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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

OTHER AUTHORITIES

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INTRODUCTION

Although respondent Charles Nutley styles his response a brief in opposition, most of his arguments point in the other direction. For example, he concedes not only that the decision below conflicts with *Dodge* v. *Tulleys*, 144 U.S. 451 (1892), but also that the question presented has divided the courts of appeals. He also agrees that that question is important and recurring. And he identifies no obstacle to this Court's resolution of the question here.

The only thing Nutley says by way of actual opposition is that answering the question presented would not completely clarify this area of the law—and so, he

asserts, the Court should deny review unless it *also* addresses a related but distinct question that he would like answered. While Chieftain Royalty stands ready to brief and argue that question if the Court so directs, the question was not "pressed or passed on below," and hence review of it would depart from this Court's "traditional rule." *United States* v. *Williams*, 504 U.S. 36, 41 (1992). But regardless, there is no merit to Nutley's "both-or-neither" argument. Even if Nutley's question is not taken up, Chieftain's question should be because (again as Nutley admits) it satisfies the criteria for this Court's review.

ARGUMENT

I. NUTLEY ACKNOWLEDGES THAT THE DECISION BELOW IMPLICATES A CIRCUIT CONFLICT AND DEPARTS FROM THIS COURT'S PRECEDENT

A. Nutley agrees with Chieftain that the decision below "conflict[s] with the Fifth Circuit's holding in *Ojeda* v. *Hackney*, 452 F.2d 947, 948 (5th Cir. 1972) [(per curiam)]." Opp. 3. There the Fifth Circuit held that a "district judge … possesses an equitable discretion to award attorneys' fees in a class action suit despite the provisions of State l[aw]." 452 F.3d at 948, *quoted in* Pet. 16. There is no way to reconcile that holding with the decision below, and so "Nutley concedes that this is a clear conflict." Opp. 3; *accord* Opp. 4, 17 (similar).[1]

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[1] Nutley likewise recognizes (Opp. 4, 16-17) that the Tenth Circuit's decision conflicts with the line of authority cited in *Allapattah Services, Inc.* v. *Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006), which invoked decisions from several circuits in holding that "the district court presiding over a diversity-based class action … has equitable power to apply federal common law in de-

B. Nutley recognizes not only that "Chieftain has identified genuine [circuit] conflict," Opp. 13, but also that "the decision below conflicts with *Dodge*," *id.* He argues, however (Opp. 2), that the conflict with *Dodge*—unlike the circuit conflict—"provides no basis for granting certiorari" because "*Dodge*'s holding did not survive" this Court's decisions in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), and *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945). That would not justify denying review even if it were true, given the acknowledged circuit conflict and (as discussed below) the acknowledged importance of the question presented. But it is not true.

As the petition explained (at 13-16), the opinion in *Dodge*—which held that state law "does not … control the discretion exercised [by federal courts] in matters of [fee] allowances," 144 U.S. at 457—is consistent with *Erie* and its progeny. *Dodge* expressly recognized what later became *Erie*'s core holding, stating that "this court follows the decisions of the highest court of the State in … matters" of state law. *Id.*; *compare Erie*, 304 U.S. at 78. That is likely why the Court cited *Dodge* after *Erie*, for the proposition that federal courts have inherent power to award common-fund fees. *See Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 165 n.2 (1939). Moreover, *Dodge*'s answer to the question presented is correct under the analysis prescribed by this Court's modern *Erie* precedent. Again, the petition explained all this, yet Nutley tellingly ignores it (while falsely asserting, with considerable gumption, that the *petition* "ignores the revolution worked by *Erie* and its progeny" (Opp. 9)).

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termining fee awards," *id.* at 1200. Indeed, Nutley argues (Opp. 3, 13, 15-16) that the conflict is broader than the petition portrayed it, involving the Third and likely the Fourth Circuits as well.

Chieftain likewise addressed (Pet. 13-15) Nutley's claim (Opp. 9-10) that *Dodge* was implicitly overruled by *York*'s rejection of a blanket "exception to *Erie* … on the equity side of" federal jurisdiction, 326 U.S. at 111. That is a selective reading of *York*; the Court there stated that its holding did "not mean … that a federal court may not afford an equitable remedy not available in a State court." *Id.* at 105. To the contrary, "a federal court [in diversity] may afford an equitable remedy … even though a State court cannot give it." *Id.* at 106. Accordingly, "[m]ost federal courts" have read *York* to mean "that a federal court in equity is not bound by state rules dealing with equitable procedure and remedies." Cross, *The* Erie *Doctrine In Equity*, 60 La. L. Rev. 173, 189-190 (1999). Here too, Nutley never engages with the petition's explication.[2]

Equally infirm is Nutley's contention (Opp. 10) that the Tenth Circuit's departure from *Dodge* is immaterial because *Dodge*'s answer to the question presented is incorrect under the analysis required by this Court's modern *Erie* cases, i.e., incorrect in light of *Erie*'s "twin aims …: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965). To begin with, Nutley—like the Tenth Circuit—recites the latter aim

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[2] In contending that *Dodge* has been implicitly overruled, Nutley cites *Montgomery Ward & Co.* v. *Pacific Indemnity Co.*, 557 F.2d 51 (3d Cir. 1977). *See* Opp. 12-13. But he does not answer Chieftain's point (Pet. 13 n.3) that *Montgomery Ward*'s dismissal of *Dodge* rested on a reading of *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), that was rejected by *Chambers* v. *NASCO, Inc.*, 501 U.S. 32 (1991). Nor does Nutley answer Chieftain's further point (Pet. 13 n.3) that *Chambers* similarly rejected *Montgomery Ward*'s underlying choice-of-law holding. It is thus *Montgomery Ward*, not *Dodge*, that is "defunct" (Opp. 2).

but never addresses it. *Compare* Pet. 25-26. And while he (unlike the Tenth Circuit) does address the former, he simply asserts (Opp. 10) that litigants would have "a compelling reason to … forum shop[]" if they could "recover attorneys' fees in federal court that are unavailable in state court." But as the petition expounded (at 24-26), forum-shopping would be a risk only if fees were consistently higher or lower under the percentage-of-the-fund method than under the lodestar approach. Nutley yet again ignores the petition, offering no sound basis to conclude that that is the case, let alone to conclude that any such difference would be predictable at the outset of a case—as it would have to be for forum-shopping to be a concern. In short, *Dodge* is correct under this Court's modern *Erie* precedent.[3]

The bottom line as to all of Nutley's arguments regarding *Dodge*, however, is that even if later cases called its validity into question, that would not weaken the rationale for certiorari. This Court has not overruled *Dodge*—Nutley cites no case doing so—so the Tenth Circuit's duty was to "follow" it, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). And if any legitimate doubt existed about *Dodge*'s vitality, that would weigh in favor of

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[3] Nutley claims (Opp. 10-11) that this Court applied state law to a common-fund fee in *Central Railroad & Banking Co.* v. *Pettus*, 113 U.S. 116 (1885), which the petition cited (at 11) as showing that federal law applies. But the language Nutley cites to support that claim pertained to a different issue, namely entitlement to a lien. *See* 113 U.S. at 127 ("The court below did not err in declaring a lien upon the property …, for, according to the law of Alabama, … by which law *this question* must be determined…." (emphasis added)). As to the common-fund fee, the Court cited only *Trustees* v. *Greenough*, 105 U.S. 527 (1882), which arose from a different state. *See Pettus*, 113 U.S. at 126-128; Pet. 11.

granting review so that the Court could harmonize its cases and resolve the doubt.

II. NUTLEY CONCEDES THAT THE QUESTION PRESENTED IS IMPORTANT

Although his reasoning differs, Nutley agrees with Chieftain that "the conflict among the circuits has substantial consequences." Opp. 17 (capitalization and typeface altered). Specifically, the question presented is important to the administration of federal-court class actions in two ways. *See* Pet. 26-29.

A. First, the decision below will undermine procedural uniformity for federal-court class actions, which Congress sought to promote in enacting the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4. *See* Pet. 28-29; Former Federal Judges Amicus Br. 9-11; Arthur Miller Amicus Br. 8-10.[4]

Nutley responds that the application of state law would not "'disrupt' federal interests" in uniformity because "[t]here is … nothing peculiarly 'federal' about the common-fund doctrine." Opp. 10-11. That misses the point. Under the decision below, district courts in the Tenth Circuit would still be required to follow Federal Rule of Civil Procedure 23 in most respects. But they could no longer follow Rule 23(h), which permits them to "award reasonable attorney's fees … that are authorized by law"—without limiting their discretion in choosing the method for determining the award. *See* Fed. R. Civ. P. 23, 2003 advisory committee note. Courts would instead be required (unlike district courts elsewhere) to disregard the federal rule and use the

[4] Professor Miller explains in detail why the decision below is wrong and how the panel went astray in relying on his treatise to justify its ruling.

method prescribed by state law, even though they might be unfamiliar with it and might even find it difficult (as here) to discern what state law requires. *See* Pet. 29. *That* is the uniformity problem, and Nutley says nothing that refutes it.

B. The question presented is independently important because the decision below will require district courts in Oklahoma—and perhaps elsewhere in the circuit—to determine common-fund awards in diversity cases using the lodestar. But that method is "difficult and burdensome to apply." *Third Circuit Task Force Report on Selection of Class Counsel*, 74 Temple L. Rev. 689, 776 (2001), *quoted in* Pet. 27. While this burden might be tolerable if the method produced superior fee awards, that is not the case. To the contrary, the lodestar—unlike the percentage-of-the-fund method—"encourages counsel to run up the bill, expending hours that are of no benefit to the class," and "may result in undercompensation of talented attorneys" who can "do more for a class in an hour than another attorney could do in ten." *Id.*, *quoted in* Pet. 27.

Nutley is evidently unconcerned by these shortcomings, as he never addresses them. Instead, he inveighs at length against the percentage-of-the-fund approach (and the Third Circuit Task Force's endorsement of it), implying that "[t]he plaintiffs' class-action bar" (Opp. 20) somehow hoodwinked the Task Force and many federal judges into approving the percentage approach—including Judge Sentelle, who authored the D.C. Circuit decision endorsing the percentage method, and Judges Randolph and D.H. Ginsburg, who joined that decision. *See Swedish Hospital Corp.* v. *Shalala*, 1 F.3d 1261 (D.C. Cir. 1993). This suggestion is, to put it mildly, highly dubious. Just as unfortunate is Nutley's open disparagement of district judges as lazy gate-

keepers who, when "[g]iven the choice between … the … 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)[,] … needed little encouragement to abandon relatively time-consuming lodestar awards for quick-and-easy percent-of-fund fee awards." Opp. 22; *see also* Opp. 26 (attacking the district court in this case), *id.* (attacking judges throughout the Tenth Circuit). Nutley's resort to such invective does nothing to undermine Chieftain's point that review is appropriate in part because of the additional—and unjustified—onus that the decision below will often impose on already-overburdened district courts.

Nutley also errs in suggesting that this Court has rejected the percentage-of-the-fund approach for common-fund fees in favor of the lodestar. To the contrary, "every Supreme Court case addressing the computation of a common fund fee award has determined such fees on a percentage of the fund basis." *Camden I Condominium Ass'n* v. *Dunkle*, 946 F.2d 768, 773 (11th Cir. 1991). Moreover, this Court has stated in dicta that "under the 'common fund doctrine,' … a reasonable fee is based on a percentage of the fund." *Blum* v. *Stenson*, 465 U.S. 886, 900 n.16 (1984). "[T]he *Blum* footnote makes it plain that that decision's approval of the lodestar method in the fee-shifting context was not intended to overrule prior … cases" "in which the Court approved a [common-fund] fee award based on the percentage-of-the-fund method." *Swedish Hospital*, 1 F.3d at 1268. Given all this, lower courts' continued use of the percentage method in common-fund cases—no circuit requires use of the lodestar—is not at all "shocking" (Opp. 28).

Nutley responds by citing *Perdue* v. *Kenny A. ex rel. Winn*, 559 U.S. 542 (2010), and *City of Burlington* v. *Dague*, 505 U.S. 557 (1992). But both cases involved fee shifting rather than common-fund fees. *See Dague*, 505 U.S. at 562 (referring to the lodestar as "the guiding light of our *fee-shifting* jurisprudence" (emphasis added)), *quoted in Perdue*, 559 U.S. at 551. They are therefore inapposite. *See* Pet. 6, 21-22 (explaining differences between fee-shifting and common-fund awards).

To be clear, Chieftain does not view the percentage method as immune to misuse. That method is certainly "not perfect," *Perdue*, 559 U.S. at 551 (describing the lodestar), but it has "several important virtues," *id.* (describing the lodestar). And Nutley's extended diatribe does not alter the central point that certiorari is warranted here because the decision below improperly curtails district courts' discretion to conclude that those virtues justify the use of the percentage method to determine common-fund fees in particular cases.

III. CERTIORARI IS WARRANTED EVEN IF THE COURT DOES NOT ADD NUTLEY'S PROPOSED QUESTION

In addition to agreeing that Chieftain's question presented satisfies the criteria for certiorari under this Court's Rule 10, Nutley identifies no vehicle problem or other impediment to the Court's resolution of the question in this case. In fact, the sole basis on which he opposes a straightforward grant of certiorari is his claim that "answering Chieftain's question presented cannot [alone] bring order to a chaotic field." Opp. 23 (capitalization and typeface altered). Specifically, Nutley contends that because lower courts are divided about how to calculate common-fund fees under federal law, the

petition should be granted only if the Court orders briefing and argument on that question as well.

As an initial matter, Nutley's plea for this additional question—and the amount of space he devotes to making that plea (*see* Opp. 1-2, 5-9, 23-32)—go far in the direction of a concession that federal law *does* govern in cases like this, i.e., that the decision below is wrong. After all, the Court would have no occasion to reach Nutley's additional question if it agreed with the Tenth Circuit that state law governs.

In any event, the Court may indeed deem the question of how common-fund fees are determined under federal law to be worthy of review at some point, because Nutley is correct that there is lower-court division on that issue. And if the Court wishes to resolve that division in this case, Chieftain, as noted, is prepared to brief and argue the issue. The Court may prefer, however, to await a case in which its ability to answer Nutley's question is not contingent on how it answers an antecedent question (here, the *Erie* question). Furthermore, Nutley did not ask the Tenth Circuit to revisit its jurisprudence concerning the determination of common-fund fees under federal law (nor did any other party), and the Tenth Circuit did not address Nutley's proposed question sua sponte because it held that state law governed. Addressing that question here would thus be unusual, because this is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

However the Court resolves Nutley's request to add a second question, though, it should reject his assertion that taking up that question is a prerequisite to granting Chieftain's petition. As mentioned, Nutley argues (Opp. 23) that "merely answering Chieftain's

[q]uestion [p]resented will not bring uniformity to the federal courts' common-fund jurisprudence." But certiorari is not reserved for cases that will immediately yield complete clarity and uniformity in the relevant area of law. To the contrary, this Court routinely takes up questions that, when answered, will leave uncertainty about related questions. The Court can of course resolve such related questions in a later case, once lower courts have had an opportunity to apply the Court's new guidance. Indeed, the Court has said that "when we reverse on a threshold question, we *typically* remand for resolution of any claims the lower courts' error prevented them from addressing." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (emphasis added) (citing *Bond* v. *United States*, 564 U.S. 211 (2011)).

Nothing requires a departure from that "typical[]" approach here; the Court could provide much-needed guidance simply by resolving the question presented. If it holds that federal law governs, it could then take up Nutley's question in a later case (one in which the issue has been pressed or passed upon below).

Nutley argues, however (Opp. 8, 32), that this Court has previously added questions when granting certiorari. That is true, and again Chieftain does not oppose that approach here if the Court deems it appropriate. But none of Nutley's cited cases supports his contention that Chieftain's petition should be denied *unless* his second question is added. Chieftain's petition should be granted either way, because—again as Nutley agrees—its question presented is an important and recurring one that has divided the lower courts, and the Tenth Circuit's answer to that question conflicts with this Court's precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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