No. 23-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When determining a reasonable attorney's fee in a class action settlement with a common benefit fund, are district courts required to apply the percentage-of-the-fund method?

2. Even if it is appropriate to apply the percentage-of-the-fund method in a class action settlement with a common benefit fund, may district courts presume that 25% of the fund is a reasonable request?

PARTIES TO THE PROCEEDINGS

Petitioner was an objector in the District Court and an appellant in the Court of Appeals. Petitioner is David G. Behenna, a member of both subclasses. The other appellants below were Topographic, Inc.; Employee Services, Inc.; Jennifer Cochran; Aaron Craker; and Home Depot U.S.A., Inc.

Respondents were the plaintiff-appellees and defendant-appellees in the Court of Appeals. The plaintiff-appellees below were Galactic Funk Touring, Inc.; American Electric Motor Services, Inc.; CB Roofing, LLC; Pearce, Beville, Leesburg, Moore, P.C.; Pettus Plumbing & Piping, Inc.; Consumer Financial Education Foundation of America, Inc.; Fort McClellan Credit Union; Rolison Trucking Co., LLC; Conrad Watson Air Conditioning, Inc.; Linda Mills; Frank Curtis; Jennifer Ray Davison; Pete Moore Chevrolet, Inc.; Jewelers Trade Shop; Saccoccio & Lopez; Angel Foster; Monika Bhuta; Michael E. Stark; G & S Trailer Repair Incorporated; Chelsea Horner; Montis, Inc.; Renee Allie; John G. Thompson; Avantgarde Aviation, Inc.; Hess, Hess, & Daniel, P.C.; Betsy Jane Belzer; Barlett, Inc.; Matthew Alden Boyd; Gaston GPA Firm; Rochelle McGill; Brian McGill; Sadler Electric; Jeffrey Garner; Amy Macrae; Vaughn Pools, Inc.; Casa Blanca, LLC; Jennifer D. Childress; Clint Johnston; Janeen Goodin; Marla Sharp; Erik Barstow; GC/AAA Fences, Inc.; Angie Hill; Christy Bradberry; Kevin Bradberry; Juanita Aschenbrenner; Tom Aschenbrenner; Free State Growers, Inc.; Jason Goodman; Tom Goodman; Comet Capital, LLC; Barr, Sternberg, Moss, Lawrence, Silver & Munson, P.C.; Mark Krieger; A. Duie Pyle, Inc.; Deborah Piercy; Lisa Tomazolli; and Hibbett Sports.

The defendants-appellees in the Court of Appeals were Blue Cross Blue Shield Association, Blue Cross and Blue Shield of Alabama; Blue Cross and Blue Shield of Arizona, Inc.; Blue Cross and Blue Shield of Florida, Inc.; Blue Cross and Blue Shield of Massachusetts, Inc.; Blue Cross and Blue Shield of North Carolina, Inc.; BlueCross BlueShield of Tennessee, Inc.; California Physicians' Service d/b/a Blue Shield of California; CareFirst, Inc.; Care-First of Maryland, Inc.; Group Hospitalization and Medical Services, Inc.; CareFirst BlueChoice, Inc.; Hawaii Medical Service Association (Blue Cross and Blue Shield of Hawaii); Health Care Service Corporation, an Illinois Mutual Legal Reserve Company, including its divisions Blue Cross and Blue Shield of Illinois, Blue Cross and Blue Shield of Texas, Blue Cross and Blue Shield of New Mexico, Blue Cross and Blue Shield of Oklahoma, and Blue Cross and Blue Shield of Montana; Caring for Montanans, Inc., f/k/a Blue Cross and Blue Shield of Montana, Inc.; Wellmark of South Dakota, Inc. (Wellmark Blue Cross and Blue Shield of South Dakota); Wellmark, Inc. (Wellmark Blue Cross and Blue Shield of Iowa); Triple-S Management Corporation; Triple-S Salud, Inc.; Elevance Health, Inc. f/k/a Anthem, Inc., and all of its named subsidiaries in this consolidated action; Aware Integrated, Inc.; Louisiana Health Service & Indemnity Company (Blue Cross and Blue Shield of Louisiana); BCBSM, Inc. (Blue Cross and Blue Shield of Minnesota); Blue Cross and Blue Shield of South Carolina; Horizon Healthcare Services, Inc. (Horizon Blue Cross and Blue Shield of New Jersey); Blue Cross & Blue Shield of Rhode Island; Blue Cross and Blue Shield of Vermont; Cambia Health Solutions, Inc.; Regence BlueShield of Idaho; Regence BlueCross BlueShield of Utah; Regence BlueShield (of Washington); Regence BlueCross BlueShield of Oregon; Health Care Service Corporation, an Illinois Mutual Legal

Reserve Company, including its divisions Blue Cross and Blue Shield of Illinois, Blue Cross and Blue Shield of Texas, Blue Cross and Blue Shield of New Mexico, Blue Cross and Blue Shield of Oklahoma, and Blue Cross and Blue Shield of Montana; Caring for Montanans, Inc., f/k/a Blue Cross and Blue Shield of Montana, Inc.; Highmark Health, a Pennsylvania non-profit organization; Highmark Inc., f/k/a Highmark Health Services; Highmark West Virginia Inc.; Highmark Blue Cross Blue Shield Delaware Inc.; Highmark Western and Northeastern New York Inc.; Premera Blue Cross, d/b/a Premera Blue Cross Blue Shield of Alaska; Blue Cross Blue Shield of Michigan Mutual Insurance Company; Blue Cross & Blue Shield of Mississippi, a Mutual Insurance Company; Independence Hospital Indemnity Plan, Inc.; Independence Health Group, Inc.; USAble Mutual Insurance Company, d/b/a Arkansas Blue Cross and Blue Shield and as Blue Advantage Administrators of Arkansas; Capital Blue Cross; Blue Cross of Idaho Health Service, Inc.; Blue Cross and Blue Shield of Kansas, Inc.; Blue Cross and Blue Shield of Kansas City; Blue Cross and Blue Shield of Nebraska; Blue Cross Blue Shield of North Dakota; Blue Cross Blue Shield of Wyoming; and Excellus Health Plan, Inc., d/b/a Excellus BlueCross BlueShield.

RELATED PROCEEDINGS

1. This case arises out of multi-district litigation consolidated *In re Blue Cross Blue Shield Antitrust Litigation MDL 2406*, 2:13-cv-20000 (N.D. Ala.), before the Northern District of Alabama. The District Court entered a final order and judgment approving the settlement agreement on August 9, 2022. That judgment was amended by the District Court on September 7, 2022.

2. Petitioner David G. Behenna appealed that judgment on September 8, 2022. *In re Blue Cross Blue Shield Antitrust Litig. MDL 2406*, No. 22-13051 (11th Cir.). On October 25, 2023, the Eleventh Circuit affirmed the District Court's judgment approving the settlement agreement. *In re Blue Cross Blue Shield Antitrust Litig. MDL 2406*, 85 F.4th 1070 (11th Cir. 2023).

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INTRODUCTION

This Court has held that "there is a strong presumption that the lodestar"—the "number of hours worked multiplied by the prevailing hourly rates"—"is sufficient" to calculate a reasonable attorney's fee "under federal fee-shifting statutes;" that "factors subsumed in the lodestar calculation cannot be used as a ground for increasing an award above the lodestar;" and that "a party seeking fees has the burden of identifying a factor that the lodestar does not adequately take into account and proving with specificity that an enhanced fee is justified." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 546 (2010). When courts fail to "apply these standards," this Court will "reverse" and "remand for further proceedings." *Ibid.*

But in this case, the Eleventh Circuit held that because the parties agreed to settle plaintiffs' statutory fee-shifting claims on behalf of a nationwide class in exchange for diluted injunctive relief and $2.67 billion—a small fraction of their claimed damages—the District Court was required to award plaintiffs' lawyers a percentage of the class's fund rather than the $194.23 million lodestar. App.41a. That minority view conflicts with the decisions of nearly every other circuit and this Court's precedent. And because the lawyers requested 23.47% of the fund—a whopping $626.65 million, over three times the lodestar—the Eleventh Circuit held that the judge could presume the fee was reasonable without regard to any other consideration, since it fell within a "benchmark" range of 20% to 25%. App.41a-42a. That minority view also conflicts with the decisions of other circuits and this Court's precedent.

Plaintiffs are subscribers of health insurance from 36 Blue Cross Blue Shield ("BCBS") businesses. These health-insurance subscribers alleged that the BCBS

Association and its 36 member BCBS businesses agreed not to compete in violation of federal antitrust laws. The District Court agreed, granting partial summary judgment to plaintiffs. *In re BCBS Antitrust Litig.*, 308 F. Supp. 3d 1241, 1267 (N.D. Ala. 2018).

Petitioner, a non-lawyer member of the class who represented himself *pro se* before coming to this Court, did not object to the substantive terms of the settlement. What he could not abide was counsel's fee request, given the "strong presumption" that the lodestar figure is "sufficient" under federal fee-shifting statutes like the Clayton Act. *Perdue*, 559 U.S. at 554. And this is not an outlier case. The lower courts are rubber-stamping fee requests without "moderation" or "a jealous regard for the rights of those who are interested in the fund." *Contra Trustees v. Greenough*, 105 U.S. 527, 536-37 (1881).

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 they resolve their disputes through common-fund settlements is a recurringly important issue this Court should address. Plaintiffs' lawyers have not identified a single mega-fund case that was litigated to judgment. And it's easy to understand why. If they had litigated this case to judgment and achieved all the treble damages and injunctive relief they sought, they would have faced a strong presumption that the lodestar is suitable. By settling for pennies on the dollar and diluted injunctive relief, plaintiffs' counsel were able to obtain many times that amount with no real scrutiny.

This Court's intervention sorely is needed to put an end to this unacceptable trend.

PETITION FOR WRIT OF CERTIORARI

Petitioner David G. Behenna respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit. Alternatively, the Petition should be held for this Court's disposition of *Home Depot U.S.A., Inc. v. BCBS Association*, No. 23-1063 (U.S.) (petition pending).

OPINIONS BELOW

The order of the Court of Appeals denying rehearing en banc (App.173a-174a) is unreported. The opinion of the Court of Appeals (App.1a-45a) is reported at 85 F.4th 1070. The opinion of the District Court (App.46a-172a) is unreported but available at 2022 WL 4587618.

JURISDICTION

The Court of Appeals entered its judgment on October 25, 2023. Petitioner timely petitioned for rehearing en banc, after being granted an extension, on December 15, 2023. The Court of Appeals denied en banc rehearing on January 26, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.
>
> ***

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides, in relevant part:

> (a) … [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
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> ***

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides, in relevant part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue:
>
> ***

> In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

STATEMENT

1. The Sherman Act prohibits "contracts, combinations, or conspiracies in restraint of trade or commerce." *NCAA v. Alston*, 594 U.S. 69, 80 (2021) (quoting 15 U.S.C. § 1) (cleaned up). To bolster enforcement of that prohibition, Congress created a private right of action that authorizes "any person, firm, corporation, or association" to sue for injunctive relief or treble damages. 15 U.S.C. §§ 15, 26; *see Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 130-31 (1969) (Congress's purpose in "giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws").

a. Congress also provided for fee-shifting—an exception to the "well established" "'American Rule,'" under which "'the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.'" *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561 (1986) ("*Delaware Valley I*") (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975)). Thus, a successful antitrust plaintiff "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15. And in "any action" for injunctive relief under Section 16, "in which the plaintiff substantially prevails, the court shall award the

cost of suit, including a reasonable attorney's fee, to such plaintiff." 15 U.S.C. § 26.

Previously, this Court held that exceptions to the American Rule for claims seeking injunctive relief must come from Congress. *See Alyeska*, 421 U.S. at 262-63. The Court highlighted "[f]ee shifting in connection with treble-damages awards under the antitrust laws [a]s a prime example." *Id.* at 263. But at the time, there was no fee-shifting provision in Section 16. Concerned this would hinder private plaintiffs from bringing actions to enjoin federal antitrust violations, Congress responded with the Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976)—amending the Clayton Act in part to provide for mandatory fee-shifting to plaintiffs who substantially prevail on their Section 16 claims. *See* 15 U.S.C. § 26.

"*Alyeska* invite[d] Congress to enact specific legislation authorizing the award of attorneys' fees when there is a strong public policy," and "[i]n the case of § 16 antitrust injunction actions, there is such a compelling public policy to justify the award of attorneys' fees." H.R. Rep. No. 94-499, at 19 (1976); *see* S. Rep. No. 94-803, pt. 1, at 37-39 (1976). "Indeed, the need for the awarding of attorneys' fees in § 16 injunction cases is greater than the need in § 4 treble damage cases." H.R. Rep. No. 94-499, at 20. "In injunction cases, ... without the shifting of attorneys' fees, a plaintiff with a deserving case would personally have to pay the very high price of obtaining judicial enforcement of the law and of the important national policies the antitrust laws reflect." *Ibid.* "A prevailing plaintiff should not have to bear such an expense." *Ibid.*

b. Interpreting other statutes for which Congress permits an award of "reasonable attorney's fees," this Court has held: "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate"—the lodestar. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (so holding as to 42 U.S.C. § 1988, which permits courts to award "a reasonable attorney's fee" to "the prevailing party"). "This calculation," the Court explained, "provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Ibid.*

And "in determining an award of reasonable attorney's fees under § 7002(e) of the Solid Waste Disposal Act (SWDA) or § 505(d) of the Federal Water Pollution Control Act (Clean Water Act (CWA))," the Court reaffirmed that the "'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence." *City of Burlington v. Dague*, 505 U.S. 557, 559, 562 (1992) (citations omitted). "We have established a 'strong presumption' that the lodestar represents the 'reasonable' fee, and have placed upon the fee applicant who seeks more than that the burden of showing that 'such an adjustment is *necessary* to the determination of a reasonable fee.'" *Ibid.* (quoting *Blum v. Stenson*, 465 U.S. 886, 898 (1984)) (citation omitted).

In *Dague*, the Court rejected the plaintiff's argument "that a 'reasonable' fee for attorneys who have been retained on a contingency-fee basis must go beyond the lodestar, to compensate for risk of loss and of consequent nonpayment." 505 U.S. at 562. "Fee-shifting statutes should be construed, he contend[ed], to replicate the

economic incentives that operate in the private legal market, where attorneys working on a contingency-fee basis can be expected to charge some premium over their ordinary hourly rates." *Ibid.*

Writing for the Court, Justice Scalia noted "at the outset that an enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar." *Dague*, 505 U.S. at 562. The "risk of loss," for example, "is ordinarily reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty" of the case, "or in the higher hourly rate of the attorney skilled and experienced enough to do so." *Ibid.* "Taking account of it again through lodestar enhancements," the Court held, "amounts to double counting." *Ibid.* Nor should counsel be awarded an enhancement based on any risk related to the "relative merits of the claim," because "that *always* exists (no claim has a 100% chance of success)." *Id.* at 563. "Moreover, the consequence of awarding contingency enhancement to take account of this 'merits' factor would be to provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones." *Ibid.*

Reviewing the foregoing precedents, the Court reiterated more recently that the lodestar results in a presumptively reasonable "attorney's fee, under federal fee-shifting statutes." *Perdue*, 559 U.S. at 546. "First, a 'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious ... case." *Id.* at 552. Just like the fee-shifting provisions of the Clayton Act, "Section 1988's aim is to enforce the covered civil rights statutes, not to provide 'a form of economic relief to improve the financial lot of attorneys.'"

See ibid. (quoting *Delaware Valley I*, 478 U.S. at 565). "Second, the lodestar method yields a fee that is presumptively sufficient to achieve this objective." *Ibid.* "Indeed," that "presumption is a 'strong' one." *Ibid.* (quoting *Dague*, 505 U.S. at 565). "Third," this Court has "never sustained an enhancement of a lodestar amount for performance," but "repeatedly said that enhancements may be awarded in 'rare' and 'exceptional' circumstances." *Ibid.* (citation omitted).

"Fourth," the Court "ha[s] noted that the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee, and ha[s] held that an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation." *Perdue*, 559 U.S. at 553 (cleaned up). For example, "the novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors presumably are fully reflected in the number of billable hours recorded by counsel." *Ibid.* (cleaned up). And "the quality of an attorney's performance generally should not be used to adjust the lodestar because considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate." *Ibid.* (cleaned up).

Since "the burden of proving that an enhancement is necessary must be borne by the fee applicant," the "fee applicant seeking an enhancement must produce 'specific evidence' that supports the award." *Perdue*, 559 U.S. at 553. "This requirement is essential if the lodestar method is to realize one of its chief virtues, *i.e.*, providing a calculation that is objective and capable of being reviewed on appeal." *Ibid.*

c. In the absence of a federal fee-shifting statute, this Court established in 1881 a limited exception to the American Rule when a party "recovers a fund for the common benefit" of nonparties. *Greenough*, 105 U.S. at 534. In that situation, this Court held, federal courts have the inherent power to award actual "costs and expenditures" to be "paid out of the fund," including the "fees of solicitors and counsel." *Id.* at 530, 534. This "common-fund doctrine reflects the traditional practice in courts of equity," which "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." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Yet "allowances of this kind," the Court cautioned, must be "made with moderation and a jealous regard to the rights of those who are interested in the fund." *Greenough*, 105 U.S. at 536-37.

"That rule has been consistently followed" by this Court. *See Alyeska*, 421 U.S. at 257-58 (1975) (collecting cases from 1881 through 1970); *see, e.g.*, *United States v. Equitable Tr. Co. of New York*, 283 U.S. 738, 746 (1931) (district court awarded 25% of common fund, Second Circuit reduced the award to 15%, and this Court further reduced the award to 7.5%); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 128 (1885) (reducing "10 per cent" fee award by half); *see also Harrison v. Perea*, 168 U.S. 311, 325 (1897) (approving reduction of fee award from equitable fund to 10%).

2. This consolidated action involves several private antitrust enforcement suits, the facts and procedure of which are also described in a related Petition for Writ of Certiorari, *Home Depot U.S.A., Inc. v. BCBS Association*

("Home Depot Petition"), No. 23-1063 (U.S. Mar. 26, 2024), at 8-15 (pending).

In short, several health-insurance subscribers filed class-action complaints alleging that defendants violated federal antitrust law by restricting their competition through the BCBS Association. App.3a. For these alleged violations, the subscribers sought money damages, treble damages, restitution, and injunctive relief under the Clayton Act. App.4a.

In April 2018, the District Court granted partial summary judgment to the subscribers, holding that defendants' agreements violated the Sherman Act *per se*. *BCBS*, 308 F. Supp. 3d at 1267.

3. Subscribers' counsel engaged defendants in settlement discussions beginning in 2015. A class settlement was reached in October 2020.

The settlement agreement includes two classes: a Rule 23(b)(2) injunctive-relief class (no opt out) and a Rule 23(b)(3) damages class (opt out). Petitioner is a member of both. *See* App.5a.

Defendants agreed to pay $2.67 billion in damages to the (b)(3) class. App.230a. And defendants agreed that so long as plaintiffs' lawyers' request for attorney's fees and costs did not exceed "25% of the $2.67 billion fund," they would not object. App.239a. The agreement further provided that a "partial award of seventy-five million ($75,000,000) of the total attorneys' fees, expenses, and interest ... shall be paid ... no later than 31 days after the entry of and order preliminarily approving the Settlement"—long before any common fund or injunctive relief was secured for the class, and indeed long before

plaintiffs' lawyer had submitted their attorney's fee application. App.239a.

4.a. Petitioner objected *pro se* and "presented argument on his objection at the Fairness Hearing." App.138a.

Relevant here, Petitioner argued that "Subscribers' counsel's fees should be limited to the lodestar because the Sherman Act is a fee-shifting statute." App.139a; *see* D.Ct.Doc.2812-20. The District Court disagreed.

Applying Eleventh Circuit precedent, the court held that it was required to use the percentage-of-the-fund method. App.142a. Moreover, according to the court, the "fee sought by Subscribers' Counsel, 23.47% of the Common Fund, is at or below the percentage fee typically awarded in similar cases" and within the "'benchmark range' in this Circuit." App.142a (footnote and citation omitted). "Because the requested fee—even when including expenses—does not exceed 25%," the court held it did not "need [to] consider" other factors. App.143a (citing *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1242 (11th Cir. 2011)).

"Nevertheless," the court held that "even if the factors" set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), *abrogated by Blanchard v. Bergeron*, 489 U.S. 87 (1989), "applied here, that process confirms that the requested fee is reasonable." App.143a; *see* App.144a-147a (summarily concluding that every *Johnson* factor weighed in favor of approving the $626.65 million fee request).

Petitioner appealed.

b. Before the Eleventh Circuit, Petitioner argued that "the District Court failed to treat separately the injunctive relief in its analysis and assessment of Plaintiffs' Counsel's fee application." C.A.Doc.122 ("Objection"), at 9. Because the "District Court found that the injunctive relief was of greater value to the Class than was the $2,670,000,000 monetary relief," he argued that the District Court "should have bifurcated its fee analysis." *Ibid.* The "greater value" injunctive relief was obtained pursuant to a mandatory fee-shifting statute, "requir[ing] the District Court to assess the attorneys' fees for the injunctive relief using the lodestar method." *Ibid.*

He also argued that the $75,000,000 prepayment for attorney's fees and costs at the preliminary approval stage was improper. Objection, at 9-10. Moreover, he argued, the judge's "lodestar multiplier" was inaccurate, and should have been understood to represent a 10x lodestar multiplier, not 3.23. *Id.* at 10.[1] Finally, Petitioner argued, "the District Court erred in finding that 23.5% was a reasonable percentage-of-fund attorneys' fee," since the analysis "included the injunctive relief lodestar," and because the judge erred in applying "the *Johnson* factors." *Ibid.*

The Eleventh Circuit rejected the arguments. Although the Eleventh Circuit viewed Petitioner's specific

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[1] *See id.* at 87-88 (because counsel "disclose[d] that up to three-quarters of the lodestar ... was billed on non-monetary relief, the lodestar related to non-monetary relief is estimated at $146,000,000 and the lodestar related to monetary relief would approximate $48,000,000," such that lodestar multiplier would be "10.0 times" the "est. monetary relief lodestar") (citation omitted).

bifurcation objection as forfeited, it proceeded to consider the merits, holding that "the district court did not abuse its discretion." App.39a-40a.

Whether the claims "arose under a fee-shifting statute 'is of no consequence,'" the Eleventh Circuit held. App.40a-41a (quoting *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1279 n.24 (11th Cir. 2021)). "What matters," in the Eleventh Circuit, "is the kind of fund that the settlement agreement creates. *See In re Home Depot Inc.*, 931 F.3d 1065, 1082 (11th Cir. 2019) ('Where there has been a settlement, the basis for the statutory fee has been discharged, and it is only the fund that remains.')." App.41a. Because the "settlement created a common fund," the court held that under its circuit precedent, the "district court did not abuse its discretion in using the percentage-of-the-fund analysis" instead of "the lodestar methodology or some combination of the two." *Ibid.*

The court also reaffirmed its circuit precedent requiring that 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 Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991)). And the court reaffirmed its precedent reasoning that courts "typically award fees of 20 to 30 percent of the common fund, *see In re Home Depot*, 931 F.3d at 1076, and view the mean of that range—25 percent—as a rough benchmark, *Camden I*, 946 F.2d at 775." App.41a. "If a fee award falls between 20 and 25 percent, it is presumptively reasonable" in the Eleventh Circuit. *Ibid.* (citing *Faught*, 668 F.3d at 1242. "If the fee exceeds 25 percent," *then*, according to

the court, "the district court must assess the reasonableness of the percentage using the 12 *Johnson* factors. *Ibid.*

"Even though this fee fell within the range of reasonableness," such that the District Court did not need to take case-specific factors into consideration under circuit precedent, the Court of Appeals noted that "the district court reviewed the percentage under the *Johnson* factors" anyway, "then used the lodestar to confirm the reasonableness of the percentage." App.42a. "That thorough analysis" and award of 3.23 times the lodestar, the court concluded, "followed our precedents and was not an abuse of discretion." *Ibid.*

The Eleventh Circuit denied rehearing en banc. App.174a.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's Decision Conflicts With the Rules of Other Circuit Courts.

The Eleventh Circuit's ruling exacerbates a deeply entrenched circuit split on each question presented. The circuits are divided 2 to 10 on the first Question, and at least 2 to 2 on the second.

A. The circuits are divided 2 to 10 on the first Question Presented.

1. Only the Eleventh and D.C. Circuits have held that district courts are precluded from using the lodestar method to calculate reasonable attorney's fees in common-fund cases.

In *Camden I*, the Eleventh Circuit considered whether attorney's fees and expenses awarded "out of the

fund that has been created for the class .... should be based upon a percentage of the fund or the lodestar computation method." 946 F.2d at 771. Because it "believe[s] that the percentage of the fund approach is the better reasoned in a common fund case," the court held that district judges do not have discretion to use any other method. *Id.* at 774. "Henceforth in this Circuit," the court held, "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Ibid.* "The lodestar analysis," on the other hand, "shall continue to be the applicable method used for determining statutory fee-shifting awards." *Ibid.*

In this case, the court reaffirmed its circuit precedent in rejecting Petitioner's objections. "In a common fund settlement," the court held, "attorneys' fees 'shall be based upon a reasonable percentage of the fund established for the benefit of the class.'" App.41a (quoting *Camden I*, 946 F.2d at 774). It did not matter to the court that the Clayton Act is a fee-shifting statute. "[W]hether the claim arose under a fee-shifting statute 'is of no consequence.'" App.40a-41a (quoting *In re Equifax*, 999 F.3d at 1279 n.24). "What matters is the kind of fund that the settlement creates." App.41a.

The D.C. Circuit is the only other circuit that forbids district courts from using the lodestar method in common-fund cases. The panel majority in *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993), "conclude[d] that percentage-of-the-fund is the proper method for calculating fees in a common fund case." *Id.* at 1272; *see also In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 87-88 (D.D.C. 2013) ("While the commonly used 'lodestar' method represents one way of calculating

reasonable attorneys' fees, this circuit has indicated that in cases involving a common fund that has been established for the benefit of the plaintiffs, the 'percentage of the fund' method 'is the appropriate mechanism for determining the attorney fees award.'" (quoting *In re Dep't of Veterans Affs. (VA) Data Theft Litig.*, 653 F. Supp. 2d 58, 60 (D.D.C. 2009))).

Judge Douglas H. Ginsburg dissented "insofar as the court relie[d] upon the percentage-of-the-fund approach as the only permissible measure of a reasonable fee in a common fund case." *Swedish Hosp.*, 1 F.3d at 1273 (D.H. Ginsburg, J., concurring in part and dissenting in part). The "lodestar is the starting point for calculating a fee award," he argued, "and the percentage-of-the-fund it represents is merely a secondary check upon the reasonableness of the resulting award." *Ibid.* "[R]eliance upon the percentage-of-the-fund approach without any regard for the lodestar," he cautioned, "may produce excessively high awards." *Ibid.* The case at bar was "a case in point: since the fee award c[ame] to about 3.3 times what it would be using the lodestar, the case would have been worth bringing (i.e., would have given counsel an *ex ante* probability of earning the lodestar rate) even if the plaintiff had only a 30% chance of any success." *Ibid.*

2. Every other circuit holds that district courts have discretion to apply the lodestar method in common-fund cases.

a. At least five circuits have expressly considered and rejected "the District of Columbia and Eleventh Circuits mandate" of "the exclusive use of the percentage approach in common fund cases." *E.g.*, *Goldberger v. Integrated*

Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000) (citing *Swedish Hosp.*, 1 F.3d at 1271; *Camden I*, 946 F.2d at 774).

The Second Circuit, for example, "question[ed] the wisdom of abandoning the lodestar entirely," which in the court's view "remains useful as a baseline even if the percentage method is eventually chosen." *Goldberger*, 209 F.3d at 50. "The district court's use of the lodestar method" in that case was thus "a permissible exercise of its discretion." *Ibid.* The Second Circuit recently reaffirmed its long-held approach, "established at the turn of this century." *See Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 723 (2d Cir. 2023) (citing *Goldberger*, 209 F.3d at 50).

The Sixth Circuit, "aware of the recent trend towards adoption of a percentage of the fund method" in common fund cases (citing *Swedish Hospital* and *Camden I*), noted that other "sister courts of appeals have recognized that the appropriate method for use in common fund cases depends on the circumstances of each case." *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993). "In this circuit," the Sixth Circuit concluded, "we require only that awards of attorney's fees by federal courts in common fund cases be reasonable under the circumstances." *Id.* at 516; *see also Linneman v. Vita-Mix Corporation*, 970 F.3d 621, 624 (6th Cir. 2020).

The Seventh Circuit also "considered ... and rejected" arguments that it should follow the Eleventh and D.C. Circuits' approach and "compel district courts to use the 'percentage-of-recovery method' to award attorney's fees in all common fund cases." *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994); *see also*

Americana Art China Co., Inc. v. Foxfire Printing and Packaging, Inc., 743 F.3d 243, 247 (7th Cir. 2014).

The Ninth Circuit has done so as well. *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994); *see also In re Optical Disk Drive Prod. Antitrust Litig.*, 959 F.3d 922, 929 (9th Cir. 2020).

Same for the Tenth Circuit. *Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994); *see also Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988).

b. Five other circuits agree that "in a common fund case," district courts "may calculate counsel fees either on a percentage of the fund basis or by fashioning a lodestar." *Heien v. Archstone*, 837 F.3d 97, 100 (1st Cir. 2016) (quotation marks omitted); *see Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 496 (3d Cir. 2017) (same); *McAdams v. Robinson*, 26 F.4th 149, 162 (4th Cir. 2022) (same); *Union Asset Management Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012) (same); *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019) (same).

"Regardless of the method chosen," these courts generally "suggest[] it is sensible for a court to use a second method of fee approval to cross-check its initial fee calculation." *See, e.g.*, *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005), *as amended* (Feb. 25, 2005).

B. The circuits are divided at least 2 to 2 on the second Question Presented.

1. Only the Eleventh and Ninth Circuits have held that district courts may presume a request for attorney's fees is reasonable so long as it meets a fixed "benchmark."

In *Faught*, the Eleventh Circuit held that it is "well-settled law from this court that 25% is generally recognized as a reasonable fee award in common fund cases." 668 F.3d at 1243. The district court had not even "separately analyze[d] whether the 25% awarded ... was a reasonable fee in itself, but determined that because 25% is generally accepted as reasonable in common fund cases, *see Camden I*, 946 F.2d at 774, it should also be considered reasonable in this case." *Ibid.* The Eleventh Circuit nonetheless affirmed. *Ibid.*

Here, the Eleventh Circuit reaffirmed its approach: "If a fee award falls between 20 and 25 percent, it is presumptively reasonable." App.41a (citing *Faught*, 668 F.3d at 1242). "If the fee exceeds 25 percent," *then* "the district court must assess the reasonableness of the percentage using the 12 *Johnson* factors." *Ibid.* (citing *Johnson*, 488 F.2d at 717-19); *see, e.g.*, *Faught*, 668 F.3d at 1243 (affirming district court, which "turned its attention to [a] $1.5 million lump sum award that took the total fee award above the 25% benchmark and" only "analyzed that [additional] amount under the *Johnson* factors").

The Ninth Circuit similarly fixes "25% of the fund as the 'benchmark' for a reasonable fee award" in common-fund cases; if trial judges wish to vary from that benchmark, they must "provid[e] adequate explanation in the record of any 'special circumstances' justifying a departure." *See In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) (quoting *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) ("[W]e established 25 percent of the fund as the 'benchmark' award that should be given in common fund cases.")).

2. Other circuits have expressly rejected the "benchmark" approach.

In *Goldberger*, the Second Circuit confronted whether "25% of the recovery—whether reached by application of a [lodestar] multiplier, or as a straight percentage—is an established 'benchmark' in common fund cases." 209 F.3d at 51. The court acknowledged "the Ninth Circuit has cautioned that district courts must justify departure from the 25% benchmark by pointing to unusual circumstances." *Ibid.* Soo too, the court understood that "district courts across the nation have apparently eased into a practice of 'systematically' awarding fees in the 25% range, 'regardless of type of case, benefits to the class, numbers of hours billed, size of fund, size of plaintiff class, or any other relevant factor.'" *Ibid.* (quoting Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 274 (1986)).

The court was "nonetheless disturbed by the essential notion of a benchmark." *Goldberger*, 209 F.3d at 51. In particular, the Second Circuit reasoned that "even a theoretical construct as flexible as a 'benchmark' seems to offer an all too tempting substitute for the searching assessment that should properly be performed in each case." *Id.* at 52. "Starting an analysis with a benchmark," the court warned, "could easily lead to routine windfalls where the recovered fund runs into the multi-millions." *Ibid.* "Obviously, it is not ten times as difficult to prepare, and try or settle a 10 million dollar case as it is to try a 1 million dollar case." *Ibid.* (quotation marks omitted).

"But the principal analytical flaw," the court reasoned, is the "assumption that there is a substantial contingency risk in every common fund case." *Goldberger*,

209 F.3d at 52. The court noted in the securities class action context that "there appears to be *no appreciable risk* of non-recovery" because "virtually all cases are settled." *Ibid.* (quotation marks omitted). "Even where there is some contingency risk but recovery remains virtually certain," the court "question[ed] whether a fully informed group of plaintiffs able to negotiate collectively would routinely agree to pay their lawyers a fee of 25% of a multi-million dollar settlement." *Ibid.*

Recently, the Tenth Circuit also rejected the idea that "a 'benchmark' of 25% for attorneys' fees from a common fund" is presumptively reasonable. *Voulgaris v. Array Biopharma, Inc.*, 60 F.4th 1259, 1263 (10th Cir. 2023). "To date, we have not adopted a benchmark percentage for attorneys' fees from common fund settlements." *Ibid.* "And we decline to pronounce a bright-line benchmark today. Instead, we reiterate our prior recognition that awards across a range of percentages *may* be reasonable." *Id.* at 1263-64 (emphasis added); *see also In re Pet Food Prod. Liab. Litig.*, 629 F.3d 333, 361 (3d Cir. 2010) (Weis, J., concurring in part and dissenting in part) ("There appears to be a perception in many district courts that the twenty-five percent 'benchmark' is an appropriate place to begin the fee analysis for most common fund purposes. Too often that is the end of the discussion, rather than a beginning point for determining whether a particular fee is reasonable." (citing *Goldberger*, 209 F.3d at 43, 48)).

II. The Eleventh Circuit's Decision Is Wrong.

A. The decision is contrary to this Court's precedent.

1. As discussed, this Court instructs that the lodestar is the presumptively reasonable attorney's fee award, so it

is error to *require* district courts to apply the percentage method instead. *Contra* App.41a. Nor can the Eleventh Circuit's "benchmark" presumption be squared with this Court's case-specific scrutiny in common-fund cases policing equitable fee awards. *E.g.*, *Equitable Trust Co.*, 283 U.S. at 746 (reducing fee award to 7.5% of the award already reduced by Second Circuit); *Pettus*, 113 U.S. at 128 (slashing common-fund fee award from 10% to just 5% based on "all the circumstances" of the case); *see also Harrison*, 168 U.S. at 325 (approving reduction of common-fund fee award to 10%).

The Eleventh Circuit affirmed the over $626 million in attorney's fees awarded because the percentage "fell within the range of reasonableness," and even though the District Court thus did not need to go any further under circuit precedent, its "thorough analysis" of the "*Johnson* factors and lodestar cross-check confirmed that a fee award of 23.47 percent was reasonable." App.42a. That was wrong.

First, the court disregarded this Court's requirement that common-fund fee awards must be "made with moderation and a jealous regard to the rights of those who are interested in the fund." *Greenough*, 105 U.S. at 536-37. Although this Court has not categorically prohibited the percentage method in common-fund cases, *cf. Blum*, 465 U.S. at 900 n.16, it has always held that the equitable exception to the American Rule is "limited," *Alyeska*, 421 U.S. at 257 (common-fund doctrine allows "a *party* preserving or recovering a fund for the benefit of others in addition to himself[] to recover his *costs,* including his attorneys' fees, from the fund or property itself" (emphasis added)).

Second, this Court has repeatedly chastised the lower courts for using the *Johnson* factors to determine whether attorneys entitled to a "reasonable" fee for their services should be awarded an enhancement to their lodestar, because "many of the *Johnson* factors 'are subsumed within the initial calculation' of the lodestar." *Delaware Valley I*, 478 U.S. at 565 (quoting *Blum*, 465 U.S. at 898-900). Yet the Eleventh Circuit affirmed the District Court's "thorough" *Johnson* analysis as justifying an award amounting to a lodestar enhancement of 323%. App.42a.

The trial judge found that the $626.65 million fee was appropriate, for example, because the "case required an immense amount of time and labor" (number of hours worked reflected in the lodestar); "presented a plethora of difficult factual issues" requiring "substantial discovery and pretrial litigation" (same); "raised novel and complex legal questions" (same); class counsel "are among the nation's most experienced and able litigators in the antitrust arena" (prevailing hourly rates based on experience reflected in the lodestar); "the significant commitment of time and resources that were required to litigate this case" (number of hours worked reflected in the lodestar); "this case was contingent" and plaintiffs' counsel "invested their own money in fronting the expenses in this litigation, all in the face of significant risk" (contingency risk not appropriate enhancement consideration, *Dague*, 505 U.S. at 562); and "the enormous commitments of time and resources, as well as the significant risk entailed" (number of hours worked reflected in the lodestar and inappropriate risk consideration). *See* App.144a-147a.

It is hard to see how these conclusory findings, spanning just a few pages of the Appendix, are fairly described as a "thorough analysis." App.42a. More importantly, every one of them is already reflected in the lodestar or is otherwise an inappropriate basis to enhance the fee. Indeed, the District Court reasoned that the lodestar calculation itself reflected a "significant commitment of time and resources" justifying an upward departure *from the lodestar*. App.145a. "Taking account of" these same considerations "again through lodestar enhancements amounts to double counting." *See, e.g.*, *Dague*, 505 U.S. at 562.

2. Even if it might be appropriate to apply the percentage method in some common-fund cases, the lodestar calculation is the correct method in common-fund cases settling claims for which Congress has already provided for fee-shifting in the statute that creates the right of action. *Perdue*, 559 U.S. at 546 (so holding as to discretionary fee-shifting statute).

This is an even stronger case because the fee-shifting provisions of the Clayton Act are mandatory. When a private plaintiff "substantially prevails" in a private action under Section 16, for example, "the court *shall award* the cost of suit, including a reasonable attorney's fee, to such plaintiff." 15 U.S.C. § 26 (emphasis added). The subscribers substantially prevailed here, when the District Court granted partial summary judgment on their claim that defendants' agreements were a *per se* violation of the Sherman Act. *See BCBS*, 308 F. Supp. 3d at 1267. *Perdue* requires fees awarded pursuant to such provisions to apply the lodestar method. 559 U.S. at 546.

This Court explained in *Boeing* 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." 444 U.S. at 478. Here, counsel agreed to settle the case and release plaintiffs' right to statutory fees in exchange for a common fund—such that they were able to get many times the fee-shifting lodestar. The class was not unjustly enriched, because they were entitled to recuperate attorney's fees under the Clayton Act, regardless of any common fund negotiated for the class. Rather, it is unjust that the lawyers get more than three times their lodestar—taken from the common fund intended to benefit the class—because they decided to forgo the lower fee amount they could get under the statute.

B. The decision is contrary to Rule 23(h).

The Eleventh Circuit silently rejected Petitioner's argument that the $75,000,000 prepayment of attorney's fees, awarded at the preliminary approval stage before the class had received anything and before the lawyers even submitted their motion for attorney's fees, was improper. *See* Objection, at 22-23 ("[T]he District Court approved the payment and payment was made (1) without benefit of a fee application, (2) before class members had been noticed, (3) before the fairness hearing and (4) before settling defendants paid to a plaintiff class the full monetary damages.").

In its preliminary approval order, the District Court remarked that it was "the first time the court ha[d] been presented with such a 'quick pay' agreement," but held that "concerns about equitable distribution between the class and its counsel are not at issue." D.Ct.Doc.2641,

at 46-47. But before district courts may award "reasonable attorney's fees and nontaxable costs authorized ... by the parties' agreement," the "claim for an award must be made by motion," notice of such motion by class counsel "must be ... directed to class members in a reasonable manner," and class members must have the opportunity to object. *See* Fed. R. Civ. P. 23(h)(1)–(2).

"The plain text of the rule requires a district court to set the deadline for objections to counsel's fee request on a date *after* the motion and documents supporting it have been filed." *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993 (9th Cir. 2010). "The Advisory Committee Notes to the 2003 amendments to Rule 23(h) further support this reading of the rule," elaborating "that in setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion." *Id.* at 994 (cleaned up).

Policy concerns also support this reading. "Allowing class members an opportunity thoroughly to examine counsel's fee motion, inquire into the bases for various charges and ensure that they are adequately documented and supported is essential for the protection of the rights of class members." *See Mercury*, 618 F.3d at 994. "It also ensures that the district court, acting as a fiduciary for the class, is presented with adequate, and adequately-tested, information to evaluate the reasonableness of a proposed fee." *Ibid.*

"A host of circuits, many districts courts, and at least one state supreme court have adopted" the Ninth Circuit's reasoning. 5 Newberg and Rubenstein on Class Actions § 15:13 (6th ed.) (collecting cases from the Third, Sixth,

Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, as well as the Alabama Supreme Court, in footnote 16). As then-Judge Richard Posner agreed, "Rule 23(h) of the civil rules requires that a claim for attorneys' fees in a class action be made by motion, and 'notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.'" *Redman v. RadioShack Corp.*, 768 F.3d 622, 637 (7th Cir. 2014). Because "[c]lass counsel did not file the attorneys' fee motion until after the deadline set by the court for objections," they "violated the rule." *Id.* at 637-38 (citing *Mercury*, 618 F.3d at 993-95).

In *Redman*, as here, "the objectors knew that class counsel were likely to ask for" a certain total attorney's fee, "but they were handicapped in objecting because the details of class counsel's hours and expenses were submitted later ... and so they did not have all the information they needed to justify their objections." *See, e.g.*, 768 F.3d at 638. "The objectors were also handicapped by not knowing the rationale that would be offered for the fee request, a matter of particular significance in this case because of the invocation of administrative costs as a factor warranting increased fees." *See, e.g.*, *ibid.* "There was no excuse for permitting so irregular, indeed unlawful, a procedure." *See, e.g.*, *ibid.*

This is especially important when, as here, App.239a, defendants agree to a settlement that includes a "clear sailing" provision—an agreement not to challenge class counsel's fee request. "The very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class." *See, e.g.*, *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d

at 948 (cleaned up). "Therefore, when confronted with a clear sailing provision, the district court has a heightened duty to peer into the provision and scrutinize closely the relationship between attorneys' fees and benefit to the class, being careful to avoid awarding unreasonably high fees simply because they are uncontested." *Ibid.* (quotation marks omitted).

III. The Questions Presented Are Important.

This Court's intervention is desperately needed because federal courts are entirely failing to seriously scrutinize fee applications in common-fund cases.

1. In *Delaware Valley I*, this Court considered the "*Johnson* factors" first employed by the Fifth Circuit in 1974. *See* 478 U.S. at 562, 565. The "major fault" with "[t]his mode of analysis," the Court reasoned, was "that it gave very little actual guidance to district courts" assessing the reasonableness of attorney's fee awards. *Id.* at 563. "Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results." *Ibid.*

In *Perdue*, this Court quoted *Delaware Valey I* for this proposition when considering the appropriate method for determining a "reasonable attorney's fee" under a fee-shifting statute like the Clayton Act. 559 U.S. at 550-51 (interpreting same "reasonable attorney's fee" language in 42 U.S.C. § 1988). In contrast to the boundless *Johnson* factors, the Court noted "several important virtues" of the lodestar method.

"First, in accordance with [the Court's] understanding of the aim of fee-shifting statutes" like the Clayton Act, "the lodestar looks to 'the prevailing market

rates in the relevant community.'" *Perdue*, 559 U.S. at 551. "Second," and perhaps more importantly, "the lodestar method is readily administrable, and unlike the *Johnson* approach, the lodestar calculation is objective, and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results." *Ibid.*

As earlier described, this Court has a long history of criticizing *Johnson* as a means of assessing a reasonable attorney's fee. Indeed, *Johnson*'s central holding was abrogated by this Court. *Blanchard*, 489 U.S. at 94 (assuming without deciding that the "*Johnson* factors may be relevant in adjusting the lodestar amount, but" holding that "no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation").

And yet many circuits continue to require application of the *Johnson* factors when analyzing common-fund fee requests. *See Union Asset Mgmt. Holding A.G.*, 669 F.3d at 643 (5th Cir.) (requiring use of the *Johnson* factors to assess reasonableness); *Rawa*, 934 F.3d at 870 (8th Cir.) (same); *Voulgaris*, 60 F.4th at 1263 (10th Cir.) (same); *see also* App.41a (requiring district courts to "assess the reasonableness of the percentage using the 12 *Johnson* factors" if "the fee exceeds 25 percent" of the common fund). Other circuits apply similar variations that include the same factors this Court has repeatedly criticized as too subjective or already accounted for in the lodestar. *See Goldberger*, 209 F.3d at 50 (2d. Cir.); *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000); *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974).

But again, "the novelty and complexity of a case generally may not be used as a ground for an enhancement." *Perdue*, 559 U.S. at 553 (cleaned up). And "the quality of an attorney's performance generally should not be used to adjust the lodestar because considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate." *Ibid.* (cleaned up). The same goes for the "risk of loss in a particular case (and, therefore, the attorney's contingent risk)." *Dague*, 505 U.S. at 562.

2. The result is 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.

This Court need look no further than plaintiffs' counsel's fee application. *See* D.Ct.Doc.2733-1 ("Fee Memo"). According to plaintiffs' counsel, the 23.47% fee request "falls comfortably within the range of percentage awards that the courts have approved." *Id.* at 57 (citing D.Ct.Doc.2733-4 ("Fitzpatrick Decl.")). They cite eight district court cases from the Third, Fifth, Eleventh, and D.C. Circuits approving fee awards from 25% to 43.87% of a common fund. *Ibid.* & n.55. None were litigated to judgment.

Plaintiffs' counsel then cite 25 district court cases from the Second, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits that they argue are comparably "complex cases," where the judges approved fee requests ranging from 33.3% to 50% of the common fund. Fee Memo, at 57-58 & n.56. None were litigated to judgment.

Perhaps most illustrative, plaintiffs' counsel cited several "'mega-fund' cases involving funds over $100 million," including "so-called 'super-mega' fund cases, in which funds of over $1 billion are created," where district courts from the Second, Fifth, Eleventh, and D.C. Circuits approved fee applications ranging from 30% to 36% of the common fund. Fee Memo, at 57-58 & n.57. None were litigated to judgment.

Plaintiffs' counsel's expert "collected the fee awards in every billion-dollar class action recovery in federal court that [he] could find from any year and listed them" in "Table 1" of his declaration. *See* Fitpatrick Decl. ¶18. He identified 34 cases, and calculated that the awards resulted in fees that were on average 2.8 times the lodestar rate, and several where the lodestar was enhanced more than fourfold. *Ibid.* The decisions hail from the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits. *Ibid.* & nn.3-36. If the fee expert's report is accurate, it means there has never been a case litigated to judgment that resulted in at least a $1 billion common benefit fund.

3. It makes little 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 judgement and won *all* the claimed damages and injunctive relief the class sought. Yet that is precisely what federal district and circuit courts routinely permit.

This case is illustrative. Plaintiffs' counsel claim that "damages nationwide for the Damages Class over the Settlement Class Period are estimated to range from $18.6

billion to $36.1 billion." D.Ct.Doc.2610-11, at 5 (Declaration of Dr. Ariel Pakes, in support of Subscriber Plaintiffs' Motion for Preliminary Approval). And plaintiffs sought injunctive relief that would prohibit defendants from continuing their anticompetitive behavior. App.190a-93a, 201-202a, 219a-220a, 224a. Had they litigated the case to judgment and won everything they claimed—$55.8 billion to $108.3 billion in treble damages and full injunctive relief—they presumptively would have been entitled only to their lodestar. And they would have had to argue for an enhancement based on considerations that were not already subsumed in that calculation.

But class counsel did not litigate the case to judgment. They agreed to settle the case for 2.4% to 4.8% of the treble-damages claimed. *Cf.* D.Ct.Doc.2610-11, at 5. And as Home Depot describes in its related petition, plaintiffs' counsel agreed that defendants could "modify some—but not all—of the allegedly anticompetitive practices that they engaged in." *See* Home Depot Petition, at 11. Worse, plaintiffs' counsel agreed to a release that immunizes defendants from private enforcement of claims seeking market-wide injunctive relief that accrue after the settlement's effective date. *See id.* at 12-15.

It makes no sense to award class counsel 323% of the fees they would be entitled to had they won the case merely because they instead agreed to settle for pennies on the dollar and diluted injunctive relief. That absurd result cannot be sustained.

* * *

It is hard to understand how any of the foregoing comports with this Court's precedent. *Perdue* set forth

three "'rare' and 'exceptional'" circumstances where "either the quality of an attorney's performance or the results obtained are factors that may properly provide a basis for an enhancement" to the lodestar. 559 U.S. at 554 (quoting *Blum*, 465 U.S. at 897). "First, an enhancement may be appropriate where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation." *Id.* at 554-55. "Second, an enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted." *Id.* at 555. "Third, there may be extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees." *Id.* at 556.

Perhaps, on remand, plaintiffs' counsel will be able to show that this is one such "rare" and "exceptional" case justifying an upward departure from their $194,226,321.65 lodestar. Presently, though, the "District Court did not provide proper justification for the large enhancement it awarded." *E.g.*, *Perdue*, 559 U.S. at 557. Even then, it is unlikely that a "lodestar multiplier of 3.23," App.146a, would be warranted applying the proper standard on remand. *Cf. ibid.*

CONCLUSION

The Petition should be granted. Alternatively, the Petition should be held for *Home Depot U.S.A., Inc. v. BCBS Association*, No. 23-1063 (U.S.) (petition pending).

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