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 *AMICUS CURIAE* OF PROFESSOR CHARLES SILVER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CHARLES SILVER
Counsel of Record
UNIVERSITY OF TEXAS
SCHOOL OF LAW*
727 E. Dean Keeton St.
Austin, TX 78705
(512) 913-0550
csilver@law.utexas.edu

Counsel for Amicus Curiae

*Affiliation for purpose of identification only

October 9, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
BACKGROUND	2
ARGUMENT	3
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page(s)

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,
421 U.S. 240 (1975) 3, 6

Boeing Co. v. Van Gemert,
444 U.S. 472, 100 S. Ct. 745,
62 L. Ed. 2d 676 (1980) 7

Central Railroad & Banking Co. v. Pettus,
113 U.S. 116, 5 S. Ct. 387,
28 L.Ed. 915 (1885) 6

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938) 3, 6, 7, 8

Guar. Tr. Co. of N.Y. v. York,
326 U.S. 99, 65 S. Ct. 1464,
89 L. Ed. 2079 (1945) 8, 9

Hall v. Cole,
412 U.S. 1, 93 S. Ct. 1943,
36 L.Ed.2d 702 (1973) 6

Harrison v. Perea,
168 U.S. 311, 18 S. Ct. 129,
42 L.Ed. 478 (1897) 6

Hobbs v. McLean,
117 U.S. 567, 6 S. Ct. 870,
29 L.Ed. 940 (1886) 6

Internal Imp. Fund Trustees v. Greenough,
105 U.S. 527 (1881) .... *passim*

Laffitte v. Robert Half Int'l Inc.,
1 Cal. 5th 480, 376 P.3d 672 (2016) 1, 2

TABLE OF AUTHORITIES—Continued

Page(s)

Mills v. Electric Auto-Lite Co.,
396 U.S. 375, 90 S. Ct. 616,
24 L.Ed.2d 593 (1970) 6

Ruhlin v. New York Life Ins. Co.,
304 U.S 202 (1938) 8

Sprague v. Ticonic Nat'l Bank,
307 U.S. 161, 59 S. Ct. 777,
83 L. Ed. 1184 (1939) 6, 7

United States v. Equitable Trust Co.,
283 U.S. 738, 51 S. Ct. 639,
75 L.Ed. 1379 (1931) 6

STATUTES

28 U.S.C. § 1920 5

28 U.S.C. § 1923 5

Act of Feb. 26, 1853 .... 5, 6

OTHER AUTHORITIES

Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 Cornell L. Rev. 656 (1991) 1, 2

Charles Silver, *Dissent from Recommendation to Set Fees Ex Post*, 25 Rev. Litig. 497 (2006) 2

Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee–Setting in Securities Class Actions* 115 Colum. L. Rev. 1371 (2015) 1, 2

TABLE OF AUTHORITIES—Continued

Page(s)

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011) 7

Amicus, Professor Charles Silver, respectfully submits this *amicus curiae* brief in support of Chieftain Royalty Company's petition for writ of certiorari in the above-captioned matter.[1]

STATEMENT OF INTEREST

Amicus is a law professor at the University of Texas at Austin. Amicus has spent much of his career studying and writing about attorneys' fees. The first article Amicus published after joining the Texas law faculty focused on the law supporting fee awards to lawyers whose efforts help produce common fund recoveries in class actions. Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 Cornell L. Rev. 656 (1991) ("*Restitutionary Theory*"). Amicus has continued to produce scholarship on fee awards in class actions ever since. Most recently, two coauthors and Amicus published a large empirical study of fee awards in securities class actions. Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee–Setting in Securities Class Actions* 115 Colum. L. Rev. 1371 (2015) ("*Is the Price Right?*"). THE CORPORATE PRACTICE COMMENTATOR chose this article as one of the ten best in the field of corporate and securities law that appeared in 2016.

Judges have cited Amicus' writings on fee awards many times. The Supreme Court of California recently did so repeatedly in *Laffitte v. Robert Half*

[1] Amicus has received no compensation for preparing or submitting this brief. No party or their counsel drafted this brief in whole or in part or provided funds intended for the preparation of this brief. However, the cost of my application for admission to the Supreme Court and the costs for printing were covered by the Whitten Burrage Law Firm. Pursuant to Rule 37.2, amicus states that after timely notification, all parties consented to the filing.

Int'l Inc., 1 Cal. 5th 480, 376 P.3d 672 (2016), a case that required it to decide whether trial judges in that state can use the percentage method when calculating common fund fee awards. In the course of concluding that they could, the California Supreme Court relied on three of Amicus' published works. See *Laffitte*, 376 P.3d at 689 (quoting *Restitutionary Theory*, supra, at 667 & 669); *Id.* at 690 (quoting Charles Silver, *Dissent from Recommendation to Set Fees Ex Post,* 25 Rev. Litig. 497, 499 & 499-500 (2006); and *id. generally* (repeatedly citing and discussing *Is the Price Right?*). Amicus was one of a group of law professors who submitted an amicus brief in *Laffitte*.

With respect, Amicus believes that, when considering the appeal of the fee awarded by the district court in this case, the Court of Appeals for the Tenth Circuit misanalysed the choice of law question. Because Amicus believes the Tenth Circuit's opinion will cause confusion and misapplication of the law in federal district courts, Amicus wishes to submit this brief in support of the request for certiorari.

BACKGROUND

The facts presented are simple. The underlying matter was a diversity case in which the plaintiff class members sought to recover unpaid royalties on gas extracted from wells in Oklahoma. The parties settled on terms that created a common fund containing $52 million in cash. This settlement included payment of approximately 100% of the principal damages. Class Counsel and Chieftain also negotiated binding changes to the way the defendants calculate and pay royalties for at least three years—changes valued at approximately $2,965,000. Class Counsel requested fees equal to 40% of the settlement cash, arguing that an award in that amount was justified on both percentage grounds and under the lodestar method. Finding that the percentage method was the preferred approach, the district court judge awarded 33.33% of the settlement cash as fees, or 31% of the total settlement value.

Two class members objected to the fee request. They argued that, under Oklahoma law, the lodestar method governs the size of fee awards from common funds and that, under that method, the award should be less. The district court held an extensive evidentiary hearing, where Class Counsel and Chieftain submitted substantial evidence. The two objectors did not object to any of this evidence and submitted none of their own. After the district court overruled their objections, the objectors appealed. The Tenth Circuit agreed with the objectors, reversed the fee award, and remanded with instructions to recalculate the fee. Citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the panel held that the district court was required to follow Oklahoma law when calculating the amount of a fee award from a common fund in a diversity case. This conclusion is mistaken and conflicts with Supreme Court precedent.

ARGUMENT

Federal courts have always regarded the equitable power to award fees from common fund recoveries as an inherent one that is available whenever a need arises to remedy unjust enrichment that occurs in the course of litigation. The Supreme Court recognized this in *Internal Imp. Fund Trustees v. Greenough*, 105 U.S. 527 (1881), and reaffirmed it almost a century later in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257–58 (1975). To my knowledge, the Supreme Court has never deviated from this view.

In *Greenough*, a plaintiff named Vose sued on behalf of himself and other bondholders to divest the trustee-defendants of control over identified assets, which they were accused of wasting by selling at nominal prices. After Vose succeeded, a new managing agent was appointed and subsequent asset sales produced a large fund, from which Vose sought to obtain reimbursement of his litigation costs.

The Court agreed that equity was on Vose's side. He had litigated on behalf of a group of bondholders, all of whom benefited from his efforts, in a context where face-to-face negotiations over responsibility for lawyers' fees and litigation costs were impracticable. Consequently, unless the court required other bondholders to share a portion of Vose's costs, they would be unjustly enriched.

> There is no doubt, from the evidence, that, besides the bestowment of his time for years almost exclusively to the pursuit of this object, [Vose] has expended a large amount of money …. It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee-bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.

Greenough, 105 U.S. at 532.

In the same opinion, the Court also distinguished sharply between the "fee-bill"—the list of charges that federal statutes authorize judges to impose on losing parties—and an equitable award to a litigation representative. In *Greenough*'s day, the fee-bill was governed by the Act of Feb. 26, 1853 (some provisions of which were later incorporated into 28 U.S.C. §§ 1920 & 1923), and the Court stated clearly that the Act had no bearing on federal judges' equitable power to award fees and costs from common funds.

> The fee-bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, *nor the power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require*. The fee-bill itself expressly provides that it shall not be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients (other than the government) such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States … *And the act contains nothing which can be fairly construed to deprive the Court of Chancery of its long-established control over the costs and charges of the 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*.

Greenough, 105 U.S. at 535–36 (emphasis added). From the beginning, then, the power to cure unjust enrichment by awarding compensation from common funds arose in equity and inhered in the federal courts' mandate to do justice.

The inherent power understanding of the common fund doctrine survived the decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). For example, the Court reiterated it in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257–58 (1975), a seminal post-*Erie* decision on fee awards.

> In *Trustees v. Greenough*, … , the 1853 Act was read as not interfering with the 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. That rule has been consistently followed. *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885); *Harrison v. Perea*, 168 U.S. 311, 325—326, 18 S.Ct. 129, 134—135, 42 L.Ed. 478 (1897); *United States v. Equitable Trust Co.*, 283 U.S. 738, 51 S.Ct. 639, 75 L.Ed. 1379 (1931); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); *Hall v. Cole*, [412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973)]; cf. *Hobbs v. McLean*, 117 U.S. 567, 581—582, 6 S.Ct. 870, 876—877, 29 L.Ed. 940 (1886).

Alyeska Pipeline Serv. Co., 421 U.S. at 257–58.

The same account of the power and a similar string of cases appeared in 1980, when the Supreme Court decided *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 749, 62 L. Ed. 2d 676 (1980). Notably, the substantive claim at issue in *Boeing*—another post-*Erie* decision—arose under New York law.

Today, the principles that supply and govern the courts' equitable power to award fees from common funds have been crystallized and codified in the law of restitution and unjust enrichment. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, § 29 (common fund doctrine). But the Restatement recognizes that the power to do equity when unjust enrichment is threatened during litigation inheres in the courts. Quoting Justice Frankfurter's opinion in *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166-167 (1939), the Restatement observes that "the foundation for the historic practice of granting reimbursement for the costs of litigation . . . is part of the original authority of the chancellor to do equity in a particular situation . . . [S]uch allowances are appropriate only in exceptional cases and for dominating reasons of justice." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29, *Cmt f* (2011).

The question at hand is whether, in a diversity class action involving state-law claims, the historic power to do equity empowers a federal district court judge to use the percentage method when awarding fees from a common fund even though courts in the relevant state have embraced the lodestar. Considering only this Court's cases, the answer is yes. After applying the percentage method itself in *Greenough,* the Court has never so much as hinted that a federal judge's power to cure unjust enrichment by awarding fees from a common fund is governed by state law.

It is true that some post-*Erie* cases have subjected other equitable powers exercised by federal judges to state law limitations. For example, in *Ruhlin v. New York Life Ins. Co.*, 304 U.S 202 (1938), a case decided on the very heels of *Erie*, the Court held that state law applied to a suit brought in equity to rescind an insurance contract. Subsequently, though, in *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 105, 65 S. Ct. 1464, 1468, 89 L. Ed. 2079 (1945), the Court both took note of *Ruhlin* and described the circumstances in which federal judges presiding over diversity cases can award equitable remedies that state court judges cannot.

> In giving federal courts 'cognizance' of equity suits in cases of diversity jurisdiction, Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law....
>
> *This does 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*. Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery[;] a plain, adequate and complete remedy at law must be wanting[;] explicit Congressional curtailment of equity powers must be respected[;] and the constitutional right to trial by jury cannot be evaded, … 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. Contrariwise, *a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it*.

Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 105–07, 65 S. Ct. 1464, 1468–69, 89 L. Ed. 2079 (1945) (internal citations omitted) (emphasis added).

When a federal judge presiding over a class action awards fees from a common fund, the conditions set out in *York* are met. The claim for fees falls within the traditional scope of equity; there can be no adequate remedy at law because it is impracticable for class counsel to obtain fees by suing class members for them; and there is no constitutional right to a jury trial because common fund fee awards have always been made by judges. Because Oklahoma recognizes the right to collect fees from common funds, it follows per *York* that a federal judge handling a diversity action governed by Oklahoma law can use the percentage method when needed to cure unjust enrichment. This is so even though an Oklahoma state court judge could not.

CONCLUSION

For the reason stated herein, I respectfully submit that the petition for writ of certiorari should be granted to avoid confusion and misapplication of the law regarding the award of attorneys' fees in common fund class actions.

Respectfully submitted,

CHARLES SILVER
Counsel of Record
UNIVERSITY OF TEXAS
SCHOOL OF LAW*
727 E. Dean Keeton St.
Austin, TX 78705
(512) 913-0550
csilver@law.utexas.edu

Counsel for Amicus Curiae

*Affiliation for purpose of identification only

October 9, 2018