No. 18-301

IN THE

Supreme Court of the United States

CHIEFTAIN ROYALTY COMPANY,

Petitioner,

—v.—

CHARLES DAVID NUTLEY, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENT CHARLES DAVID NUTLEY

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QUESTION PRESENTED

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.

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STATUTE AND RULE INVOLVED

The Rules of Decision Act provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. §1652.

Federal Rule of Civil Procedure 23(h) provides in relevant part:

> (h) *Attorney's Fees and Nontaxable Costs.* In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. …

Fed. R. Civ. P. 23(h).

SUMMARY OF ARGUMENT

Respondent Charles David Nutley respectfully submits that Chieftain Royalty Company's Petition for a Writ of Certiorari should be denied unless the Court directs the parties to address an additional question in order to clarify what the controlling federal standards are in the event that the Court holds common-fund fee awards are indeed controlled by federal law even in diversity cases. In particular, the Court should be able to address not just whether common-fund attorney's fee awards in diversity cases are governed by federal law but also, if federal law indeed controls, whether a "reasonable attorney's fee" is presumed to be the attorney's lodestar, *see, e.g.,*

Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542 (2010), provided it does not exceed a reasonable percentage of the common fund.

The decision below's apparent conflict with the 1892 holding of *Dodge v. Tulleys,* 144 U.S. 451 (1892), that a federal judge sitting in diversity could award attorneys' fees to a litigant trustee even if such an award was not available under state law, provides no basis for granting certiorari. *Dodge's* holding did not survive the *Erie* doctrine's rule that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938). This Court's decision in *Guaranty Trust Co. v. York,* 326 U.S. 99, 111 (1945), expressly extended *Erie's* mandate to cases coming within the federal courts' equitable jurisdiction. And *Hanna v. Plumer,* 380 U.S. 460, 468 (1965), requires reference to "the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Dodge's* rule, allowing litigants who sue in federal court to receive awards of attorneys' fees that are not available in state court, clearly violates those twin aims. *Dodge* is defunct. *See infra* §I, at 9-13.

There is, however, very real conflict among the circuits on whether, in diversity cases, common-fund attorneys' fees are governed by state or federal law. *See infra* §II, at 13-17. That conflict has substantial consequences, as attorneys surely consider potential fee awards when deciding where and how to litigate state-law claims. *See infra* §III, at 17-23. There is great conflict, as well, concerning what the federal law is—so that merely answering Chieftain's Question Presented cannot bring uniformity to a disordered field, unless this Court directs the parties

to brief and argue an additional question. *See infra* §IV, at 23-32.

With its decision below, the Tenth Circuit joins the Ninth Circuit in holding that common-fund fee awards in diversity cases are governed by state law. *See* Pet. App. 7a-16a; *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1047 (9th Cir. 2002); *Rodriguez v. Disner,* 688 F.3d 645, 653 (9th Cir. 2012). Chieftain's Petition convincingly demonstrates that Ninth and Tenth Circuit decisions conflict with the Fifth Circuit's holding in *Ojeda v. Hackney,* 452 F.2d 947, 948 (5th Cir. 1972), that when sitting in diversity "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" barring such an award. Respondent Nutley concedes that this is a clear conflict. *See infra* §II, at 13-14.

But there is more conflict among the circuits than Chieftain's Petition identifies. Chieftain overlooks Third Circuit precedent directly holding that common-fund attorneys' fees come within its own more general rule that "'contingency fee agreements in diversity cases are to be treated as matters of procedure governed by federal law.'" *Halley v. Honeywell International, Inc.,* 861 F.3d 481, 499-500 (3d Cir. 2017) (citation omitted). This places the Third Circuit, as well as the Fifth Circuit, in direct conflict with the Ninth and Tenth Circuits. The Fourth Circuit, moreover, appears to follow the Third Circuit's general rule that contingent fees in diversity cases are governed by federal law, *see In re Abrams & Abrams, P.A.,* 605 F.3d 238, 244 (4th Cir. 2010), and likely would join the Third Circuit in applying it to common-fund fee awards. *See infra* §II, at 14-16.

In addition, federal district courts sitting in Florida have for more than a decade have refused in diversity cases to apply the Florida Supreme Court's holding in *Kuhnlein v. Dept. of Revenue*, 662 So.2d 309 (Fla. 1995), that common-fund attorneys' fees shall not be awarded as a percentage of the fund, but must be constrained by lodestar principles. Federal district courts in Florida hold: "The district court presiding over a diversity-based class action pursuant to Fed. R. Civ. P. 23 has equitable power to apply federal common law in determining fee awards irrespective of state law." *Allapattah Services, Inc. v. Exxon Corp.,* 454 F.Supp.2d 1185, 1200 (S.D. Fla. 2006). *See infra* §II, at 16-17.

So, there is clear conflict. The Tenth Circuit and the Ninth Circuit both hold that common-fund fee awards in diversity cases are governed by state law, while the Third and the Fifth Circuits, as well as district courts in the Eleventh Circuit, hold that common-fund fee awards in diversity cases always are governed by federal law. That circuit conflict might be a compelling reason for granting certiorari—if only the conflict were consequential.

The conflict is far more consequential than Chieftain's Petition suggests. Because the *Erie* doctrine mandates applying state law if applying a significantly different federal law would cause "forum-shopping" or "inequitable administration of the laws," *Hanna,* 380 U.S. at 468, Chieftain finds itself compelled to downplay the consequences of displacing Oklahoma's state-law lodestar awards with the federal-law percent-of-fund fee awards that Chieftain favors. *See* Pet. at 24-26. Hoping to avoid *Erie,* Chieftain describes the difference between Oklahoma's lodestar approach to fee awards, and a federal-law percent-of-fund award as "'[n]onsub-

stantial, or trivial, variations.'" Pet. at 25 (quoting *Hanna,* 380 U.S. at 468). In truth, the two methods have dramatic consequences for plaintiffs' class-action lawyers. Plaintiffs' attorneys prosecuting antitrust, securities, consumer, or oil-and-gas-royalty class actions that produce large common-fund recoveries can expect, in the long run, to make a lot more money with percent-of-fund fee awards unconstrained by their lodestars. That is why Chieftain desires this Court's review. *See infra* §III, at 17-22.

A genuine conflict among the circuits, on a matter of consequence could easily warrant this Court's intervention—which Chieftain insists is needed to ensure national uniformity. But on this score, Chieftain's Petition fails, for answering Chieftain's Question Presented as currently framed would neither resolve what standards properly control common-fund fee awards nor bring national uniformity to a chaotic field. Chieftain asks this Court only to decide: "Whether common-fund fee awards are governed in diversity cases by state or federal law." But the ruling Chieftain seeks—merely that federal law controls—would do next to nothing to determine what the controlling law really is. There are many possibilities. *See infra* §IV, at 23-32.

First, even if common-fund fee awards are governed by federal common law, this Court's decisions hold that the federal common law often incorporates state law. *See, e.g., Semtek Int'l Inc. v. Lockheed Martin Corp.,* 531 U.S. 497, 508 (2001); *Kamen v. Kemper Financial Services, Inc.,* 500 U.S. 90, 98-99 (1991). Third Circuit decisions holding that federal law governs attorneys' contingent fees have applied New Jersey Court Rules as the controlling "federal procedural law" limiting attorneys' fee awards in diversity cases from the District of New Jersey. *E.g.,*

Halley, 861 F.3d at 499. Thus, even if common-fund fee awards are governed by federal common law, that common law may well incorporate state law, either from the state in which the district court sits, or from the state under whose laws the plaintiffs' claims arise. *See infra* §IV, at 23-25.

Second, even if common-fund fees in diversity cases are to be governed by an exclusively federal common law that resolutely ignores state-law principles and precedents, the central question remains of what constitutes "a reasonable attorney's fee"—a question that this Court has repeatedly answered in cases where Congress authorized the award of "a reasonable attorney's fee." *See, e.g., Perdue,* 559 U.S. at 550-53; *City of Burlington v. Dague,* 505 U.S. 557, 562 (1992). Chieftain offers no reason why "a reasonable attorney's fee" must mean something entirely different in this common-fund case than it does in cases where this Court held that "a reasonable attorney's fee" ordinarily should not exceed the attorney's lodestar. *E.g., Perdue,* 559 U.S. at 546, 550-54.

Chieftain studiously ignores this Court's decisions defining "a reasonable attorney's fee" and instead assumes that its lawyers are entitled to one-third of the fund in this case—under Tenth Circuit precedent expressing a clear "preference" for awarding common-fund fees as a percentage of the fund, to determined using the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717 (5th Cir. 1974). *See* Pet. App. 4a-5a. That should be troubling, for the Tenth Circuit's common-fund jurisprudence is grounded in the very *Johnson*-factor approach *Perdue* jettisoned as too subjective to produce reasonably predictable results suited to

meaningful appellate review. 559 U.S. at 550-52. *See infra* §IV, at 25-29.

Merely holding that common-fund fee awards shall be governed by federal law would not bring order to a chaotic field. The Tenth Circuit's continued reliance on the *Johnson* factors is misplaced, and the circuits otherwise are in conflict on the most basic standards governing fee awards in common-fund cases. Some decisions sensibly apply the rule of *Perdue* and *Dague,* that a reasonable attorney's fee is properly limited to the attorney's lodestar even when a common fund is recovered—at least in cases involving claims also subject to a fee-shifting statute—while others hold that this Court's decisions defining "a reasonable attorney's fee" have no application at all in common-fund cases. *See infra* §IV, at 28-29.

The circuits are in conflict in other ways. The Eleventh Circuit and the District of Columbia Circuit have mandated that common-fund attorneys' fees always be awarded as a percentage of the fund—and never based on the attorneys' lodestar. Other circuits hold that district judges possess a largely unbridled discretion to choose between awarding common-fund fees as a percentage of the fund, or based on the attorneys' lodestar. *See infra* §IV, at 29-30.

Common-fund conflicts do not end there. This Court's own decisions support common-fund awards coming to but ten percent, or less, of the fund.[1] The

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[1] *See, e.g., Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116, 128 (1885) (slashing common-fund fee award from an unreasonably high 10% of the fund to just 5%); *Harrison v. Perea,* 169 U.S. 311, 317-18, 325-26 (1897) (affirming award of a fee amounting to 10% of the fund); *United States v. Equitable Trust Co.,* 283 U.S. 738, 746 (1931) (holding "the allowance [for attorneys' fees] of $100,000 unreasonably high and that to bring

Ninth Circuit and Eleventh Circuits nonetheless impose a 25% "benchmark" when common-fund fees are awarded as a percentage of the fund. The Second Circuit, on the other hand, has flatly rejected the Ninth Circuit's 25% benchmark as "an all too tempting substitute for the searching assessment that should properly be performed in each case." *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 52 (2d Cir. 2000). *See infra* §IV, at 30-31.

If this Court determines that an exclusively federal common law controls the award of common-fund attorneys' fee awards in diversity cases, it should have the opportunity to specify what principles, if any, cabin those awards. Thus, Nutley respectfully submits that Chieftain's Petition for a Writ of Certiorari should be denied, unless this Court directs the parties to brief and argue an additional question—as it has many times done when granting writs of certiorari. *See, e.g., Lafler v. Cooper,* 562 U.S. 1127 (2011); *Wal-Mart Stores, Inc. v. Dukes,* 562 U.S. 1091 (2010); *Pearson v. Callahan,* 552 U.S. 1279 (2008); *Central Bank v. First Interstate Bank,* 508 U.S. 959 (1993).

Specifically, this Court should direct the parties to brief and argue the additional question of whether, in a common-fund case like this, "a reasonable attorney's fee" is presumed to be the attorney's lodestar, *see Perdue,* 559 U.S. at 546, 550-54, provided it does not exceed a reasonable percentage of the common fund. An affirmative answer to that question would resolve many conflicts in federal common-fund jurisprudence by providing a uniform rule that is consistent with

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it within the standard of reasonableness it should be reduced to $50,000," which was roughly 7½% of the fund in question).

this Court's prior holdings defining "a reasonable attorney's fee." *See infra* §IV, at 32.

REASONS FOR DENYING THE PETITION

I. CHIEFTAIN IDENTIFIES NO MEANINGFUL CONFLICT WITH THIS COURT'S DECISIONS

Chieftain contends that the decision below conflicts with *Dodge v. Tulleys,* 144 U.S. 451 (1892), a diversity case holding that

> while 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 the costs which are taxable there, or control the discretion exercised in matters of [attorney's fee] allowances.

Id. at 457. "It is a general rule of equity," said *Dodge,* "that a trustee called upon to discharge any duties in administering of his trust is entitled to compensation therefor, and included therein is a reasonable allowance for counsel fees," even if it would not be available in state court. *Id.* at 457. In *Guffey v. Smith,* 237 U.S. 101, 114 (1915), this Court cited *Dodge* as holding "that the remedies afforded and the modes of proceeding pursued in the Federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting."

That said, Chieftain's reliance on *Dodge* ignores the revolution worked by *Erie* and its progeny, including *Guaranty Trust Co. v. York,* 326 U.S. 99 (1945), and *Hanna v. Plumer,* 380 U.S. 460 (1965). *Erie* held:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

Erie, 304 U.S. at 78. "To make an exception to *Erie R. Co. v. Tompkins* on the equity side of a federal court is to reject the considerations of policy which, after long travail, led to that decision." *York,* 326 U.S. at 111. "The source of rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States." *Id.* at 112.

The contrary rule of *Dodge* directly violates "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. For if a litigant can recover attorneys' fees in federal court that are unavailable in state court, this would be a compelling reason to engage in forum shopping. Only by filing suit in federal court would the trustee or class representative be able to recover its attorneys' fees. This is by no means a "nonsubstantial, or trivial, variation[]" that could be characterized as "unlikely to influence the choice of forum." *Hanna,* 380 U.S. at 468.

Nor would applying state law "disrupt" federal interests. *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.,* 356 U.S. 525 (1958). There is, after all, nothing peculiarly "federal" about the common-fund doctrine. This Court's original common-fund decision, *Trustees v. Greenough,* 105 U.S. 527, 536 (1882), applied what it described as "the common practice, as well in the

courts of the United States as in those of the States." This Court's next common-fund case, *Central R. & Banking Co. v. Pettus,* 113 U.S. 116, 128 (1885), it decided "according to the law of Alabama, by one of whose courts the original decree was rendered, and by which this question must be determined." More recently, in *U.S. Airways v. McCutchen,* 569 U.S. 88, 104 (2013), which involved the terms of a federal ERISA plan, this Court emphasized that it was not alone in applying the common-fund doctrine "in a wide range of circumstances as part of our inherent authority," since "State courts have done the same; the 'overwhelming majority' routinely use the common-fund rule to allocate the costs of third party-recoveries between insurers and beneficiaries." *McCutchen* follows those state-court common-fund decisions explaining: "A party would not typically expect or intend a[n ERISA] plan saying nothing about attorney's fees to abrogate so strong and uniform a background rule. And that means a court should be loath to read such a plan in that way." *Id.* at 104 & n.8.

Chieftain nonetheless suggests there is some overarching federal interest in awarding fees as a percentage of any common fund, so that district courts may avoid the burden of lodestar analysis in diversity cases.

Yet this Court's precedents hold that a "reasonable attorney's fee" award in cases involving federal statutory claims ordinarily requires calculation of the attorneys' lodestar: "'[T]he 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence.'" *Perdue,* 559 U.S. at 551 (citations omitted). Whenever federal courts award a "reasonable attorney's fee" under a federal statute "there is a strong presumption that the lodestar is

sufficient." *Id.* at 546. "'[A] reasonable attorney's fee is one that is adequate to attract competent counsel, but that does not produce windfalls to attorneys.'" *Id.* at 552 (quoting *Blum v. Stenson,* 465 U.S. 886, 897 (1984)). "[T]he lodestar method yields a fee that is presumptively sufficient to achieve this objective," with the caveat that "enhancements may be awarded in "'rare'" and "'exceptional'" circumstances." *Id.* at 552 (citations omitted).

Applying the lodestar analysis required by Oklahoma's common-fund doctrine is no more demanding, and no more disruptive of federal interests, than applying lodestar analysis to determine a "reasonable attorney's fee" under this Court's decisions in *Perdue* and *Dague.*

Chieftain nonetheless suggests that applying Oklahoma's preference for lodestar awards somehow frustrates policies underlying the Class Action Fairness Act of 2005 ("CAFA"), which provides for the removal to federal courts' diversity jurisdiction of most state-law class actions. Without doubt, CAFA reflects a Congressional determination that federal courts should administer state-law class actions, including the award of attorneys' fees. But Chieftain's notion that CAFA overrides Oklahoma's lodestar fee awards is contrary to statutory text and legislative history. *See* 28 U.S.C. §1712(b)(2) ("Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees."); S. Rep. No. 109-14, at 49 (2005) (CAFA "does not change the application of the *Erie* Doctrine").

Dodge thus is best understood as a decision "imbued with the rationale of *Swift v. Tyson,*" 41 U.S. 1 (1842), which *Erie* "thoroughly rejected."

Montgomery Ward & Co. v. Pacific Indemnity Co., 557 F.2d 51, 56-57 n.8 (3d Cir. 1977). That the decision below conflicts with *Dodge* thus provides no reason to grant certiorari.

II. THE CIRCUITS ARE IN CONFLICT ON WHETHER FEDERAL OR STATE LAW CONTROLS COMMON-FUND ATTORNEYS' FEE AWARDS IN DIVERSITY CASES

Chieftain has identified genuine conflict between decisions of the Ninth and Tenth Circuits, which both hold that common-fund fee awards in diversity cases are governed by state law, and the Fifth Circuit's decision in *Ojeda v. Hackney,* 452 F.2d 947 (5th Cir. 1972), which applies *Dodge's* outmoded reasoning to displace state law denying attorneys' fees with a contrary federal rule. But the conflict is worse than that, for a line of Third Circuit decisions holds that federal law controls attorneys' contingent fees in diversity cases, including common-fund cases. *See Halley v. Honeywell International, Inc.,* 861 F.3d 481, 498-500 (3d Cir. 2017). The Fourth Circuit has endorsed that line of decisions. *See In re Abrams & Abrams, P.A.,* 605 F.3d 238, 244 (4th Cir. 2010). And for more than a decade, federal district courts sitting in diversity have flatly refused to follow the Florida Supreme Court's holding in *Kuhnlein v. Dept. of Revenue*, 662 So.2d 309, 311-12 (Fla. 1995), that common-fund fees shall be calculated based on the attorneys' lodestar rather than as a percentage of the fund.

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Like the Tenth Circuit in the decision below, the Ninth Circuit squarely holds that common-fund attorneys' fee awards in diversity cases are governed by state law. When Washington state-law claims settled, producing a common fund, the Ninth Circuit held: "Because Washington law governed the claim, it also governs the award of fees. Under Washington law, the percentage-of-recovery approach is used in calculating fees in common fund cases." *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1047 (9th Cir. 2002) (citations omitted).

In *Rodriguez v. Disner,* 688 F.3d 645, 653 (9th Cir. 2012), moreover, the Ninth Circuit reiterated that while the claims before it involved alleged violations of federal antitrust laws, so that common-fund attorneys' fees were governed by federal law, "[i]f, on the other hand, we were exercising our diversity jurisdiction, state law would control whether an attorney is entitled to fees and the method of calculating such fees." *Id.* at 653 n.6. District courts in the Ninth Circuit naturally follow this rule, that common-fund attorneys' fee awards are controlled by state law in diversity cases. *See, e.g., In re Apple iPhone/iPod Warranty Litigation,* 40 F.Supp.3d 1176, 1180 & n.1 (N.D. Cal. 2014).

This approach, of both the Ninth and Tenth Circuits, clearly conflicts with that of the Fifth Circuit in *Ojeda,* citing this Court's pre-*Erie* decision in *Dodge* to hold that when sitting in diversity over a class action asserting only Texas state-law claims "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." *Ojeda,* 452 F.3d at 948. It is tempting to dismiss *Ojeda* as an isolated and ill-considered decision mistaking *Dodge* for good law.

Yet Chieftain overlooks another line of decisions, originating in the Third Circuit and holding that attorneys' contingent fees in diversity cases—including class actions producing common-fund settlements—are governed by federal law. The Third Circuit's decision in *Halley v. Honeywell International, Inc.,* 861 F.3d 481, 498-500 (3d Cir. 2017), which involved a common-fund class-action settlement, directly holds that "'contingency fees in diversity cases are to be treated as matters of procedure governed by federal law.'" *Id.* (quoting *Mitzel v. Westinghouse Elec. Corp.,* 72 F.3d 414, 417 (3d Cir. 1995)). *Halley* follows the Third Circuit's opinion in *Mitzel,* which in turns relies on *Elder v. Metropolitan Freight Carriers, Inc.,* 543 F.2d 513 (3d Cir. 1976):

> "Rules regulating contingent fees pertain to conduct of members of the bar, not to substantive law which determines the existence or parameters of a cause of action. Such rules are designed to promote the efficient disposition of litigation and enhance the public's confidence in the bar."

Mitzel, 72 F.3d at 417 (quoting *Elder,* 543 F.2d at 519; *see also Dunn v. H.K. Porter Co.,* 602 F.2d 1105, 1110 n.8 (3d Cir. 1979) (in evaluating attorneys' contingent fees' reasonableness, a district court "should apply federal law for its action is part and parcel of the process a federal court follows both in supervising members of its bar and in meeting the obligations imposed on it by Fed. R. Civ. P. 23(e)").

The Fourth Circuit, moreover, has cited *Mitzel* with apparent approval as holding that the "attorney fee determination in contingency case[s] is [a] federal procedural question." *In re Abrams & Abrams, P.A.,*

605 F.3d 238, 244 (4th Cir. 2010). The Fourth Circuit clearly agrees that federal law controls, being "persuaded that the virtues of simplicity and straightforwardness counsel against adopting different standards with different shades and nuances in different contexts." *Id.* at 244. Thus, the Fourth Circuit held that a contingent attorneys' fee award—even in a state-law personal-injury action—must be evaluated not according to state law, but under "the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974)." *Abrams,* 605 F.3d at 244. The Fourth Circuit failed to note that this Court had specifically disparaged the *Johnson* factors just four weeks earlier in *Perdue,* 559 U.S. at 550-52.

Further contributing to the conflict in the lower courts, federal district courts in Florida when awarding common-fund fees in diversity cases have for more than a decade refused to apply the Florida Supreme Court's holding in *Kuhnlein v. Dept. of Revenue*, 662 So.2d 309, 311-12 (Fla. 1995), that common-fund attorneys' fees shall not be awarded as a percentage of the fund, but must be constrained by lodestar principles. They hold: "The district court presiding over a diversity-based class action pursuant to Fed. R. Civ. P. 23 has equitable power to apply federal common law in determining fee awards irrespective of state law." *Allapattah Services, Inc. v. Exxon Corp.,* 454 F.Supp.2d 1185, 1200 (S.D. Fla. 2006). As one recent decision explained:

> It is true that Florida courts follow the lodestar approach in common fund class action cases. The federal courts in this circuit, however, do not, and have not at least since the Eleventh Circuit declared in *Camden I* that "[a]ttorneys' fees awarded from

> a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class."

Morgan v. Public Storage, 301 F.Supp.3d 1237, 1266 (S.D. Fla. 2016) (quoting *Camden I Condominium Ass'n v. Dunkle,* 946 F.2d 768, 774 (11th Cir. 1991)); *accord, e.g., In re Checking Account Overdraft Litig.,* 830 F.Supp.2d 1330, 1362 n.32 (S.D. Fla. 2011) ("Plaintiffs are correct that Eleventh Circuit attorneys' fee law governs" a common-fund fee award in a diversity case, "not the law of Florida.").

Clearly, we have a serious conflict among the circuits on whether a federal general common law of common-fund attorneys' fees displaces otherwise applicable state law in diversity cases. Such a conflict might warrant this Court's review, if it were at all consequential.

III. THE CONFLICT AMONG THE CIRCUITS HAS SUBSTANTIAL CONSEQUENCES

Given *Erie's* aim of discouraging forum shopping, Chieftain feels compelled to downplay the consequences of choosing between Oklahoma's lodestar fee awards, and what it touts as "federal" percent-of-fund awards. But the prospect of attorneys' fees, and method by which they will be calculated, make a big difference in where and how lawyers choose to litigate cases. "Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions." Fed. R. Civ. P. 23, Advisory Committee Note to 2003 amendment adding subdivision 23(h).

Chieftain says that "there is no reason to believe that awards will be predictably higher or lower under either method," dismissing the differences between

percent-of-fund and lodestar awards as "'[n]on-substantial, or trivial, variations" that are unlikely to affect plaintiffs' class-action counsel's litigation decisions. Pet. at 25 (quoting *Hanna,* 380 U.S. at 468). But plaintiffs' class-action counsel know better. They know that they can expect to make a lot more money, on average, when courts award common-fund fees as a percentage of the fund unconstrained by the attorneys' lodestars.[2]

That is why securities-fraud and antitrust class-action plaintiffs' lawyers have long favored replacing lodestar fee awards with percent-of-fund awards. Their complaints about lodestar awards reportedly induced the Third Circuit to convene a Task Force on Attorneys' Fees, which issued a report in 1985 that catalyzed a trend among federal courts to awarding common-fund fees as a percentage of the fund unhinged from attorneys' lodestars. The *Task Force Report* recognized that over the preceding decade this Court's decisions had endorsed the Third Circuit's approach to attorneys' fees in *Lindy Bros. Builders, Inc. v. American Radiator & Sanitary Corp.,* 487 F.2d 161 (3d Cir. 1973), *appeal following remand,* 540 F.2d 102 (3d Cir. 1976) (en banc), which had overturned a percent-of-fund award and directed that common-fund fees instead be calculated according to the attorneys' lodestar.[3]

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[2] A remarkable irony in this case is that Chieftain's lawyers initially filed in Oklahoma state court apparently thinking they would obtain a 40% fee award there. Put bluntly, "class counsel did not do the necessary homework on Oklahoma law." Pet. App. at 16a.

[3] *See Court Awarded Attorney Fees, Report of the Third Circuit Task Force,* 108 FRD 237, 242-43 (1985) ("*Task Force Report*") ("In *Lindy,* the court vacated the district court's fee award,

Acknowledging that this Court had "declared that the lodestar generally is 'presumed to be the reasonable fee,'" the *Task Force Report* challenged that view. 108 F.R.D. at 246 (quoting *Blum v. Stenson,* 465 U.S. 886, 897 (1984)). Further consideration was needed, the Task Force Report insisted, because despite this Court's acceptance of *Lindy's* lodestar methodology over the preceding decade, "*Lindy* has come under increased criticism, with some observers asserting that this technique causes more problems than it solves." *Task Force Report,* 108 F.R.D. at 246. "Whatever the merits of the *Lindy* objectives and the degree to which they are being achieved, there is a widespread belief that the deficiencies of the current system either offset or exceed its benefits." *Id.*

For its assertions that "*Lindy* has come under increased criticism," and had produced "widespread belief that the deficiencies of the current system" of lodestar common-fund fee awards "offset or exceed its benefits," the *Task Force Report* offered but two citations. 108 F.R.D. at 246 & n.28. One was to a *National Law Journal* article by David Lauter, explaining why the Third Circuit Task Force had been convened: "Circuit Chief Judge Ruggero J. Aldisert acted after complaints by some antitrust lawyers that the rules—under which fees are set by

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which had been based on a percentage of the settlement fund, and directed the district court to recalculate the fee pursuant to an entirely different formula. The technique is easily described. First, the court must determine the hours reasonably expended by counsel that created, protected, or preserved the fund. Second, the number of compensable hours is multiplied by a reasonable hourly rate for the attorney's services.") (footnote omitted).

multiplying the hourly market rate by the total number of hours spent—force lawyers in antitrust and securities class actions to pad their hours or delay settlement to build their fees." Brian Lauter, *When the Court Awards Fees,* National Law Journal, July 8, 1985, Special Section at S2. The other authority cited by the *Task Force Report* for its assertion that the *Lindy* lodestar awards were problematic was a class-action plaintiff lawyer's "unpublished report on fees presented to the Ninth Circuit [that] advocates abolishing *Lindy* and returning to percentage based fees." 108 F.R.D. at 246 & n.28. Simply put, securities and antitrust plaintiffs' lawyers wanted more money.

They undoubtedly were pleased when the *Task Force Report* recommended replacing the lodestar methodology with a "negotiated percentage fee procedure."[4] With the 1985 *Task Force Report* in hand, class-action plaintiffs' lawyers urged federal appellate courts "to 'junk' the lodestar altogether in common fund cases," replacing it with a requirement that district judges always award common-fund attorneys' fees as a percentage of the fund.[5] The plaintiffs' class-action bar scored remarkable victories in the Eleventh Circuit and the District of Columbia Circuit, which both ruled that district judges cannot

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[4] *Task Force Report,* 108 F.R.D. at 255-59; *cf. Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 49 (2d Cir. 2000) (noting that "[t]he Task Force unequivocally recommended a return to the percentage method in common fund cases," but without noting the Task Force's recommended procedural qualifications).

[5] *Goldberger,* 209 F.3d at 48 ("As succinctly stated at oral argument, counsel now urge us to 'junk' the lodestar altogether in common fund cases, and to remand for an award of an appropriate percentage fee.").

employ lodestar fee awards in common-fund cases, but must award attorneys' fees as a percentage of the fund.[6]

Other circuits answered requests to junk the *Lindy* lodestar approach to common-fund attorneys' fees by holding that district courts must have discretion to award fees however they choose, based either on the attorneys' lodestar or as a percentage of the fund.[7]

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[6] *Camden I Condominium Ass'n, Inc. v. Dunkle,* 946 F.2d 768, 770 (11th Cir. 1991) (embracing class counsel's argument that a district court abuses its discretion by "calculating attorneys' fees based upon the lodestar and risk enhancement method rather than a percentage of the class action common fund"); *Swedish Hospital Corp. v. Shalala,* 1 F.3d 1261, 1263 (D.C. Cir. 1993) (adopting class counsel's arguments: "This appeal raises important questions about the reasonable calculation of contingent counsel fees in class actions resulting in the creation of a common fund payable to plaintiffs. We hold that the proper measure of such fees in a common fund case is a percentage of the fund.").

[7] *See, e.g., Harman v. Lyphomed, Inc.,* 945 F.2d 969, 971, 974 (7th Cir. 1991) (holding district judges retain discretion to award lodestar fees, even though "the attorneys suggest adoption of the percentage-of-the-fund method as a rule of law in common fund cases" based on counsel's argument "that the percentage method offers advantages that recommend it over the lodestar method in common fund cases."); *Rawlings v. Prudential-Bache Properties, Inc.,* 9 F.3d 513, 515 (6th Cir. 1993) (approving lodestar fee award although "[c]lass counsel argues that the percentage of the fund method is the appropriate way to calculate attorney's fees in common fund cases"); *Florin v. NationsBank of Georgia, N.A.,* 34 F.3d 560, 565 (7th Cir. 1994) ("Class counsel have urged us to declare a rule in this case that would compel district courts to use the 'percentage-of-recovery method' to award attorney's fees in all common fund cases. They point out that at least two other circuits have done so, citing *Swedish Hospital* ... and *Camden I* ...."); *In re Washington Public Power Supply System Sec. Litig.,* 19 F.3d 1291, 1295 (9th Cir. 1994) ("Class Counsel urge us to follow the Eleventh Circuit's lead in mandating the

Still, the Third Circuit held that "[t]he percentage-of-recovery method is generally favored in common fund cases." *In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294, 300 (3d Cir. 2005). Holding that "either method is permissible in common fund cases," the Tenth Circuit similarly expressed "a preference for the percentage of the fund method."[8] Given the choice between awarding common-fund fees based on the *Lindy* lodestar methodology (requiring them actually to monitor the attorneys' work and time-keeping) or the percent-of-fund "methodology" (permitting them to pluck a percentage out of the air) district judges needed little encouragement to abandon relatively time-consuming lodestar awards for quick-and-easy percent-of-fund fee awards.[9]

The result has been to funnel vast wealth into the hands of a few plaintiffs' class-action lawyers. That is why Chieftain and its amici urgently desire this

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use of the percentage method in common fund cases. Because the law in our circuit is settled on this issue, we are not at liberty to follow the Eleventh Circuit. We instead apply the law of our circuit that the district court has discretion to use either method in common fund cases.").

[8] *Gottlieb v. Barry,* 43 F.3d 474, 483 (10th Cir. 1994) (holding district court abused its discretion by rejecting the master's recommendation of the percentage-of-fund method); *see* Pet. App. at 5a; *see also Rosenbaum v. MacAllister,* 64 F.3d 1439, 1445 (10th Cir. 1995).

[9] *See, e.g., In re Nasdaq Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 484-85 (S.D.N.Y.1998) (collecting cases); *In re Activision Sec. Litig.,* 723 F.Supp. 1373, 1378 (N.D. Cal. 1989) ("this court concludes that in class action common fund cases the better practice is to set a percentage fee and that, absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%").

Court's review. Class counsel make a lot more money under a regime of percent-of-fund fee awards than they do when limited to what this Court has repeatedly held is a reasonable attorney's fee.

IV. ANSWERING CHIEFTAIN'S QUESTION PRESENTED CANNOT BRING ORDER TO A CHAOTIC FIELD UNLESS THIS COURT DIRECTS THE PARTIES TO BRIEF AND ARGUE AN ADDITIONAL QUESTION

"If left undisturbed," Chieftain says, "the Tenth Circuit's decision will burden lower courts and undermine the uniformity in class actions that Congress has specifically sought to ensure." Pet. at 26. Chieftain says that "perhaps most importantly, the application of state law would 'disrupt' an important federal interest … namely the uniform administration of class actions in federal court." Pet. at 26.

But merely answering Chieftain's Question Presented will not bring uniformity to the federal courts' common-fund jurisprudence. Chieftain asks this Court to decide: "Whether common-fund fee awards are governed in diversity cases by state or federal law." A holding that common-fund fee awards are governed by federal law will mean next to nothing unless this Court also specifies what the federal law is.

For one thing, holding that federal common law controls the award of common-fund attorneys' fees in diversity cases would not necessarily preclude reference to state law, since the federal law often incorporates state law. In *U.S. Airways, Inc. v. McCutchen,* 569 U.S. 88, 104 & n.8 (2013), for example, this Court held that a federal ERISA plan

should be interpreted in accord with state-court common-fund precedents: "A party would not typically expect or intend a plan saying nothing about attorney's fees to abrogate so strong and uniform a background rule. And that means a court should be loath to reach such a plan in that way." *Id.*

In *Semtek Int'l Inc. v. Lockheed Martin Corp.,* 531 U.S. 497, 508 (2001), this Court held that because "federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity," its task was "to determine the appropriate federal rule." This Court adopted a federal common-law rule that state law controls: "This is, it seems to us, a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits." *Id.* at 508. The federal rule for common-fund fee awards might similarly incorporate the law of the state in which the district court sits.

Alternatively, the federal common law might incorporate the common-fund rules of the state under whose laws the underlying claims arise—particularly in a case like this one, in which state law provides for statutory fee shifting under the Oklahoma Production Revenue Standards Act ("PRSA").[10] "The presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with

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[10] *See* 52 O.S. 2001 §570.14(A), (C); *Tarrant v. Capstone Oil & Gas Co.,* 2008 OK CIV APP 17, ¶18, 178 P.3d 866, 871 (Okla. Civ. App. 2007) ("The PRSA allows for recovery of unpaid royalties with interest, damages for injury to business or property arising from the violation, litigation costs, *and attorney fees*.") (emphasis added).

the expectation that their rights and obligations would be governed by state-law standards." *Kamen v. Kemper Financial Services, Inc.,* 500 U.S. 90, 96-97 (1991).

Also worth noting are Third Circuit decisions holding federal law controls attorneys' contingent fees in diversity cases, as a matter of "federal procedure," which then apply the local rules of the U.S. District Court for the District of New Jersey, and through them incorporating as a federal procedural rule New Jersey Court Rule 1:21-7's state-law limitations on attorneys' contingent fees.[11] The Fourth Circuit, though following Third Circuit precedent in holding that attorneys' contingent fees are an issue of federal procedural law, it apparently did so so in order to *avoid* applying competing state-law standards. *See Abrams,* 605 F.3d at 244.

Were this Court to hold that the federal common law concerning common-fund fee awards *does not*

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[11] *See, e.g., Halley,* 861 F.3d at 198-99; *Mitzel,* 72 F.3d at 416-18; *Elder,* 543 F.2d at 516 & n.2, 518-19; *see also Elder,* 543 F.2d at 521 & n.5 (Hunter, J., dissenting). New Jersey Court Rule 1:21-7 currently provides that "an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits: (1) 33[1]/[3]% on the first $750,000 recovered; (2) 30% on the next $750,000 recovered; (3) 25% on the next $750,000 recovered; (4) 20% on the next $750,000; and (5) on all amounts recovered in excess of the above by application for reasonable fee in accordance with the provisions of paragraph (f) hereof; and (6) where the amount recovered is for the benefit of a client who was a minor or mentally incapacitated when the contingent fee arrangement was made, the foregoing limits shall apply, except that the fee on any amount recovered by settlement before empaneling of the jury or, in a bench trial, the earlier to occur of plaintiff's opening statement or the commencement of testimony of the first witness, shall not exceed 25%." N.J. Ct. Rule 1:21-7.

incorporate any state-law common-fund rules, that still would not settle what standards should control the award of attorneys' fees in this case. Chieftain simply assumes that its lawyers are entitled to one-third of the common fund under Tenth Circuit precedent expressing a preference for awarding fees as a percentage of the fund, with the appropriate percentage to be reckoned using the so-called *Johnson* factors. *See* Pet. App. at 5a.

The decision below reiterates the Tenth Circuit's "preference for the percentage-of-the-fund approach," Pet. App. at 5a, that employs *Johnson's* "12 factors to determine the appropriate percentage." Pet. App. at 4a. "The district court chose the percentage-of-the-fund analysis, explaining that this is '[t]he preferred method of determining a reasonable attorney fee award in common fund cases.' … It overruled the objectors' argument that the lodestar approach should govern and that the fee is excessive under that analysis." Pet. App. at 6a; *see id.* at 32a & 35a. "It then recited the *Johnson* factors and found that 'most, if not all, … support Class Counsel's fee request, as reduced by the Court'" from the 40% that Class Counsel requested, to the $33^{1}/_{3}$% figure that the district court plucked from the air. 6a; *see* 36a-37a. This apparently is how things are done in the Tenth Circuit—with district courts randomly generating a percentage figure after reciting the twelve *Johnson* factors.[12]

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[12] *See* Pet. App. at 4a-6a; *See, e.g., Gottlieb v. Barry,* 43 F.3d 474, 482 & n.4 (10th Cir. 1994) (expressing a "preference for the percentage of fund method," with the specific percentage to be set based on "the twelve *Johnson* factors"); *Uselton v. Commercial Lovelace Motor Freight, Inc,* 9 F.3d 849, 853 (10th Cir. 1993) (*Johnson* factors to be used to determine percentage fee awards in common fund cases); *Brown v. Phillips Petroleum*

Alas, the Tenth Circuit's common-fund jurisprudence, and the district court's 33⅓% award below, are grounded in the very *Johnson*-factor routine that this Court jettisoned in *Perdue,* 559 U.S. at 550-52, as far too subjective to produce reasonably predictable results that may be subject to meaningful appellate review. Prior to *Perdue,* this Court had several times held that the *Johnson* factors improperly double-count considerations already reflected in the first *Johnson* factor, the attorneys' hourly rates and time expended, also known as their lodestar.[13] In *Perdue* it specifically repudiated the *Johnson*-factors routine for setting attorneys' fees as one that "'gave very little actual guidance to district courts. Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and

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Co., 838 F.2d 451, 454 (10th Cir. 1988) (*Johnson* factors to be used "in setting and reviewing percentage fee awards in common fund cases").

[13] *See*, *e.g., Dague,* 505 U.S. at 562 (holding that a contingency enhancement under the fifth *Johnson* factor "amounts to double counting"); *Blum,* 465 U.S. at 899 (holding the district court's reliance on "quality of representation" presents "a clear example of double counting" and that "the results obtained," the seventh Johnson factor, "generally will be subsumed within [the] other factors"); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711, 726-27 (1987) (*Delaware Valley II*) (*Johnson* factors relating to contingency risk and "the novelty and difficulty of the issues presented" are already reflected "in determining the reasonable number of hours expended and the reasonable hourly rate" for the first *Johnson* factor) (plurality opinion); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 566 (1986) (*Delaware Valley I*) ("considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate").

produced disparate results.'"[14] *Perdue* rejected the *Johnson*-factors routine in favor of simply using attorneys' lodestar which, "unlike the *Johnson* approach … is 'objective' … and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results." *Perdue,* 559 U.S. at 551-52. Given this Court's express rejection of the *Johnson*-factors routine, it is frankly shocking how many courts continue to follow it.[15] Applying to common-fund cases *Perdue's* holding that an attorney's lodestar ordinarily is "a reasonable attorney's fee," provided of course that it does not exceed a reasonable percent of the total fund, would be a giant step toward uniformity and predictability for fee awards in common-fund cases.

Merely holding that common-fund fee awards shall be governed by federal law would not bring order to a chaotic field, as federal courts are in conflict on the most basic standards governing fee awards in common-fund cases. Some decisions sensibly apply the rule of *Dague* and *Perdue*, that a reasonable

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[14] *Perdue,* 559 U.S. at 550-51 (quoting *Delaware Valley I,* 478 U.S. at 563).

[15] *See, e.g., Muransky v. Godiva Chocolatier, Inc.,* __F.3d__, 2018 WL 4762434, at *11 (11th Cir. Oct. 3, 2018) (*Johnson* factors control common-fund fees); *Black v. Settlepou, PC,* 732 F.3d 492, 502 (5th Cir. 2013) (citing *Perdue's* "strong presumption of the reasonableness of the lodestar amount," but then holding: "However, after calculating the lodestar, a district court may enhance or decrease the amount of attorney's fees based on the 'relative weights of the twelve factors set forth in *Johnson.*'") (citation omitted); *Union Asset Management Holding A.G. v. Dell, Inc.,* 669 F.3d 632, 642-44 (5th Cir. 2012) (requiring common-fund fee awards to be based on a *Johnson*-factors analysis).

attorney's fee is properly limited to the attorney's lodestar even when a common fund is recovered—at least in cases involving claims also subject to a fee-shifting statute.[16] Other decisions hold that this Court's decisions in *Perdue* and *Dague,* defining what constitutes a "reasonable attorney's fee," have no application at all to common-fund fee awards—not even to those awarded for settling and releasing claims otherwise subject to statutory fee-shifting.[17]

The circuits are in conflict in other respects. The Eleventh Circuit and the District of Columbia Circuit have mandated common-fund attorneys' fees be awarded as a percentage of the fund—prohibiting fee awards based on the attorneys' lodestar. *See Swedish Hospital Corp. v. Shalala,* 1 F.3d 1261, 1263 (D.C. Cir. 1993); *Camden I Condominium Ass'n, Inc. v. Dunkle,* 946 F.2d 768, 770 (11th Cir. 1991). The Seventh, Ninth, and Tenth Circuits have refused to follow those decisions, insisting that district judges must be free to choose whether to award common-

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[16] *See, e.g., Haggart v. Woodley,* 809 F.3d 1336, 1358-69 (D.C. Cir. 2016); *Pierce v. Visteon Corp.,* 791 F.3d 782, 787 (7th Cir. 2015); *Brytus v. Spang & Co.,* 203 F.3d 238, 242-47 (3d Cir. 2000); *In re GMC Pick-up Truck Fuel Tank Prod. Liab. Litig.,* 55 F.3d 768, 822 (3d Cir. 1995); *Nensel v. People's Heritage Fc'l Gp.,* 815 F.Supp. 26, 27-30 (D. Me. 1993); *In re Bolar Pharm. Co. Sec. Litig.,* 800 F.Supp. 1091, 1095-96 (E.D.N.Y. 1992).

[17] *See, e.g., Muransky,* __F.3d__, 2018 WL 4762434, at *10 (11th Cir. 2018); *Staton v. Boeing Co.,* 327 F.3d 938, 967-69 (9th Cir. 2003); *Florin v. NationsBank of Georgia, NA.,* 34 F.3d 560, 562 (7th Cir.1994); *In re Washington Public Power Supply System Litig.,* 19 F.3d 1291, 1299-1301 (9th Cir. 1994); *In re BioScrip, Inc. Sec. Litig.,* 273 F.Supp.3d 474, 483-86 (S.D.N.Y. 2017); *In re Enron Corp. Sec. Litig.,* 586 F.Supp.2d 732, 757-61 (S.D. Tex. 2008).

fund fee awards as a percentage of the fund, or based on the attorneys' lodestar.[18]

Nor do the conflicts in federal common-fund jurisprudence end there. The Ninth Circuit mandates a 25% "benchmark" fee as "a per se equitable rule" when common-fund fees are awarded as percentage of the fund,[19] and the Eleventh Circuit precedent approves a similar 25% "benchmark."[20] Yet this

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[18] *See Gottlieb v. Barry,* 43 F.3d 474, 483 (10th Cir. 1994) (rejecting "two cited cases, *Swedish Hosp. Corp.* and *Camden I Condominium Ass'n,* [as] the only two circuit decisions explicitly rejecting the use of the lodestar method in common fund cases"); *Florin v. NationsBank,* 34 F.3d 560, 565 (7th Cir. 1994) (similarly rejecting *Swedish Hospital* and *Camden I*); *In re Washington Public Power Supply System Litig.,* 19 F.3d 1291, 1295 (9th Cir. 1994) ("Class Counsel urge us to follow the Eleventh Circuit's lead in mandating the use of the percentage method in common fund cases. *See Camden I* … Because the law in our circuit is settled on this issue, we are not at liberty to follow the Eleventh Circuit. We instead apply the law of our circuit that the district court has discretion to use either method in common fund cases.").

[19] *Fritsch v. Swift Transp. Co.,*899 F.3d 785, 796 (9th Cir. 2018); *see, e.g., Stanger v. China Electric Motor, Inc.,* 812 F.3d 734, 738 (9th Cir. 2016) ("The Ninth Circuit has set 25% of the fund as a 'benchmark' award under the percentage-of-fund method."); *In re Bluetooth Headset Prod. Liab. Litig.,* 654 F.3d 935, 942 (9th Cir. 2011)(citing "25% of the fund as the 'benchmark' for a reasonable fee award" and requiring an "adequate explanation in the record of any 'special circumstances' justifying a departure" from the benchmark); *In re Coordinated Pretrial Proceedings,* 109 F. 3d 602, 607 (9th Cir. 1997) ("'the district court should take note that 25 percent has been a proper benchmark figure.'") (quoting *Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 270 (9th Cir.1989)).

[20] *Muransky,* __F.3d__, 2018 WL 4762434, at *11 (11th Cir. 2018) ("[i]n *Camden I*, this Circuit called 25% of a common fund a benchmark attorney's fee award"); *Faught v. American Home*

Court's own common-fund precedents support cutting common-fund awards to ten percent or less of the fund.[21] Concordant with this Court's jurisprudence, and "disturbed by the essential notion of a benchmark," the Second Circuit has rejected the Ninth Circuit's 25% benchmark as "an all too tempting substitute for the searching assessment that should properly be performed in each case."[22]

Shield Corp., 668 F.3d 1233, 1243 (11th Cir. 2011) (Noting "well-settled law from this court that 25% is generally recognized as a reasonable fee award in common fund cases" and sustaining 25% common-fund award where: "The district court did not separately analyze whether the 25% awarded here 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.").

[21] *See, e.g., Central R. & Banking Co. v. Pettus,* 113 U.S. 116, 128 (1885) (slashing common-fund fee award from an unreasonably high 10% of the fund to just 5%); *Harrison v. Perea,* 168 U.S. 311, 325 (1897) (affirming award of a fee amounting to 10% of the fund); *United States v. Equitable Trust Co.,* 283 U.S. 738, 746 (1931) (holding "the allowance [for attorneys' fees] of $100,000 unreasonably high and that to bring it within the standard of reasonableness it should be reduced to $50,000," which was roughly 7½% of the fund in question).

[22] *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 52 (2d Cir. 2000). "Starting an analysis with a benchmark could easily lead to routine windfalls." *Id.*; *see also Barnett v. Equitable Trust Co.,* 34 F.2d 916, 919 (2d Cir. 1929) (Learned Hand, J.) ("If there be a rule in the District Court that in such cases allowances shall be made upon a basis of one-third of the amount involved, we do not know it and we disapprove it; it certainly has never had our sanction."), *mod. sub nom. United States v. Equitable Trust Co.,* 283 U.S. 738, 746 (1931) (cutting fee award still further "to bring it within the standard of reasonableness").

The foregoing conflicts could be resolved by a holding that in common-fund cases a "reasonable attorney's fee" is presumed to be the attorneys' lodestar, *see, Perdue,* 559 U.S. at 552-553, provided it does not exceed a reasonable percentage of the common fund. *See supra* at 31 & notes 21-22. This Court regularly directs the parties to brief and argue an additional question when granting a petition for certiorari. *See, e.g., Lafler v. Cooper,* 562 U.S. 1127 (2011); *Wal-Mart Stores, Inc. v. Dukes,* 562 U.S. 1091 (2010); *Pearson v. Callahan,* 552 U.S. 1279 (2008); *Central Bank v. First Interstate Bank,* 508 U.S. 959 (1993). Doing so here would give the Court the opportunity to provide a uniform standard that Chieftain says is badly needed.

CONCLUSION

Chieftain's Petition should be denied, unless this Court supplements the Question Presented so that, if federal law indeed controls, the Court may provide meaningful guidance concerning what principles cabin a district court's award of common-fund attorneys' fees. The Petition should be granted if the Court directs the parties to address an additional question:

> Whether a "reasonable attorney's fee" is presumed to be the attorney's lodestar, provided it does not exceed a reasonable percentage of the common fund.

Respectfully submitted,

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DATED: OCTOBER 9, 2018