No. 22-517

In the Supreme Court of the United States

JENNA DICKENSON, PETITIONER

v.

CHARLES T. JOHNSON AND NPAS SOLUTIONS LLC,
RESPONDENTS

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

BRIEF IN OPPOSITION

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February 13, 2023

QUESTIONS PRESENTED

The Eleventh Circuit vacated and remanded an attorneys'-fee award in a class-action settlement because the district court failed to make the requisite findings of fact that would support the award. The questions presented by the Petition are:

1. Does this Court's rejection of the 12-factor balancing test for fee awards in statutory fee-shifting cases in favor of the lodestar method also require the exclusive use of the lodestar method in common fund cases rather than the prevalent percentage-of-the-fund method?

2. Did the Eleventh Circuit err in this case by declining to instruct the district court that, on remand, it could award fees based exclusively on the lodestar method?

3. Did the Eleventh Circuit err in this case by saying nothing about whether a benchmark of any percentage should be applied on remand?

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INTRODUCTION

Petitioner's first question presented seeks a splitless request *to affirm* the judgment below in an interlocutory posture. The second and third questions presented suffer from the same vehicular deficiencies alongside waiver for good measure. The Court should deny the writ.

The district court approved a class-action settlement of a robo-call case, awarding an incentive award to the class representative and an attorneys'-fee award to class counsel. The lone objector to the class-action settlement below, and petitioner here, appealed. The Eleventh Circuit gave petitioner everything she asked for: it *reversed* the incentive award to the named class representative and *vacated* the attorneys'-fee award on procedural grounds. The reversal was because the Eleventh Circuit held—in conflict with every other court of appeals—that incentive payments to class representatives are *per se* unlawful. The vacatur was premised on a procedural point petitioner pressed: the district court did not adequately explain its reasoning for approving the attorneys'-fee award. Unwilling to take "yes" for an answer, petitioner asks this Court to grant review so it can *affirm* the vacatur on additional grounds.

Particularly in this posture, none of the questions presented remotely meet this Court's criteria for review. Every court of appeals *favors* calculating attorneys' fees using a percentage-of-the-fund approach in common fund cases (and some require it), so the Petition's first question presented poses a splitless request for interlocutory error-correction that goes against the uniform recommendations of treatises, task forces, scholars, and jurists.

The second and third questions presented are not, in fact, "presented" by this case at all. The second question

asks this Court to tell the Eleventh Circuit that district courts should be *allowed* to use the lodestar method, not required to use the percentage-of-the-fund method. But neither the district court nor any party sought to justify an attorneys'-fee award using the lodestar method, so nothing turns on whether that method is permissible or impermissible.

The third question presented asks this Court to tell the Eleventh Circuit that a 25%-of-the-fund attorneys'-fee benchmark is inappropriate, but the opinion below said nothing about any benchmark, 25% or otherwise. That silence is hardly a surprise, since the briefs emphasized that attorneys' fees are case-specific, not mechanistic. Regardless, the Eleventh Circuit vacated the fee award without reviewing it for reasonableness, and so the issue plainly was not decided below.

In sum, there are no circuit splits on any preserved questions, this case is an exceptionally poor vehicle to resolve any fee award issue, and the arguments are meritless on their face. The Court should deny the Petition.

STATEMENT OF THE CASE

A. The Litigation Below Settles a Robo-Call Class Action.

This case started when Charles Johnson received a call on his cell phone. When he picked up, a voice asked him to hold for the next available operator, and the next available operator was convinced that he was named "Stephanie" and owed money. He told the operator that this was a wrong number, and not to call again. The operators worked for NPAS Solutions, LLC, and they kept calling, asking for Stephanie to pay her putative debt. Congress provided for statutory damages for these sorts

of calls under the Telephone Consumer Protection Act, 47 U.S.C. § 227. So, in March 2017, Mr. Johnson sued NPAS under the TCPA on behalf of a class of thousands of others who received the same sorts of calls.

TCPA cases are complex and challenging to litigate. NPAS strongly denied liability and hired sophisticated counsel, asserting various defenses that could threaten class certification. For example, it argued that some of the calls were to people who had consented to be called, but whose numbers had been reassigned. Others were to people who had consented to be called when they incurred medical debt, but refused to confirm their identity to avoid debt collection once they were called.[1] On the merits, NPAS asserted that the dialer it used to place calls is not an "automatic telephone dialing system" under the TCPA, a position that found support in this Court's decision in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1173 (2021).

The parties engaged in written discovery, issued subpoenas, briefed a motion to strike the class-action allegations, and Mr. Johnson served his expert report. Then, after an arms-length negotiation, they ratified a settlement agreement, which gained preliminary approval in December 2017. The settlement provided for NPAS to contribute $1,432,000, to be distributed to class members after fees and administrative costs were deducted. The district court approved attorneys' fees of 30 percent and an incentive award to Mr. Johnson of $6,000. Pet. App. 86a. The TCPA does not provide for attorneys' fees. The fees, therefore, come not from the Defendant separately under statutory fee-shifting, but from the fund as a

[1] The Petition implies that the settlement value is low because 179,642 unique phone numbers received calls, Pet. at 4, but neglects to account for the class members who consented to calls or whose number was reassigned.

whole—meaning, the class overall. After fulsome notice, 9,543 class members submitted valid claims by stating they received wrong-number calls from NPAS, and none opted out.

Jenna Dickenson, Petitioner here was the lone objector. She objected to the incentive award as *per se* unlawful, and to the attorneys' fees as insufficiently explained and too high. The district court considered and rejected each objection. After notice and a hearing, it found the settlement fair, reasonable, and adequate under Rule 23(e). Dickenson appealed.

B. The Eleventh Circuit Vacates the Fee Award.

On appeal, Dickenson argued that the district court failed to make required findings, failed to explain its reasoning, and failed to respond to her objections. Moreover, the incentive award to Johnson, according to Dickenson, was barred by a pair of 1800s-era cases from this Court.

The bulk of the Eleventh Circuit's opinion held—in conflict with every other court of appeals to consider the issue—that the incentive award to Johnson was *per se* illegal. A separate (and unopposed) petition for certiorari seeks review of that determination. *See* Pet. for Cert., *Johnson v. Dickenson*, No. 22-389 (U.S. Oct. 21, 2022). On that issue, the panel "reverse[d]" the district court, making a final, dispositive ruling that no incentive award can ever be lawful. *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1260 (11th Cir. 2020). There is nothing further for the district court to consider on that question. Absent relief from this Court resolving the entrenched circuit conflict, Johnson—alongside every other class representative litigating in the Eleventh Circuit—will receive no incentive award for his efforts championing the absent class members' interests.

At Dickenson's behest, the Eleventh Circuit also held that the "district court failed to adequately explain (1) its award of attorneys' fees, (2) its denial of [Dickenson's] objections, and (3) its approval of the settlement." 975 F.3d at 1261. Federal Rule of Civil Procedure 23(h)(3) requires district courts to make certain findings before granting attorneys' fees, but "the district court didn't explain its approval of the attorney fee award." *Id.* The Eleventh Circuit did reject Dickenson's argument that, on remand, the district court could only consider lodestar, since that rule applied only "to fee-shifting statutes" not "to common-fund cases." *Id.* at 1261 n.14 (quoting *In re Home Depot Inc.*, 931 F.3d 1065, 1085 (11th Cir. 2019)).

The Eleventh Circuit next turned to the district court's response to Dickenson's objections. The problem: the district court "gave no 'reasoned response' whatsoever to Dickenson's objections," which similarly required vacatur. *Id.* at 1262. And its approval of the settlement itself "without any accompanying analysis, conclusorily asserted that the settlement" was fair. *Id.* at 1263. The Eleventh Circuit declined to evaluate the propriety of the attorneys'-fee award or settlement. "From the record before us, we can't tell whether the district court abused its discretion." *Id.* Review would only be possible with "a fuller explanation." *Id.*

In sum, the panel reversed in part (on the incentive award), vacated in part (the fee award and settlement), and remanded (for a fuller explanation). Dickenson's Petition focuses only on the vacatur, where she received the very judgment she hopes this Court will affirm.

Johnson filed for rehearing en banc on the incentive award issue, and Dickenson on the attorneys'-fee calculation method. The Eleventh Circuit denied Dickenson's petition without comment and denied

Johnson's petition over the strenuous dissent of Judge Jill Pryor and three others. *See Johnson v. NPAS Sols., LLC*, 43 F.4th 1138 (11th Cir. 2022). Both Johnson and Dickenson filed petitions for certiorari in this Court.

REASONS FOR DENYING THE PETITION

The earliest the Court should hear any of the questions presented here is *after* the district court approves a fee award on remand that the Eleventh Circuit affirms. At present, Dickenson simply wants this Court to supply additional reasoning to support the very same judgment—vacatur—that she already has. Beyond that dispositive problem, the questions presented have resulted in no genuine circuit splits, are largely unimportant, and, in the case of the second and third questions, were forfeited.

A. *Certiorari* Is Not A Writ To Obtain The Same Relief Provided By The Lower Court.

This case presents an exceptionally poor vehicle to review any of the issues presented in the Petition because it seeks *affirmance* on additional—unnecessary—grounds. This Court does not take cases to gild the lily. Nothing in the opinion below turned on the Eleventh Circuit's fee-award doctrine highlighted in the Petition (the percentage-of-the-fund approach or the 25% benchmark). Rather, at Dickenson's behest, the Eleventh Circuit vacated the fee award because Judge Rosenberg "didn't make the required findings or conclusions," "didn't explain its approval of the attorneys' fee award" and "gave no 'reasoned response' whatsoever to Dickenson's objections." *Johnson*, 975 F.3d at 1261-62. The Eleventh Circuit could not "tell whether the district court abused its discretion." *Id.* at 1263. That holding is unchallenged and requires vacatur. What relief would this Court provide for Dickenson—vacating the award *again*?

Without knowing how the district court will rule on remand, Dickenson cannot even be sure the issues in the Petition will make any difference in this case. The district court could reduce the fee award. It could explain its decision to Dickenson's satisfaction. Many possible paths on remand would moot the issues in the Petition.[2]

On the other hand, if the district court *does* approve the settlement and fee award, does so based on a percentage of the fund and not based on lodestar, and if the Eleventh Circuit affirms, Dickenson can file another petition at that point, seeking reversal of a judgment she thinks is erroneous rather than correct.

B. Dickenson's Attempt To Import Statutory Fee-Shifting Standards Into Common Fund Cases Lacks Support From This Court Or Any Court Of Appeals.

The Eleventh Circuit's percentage-of-the-fund approach in common fund cases conflicts with no other circuit's rule. Dickenson does not claim otherwise. Instead, she contends that every court of appeals is ignoring this Court's precedent. That is false and explains why the Eleventh Circuit properly disposed of Dickenson's argument in a footnote.

1. Just as private attorneys typically either bill on contingency or by the hour, attorneys'-fee awards typically are based on a percentage-of-the-fund or the time reasonably expended.

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[2] Notably, the same reasoning does not apply to the incentive award issue featured in Mr. Johnson's separate petition for certiorari. The Eleventh Circuit's ruling that incentive awards are *per se* forbidden is ripe now because it was dispositive (a reversal, rather than vacatur). The district court's opinion after remand will provide nothing further on incentive awards.

Under a percentage-of-the-fund approach, the "monetary results achieved predominate." *Camden I Condo. Ass'n Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991). The percentage-of-the-fund approach encourages efficient litigation, since counsel has an incentive to resolve the case as quickly as possible, and not drag litigation out at the expense of the class. And it aligns the interests of counsel and client, since the fee award grows where the recovery is larger. *See generally* 5 W. Rubenstein, *Newberg on Class Actions* § 15:65 (6th ed. 2022) (citing sources). A celebrated task force from the Third Circuit relied on these advantages (among others) in endorsing the percentage-of-the-fund approach in common fund cases. *See Court Awarded Attorney Fees*, Report of the Third Circuit Task Force, 108 F.R.D. 237, 244 (1986).

The percentage-of-the-fund approach works well in common fund cases, but other approaches have long predominated in statutory fee-shifting cases. The reason is clear: courts cannot discern a reasonable fee from the fund in, for instance, prison-reform litigation—there often is no fund, or it is quite small. And so, this Court explained, "[u]nlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under § 1988 reflects the amount of attorney time reasonably expended on the litigation." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984).

2. The Eleventh Circuit's percentage-of-the-fund approach to fee awards in common fund cases has been the same since at least 1991. In *Camden I*, that court canvassed the various approaches to fee awards, then concluded, based on "the Task Force Report, and the foregoing cases from other circuits":

> that the percentage of the fund approach is the better reasoned in a common fund case. Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class. The lodestar analysis shall continue to be the applicable method used for determining statutory fee-shifting awards.

Camden I, 946 F.2d at 774.

Nothing in this Court's case law casts any doubt on *Camden I*. The Petition claims it conflicts with *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010), but any conflict is a mirage. *Perdue* was a statutory fee-shifting case, and largely endorsed the *Lindy* lodestar method over the *Johnson* factors in that context, which were both methods of calculating fees based mostly on attorney time.[3]

That holding says nothing about the key distinction between common-fund cases and statutory fee-shifting cases. In the 13 years since *Perdue* was decided, not a single court of appeals has changed its rule.[4] The

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[3] *See Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Camden I*, 946 F.2d at 772 ("[M]ost commentators consider *Johnson* to be little different from *Lindy* because the first criterion of the *Johnson* test, and indeed the one most heavily weighted, is the time and labor required.") (quoting *Court Awarded Attorney Fees*, Report of the Third Circuit Task Force, 108 F.R.D. 237, 244 (1986)).

[4] *E.g.*, *Heien v. Archstone*, 837 F.3d 97, 100 (1st Cir. 2016) ("the percentage-of-fund method 'in common fund cases is the prevailing praxis'") (citation omitted); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) ("The trend in this Circuit is toward the percentage method, which 'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation'") (citation omitted);

(*Footnote continued*)

Eleventh Circuit remains in good—and unanimous—company. This Court generally declines to address novel arguments in the first instance that no court has previously accepted. It should follow that sound practice here.

In response, the Petition frontally assaults the distinction between statutory fee-shifting cases and

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Cassese v. Williams, 503 F. App'x 55, 59 (2d Cir. 2012) (applying percentage-of-the-fund after *Perdue*); *Gelis v. BMW of N. Am., LLC*, 49 F.4th 371, 379 (3d Cir. 2022) ("While the 'percentage-of-recovery method is generally favored in cases involving a common fund,' the lodestar method … 'is more commonly applied in statutory fee-shifting cases.'") (citation omitted); *McAdams v. Robinson*, 26 F.4th 149, 162 (4th Cir. 2022) (allowing either method); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012) ("[W]e endorse the district courts' continued use of the percentage method … join[ing] the majority of circuits in allowing our district courts the flexibility to choose between the percentage and lodestar methods in common fund cases") *Linneman v. Vita-Mix Corp.*, 970 F.3d 621, 624 (6th Cir. 2020) ("district courts have discretion in some contexts to choose" between lodestar and percentage-of-the-fund); *Americana Art China Co. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2014) ("[I]n common fund cases, the decision whether to use a percentage method or a lodestar method remains in the discretion of the district court….") (citation omitted); *Huyer v. Buckley*, 849 F.3d 395, 398 (8th Cir. 2017) (employing percentage-of-the-fund); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) ("Because the benefit to the class is easily quantified in common-fund settlements, we have allowed courts to award attorneys a percentage of the common fund …."); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (endorsing percentage-of-the-fund); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("[W]e join the Third Circuit Task Force and the Eleventh Circuit, among others, in concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases."); *Haggart v. Woodley*, 809 F.3d 1336, 1355 (Fed. Cir. 2016) ("courts may determine the amount of attorney fees to be awarded from the fund by employing a percentage method").

common fund cases. Pet. at 13-14 (calling the distinction "baseless[]" and "unsupportable"). But of course, that is simply an emphatic cry of error, not the identification of a sharp conflict that typically warrants this Court's intervention.

The argument is meritless in all events. This Court has distinguished between fee-shifting cases and common fund cases. *See Blum*, 465 U.S. at 900 n.16. The well-regarded Third Circuit Task Force did the same. 108 F.R.D. at 254 ("the fundamental differences between statutory fee and fund-in-court cases should be recognized in the fee-setting process). Treatises recognize the same distinction. *See, e.g.*, 5 W. Rubenstein, *Newberg on Class Actions* § 15:38 (in "fee-shifting" cases, "failure to utilize the lodestar method … may constitute reversible error"); *id.* § 15:67 (but in "common fund" cases, courts use percentage-of-the-fund, sometimes with a cross-check, in about 90% of cases). This consensus has arisen because the distinction makes sense.

3. The percentage-of-the-fund approach begins with an *objective*, hard number: the common fund. That starting point anchors the calculation. And it "*roughly* approximates," *Perdue*, 559 U.S. at 551, the fee an attorney would receive in a contingent fee case, which is the right analog in a common-fund case on behalf of a class. As for administrability, estimating the right percentage is often far easier than poring over billing records—a task that courts usually must do without adversarial testing in common fund cases (unlike fee-shifting cases).

As one would expect given these virtues, the percentage-of-the-fund approach does not give "unlimited discretion," and does not produce highly "disparate" results. Empirical studies have shown that there is

relatively modest variation among circuits. *See* 5 W. Rubenstein, *Newberg on Class Actions* § 15:83, table 2 (showing the results of four studies across every circuit, with nearly every observation in the mid-twenties). In fact, "fee awards across all case types generally remain in the mid-20% range," with a higher percentage common in smaller cases (like this one), and lower in mega-fund cases. *Id.*

It is true, as the Petition notes, that the opinion below advised the district court to "calculate a common-fund award as a percentage of the fund using a 12-factor test [from *Johnson*]." 975 F.3d at 1262 n.14. But there is a difference between applying the *Johnson* factors as an aid in the determinate calculation of a percentage of the fund (as most circuits now do), and the very different phenomenon rejected in *Perdue* of using the unmoored *Johnson* factors to calculate a reasonable fee in cases that had no common fund as an anchor. The latter inquiry is hopelessly amorphous. The former is essentially what every court now does (either as an aid in setting the percentage, or as a cross-check), producing *consistent* results. Consistency would not be possible if the factors, applied to common-fund cases, allowed for limitless discretion.

C. *Camden I*'s Requirement That District Courts Use A Percentage-Of-The-Fund Approach Is Not Presented, Is Functionally Similar To Every Other Circuit's Approach, And Is Correct.

The Petition exaggerates a minor circuit conflict on whether the percentage-of-the-fund method of calculating attorneys' fees is the *favored* approach in common fund cases or the *only* permissible approach (as the Eleventh and D.C. Circuits have held). Pet. at 15. This question simply does not matter enough for this Court to ever

decide it. The Court surely should not decide the issue here.

1. The most glaring problem is that the question, as the Petition frames it, is forfeited. Class counsel sought a fee based on the percentage-of-the-fund method in the settlement. The district court approved the settlement and fee award. Dickenson never *requested* a lodestar-based fee award. The district court never suggested it was inclined to calculate the fee award based only on lodestar. The Eleventh Circuit vacated the award, not because the district court failed to use the percentage-of-the-fund method (it did), but because it failed to provide necessary findings. If the rule in the Eleventh Circuit allowed either a lodestar-based fee or a percentage-of-the-fund award—the only circuit conflict the Petition identifies—nothing in the litigation would be different, because neither the district court nor any litigant nor counsel proposed paying a fee award under that calculation.

2. Even if the issue were preserved, the circuit split is paper-thin. Though only a few circuits *require* the percentage-of-the-fund approach, essentially every circuit *favors* it. Unsurprisingly, "[e]mpirical evidence shows that very few courts—around 10%—utilize a pure lodestar method to determine a common fund fee award. 5 W. Rubenstein, *Newberg on Class Actions* § 15:92. Even in the ten percent of cases, it is not clear that the fee is meaningfully different, nor is there any evidence that the Eleventh Circuit's approach has proven unworkable or harmful. Even in the Eleventh Circuit, lodestar is not irrelevant. Courts commonly perform a lodestar cross-check, making any difference even smaller. The real-world effects of the circuit-split are de minimis, making it unworthy of certiorari, particularly in a case where

Dickenson has made no effort to show why a different rule would produce a different result.

D. The Eleventh Circuit's 25% Benchmark Is Not Worthy Of This Court's Review, Not Preserved Below, And Not Presented In This Case.

The Petition's third question presented addresses the "25% benchmark for common-fund fee awards," but this minor sub-part of the Eleventh Circuit's test was not applied in this case and not preserved by Dickenson before the Eleventh Circuit.

The opinion below does not rest upon, or even mention, any benchmark percent for fee awards. That is not surprising, since *no* party argued for a "benchmark." The district court granted a fee award of 30%, and so a benchmark of 25% would not have made the fee award easier to sustain. Mr. Johnson's brief, quoting *Camden I*, argued that "the amount of any fee must be determined upon the facts of each case" and that "no hard and fast rule" for a specific percentage exists. Appellee's CA11 Br. at 24, ECF 26 (quoting *Camden I*, 946 F.2d at 774).

Quoting the same page of *Camden I*, Dickenson's brief before the Eleventh Circuit argued in ***bold and italics*** that "[t]here is no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded as a fee ***because the amount of any fee must be determined upon the facts of each case***." Appellant's CA11 Br. at 44, ECF 21 (quoting *Camden I*, 946 F.2d at 774). On the same page, she argued that because "the district court made no findings and engaged in no analysis at all," "[i]ts 30% fee award cannot stand." *Id.*

The Eleventh Circuit sided with Dickenson, vacating the fee award and never suggesting that any benchmark was relevant. 975 F.3d at 1261-62 & n.14. Whether there

is any benchmark applied in other cases is simply not at issue, and there is nothing for this Court to review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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