, have all condemned the mismanagement of the IIM trust accounts over the past twenty years."). Further compounding these problems, the full scope of the government's mismanagement remained hidden from individual Indian beneficiaries because, as a matter of policy, they were not provided with statements of account and "[n]o real accounting, historical or otherwise, has ever been done of the IIM trust." *Cobell v. Kempthorne* (*Cobell XX*), 532 F. Supp. 2d 37, 43 (D.D.C. 2008).

II. THE TRUST REFORM ACT

A century of complaints by Indians, and "many years of congressional frustration over Interior's handling of the IIM trust," *id.* at 41, led to passage of the American Indian Trust Fund Management Reform Act of 1994 ("Trust Reform Act"), Pub. L. No. 103-412, 108 Stat.

4239. It confirmed and codified the government's pre-existing fiduciary duties, including the duty to provide a full accounting to IIM Trust beneficiaries. *Cobell VI*, 240 F.3d at 1090.

Plaintiffs brought this class action in 1996, after the government failed to begin the accounting mandated by the Trust Reform Act and required by the government's pre-existing fiduciary duties. In 1999, the district court found the Interior and Treasury Departments in violation of the Trust Reform Act and held them in breach of their trust duties to Plaintiffs. *Cobell v. Babbitt* (*Cobell V*), 91 F. Supp. 2d 1, 58 (D.D.C. 1999). The district court granted declaratory relief, ordered the Interior and Treasury Secretaries as trustee-delegates "to provide plaintiffs an accurate accounting of all money in the IIM trust," and established a plan for compliance. *Id.* The D.C. Circuit affirmed. *Cobell VI*, 240 F.3d at 1110.

III. SCOPE OF THE TRUST ACCOUNTING

In addition to reform of the government's broken Trust management system, the central issue in this action has been the scope of the accounting applicable to the IIM Trust. In 2008, the district court held that it is "clear that . . . the required accounting is an impossible task" and that "the Department of the Interior has not—and cannot—remedy the breach of its fiduciary duty to account for the IIM trust." *Cobell XX*, 532 F. Supp. 2d at 39, 103. On interlocutory appeal, the D.C. Circuit rejected the district court's finding of legal impossibility, holding that Interior must provide an accounting. *Cobell v. Salazar* (*Cobell XXII*), 573 F.3d 808, 812-13 (D.C. Cir. 2009). However, the D.C. Circuit denied Plaintiffs a full historical accounting, and instead concluded that the government

must undertake only "the best accounting possible, in a reasonable time, with the money that Congress is willing to appropriate." *Id.* at 813. The court also instructed that, during such an accounting, Interior need only "concentrate on picking the low-hanging fruit." *Id.* at 815. Under this holding, class members were no longer guaranteed to receive an accounting—even if they prevailed in this litigation—because Congress could decline to appropriate sufficient (or any) funds, or the Interior Secretary could deprioritize the accounting.

IV. THE SETTLEMENT AGREEMENT AND THE CLAIMS RESOLUTION ACT OF 2010

After *Cobell XXII*, the government was under increasing pressure to find a solution to this protracted and costly litigation. The D.C. Circuit even acknowledged that "our precedents do not clearly point to any exit from this complicated legal morass." *Id.* at 812. In recognition of this need to find a solution, the parties spent five months in continuous and intensive negotiations, culminating in the execution of a Settlement Agreement on December 7, 2009. The Settlement Agreement was contingent upon congressional enactment of authorizing legislation and appropriations, and the district court's approval.

The amended complaint filed pursuant to the Settlement Agreement created two classes. The Historical Accounting Class consists of class members who seek injunctive and declaratory relief, including an accounting and necessary Trust reform. (Craven App. 539.)[1] Under

1. Citations to "Craven App." refer to Craven's separate appendix in the Court of Appeals. Citations to "App." refer to Plaintiffs' separate appendix in that court.

the settlement, each member of the Historical Accounting Class receives a payment of $1,000, totaling approximately $337 million. This payment is in lieu of a complete historical accounting; it is not compensation for accounting or other errors. The Historical Accounting Class is certified under Rule 23(b)(1)(A) and 23(b)(2) of the Federal Rules of Civil Procedure. Historical Accounting Class members are not permitted to opt out. (Craven App. 548.)

The Trust Administration Class consists of class members with claims against the government for mismanagement of their IIM Trust assets. (Craven App. 543.) The settlement provides that these class members will receive a baseline payment of approximately $800, plus an additional amount calculated from the ten highest-revenue years in each class member's IIM account. The Trust Administration Class payments total approximately $1.1 billion. The class is certified under the Claims Resolution Act of 2010, described below, and alternatively under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Trust Administration Class members may opt out. (Craven App. 548-49.)

The settlement also allocates $1.9 billion for the Trust Land Consolidation Fund, which Interior must use to purchase highly fractionated Trust interests at market rates.[2] (Craven App. 544.) Finally, the settlement also

2. "Fractionated" interests resulted when allotments were continuously divided among the original beneficiaries' descendants over many generations. As the government has conceded, continuously fractionating interests contribute materially to its inability to maintain accurate IIM Trust records and prudently manage the commingled Trust. *Cobell XX*, 532 F. Supp. 2d at 41; App. 224-25. This Court has recognized that "extreme

created the Indian Education Scholarship Fund to help Indian students "defray the cost of attendance at both post-secondary vocational schools and institutions of higher education." (Craven App. 567.)

Because the settlement required congressional approval, Congress enacted the Claims Resolution Act of 2010 ("CRA"), Pub. L. No. 111-291, 124 Stat. 3064, on November 30, 2010. On December 8, 2010, the President signed the CRA into law. The CRA provided that "[t]he Settlement is authorized, ratified, and confirmed." CRA § 101(c)(1). In addition, because the Trust Administration Class had not previously been certified expressly, Congress provided that "[n]ot withstanding the requirements of the Federal Rules of Civil Procedure, the court in the Litigation may certify the Trust Administration Class."[3] *Id*. § 101(d)(2)(A).

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fractionation of Indian lands is a serious public problem." *Hodel v. Irving*, 481 U.S. 704, 718 (1987). Indeed, the Court described Craven's own tribe, the Sisseton-Wahpeton Sioux, as "a quintessential victim of fractionation." *Id*. at 712. "Forty-acre tracts on the Sisseton-Wahpeton Lake Traverse Reservation, leasing for about $1,000 annually, are commonly subdivided into hundreds of undivided interests, many of which generate only pennies a year in rent. The average tract has 196 owners, and the average owner [has] undivided interests in 14 tracts." *Id*. Thus, consolidating fractionated interests is necessary for meaningful Trust reform and prudent Trust management.

3. Because under existing law certain Trust Administration Class claims must be brought in the Court of Federal Claims, *see* 28 U.S.C. § 1491(a)(1), Congress also expressly conferred jurisdiction on the district court for all claims asserted in the Amended Complaint. CRA § 101(d)(1).

V. APPROVAL OF THE SETTLEMENT

Following enactment of the CRA, Plaintiffs undertook the most extensive class settlement notice process ever conducted. Plaintiffs sent direct mail notice to the known addresses of all class members; advertised the settlement extensively in local, regional, and national media including television, radio, newspapers, and magazines; and contacted businesses, non-profits, educational institutions, and others serving Indians to provide posters, flyers, DVDs, and other materials containing notice of the settlement, in English and in multiple Indian languages. (App. 230-36.) In addition, the class representatives and class counsel traveled thousands of miles through Indian Country over many months to explain the settlement to thousands of class members. The settlement garnered significant media coverage and public statements by high-ranking government officials, including the President. (App. 235.)

The settlement notice informed class members of their right to opt out of the Trust Administration Class and to submit objections to the settlement. Of the 500,000 class members in the two classes, the district court received only 92 objections, including one from Craven, and 1,824 opt outs, the overwhelming majority of which are from one tribe. (Craven App. 778, 789.)

The district court held a fairness hearing on June 20, 2011. Craven, through counsel, appeared and opposed the settlement. After hearing arguments from objectors and the parties' counsel, the district court approved the settlement, finding it "fair, reasonable, and adequate." (Craven App. 771-83.) The district court also awarded $2.5

million in incentive awards to the class representatives for their personal contribution to the lawsuit, with the bulk of that award to lead plaintiff Elouise Cobell. (Craven App. 779-80.) The court entered its approval order on July 27, 2011, and entered final judgment on August 4, 2011. (Craven App. 837, 843-55.) Craven appealed.

VI. THE COURT OF APPEALS' DECISION

The Court of Appeals, in a unanimous decision, upheld the district court's approval of the settlement. (Pet. App. 30a.) On appeal, Craven challenged the settlement, among other grounds, based on purported intraclass conflicts among members of the Historical Accounting Class. (*Id.* at 14a.) Craven argued that there was a conflict between class members that required disapproval of the settlement because every member of the Historical Accounting Class received a $1,000 payment, even though some class members purportedly had potential claims that were "orders of magnitude" larger than others. The Court of Appeals, however, found that the massive trial record "indicates that the different interests she alleges likely do not exist." (*Id.* at 15a.) Moreover, the court explained that, even if such intraclass conflicts are present as a theoretical matter, "they would not be revealed by the type of sampling-heavy accounting that would almost certainly occur if the plaintiff class prevailed in the litigation." (*Id.*) The court also noted that "this case is extraordinary in that Congress not only expressly authorized, ratified, and confirmed the settlement, but also appropriated $3.4 billion to fund it." (*Id.* at 16a.) The court rejected the relevancy of Craven's speculative intraclass conflicts among class members because she "offers no persuasive evidence to support her claim of unfair compensation," and

because she relied solely on hypotheticals and speculation that contradicted the trial record and the district court's factual findings. (*Id.* at 17a-23a.) Simply put, Craven failed to demonstrate that the district court's findings were erroneous, let alone clearly erroneous.

The Court of Appeals also rejected Craven's challenge to the incentive awards given to the class representatives as part of the settlement. Craven argued that the large size of those awards compromised the named plaintiffs' ability to adequately represent the class. The court noted that the settlement provided no guarantee that the class representatives would receive incentive payments, that the decision was left entirely to the discretion of the district court, and that the government opposed the awards. (*Id.* at 25a-26a.) The court held that the district court was well within its discretion in concluding that, in light of "Ms. Cobell's singular, selfless, and tireless investment of time, energy, and personal funds to ensure survival of the litigation," her incentive award did not compromise her ability to represent the class. (*Id.*)

REASONS FOR DENYING THE PETITION

Craven's Petition presents two discrete questions, neither of which warrants review by this Court.

First, Craven asserts that the Court of Appeals' decision creates a "conflict over when conflicts among class members renders [*sic*] adequate representation impossible." (Pet. 11.) But the petition does not identify a circuit split on this issue. This Court established the legal standard for evaluating purported intraclass conflicts in its decisions in *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S.

815 (1999). The cases cited by Craven, and the Court of Appeals' decision below, all uniformly applied the legal standard from *Amchem* and *Ortiz*, but naturally reached different results based on different facts. This is not evidence of a circuit split; it simply demonstrates that the lower courts are applying this Court's precedent to the various factual situations that arise in class actions.

Craven also argues that the Court of Appeals "improperly shifted the burden of persuasion to the objectors" to demonstrate an intraclass conflict. (Pet. 17.) But as the court's opinion makes clear, it did not shift the class certification burden to Craven; rather, the court noted—correctly—that to prevail on appeal Craven would need to show that the district court abused its discretion (Pet. App. 17a), and it then went on to find that no such abuse occurred because Craven's unsupported arguments were factually wrong. Craven's intraclass conflict argument is premised on a theoretical notion that there could be very large errors in some class members' IIM accounts, and very small errors in others. But the record below and the district court's factual findings establish that there is no such disparity among IIM accounts. *Cobell v. Kempthorne* (*Cobell XXI*), 569 F. Supp. 2d 223, 238 (D.D.C. 2008). As the Court of Appeals explained, "Craven's argument ignores that the record developed through extensive and hard-fought litigation indicates that the different interests she alleges likely do not exist." (Pet. App. 15a.) Simply put, Craven's intraclass conflicts argument is not based on a circuit split or a mistake about the burden of proof at the settlement fairness hearing; her argument is based on her disagreement with the district court's factual findings at trial. That is not an appropriate ground for this Court's review.

Second, Craven asserts that the Court of Appeals' decision creates a "split[] with established precedent discussing how to reconcile incentive awards for named plaintiffs with the requirements of adequate representation." (Pet. 24.) But again, Craven does not identify an actual circuit split; the cases on which she relies, and the Court of Appeals' decision below, apply the same legal standard.

Here, the incentive award to Ms. Cobell was admittedly large, but her work on this case was unprecedented and exceptional, far exceeding, by orders of magnitude, the work of a typical named plaintiff in class litigation. Ms. Cobell devoted nearly 20 years of her life—and hundreds if not thousands of hours each of those years—to this historic lawsuit and spent hundreds of thousands of dollars of her *own* money to fund it. Her work on behalf of the litigation earned her a "genius" grant from the MacArthur Foundation, honorary degrees from a number of institutions including Dartmouth College, and articles about her life and accomplishments in the *New York Times* and the *Washington Post*. The Court of Appeals correctly held that there was no evidence that Ms. Cobell's ability to represent class members was compromised by the incentive award, particularly where the award was not required by the settlement or the class representatives' agreement with class counsel (unlike the cases on which Craven relies) and was instead left to the sole discretion of the district court.

Thus, Craven has not identified any legal issues warranting this Court's review and the Court should deny the petition.

I. CRAVEN'S INTRACLASS CONFLICT ARGUMENT DOES NOT WARRANT REVIEW.

A. There is no conflict among the circuits on how to approach intraclass conflicts.

Craven first argues that "the D.C. Circuit has created a split in how to approach intraclass conflicts." (Pet. 15.) But the cases she cites in support of this argument, as well as the Court of Appeals' decision below, all applied the *same* standard. Those courts reached different outcomes not because they applied different legal tests, but because the facts in those individual cases were markedly different.

Intraclass conflicts exist when the goals of one group of class members conflict with the goals of another, necessitating subclasses with separate class representatives and counsel. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). In *Amchem* and *Ortiz*, both of which involved proposed class settlements for claims by workers exposed to asbestos, this Court established the legal standard for evaluating intraclass conflicts. The Court rejected class certification in those cases in part because the proposed class included both class members with existing asbestos-related diseases and those who had been exposed to asbestos but had no current asbestos-related health problems. The Court explained that "for the currently injured, the critical goal is generous immediate payments, but that goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Ortiz*, 527 U.S. at 856 (internal quotation marks and alterations omitted); *see also Amchem*, 521 U.S. at 626. This conflict between

two groups of class members, in the absence of separate representation for each group, meant there was "no structural assurance of fair and adequate representation." *Id.* at 627.

The cases cited by Craven, and the Court of Appeals' decision below, all apply this settled intraclass conflicts precedent. Nevertheless, Craven argues that "[s]ome courts—like the D.C. Circuit below, and the Fourth and Ninth Circuits—require hard 'evidence' of an actual conflict" but "[o]thers, like the Second, Third, Sixth, and Seventh Circuits, believe that a structural flaw or 'potential' issue is enough to raise 'serious questions' warranting the denial of certification." (Pet. 16.) But far from demonstrating a circuit split, the cases cited by Craven simply underscore that the Circuits all apply the same legal standard.

As an initial matter, the Court of Appeals below did not "require hard 'evidence' of an actual conflict." (*Id.*) Rather, the court held that the speculative premise of Craven's intraclass conflicts argument was contrary to the *actual evidence* in the trial record and the factual findings by the district court. (Pet. App. 15a, 21a.) Specifically, the court held that "Craven's argument ignores that the record developed through extensive and hard-fought litigation indicates that the different interests she alleges *likely do not exist* and that even if they do exist, they would not be revealed by the type of sampling-heavy accounting that would almost certainly occur if the plaintiff class prevailed in the litigation." (*Id.* at 15a) (emphasis added). "Viewed, then, not in the hypothetical light cast by Craven's challenge, but in the actual light illuminating the parties' negotiations, the district court

reasonably concluded that the class settlement agreement offered a fair resolution of the plaintiff classes' claims free of impermissible intra-class conflict." (*Id.* at 23a.)

In short, the Court of Appeals did not create a new "hard evidence" standard for objectors alleging intraclass conflicts; it simply held that Craven ignored the trial record, which established that an intraclass conflict did not exist. Instead, she relied solely on naked hypotheticals and pure speculation that were inconsistent with the trial record in this 15-year litigation.

Similarly, the Fourth and Ninth Circuit cases on which Craven relies (Pet. 15) do not adopt a special "hard evidence" requirement for intraclass conflicts. Instead, in each case the court of appeals found—as did the D.C. Circuit below—that the alleged conflict simply did not exist as a factual matter.

In *Cummings v. Connell*, 316 F.3d 886 (9th Cir. 2003), nonunion employees brought a class action against their union over the collection of mandatory fees associated with administering a collective bargaining agreement. The court acknowledged the "potential" for a conflict between class members who are ideologically opposed to unions and class members who are "free riders"—that is, class members who don't want to pay union dues but "have no desire to ruin the union or impair its ability to represent them." *Id.* at 895-96. The court noted that the former category might desire a legal remedy that harms the union, while the latter might not. *Id.* at 896. But the court held that any "punitive" remedy that could potentially create that conflict was "precluded in this circuit by existing caselaw" and therefore the district

court did not abuse its discretion by concluding that "the potential conflict . . . is not truly present in this case." *Id.*

Similarly, in *Ward v. Dixie National Life Insurance Co.*, 595 F.3d 164 (4th Cir. 2010), cancer patients sued their health insurer for underpayment of cancer treatment costs. The insurer argued that there was a conflict between the named plaintiff and other class members because the named plaintiff "will likely receive enough in damages to offset any increased insurance premiums resulting from this lawsuit" but that other class members' recovery is "so small that they stand to lose on net." *Id.* at 179-80. The court rejected that argument because the insurer's assertion that premiums might rise was "merely speculative or hypothetical," and, thus, "the district court . . . did not abuse its discretion in concluding, after a detailed factual analysis, that . . . there is no potential for conflicting interests in this action." *Id.* at 180.

These three holdings are perfectly consistent with the Second, Third, Sixth, and Seventh Circuit case law cited by Craven. For example, the Second Circuit's decision in *In re Literary Works in Electronic Databases Copyright Litigation*, 654 F.3d 242 (2d Cir. 2011), on which Craven relies, involved a lawsuit by freelance authors over the republication of their copyrighted works in online databases. The settlement divided the class into subgroups and provided that one subgroup would only recover if there were sufficient funds left over after payments were made to the other subgroups. *Id.* at 251-52. Unsurprisingly, the Second Circuit found an obvious conflict because the disfavored subgroup did not have separate class representatives and class counsel. *Id.* at 254-55.

Similarly, in *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012), the Third Circuit rejected a proposed class settlement that created two groups within the class and gave one group "priority access to the $8 million" settlement fund without providing separate class representatives and class counsel for the disfavored class.[4] *Id.* at 187. Notably, both *In re Literary Works* and *Dewey* involved cases where the trial record demonstrated that there were class members in both of the potentially conflicting categories. This distinguishes those decisions from this case, where, as the Court of Appeals recognized, the allegedly conflicting categories of class members "do not exist." (Pet. App. 15a.)

Finally, the Sixth and Seventh Circuit cases cited by Craven, *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), and *Gilpin v. AFSCME, AFL-CIO*, 875 F.2d 1310 (7th Cir. 1989), involved the same type of claims by nonunion members against a union that the Ninth Circuit addressed in *Cummings*. However, unlike the Ninth Circuit labor law precedent that applied in *Cummings*, Sixth and Seventh Circuit precedent permitted the "punitive" remedies that could create a conflict between class members ideologically opposed to unions and those who were merely "free riders." *Weaver*, 970 F.2d at 1531; *Gilpin*, 875 F.2d at 1313. Indeed, *Cummings* cited both *Gilpin* and *Weaver*, but held that "the 'punitive' remedy of full restitution is precluded in this circuit by existing

4. Craven also fails to recognize that *Dewey* rejected a second, separate intraclass conflict argument because it was "unduly speculative" and not supported by record evidence. 681 F.3d at 186. Thus, the Third Circuit expressly applied the same test Craven mistakenly argues is applied only in the Fourth and Ninth Circuits. (Pet. 16.)

caselaw" and thus "the potential conflict discussed in *Gilpin* is not truly present in this case." 316 F.3d at 896. Simply put, although the outcome of these cases suggests a possible circuit split on the underlying labor law issue, which is not present here, it does not demonstrate that these circuits apply conflicting law when analyzing alleged intraclass conflicts.

In sum, the Court of Appeals below used the same legal standard as all other circuits in examining intraclass conflicts—the standard established in *Amchem* and *Ortiz*. Craven's argument does not establish a circuit split; it simply highlights that courts have reached different outcomes when applying the same legal standard to markedly different facts in a wide range of class action cases. Thus, the decision below does not warrant review by this Court.

B. The Court of Appeals did not improperly shift the burden of persuasion to Craven as class objector.

Craven next argues that "by assigning the burden of demonstrating inadequate representation to the objectors, the courts below contravened this Court's clear instructions in [*Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)]." (Pet. 17-18.) Specifically, Craven contends (*id.* at 19) that the Court of Appeals improperly required her to produce evidence of an intraclass conflict, whereas it is the plaintiffs' burden to prove no conflict within the class exists. Craven, however, misunderstands the holding of the courts below. The district court and the Court of Appeals rejected her argument because they determined that plaintiffs and the government demonstrated that her argument is factually wrong.

Craven argued below that the settlement of the Historical Accounting Class claims for a uniform $1,000 payment to each class member created an impermissible intraclass conflict between class members with "high value" accounting claims and class members with "low value" accounting claims. (Pet. 12-13.) The *evidence* in the record refutes the premise that there are high value and low value accounting claims. The government has always insisted—from the outset of this case in 1996—that there are no non-minor accounting errors. In other words, the government contends that *all* class members' Historical Accounting Class claims are "low-value" claims. The government presented evidence to support its position at trial. For example, the government introduced a 2,000-page report from an Interior contractor who reviewed IIM account data. (App. 164-98.) That report asserts that the government had successfully tracked 93,925,912 of the 96,523,218 IIM transactions (over 97.3%) during a 22-year period. (*Id.* at 194-95.) "Associate Deputy Secretary James Cason testified that Interior understood the results of [the accounting analysis] as indicating that, although there were errors in the accounts, the errors were relatively few, the errors tended to be small, and the errors were on both sides of the ledger." *Cobell XX*, 532 F. Supp. 2d at 50.

After the 2008 trial, the district court found that "one permissible conclusion from the record would be that the government has not withheld any funds from plaintiffs' accounts. . . . [D]espite a profusion of evidence and opinion about the unreliability of IIM records, there has been essentially no direct evidence" of funds missing from IIM accounts. *Cobell XXI*, 569 F. Supp. 2d at 238. Thus, as the Court of Appeals explained, "Craven's argument ignores that the record developed through extensive and hard-fought litigation indicates that the different interests

she alleges likely do not exist." (Pet. App. 15a.) Indeed, various parts of the trial record directly "contradict the inequity Craven alleges." (*Id.* at 20a.) Simply put, the lower courts did not impermissibly shift any burden of proof to Craven—they merely held that her unsupported assertions about the existence of "high value" accounting errors were factually wrong.

In her petition, Craven relies heavily (Pet. 12-13) on *Two Shields v. United States*, No. 11-cv-00531-LB, Doc. 1 (Fed. Cl., filed Aug. 24, 2011), a case pending in the Court of Federal Claims. Craven contends that *Two Shields* demonstrates the existence of "high value" accounting claims. This argument reflects a deep misunderstanding of the claims asserted by the Historical Accounting Class and the plaintiffs in *Two Shields*.

The claims in *Two Shields* are claims for trust *mismanagement*, not claims seeking a historical *accounting*. *Id.* ¶¶ 68-78. Those mismanagement claims arise out of the "oil boom" in states such as North Dakota, where energy companies today are paying substantial royalties, rents, and bonuses to lease certain lands for shale oil exploration and drilling. *Id.* ¶¶ 8-17. The *Two Shields* plaintiffs allege that the government wrongly has leased their trust land to oil companies for far less than it is worth. *Id.* ¶ 76. But the fact that those plaintiffs have alleged large trust *mismanagement* claims—*i.e.*, that, but for government mismanagement, there would be much more money coming into their IIM accounts as oil and natural gas revenue—does not establish that they (but not other class members) have very large *accounting* errors in their existing IIM accounts. Those are separate and distinct issues. Thus, the allegations in *Two Shields* (even assuming those allegations ultimately prove correct

and the *Two Shields* plaintiffs ultimately prevail) do not support Craven's argument that there are significant accounting errors within the IIM Trust.

In any event, there has been no judicial finding of trust mismanagement by the government in *Two Shields*. Rather, petitioner's argument relies solely on unproven allegations in the *Two Shields* complaint. But "mere allegations of a complaint are not evidence." *Tibbs v. City of Chicago*, 469 F.3d 661, 663 n.2 (7th Cir. 2006). Craven made no effort below to demonstrate the veracity of those allegations whether or not she even has standing to do so.

In sum, Craven's intraclass conflict argument depends entirely on her unsupported argument that class members' accounting claims have "wildly varying values" and that some class members have "high value" accounting claims. (Pet. 15.) The lower courts rejected this argument because it is factually wrong. That fact-specific holding does not warrant review by this Court.[5]

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5. Craven appears to confuse the Historical Accounting Class and the Trust Administration Class at various points in her petition. (Pet. 13-15.) Unlike the Historical Accounting Class, which provides uniform, per capita payments to all class members, the Trust Administration Class uses a formula that accounts for the high-value claims of class members like those in *Two Shields*. Each member of the Trust Administration Class receives a minimum payment of approximately $800, with an additional payment that is calculated based on the ten highest revenue-generating years for that class member's IIM account. (Craven App. 559.) This calculation ensures that class members with high-value trust assets (and, thus, potentially high-value mismanagement claims) receive their fair share of the settlement. Indeed, some class members will receive settlement payments of hundreds of thousands of dollars, or even millions of dollars, for their Trust Administration Class claims. (*Id.*)

II. CRAVEN'S INCENTIVE AWARDS ARGUMENT DOES NOT WARRANT REVIEW BY THIS COURT.

A. There is no conflict among the circuits concerning incentive awards for class representatives.

Craven argues that the D.C. Circuit's holding "splits with established precedent discussing how to reconcile incentive awards for named plaintiffs with the requirements of adequate representation." (Pet. 24.) But there is no circuit split on the permissibility of incentive awards.

Craven contends that the Sixth, Seventh, and Ninth Circuits have "suggested" that a large disparity between the payments to class members and the incentive awards to named plaintiffs "might render a settlement 'untenable'" and that "excess incentive awards may put the class representative in a conflict with the class." (Pet. 24-25.) But the D.C. Circuit's opinion below is fully consistent with the principle that *some* very large incentive awards *could*, in certain circumstances, create a conflict between the named plaintiff and the class. The Court of Appeals simply held that, given the particular facts in *this* case, the district court did not abuse its discretion in finding that the incentive award did not create such a conflict. (Pet. App. 25a-26a.)

Craven also contends that the circuit courts need "guidance" from this Court "about the maximum acceptable level of these [incentive] awards." (Pet. 25.)

But again, Craven does not provide any support for this contention. Indeed, the cases on which Craven relies for her argument concerning the purported circuit split (*id.* at 24-25) undercut her argument that there is a need for guidance from this Court. In cases where a large incentive award creates a potential conflict, the courts of appeals have no difficulty identifying and remedying that conflict. *See, e.g.*, *Murray v GMAC Mortgage Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (holding that a $3,000 incentive award was disproportionate when class members received less than $1 because class members were unlikely to mail in such a small claim and therefore the named plaintiff negotiated a settlement that rewarded herself but not the class). In short, Craven's argument does not demonstrate a need for guidance from this Court—it simply demonstrates that Craven disagrees with the Court of Appeals' holding that the district court did not abuse its discretion in concluding, as a factual matter, that an incentive award was appropriate here and did not create a conflict in this particular case.

B. The Court of Appeals' decision on incentive awards was correct.

Even setting aside the lack of a circuit split on incentive awards, the Court of Appeals' decision does not warrant review because it involves a fact-bound decision properly left to the sound discretion of the district court.

Craven argues that the size of the incentive payment "aligned the interests of the class representatives with their lawyers instead of the class members." (Pet. 26.)

The district court did not abuse its discretion in rejecting that argument.[6]

As the district court found, this unique, nearly 17-year old lawsuit stands in stark contrast to typical class action litigation. Ms. Cobell did not sit on the sidelines while class counsel handled the case and negotiated a settlement. She dedicated her life to obtaining justice for her fellow Indians—she was involved in every strategic decision and made every political decision in the case; she spent nearly $390,000 of her own money and incurred substantial debt to prosecute this lawsuit; and for years she traveled the country speaking with IIM beneficiaries and raising funds to cover certain litigation costs. (App. 277, 293, 296.) Her work on the case won her a prestigious "Genius Grant" from the MacArthur Foundation; honorary degrees from Dartmouth College, Montana State University, and Rollins College; and awards from groups as diverse as the International Women's Forum and AARP. (App. 293, 296.) Sadly, Ms. Cobell died after final approval of the settlement. As a testament to her remarkable achievements through this historic lawsuit, numerous members of Congress extended their condolences,

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6. Craven misstates the incentive awards request. Plaintiffs sought $2.5 million in incentive awards for the named plaintiffs, with the majority for lead plaintiff Elouise Cobell. (Craven App. 779-80.) Craven claims that Ms. Cobell sought a "$10 million" incentive award, apparently by adding Ms. Cobell's costs request to her incentive award request. (Pet. 26.) Those costs represent substantial indebtedness that Elouise Cobell actually incurred to litigate this case—they are not incentive awards. (App. 283-87; Craven App. 779.) In any event, the court denied Plaintiffs' request for those costs and they are not included in the $2.5 million incentive award that Craven challenges on appeal.

President Obama issued a formal statement celebrating her life and accomplishments, and the *New York Times* and *Washington Post* published obituaries commemorating her unflinching commitment to reforming the IIM Trust. *See, e.g.*, *Elouise Cobell, A Native American Leader Who Took on Washington and Won*, Wash. Post, Oct. 17, 2011, at B6.

Craven's conflict argument ignores Ms. Cobell's unflinching, 20-year dedication to this case and asserts, in willful disregard of record evidence, that Ms. Cobell and the other named plaintiffs (who received much smaller incentive payments) "had grown far more interested in maximizing their own recovery than in protecting the interests of the class." (Pet. 27.) The district court correctly found otherwise:

> I was distressed to hear Ms. Cobell attacked today by one of the objectors' representatives [Craven's counsel]. I felt that was without foundation. There was no suggestion of any collusion by her part to get a fee, and then she would settle the case. There is nothing in the record to support that. All I have in the record for Ms. Cobell is starting this case maybe 20 years ago trying to get someone to take it, 15 years ago getting the suit filed, and forever thereafter being intimately involved and paying hundreds of thousands of dollars out of her own pocket to make sure that the case could continue when there was no money. How can it now be claimed that she would then, somehow, compromise easily, I don't understand that accusation. She has accomplished more for the

> individual, I think, Native Americans than any other person recently that I can think of in history. This is her case. She contributed hundreds of thousands of dollars. She helped fund raise. She spent hundreds and thousands of hours. She was part of every serious, strategic decision made. She dedicated up to 1,200 hours per year. She put her reputation on the line, her health, and [made] unprecedented efforts by a named plaintiff I have not seen before in a class action case. I believe she is fully entitled to the award that she has requested in this matter.

(Craven App. 779.)

Similarly, with respect to the other class representatives, the district court found:

> [Mr. LaRose] was in the deposition. [He] coordinated the media efforts . . . engaged political leaders, and [was] as heavily involved in the case as the others. [He was a]n original plaintiff since the beginning. . . . [Mr. Maulson was a]n original plaintiff. He was deposed by the government; discussed key litigation issues; and helped with the continuation of the case; and again, put his reputation at risk. . . . [Ms. Cleghorn] took her mother's spot as a plaintiff when her mother died in 1997. [She was d]eposed by the government, attended court hearings; participated in the strategic decisions; and came forth to support the case at all times.

(Craven App. 779-80.)

Craven does not cite *any* evidence contradicting these factual findings—let alone demonstrating that they are clearly erroneous—or showing that the class representatives' interests were compromised by the incentive request. Moreover, Craven ignores several critical facts that distinguish this case from those in which incentive requests were rejected on conflict grounds: here, the settlement agreement did not require the district court to award any incentives to the named plaintiffs at all; the government opposed the incentives request; and the district court exercised unfettered discretion in reviewing the request. (Pet. App. 25a-26a). *See, e.g.*, *Cohen v. Chilcott*, 522 F. Supp. 2d 105, 115 n.2 (D.D.C. 2007) (holding that the named plaintiffs' interests were not compromised because granting the incentive awards was solely "within the Court's discretion" and the named plaintiffs had "no assurance of receiving such awards during the pendency of [the] litigation"); *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 52-53 (D.D.C. 2010) (same). In sum, the Court of Appeals' decision—which reviewed the district court's exercise of its broad discretion—is consistent with the case law in other circuits, and there is no warrant for this Court to review that fact-bound decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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