Nos. 22-389, 22-517

In the Supreme Court of the United States

CHARLES T. JOHNSON, PETITIONER
vs.
JENNA DICKENSON, RESPONDENT.

JENNA DICKENSON, PETITIONER,
vs.
CHARLES T. JOHNSON, AND NPAS SOLUTIONS LLC,
RESPONDENTS.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

Recent decisions underscore the need for this Court's review in *Johnson v. Dickenson,* No. 22-389, concerning incentive awards, and in *Dickenson v. Johnson,* No. 22-517, concerning common-fund attorney's fees.

The Second Circuit's March 15, 2023, decision in *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.,* __F.4th__, 2023 WL 2506455 (2d Cir.2023), demonstrates the pressing need for this Court's review of the question presented by *Johnson v. Dickenson,* No. 22-389: whether federal courts must continue to follow this Court's decisions in *Trustees v. Greenough,* 105 U.S. 527, 537 (1882), and *Central Railroad & Banking v. Pettus,* 113 U.S. 116, 122 (1885), barring payments in common-fund cases to compensate litigants for their service as representative plaintiffs. In *Fikes* the Second Circuit recognizes that this Court's precedents prohibit incentive awards, but it approves of such awards nonetheless. *Fikes,* 2023 WL 2506455, at *8-*10; *id.* at *17 (Jacobs, J., concurring); *see infra* 3-4.

Fikes also deepens the split between the Eleventh and District of Columbia Circuits, on the one hand, which hold that common-fund attorney's fee awards must be calculated solely as a percentage of the fund, and all the circuits permitting district courts to award lodestar common-fund fees. In addition, the percent-of-fund attorney's fee award approved in *Fikes* shows how such awards have come unhinged from objective standards. The $523 million attorney's fee award in *Fikes* is 2.45 times the unenhanced lodestar that this Court held in *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542 (2010), is the presumptively reasonable attorney's fee for victorious contingent-fee class-action lawyers. It is hard to see why lawyers in *Fikes,* who settled for less

than three percent of claimed damages, must be paid more than twice as much as lawyers would get under *Perdue* for winning those antitrust claims. Something is seriously wrong with a common-fund fee jurisprudence in the lower courts that pays lawyers *more* for achieving *less*. *Infra* 4-9.

Adding to the jurisprudential incoherence on common-fund attorney's fees are two late-February decisions in which the Tenth Circuit joins the Eleventh in requiring district courts to determine *all* common-fund fee awards using the "*Johnson* factors" that this Court expressly repudiated in *Perdue,* 559 U.S. at 552.

One affirms a *Johnson*-factors common-fund percent-of-fund fee award amounting to "2.8 times Plaintiffs' counsel's lodestar," which it describes as a multiplier "'routinely approved by courts in ... the Tenth Circuit.'" *Voulgaris v. Array Biopharma, Inc.,* 60 F.4th 1259, 1263 & n.1, 1266 (10th Cir.2023)(citation omitted).

Another affirms an allocation of common-fund attorney's fees in which class counsel (appointed by the district court to allocate fees among themselves and other counsel) awarded themselves *Johnson*-factors common-fund fees amounting to three times their lodestar, at the expense of other attorneys in the complex MDL proceedings who received only a fraction of theirs. *In re Syngenta AG MIR 162 Corn Litig.,* 61 F.4th 1126, 1193 (10th Cir.2023). *Infra* 9-12.

I. The Second Circuit's Rejection of *Greenough* in *Fikes* Underscores the Need for Review of Incentive Awards in *Johnson v. Dickenson*, No. 22-389

Fikes recognizes that "[s]ervice awards are likely impermissible under Supreme Court precedent." *Fikes,*

2023 WL 2506455, at *9. The Second Circuit nonetheless holds that this Court's decisions may be ignored because

> practice and usage seem to have superseded *Greenough* (if that is possible). *See Melito v. Experian Mktg. Sols. Inc.,* 923 F.3d 85, 96 (2d Cir.2019); *Hyland v. Navient Corp.,* 48 F.4th 110, 123-24 (2d Cir.2022).

Fikes, 2023 WL 2506455, at *9.

The *Fikes* panel unanimously holds that "even if (as we think) practice and usage cannot undo a Supreme Court holding," the Second Circuit's own contrary holdings have done just that, as "*Melito* and [*Hyland v.*] *Navient* are precedents that we must follow." *Fikes,* 2023 WL 2506455, at *9. Second Circuit law controls, in direct contravention of this Court's holding in *Greenough.*

The Second Circuit recognizes, moreover, that the resulting incentive awards are not much constrained by meaningful standards: "Given the Supreme Court's precedent in apparent opposition to the practice, and the standardless use of it nevertheless, it is unsurprising that, as has been said, 'the decision to grant the [service] award, and the amount thereof, rests solely within the discretion of the [District] Court.'" *Fikes,* 2023 WL 2506455, at *9 (citation omitted). "Given that the basis for any service award in a class action is at best dubious under *Greenough*, and that, unsurprisingly, calculation of such an award is standardless, it is difficult to find traction for a ruling that this award is an abuse of discretion." *Fikes,* 2023 WL 2506455, at *10. The *only* limitation placed on such awards by the Second Circuit is that the "class should not pay for time spent lobbying for changes in law that do not benefit the class. We direct the district

court to reduce the award to the extent its size was increased because of time spent lobbying." *Id.* at *10.

In a concurring opinion Judge Dennis Jacobs explains that although *Greenough* prohibits payments rewarding litigants for service as representative plaintiffs, the Second Circuit's decisions in *Melito* and *Hyland v. Navient* firmly place it "on the wrong side of a circuit split." *Fikes,* 2023 WL 2506455, at *17. The Second Circuit denied en banc rehearing in both *Melito* and *Hyland v. Navient,* of course, and is unlikely now to change course and reconsider *Fikes.* Even if it did, the Second Circuit would at best end up on the correct side of a remarkably stark circuit split concerning the authority of this Court's precedents.

The Second Circuit cannot resolve that split. Only this Court can. The petitions for certiorari in *Johnson v. Dickenson*, No. 22-389, and in *Carson v. Hyland,* No. 22-634, provide ideal vehicles for restoring the authority of this Court's precedents.

II. *Fikes* Underscores the Need for Review on Common-Fund Attorney's Fees in *Dickenson v. Johnson,* No. 22-517

Fikes also underscores the need for review in *Dickenson v. Johnson,* No. 22-517, which concerns the standards governing common-fund attorney's fees. *Fikes* deepens the conflict between the two circuits that *require* common fund attorney's fees awards to be determined as a percentage of the common fund rather than based on attorneys' lodestars, and all others, which do not. *Fikes* stands firmly with the majority in holding that district courts can choose to award attorneys their lodestar, while the Eleventh Circuit and District of Columbia Circuit both entirely foreclose

lodestar fee awards in common-fund cases. *See Dickenson v. Johnson,* No. 22-517, Petition at 16-17.

Fikes explains that

> [w]hile this Circuit's approach to calculating fees has "evolved in a somewhat circuitous fashion," *Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 48 (2d Cir. 2000), we established at the turn of this century that district courts could calculate fees using either the lodestar amount, which is the reasonable hourly rate multiplied by the hours reasonably expended, or a percentage of the fund, *see id.* at 50.

Fikes, 2023 WL 2506455, at *11.

When a district court opts to use a percent-of-fund calculation, outside the Eleventh Circuit it ordinarily will "cross-check" the award against the attorneys' lodestar to ensure that class counsel do not receive windfalls. *Fikes* says that in the Second Circuit "district courts that use the percentage method routinely keep the lodestar in sight," thereby "heeding *Goldberger*'s advice to 'requir[e] documentation of hours as a cross check on the reasonableness of the requested percentage.'" *Id.* (quoting *Goldberger*).

Seeking a percent-of-fund fee award under Eleventh Circuit law in this case, however, Johnson's counsel declined to specify a lodestar, or to provide information from which it might be calculated—making a lodestar cross-check impossible. The disparity in standards among the circuits deserves this Court's attention.

Perhaps more important, *Fikes* shows that percent-of-fund attorney's awards are constrained by no meaningful limiting principles—even in the Second Circuit. They are awarded instead based on district judges' subjective impressions, whether under the six

"*Goldberger* factors" employed in the Second Circuit or under the twelve *Johnson* factors that the Eleventh continues to mandate.

Where the Eleventh Circuit requires district courts to use the twelve *Johnson* factors in setting common-fund attorney's fee awards, the Second Circuit mandates use of its own "*Goldberger* factors," which supply a similarly subjective multi-factor "methodology." "Regardless of which method [lodestar or percent-of-fund] is chosen," *Fikes* holds that

> the analysis is effectively the same. In calculating a reasonable common fund fee, district courts are to be guided by the following factors: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ... ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Id.* (alteration in original)(citation omitted).

Fikes, 2023 WL 2506455, at *11.

These *Goldberger* factors in *Fikes* clearly share the standardless subjectivity of the *Johnson* factors that this Court expressly repudiated in *Perdue*:

> These [*Johnson*] factors were: "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience,

> reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases."[1]

Perdue found the fundamental problem with the multifactor approach to awarding attorney's fees is that it "'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 produced disparate results.'"[2] *Perdue* accordingly mandates that "reasonable attorney's fees" be measured by the lawyers' lodestar—the product of their reasonable hourly rates multiplied by hours reasonably expended—because "the lodestar method is readily administrable ... and unlike the *Johnson* approach, the lodestar calculation is 'objective' ... and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results." *Perdue,* 559 U.S. at 552.

Fikes shows how subjective multifactor determinations of common-fund attorney's fees continue to produce unpredictable and grossly disparate results. *Fikes* involves the common-fund settlement of federal antitrust claims that are subject to the antitrust law's statutory fee-shifting provision, which mandates that "the court shall, at the conclusion of the action—(1)

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[1] *Perdue,* 559 U.S. at 551 n.4 (2010)(quoting *Hensley v. Eckerhart,* 461 U.S. 424, 430, n. 3 (1983)); *see Camden I Condominium Ass'n v. Dunkle,* 946 F.2d 768, 772 n.3, 774-75 (11th Cir.1991); *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir.1974).

[2] *Perdue,* 559 U.S. at 551 (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 563 (1986).

award to a substantially prevailing claimant the cost of suit attributable to such claim, including a reasonable attorney's fee." 15 U.S.C. §4304(a)(1). *See Alyeska Pipeline Serv. Co. v. Wilderness Society,* 421 U.S. 240, 262 & n.34 (1975)("Under the antitrust laws allowance of attorneys' fees to a plaintiff awarded treble damages is mandatory.").

Such statutory fee awards are of course subject to *Perdue*'s "strong presumption" that an attorney's unenhanced "lodestar is sufficient" compensation, and thus is the presumptively reasonable attorney's fee. Yet because the plaintiffs' attorneys in *Fikes,* far from winning their treble-damages case, instead settled for less than three percent of asserted single damages,[3] the district court and Second Circuit threw *Perdue*'s limitations on reasonable attorney's fee awards to the wind. Class counsel were awarded not merely their lodestar, which *Perdue* holds is the presumptively reasonable award for attorneys who press meritorious claims to a final verdict and win—*Fikes* class counsel were awarded *2.45 times* their claimed lodestar for agreeing to a far less favorable result.

It is hard to see why class counsel who settle claims for a fraction of the defendant's exposure should be rewarded several times their lodestar, despite *Perdue*'s strong presumption that an unenhanced lodestar award sufficiently compensates attorneys who actually win a case. But that appears to be the law in the Second Circuit, where *Fikes* affirms a multiplier of 2.45, following *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 123 (2d Cir.2005), which sustained a

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[3] *See In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.,* 330 F.R.D. 11, 47-49 (E.D.N.Y.2019)(preliminary-approval order), *and* 2019 WL 6875474, at *28 (E.D.N.Y.2019)(final approval), *aff'd by Fikes,* 2023 WL 2506455.

3.5 multiplier in an antitrust action that also settled for but a fraction of the claimed damages.

And things are *even worse* in the Eleventh Circuit, where the district court is denied the option of even considering a lodestar fee award in common-fund cases. The decision below in this case holds that attorney's fees *must* be awarded under "*Camden I Condominium Ass'n v. Dunkle,* 946 F.2d 768 (11th Cir. 1991), which instructs courts to calculate a common-fund award as a percentage of the fund using a 12-factor test," the very *Johnson* factors that *Perdue* expressly rejects. No. 22-389 Pet.App.65a n.14.

Fikes accordingly underscores the need for this Court's review of common-fund attorney's fee awards, which may sensibly start with review of the Eleventh Circuit's holding that *Camden I* and the *Johnson* factors must be applied despite this Court's explicit repudiation of the *Johnson* factors in *Perdue.*

III. New Tenth Circuit Opinions, Mandating Use of the *Johnson* Factors to Determine Common-Fund Fees, Underscore the Need for Review in *Dickenson v. Johnson,* No. 22-517

Two recent Tenth Circuit decisions further underscore the need for review in *Dickenson v. Johnson,* No. 22-517. For with those decisions the Tenth Circuit joins the Eleventh Circuit in mandating that district courts continue to use the *Johnson* factors in determining common-fund attorney's fees, notwithstanding this Court's explicit repudiation of the *Johnson*-factors approach in *Perdue.*

The first, *Voulgaris v. Array Biopharma, Inc.,* 60 F.4th 1259, 1263 (10th Cir.2023), affirms a common-fund attorney's fee award, endorsing "the applicability

of the *Johnson* factors to the percentage-of-the-fund method" applied in that case. *Id.* (citing *Brown v. Phillips Petroleum Co.,* 838 F.2d 451, 454-55 (10th Cir.1988)(citing *Johnson,* 488 F.2d at 717-19)).

Voulgaris also holds that in awarding percent-of-fund attorney's fees "the district court was not required to perform a lodestar cross-check." *Voulgaris* 60 F.4th at 1265-66. That holding—which deliberately detaches common-fund fee awards from the requirement of any reasonably objective lodestar analysis—is quite at odds with *Perdue*'s holding that an attorney's lodestar provides the objectively reasonable reference point for class-action fee awards.

So is the resulting fee award, which the Tenth Circuit praises for "routinely" paying class-action lawyers nearly three times their lodestar:

> The requested fee ($2,833,333.33) is 2.8 times Plaintiffs' counsel's lodestar. ... The district court correctly observed that "a multiplier of 2.8x" is "consistent with the typical range of multipliers routinely approved by courts in this District and the Tenth Circuit."

Voulgaris, 60 F.4th at 1266 (citations omitted).

The Tenth Circuit's decision in *In re Syngenta AG MIR 162 Corn Litig.,* 61 F.4th 1126, 1193 (10th Cir.2023), mandates that the *Johnson* factors be used to calculate attorney's fees in all common-fund cases, and affirms an allocation of fees in which class counsel appointed to allocate fees gave themselves multipliers of *three times* their reasonable hourly rates—at the expense of other lawyers who were given but a fraction of their lodestars. *See Syngenta,* 61 F.3d at 1155-57, 1160-61, 1190-96.

Unlike the Eleventh Circuit, which flatly bars lodestar fees and requires all common-fund fee awards to be calculated under *Camden I* as a percentage of the fund, the Tenth Circuit holds that "we do not require rigid adherence to either the percentage-of-the-fund or lodestar methods in the common fund context." *Syngenta,* 61 F.4th at 1193 (citing *Gottlieb v. Barry,* 43 F.3d 474, 482-83 (10th Cir.1994)). But with *Syngenta,* the Tenth Circuit now mandates that district courts use the *Johnson* factors to determine a "reasonable" common-fund attorney's fee no matter how it is calculated:

> To illustrate reasonableness, district courts must "articulate specific reasons for [their] findings." ... And, to guide those findings, we further require district courts to consider the factors outlined in *Johnson,* 488 F.2d at 717-19, regardless of which method is used.

Syngenta, 61 F.4th at 1193. This effectively reiterates *Gottlieb*'s pre-*Perdue* holding that "[i]n all cases, whichever method is used, the court must consider the twelve *Johnson* factors." *See Syngenta,* 61 F.3d at 1192-93 (citing *Gottlieb,* 43 F.3d at 483). Adding to jurisprudential confusion, the Tenth Circuit describes its profoundly idiosyncratic "'percentage plus *Johnson* factors' framework as a 'hybrid' approach to attorneys' fees." *Syngenta,* 61 F.4th at 1193-94, 1205, 1219. Whatever that means.

The *Syngenta* district court, in any event, assigned certain class counsel responsibility for using the *Johnson* factors to allocate attorney's fees among themselves and other lawyers involved in the case. *Id.* at 1155-57. Those lawyers gave themselves multiples of *three times* their own lodestars, at the expense of

other counsel who received mere fractions of theirs. *See id.* at 1182, 1190-91, 1197.

The Tenth Circuit affirmed, thinking itself free to ignore all that *Perdue* says about reasonable attorney's fee awards merely because "*Perdue* was a *fee-shifting* case." *Syngenta,* 61 F.4th at 1192 n.41 (court's emphasis). Having set *Perdue* aside*,* the Tenth Circuit now "allows for the application of multipliers where, as here 'there is evidence of something extraordinary in the results ... or if one of the *Johnson* factors demand it.'" *Syngenta,* 61 F.4th at 1197(citation omitted). And with an idiosyncratic and essentially standardless "hybrid" *Johnson*-factors approach, it "cannot conclude that the district court abused its discretion in awarding a multiplier of 3 to the Kansas MDL Leadership." *Id.* at 1197.

CONCLUSION

The Petitions in Nos. 22-389 and 22-517 should be granted.

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