UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

IN RE: CAPITAL ONE 360 SAVINGS ACCOUNT INTEREST RATE LITIGATION	Civil Action No. 1:24-md-03111-DJN-WBP

BRIEF OF *AMICI CURIAE* THE ATTORNEYS GENERAL OF NEW YORK, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, HAWAII, ILLINOIS, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, OHIO, OREGON, RHODE ISLAND, AND WASHINGTON IN OPPOSITION TO THE PROPOSED SETTLEMENT

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September 22, 2025

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INTRODUCTION

The Attorneys General of New York, Arizona, California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, Ohio, Oregon, Rhode Island, and Washington submit this *amicus curiae* brief in opposition to the proposed class action settlement in this case (the "Proposed Settlement").[1]

Capital One[2] cheated its customers out of more than $2 billion in unpaid interest. After marketing 360 Savings as its flagship high-interest savings account and promising that customers would earn more interest than they would with an average savings account, Capital One created a new savings account product called 360 Performance Savings. The two types of accounts were identical, except that 360 Performance Savings paid a much higher interest rate than 360 Savings—at one point, more than 14 times higher. To avoid paying competitive rates to existing customers, Capital One concealed that these were two distinct products with very different interest rates. It removed all references to 360 Savings from its website and replaced them with the similarly named 360 Performance Savings and instructed employees not to proactively tell 360 Savings customers about 360 Performance Savings. Capital One operated a deceptive and abusive two-tier scheme that took advantage of 360 Savings customers by relegating them to lower-tier status and paying them much less interest than they would have earned with a 360 Performance Savings account.

"No rational person would maintain an otherwise identical account that paid materially lower interest absent deception." Am. Compl. ¶ 6, ECF No. 10. Indeed, the Court found that Capital One's "furtive" scheme, as alleged in the Complaint, represented "an active course of

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[1] The Attorneys General submit this *amicus curiae* brief without prejudice to their ability to enforce claims related to the issues in dispute.

[2] Defendants Capital One, N.A. and Capital One Financial Corporation are referred to herein collectively as "Capital One."

concealment to hide the truth" from consumers. Mem. Op. ("MTD Op.") at 60-61, ECF No. 31. But the Proposed Settlement would not remedy the deception—it would perpetuate the two-tier scheme at the heart of it, and it would do so with the Court's blessing. The premise of the Proposed Settlement is that class members will remain in 360 Savings accounts that pay materially lower interest than otherwise-identical 360 Performance Savings accounts, and Capital One will continue to profit from an artificial distinction of its own making. The parties call this an "excellent result." Mem. in Supp. of Prelim. Approval ("Prelim. Approval Mem.") at 1, ECF No. 162. And it is for Capital One, but not for the class.

The Proposed Settlement has a putative "combined" value of $425 million and is composed of distinct parts. Capital One has agreed to make $125 million in future "additional interest" payments to customers who continue to hold 360 Savings accounts. This actually saves Capital One money while inflating the nominal value of the settlement used to calculate attorneys' fees because the interest rate on 360 Savings accounts, even with the additional interest payments, would still be significantly lower than the 360 Performance Savings rate. Based on interest rates at the time the Proposed Settlement was announced, 360 Savings customers would earn 0.78% APY under the Proposed Settlement, while 360 Performance Savings would earn 3.50% APY. By the time Capital One has paid $125 million in additional interest to 360 Savings customers, it will have ***avoided paying over $800 million*** compared to what it would have paid at the 360 Performance Savings rate.

Capital One has also agreed to pay $300 million to a settlement fund, which will be used for direct cash payments to class members. But all fees and expenses (including $25 million in attorneys' fees attributable to the $125 million in "additional interest" payments) will come out of the settlement fund before any distributions are made to the class, so the value to consumers is

significantly lower than that. The anticipated actual cash payments to consumers also represent less than 7.5% of the interest that Capital One avoided paying to 360 Savings customers. Capital One would keep over $2.5 billion in unpaid interest, while the average consumer—who lost out on more than $717 in interest—would receive less than $54 in direct compensation.

The Proposed Settlement not only fails to adequately redress the harms caused by Capital One's unlawful scheme, but also enshrines that scheme in a Court order and allows those harms to continue. Moreover, Capital One has taken the position that the Proposed Settlement would preclude monetary relief for consumers in the separate and currently pending enforcement action brought by the Attorney General of New York (the "NYAG Action"),[3] which was recently transferred to this Court. Capital One is wrong, and any effort to use a private agreement to impede an ongoing government enforcement action should be unequivocally rejected.

For these reasons, and as set forth in greater detail below, the Attorneys General urge the Court to reject the Proposed Settlement.

INTEREST OF *AMICI CURIAE*

The Attorneys General have a long-standing interest in protecting residents of their respective states from deceptive and unlawful practices. The Attorneys General investigate and take enforcement action on behalf of the public interest and have relevant experience in bringing consumer harm to light and crafting appropriate remedies. The Attorneys General have a broad range of sovereign enforcement powers, including the ability to obtain injunctive relief, restitution, disgorgement, and civil monetary penalties. *See, e.g.*, N.Y. Gen. Bus. Law §§ 349, 350, 350-d; Cal. Bus. & Prof. Code §§ 17203, 17206, 17535, 17536; N.J. Rev. Stat. § 56:8-2.

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[3] *New York v. Capital One, N.A.*, No. 1:25-cv-01403-DJN-WBP (E.D. Va.). The NYAG Action asserts claims under New York Executive Law § 63(12), New York General Business Law §§ 349 and 350, the Consumer Financial Protection Act, 12 U.S.C. § 5536(a)(1)(A) and (B), the Truth in Savings Act, 12 U.S.C. § 4302(e), and Regulation DD, 12 C.F.R. § 1030.8(a)(1).

The Attorneys General have a direct interest in ensuring that their ability to exercise their enforcement powers and pursue all available remedies are not compromised by any agreement between private litigants. On May 14, 2025, the Attorney General of New York sued Capital One for its conduct relating to 360 Savings accounts. The NYAG Action seeks restitution, a permanent injunction against Capital One's unlawful practices, civil penalties, and other relief. In its motion to dismiss the NYAG Action, Capital One took the position that the Proposed Settlement in the class action litigation would "preclude the NYAG from seeking monetary relief on behalf of class members." Defs.' Mem. of Law at 12, New York v. Capital One, N.A., 1:25-cv-1403 (Aug. 29, 2025), ECF No. 18.

State attorneys general perform a unique role for the Court by addressing the fairness of class action settlements. The Class Action Fairness Act requires parties to provide information about proposed settlements to the appropriate state and federal officials before the fairness hearing. 28 U.S.C. § 1715(b). This provision "is intended to combat the 'clientless litigation' problem by adding a layer of independent oversight" and "provid[ing] a check against inequitable settlements." S. Rep. No. 109-14 at 34, 35 (2005). Courts have frequently recognized that the opposition of attorneys general weighs against a proposed class settlement. *See, e.g., Wilson v. DirectBuy, Inc.*, 2011 WL 2050537, at *9 (D. Conn. May 16, 2011) (objection of attorneys general may be "viewe[d] … as a placeholder for many absent class members' objections"); *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1328 (S.D. Fla. 2007) (objection of attorneys general "distinguishes this case from other class actions" and "counsels against a finding" of fairness); *Thompson v. Midwest Found. Indep. Physicians Ass'n*, 124 F.R.D. 154, 161 (S.D. Ohio 1988) (opinion of state attorneys general "is an important factor for the court's consideration in determining the fairness of the proposed settlement").

Finally, a significant portion of the nationwide class members are residents of the states represented by the Attorneys General. There are approximately 4 million nationwide class members, nearly half of whom reside in the states represented by *amici*.[4]

ARGUMENT

Before approving a proposed class action settlement, the Court must find that the settlement is "fair, reasonable, and adequate." Fed R. Civ. P. 23(e)(2). As the Supreme Court has noted, "[c]ourts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). As set forth in greater detail below, the relief offered in the Proposed Settlement is fundamentally flawed in form and inadequate in amount. The Proposed Settlement should therefore be rejected.

I. The Additional Interest Payments Offer Illusory Value and Would Perpetuate a Deceptive Two-Tier Scheme with the Court's Blessing

Under the Proposed Settlement, Capital One would pay $125 million in future "additional interest" to class members with open 360 Savings accounts. Specifically, it would "maintain an interest rate on the 360 Savings account of . . . not less than two times" the national average savings rate, until it has paid $125 million more in interest than it would have paid at the national average rate. Settlement Agreement ¶¶ 5.2, 5.3. This is a massive windfall—for Capital One.

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[4] This estimate is based on the proportional populations of the states represented by the Attorneys General. Capital One did not provide the "reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members," required by 28 U.S.C. § 1715(b)(7)(B). As a result, the exact number of class members residing in states represented by the Attorneys General is not known to *amici*.

The national average savings rate as of June 2025, when the parties announced the Proposed Settlement, was .38%.[5] The Proposed Settlement requires Capital One to pay two times the national average rate, which is still only .76%. By comparison, the 360 Performance Savings rate is 3.50%.[6] That means that even with the additional interest payments, 360 Savings customers would *still* earn much less interest than they would with a 360 Performance Savings account.

Capital One estimates that it will take three years to pay out the additional $125 million in interest. *See* Settlement Agreement ¶ 5.7. This suggests that total 360 Savings deposits are approximately $10.783 billion, with an average balance of $3,594.[7] Using the .76% interest rate above, the average 360 Savings customer would earn $82.26 in interest during this period, including $41.66 in "additional interest."[8] During that same period, a 360 Performance Savings customer with the same starting balance would have earned $397.28 in interest at the account's

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[5] *See* "National Rates and Rate Caps – June 2025," FDIC, https://www.fdic.gov/national-rates-and-rate-caps/national-rates-and-rate-caps-june-2025 (accessed September 18, 2025); Settlement Agreement ¶ 2.28 (defining the minimum rate as twice the National Deposit Rate for Savings Deposit Products, as calculated by the FDIC and reported on the agency's website).

[6] *See* "360 Performance Savings," Capital One, https://www.capitalone.com/bank/savings-accounts/online-performance-savings-account (accessed September 16, 2025).

[7] Using a simple interest calculator, a principal balance of $10.783 billion would yield a total balance of $10,906,609,867.23 after three years at .38% interest. The same principal balance would yield $11,031,596,925.18 at .76%, or $124,987,057.95 in "additional interest." *See* https://www.nerdwallet.com/calculator/compound-interest-calculator (accessed September 16, 2025). There are more than 4 million class members, and approximately 75% of 360 Savings accounts are still open. *See* Prelim. Approval Mem. at 12.

[8] Under the Proposed Settlement, "additional interest" is any interest paid above the national average savings rate. *See* Settlement Agreement ¶ 5.3. Using this benchmark, Capital One was paying some of this additional interest already; as of January 2025, the 360 Savings rate of 0.50% was above the national average savings rate of 0.41%. *See* Ben Blatt, *Why Banks May Be Hoping You're Not Paying Attention*, N.Y. Times (Feb. 2, 2025), https://www.nytimes.com/2025/02/02/upshot/capital-one-savings-interest.html; "National Rates and Rate Caps – January 2025," FDIC, https://www.fdic.gov/national-rates-and-rate-caps/national-rates-and-rate-caps-january-2025 (accessed September 8, 2025).

current rate.[9] By the time Capital One has paid $125 million in additional interest, it would have ***saved over $800 million*** compared to what it would have had to pay at the 360 Performance Savings rate. And once it has done so, it has no obligation to pay even a market interest rate on 360 Savings accounts.

The central claim in the litigation is that Capital One "furtively replaced 360 Savings with 360 Performance Savings, a nearly identically named product with otherwise identical features and disclosures, and then paid vastly divergent interest rates based on accountholder status." MTD Op. at 60. Capital One did so after Plaintiffs deposited their money in 360 Savings accounts "with the reasonable expectation that their accounts, which Capital One labeled 'high interest,' would not later be relegated to a 'much less than high interest' status in reference to . . . 360 Performance Savings." *Id.* at 72. The Court has previously held that the "complex scheme" alleged in the Complaint, if proven, would constitute "an active course of concealment," *id.* at 61, which was "materially misleading," *id.* at 86, "dishonest," *id.* at 40, "fraudulent," "unfair," and "deceptive," *id.* at 69-70. Now, the parties are asking the Court to stamp that scheme with a seal of approval. Instead of ending these unfair, deceptive, and abusive practices, the Proposed Settlement perpetuates them.

The additional interest payments offer the illusion of relief while cementing a two-tier scheme in which 360 Savings customers earn less interest than 360 Performance Savings customers. "There is no reason why anyone would choose the 360 Savings account over the 360 Performance Savings account"—absent deception—because "[t]he products are identical except

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[9] Although Capital One could theoretically lower the interest rate on the 360 Performance Savings account below the 360 Savings rate, in reality, "[t]he 360 Performance Savings account has always had a higher interest than the 360 Savings account." *See* Am. Compl. ¶ 83. 360 Performance Savings is Capital One's flagship savings account, while it is no longer opening or advertising new 360 Savings accounts.

for the interest rate." Amended Complaint at ¶ 81. Yet almost six years after Capital One launched 360 Performance Savings, 75% of class members still have their 360 Savings accounts and are still earning less interest than they would with a 360 Performance Savings account. *See* Prelim. Approval Mem. at 12. The Proposed Settlement is designed to keep it that way.

These structural issues cannot be cured by modifying the Notice of Class Action Settlement ("the Notice"). *See* MTD Op. at 60 ("the allegations in this case do not involve an instance in which Defendants simply omitted information"). But it is worth noting that the Notice digs even deeper to maintain the two-tier system by effectively encouraging class members to keep their 360 Savings accounts and continue to earn less interest than they would with 360 Performance Savings – or to simply close them. The Notice states that $125 million will be paid only "to customers who continue to maintain 360 Savings accounts," Notice at 1, and that 360 Savings customers who "choose to close" their accounts "will receive a Class Cash Payment that is currently estimated to be approximately 15% larger than [they] otherwise would" receive, *id.* at 2-3. It disguises the fact that 360 Savings customers who close their accounts *and* switch to 360 Performance Savings would both receive a larger cash payment and earn more interest going forward than if they kept their 360 Savings account.

But "only an incredibly attentive consumer," MTD Op. at 67, would realize that keeping their account and receiving the "additional interest" touted by the Proposed Settlement is a bad deal. To discover this, a class member would not only have to carefully read the Notice, but would also have to (*i*) visit the Capital One website and visit the page for 360 Performance Savings to check the current interest rate on those accounts, (*ii*) visit the FDIC website and visit the page for national rate information to check the national average rate for savings accounts, and (*iii*) calculate the rate that would be paid on 360 Savings accounts under the Proposed Settlement and compare

it to the 360 Performance Savings rate. The Court has previously found that this type of "detective work" is "unreasonable" and supports a claim of deception. MTD Op. at 67-68.

If the Proposed Settlement were to be approved, Capital One would receive the Court's imprimatur to keep operating and profiting from a two-tier scheme that takes advantage of its customers' misunderstanding—the very wrongdoing that is the gravamen of the class action. *See* Am. Compl. ¶ 6 ("The only explanation for Capital One's conduct is its desire to cheat customers out of interest payments. No rational person would maintain an otherwise identical account that paid materially lower interest absent deception by Capital One"); ¶ 9 ("For every day that 360 Savings accountholders keep their money in the 360 Savings account, Capital One profits from paying less interest to those accountholders than it otherwise would").

II. The Direct Cash Payments Are Not Sufficient to Redress Historical Losses

Under the Proposed Settlement, Capital One would also pay $300 million into a settlement fund, which would be used to pay attorneys' fees, service awards, administrative costs, notice costs, and other expenses before any distributions are made to the class. The anticipated attorneys' fee award of $85 million represents 20% of the "combined" settlement value of $425 million, but all of it comes out of the $300 million allocated for cash payments.[10] Service awards of $10,000 for each of the 26 individual class representatives are another $260,000. Administrative and notice costs and other expenses are unknown but are likely to be substantial. This leaves less than $215 million for cash payments to consumers—a small fraction of the interest that 360 Savings customers would have earned if they had been paid interest at the 360 Performance Savings rate.

[10] Not only do the additional interest payments provide no real relief for consumers, *supra* at 5-7, but their inclusion in the total settlement figure *reduces* the value of the cash payment component—the only meaningful recovery to be had under the Proposed Settlement—by $25 million.

The direct cash payments are the only portion of the Proposed Settlement addressed to the historical losses suffered by the class. The damages in this case have been valued at more than $2.871 billion.[11] Based on this figure, the total cash payments under the Proposed Settlement after fees and costs represent less than 7.5% of the interest that Capital One avoided paying to 360 Savings customers. If the Proposed Settlement is "one of the largest settlements ever in a consumer fraud class action against a bank," Prelim. Approval Mem. at 1, it is because of the sheer scale of Capital One's misconduct. But it does not come close to redressing the harm inflicted.

With over 4 million members in the putative class, the average class member lost out on more than $717 in interest but will receive less than $54 in compensation.[12] By comparison, the statutory *minimum* damages under New York's consumer protection laws are $50, and a court may also award treble damages up to $1,000 for willful violations. *See* N.Y. Gen. Bus. Law § 349(h). The $1,000 potential recovery for the average class member in New York is more than 18 times the average cash payment that they would receive under the Proposed Settlement.

The Proposed Settlement does not adequately compensate class members for their losses. The percentage of recovery is even lower if one accounts for the availability of statutory damages.

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[11] *See* Prelim. Approval Mem. at 18 n.10 ("The Settlement here represents 14.8% of damages"). $425 million divided by 14.8% is more than $2.871 billion. While Capital One disputes this figure, the CFPB also estimated that Capital One's conduct "cost millions of consumers more than $2 billion in lost interest payments." *See* Press Release, *CFPB Sues Capital One for Cheating Consumers Out of More Than $2 Billion in Interest Payments on Savings Accounts* (Jan. 14, 2025), https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-capital-one-for-cheating-consumers-out-of-more-than-2-billion-in-interest-payments-on-savings-accounts/.

[12] The $10,000 service awards for individual class representatives are almost 14 times the average amount of lost interest and more than 185 times the average cash payment for the rest of the class. *Cf. In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013) ("But we should be most dubious of incentive payments when they make the class representatives whole, or (as here) even more than whole; for in that case the class representatives have no reason to care whether the mechanisms available to unnamed class members can provide adequate relief").

And if the Proposed Settlement were to be approved, Capital One would get to keep more than ***$2.5 billion*** in unpaid interest—nearly 90% of the amount it wrongfully withheld. The Proposed Settlement would do little to make consumers whole, while greatly enriching Capital One.

III. The Proposed Settlement Lacks an Express Carveout for Government Claims, Creating the Potential for Ambiguity which Capital One Will Seek to Exploit

The Attorneys General are governmental law enforcement officers authorized by statute to assert claims in the public interest, based on causes of action and seeking remedies that are not available to private litigants. New York, for example, has a public policy of protecting its residents from business practices that are fraudulent, illegal, deceptive, or misleading, and of restraining such business practices from occurring in New York. The New York Attorney General is charged with enforcing that policy, which is codified in statutes including Executive Law § 63(12) and General Business Law § 349.

The Attorneys General are neither parties nor in privity with any party to the Proposed Settlement or any of the releases therein. However, the Proposed Settlement does not contain a carveout which expressly clarifies that it does not release, preclude, or alter any claims belonging to governmental entities, or otherwise limit the rights and remedies available to governmental entities. Instead, the Proposed Settlement broadly releases Capital One from

> any and all claims, defenses, demands, actions, causes of action, rights, offsets, setoffs, suits, damages, lawsuits, costs, relief for contempt, losses, attorneys' fees, expenses, or liabilities of any kind whatsoever, in law or in equity, for any relief whatsoever, including monetary sanctions or damage for contempt, injunctive or declaratory relief, rescission, general, compensatory, special, liquidated, indirect, incidental, consequential, or punitive damages, as well as any and all claims for treble damages, penalties, interest, attorneys' fees, costs, or expenses . . . that in any way concern, arise out of, or relate to the facts alleged in the Complaint or the Action.

Settlement Agreement ¶¶ 2.43, 15.1. These releases are made by "all Settlement Class Members and all Settlement Class Representatives, on behalf of themselves, their heirs, assigns, executors,

administrators, predecessors, and Successors, and any other person or Entity purporting to claim on their behalf." *Id.* at ¶ 15.1.

Any settlement reached between the private parties in this action and approved by the Court should make clear that it does not preclude governmental entities, acting in the public interest pursuant to a statutory mandate, from exercising their sovereign enforcement powers regarding Capital One's unlawful and deceptive acts and practices, including by seeking restitution on behalf of affected consumers. In its motion to dismiss the NYAG Action, Capital One argued that the settlement will "preclude the NYAG from seeking monetary relief on behalf of class members." Defs.' Mem. of Law at 20, New York v. Capital One, N.A., No. 1:25-cv-1403 (Aug. 29, 2025), ECF No. 18. Capital One is clear about its intentions: "if and when" the settlement is finally approved, it will "seek dismissal of the NYAG's claims for restitution." *Id.* at 21.

The Proposed Settlement should be rejected in its entirety because its structure rests upon Capital One's inherently problematic two-tier scheme. In any event, the Proposed Settlement should be amended to include an express carveout for claims and remedies (including but not limited to restitution) belonging to governmental entities.

IV. The Proposed Settlement Is Inadequate Given the Strength of the Claims Released

Finally, it is worth noting that the plaintiffs in the class action "have largely prevailed on the motions that the Court has decided." Prelim. Approval Mem. at 17. The Court (*i*) "denied in substantial part" Capital One's motion to dismiss the amended complaint; (*ii*) denied Capital One's motion to strike plaintiffs' jury demand; and (*iii*) denied Capital One's motion to certify a question to the Virginia Supreme Court regarding plaintiffs' contractual claims. *Id.* at 7-8. But under the Proposed Settlement, Capital One would retain almost all the interest that it avoided paying to 360 Savings customers, and can continue to underpay them in the future, resulting in billions of dollars in profit.

Capital One faces meritorious claims and enormous potential liabilities associated with its unlawful two-tier scheme. The Consumer Financial Protection Bureau and the Attorney General of New York filed separate actions against Capital One based on similar factual allegations. *Cf. Wilson v. DirectBuy, Inc.*, 2011 WL 2050537, at *13 (D. Conn. May 26, 2011) ("evidence that public . . . attorneys are prepared to enforce" consumer protection statutes is relevant to the strength of the claims to be released). Although the Consumer Financial Protection Bureau voluntarily dismissed its lawsuit following a change in leadership, the NYAG Action is currently pending. Capital One's conduct has also given rise to at least two separate shareholder derivative actions. *See Reiter v. Fairbank*, No. 25-cv-01076-CMH-LRV (E.D. Va.); *Kathryn Caliguiri Irrevocable Tr. v. Fairbank*, No. 25-cv-01201-DJN-WBP (E.D. Va.). Particularly with this backdrop in mind, the relief provided by the Proposed Settlement is wholly inadequate. While the risk of further litigation may well support a settlement, it does not support *this* settlement.

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CONCLUSION

For the reasons set forth above, the Attorneys General respectfully urge the Court to reject the Proposed Settlement because it is not fair, reasonable, or adequate.

Dated: September 22, 2025
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Respectfully submitted,

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