No. 18-301

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

BRIEF *AMICI CURIAE* OF FORMER FEDERAL JUDGES IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are former federal judges with extensive experience in applying federal equitable common law when circumstances so warrant. *Amici* include:

(1) Robert H. Henry served as a United States Circuit Judge of the United States Court of Appeals for the Tenth Circuit from 1994 to 2010. He served as Chief Judge from 2008 to 2010.

(2) David Folsom served as a United States District Judge of the United States District Court for the Eastern District of Texas from 1995 to 2012. He served as Chief Judge from 2009 to 2012.

(3) T. John Ward served as a United States District Judge of the United States District Court for the Eastern District of Texas from 1999 to 2011.

(4) Frank H. Seay served as a United States District Judge of the United States District Court for the Eastern District of Oklahoma from 1979 to 2015.

The panel opinion issued by the Tenth Circuit creates inconsistency regarding the application of federal equitable common law in common fund cases and sharply limits the equitable discretion of federal judges. *Amici* seek to ensure the law governing the

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this Brief in whole or in part, and no person other than *amici* made a monetary contribution to the preparation or submission of this Brief. Pursuant to Rule 37.2, *amici* state that after timely notification, all parties consented to the filing of this *Brief*.

award of common fund attorneys' fees in federal courts sitting in diversity is applied consistently and correctly.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The panel opinion undermines certain inherent equitable powers federal courts have always possessed. "It has long been understood that certain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (internal citations omitted). For this reason, "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Id*. These powers are "governed not by rule of statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962).

One of these implied powers is the power to award attorneys' fees when the interests of justice so require. *See Hall v. Cole*, 412 U.S. 1, 5 (1973) ("Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require."). Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939). Historically, federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need

for such a recovery." *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970).

One such circumstance requiring the recovery of fees is when attorneys create a common fund for the benefit of others. Under the "common fund doctrine," the award is formed by assessing fees from the beneficiaries of successful litigation from the funds won by settlement or judgment. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975) (referring to "[t]he historic power of equity to permit the trustee of a fund or property, or 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 or directly from the other parties enjoying the benefit."). Although common fund jurisprudence has been most commonly used in class actions, federal courts also apply it in complex litigation, and of late it has found considerable use in multi-district litigation ("MDL") procedures created by Congress in 1968 (including diversity cases). "The theoretical bases for the application of the common fund concept to MDLs are the same as for class actions—namely, equity and her blood brother quantum meruit." Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 La. L. Rev. 371, 376 (2014).[2]

The question presented to this Court is whether a common-fund fee award ordered by a trial court in a diversity case pursuant to its inherent equitable powers is governed by state or federal law. A two-judge panel from the Tenth Circuit held that state law governs in such cases—a decision which: (a) constitutes an intrusion into the equity jurisdiction of the

[2] Eldon Fallon is a Judge for the United States District Court for the Eastern District of Louisiana.

federal courts by tethering the courts' inherent equitable power to assess attorneys' fees to state law; (b) is inconsistent with this Court's precedent; and (c) undermines the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1711, *et seq*. and Rule 23 of the Federal Rules of Civil Procedure.

The Tenth Circuit's panel opinion will have significant consequences on the equitable power of federal courts to award attorneys' fees from a common fund, and it will undermine principles of uniformity, fairness and consistency when collective claims are litigated in federal courts sitting in diversity under CAFA. Certiorari should be granted.

ARGUMENT

I. The Panel Opinion Runs Afoul Of This Court's Precedent.

The panel opinion failed to acknowledge the guidance provided by this Court related to the determination of common-fund class action attorneys' fees. Instead, the panel opinion relied exclusively on fee-shifting cases. However, this case does not involve a state fee-shifting law. Instead, the fee at issue was based entirely on the common fund doctrine.

The common fund doctrine "is part of the historic equity jurisdiction of the federal courts." *Sprague*, 307 U.S. at 165. The "power to award counsel fees out of a fund created or preserved through someone's efforts" has been affirmed and extended repeatedly by this Court. 10 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2675 (2014) (citing *Internal Imp. Fund Trustees v. Greenough*, 105 U.S. 527, 533-36 (1881) (the court cannot be divested "of its long-established control over the costs and charges of litigation, to be exercised as equity and

justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund.")). As this Court stated long ago:

> Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts. The suits "in equity" of which these courts were given "cognizance" ever since the First Judiciary Act, 1 Stat. 73, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery, subject, of course, to modifications by Congress . . . .The sources bearing on eighteenth-century English practice—reports and manuals—uniformly support the power not only to give a fixed allowance for the various steps in a suit, what are known as costs "between party and party," but also as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit, technically known as costs "as between solicitor and client." To be sure, the usual case is one where through the complainant's efforts a fund is recovered in which others share. Sometimes the complainant avowedly sues for the common interest while in others his litigation results in a fund for a group though he did not profess to be their representative.

Sprague, 307 U.S. at 164-66 (internal citations omitted) (emphasis added). It is the court's jurisdiction "over the fund involved in the litigation" that invokes the court's equitable jurisdiction to assess "attorney's fees against the entire fund, thus spread-

ing fees proportionally among those benefited by the suit." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

Boeing confirmed federal courts possess equitable powers to award attorneys' fees out of the common fund, even in a class action asserting state law claims. The class in *Boeing* recovered damages solely for claims asserted under New York contract law, as the additional federal claim was unsuccessful. *See Boeing*, 444 U.S. at 474. Thus, while *Boeing* did not directly address the choice-of-law issue raised here, it nonetheless applied federal equitable law and the common fund doctrine in the context of a settlement involving state law claims. That *Boeing* originally involved a federal law should not lead to a different result here; otherwise litigants would need only include any available federal claim (even an unsuccessful one) to avoid application of state law.

The Supreme Court has explained that common fund cases are fundamentally different from fee-shifting cases, and the method for calculating fees for each is different. In *Blum v. Stenson*, 465 U.S. 886 (1984), a fee-shifting case, this Court stated, "[u]nlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under [the applicable fee-shifting statute] reflects the amount of attorney time reasonably expended on the litigation," *i.e.*, the lodestar method. *Id*. at 910, n.16. Thus, both the right to fees and the method for calculating fees in common fund cases is different from fee-shifting cases.[3]

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[3] As the Third Circuit Task Force Report, *Court Awarded Attorney Fees*, explained: "A key element of the fund case is that the fees are not assessed against the unsuccessful litigant (fee

Here, the settlement resulted in a common fund for the benefit of the class. No fee-shifting statute is at issue. Thus, the district court, consistent with Supreme Court precedent, awarded 33% of the settlement fund. The district court made this award after considering extensive briefing from counsel, reviewing the many declarations filed by the parties, and conducting a thorough fairness hearing. In its well-reasoned and lengthy ruling, the district court observed that "state and federal cases recognize and/or permit a percentage of fund recovery under the common fund doctrine." App. 34a-35a. The district court methodically walked through its findings of fact and conclusions of law, and it found the thirteen *Johnson*[4] factors supported its fee

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shifting), but rather are taken from the fund or damage recovery (fee spreading), thereby avoiding the unjust enrichment of those who otherwise would be benefitted by the fund without sharing in the expenses incurred by the successful litigant." 108 F.R.D. 237, 250 (1985). The Task Force concluded, "treating these two categories of cases in variant ways to best achieve their policy objectives appears sound, especially in light of footnote 16 of Justice Powell's opinion in *Blum v. Stenson*." *Id.* at 254-55.

[4] The district court stated as follows: "Under [the percentage of the fund] approach, the trial court evaluates the reasonableness of the requested percentage by analyzing the applicable factors contained in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The *Johnson* factors include: the time and labor required, the novelty and difficulty of the question presented by the case, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorneys due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, any time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation and ability of the attorneys, the undesirability of the case, the nature and length of the professional relationship with the client, and awards in similar cases. Rarely are all of the *Johnson* factors applicable; this is particularly so in a common fund situation. The Court finds that

award. *Id*. It further concluded that "the percentage of the fund method" is "[t]he preferred approach for determining attorneys' fees in common fund cases," and accordingly found an award of 33% of the settlement fund both "fair and reasonable." App. 33a, 34a-35a (citing Tenth Circuit precedent). The thoroughness of the district court's analysis is a model for how these matters should be handled.

Despite the reasonableness of the ruling, the panel disagreed with the district court's approach, holding the district court should have applied Oklahoma state procedure which, according to the panel, required the lodestar method. The panel's decision runs afoul of *Greenough* and *Boeing*. While these cases do not directly address the choice-of-law issue raised here, they strongly suggest federal equitable law should be applied in awarding attorneys' fees from a common fund created by the settlement of state law claims in federal court. In fact, for over 100 years, the ability of federal courts to exercise their equitable jurisdiction in this manner has not been directly questioned. The panel opinion calls into doubt a practice federal courts have long believed is available to them. The percentage of the fund method should be available to federal judges in cases such as the one at bar.

Equally important, the panel opinion undermines the exact type of thoughtful analysis and well-reasoned approach federal courts attempt to achieve. The district court, within its equitable discretion, considered the law and evidence before it and reached a result that was both fair and reasonable. To reverse this ruling because the district court should have used

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most, if not all, of the *Johnson* factors support Class Counsel's fee request, as reduced by the Court…"

the more complicated and overly burdensome lodestar method (essentially making the district court an auditor of billing statements) is to significantly limit the trial court's equitable jurisdiction and inject complication into an otherwise efficient process.

II. The Panel Opinion Undermines CAFA And Rule 23.

Congress enacted CAFA "to amend the procedures that apply to consideration of interstate class actions." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 163-67 (2014) (citing 119 Stat. 4). Congress was concerned the prior version of 28 U.S.C. § 1332 had kept "cases of national importance" in state courts "where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements." S. Rep. No. 109-14, at 3 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 5. As stated in the 2005 session laws:

> (4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—
>
> (A) keeping cases of national importance out of Federal court;
>
> (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

> (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

Pub. L. No. 109-2, § 2(a)(4), 119 Stat. 4. In enacting CAFA, "Congress intended to ensure that class actions are decided consistently, that they are adequately supervised by the court, and that federal courts handle the decisions that have nationwide implications." *Carter v. CIOX Health, LLC*, 260 F. Supp. 3d 277, 285-86 (W.D.N.Y. 2017). Accordingly, CAFA authorized federal jurisdiction in minimally diverse class actions so that the Federal Rules of Civil Procedure—including Rule 23—would govern. 28 U.S.C. § 1332(d)(1)(B).

The purpose of Rule 23 is to promote judicial economy by allowing for litigation of common questions of law and fact at one time. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). Federal courts, using their equitable powers in conjunction with Rule 23, regularly resolve questions on fees and other matters without the need to consult state laws. If this Court declines to grant certiorari, the panel opinion may well result in the chipping away of Rule 23 altogether. For example, after a certified class action settles, Rule 23(e)(2) requires district courts to hold a hearing and determine whether to approve the binding settlement as "fair, reasonable, and adequate." Is the meaning of this standard now "cabined" by state law? What about other provisions of Rule 23? Would federal courts be required to look to state law to determine how the numerosity and commonality requirements of Rule 23(a) are defined? If Oklahoma adopted lax criteria for determining predominance under Rule 23(b), would federal courts be bound by those criteria in diversity actions?

Unfortunately, these questions are a natural extension of the panel opinion and demonstrate the panel's fundamental misapplication of the *Erie* doctrine.[5] If the panel opinion holds, federal courts sitting in diversity under CAFA may be governed by the procedural rules and case law of various states—a prospect which CAFA sought to avoid. Further, the panel opinion will likely encourage forum shopping by incentivizing potential plaintiffs to take their claims to states that have more favorable fee laws.

Federal courts need guidance on whether state or federal law governs when awarding attorneys' fees in a common fund diversity case.[6] Without such guidance, the consistency, fairness, and efficiency objectives of CAFA and Rule 23 will be rendered meaningless. *See Bridewell-Sledge v. Blue Cross of California*, 798 F.3d 923, 932 (9th Cir. 2015) (a purpose of CAFA was to expand federal jurisdiction so that overlapping actions can be coordinated and decided by a single judge to promote judicial efficiency and ensure consistent treatment of legal issues).

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[5] The errors in the panel's *Erie* analysis may well reach beyond Rule 23 and lead to incursions into federal judicial discretion under other rules. If federal judges must apply state-law-based reasonableness norms when applying Rule 23, would that also be true for other rules that leave it to judges to determine what is reasonable under the particular circumstances? The slope is a slippery one.

[6] This is especially true given the circuit split identified in the Petition between the opinion in this case and that in *Ojeda v. Hackney*, 452 F.2d 947 (5th Cir. 1972) (per curiam). *See* Supreme Court Rule 10(a); *see also Ford v. United States*, 484 U.S. 1034, 1035 (1988) (split among Circuits warrant granting certiorari); *Lormand v. Aries Marine Corp.*, 484 U.S. 1031, 1032 (1988) (same).

CONCLUSION

The panel opinion essentially deprives federal courts of an efficient tool by which to calculate a reasonable attorney's fee and replaces it with an overly complicated, inefficient methodology. By removing the federal courts' ability to use equity and a percentage method to calculate attorneys' fees from a common fund, it has injected an unnecessary burden into the fee award process. Reasonableness is the goal, and federal courts have always had the ability and power to assess an attorney fee award in a manner which accomplishes that goal. The panel opinion takes this power away from the federal courts to the detriment of the court, the parties, and their counsel.

Amici respectfully request the Court to grant certiorari and provide clarity on these exceptionally important issues which directly affect the uniformity of decisions in the Tenth Circuit and throughout the nation.

Respectfully submitted,

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