No. 18-

IN THE

Supreme Court of the United States

CHIEFTAIN ROYALTY COMPANY,
Petitioner,

v.

CHARLES DAVID NUTLEY AND DANNY GEORGE, PERSONALLY AND AS EXECUTOR OF THE ESTATE OF BEVERLY JOYCE GEORGE, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

BRADLEY E. BECKWORTH
JEFFREY J. ANGELOVICH
SUSAN WHATLEY
NIX PATTERSON & ROACH LLP
3600B N. Capital of Texas Hwy., Suite 350
Austin, TX 78746

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
DANIEL WINIK
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

QUESTION PRESENTED

This Court has long held that a "lawyer who recovers a common fund for the benefit of persons other than … his client is entitled to a reasonable attorney's fee from the fund." *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478 (1980). Federal courts award such common-fund fees using their "inherent power." *E.g.*, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 259 (1975). The question presented is:

Whether common-fund fee awards are governed in diversity cases by state or federal law.

PARTIES TO THE PROCEEDING

Petitioner Chieftain Royalty Company was plaintiff-appellee below.

Respondents Charles David Nutley and Danny George were objectors-appellants below.

Respondents EnerVest Energy Institutional Fund XIII-A, L.P.; EnerVest Energy Institutional Fund XIII-WIB, L.P.; EnerVest Energy Institutional Fund XIII-WIC, L.P.; EnerVest Operating, L.L.C.; and FourPoint Energy, LLC were defendants-appellees below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Chieftain Royalty Company has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

No. 18-

CHIEFTAIN ROYALTY COMPANY,
Petitioner,

v.

CHARLES DAVID NUTLEY AND DANNY GEORGE, PERSONALLY AND AS EXECUTOR OF THE ESTATE OF BEVERLY JOYCE GEORGE, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Chieftain Royalty Company respectfully petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Tenth Circuit.

INTRODUCTION

Class-action and other collective litigation often presents a free-rider problem: Although class counsel litigate on behalf and in the interest of all class members, individual class members are not obligated to fund the representation. And because any recovery is distributed to the class without regard to which mem-

bers helped pay for counsel, absent class members frequently have no incentive to contribute toward the prosecution of the action. To solve that problem, federal courts possess the inherent power to award attorneys' fees to class counsel out of any funds recovered. Such awards—known as common-fund awards—distribute litigation costs so that each class member shares in those costs in proportion to his or her recovery.

There are two principal methods of calculating common-fund fees. One is the "lodestar," in which the fee award is based largely on the number of hours counsel worked and a typical hourly rate. The other method is to award counsel a percentage of the amount recovered. When awarding fees in class actions, federal courts generally prefer the percentage-of-the-fund method. That is because the lodestar method is burdensome and creates a perverse incentive for class counsel to litigate inefficiently, whereas the percentage method aligns the interests of class and counsel: the higher the recovery for the class, the higher the fee.

When a plaintiff's cause of action arises under federal law, it is clear that federal law governs any award of common-fund fees in federal court (and that federal law gives courts discretion regarding which calculation method to choose, although with either method the ultimate award must be reasonable). The question presented here is whether federal law likewise governs a common-fund fee award in a diversity action, *i.e.*, when the underlying cause of action arises under state law.

A two-judge panel of the Tenth Circuit held that the answer is no. That answer is wrong and conflicts with decisions of this Court and lower courts.

In a series of cases following *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), this Court has marked a clear path for courts to follow in determining whether state or federal law governs issues in a diversity case. In particular, the Court has established that courts may not just ask, as they did in the early days after *Erie*, whether a state rule is "substantive" or "procedural." Nor may they rely solely on whether the choice of law is outcome-determinative. Instead, they must consider whether the choice of law implicates *Erie*'s "twin aims": "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965). They must also address the considerations enumerated in *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958), such as whether applying state law would "disrupt" federal interests, *id.* at 538.

The Tenth Circuit in this case failed to follow the path this Court's decisions lay out. It did not examine, as required by *Hanna*, whether the method for determining a common-fund award implicates *Erie*'s "twin aims." Nor did it address the considerations set forth in *Byrd*. Instead, it relied on the simplistic rationale that common-fund fee awards are "substantive," and thus governed by state law, because they are "tied to the outcome of the litigation," App. 8a-10a. That is exactly the analysis this Court long ago rejected. *See infra* pp.18-20.

Had the court of appeals done what this Court's precedent requires, it would have reached a different conclusion. The choice of law here raises little risk of either forum shopping or inequitable treatment of forum-state defendants (*Erie*'s "twin aims"), because neither the percentage-of-the-fund method nor the lodestar method reliably produces higher fee awards. One

method might be more generous than the other in a given case, but that depends on characteristics of the litigation that will be unclear when the forum is chosen—and at any rate, both approaches are subject to the same ultimate reasonableness standard. Because the twin aims are not implicated, federal courts sitting in diversity are free to apply federal law. That conclusion is confirmed by *Byrd*, in that the application of state law in these circumstances would disturb an important federal interest, namely the procedural uniformity of class actions heard in federal court.

Consistent with this analysis, the Fifth Circuit and other lower courts have held after *Erie* that federal law governs common-fund fee awards. This Court did the same before *Erie*—and that precedent remains good law because its analysis was fully consistent with *Erie*. The Tenth Circuit's ruling squarely conflicts with these pre- and post-*Erie* decisions, as well as with the Court's choice-of-law cases discussed above.

If allowed to stand, moreover, the decision below will burden lower courts by frequently requiring them to use the lodestar method, even though many courts disfavor that method (certainly for class actions) because it is enormously time-consuming and encourages inefficient litigating. The decision will also hamper the uniform administration of justice in diversity class actions, which Congress specifically sought to promote by enacting the Class Action Fairness Act. Courts will have to determine and apply state law in order to award fees, rather than simply applying Federal Rule of Civil Procedure 23(h), which allows courts to "award reasonable attorney's fees" without limiting their discretion in choosing the best method for determining the award.

Given the Tenth Circuit's departure from this Court's precedent (pre- and post-*Erie*), the conflict with the Fifth Circuit and other lower courts, and the harm the decision below would engender, this Court's review is warranted.

OPINIONS BELOW

The court of appeals' opinion, as amended on the denial of rehearing (App. 1a-28a), is reported at 888 F.3d 455. The court's order denying rehearing (App. 43a-45a) is unreported. The district court's opinion (App. 29a-42a) is unreported but available at 2015 WL 9451069.

JURISDICTION

The court of appeals entered judgment on July 3, 2017, and denied a timely petition for rehearing on April 11, 2018. On June 12, 2018, Justice Sotomayor extended the time for filing a petition for certiorari through August 9; on July 25, she further extended that time through September 7. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

STATEMENT

A. Common-Fund Fee Awards

1. For over 125 years, "this Court has recognized consistently that … a lawyer who recovers a common fund for the benefit of persons other than … his client is entitled to a reasonable attorney's fee from the fund." *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478 (1980) (citing cases back to 1882). This rule—known as "[t]he common-fund doctrine"—"rests on the perception that persons who obtain the benefit of a lawsuit without

contributing to its cost are unjustly enriched at the successful litigant's expense." *Id.*

Common-fund awards differ from statutory fee-shifting awards. Whereas fee-shifting awards reallocate litigation costs from the losing to the winning party, as an entitlement accompanying the underlying cause of action, common-fund awards allocate the costs of representation—independent of the underlying cause of action—among all those who benefitted from the litigation. *See, e.g.*, *Skelton* v. *General Motors Corp.*, 860 F.2d 250, 252-253 (7th Cir. 1988); *Brown* v. *Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988).

Common-fund fee awards flow not from a court's personal jurisdiction over the parties but from its "[j]urisdiction over the fund involved in the litigation." *Boeing*, 444 U.S. at 478. And this Court has repeatedly explained that federal courts have "inherent power" to make such awards. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 259 (1975); *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45 (1991) (quoting *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 765 (1980)). That inherent power derives from "the original authority of the chancellor to do equity in a particular situation," authority federal courts have possessed since the First Judiciary Act of 1789. *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 165 n.2 166 (1939).

Common-fund awards are one of three types of fee awards that federal courts have inherent power to make; the other two are "fees as a sanction for the willful disobedience of a court order" and "fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers*, 501 U.S. at 45-46 (quotation marks omitted). This Court has held that inher-

ent-power awards for bad faith or vexatious conduct are governed by federal law, even in diversity cases. *See id.* at 51-55.

B. District Court Proceedings

Petitioner Chieftain Royalty Company brought this action against SM Energy Company in Oklahoma state court. C.A.J.A. 28-38. Advancing only state-law claims, the complaint alleged—on behalf of a putative class of royalty holders in SM's gas wells—that SM had underpaid royalties that were due. C.A.J.A. 31. SM removed the action under 28 U.S.C. §1332(d)(2), a provision of the Class Action Fairness Act that authorizes the removal of class actions in which the amount in controversy exceeds $5 million and the citizenship of any plaintiff differs from that of any defendant. C.A.J.A. 20. Once in federal court, Chieftain amended the complaint to join other gas-well owners as defendants, including FourPoint Energy and several entities bearing variations on the name EnerVest. C.A.J.A. 52-80.

After years of litigation, Chieftain reached a $52 million cash settlement with FourPoint and the EnerVest entities—an amount representing approximately 100 percent of the class's claimed damages. *See* C.A.J.A. 81-142 (settlement agreement), 228. The settlement also provided for the settling defendants to make changes to their business practices, changes worth nearly an additional $3 million to the class. C.A.J.A. 228-229.

After certifying the proposed class for settlement purposes, *see* Dist. Ct. Dkt. 115, the district court conducted a hearing to consider the settlement's fairness and class counsel's request for 40% of the settlement fund as attorneys' fees. C.A.J.A. 380-480. In advance

of the hearing, class counsel supported their fee request by submitting several declarations, explaining the value of the settlement to class members and the consequent reasonableness of the award sought. For example, Professor Geoffrey Miller of New York University Law School told the court that the settlement's $52 million cash amount was "a remarkable recovery," and that the settlement's provision for changes in how royalties were calculated would "immediately increase the value of all Class Leases." C.A.J.A. 150-151. He also stated that a 40% fee would be "reasonable" and "consistent with the market rate for the high quality legal services provided by Class Counsel in royalty underpayment class actions." C.A.J.A. 162. Similar declarations were filed by former federal judges Layn Phillips and Michael Burrage, among others. *See* C.A.J.A. 164-169 (Miller declaration describing others).

Although all 21,000 class members would indirectly pay any fee award out of the settlement fund, only two objected to the requested award: respondents Charles Nutley and Danny George. They submit no evidence, however, to support their objections. Nor did they challenge any of class counsel's evidence.

Following the fairness hearing, the district court approved the settlement. C.A.J.A. 483-500. It also awarded class counsel one-third of the settlement fund as attorneys' fees, concluding that a one-third share—reduced from the requested 40%—was "fair and reasonable." App. 33a. The court rejected Nutley's and George's arguments that Oklahoma law governed the determination of the fee award and that that law required a lodestar analysis. App. 33a-34a. The court observed that "state and federal cases recognize and/or permit a percentage of fund recovery under the common fund doctrine" and concluded that "the percentage

of the fund method" is "[t]he preferred approach for determining attorneys' fees in common fund cases." App. 34a-35a (citing Tenth Circuit precedent); *see also Blum* v. *Stenson*, 465 U.S. 886, 900 n.16 (1984) ("[U]nder the 'common fund doctrine,' … a reasonable fee is based on a percentage of the fund bestowed on the class.").

In support of the reasonableness of its award, the district court noted that Nutley and George were the only two objectors, App. 35a, and that class counsel had acted "with skill, perseverance and diligen[ce]" in conducting "[l]itigation [that] involved complex factual and legal issues and was actively prosecuted for over four years," App. 36a. The court also observed that "fees in the range of one-third of the common fund are frequently awarded in class action cases." App. 37a.

Although Chieftain's claims against SM remained pending, the district court certified the judgment on the claims against EnerVest and FourPoint for immediate appeal under Federal Rule of Civil Procedure 54(b). App. 42a (fee order); C.A.J.A. 499-500 (settlement order); C.A.J.A. 537-540 (supplemental order).

C. Tenth Circuit Proceedings

1. A two-judge panel of the Tenth Circuit reversed the common-fund fee award, holding that state law governs such awards in diversity cases and that Oklahoma law requires the lodestar approach rather than the percentage method. App. 3a, 28a.[1]

The court of appeals reasoned that "it is necessary to distinguish between … [*s*]*ubstantive fees*," which

[1] Then-Judge Gorsuch, the panel's third member, heard oral argument but was nominated to this Court soon thereafter, and thus did not participate in the panel's decision. App. 3a n.*.

"are tied to the outcome of the litigation," and "*procedural fees*," which are "generally based on a litigant's bad faith conduct in litigation." App. 8a. "These labels," the court held, "are shorthand for those attorney fees that are governed by *Erie* (substantive fees) and those that are not (procedural fees)." *Id.* "Substantive fees," the court continued, "are part and parcel of the cause of action over which [the court has] diversity jurisdiction.… In contrast, an attorney-fee award against bad-faith conduct in the litigation has nothing to do with the nature of the cause of action and does not derive in any way from state substantive law." App. 8a-9a. Applying this dichotomy, the court concluded that the common-fund award at issue here is governed by state law because it is "tied to the *outcome* of the litigation" and therefore "substantive." App. 9a-10a.

The court next held that Oklahoma law requires courts to use the lodestar method in awarding common-fund fees. App. 14a-15a. And because "[t]he district court did not use the lodestar method to calculate class counsel's fee," the court of appeals vacated the fee award and remanded for the district court to apply that method. App. 15a-16a.

Finally, the court reversed the incentive award that the district court had made to the named plaintiff. App. 16a-28a. That award is not at issue here.

2. The Tenth Circuit denied Chieftain's petition for rehearing or rehearing en banc after considering it for nearly eight months, although the panel did make "limited" changes to its opinion. App. 45a.[2]

---

[2] These changes included affirming the approval of the settlement. App. 28a. The court's initial opinion had rejected the ob-

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW BOTH DEPARTS FROM THIS COURT'S PRECEDENT AND CREATES A CIRCUIT CONFLICT

The court of appeals held here that common-fund fee awards in diversity actions are governed by state law rather than federal law. That holding is contrary to pre-*Erie* precedent of this Court—precedent that remains good law—and likewise inconsistent with other lower courts' post-*Erie* rulings.

A.1.One of this Court's seminal common-fund cases, *Central Railroad & Banking Co.* v. *Pettus*, 113 U.S. 116 (1885), was a diversity action. *See Pettus* v. *Georgia Railroad & Banking Co.*, 19 F. Cas. 396, 399 (C.C.M.D. Ala. 1879) (No. 11,048) (subsequent history omitted). Presaging its later decision in *Erie*, this Court therefore applied state law to one issue, holding that a lien had properly issued "according to the law of Alabama, by … which law this question must be determined." *Pettus*, 113 U.S. at 127. In approving the common-fund award, however, the Court relied on *Trustees* v. *Greenough*, 105 U.S. 527 (1882)—which arose from a different state, New York. *See Pettus*, 113 U.S. at 126-128. This reliance confirms that federal law governs; if state law controlled, the Court would not have cited a case from New York to determine a common-fund award in a case otherwise governed by Alabama law.

The Court's subsequent decision in *Dodge* v. *Tulleys*, 144 U.S. 451 (1892), is even more explicit on the point. In that case—which was a diversity action like *Pettus*, *see Navarro Savings Association* v. *Lee*, 446

---

jectors' appeal of the settlement, yet the opinion had (in an apparent oversight) concluded simply by reversing and remanding.

U.S. 458, 463 (1980)—this Court unanimously held that a federal court could award a "solicitor's fee" even though the contractual provision allowing the fee was "unauthorized" under decisions of the Nebraska Supreme Court. *Dodge*, 144 U.S. at 456. This Court acknowledged that in light of those decisions, the contractual provision could not "be regarded as … binding," because federal courts must "follow[] the decisions of the highest court of the State in such matters." *Id.* at 457. But, the Court continued:

> [W]hile contract rights are settled by the law of the State, that law does not determine the procedure of courts of the United States sitting as courts of equity, … *or control the discretion exercised in matters of [fee] allowances*. Those courts acquire their jurisdiction and powers from another source than the State.

Id. (emphasis added). Further underscoring the point, this Court observed that although there was no applicable Nebraska statute, "[e]ven if there were one … prohibiting courts of equity from making [fee] allowances to … counsel, such prohibition would not control the proceedings in Federal equity courts," because federal courts' "general powers as courts of equity are not determined and cannot be cut off by any state legislation." *Id.* Because *Greenough* and *Pettus* had held—as a matter of federal law—that it was "the power and duty of the court to make reasonable allowances (including counsel fees) to trustees or others acting in that capacity," this Court deemed the solicitor's fee in *Dodge* lawful. *Id.* *Dodge* thus left no doubt that, contrary to the Tenth Circuit's ruling here, an award of common-fund fees is a matter of federal courts' inherent powers, and accordingly is controlled by federal law.

2. *Dodge* of course predated *Erie* (as did *Greenough* and *Pettus*). The Third Circuit dismissed *Dodge* on that basis in one case, saying the decision "seems to have been imbued with the rationale of *Swift* v. *Tyson*." *Montgomery Ward & Co.* v. *Pacific Indemnity Co.*, 557 F.2d 51, 56-57 n.8 (3d Cir. 1977). But the court did not specify why *Dodge* "seems" that way, and as the discussion above makes clear, that characterization is in fact wrong. Not only did *Dodge* (like *Pettus*) never cite *Swift*, but the Court in *Dodge* also explicitly recognized—contrary to *Swift* and consistent with *Erie*—that it was bound by state courts' rulings on state law. *See* 144 U.S. at 457. Over a year after *Erie*, moreover, Justice Frankfurter's opinion for the Court in *Sprague* v. *Ticonic National Bank* cited *Dodge* (and *Greenough* and *Pettus*) for the proposition that federal courts have inherent power to award common-fund fees. *See* 307 U.S. at 165 n.2.[3]

In opposing rehearing, respondents adopting a somewhat different view than the Third Circuit, arguing (Opp. 9-10) that *Dodge* was overruled not by *Erie* (as the Third Circuit concluded) but by *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945). That too is wrong. Respondents cited no case (from any court, let alone this Court) stating that *York* overruled *Dodge*—because there is none. And that is dispositive because this

[3] The Third Circuit's dismissal of *Dodge* rested primarily on a footnote in *Alyeska Pipeline*. *See Montgomery Ward*, 557 F.2d at 55-56 (citing 421 U.S. at 259 n.31). In *Chambers* v. *NASCO*, however, this Court expressly limited the reach of that footnote to fee-shifting cases. *See* 501 U.S. at 52, discussed *infra* pp.22-23. *Chambers* also abrogated *Montgomery Ward*'s holding that in diversity cases, state law controls awards of attorneys' fees for bad-faith litigation conduct. *Compare* 557 F.2d at 56-58 *with* 501 U.S. at 51-55.

Court has held that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). *Dodge* unquestionably has "direct application" here, so the Tenth Circuit's obligation was to "follow th[at] case." *Id.*

The absence of any case stating that *York* overruled *Dodge* is unsurprising. *York* held that a federal court sitting in diversity had to apply a state statute of limitations, whether the case was one at law or in equity. *See* 326 U.S. at 107-112. In so holding, this Court observed that "[t]o make an exception to *Erie* … on the equity side of a federal court is to reject the considerations of policy which, after long travail, led to that decision." *Id.* at 111. It was this language that respondents cited (Reh'g Opp. 1, 2, 9-10) for the proposition that *York* abrogated *Dodge*. But this language establishes only that there is no blanket carve-out from *Erie* for cases in equity. It does not mean that federal courts' equitable powers are entirely subsumed by state law in diversity cases. *York* itself made that clear, stating that its particular holding did "not mean that whatever equitable remedy is available in a State court must be available in a diversity suit in a federal court, or, conversely, that a federal court may not afford an equitable remedy not available in a State court." 326 U.S. at 105. To the contrary, the Court continued, "a federal court [sitting in diversity] may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it." *Id.* at 106; *see also id.* ("State law cannot define the remedies

which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts."). This language is fully consistent with *Dodge*. While respondents' rehearing opposition dismissed the language as dicta, it is no more dicta than *York*'s language that respondents invoked; both passages articulated the reasoning and limits of the Court's holding but were not strictly necessary to it.

Lower courts have recognized this, rejecting respondents' view that the last three passages quoted above from *York* are dicta. In fact, "[m]ost federal courts, including the Second, Fifth, and Seventh circuits, as well as several district courts, have relied on *York* to hold that a federal court in equity is not bound by state rules dealing with equitable procedure and remedies. The Third Circuit has agreed with this conclusion in dictum." Cross, *The* Erie *Doctrine In Equity*, 60 La. L. Rev. 173, 189-190 (1999) (footnotes omitted) (citing, among other cases, *Perfect Fit Industries, Inc.* v. *Acme Quilting Co.*, 646 F.2d 800 (2d Cir. 1981); *Clark Equipment Co.* v. *Armstrong Equipment Co.*, 431 F.2d 54 (5th Cir. 1970); *General Electric Co.* v. *American Wholesale Co.*, 235 F.2d 606 (7th Cir. 1956); and *Zippertubing Co.* v. *Teleflex Inc.*, 757 F.2d 1401 (3d Cir. 1985)). These decisions further undermine respondents' claim—one that, again, no court has adopted—that *York* overruled *Dodge*.

Lastly, as explained below, this Court's modern *Erie* precedent requires a court to resolve an *Erie* issue by analyzing particular questions, such as whether applying federal law rather than state law would foster forum shopping. *See infra* pp.18-20. Here, that analysis leads to the conclusion that an award of common-

fund fees is governed by federal rather than state law—precisely as *Dodge* held. *See infra* pp.24-26.

Put simply, *Dodge* remains good law, and the Tenth Circuit's departure here from it (and *Pettus*) warrants certiorari.

B. The need for review is confirmed by the divergence among lower courts on the question presented. Most importantly, the Tenth Circuit's ruling squarely conflicts with the Fifth Circuit's decision in *Ojeda* v. *Hackney*, 452 F.2d 947 (5th Cir. 1972) (per curiam). In that case—which, like this one, was a diversity class action—the district court had concluded that although the class had benefited from counsel's services, "there [was] no way under presently existing [Texas] laws that" class counsel could "be awarded attorneys' fees." *Id.* at 948 (second alteration in original). The Fifth Circuit reversed, holding that Texas law was irrelevant. Citing *Sprague* and *Dodge* (which is further evidence that the latter case was not overruled by *York* but remains good law), the Fifth Circuit explained that "the district judge, as a federal chancellor, possesses an equitable discretion to award attorneys' fees in a class action suit *despite the provisions of State legal restraints*." *Id.* (emphasis added). Indeed, the court elaborated, such awards are "committed to the unfettered discretion of the district judge." *Id.*; *see also Allapattah Services, Inc.* v. *Exxon Corp.*, 454 F. Supp. 2d 1185, 1200 (S.D. Fla. 2006) (citing cases from three circuits in holding that "the district court presiding over a diversity-based class action … has equitable power to apply federal common law in determining fee awards

irrespective of state law"). There is no way to reconcile *Ojeda* with the court of appeals' decision here.[4]

The decision below is, on the other hand, consistent with dicta in *Vizcaino* v. *Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002). In that diversity case, the Ninth Circuit stated that "[b]ecause Washington law governed the claim, it also governs the award of [common-fund] fees." *Id.* at 1047. Like the Tenth Circuit here, however (*see infra* pp.21-22), the Ninth Circuit supported its view by citing precedent that involved fee-shifting statutes rather than common-fund fee awards, ignoring the important differences between the two. Moreover, the Ninth Circuit's statement—which the court did not explain, let alone attempt to reconcile with *Dodge*—was dicta because Washington law on the issue followed federal law. *See* 290 F.3d at 1047. The court therefore had no actual occasion to resolve which law applied.

In sum, the decision below not only departs from this Court's pre-*Erie* (and still valid) case law, but also creates a post-*Erie* circuit conflict regarding whether state law or federal law governs common-fund fee awards. This Court should resolve that conflict.[5]

---

[4] Nor is *Ojeda* the only post-*Erie* court of appeals case to look to *Dodge* on this point. *See Jordan* v. *Fusari*, 496 F.2d 646, 649 n.3 (2d Cir. 1974) (recognizing the holdings of *Dodge* and *Ojeda*); *Mercantile-Commerce Bank & Trust Co.* v. *Southeast Arkansas Levee District*, 106 F.2d 966, 970-972 (8th Cir. 1939) (following *Dodge* after discussing *Erie*).

[5] Even if the Ninth Circuit's statement in *Vizcaino* were not dicta, that would simply mean that the decision below deepened, rather than created, a circuit conflict on the question presented.

II. THE DECISION BELOW IS WRONG

For more than seven decades, the Court has provided clear and consistent instructions on how courts sitting in diversity should analyze whether a particular issue is governed by state or federal law. The Tenth Circuit did not follow those instructions here, instead embracing an analytic framework that this Court adopted shortly after *Erie* but has long since rejected, and relying on fee-shifting cases that are not relevant in the common-fund context. The doctrinal flaws in the Tenth Circuit's analysis, moreover, led the court to the wrong conclusion. Under the approach dictated by this Court federal law (as *Dodge* and *Ojeda* held) governs the award of common-fund fees, even in diversity cases.

A. After famously declaring that "[t]here is no federal general common law," *Erie* held that "Congress has no power to declare *substantive* rules of common law applicable in a State." 304 U.S. at 78 (emphasis added). In the early years after that decision, lower courts, in identifying which issues were governed by state law in diversity cases, relied on this language to create a stark divide between "substance" and "procedure." *See, e.g.*, 19 Wright & Miller et al., *Federal Practice and Procedure* §4508 (3d ed. 2018). Commentators, however, were "[a]lmost immediately … critical" of that approach. *Id.*

This Court soon joined the chorus of criticism. In *York*, the Court observed that although "[m]atters of 'substance' and … 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law," *Erie* did not "formulate scientific legal terminology." 326 U.S. at 108, 109. The relevant question, the Court explained, is "not whether [a particular issue] is deemed a matter of 'pro-

cedure' in some sense." *Id.* at 109. Rather, "[t]he question is whether … it significantly affect[s] the result of a litigation for a federal court to disregard a law of a State that would be controlling … in a State court." *Id.* *York*, that is, "propounded an 'outcome-determination' test." *Gasperini* v. *Center for Humanities*, *Inc.*, 518 U.S. 415, 427 (1996).

That test, however, proved difficult to apply, not least because "in [some] sense *every* procedural variation is 'outcome-determinative,'" *Hanna*, 380 U.S. at 468. This Court responded by once again modifying the rule, clarifying in *Hanna* and *Byrd* that "'[o]utcome-determination' analysis was never intended to serve as a talisman." *Id.* at 466-467 (citing *Byrd*, 356 U.S. at 537). Hence, the Court in *Byrd*—in considering whether an affirmative defense in a diversity case was to be resolved by a judge (as in state practice) or a jury (as in federal practice)—observed that "were 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow the state practice." 356 U.S. at 537. But it rejected that conclusion in reliance on "countervailing considerations," including that the state rule was "not bound up with [the substantive] rights and obligations" of the parties, that it would "disrupt[] the federal system of allocating functions between judge and jury," and that there was no "certainty that a different result would follow" depending on the choice of law. *Id.* at 537-539.

The Court in *Hanna* took a similar approach in addressing whether state law or a federal rule governed the service of process in a diversity action. *See* 380 U.S. at 461. Although the defendant argued that the choice was outcome-determinative (because state law but not federal law would have required dismissal of the complaint), this Court explained that "choices between

state and federal law are to be made not by application of any automatic, 'litmus paper' criterion, but rather by reference to the policies underlying the *Erie* rule," namely the need to deter "forum-shopping" and prevent "discrimination by non-citizens [of the forum state] against citizens." *Id.* at 467. Those "twin aims," the Court held, are the lens through which "[t]he 'outcome-determination' test" must be applied. *Id.* at 468.

Since *Hanna*, this Court has consistently reaffirmed that "the 'outcome-determination' test must not be applied mechanically," but rather "*must* be guided by 'the twin aims of the *Erie* rule.'" *Gasperini*, 518 U.S. at 428 (emphasis added). It did so not only in *Gasperini* but also in *Chambers*, 501 U.S. at 52; *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 27 n.6 (1988); and *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 747 (1980). This Court has also reiterated that, as *Byrd* expounded, courts must consider the state and federal interests at stake in the choice-of-law question. In *Gasperini*, for example, the Court recognized that the choice between federal and state rules for appellate review of damages awards *did* "implicate[] … *Erie*'s 'twin aims.'" 518 U.S. at 430. Yet the Court fashioned a compromise between the state and federal regimes, reasoning that a straightforward application of the state rule would disrupt the federal interest against appellate review of jury factfinding. *See id.* at 431-439.

B. The Tenth Circuit's analysis here bears no resemblance to what this Court's decisions require.

1. As recounted in the Statement, the Tenth Circuit's choice-of-law ruling hinged on a distinction between "[*s*]*ubstantive fees*," which the court defined as those "tied to the outcome of the litigation," and "*procedural fees*," which it defined as those that are "gener-

ally based on a litigant's bad faith conduct in litigation." App. 8a. "These labels," the court opined, "are shorthand for those attorney fees that are governed by *Erie* (substantive fees) and those that are not (procedural fees)." *Id.*

This reliance on a substance-procedure dichotomy is starkly inconsistent with over 70 years of this Court's precedent; indeed, it is precisely the approach that this Court long ago condemned. As explained, the Court in *York* clearly stated that the relevant question in determining whether to apply state or federal law in a diversity case is *not* whether a state-law rule "is deemed a matter of 'procedure' in some sense," but rather whether the choice of law would "significantly affect the result of a litigation," 326 U.S. at 109—an analysis the Court then refined in later cases.

The court of appeals did not do what those later cases require. It did not consider, as *Hanna* and its progeny mandate, whether the choice between federal and state law implicates "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws," *Hanna*, 380 U.S. at 468. The court of appeals *recited* the "twin aims," App. 8a, but it never explained whether they are implicated here (and if so why). Similarly, the court did not examine the questions that *Byrd* directs courts to address: whether applying state law would "disrupt" federal interests, whether the state rule is "bound up with" the parties' substantive "rights and obligations," and whether it is a "certainty that a different result would follow" depending on the choice of law, 356 U.S. at 537-540.

The Tenth Circuit's disregard of this Court's precedent was driven by the court's exclusive reliance on

cases and commentary concerning *fee-shifting* awards. App. 9a-11a. That makes no sense—which is why a leading treatise criticizes the decision below for having "failed to distinguish between fee-shifting and fee-sharing," *Federal Practice & Procedure* §4513. Fee-shifting awards are fundamentally different from common-fund awards. Whereas fee-shifting derives from state or federal statutes, common-fund awards derive from federal courts' "inherent power," *Alyeska*, 421 U.S. at 259; *Chambers*, 501 U.S. at 45, as well as their concomitant "[j]urisdiction over the fund involved in the litigation," *Boeing*, 444 U.S. at 478; *see also Sprague*, 307 U.S. at 165 n.2. Moreover, whereas a prevailing party's entitlement to fee-shifting is closely tied to the underlying cause of action, such that it makes sense for state law to govern fee-shifting in a diversity action, common-fund awards serve not to advance "a substantive policy," *Chambers*, 501 U.S. at 52, but to avoid the inequity of allowing class members to share in the benefit from a lawsuit without helping to fund it. *See Skelton*, 860 F.2d at 252-253 (comparing fee-shifting and common-fund awards); *accord Brown*, 838 F.2d at 454; *Federal Practice & Procedure* §4513; *see also Blum*, 465 U.S. at 900 n.16, quoted *supra* p.8 (distinguishing the calculation method for the two types of awards). In light of that justification, it does not make sense for state law to control, *i.e.*, for federal courts' inherent power to be supplanted by state law. *See Dodge*, 144 U.S. at 457 ("courts of the United States sitting as courts of equity … acquire their jurisdiction and powers from another source than the State").[6]

[6] Even one of the fee-shifting cases that the Tenth Circuit relied on flagged the distinction between fee-shifting and common-fund fees. *See In re Volkswagen & Audi Warranty Extension Lit-*

2. The only conceivable support for the Tenth Circuit's ruling in the last 70 years of this Court's precedent is footnote 31 of *Alyeska Pipeline*. That footnote came at the end of the Court's description of the three types of fees that federal courts have inherent power to grant: common-fund awards, fees as sanctions "for the 'willful disobedience of a court order,'" and fees "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" 421 U.S. at 257-259. Having outlined those three categories, the footnote contrasted federal courts' power in diversity cases with their power in federal-question cases:

> A very different situation is presented when a federal court sits in a diversity case. "[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, … state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed."

Id. at 259 n.31 (alteration in original). Standing alone, this footnote could be read to suggest that state law governs *all* fee awards in diversity cases.

The Court, however, later rejected that reading (which is likely why the decision below never even cited *Alyeska Pipeline*). In *Chambers*, the Court explained that "[t]he limitation on a court's inherent power described [in the footnote] applies only to fee-shifting rules that embody a substantive policy, such as a statute which permits a prevailing party in certain

---

igation, 692 F.3d 4, 16-17 (1st Cir. 2012) (holding that state law governed a fee-shifting award after noting that "this is not a common fund … case").

classes of litigation to recover fees." 501 U.S. at 52. As discussed, there is a bright-line difference between common-fund awards and fee-shifting awards; the reasons that state law governs fee-shifting awards authorized by state statute simply do not apply to common-fund awards, which emanate—even in diversity cases—not from state law but from federal courts' inherent powers. In light of *Chambers*, the *Alyeska Pipeline* footnote provides no support for the decision below.

In short, the Tenth Circuit failed to follow, distinguish, or in some instances (such as *Dodge*) even cite this Court's relevant precedents. Instead, it cited cases that are inapposite because they address fee-shifting instead of common-fund awards, a distinction the Tenth Circuit wholly ignored. And it did not conduct the *Erie* analysis that *Hanna*, *Byrd*, and their progeny require. Instead, it relied on the simplistic rationale, long rejected by this Court, that common-fund awards are "substantive"—and thus governed by state law—because they are "tied to the outcome of the litigation."

C. Had the Tenth Circuit properly applied this Court's precedents, it would have reached the same conclusion that this Court did in *Dodge* and that the Fifth Circuit did in *Ojeda*: Federal law governs the determination of a common-fund fee award by a federal court sitting in diversity.

1. *Erie*'s "twin aims" are not implicated here because the application of federal law would cause neither "forum-shopping" nor "inequitable administration of the laws," *Hanna*, 380 U.S. at 468.

a. If forum shopping were to occur in this context, it would flow from the possibility that fee awards are consistently higher under the percentage-of-the-fund method than under the lodestar approach, or vice-

versa. In that event, plaintiffs would be inclined toward the forum (state or federal) that employed the method producing the higher award. But in reality, there is no reason to believe that awards will be predictably higher or lower under either method. If litigation is arduous but results in little or no recovery, then the lodestar approach will produce a higher award. If instead litigation is efficient and results in a sizable recovery, then the percentage-of-the-fund approach will produce a higher award. And plaintiffs cannot know at the outset—*i.e.*, when the forum is chosen—which of those characteristics the litigation will have.

Any forum-shopping concern is further diminished by the fact that, as the Tenth Circuit recognized, "the ultimate standard for awarding a fee under either the lodestar or" the percentage-of-the fund "methodology is whether the fee is reasonable," App. 12a. That does not mean the two approaches will produce identical awards, of course; in any given case, there may be a range of reasonable awards. But for *Erie* purposes, only "'*substantial*' variations [in outcomes] between state and federal litigation" matter, because only those variations "would '[l]ikely … influence the choice of a forum.'" *Semtek International Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001) (emphasis added) (omission in original). "[N]onsubstantial, or trivial, variations" do not matter, because they are "unlikely" to have such influence. *Hanna*, 380 U.S. at 468. Given the overarching reasonableness standard, any consistent difference in outcomes between the lodestar and percentage approaches would not be "substantial" enough to affect forum selection.

b. For the same reasons, applying federal law in this context would not produce "inequitable administration of the laws," *Hanna*, 380 U.S. at 468—that is,

it would not "unfairly discriminate against citizens of the forum State," *id.* at 468 n.9; *see also Gasperini*, 518 U.S. at 428 & n.8. Because neither method of calculating fees predictably produces higher awards, neither discriminates against defendants who are forum-state citizens (or anyone else). In fact, defendants do not even pay common-fund fees in the same way they do with fee-shifting, *i.e.*, in addition to the plaintiffs' underlying recovery. Fees are instead drawn from that recovery.

2. The *Byrd* factors similarly support the application of federal law. State law regarding common-fund awards is not "bound up with" the parties' substantive "rights and obligations," *Byrd*, 356 U.S. at 535-538; as explained, such awards are made to avoid an inequitable result, one unrelated to the underlying substantive claims. And for the reasons just given, it is not remotely a "certainty that a different result would follow" depending on which law applies, *id.* at 539. Finally, and perhaps most importantly, the application of state law would "disrupt" an important federal interest, *id.* at 538, namely the uniform administration of class actions in federal court, *see infra* pp.27-29.

The fact that the Tenth Circuit's failure to conduct the analysis required by this Court's precedent led it to the wrong result (as, again, *Dodge* confirms) further reinforces the need for review here.

III. The Tenth Circuit's Ruling Will Have Harmful Consequences

If left undisturbed, the Tenth Circuit's decision will burden lower courts and undermine the uniformity in class actions that Congress has specifically sought to ensure.

First, the decision will require district courts in Oklahoma—and perhaps elsewhere in the circuit, depending on state law—to determine common-fund awards in diversity cases using the lodestar method. But it is for good reason that, as the district court stated here, the percentage-of-the-fund method is "[t]he preferred approach for determining attorneys' fees in common fund cases," App. 35a. The lodestar approach is "difficult and burdensome to apply." *Third Circuit Task Force Report on Selection of Class Counsel*, 74 Temple L. Rev. 689, 776 (2001). It requires district courts (and often courts of appeals) to review voluminous time records and to oversee sometimes-protracted litigation over, for example, the typical hourly fee in a certain market for a particular type of case. The lodestar also "encourages counsel to run up the bill, expending hours that are of no benefit to the class" so that they can be reimbursed for those hours later. *Id.* And it "may result in undercompensation of talented attorneys" who can "do more for a class in an hour than another attorney could do in ten." *Id.* All this explains why, "[a]fter a period of experimentation with the lodestar," most circuits—including the Tenth Circuit—"now permit or direct district courts to use the percentage-fee method in common-fund cases." Federal Judicial Center, *Manual for Complex Litigation* 187 (4th ed. 2004); *see also Union Asset Management Holding A.G.* v. *Dell, Inc.*, 669 F.3d 632, 643-644 (5th Cir. 2012) (joining other circuits in endorsing the percentage method for common-fund fee awards); *Gottlieb* v. *Barry*, 43 F.3d 474, 483 (10th Cir. 1994) (noting that for "common fund cases," circuit precedent "implies a preference for the percentage of the fund method"). The decision below will thus greatly burden district courts in the circuit (and per-

haps elsewhere if other circuits repeat the panel's error).

Second, the ruling threatens the procedural uniformity of federal class actions—a value that Congress has sought to promote.

As noted in the Statement, this case was removed under the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4—specifically, the provision permitting the removal of certain class actions with only minimal diversity among the parties, 28 U.S.C. §1332(d)(2). Congress's purpose in enacting CAFA was to "restore the intent of the framers … by providing for Federal court consideration of interstate cases of national importance." 119 Stat. 5 (codified at 28 U.S.C. §1711 note). In other words, Congress sought to "solidif[y] federal judicial oversight of nationwide class action suits." Ahn, *CAFA, Choice-of-Law, and the Problem of Legal Maturity in Nationwide Class Actions*, 76 U. Cin. L. Rev. 105, 106 (2007). One reason Congress wanted federal oversight, undoubtedly, was that federal judges, who regularly handle complex class actions, are experienced in administering such cases according to the detailed provisions of Federal Rule of Civil Procedure 23.

Yet under the Tenth Circuit's ruling, district courts can no longer simply follow Rule 23 when sitting in diversity. They must still follow it in most respects, including in determining the fitness of the action for classwide resolution (Rule 23(a) and (b)), certifying and notifying the class (Rule 23(c)), evaluating the fairness of a settlement (Rule 23(e)), and appointing class counsel (Rule 23(g)(1)). When it comes to awarding fees, however, they may not simply follow Rule 23(h), which permits them to "award reasonable attorney's fees …

that are authorized by law," *without* limiting their discretion in choosing the appropriate methodology for determining the award. *See* Fed. R. Civ. P. 23, 2003 advisory committee note ("The rule does not attempt to resolve the question whether the lodestar or percentage approach [is] … preferable."). Instead, district courts must examine how state courts award fees—an analysis that can be difficult, as evinced by the fact that the district court and the Tenth Circuit could not agree on how Oklahoma courts would have handled this case. *Compare* App. 34a (district court observing that "state … cases recognize and/or permit a percentage of fund recovery under the common fund doctrine"), *with* App. 14a-15a (Tenth Circuit disagreeing). And then district courts must apply the state courts' methodology for calculating the fee award, even though they may be considerably less familiar with that methodology (and even if it would be far more burdensome) than the approach they ordinarily employ for determining a common-fund award.

The decision below will thus weaken the procedural uniformity of federal class actions, undermining Congress's objective in enacting CAFA. It will also impose on overburdened district courts the obligation to scour state law rather than simply applying Rule 23. And as explained, it will require them (at least in Oklahoma) to use the lodestar—with all the attendant inefficiencies—rather than the approach most federal courts employ (for good reason). These deleterious consequences, along with the departures from precedent discussed above, warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BRADLEY E. BECKWORTH
JEFFREY J. ANGELOVICH
SUSAN WHATLEY
NIX PATTERSON & ROACH LLP
3600B N. Capital of Texas Hwy., Suite 350
Austin, TX 78746

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
DANIEL WINIK
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

SEPTEMBER 2018