No. 15-1072

In the Supreme Court of the United States

DANIEL HAGGART AND KATHY HAGGART, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS,

v.

GORDON ARTHUR WOODLEY, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The attorney's-fee provision of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4654(c), requires the United States to pay the reasonable litigation expenses, including reasonable attorney's fees, of plaintiffs who obtain a judgment or settlement for just compensation for the government's taking of their property. The amount of reasonable attorney's fees in this case totaled $1.92 million. The question presented is as follows:

Whether an award of reasonable attorney's fees under Section 4654(c) precludes a federal court from exercising its equitable authority under a common-fund theory to order nonconsenting plaintiffs to pay their attorneys—out of the plaintiffs' own recovery of just compensation—more than $33 million for attorney services in addition to the $1.92 million of reasonable attorney's fees awarded under Section 4654(c).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 809 F.3d 1336. The opinion of the Court of Federal Claims (Pet. App. 41a-78a) is reported at 116 Fed. Cl. 131.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2016. The petition for a writ of certiorari was filed on February 23, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This attorney's-fee case implicates the divergent monetary interests of the attorneys and law firm (collectively, Class Counsel) that are listed in the certiorari petition as the real parties in interest (Pet. ii), and

the landowner-plaintiffs in the underlying inverse-condemnation action. See Pet. App. 30a. Each of the plaintiffs joined this action to seek just compensation for the government's alleged taking of their separate and distinct parcels of property, but only about 68 plaintiffs signed a contingency-fee agreement providing for a 35%-45% contingency fee to be paid to Class Counsel from the plaintiffs' recovery of just compensation. *Ibid.*; see *id.* at 3a-4a & n.3.

The parties agreed to a $138 million settlement of the underlying Fifth Amendment claims, and they agreed that $1.92 million was the "reasonable" attorney's fee for the litigation under 42 U.S.C. 4654(c). Pet. App. 5a. The Court of Federal Claims (CFC) approved both agreements. In addition to the award of a reasonable attorney's fee, the CFC invoked an equitable "common fund" theory to grant Class Counsel's request for an additional award of more than $33 million payable to counsel out of the client-plaintiffs' recoveries of just compensation. *Id.* at 62a-77a. The Federal Circuit reversed the CFC's award of common-fund fees. *Id.* at 25a-40a.

1. a. In 2009, petitioners Daniel and Kathy Haggart filed this CFC action under the Tucker Act, 28 U.S.C. 1491(a)(1). Petitioners alleged that they were entitled to just compensation under the Fifth Amendment for the government's taking of a reversionary interest in a right of way across their land in King County, Washington. Pet. App. 2a-3a. That taking allegedly occurred when King County acquired an interest in their land as part of the conversion of a railroad corridor across the Haggarts' property into a public recreational trail under Section 208 of the National Trails System Act Amendments of 1983 (Trails

Act), 16 U.S.C. 1247(d). See Pet. App. 2a-3a. Approximately 68 of the plaintiffs who entered an appearance and remain in the case have signed a contingency-fee agreement with Class Counsel that specified that they would pay counsel the greater of (1) 35% to 45% of their recovery or (2) the statutory attorney's fees that would be awarded in the case. *Id.* at 3a-4a & n.3.[1]

The CFC certified the case as a class action under CFC Rule 23, with multiple subclasses of plaintiffs who owned land along the rail corridor. Pet. App. 3a, 41a-42a. Unlike district court class actions under Fed. R. Civ. P. 23, each class member must individually opt into the CFC action. Pet. App. 29a; see CFC R. 23(c)(2)(B)(v), & 2002 Rules Committee Notes. More than 500 landowners eventually opted into the suit, and 253 class members remained after the government obtained partial summary judgment. Pet. App. 4a, 41a. Of those 253 plaintiffs, 185 have not signed a fee agreement with Class Counsel. *Id.* at 30a.

A plaintiff who successfully asserts a takings claim against the United States under the Tucker Act may obtain an award of attorney's fees under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA), Pub. L. No. 91-646, 84 Stat. 1894 (42 U.S.C. 4601 *et seq.*). Section 4654(c) provides in pertinent part:

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[1] Because the number of signatories does not affect the proper resolution of the question presented, the government assumes *arguendo* that 68 plaintiffs signed the agreements and the remaining 185 did not. Cf. Pet. App. 3a n.3, 30a (noting that the government presented a different number). Plaintiff-respondents Gordon and Denise Woodley argued below that these particular contingent-fee agreements are unenforceable. See Woodleys' C.A. Br. 4-5, 17-18. The court of appeals did not resolve that issue.

> The court rendering a judgment for the plaintiff in a proceeding brought under [the Little Tucker Act, 28 U.S.C. 1346(a)(2) or the Tucker Act, 28 U.S.C. 1491], awarding compensation for the taking of property by a Federal agency, * * * shall determine and award or allow to such plaintiff, as a part of such judgment * * * , such sum as will in the opinion of the court * * * reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

42 U.S.C. 4654(c). As under other reasonable-fee provisions, the amount of a reasonable attorney's fee under the URA is determined using the lodestar method, which multiplies the number of hours reasonably expended on the litigation by a reasonable hourly rate. Pet. App. 31a-32a; see *City of Burlington* v. *Dague*, 505 U.S. 557, 559, 562 (1992).

In 2013, the United States and Class Counsel negotiated a settlement under which the government would pay the 253 landowners an aggregate amount of $110 million in principal plus 4.2% annual interest. Pet. App. 5a; see *id.* at 15a. By May 2014, the accrued interest was approximately $28 million, bringing the total recovery to nearly $138 million. *Id.* at 5a. Class Counsel determined how much each member of the class would recover out of the aggregate settlement. *Id.* at 19a-20a. Those amounts ranged from $444.45 to more than $2.4 million. *Id.* at 20a.

The parties additionally agreed that, if the CFC approved the settlement and entered judgment thereon, the amount of the reasonable attorney's fee owed under the URA should be $1.92 million and the

amount of the other reasonable expenses should be $660,000. Pet. App. 5a.

In February 2014, the parties moved the CFC to approve the settlement. Pet. App. 5a. One day later, Class Counsel moved the CFC for an additional award of attorney's fees based on a common-fund theory. *Ibid.* Under the common-fund doctrine, a litigant or lawyer who recovers a "common fund" for the benefit of persons other than himself or his client may recover "a reasonable attorney's fee from the fund as a whole." *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478 (1980). That equitable doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Ibid.* By "assessing attorney's fees against the entire fund," the court exercises its equitable authority to "prevent this inequity." *Ibid.* Invoking the common-fund doctrine, Class Counsel requested a total award of approximately $42 million, representing 30% of the principal, interest, and the URA fee that would be awarded if the settlement were approved. Pet. App. 48a-49a.

b. The CFC approved the settlement and entered judgment. Pet. App. 41a-78a.

The CFC approved the parties' settlement providing $138 million to the class as just compensation with interest through May 2014. Pet. App. 77a. The court similarly approved the parties' determination that $1.92 million is the reasonable attorney's fee owed under the URA, and that $660,000 should be awarded for litigation costs and expenses. *Ibid.*; see *id.* at 58a-60a. The court also granted Class Counsel's motion for common-fund fees. *Id.* at 62a-77a. The court accordingly awarded Class Counsel more than $33 mil-

lion, to be paid out of the class members' recovery, in addition to the reasonable fee of $1.92 million paid by the government. *Id.* at 76a-77a.

The CFC directed that judgment be entered against the United States for nearly $138 million in takings liability, plus $1.92 million in attorney's fees and $660,000 in costs. Pet. App. 77a. The court ordered that the judgment be paid to Class Counsel and that such counsel "shall retain" out of the payment the $1.92 million in attorney's fees and $660,000 in costs paid by the government, as well as "$33,172,243.74 of the common fund as a contingent fee." *Ibid.*

2. The Federal Circuit vacated and remanded for further proceedings. Pet. App. 1a-40a.

a. The court of appeals held that the CFC's approval of the settlement had been an abuse of its discretion because Class Counsel had failed to disclose when requested by class members how Class Counsel had determined the value of the individual property interests owned by the class members. Pet. App. 14a-25a. Approval of the settlement, the court explained, was not appropriate because Class Counsel had "withheld critical information" that was "necessary for the * * * class members to make an informed decision about the settlement agreement." *Id.* at 24a. The court observed that "[C]lass [C]ounsel owe[d] a fiduciary duty to his clients to furnish such information," and it saw "no reason why * * * [C]lass [C]ounsel can or should deny his clients access to the physical copy of the information which they are entitled to receive." *Ibid.*

b. The court of appeals further held that the CFC had erred in awarding Class Counsel more than $33

million in common-fund fees out of their clients' recovery. Pet. App. 25a-40a.

The court of appeals held that the aggregate amount of the class members' just-compensation claims reflected in the $138 million settlement could constitute a "common fund" for purposes of the common-fund doctrine. Pet. App. 26a-28a. The court also concluded that the common-fund doctrine could generally be applied in the context of a CFC opt-in class action. *Id.* at 28a-30a. The court explained that the "relevant question" when considering "the application of the common fund doctrine" is "whether an inequity exists." *Id.* at 30a. The court stated that, in the absence of the URA, an inequity would exist because only 68 of the 253 class members had accepted contractual obligations to contribute to the costs of suit by entering into contingency-fee agreements. *Ibid.*

The court of appeals further held, however, that a common-fund fee award was unwarranted because the award of a reasonable attorney's fee under the URA had "resolve[d] the inequity." Pet. App. 31a; see *id.* at 31a-40a. The court explained that, "[u]nder the URA," the government pays "the reasonable cost of the action" for the plaintiffs and thereby addresses "the inequity that would otherwise result" if a subset of plaintiffs did not contribute to the litigation cost. *Id.* at 36a; see *id.* at 30a. Accordingly, "[i]n the presence of the URA, [the court] f[ou]nd *no inequity* to address." *Ibid.*

The court of appeals further explained that the URA was designed to "allow[] landowners to retain the full compensation of the value of their property by mandating the Government to assume the litigation expenses of counsel in bringing forth the takings

claim." Pet. App. 36a. Class Counsel's "attempt to augment reasonable attorney fees by substituting application of the [common-fund] doctrine in place of the URA," the court determined, "not only undermines the purpose of the URA," it "also unjustly enriches class counsel at the expense of class members" by depleting their recoveries. *Id.* at 36a-37a. The court explained that "Congress has spoken 'directly to the question at issue'" by enacting the URA to "provide[] class counsel with reasonable fees as compensation for their efforts" litigating takings cases. *Id.* at 37-38a (citation omitted).

ARGUMENT

Class Counsel contend (Pet. 18-24) that the court of appeals erred in disapproving the CFC's common-fund award in this case. Class Counsel further contend that the decision below conflicts with decisions of three other courts of appeals, Pet. 13-17, and involves a recurring and important question, Pet. 25-30. The Federal Circuit's decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. "The common-fund doctrine reflects the traditional practice in courts of equity" under which "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client" may be awarded "a reasonable attorney's fee from the fund as a whole." *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478 (1980). That doctrine rests on the equitable principle that "persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Ibid.*

The court below correctly held that a common-fund award was not warranted in this case because the

award of a reasonable attorney's fee under the URA "resolve[d] the inequity" that otherwise would have resulted if the 185 class members who had not signed contingency-fee agreements were allowed to free-ride on other class members who had. See Pet. App. 30a-31a, 36a. The URA required the government to pay reasonable attorney's fees and expenses of the takings litigation. Both the CFC (*id.* at 77a) and the court of appeals (*id.* at 36a-37a) understood that the class members owed those fees to Class Counsel. That outcome reflects the intended operation of the URA, which ensures that counsel in a successful takings suit can receive a reasonable fee, while allowing the plaintiffs to retain the full amount of just compensation for their taken property.

a. In 1971, Congress enacted Section 4654(c) as one of many URA provisions designed to ameliorate the adverse effect on property owners from the government's taking of property for public use. See URA, Pub. L. No. 91-646, § 304(c), 84 Stat. 1906 (42 U.S.C. 4654(c)). The provision was added to then-pending URA legislation in response to requests that Congress insert a litigation-expense provision borrowed from a prior bill in order to authorize the payment of "the costs of litigation when [a property] owner successfully" obtains just compensation in a takings action. See *Uniform Relocation Assistance and Land Acquisition Policies—1970*, *Hearings Before the House Comm. on Public Works on H.R. 14898, H.R. 14899, S. 1 and Related Bills*, 91st Cong., 1st & 2d Sess. 322 (1969-1970); see also *id.* at 323, 1108. The provision reflected Congress's view that successful plaintiffs "should be 'made whole'" for any taking, and that such plaintiffs are "not 'made whole' unless [they

are] awarded litigation costs" that would otherwise reduce their recoveries. See *id.* at 322; see also *id.* at 1108. The House Committee on Public Works accepted that recommendation by inserting language from the prior bill (with non-material modifications) into the then-pending URA legislation. See H.R. Rep. No. 1656, 91st Cong., 2d Sess. 25 (1970); compare S. 1, 91st Cong., 2d Sess. § 304 (Dec. 2, 1970) (URA bill as reported), with H.R. 10549, 90th Cong., 1st Sess. § 106 (June 6, 1967) (litigation-expense provision in the prior bill).

The unique litigation-expense provisions in Section 4654(c) reflect Congress's intent to make takings plaintiffs whole by requiring the government to cover the reasonable expenses that successful plaintiffs incur in inverse-condemnation actions. Unlike most fee-shifting provisions, see *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603-604 & n.4 (2001), Section 4654(c) applies not only when a court enters "judgment for the [takings] plaintiff," but also when "the Attorney General effect[s] a settlement" of such a takings claim, 42 U.S.C. 4654(c). And while most fee-shifting provisions make awards discretionary, see, *e.g.*, 42 U.S.C. 1988(b) ("may allow" award); 42 U.S.C. 2000e-5(k) (same), Section 4654(c) is phrased in mandatory terms, requiring that courts (when they enter a judgment awarding just compensation) and the Attorney General (when she settles a case without a court judgment) "*shall* determine and award" a sum to "reimburse [the takings] plaintiff" for his reasonable litigation expenses. 42 U.S.C. 4654(c) (emphasis added). Those provisions reflect a strong congressional policy of preserving for property owners the whole

amount awarded to them under the Fifth Amendment's Just Compensation Clause. The court below appropriately took account of that policy in determining that Class Counsel should not receive additional common-fund fees out of class members' recoveries. See, *e.g.*, *Hecht Co.* v. *Bowles*, 321 U.S. 321, 331 (1944) (equity jurisdiction must be exercised in light of the objectives of the relevant statute); *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497-498 & n.9 (2001).

When the government is required to pay URA fees under Section 4654(c), all plaintiffs who benefit from a judgment awarding just compensation will contribute their fair share to the cost of obtaining that judgment. Section 4654(c) requires the government to pay "reasonable" litigation expenses, including a "reasonable" attorney's fee, to each such plaintiff as part of the "judgment for th[at] plaintiff," 42 U.S.C. 4654(c). See *Astrue* v. *Ratliff*, 560 U.S. 586, 588-589 (2010) (fee award is "payable to the litigant" under statutes awarding fees to a prevailing party). Although 185 of the individual plaintiffs in this case had no express fee agreement with Class Counsel, those plaintiffs impliedly agreed to pay counsel that statutory fee award.

Both courts below effectively recognized this principle by determining that the URA award of reasonable attorney's fees here would be paid to Class Counsel. See Pet. App. 37a (URA award "provides class counsel with reasonable fees"); *id.* at 77a (ordering that "Class [C]ounsel shall retain" the $1.92 million reasonable fee paid by the government). By ensuring that there will be no "persons who obtain the benefit of a lawsuit without contributing to its cost," *Boeing Co.*, 444 U.S. at 478, the URA prevents the inequity

that the common-fund doctrine might otherwise be used to address. And the fact that some class members in this case may have voluntarily agreed to pay more than a reasonable attorney's fee provides no sound basis for imposing a similar obligation on non-consenting plaintiffs.

b. Class Counsel relies on *Venegas* v. *Mitchell*, 495 U.S. 82, 86-87 (1990), for the proposition that "fee-shifting statutes do not control what clients pay their lawyers, and do not cap or limit the amount of fees that lawyers can collect—unless the statutes expressly 'regulate' those issues." Pet. 20. The Court in *Venegas* held that "Section 1988 itself does not interfere with the enforceability of a contingent-fee contract" between a litigant and his attorney. 495 U.S. at 90. That holding supports the view that the 68 class members in this case who agreed to pay contingency fees potentially greater than the URA "reasonable fee" may be held to their promises (if the fee contract is otherwise enforceable). *Venegas* does not suggest, however, that Class Counsel may collect such fees from *non*-consenting plaintiffs. See Pet. App. 35a-36a.

Class Counsel suggest (Pet. 20-21) that the court of appeals' analysis was "schizophrenic" because the court stated that "some inequity exists" (Pet. App. 30a) but then found "*no inequity* to redress" (*id.* at 36a) under the common-fund doctrine. That charge is misconceived. The court of appeals stated that, "*before* considering how the URA impacts the application of the common fund doctrine, * * * it is clear that some inequity exists." *Id.* at 30a (emphasis added). The court's point was simply that, if the 185 class members who had not signed contingency-fee agreements had no *other* obligation to contribute to the

costs of suit, their free-rider status would create the sort of inequity that might justify a common-fund award. The court further explained, however, that "the URA resolves the inequity" by "provid[ing] class counsel with reasonable fees" that the government must pay for "the plaintiff class." *Id.* at 31a, 36a-37a. The court therefore found "no inequity to redress." *Id.* at 36a (emphasis omitted). That analysis was logically consistent and legally sound.

2. Class Counsel contend (Pet. 13-17) that the court of appeals' decision conflicts with *Staton* v. *Boeing Co.*, 327 F.3d 938, 963-969 (9th Cir. 2003); *County of Suffolk* v. *Long Island Lighting Co.*, 907 F.2d 1295, 1326-1328 (2d Cir. 1990); and *Brytus* v. *Spang & Co.*, 203 F.3d 238, 244-247 (3d Cir. 2000). No such conflict exists, since none of those decisions approved a common-fund award to counsel who were already entitled to a "reasonable" statutory attorney's fee.

a. *Staton* did not involve a common-fund award that ordered plaintiffs to pay attorneys out of their own recovery. See 327 F.3d at 963-975. Rather, *Staton* involved a court-ordered consent decree in which the defendant, rather than litigate the amount of fees that it might have been ordered to pay under the discretionary fee-shifting statutes for the plaintiff class's Title VII and Section 1981 claims, "agree[d] to pay [the class's attorney's] fees independently of any [recovery] provided to the class in the agreement." *Id.* at 964; see *id.* at 948 (defendant "agreed to pay $3.75 million to $3.85 million to class counsel"). As part of its review of the district court's settlement approval, the court of appeals analyzed "the reasonableness of [the] fee amount spelled out in [the] class action settlement agreement." *Id.* at 963; see *id.* at

966 (concluding that the court did not need to apply "the same level of scrutiny as when the fee amount is litigated" because the defendant and the class were entitled to compromise "the proper amount of fees * * * to avoid litigation").

In that settlement context, the *Staton* court noted that the parties sought to justify the reasonableness of the negotiated amount of attorney's fees by reference to common-fund principles. 327 F.3d at 966. The court emphasized that the parties' aggregation of the individual amounts that the defendant would owe to each class member under the consent decree was "not properly viewed as a common fund as that term is used in attorneys' fees law," but that the parties had used the aggregated figure as a "'putative fund'" for comparison purposes. *Ibid.* The court stated that "Congress did not explicitly forbid the use of the common fund doctrine in cases potentially involving [Title VII's and Section 1981's fee-shifting provisions]," and that "[a]pplication of the common fund doctrine to class action settlements" would not undermine the "intent of the fee shifting provisions at issue here." *Id.* at 968. More specifically, the court explained, "[i]n settlement negotiations, the defendant's determination of the amount it will pay" is directly guided by "its potential liability for fees under the fee-shifting statute" and, in addition, the class can "insist as a condition of settlement that the defendants contribute a higher amount" so as not to cut into their recovery. *Id.* at 969.

The decision below does not conflict with *Staton*. *Staton* did not involve an *actual* common-fund award. Rather, *Staton* involved an attempt by the litigants to justify the reasonableness of the attorney's fee that

they had negotiated by comparing it to a hypothetical fee based on common-fund theories. Furthermore, the entire discussion in *Staton* on which Class Counsel rely (Pet. 14-15) was unnecessary to the judgment. The court in *Staton* ultimately held that parties cannot include negotiated fees within a class-action settlement when those fees are based on a percentage of the class recovery. 327 F.3d at 945, 969-972. The court held that, if plaintiffs' counsel desires a common-fund award, it must separately present that request to the district court after negotiating an overall settlement with the defendant. *Id.* at 945, 972.

b. The Second Circuit's decision in *Suffolk* is also inapposite. See 907 F.2d at 1326-1328. In *Suffolk*, the County of Suffolk and other plaintiffs brought a putative class action asserting civil RICO claims against the defendants. *Id.* at 1300. After the district court declined to certify the class on the ground that the initial named plaintiffs were inadequate class representatives, the plaintiffs' claims proceeded individually and the County went to trial, lost, and appealed. *Id.* at 1300-1301. Meanwhile, the district court certified a class with different representatives, and the County opted out of that class in order to continue to pursue its own RICO claims independently. *Id.* at 1301-1302. The defendants then entered a monetary settlement with the class that included a $10 million settlement for the class's claim to statutory attorney's fees. *Id.* at 1302. The County thereafter sought to recover some of its own attorney's fees from the class recovery under a common-fund theory, based on the fact that the County's litigation of its own claims had benefitted the class in obtaining the class settlement award. *Id.* at 1326-1327.

The Second Circuit concluded that a common-fund fee award was warranted in those circumstances. *Suffolk*, 907 F.2d at 1326-1328. The court rejected the district court's conclusion that a common-fund award was unwarranted because RICO's fee-shifting statute would have provided "an independent basis for recoupment of [the County's] attorneys' fees" if the County had prevailed in its own appeal. *Id.* at 1327. The County had lost its appeal, *id.* at 1311, and the *Suffolk* court held that the mere "possibility that [the County] could recover attorneys' fees based upon RICO's fee-shifting provision" was an insufficient ground to deny it any recovery. *Id.* at 1327. The court recognized that "if, under a particular combination of facts, the operation of the equitable fund doctrine conflicts with an intended purpose of a relevant fee-shifting statute, the statute must control." *Ibid.* But the court found no such conflict in light of "the value to the class of the legal work performed by Suffolk's attorneys." *Id.* at 1327-1328.

In *Suffolk*, the County could not recover any statutory attorney's fee based on a successful class recovery because the County was not a member of the class and was not represented by class counsel. Indeed, the County was unable to recover any statutory fees under RICO's fee-shifting provision because the County had lost on its own claims. In concluding that the mere "possibility" of recovering fees on that non-class claim should not preclude a common-fund award, 907 F.2d at 1327, the Second Circuit had no occasion to consider whether attorneys who have actually been awarded statutory "reasonable" fees can be awarded additional fees on a common-fund rationale.

c. Finally, the Third Circuit's decision in *Brytus* supports the decision here. See 203 F.3d at 245-247. In *Brytus*, the plaintiff class obtained a $12.5 million judgment on their ERISA claim. *Id.* at 240-241. The district court then ordered payment of "reasonable attorney's fees [from the defendant] under the statutory fee provision of ERISA" but rejected class counsel's request for an additional fee award paid out of the class members' recovery under a common-fund theory. *Id.* at 241. The court of appeals affirmed, based on its conclusion that the actual payment of reasonable attorney's fees under ERISA's fee-shifting statute obviated the justification for an equitable common-fund fee award. *Id.* at 245-247. The court explained that the common-fund doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Id.* at 245 (quoting *Boeing Co.*, 444 U.S. at 478). But the court found "no inequity to redress" because the "[defendant] ultimately bore the entire cost of the litigation" by being ordered to pay a reasonable attorney's fees under a fee-shifting statute. *Id.* at 246. The Federal Circuit's analysis in this case closely tracks that reasoning.

d. Class Counsel assert that the court below "acknowledged that there is a square conflict among the circuits." Pet. 14 (citing Pet. App. 38a-39a). That is incorrect. The Federal Circuit simply observed that Class Counsel had "point[ed] to the Ninth Circuit's decision in *Staton*" to suggest that the common-fund doctrine may be applied "in the presence of a fee-shifting statute." Pet. App. 38a. The court then stated that it "agree[d] with the Seventh Circuit[']s" view

in *Pierce* v. *Visteon Corp.*, 791 F.3d 782 (7th Cir. 2015), that a common-fund theory should not be applied where the trial court had actually awarded reasonable attorney's fees under a fee-shifting statute. Pet. App. 38a-39a; see *id.* at 38a n.22 (discussing *Pierce*). The court in *Pierce* explained that "clients should not be ordered to pay counsel *who are compensated* under a fee shifting-statute" that has provided a "reasonable" attorney's fee. 791 F.3d at 787 (emphasis added). This case involves not simply "the presence of a fee-shifting statute," Pet. App. 38a, but an actual award of "reasonable" fees under the URA.

3. Class Counsel contend (Pet. 25-30) that review is warranted to ensure that plaintiffs with meritorious claims can secure competent counsel. That is incorrect. The Federal Circuit's decision was confined to contexts in which a reasonable attorney's fee is properly payable under the URA. See pp. 7-8, *supra*. And Class Counsel's failure to identify any court of appeals decision upholding a common-fund fee award in similar circumstances belies Counsel's contentions regarding the significance of the ruling below.

Class Counsel argue (Pet. 26-29) that the rule announced by the Federal Circuit will prevent many takings plaintiffs from securing counsel. That prediction is unfounded. This Court's long experience with fee-shifting statutes has led it to recognize a "strong presumption" that the lodestar amount—*i.e.*, the product of the hours reasonably expended by counsel and a reasonable hourly rate—represents "the 'reasonable' fee" to award. *City of Burlington* v. *Dague*, 505 U.S. 557, 559, 562 (1992) (citation omitted); cf. *id.* at 562 ("[O]ur case law construing what is a 'reasona-

ble' fee applies uniformly" to fee-shifting statutes awarding "reasonable" attorney's fees).

Class Counsel assert (Pet. 27) that, given the "complicated" nature of Trails Act takings cases, qualified counsel will agree to represent plaintiffs only if their fees are calculated as a percentage of the plaintiff's recovery. But the lodestar method properly accounts for complexity because the "complexity of the issues presumably [will be] fully reflected in the number of billable hours recorded by counsel" and used to determine the lodestar amount. *Blum* v. *Stenson*, 465 U.S. 886, 898 (1984). Class Counsel similarly suggest (Pet. 26, 28) that their "expertise" warrants a common-fund award, but the lodestar method already approximates "the fee that the prevailing attorney would have received if he or she had been representing a paying client" by using a reasonable hourly rate based on "'the prevailing market rates in the relevant community.'" *Perdue* v. *Kenny A. ex rel. Winn*, 559 U.S. 542, 551 (2010) (quoting *Blum*, 465 U.S. at 895).

Class Counsel's evident wish to obtain a type of contingency fee through a common-fund award likewise does not suggest that the prospect of URA awards will be insufficient to attract qualified counsel. A statutory "'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious" case "'but that does not produce windfalls to attorneys.'" *Perdue*, 559 U.S. at 552 (quoting *Blum*, 465 U.S. at 897). The Court in *Dague* rejected an argument similar to Class Counsel's, concluding that the lodestar remains the "reasonable" fee to award when counsel pursue a case on a contingent-fee basis, and that the award "duplicate[s] in substantial part factors" that could arguably justify

a contingency-fee-like enhancement. 505 U.S. at 562; see *id.* at 562-567. The Court also observed that the lodestar method "often (perhaps, generally) results in a *larger* fee award than the contingent-fee model." *Id.* at 566 (emphasis added).

Consistent with that statement, the United States' payment of a reasonable fee under the URA has often exceeded the *total* payment of just compensation (*i.e.*, a 100% contingency fee).[2] To be sure, the *Dague* Court's generalization does not hold true in this case, where the CFC's common-fund award (Pet. App. 76a-77a) was more than 18 times the $1.92 million statutory fee that Class Counsel agreed, and the CFC found, is the "reasonable" attorney's fee. But Class Counsel's desire to obtain a windfall out of non-consenting class members' recoveries provides no basis for concluding that such windfalls are necessary to attract qualified counsel in federal takings cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] See, *e.g.*, Doc. 165 at 1, *Adkins* v. *United States*, No. 09-503 (CFC Dec. 21, 2015); Doc. 79 at 1-2 & Ex. A, *Buford* v. *United States*, No. 09-121 (CFC May 1, 2014); Doc. 141 at 1, *Fauvergue* v. *United States*, No. 08-431 (CFC Aug. 23, 2013); *Grantwood Vill. v. United States*, 55 Fed. Cl. 481, 483, 489 (2003).