No. 23-1163

IN THE

Supreme Court of the United States

DAVID G. BEHENNA,

Petitioner,

v.

BLUE CROSS BLUE SHIELD ASSOCIATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The Petition presents two Questions over which the Courts of Appeals are deeply divided, Pet.15-22, and explained that the lower federal courts are entirely failing to seriously scrutinize attorney's fee applications in class actions like this one, Pet.29-34. Petitioner argued that the answer to each Question Presented is "no," because this Court's precedent "*requires* fees awarded" in cases settling statutory fee-shifting claims to be based on the lodestar method with rare exception. *See* BIO47 (quoting Pet.25; citing Pet.22-23).

Respondents do not deny that the Courts of Appeals are deeply divided over the Questions Presented. They only argue that the Petition is not certworthy because if this Court rejects Petitioner's proposed rule and agrees with any of the circuits' various answers to each, the outcome would be the same. *See* BIO47-52. That is not an answer to Petitioner's argument that *no* circuit is sufficiently policing attorney's fee applications to protect absent class members. And it is not a reason to delay providing guidance to the Courts of Appeals on Questions they are all getting wrong in different ways. Respondents do not suggest that the Court would benefit from further percolation on either Question Presented.

In claiming that this is a bad vehicle because Petitioner forfeit or waived his arguments, BIO42-45, Respondents misunderstand the rules governing review. Respondents do not dispute that the Eleventh Circuit passed upon each Question Presented. And Respondents admit that Petitioner's "argument to the district court was that 'fees should be limited to the lodestar because the Sherman Act is a fee-shifting statute." BIO42-43 (quoting Pet.12). Since that *claim* is preserved and the Court of Appeals passed on the Questions, they are ripe for review.

REPLY BRIEF FOR THE PETITIONER

I. This Court's Review Is Necessary.

The Petition explained that this Court's intervention is desperately needed because federal courts are entirely failing to seriously scrutinize fee applications in common-fund cases. In short, (1) the Courts of Appeals utilize multi-factor balancing tests this Court has expressly rejected as a legitimate means to evaluate the reasonableness of attorney's fee awards, Pet.29-31; (2) the data thus show that federal courts are shirking their duty to protect class members from excessive attorney's fee awards in class action settlements, including nationwide mega-fund settlements like this one, Pet.31-32; and (3) that as a result, class action lawyers have a perverse motive to settle massive class actions for pennies on the dollar rather than litigate even strong cases to judgment because they are likely to get much larger fee awards that way, Pet.32-33.

Respondents acknowledge that because they opted to settle rather than litigate their case, they could seek more than three times the amount of fees to which they were presumptively entitled under this Court's precedent governing "reasonable" attorney's fees in statutory fee-shifting cases. *Cf.* BIO49-50 & n.12 (distinguishing this Court's precedent requiring application of the lodestar method as "involv[ing] the application of fee-shifting statutes in cases that do not involve a common-fund" settlement). Respondents then argue "[t]here is no indication that the result would change if the Court were to provide Behenna's favored answers to either of his questions." BIO45; *see also* BIO51 ("Practically speaking, there is very little if any daylight between the approaches of these circuits."). Relatedly, Respondents argue there is

a "disconnect between [Petitioner]'s questions presented and his arguments for why the panel decision is 'wrong.'" BIO47 (quoting Pet.22-29).

But that mischaracterizes both the Questions Presented and the reasons Petitioner gives for why the answer to each should be: No. The Petition asks whether district courts are "required to apply the percentage-of-the-fund method" in "a class action settlement with a common benefit fund," and if so, whether courts may "presume that 25% of the fund is a reasonable request." *See* Pet.i. Petitioner's "central contention" is that the answer to both Questions is no, not because courts merely have *discretion* to apply the lodestar method instead, but because this Court's precedent "'*requires* fees awarded pursuant to [statutory fee-shifting] provisions to apply the lodestar method.'" BIO47 (quoting Pet.25); *see also* Pet.33-34 (quoting *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554 (2010)).

Respondents do not dispute that agreeing with Petitioner would be outcome determinative. They merely argue that Petitioner is wrong on the merits. *See* BIO49-50 (Petitioner "argues that use of the percentage approach in common-fund cases conflicts with this Court's precedent, but *all* of the decisions he cites involve the application of fee-shifting statutes in cases that do not involve a common-fund recovery"); *see also* BIO47-48 n.10 (arguing that "the 'quick pay' provision was not a 'payment' at all" and Petitioner's Rule "23(h) argument is also meritless"); BIO51-52 (distinguishing this Court's precedent scrutinizing applications for attorney's fee awards). But that is not a reason to deny the Petition and forgo addressing the merits.

Put differently, Respondents simply ignore the possibility that the Court would adopt Petitioner's primary arguments to suggest the outcome would be the same on remand. *See* BIO49-50 & n.13. But if this Court agrees with Petitioner that the answer to each Question Presented is "no" because this Court's precedent requires application of the lodestar method, at least in cases like this one, then the Eleventh Circuit's approval of over three times the lodestar cannot stand. The Petition explained "that no matter how the Courts of Appeals have come down on the Questions Presented, the data show that federal district and circuit courts are entirely failing to protect class members from excessive attorney's fee awards in common-fund class actions." *See* Pet.29-32.

Without citation or explanation, Respondents retort in the final sentence of their last footnote that this problem "does not present the type of important, cross-cutting legal question meriting this Court's review." *See* BIO53 n.15. They make no effort to explain why this Court should find any comfort in denying review despite the nearly three dozen common-fund class actions that were settled for over a billion dollars, resulting in average attorney's fees that far exceeded the lodestar because *none* was litigated to judgment. *See* Pet.31-32. Respondents still have not identified a single mega-fund case that was litigated to judgment.

And Respondents fail to explain why it makes any sense "that an attorney who *settles* a case at a fraction of the claimed damages and only partial injunctive relief is entitled to more than three times as much the attorney's fees they would have been awarded had they litigated the case to judgment and won *all* the claimed damages and

injunctive relief the class sought." *See* Pet.32. The Petition detailed how class action lawyers have been avoiding the "strong presumption" that the lodestar method provides a "reasonable" attorney's fee by settling rather than litigating their cases to judgment. Pet.1-2, 31-33 (quoting *Perdue*, 559 U.S. at 546). Whether federal courts are free to disregard this Court's instructions regarding what constitutes a "reasonable" attorney's fee award in litigated cases so long as the parties resolve their disputes through common-fund settlements is a recurringly important issue this Court should address.

II. Petitioner Did Not Forfeit Or Waive The Questions Presented.

Respondents do not dispute that (A) the Eleventh Circuit squarely passed upon each Question that Petitioner presents for this Court's review. That is all that is needed for this Court to grant the Petition. *See* BIO19. Respondents nonetheless suggest that (B) Petitioner not only forfeit his arguments, BIO42-44, but (C) expressly waived them in his petition for en banc review, BIO44-45. As explained below, neither point is fatal to the Petition.

A. The Eleventh Circuit passed on the Questions Presented.

Respondents' preservation argument (at 42-44) is mistaken. A litigant need not ask a court to overturn circuit precedent—a task a panel is powerless to accomplish—to preserve an argument for this Court's review. Rather, the Court's "traditional rule" "precludes a grant of certiorari only when the question presented was not pressed *or passed upon* below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (quotation marks omitted) (emphasis added). "[T]his rule operates (as it is phrased)

in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon ...." *Ibid.*; *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330 (2010) ("Our practice 'permits review of an issue not pressed below so long as it has been passed upon." (cleaned up)); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (same).

Respondents all but concede that each Question Presented was passed upon below. *See* BIO19 (describing Eleventh Circuit's panel decision as going "on to observe" that "[b]ecause the settlement created a common fund, the district court acted appropriately, under long-standing precedent, both in using the percentage-of-the-fund method to assess the reasonableness of any award, and in applying that method to the facts") (citing App.40a-42a). The first Question Presented asks whether the District Court was "required to apply the percentage-of-the-fund method" in this case. Pet.i. The Court of Appeals answered yes: "In a common fund settlement, attorneys' fees '*shall be* based upon a reasonable percentage of the fund established for the benefit of the class.'" App.41a (quoting *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991)) (emphasis added). The second Question asks whether the District Court could "presume that 25% of the fund is a reasonable request." Pet.i. The Court of Appeals answered yes: "If a fee award falls between 20 and 25 percent, it is presumptively reasonable." App.41a (citing *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1242 (11th Cir. 2011)); *see also* App.42a (noting that fee request "fell within the range of reasonableness" presumed in the Eleventh Circuit).

Indeed, Respondents admit that Petitioner's "argument to the district court was that 'fees should be limited to the lodestar because the Sherman Act is a fee-shifting statute.'" BIO42-43 (quoting Pet.12). They acknowledge that Petitioner "argued that the district court was *required* to use the lodestar method because this was, he said, a fee-shifting case, not a common-fund case." BIO43. There should be little doubt that any refinement of that argument before this Court "is—at most—a new argument to support what has been a consistent claim," properly raised at this stage. *See Citizens United*, 558 U.S. at 331 (cleaned up); *infra* (II)(B).

To be sure, Petitioner tried to advance his preserved claim using arguments consistent with circuit precedent on appeal (see BIO42-45), in recognition that the Eleventh Circuit's minority position on each Question Presented presently governs. But even were Petitioner represented by counsel below, such strategy would "not suggest a waiver; it [would] merely reflect[] counsel's sound assessment that the argument would be futile." *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007). Thus, the Court routinely reviews questions passed on below, even when a petitioner did not ask the appellate court to overturn its binding precedent. *Compare Nasrallah v. Barr*, 590 U.S. 573 (2021) (reversing unpublished Eleventh Circuit decision), *with* Gov't BIO18, *Nasrallah*, *supra* (No. 18-1432) (observing that "petitioner asks this Court to grant review on an argument advanced for the first time in his petition for a writ of certiorari").

B. Petitioner preserved his claim that the District Court was required to apply the lodestar method.

As described above, Respondents acknowledge that Petitioner's claim "to the district court was that 'fees should be limited to the lodestar because the Sherman Act is a fee-shifting statute." BIO42-43 (quoting Pet.12). Yet, on top of criticizing Petitioner for failing to make the same precise *arguments* to support that claim on appeal, Respondents repeatedly criticize the different way Petitioner argued his objections as a *pro se* litigant before he retained counsel to petition for this Court's review. *See, e.g.*, BIO43-44; BIO47-48 & n.10; BIO52-53 & n.15.

But as already explained, there is nothing wrong with making "a new argument to support what has been a consistent claim." *See Citizens United*, 558 U.S. at 331 (cleaned up). So long as the *claim* has been preserved, any new or refined arguments in support of that claim are properly before this Court. *Id.* at 330-31. And Respondents do not dispute that Petitioner has always claimed that the District Court was only permitted to award Respondents' counsel their lodestar for the work they did to settle the statutory fee-shifting claims.

C. Petitioner did not affirmatively waive his "central contention."

Again, since the outset, Petitioner has preserved his claim that "'fees should be limited to the lodestar because the Sherman Act is a fee-shifting statute.'" *See* BIO42-43 (quoting Pet.12). Thus, his "central contention is that the district court was *required* to apply the lodestar method because the claims here were brought under a statute that provides for fee-shifting." *See* BIO7. Yet Respondents

contend (at 44-45) that Petitioner "filed a rehearing petition" in which he "sought to clarify … that he had intentionally *waived* his argument that the district court erred in applying the percentage method to the award attributable to the common-fund recovery." But the panel did not reject Petitioner's claim on this basis, no doubt because he did not expressly waive any argument before the panel decision was entered. That is why Respondents rely on Petitioner's en banc rehearing petition to argue that Petitioner retrospectively waived the arguments he pressed in the District Court.

There was no need to seek rehearing in Respondents' preferred manner, for the Eleventh Circuit had already passed upon it. *See Williams*, 504 U.S. at 41, 44.[*] Moreover, Petitioner cannot be worse off for having filed a petition for rehearing en banc that was not a prerequisite to certiorari review in the first place. *See, e.g.*, *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1229 n.6 (11th Cir. 2005) (per curiam) ("A petition for rehearing or suggestion for rehearing en banc is not, of course, required before a petition for certiorari may be filed in the United States Supreme Court."). Especially as a *pro se* litigant. *Cf. Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is 'to be liberally construed,' ....") (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

Respondents do not explain what end would have been served by asking the en banc Eleventh Circuit to

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[*] Even if there were some pressed-*and*-passed-upon rule, it is unlikely that a petition for rehearing en banc would suffice to press an issue anyway. *Cf. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 712 n.4 (2010).

abandon long-settled circuit precedent that not only *required* the District Court to apply the percentage method, but also instructed that Respondents' $626.65 million attorney's fees request was presumptively reasonable. *See* App.41a ("In a common fund settlement, attorneys' fees 'shall be based upon a reasonable percentage of the fund established for the benefit of the class.'") (quoting *Camden I*, 946 F.2d at 774); *ibid.* ("If a fee award falls between 20 and 25 percent, it is presumptively reasonable.") (citing *Faught*, 668 F.3d at 1242). The Court of Appeals has given no indication that it is willing to revisit its 33-year-old decision in *Camden I* or its 12-year-old decision in *Faught*, as evidenced by its decision in this case. On the contrary, the Eleventh Circuit has recently and repeatedly rejected the arguments Petitioner raises here. *See, e.g.*, *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1262 n.14 (11th Cir. 2020) ("We briefly address—and reject—Dickenson's argument that the district court's fee award is unlawful because the Supreme Court's decision in *Perdue* overruled *Camden I* .... As we recently explained, *Perdue* didn't abrogate *Camden I*. *Camden I* therefore remains good law ....") (citations omitted); *In re Home Depot Inc.*, 931 F.3d 1065, 1084-85 (11th Cir. 2019) (same).

CONCLUSION

The Petition should be granted. Alternatively, the Petition should be held for No. 23-1063.

June 4, 2024

Respectfully submitted,

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