No. 20-1349

In the Supreme Court of the United States

RACHEL THREATT,

Petitioner,

v.

RYAN THOMAS FARRELL, et al., on behalf of himself and all others similarly situated, et al.,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondents shift the question presented to evade the deep divide in circuit law on Rule 23(h) awards. There is no dispute that the Ninth Circuit affirmed an attorneys' fee award that equaled at least $6,700 per hour of work without any court so much as considering whether such a windfall rate was reasonable. The class, whose recovery funded the fees, compromised their claims to recover barely $1 for every disputed $35 fee. Respondents can identify no other circuit court accepting such a disparity between results and reward, especially in a case in which the underlying legal theory repeatedly failed on the merits.

Respondents don't deny that the current state of the law produces the "disparate results" in class-action attorneys' fee awards condemned by *Perdue v. Kenny A.*, 559 U.S. 542, 551 (2010). Nor do they dispute that the Ninth Circuit's approach would affirm fees ranging from under a million dollars up to more than $16 million as reasonable. Nor do they explain why such a wide range of results can meet the "reasonable" standard of Rule 23(h) or why the standard should be subject to such unlimited discretion by district court judges. *See id.* Nor do they dispute that the Ninth Circuit's rule will incentivize meritless litigation. Pet. 19; Cato Amicus Br. 16. They instead try to confuse the issue by suggesting (at 17) that fees awarded under the common-fund doctrine are somehow exempt from the rule's reasonableness requirement.

Although respondents claim uniformity across the circuits by focusing on "reasonableness," it is precisely the

"reasonable" standard of Rule 23(h), and the lack of interpretive guidance from this Court, that results in widely divergent analyses. The issue presented is inherent in the text of Rule 23(h): How does a district court determine reasonableness and, in particular, how should the court consider an attorney's lodestar in that determination? On this question, the circuits conflict.

This Court has the authority to interpret Rule 23(h)'s reasonable standard, just as it has interpreted other Rule 23 standards and just as it has interpreted the reasonableness standard in the statutory fee context. This guidance is important because of the lack of active oversight of class counsel by absent class members and the shortfalls of the unchecked percentage-of-the-fund methodology, particularly its tendency to award windfall fees and produce wide-ranging results based on the trial judge's application of subjective factors.

While petitioner acknowledges that the lodestar approach on its own has shortcomings, respondents fail to acknowledge similar shortcomings of unchecked percentage-based awards. The choice is not binary, as respondents suggest. The correct approach is for district courts to determine reasonableness by checking a proposed fee against the more objective lodestar to meet the Rule 23(h) standard and protect class members against windfall fees reducing an already compromised recovery.

I. The Ninth Circuit's decision compounds the fracture among circuits over the role of lodestar in Rule 23(h) fee awards.

Respondents' attempt to find uniformity among the Circuits falls short. They ultimately base their uniformity argument on the reasonableness required by every Circuit. The reasonable standard, of course, comes from the

text of Rule 23(h). But *how* the Circuits determine reasonableness diverges sharply and results in vast disparities among fee awards and forum shopping by class-action plaintiffs' attorneys. *See* 5 William B. Rubenstein, *et al.*, Newberg on Class Actions §15:87–88 (5th ed. 2014).

For example, respondents argue that the Fifth Circuit does not require a lodestar cross-check but instead applies a "reasonableness cross-check" with the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974). But they don't dispute that the *Johnson* factors include (1) the time and labor required, (2) the skill required to perform the legal services adequately, and (3) the customary fee for similar work in the community, *i.e.*, the lodestar. Thus, even if lodestar is not the exclusive determinant of reasonableness in the cross-check, it is a mandatory consideration. *See Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632 (5th 2012). The Fifth Circuit "distinguished" the lodestar cross-check to observe simply that the *Johnson* cross-check may be "more searching than the 'lodestar cross-check'" because it includes additional factors. *Id.* at 644 n.42. Indeed, "the *Johnson* factors are largely redundant to the lodestar analysis because they are almost always subsumed in the lodestar." *In re Home Depot Inc.*, 931 F.3d 1065, 1091 (11th Cir. 2019).

The *Johnson* factors do require district courts to apply the lodestar cross-check, contrary to respondents' claims. While the written analysis need not belabor every factor, the record must "clearly indicate[]" that the district court conducted a full analysis of the *Johnson* factors and not in a summary fashion. *Moench v. Marquette Transp. Co. Gulf Island*, 838 F.3d 586, 596 (5th Cir. 2016) (quoting *Union Asset Mgmt.*, 669 F.3d at 642). The Fifth vacates fee awards where the district court fails to meet this standard.

E.g., *Torres v. SGE Mgmt.*, 945 F.3d 347, 351 (5th Cir. 2019).

Respondents are similarly mistaken about other circuits. Unlike the Fifth Circuit's mandatory approach, the Eighth Circuit holds that "district courts *may* consider relevant factors" from *Johnson*. *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017) (emphasis added). The Eleventh Circuit similarly holds that "courts *may* use the *Johnson* factors to determine 'what is a "reasonable" hourly rate.'" *Home Depot*, 931 F.3d at 1090–91 (emphasis added).

At odds with these permissive circuits is the Sixth Circuit's strong preference for a cross-check. Respondents quote the same language as petitioners from *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009). The facts speak for themselves: *Moulton* vacated a percentage-based fee even though it was not "on its face … unreasonable." The district court had not provided additional reasons—which "[o]ften" must include the lodestar. *Id.*

The Third Circuit is similarly rigorous. While respondents quote language "suggesting" consideration of the lodestar, the case they cite in fact vacated a fee award where the district court stated that it had considered the lodestar but then failed to make "explicit findings about how much time counsel reasonably devoted …, and what a reasonable hourly fee would be…." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 199–200 (3d Cir. 2000). If a lodestar cross-check were discretionary, or simply "the practice of requiring documentation of hours" (at 14–15), then it shouldn't matter that the court failed to make such findings.

If the Ninth Circuit's "rule" is really that a district court "must consider relevant factors" (at 13) to ensure a reasonable fee, then the result below means that lodestar

is a not relevant factor. *See Reyes v. Experian Info Solutions*, -- Fed. Appx. --, 2021 WL 1310961 (9th Cir. Apr. 8, 2021) (vacating decision to depart downward from 25% benchmark based on lodestar cross-check). Such a rule makes the conflict even sharper.

Respondents overlook significant variations among the remaining circuits as well. Second Circuit courts rarely award fees with a lodestar greater than 2. *See, e.g.*, *In re Tremont Secs. Litig.*, 699 Fed. App'x 8, 18 (2d Cir. 2017) ("A lodestar multiplier of 2.5 would be considered high … in this Circuit."). And respondents don't address the Seventh Circuit's one-of-a-kind market-mimicking approach.

Respondents are wrong (at 15) that "no court of appeals has held that a lodestar cross-check, even if the district court chooses to conduct one, limits the court's discretion in awarding percentage-based fees." *See, e.g.*, *Tremont Secs.*, 699 Fed. App'x at 18 (remanding for district court to reduce the "excessive" lodestar multiplier cap of 2.5, even where the 3% common fund award was not itself excessive); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 742 (3d Cir. 2001) (vacating fee with cross-check multiplier of "7 at a minimum"); *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1447–48 (10th Cir. 1995) (reversing "conscience-shocking" fee of 3.16 cross-check multiplier).

Respondents distort *In re Baby Products Antitrust Litigation* (at 15–16) to try to undercut the Third Circuit's use of a lodestar cross-check. *Baby Products*, a Rule 23(e) decision, explains only that counsel's lodestar cannot alone justify a fee absent benefit conferred on the class members. 708 F.3d 163, 179–80 (3d Cir. 2013).

That a discussion of the circuit case law requires this length itself exemplifies the variations. The circuits are not merely *split* over the correct way to consider lodestar

in the Rule 23(h) reasonableness analysis; they are splintered. While respondents question petitioner's grouping of the circuits, even their discussion of the holdings in each circuit reveals the deep divisions among them. Respondents' assertion that the circuits universally apply a "reasonableness test" overlooks not only variations in how the circuits consider (or disregard) lodestar but also in the results that their tests produce. This Court's guidance is needed.

II. The Court has authority to address the question presented.

Respondents criticize petitioner's question presented by ultimately questioning the Court's role in interpreting the federal rules. This critique fails. Courts have always played an active role in interpreting the federal rules. Indeed, interpreting the rules "does not involve the same separation of powers issues inherent in cases involving normal statutory construction, because the Court is interpreting rules Congress empowered it to create, not statutes created by a coequal branch." Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 Hastings L.J. 1039, 1040 (1993). The Advisory Committee Notes to Rule 23(h) reinforce this role, stating that "[a]ctive judicial involvement in measuring fee awards is singularly important to the proper operation of the proper class-action process" and noting the role of "[c]ontinued reliance on caselaw development." Recognizing this role, the rule did not seek to resolve the variation among courts over the proper approach for determining fees.

Interpreting whether and how courts must apply a lodestar cross-check is a procedural question that doesn't depend on the underlying substantive authority for the

fees. If the fees are awarded based on a fee-shifting statute, then the lodestar is relevant under *Perdue*. If the fees are awarded under the common-fund doctrine, then the Court's ruling will provide interpretive guidance district courts, many of which already apply a lodestar cross-check, sorely need. There is nothing substantive about this guidance. That the district court refused to consider the lodestar here suggests an inability to find $6700/hour fees reasonable when class members recovered monetary relief of about $1 per $35 fee.

Respondents cite *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), to argue that courts cannot read the requirement of a lodestar cross-check into Rule 23(h). But *Amchem* simply refused to ignore the text of Rule 23's certification requirements just because a settlement was overridingly "fair." The question of how a cross-check might be relevant to the "reasonable" requirement in the text of Rule 23(h), however, accords with *Amchem*'s interpretation of other broad language of Rule 23, including (a)(4)'s "adequate representation" requirement. *See id.* at 622–28; *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360–65 (2011) (Rule 23(b)(2) "final injunctive relief" that is "appropriate respecting the class as a whole"); *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981) (Rule 23(d)'s "appropriate orders").

Rule 23(h), no less than Rule 23(a)(4), should be "applied with the interests of absent class members in close view." *Amchem*, 521 U.S. at 629. To require simply that fees be "reasonable," as respondents do, is to "restate th[e] question"; "such an empty and amorphous test" would simply "leave to each and every trial court not only the implementation, but also the invention, of the applicable legal standard." *Fox v. Vice*, 563 U.S. 826, 835–36 (2011).

The Court's role in interpreting the "reasonable" standard draws additional support from the statutory context. As the Court explained in *Perdue*, because "the statute does not explain what Congress meant by a 'reasonable' fee, … the task of identifying an appropriate methodology for determining a 'reasonable' fee was left for the courts." *Perdue*, 559 U.S. at 550. So too with the "reasonable" fee requirement of Rule 23(h).

That some have criticized the lodestar methodology on a stand-alone basis (notwithstanding *Perdue*) is not cause to dispose of it as a cross-check to act as a second security for class members. Courts have also criticized the percentage method, particularly for its role in justifying windfall fees in large settlements with large classes. *See, e.g.*, *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 (3d Cir. 2005) (noting criticism of both approaches); *Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1099 (2d Cir. 1977). "Regardless of the methodology used, a detailed comparison of the results of each method can avoid the pitfalls in each method." *Strack v. Cont'l Res., Inc.*, 2021 WL 1540516, 2021 Okla. LEXIS 22, at *14 (Okla. Apr. 20, 2021).

Perhaps because neither approach is without flaws, the circuits have largely afforded trial courts discretion to elect the primary method. *But see Camden I Condominium Ass'n, Inc. v. Dunkle,* 946 F.2d 768 (11th Cir. 1991) (mandating percentage method); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) (same). But this discretion does not address the problem. For the percentage approach to work, "it is essential that the court supervise class counsel's performance and carefully scrutinize its fee application." *Cendant*, 404 F.3d at 187. Without a cross-check, a court properly cannot fulfill role in safeguarding the class's interests. *Id.*; *see also* Pet. 20-21.

Respondents could not find "any hint in the common-fund doctrine's long history" (at 22) that a lodestar cross-check is required. They abound. *See* 2 Jairus Ware Perry, A Treatise on the Law of Trusts and Trustees § 919 n.(a) (Edwin A. Howes ed., 6th ed. 1911) (percentage method "only for convenience"; "proper compensation" is determined by "the amount of risk and responsibility and the time and labor required of the trustee"); *Boyd v. Hawkins*, 17 N.C. 329, 336 (1833) ("the true object" of a "commission" "is a just allowance for time, labor, services and expenses"); *Montgomery's Appeal*, 86 Pa. 230, 234–235 (1878) ("Whilst a percentage is constantly spoken of and used because of its convenience, yet, it is compensation, nothing more or less, that is steadily kept in view"); *Blake v. Pegram*, 101 Mass. 592, 600 (1869) (similar); *Harris v. Martin*, 9 Ala. 895, 899–900 (1846).

Contrary to respondents' assertion, the Supreme Court has not "determined [common fund] fees on a percentage of the fund" (at 22) in the cases respondents cite. Instead, the Court has not interpreted Rule 23(h) since it went into effect, but it has observed the benefits of a lodestar-based fee in cases brought under fee-shifting statutes. Among such benefits, it is "objective, and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predicable results." *Perdue*, 559 U.S. at 551 (cleaned up); *see* Pet. 11–12.

Moreover, the concerns of *Perdue* are highly instructive in the class-action context. *Perdue* requires judges to "provide a reasonably specific explanation for all aspects of a fee determination" because without such explanation, "adequate appellate review is not feasible," resulting in "widely disparate awards" influenced "by a judge's subjective opinion." 559 U.S. at 558. And even if it is not the

public paying the fees, in class actions, there is no one actively monitoring the attorneys to ensure they adhere to market-based fees. Pet. 21; *see also id.* 2–3, 19–20.

III. This case is a good vehicle to resolve an important and frequently recurring question.

Respondents' self-interested insistence that the fees of at least $6700/hour and perhaps $10,000/hour awarded here are not a "windfall" highlights the problem. At the settlement stage when fees are awarded, class counsel's interests are in direct conflict with those of their clients. *See In re Dry Max Pampers Litig.*, 724 F.3d 713, 717–18 (6th Cir. 2013). Fees of thousands of dollars per hour—outrageous on their face—harm both the class members who had over-drafted bank accounts for extended periods and the public credibility of the judicial system as a whole. *See Laffitte v. Robert Half Int'l*, 376 P.3d 672, 691–92 (Cal. 2016) (Liu, J., concurring).

Even under respondents' calculation (at 26), class members recovered only "about 9%" of their damages. Their attorneys, meanwhile, made no such compromise but instead rewarded themselves with fees of several times their hourly rates. If one accepts respondents' settlement valuation and position on percentage-based awards, then it is "reasonable" to allow attorneys to take the entire cash portion of the settlement leaving the class with $0. This Court has set clear limits on "reasonable" awards in fee-shifting cases; it would be illogical in common-fund cases for the "reasonable" standard to be without constraint.

Respondents' focus on the problems with lodestar as the sole determinant of fees is a strawman. Petitioner does not ask this Court to jettison the percentage method. Respondents' concern that a lodestar cross-check will remove any incentive for counsel to expend additional effort

or take additional risk to increase class recovery is unfounded. When lodestar is employed as a cross-check, the ultimate fee still depends upon the benefit conferred on class members. The cross-check will prevent attorneys from settling too early for too little to maximize their own returns. It will minimize forum shopping, eliminate any trial penalty, discourage meritless lottery litigation, and prevent windfalls that come at the expense of the class and credibility of the judiciary.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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