No. 22-517

IN THE
Supreme Court of the United States

JENNA DICKENSON,

Petitioner,

vs.

CHARLES T. JOHNSON, AND NPAS SOLUTIONS LLC,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Two Petitions for Certiorari seek this Court's review of different aspects of the Eleventh Circuit's interpretation of this Court's "common-fund" or "equitable-fund" doctrine, which was established by two foundational decisions, *Trustees v. Greenough,* 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885), both class actions in which representative plaintiffs and their lawyers obtained common-fund recoveries benefiting classes of similarly situated bondholders. Those decisions hold that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself is entitled to a reasonable attorney's fee from the fund as a whole," *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980), provided the award is "made with moderation and a jealous regard to the rights of those who are interested in the fund." *Greenough,* 105 U.S. at 536-37. Any additional payment to compensate representative plaintiffs for their own "personal services" on behalf of a class is both "decidedly objectionable" and "illegally made." *Id.* at 537-38. A representative plaintiff's "claim to be compensated, out of the fund ... for his personal services" this Court "rejected as unsupported by reason or authority." *Pettus,* 113 U.S. at 122.

As Petitioner in No. 22-389, Charles T. Johnson seeks to challenge the Eleventh Circuit's straightforward holding in this case that "Supreme Court precedent prohibits incentive awards" compensating class representatives for their personal service on behalf of the class. Pet.App.51a. The First, Second, and Ninth circuits have directly rejected the Eleventh Circuit's conclusion that *Greenough* and

Pettus prohibit such awards.[1] This case accordingly presents an excellent vehicle for resolving an important question on which those circuits are in direct conflict with the Eleventh Circuit and—if the Eleventh Circuit is right—with this Court's decisions in *Greenough* and *Pettus*. Concerning the same conflict, a currently pending Petition for Certiorari in *Carson v. Hyland,* No. 22-634, seeks review of the Second Circuit's decision in *Hyland v. Navient Corp.,* 48 F.4th 110, 123-24 (2d Cir.2022), which expressly rejects the Eleventh Circuit's conclusion, in this case, that *Greenough* and *Pettus* continue to prohibit incentive awards.[2] The Court can appropriately grant certiorari in *Hyland* and in this case to resolve a clear conflict on an important issue.

But review in this case also should be granted to consider the Eleventh Circuit's related rulings regarding the common-fund attorney's fees that are authorized by *Greenough* and *Pettus*. The Court of Appeals remanded to the District Court directing it to follow Eleventh Circuit precedent that Dickenson challenged as contrary to this Court's attorney's fee jurisprudence because it mandates percent-of-fund awards based on the "*Johnson* factors," an exceedingly

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[1] *See Hyland v. Navient Corp.,* 48 F.4th 110, 123-24 (2d Cir.2022), *petitions for certiorari pending sub nom. Yeatman v. Hyland,* No. 22-566 (on cy pres settlements), *and sub nom. Carson v. Hyland,* No. 22-634 (challenging incentive awards); *In re Apple Inc. Device Performance Litig.,* 50 F.4th 769, 785-87 & n.13 (9th Cir. 2022); *Murray v. Grocery Delivery E-Services USA Inc.,* 55 F.4th 340, 352-54 (1st Cir.2022).

[2] The Petition for Certiorari in *Carson v. Hyland,* No. 22-634, was filed January 5, 2023. Respondents whose incentive awards the Second Circuit approved obtained an extension to March 10, 2023, for their brief in opposition.

subjective 12-factor approach that this Court rejected in *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542 (2010), as too subjective to allow for meaningful appellate review. The Court of Appeals wrote:

> We briefly address—and reject—Dickenson's argument that the district court's fee award is unlawful because the Supreme Court's decision in *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010), overruled *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 [from *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir.1974)].

Pet.App.65a n.14. "*Perdue* didn't abrogate *Camden I*," the Eleventh Circuit held. *Ibid.* "*Camden I* therefore remains good law, and the district court should apply it in the first instance on remand." *Ibid.*

This holding, though presented in a footnote, is as surely part of the Eleventh Circuit's mandate, binding the District Court on remand, as its holding that incentive awards contravene this Court's decisions in *Greenough* and *Pettus.* Johnson's Petition in No. 22-389, and Dickenson's Petition in No. 22-517, present two aspects of common-fund jurisprudence that are appropriately reviewed together in this case.

Johnson says that "[n]othing 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)." BIO at 6. Yet the Eleventh Circuit's opinion very clearly directs the District Court to ignore this Court's decision in *Perdue,* and "to calculate a common-fund award as a percentage of the fund using a 12-factor test" that

Camden I took from *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir.1974), Pet.App.65a n.14, and that this Court specifically repudiated in *Perdue*, 559 U.S. at 550-52. The *Camden I* decision that the Eleventh Circuit mandated the District Court follow on remand also expressly establishes "25%, as a 'bench mark' percentage fee award which may," employing the *Johnson* factors, "be adjusted in accordance with the individual circumstances of each case, as opposed to the lodestar hourly fee used in statutory fee awards." *Camden I,* 946 F.2d at 775 (11th Cir.1991). Subsequent Eleventh Circuit decisions have repeatedly reaffirmed *Camden I's* 25% benchmark as a starting point for *Johnson* factors fee awards in common-fund cases.[3] They have done so despite this Court's decisions disapproving far smaller percent-of-fund fee awards. *See, e.g., Pettus,* 113 U.S. at 128 (slashing common-fund fee award from the 10% awarded below to just 5% of the fund).

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[3] *See e.g., Arkin v. Pressman, Inc.,* 38 F.4th 1001, 1005-06 (11th Cir.2022)(noting Eleventh Circuit precedent's benchmark of "25% of the common fund"); *In re Equifax Inc. Customer Data Sec. Breach Litig.,* 999 F.3d 1247, 1281 (11th Cir.2022) (approvingly quoting *Camden I*: "'The majority of common fund fee awards fall between 20% to 30% of the fund,' with 25 percent as 'a "bench mark" percentage fee award.'"); *Faught v. American Home Shield Corp.,* 668 F.3d 1233, 1242 (11th Cir.2011)(citing "the 25% fee that this circuit has said is the benchmark," applying the "well-settled law from this court that 25% is generally recognized as a reasonable fee award in common fund cases," and sustaining 25% benchmark 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.").

Johnson says review of the Eleventh Circuit's holding on common-fund attorney's fees is premature because "[w]ithout 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." BIO at 7. Yet this Court's review is warranted precisely because the Eleventh Circuit's mandate requires the District Court to apply an erroneous rule of law, at odds with this Court's precedents.

"Nothing in this court's case law casts any doubt on *Camden I,*" Johnson insists. BIO at 9. Yet *Camden I,* and the decision below, hold (1) that common-fund fee awards *must* be awarded as a percentage of the fund rather than on the basis of attorneys' lodestars, a position in conflict with this Court's holding in *Greenough,* and (2) that the award *must* be determined using the 12-factor "*Johnson* factors" analysis that this Court expressly repudiated in *Perdue* because it is too subjective to allow for appellate review. *Perdue* holds that "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." 559 U.S. at 552 (citation omitted). The inherently subjective *Johnson* factors approach does not suddenly become objective when it is used to manipulate percent-of-fund fee awards.

Perdue's rejection of the *Johnson* factors was so complete that this Court described them in the past tense: "These factors *were*: …." *Perdue,* 559 U.S. at 551 n.4 (2010)(emphasis added).

Johnson asserts that any argument concerning the appropriateness of even considering his lawyer's lodestar "is forfeited" because when "Class counsel

sought a fee based on the percentage-of-the-fund method" without submitting any information concerning their lodestar, "Dickenson never *requested* a lodestar-based fee award" be considered as an alternative, or even as a cross check on the amount of a percent-of-fund fee award. BIO at 13 (Johnson's emphasis). Johnson insists that "neither the district court nor any litigant nor counsel proposed paying a fee award under that calculation." BIO at 13.

But Section C. of Dickenson's Objection before the District Court was titled: "The Court Should Consider Counsel's Lodestar in Determining a Reasonable Fee." (DE42:10). Dickenson's Objection emphasized that "[t]he seminal common-fund decision, *Trustees v. Greenough,* 105 U.S. 527 (1882), awarded itemized attorneys' fees actually incurred (and paid) for specific tasks," rather than as a percentage of the fund, and that it did so "without any kind of enhancement or multiplier." (DE42:10). Dickenson argued, moreover, that in *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980),

> the Supreme Court mandated a common-fund fee award, [and] the district court on remand honored the Supreme Court's mandate by employing the lodestar methodology to calculate fees. *See Van Gemert v. Boeing*, 516 F.Supp. 412, 414, 418 (S.D.N.Y. 1981)(employing lodestar methodology rather than percent-of-fund to calculate attorneys' fees: "'The starting point of every fee award ... must be a calculation of the attorney[s'] services in terms of the time [they have] expended on the case.'") (quoting *City of Detroit v. Grinnell*, 495 F.2d 448, 470 (2d Cir.1974)).

(DE42:10).

Dickenson's Objection clearly argued that even if attorney's fees sometimes may be awarded as a percentage of a common fund, after *Perdue* any attorney's award in a common-fund case should at least reference the lawyers' lodestar.

Citing *Camden I* and *Swedish Hospital Corp. v. Shalala,* 1 F.3d 1261 (D.C.Cir.1993), Dickenson conceded that "[d]ecisions of the Eleventh Circuit and the District of Columbia Circuit, on the other hand, appear to mandate percentage fee awards in all common-fund cases." (DE42:11). Far from forfeiting the point, she argued that those decisions are wrong, and that

> *Camden I* should no longer be deemed controlling law in light of the Supreme Court's intervening decision in *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542 (2010), which defines reasonable fee awards in terms of lodestar, and which repudiates the so-called "*Johnson* factors," *see id.* at 551-552, that *Camden I* holds should be "used in evaluating, setting, and reviewing percentage fee awards in common fund cases." *Camden I,* 946 F.3d at 775.

(DE42:11).

Johnson responded below that "Dickenson baldly contends that the Eleventh Circuit's seminal decision in *Camden I* ... should not be considered controlling law," explaining that her lawyer had "made an identical argument—nearly verbatim—in *Muransky* [*v. Godiva Chocolatier*]," and was making it again "despite this Court's rejection of his identical argument in *Muransky*." (DE45:11). District Judge Dimitrouleas's final Order in *Muransky* had indeed held:

> "Under *Camden I,* courts in this Circuit regularly award fees based on a percentage of the recovery, without discussing lodestar at all." *In re Checking Account Overdraft Litig.,* 830 F.Supp.2d 1330, 1363 (S.D.Fla.2011). While the Supreme Court in *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 550-51 (2010) questioned the usefulness of the 12 factors for determining a reasonable fee set out in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-719 (5th Cir.1974), *Camden* remains controlling law in the Eleventh Circuit for cases such as this one, as the settlement here undisputedly involves the establishment of a common fund for the benefit of the class.[4]

Johnson insisted before the District Court that his attorneys' lodestar had no legitimate place in any evaluation of common-fund attorney's fees:

> Ms. Dickenson requests that this Court conduct a lodestar cross-check. ECF No. 42 at 10-11. This recommendation, however, is not supported by Eleventh Circuit precedent. *See Camden I Condo. Ass'n, Inc.,* 946 F.2d at 775 (rejecting the use of lodestar analysis for determination of fees in common fund cases, and stating that "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").

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[4] *Muransky v. Godiva Chocolatier, Inc.,* No. 0:15-CV-60716-WPD, 2016 WL 11601080, at *3, §12.h (S.D.Fla. Sept. 28, 2016), *aff'd,* 922 F.3d 1175 (11th Cir.2019), *reh'g en banc granted, opinion vacated,* 939 F.3d 1278 (11th Cir.2019), *and rev'd on other grounds on reh'g en banc*, 979 F.3d 917 (11th Cir.2020).

(DE45:13).

Before this Court Johnson argues precisely the opposite, now asserting that "[e]ven in the Eleventh Circuit, lodestar is not irrelevant." BIO at 113. The assertion is contrary not only to what Johnson's lawyers argued below, but to what they did: they withheld from the District Court—and the class—any lodestar information at all. They submitted no evidence whatever of what their lodestar might be, underscoring their contentions it is legally irrelevant under Eleventh Circuit law.

Not only did Dickenson argue before the District Court that *Perdue* rejected *Camden I,* and that lodestar must be considered in awarding fees from a common fund, District Judge Robin L. Rosenberg clearly got the point. Judge Rosenberg opened the final-approval hearing in this case by observing that Dickenson "argues that the Court should consider Lodestar in determining a reasonable fee." (DE58:5(lines 2-8) (transcript of May 7, 2018 hearing)).

Johnson's counsel urged the court to reject Dickenson's contentions, and to hold that lodestar need not be considered at all: "Your Honor, we submit that Judge Dimitrouleas in *Muransky*, he dealt with almost the verbatim objection and reached the correct conclusion." (DE58:15(3-13) (hearing transcript)).

So, Dickenson certainly argued before the District Court that any attorney's fee award in this case must take the lawyers' lodestar, and this Court's decision in *Perdue,* into account. Dickenson *also* argued before the district court that the request for 30% of the common fund was excessive given this Court's disapproval of a 10% fee award as patently excessive in *Pettus*. (DE42:11).

Dickenson preserved her points through appeal, arguing before the Eleventh Circuit that *Perdue* repudiated *Camden I's Johnson* factors, and that the attorney's fee award was in all events excessive.

Johnson's Eleventh Circuit Appellee's Brief answered Dickenson's contentions, arguing at length that *Camden I* requires a percent-of-fund fee award that must be determined using the *Johnson* factors. *See* Johnson Ct. App. Appellee's Brief at 23-34. Johnson argued that "contrary to Ms. Dickenson's assertion," *Perdue* "did not undermine *Camden I*." Johnson Ct. App. Appellee's Brief at 23 n.2. Johnson insisted that attorneys' "time and labor involved" in prosecuting the case "'need not be evaluated using the lodestar formulation.'" Johnson Ct. App. Appellee's Brief at 27-28 (citation omitted) Defending his counsel's failure even to say, let alone to document, how many hours they devoted to the case, or what their hourly billing rates might be, Johnson argued that even performing a lodestar cross-check of a percent-of-fund fee award

> is not supported by Eleventh Circuit precedent. *See Camden I*, 946 F.2d at 775 (rejecting the use of lodestar analysis for determination of fees in common fund cases, and stating that "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").

Johnson Ct. App. Appellee's Brief at 37. Johnson insisted that under Eleventh Circuit law, "'[t]he lodestar approach should not be imposed through the back door via a "cross-check."'" Johnson Ct. App. Appellee's Brief at 38 (quoting *Checking Account Overdraft Litig.,* 830 F.Supp.2d at 1362-63.

Thus Dickenson raised, and Johnson joined, the questions of whether the *Johnson* factors may control attorney's fee awards after *Perdue,* and whether attorney's lodestars are even relevant to common-fund fee awards under Eleventh Circuit precedent.

Although the decision below did not specifically reference *Camden I's* 25% benchmark, moreover, the direction to apply *Camden I* on remand surely incorporates *Camden I*'s rule adopting that benchmark as a starting point, to then be manipulated using the very *Johnson* factors that this Court impugned and repudiated in *Perdue*. Johnson says Dickenson's objection to the 25% benchmark was "not preserved by Dickenson before the Eleventh Circuit." BIO at 14. Yet Dickenson's Opening Brief below cited Second Circuit precedent rejecting the 25% benchmark as a "tempting substitute for the searching assessment that should properly be performed in each case." Ct.App.O.B. at 43 (quoting *Goldberger v. Integrated Resources,* 209 F.3d 43, 52 (2d Cir.2000)). Dickenson argued that the "notion that courts should award fees according to a benchmark in the range of 20-30% conflicts, moreover, with the Supreme Court's equitable-fund precedents, which have slashed unreasonably high 10% fee awards to a more reasonable 5%." Dickenson's Ct.App.O.B. at 44 (citing *Pettus,* 113 U.S. at 746-47). Dickenson's petition for en banc rehearing also argued against the Eleventh Circuit's 25% benchmark for common-fund fee awards. Dickenson En Banc Pet. at 1-2, 18-19.

Finally, Johnson suggests that the rules governing common-fund fee awards don't make much difference. But we all know that they do—and that at the very minimum, "the lodestar method can provide a useful cross-check" on otherwise excessive percent-of-fund fee awards. Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor*

Protection 22-23 (Washington Legal Found., Critical Legal Issues Working Paper No. 128, 2005); *see also* Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases*, 18 Geo. J.L. Ethics 1453, 1454 (2005); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief,* 71 N.Y.U. L. Rev. 439, 503 (1996).

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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