No. _-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A court may award class-action plaintiffs "reasonable attorney's fees" under Fed. R. Civ. Proc. 23(h). In interpreting this phrase in statutory contexts, this Court has disavowed "setting attorney's fees by reference to a series of sometimes subjective factors that place unlimited discretion in trial judges and produce disparate results" and required fees tied to lodestar. *Perdue v. Kenny A.*, 559 U.S. 542, 551 (2010) (cleaned up) (rejecting a 1.75 multiplier of lodestar).

Here, plaintiffs settled class-action litigation over the legality of $35 overdraft fees charged by Bank of America. The settlement would refund class members around $1.07 for each $35 fee they had paid. The district court awarded $14.5 million in fees from class members' recovery. By class counsel's own calculations, this award was for at most 2,158 hours of work, a rate of over $6,700 an hour, a multiplier of more than ten times lodestar. The district court held that it did not have to consider the lodestar in awarding a reasonable fee, and so it would not.

After objecting class members appealed, the Ninth Circuit affirmed in a 2-1 decision, holding that a district court does not have to consider the lodestar in awarding reasonable fees under Rule 23(h). The Second, Third, Fifth, and Sixth Circuits disagree. The Ninth Circuit's decision in this case thus continues a circuit split on this issue.

The question presented is:

Whether, and to what degree, a district court must consider counsel's lodestar in awarding "reasonable attorney's fees" under Rule 23(h).

PARTIES TO THE PROCEEDING

Petitioner Rachel Threatt was an objector in the district court proceedings and appellant in the court of appeals proceedings.

Respondents Ryan Thomas Farrell; Patrick Michael Farrell; Timothy Gaelan Farrell; Brooke Ann Farrell; Ronald Dinkins; Tia Little; and Larice Addamo were named plaintiffs in the district court proceedings and appellees in the court of appeals proceedings. (The Ninth Circuit incorrectly listed Joanne Farrell as appellee in the court of appeals proceedings; she was originally a lead plaintiff in the district court proceedings, but died in 2018, and the district court substituted her four children under Rule 25(a)(1). Dkt. 115; *cf.* App. 42a.)

Respondent Bank of America, N.A., was defendant in the district court proceedings and appellee in the court of appeals proceedings.

Respondents Estafania Osorio Sanchez and Amy Collins were objectors in the district court proceedings and appellants in the court of appeals proceedings.

Because Petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR WRIT OF CERTIORARI

In statutory contexts, this Court has repeatedly opined on the need for objective standards when courts award attorney's fees. Its jurisprudence consistently criticizes multiple-factor tests that give "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." *Perdue v. Kenny A.*, 559 U.S. 542, 551 (2010) (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563 (1986)); *see also Murphy v. Smith*, 138 S. Ct. 784, 790 (2018) (rejecting statutory interpretation that would have reintroduced "unguided and freewheeling" fee-setting "and the disparate results that come with it").

But when it comes to a "reasonable attorney's fee" in a class action under Fed. R. Civ. Proc. 23(h), the Court has not interpreted the phrase since it added the rule in the 2003 amendments. Disparate results are the standard in the fractured jurisprudence of lower courts. While courts agree that an award of lodestar—the number of hours the attorneys and their employees worked multiplied by the hourly rates prevailing in the community—is presumptively reasonable, they differ widely on when and what size of a multiplier is permissible, or even whether courts must consider lodestar at all. The Ninth Circuit's decision conflicts with decisions of the Second, Third, Fifth, and Sixth Circuits on the fundamental question of whether and how district courts should consider attorneys' lodestar in awarding a reasonable attorney's fee under Rule 23(h).

The Ninth Circuit's decision leads to the "disparate results" this Court has criticized elsewhere. The district court disregarded lodestar in awarding $14.5 million for

2,158 hours of work—over $6,700 an hour, and perhaps over $10,000 an hour if petitioner was correct that class counsel improperly exaggerated the submitted hours. The Ninth Circuit's reasoning would permit both an award of the original fee request of $16.65 million (and perhaps over $22 million as a percentage of the putative common fund) and an award of under a million dollars if the district court had chosen to scrutinize the submitted lodestar and refused to award a multiplier. Both a "thirty-three percent" award and a "lodestar method" are "reasonable" and within a district court's discretion in the Ninth Circuit. *In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d 539, 571 (9th Cir. 2019) (*en banc*) (citing cases). When the permissible range of "reasonable" fees has such a wide scope, then district courts have exactly the sort of "unlimited discretion" *Kenny A.* and *Delaware Valley* condemned.

The "fundamental asymmetry" between 42 U.S.C. §1988 standards in civil-rights litigation and the free-wheeling Rule 23(h) application in class-action litigation is especially problematic under the Ninth Circuit's decision. Paul D. Clement, *The Ethics of Lawyers in Government: Lawyering in the Supreme Court*, 38 Hofstra L. Rev. 909, 916 (2010). The $14.5 million fee comes from a common fund of $37.5 million intended to partially refund class members for the disputed overdraft fee—providing class members a mere $1.07 for every disputed $35 fee they paid. Class-action settlements are compromises, but the

class—lower-income bank customers paying fees for overdrafting their checking accounts[1]—is compromising 97% of their claims here without any compromise for the attorneys asking and receiving thousands of dollars an hour. Either the court is richly rewarding attorneys for a "sell-out" of their clients' meritorious claims, or attorneys are receiving millions of dollars for a nuisance settlement of meritless litigation. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (Easterbrook, J.). Courts should not encourage either behavior with massive fees, and neither scenario merits over ten times the fee that vindicating significant civil rights does.

The question is important because the resulting windfalls transfer hundreds of millions of dollars from poor and middle-class consumers to much wealthier attorneys and encourages forum shopping in the Ninth Circuit where the law allows this result.

The Court should grant certiorari to resolve the circuit conflict, provide "actual guidance to district courts" on when and to what degree multipliers of lodestar are permissible, and correct a serious abuse of the class-action mechanism. *Delaware Valley*, 478 U.S. at 563. The stark inequities of this case provide an excellent vehicle to resolve this question.

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[1] According to the Consumer Financial Protection Bureau, nine percent of all accounts pay 79% of all overdraft and non-sufficient fund fees. Matt Egan, *Banks make billions on overdraft fees. Biden could end that*, CNN Business (Oct. 12, 2020).

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 827 F. App'x 628 and reproduced at App. 1a. The opinion of the District Court for the Northern District of California is unpublished and reproduced at App. 21a.

JURISDICTION

The court of appeals entered judgment on September 2, 2020. Timely petitions for rehearing *en banc* were denied on November 6, 2020. App. 43a. Because of COVID-19, the Court extended the time to file this petition to April 5, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1). As a class member who objected to the fee request and settlement, Petitioner has standing to appeal the final judgment. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

RULE INVOLVED

Federal Rule of Civil Procedure 23 provides:

* * *

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

* * *

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

* * *

STATEMENT OF THE CASE

I. Plaintiffs settle class litigation over Bank of America's $35 "Extended Overdrawn Balance Charges."

Under Deposit Agreements with its customers, Bank of America charges a $35 fee anytime a deposit account holder writes a check against insufficient funds. When a deposit account holder thus overdrafts his or her account, the Bank has discretion over whether to honor the overdrawn check by advancing funds to the payee sufficient to cover the note. If the Bank advanced the funds, deposit account holders were obligated under the Deposit Agreement to pay back the Bank's advance plus any fees incurred. Failure to do so within five days triggers a second fee, a $35 Extended Overdrawn Balance Charge ("EOBC"). App. 21a–22a.

Several suits challenged this second fee as usurious, theorizing that the $35 EOBC exceeded the interest rate permitted by the National Banking Act, 12 U.S.C. §§85, 86. At least nine courts in six circuits agreed that EOBCs are not "interest" and dismissed these suits. App. 5a (listing cases). The district court here, however, denied the Bank's motion to dismiss, but agreed to certify an interlocutory appeal of that denial, and the Ninth Circuit granted permissive interlocutory appeal. App. 22a–23a.

While the appeal was pending and before any formal discovery, the parties settled in October 2017. App. 45a. The Bank agreed to cease charging EOBCs for five years; create a $37.5 million fund to pay attorney's fees and settlement expenses and provide partial *pro rata* refunds for about $756 million of previous EOBC charges; and formally provide $29.1 million of debt reduction to class members whose bank accounts closed with an outstanding

balance stemming from one or more EOBC's. App. 23a–24a. The roughly seven million class members (App. 26a) would release their claims. App. 56a–58a; App. 86a n.1.

Class attorneys filed a request for $16,650,000 in fees on the theory that they were entitled to 25% of the putative $66.6 million settlement value. They asserted a lodestar of $1,428,047.50 for 2,158 hours of work, acknowledging that they were requesting a multiplier of 11.66, but argued that the district court should not consider the lodestar at all. Dkt. 80-1.

II. Rachel Threatt objects.

Class member Rachel Threatt, who had paid multiple EOBCs to the Bank in the class period, timely objected to the fee request through *pro bono* counsel.

Threatt noted that a multiplier of over eleven was by itself unacceptable for a settlement that refunded such a small percentage of class members' fees because of the resulting exorbitant hourly rate. Threatt also objected that the 2,158-hour figure was exaggerated because it included 343 hours of work on two other unsuccessful cases, the hours spent on the fee application, and a bloated 561.75 hours by eight attorneys on settlement mediation, negotiation, and drafting. With a real figure of about 1,400 hours, the lodestar was about $926 thousand, and the attorneys were seeking a multiplier of over eighteen. App. 86a–98a.

Threatt also challenged the valuation of the settlement as a rationalization for the fees, arguing that the $16,650,000 request as unreasonably more than 44% of the $37.5 million in real common-fund cash value. App. 99–105. Threatt argued that the parties overstated the settlement value because the $29.1 million in "debt reduction" was illusory. The Bank did not pursue or sell the debts of former customers whose accounts it had closed with outstanding

balances. The Bank almost certainly had already written off all or most of that sum as a loss on its books. The elimination of EOBCs in the future could not support a fee award because it was compromising the claims of customers with past injuries for the benefit of different customers. And nothing stopped the Bank from offsetting the loss of EOBC revenue with a different fee schedule that might make class members worse off.

III. The district court approves the fees.

In response to objections, class counsel reduced their fee prayer to $14.5 million. App. 36a.

The district court then approved the settlement and $14.5 million fee request in full. The district court did not ask, and the Bank did not disclose, how much of the outstanding forgiven debt the Bank had already written off. It nevertheless held that the debt relief was not illusory because the Bank could hypothetically choose to start proceedings to collect, though there was no evidence the Bank ever considered doing so. App. 35a.

The court held that it "has discretion to not apply the lodestar cross check" and concluded without additional reasoning "The Court therefore finds it proper to exercise this discretion and not apply the lodestar cross check." App. 38a–39a. It thus made no findings on hours or rates, though praised class counsel's "tenacity" in a "hard fought battle." App. 38a. The court noted the "substantial risk of non-payment in confronting the adverse legal landscape." *Id.* Using the putative $66.6 million value of the settlement, the court held a 21.1% percentage-of-fund request reasonable, and awarded the full $14.5 million. App. 39a.

Threatt and two other objectors timely appealed. Appellants were supported by an amicus brief of seven state

attorneys general urging the Ninth Circuit to require lodestar crosschecks. App. 18a.

IV. Over a dissent, the Ninth Circuit affirms and holds a district court may disregard lodestar.

The Ninth Circuit affirmed. App. 1. The Court found it noteworthy that all of the previous attempts to bring identical litigation had foundered and thus it was "exceptional" for the attorneys to recover a small fraction of the disputed fees. App. 5a. Applying Ninth Circuit precedent, App. 4a, it held there was no obligation to perform a lodestar crosscheck, so there was no abuse of discretion in the district court's fee award of thousands of dollars an hour. The court concluded that "neither the settlement nor the fee award raises an eyebrow." App. 6a.

Senior Circuit Judge Kleinfeld dissented. App. 7a–20a. He agreed with objectors that the debt reduction was worth "nowhere near $29.1 million" and likely merely "a way to puff the value of the settlement by plaintiffs' counsel and the Bank, in order to get the attorneys' fees approved." App. 10a–11a. Similarly, the injunctive relief "is speculative, uncalculated, and likely to be a negligible fraction of the valuation the district court accepted"; the court should not have "attribute[ed] *any* value to the class of the injunctive relief." App. 11a–14a. The "economic reality" alone made the award an abuse of discretion even without considering lodestar. App. 14a.

The dissent also criticized any argument "justify[ing] the fee in part by the 'difficulty' of the case." App. 14a–15a. That plaintiffs had previously lost identical cases on legal grounds suggested that the case was "bad," rather than "difficult": "To treat that sort of case as justifying an extraordinarily high fee because of 'difficulty' would reward attorneys for bringing meritless cases." App. 15a.

Of most relevance to this petition, the dissent held that "The district court also erred by not considering a lodestar calculation." App. 14a–18a. "Though circuit law does not necessarily require a cross check, it probably should." App. 17a. Failing to do so "breaches the district court's fiduciary duty to the class." App. 18a. Judge Kleinfeld noted:

> Now-Justice Gorsuch has recommended reversing the trend toward percentage fees without cross checks, and scholarly literature has developed urging the necessity of a lodestar cross check, including an article co-authored by experienced district judge Vaughn Walker.

App. 18a (citing Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection* 22–23 (2005); 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)).

On November 6, 2020, the Ninth Circuit denied two petitions for rehearing en banc despite Judge Kleinfeld's nonbinding recommendation of the petitions' grant. App. 43a.

This Petition followed.

REASONS FOR GRANTING THE WRIT

This petition presents an ideal and timely opportunity for the Court to resolve a deep circuit split over the use of lodestar analysis in class-action fee awards and provide much-needed guidance to the lower courts on a recurring issue of substantial importance.

I. The Ninth Circuit's decision compounds the fracture among circuits over the role of lodestar in Rule 23(h) fee awards and is inconsistent with this Court's jurisprudence.

Rule 23(h) authorizes a "reasonable attorney's fee," which is precisely the type of fee authorized under 42 U.S.C. § 1988(b) and many other statutes authorizing fee shifting. In the Section 1988 context, this Court has rejected multiple-factor tests because they give "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." *Kenny A.*, 559 U.S. at 551 (quoting *Delaware Valley*, 478 U.S. at 563). Thus, "the lodestar figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence," *Id.* (quoting *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002)) (cleaned up). Though the lodestar approach "is not perfect," it is "objective, and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results." *Id.* Enhancements above lodestar are permissible, but "rare and exceptional, and require specific evidence that the lodestar fee would not have been adequate to attract competent counsel." *Id.* at 554 (cleaned up).

This Court has applied the same approach in other contexts. In *Pennsylvania v. Delaware Valley Citizens'*

Council for Clean Air, 478 U.S. 546, 565 (1986), the Court incorporated the Section 1988 standards into fee awards under the Clear Air Act, 42 U.S.C. § 7401 *ff.*, noting that there was a "strong presumption that the lodestar figure-the product of reasonable hours times a reasonable rate-represents a 'reasonable fee' is wholly consistent with the rationale behind the usual fee-shifting statute...." In *Blanchard v. Bergeron*, the Court stated that "we have said repeatedly that '[t]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.'" 489 U.S. 87, 94-95 (1989) (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). Thus, the lodestar inquiry is "the guiding light of our fee shifting jurisprudence." *Burlington v. Dague*, 505 U.S. 557, 562 (1992). *See also Murphy v. Smith*, 138 S.Ct. 784, 790 (2018) (rejecting petitioner's attempt to "(re)introduce into [42 U.S.C.] §1997e(d)(2) exactly the sort of unguided and free-wheeling choice—and the disparate results that come with it—that this Court has sought to expunge from practice under §1988.").

But the Court has not interpreted Rule 23(h) since the Federal Rules added it in the 2003 amendments. And the courts of appeals are consistently inconsistent with respect to whether and to what extent district courts must consider lodestar in awarding fees under Rule 23(h). Several expressly rely on the multiple-factor test precedent that this Court has repeatedly criticized as subjective and producing "disparate results"; none follow the *Kenny A.* framework in the context of a common-fund award. *E.g.*, *In re Home Depot Inc. Customer Data Sec. Breach Litig.*, 931 F.3d 1065, 1085 (11th Cir. 2019) (citing cases); *Fresno County Employees' Ret. Ass'n v. Isaacson*, 925 F.3d 63, 68–72 (2d Cir. 2019) (same). These courts distinguish

Kenny A. without addressing that case's reasoning condemning "unlimited discretion" and "disparate results."[2]

The Ninth Circuit's decision is not only inconsistent with the Supreme Court's preference for "cabin[ing] the discretion of trial judges," but conflicts with decisions of the Second, Third, Fifth, and Sixth Circuits on the fundamental question of whether and how district courts should consider the attorneys' lodestar in awarding a reasonable attorney's fee under Rule 23(h). *See* 5 William B. Rubenstein, *et al.*, Newberg on Class Actions § 15:88 (5th ed. 2014) (identifying conflicting approaches among the Circuits). This Court's intervention is needed to establish a nationwide standard for the role of a lodestar crosscheck in Rule 23(h) awards and thereby prevent class attorneys nationwide from flocking to the Ninth Circuit at the expense of class members because its law allows them to recover fees disproportionately greater than their time and effort warrant.

This conflict is stark. The Fifth Circuit uses a mandatory approach. Like most circuits, the Fifth Circuit allows district courts to choose between the percentage method and the lodestar method as the baseline method for awarding attorney's fees from a common fund created by a class-action settlement. If a district court chooses to use the percentage method, however, the court must also apply "a meticulous *Johnson* analysis" as a "crosscheck" to ensure the fee is reasonable. *Union Asset Management Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012). The factors set forth in *Johnson v. Georgia Highway Express,*

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[2] *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980), held that attorney's fees from a common fund were appropriate, but did not discuss the appropriate methodology for calculating such fees.

Inc., 488 F.2d 714 (5th Cir. 1974), include a calculation of the time and labor, *i.e.*, lodestar, of the attorneys and, indeed, is envisioned to "be more searching than the 'lodestar cross-check' commonly referenced in other courts." *Union Asset Mgmt.*, 669 F.3d at 644 n.42. *See also In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 228 (5th Cir. 2008) ("When a district court awards attorneys' fees it must explain how each of the *Johnson* factors affects its award.").

The Second Circuit, while speaking in less mandatory terms, aligns with the Fifth Circuit in strongly preferring that district courts apply a lodestar crosscheck when awarding fees from a common fund. In *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000), the Second Circuit reaffirmed its "express goal" of "prevent[ing] unwarranted windfalls for attorneys." While allowing district courts to calculate attorney's fees using a percentage method, the court "encourage[d] the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage" and emphasized that "courts should continue to be guided" by the time and labor expended by counsel, among other relevant factors. *Id.* This holding follows the Second Circuit's long-established rule that "unless time spent and skill displayed [are] used as a constant check on applications for fees, there is a grave danger that the bar and bench will be brought into disrepute, and there will be prejudice to those whose substantive interests are at stake and who are

unrepresented except by the very lawyers who are seeking compensation." *Detroit v. Grinnell*, 495 F.2d 448, 470-71 (2d Cir. 1974).[3]

The Sixth Circuit also holds that district courts should consider the lodestar elements to determine the reasonableness of a fee awarded on a percentage basis. In *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009), the Sixth Circuit remanded an attorney's fee award in a class action even though the percentage-based award was not "on its face" unreasonable. The court held that the district court must provide its "reasons for 'adopting a particular methodology and the factors considered in arriving at the fee,'" which should "often, but not invariably" include, among other things, the lodestar value of the attorneys' services. *Id.* (quoting *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) and citing *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996)). Contrast here, where the Ninth Circuit affirmed such a fee award when the district court failed to provide reasons for its adopted methodology. App. 38a.

Similarly in tension with the Ninth Circuit standard is the Third Circuit's decision in *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005). Showing how important the crosscheck is, the Third Circuit remanded a

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[3] In practice, since *Goldberger*, "courts have generally refused multipliers as high as 2.03" in the Second Circuit. *See Fujiwara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 438 (S.D.N.Y. 2014) (cleaned up). *See also Fresno County Employees' Ret. Ass'n*, 925 F.3d at 72 ("Fee requests that deviate wildly from the unenhanced lodestar fee are unlikely to pass th[e] cross-check…."). This approach contrasts sharply with the lodestar multiplier of more than ten (and possibly more than sixteen) affirmed by the Ninth Circuit.

fee award in *Rite Aid* where the district court improperly applied the attorneys' billing rates in its lodestar crosscheck. The Third Circuit found such an improperly calculated crosscheck "inconsistent with the exercise of sound discretion." *Id.* The court held that application of a lodestar crosscheck is "sensible," reasoning that it "serves the purpose of alerting the trial judge that when the multiplier is too great." *Id.* at 306. The court thus ordered reconsideration of the fee "with an eye toward reducing the award." *Id. See also In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006) (reaffirming the "recommend[ation] that district courts use the lodestar method to cross-check the reasonableness of a percentage-of-recovery fee award" and reduce the award when the multiplier is too great).

At times, the Third Circuit has used even more forceful language, "strongly suggest[ing] that a lodestar multiplier of 3 … is the appropriate ceiling for a fee award." *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722 (3d Cir. 2001) (rejecting percentage-based fee award that was seven to ten times the lodestar); *In re Cendant Corp. Litig.*, 264 F.3d 201, 285 n.7 (3d Cir. 2001) (suggesting *Cendant PRIDES* may have elevated lodestar crosscheck from being a recommendation to a requirement).

The Ninth Circuit's approach to lodestar crosschecks joins the First, Eighth, and Eleventh Circuits on the other side of a deep fracture among the circuit courts. The First Circuit held in *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation* that "the approach of choice is to accord the district court discretion to use whichever method, [percentage-of-the-fund] or lodestar, best fits the individual case," with that discretion including the choice of whether to use a "combination" of

those methods. 56 F.3d 295, 307-08 (1st Cir. 1995). Meanwhile, the Eighth Circuit opined in *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017), that district courts need not conduct a lodestar crosscheck to verify the reasonableness of a Rule 23(h) award. *See also Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) (declining to address challenges to lodestar data because "the district court's approval of the fee under the 'percentage of the fund' approach was proper"). Even more recently, the Eleventh Circuit weighed in, noting that while courts often use a crosscheck, it is a "time-consuming exercise" and thus not "required." *Home Depot,* 931 F.3d at 1091 n.25.

The Seventh Circuit takes an idiosyncratic approach, asking courts to approximate a market-based fee and "estimate the contingent fee that the class would have negotiated with the class counsel at the outset had negotiations with clients having a real stake been feasible." *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 744 (7th Cir. 2011); *see generally In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718–20 (7th Cir. 2001). In this context, the amount of work expended by class counsel bears on the market price for legal fees. *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 833 (7th Cir. 2018). But in practice, this produces disparate results sometimes divorced from lodestar. *E.g., In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781 (N.D. Ill. 2015) (awarding over $3,600/hour for recovery of $2.72 per class member because of the lack of a "competitive market" after attorneys agreed not to compete for lead counsel status (citing Joseph Ostoyich and William Lavery, Looks Like Price-Fixing Among Class Action Plaintiffs Firms, Law360 (Feb. 12, 2014)).

The Tenth Circuit's law runs both ways, holding in different cases that courts need not evaluate time and labor

using the lodestar formulation, but also that district courts must consider all *Johnson* factors, and that a 3.16 multiplier is enough to shock the conscience. *Compare Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10th Cir. 1988), *with Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445, 1447–48 (10th Cir. 1995), *and Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455, 459 (10th Cir. 2018).

In sum, the "various federal circuits" currently "provide different directions to their district courts" and their overall approach to the topic of crosscheck multipliers under Rule 23(h) "is not particularly illuminating." Rubenstein, *et al.*, Newberg on Class Actions §15:87–88. These conflicting decisions and approaches illustrate that there is nothing to be gained by allowing the issue to further "percolate" in the lower courts. The circuit split is now well developed. Ten circuits have now opined on whether and how district courts should make use of the use of the lodestar in awarding fees under Section 23(h). The circuits are badly split with disparate reasoning and results apparent. There is no reason to allow these disparate approaches to persist. See Stephen M. Shapiro, *et al.*, Supreme Court Practice, §4.4(b) at 4-16 (11th ed. 2019) ("well-developed" circuit split consideration favoring certiorari).

II. The question presented is important and frequently recurring.

There is a remarkable discrepancy between what is a "reasonable attorney's fee" in civil rights litigation and under Rule 23(h) in the Ninth Circuit's analysis. In a §1983 case, if "a plaintiff has achieved only partial or limited success, [the lodestar figure] may be an excessive amount."

Hensley v. Eckerhart, 461 U.S. 424, 436 (1983). In comparison, the class attorneys here settled for a tiny fraction of the alleged damages under the National Bank Act, but not only obtained their full lodestar, but an extraordinary multiplier of tenfold or more. There are two possibilities. One is that class counsel brought meritorious litigation, and settled it quickly on the cheap to maximize their recovery at the expense of their clients. The other is that, as Judge Kleinfeld suggested, this is a "bad" case, App. 14a, and class counsel have cashed in a lottery ticket that resulted in huge fee award in a suit that the defendant opted to dispose of with a nuisance settlement of pennies on the dollar. *Cf. Murray*, 434 F.3d at 952. There seems to be no public-policy reason to prefer rewarding attorneys more for either scenario than for successful litigation vindicating important civil rights against the government, but the rule of the Ninth and some other Circuits creates these perverse incentives.

The windfall here is not unusual. In "class actions, effective hourly rates of tens of thousands of dollars an hour are not uncommon." Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 Wash. U. L. Q. 653, 664 (2003). An expert study showed that attorneys bringing Telephone Consumer Protection Act litigation average $1,275 an hour in fees over dozens of cases, including nuisance settlements of a few dollars per class member and losses that paid nothing. Daniel Fisher, *Lawyers Won 10x Fee Payoff By Avoiding Competition, Objector Claims,* Forbes (May 7, 2015) (discussing fee award of $3,600/hour in *Capital One* that materially raised the average).

We know that these awards of thousands of dollars an hour are windfalls beyond what courts need to encourage attorneys to engage in meritorious consumer or securities

class-action litigation. When courts require attorneys to submit competitive bids beforehand to obtain lead-counsel status, high-profile firms consistently submit bids for a fraction of what district courts award afterward. Laural L. Hooper & Marie Leary, *Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study*, Federal Judicial Center (Aug. 29, 2001) at 7-8. "[A] series of antitrust class action auctions demonstrated that qualified counsel would generally offer to represent the class for fee awards in the 10-15% range." John C. Coffee, *The PSLRA and Auctions*, N.Y.L.J., May 17, 2001, at 5. *E.g.*, *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 931 (9th Cir. 2020) (competitive bid of 12–13%); *In re Lithium Ion Batteries Antitrust Litig.*, No.13-md-2420, 2020 U.S. Dist. LEXIS 233607 (N.D. Cal. Dec. 10, 2020) (awarding just under 30% fees despite competitive bid for half that amount).

Courts resolve hundreds of class-action settlements every year. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 813 (2010). Most cases are without objection, so class counsels are effectively submitting *ex parte* applications for fees. Eighty percent of courts simply grant Rule 23(h) requests without reduction. Theodore Eisenberg *et al.*, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 954 (2017). "Only in rare instances do courts grant fees that are significantly lower than the amount requested." *Id.* This creates a ratchet of precedent increasing fees. "By submitting proposed orders masquerading as judicial opinions, and then citing to them in fee applications, the class action bar is in fact creating its own caselaw on the fees it is entitled to... No wonder that 'caselaw' is so generous to plaintiffs' attorneys." *Fujiwara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014).

Good-faith objectors are few and far between. "[I]ndividual members of the class have such a small stake in the outcome of the class action that they have no incentive to … challenge" settlements or fee awards. *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014). And successfully objecting to oversized attorney's fees on a contingency-fee basis is not a viable business model for a for-profit firm. *E.g.*, *In re Petrobras Sec. Litig.*, 828 F. App'x 754 (2d Cir. 2020) (affirming reduced lodestar award of $33 thousand in fees for successful objection winning $47 million for class after successful appeal challenging $11 thousand award).

In addition, the decision below deepened a circuit split that already created an enormous incentive for forum-shopping by plaintiffs' attorneys seeking to bring and settle nationwide class actions like this one. Exactly the same suit and result can be more profitable for attorneys in some circuits than in others, enabling a particularly "sinister" form of forum shopping. Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 765, 775 (1998). Indeed, one of the motivations for passing the Class Action Fairness Act in 2005 was to reduce, if not eliminate entirely, the problematic effects of forum shopping nationwide class actions. *See, e.g.*, S. Rep. No. 109-14, at 13-23; 151 Cong. Rec. S1225, S1228 (daily ed. Feb. 10, 2005) (statement of Sen. Orrin Hatch); 151 Cong. Rec. H723, S726 (daily ed. Feb. 17, 2005) (statement of Rep. F. James Sensenbrenner); 151 Cong. Rec. S999-02, S999 (daily ed. Feb. 7, 2005) (statement of Sen. Arlen Specter). The result costs class members money, because defendants settling class actions are indifferent between whether the allocation of the cost of settlement goes to attorneys or to class members. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014).

The decision below permits district courts to disregard the time—and the value of that time—that attorneys representing a class spend on a case in setting a reasonable fee and to do so without providing any reasoning. The result is that class counsel bringing suits in the Ninth Circuit may realize a windfall, which will come at the expense of class members whose damages claims created the common fund that pays both their own claims and the attorney's fees. Fee awards that are often a sizable multiplier of lodestar for unremarkable settlements are a gigantic wealth transfer from pension funds and poor- and middle-class consumers to millionaire attorneys.

Rule 23(h) is not yet living up to its promise as part of the "uniform system of federal procedure." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010). Guidance from this Court is thus needed to create objective standards and avoid the "disparate results" between different types of litigation and among the circuits.

III. The Ninth Circuit is wrong and this case is a good vehicle to resolve this important question.

Beyond the mature and well-developed fissure between the Circuits, this petition provides an especially good vehicle for addressing the need for a lodestar crosscheck. Experienced *pro bono* counsel represent petitioner, who has averred that she has no intention of settling her objection for any sort of personal side payment. Dkt. 85-1 ¶8.

While petitioner contends that class counsel received over $10,000/hour here,[4] even under class counsel's calculations, there is no dispute that this $14.5 million fee is at least a ten-fold multiplier on class counsel's ordinary $662/hour blended rate. On either account, Rule 23(h), interpreted correctly, precludes such an unreasonable windfall. Likewise, there is no dispute that in response to petitioner's objection, the district court simply declined to consider lodestar; it provided no justification other than "that it was not required." App. 39a. Nor is there any dispute that the panel majority endorsed the district's categorical discretion to dispense with any crosscheck of the lodestar. App. 4a. Especially in matters of class-action fee awards, it is not always so clear what standards trial and appellate courts have applied.

The panel majority asserts that the thousands of dollars an hour here for a $1.07 refund per $35 fee did not cause them to "raise[] an eyebrow." App. 6a. Respectfully, that conclusion simply demonstrates that the Ninth Circuit has become inured to inflated fee awards. In our view, a payday of over $6,700/hour (and perhaps more than $10,000/hour) for a settlement of pennies on the dollar should shock the conscience. *E.g.*, *Rosenbaum*, 64 F.3d at 1447–48 (3.16 multiplier despite district court finding that award was about 16% of estimated benefit); *Forbush v. JC Penney Co.*, 98 F.3d 817, 823 (5th Cir. 1996) (affirming district court's fee award limiting multiplier to 2 after finding

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[4] Class counsel's assertion of risk is especially ironic if one juxtaposes with their submission of hours, given that that submission was larded with hundreds of hours spent on unsuccessful litigation in other cases. App. 91–93 & n.6.

a 4.6 multiplier to be "outrageous"). Common-fund equitable fee awards must be "made with moderation and a jealous regard to the rights of those who are interested in the fund." *Trustees v. Greenough*, 105 U.S. 527, 536–37 (1881). The dissent is correct, and roughly seven million class members have at stake a sizable $14.5 million attorney's fee payment from their common fund.

While petitioner agrees that Rule 23(h) fees should be tied to actual (as opposed to hypothetical) class recovery, lodestar crosschecks have value. They prevent a trial penalty. *See Brytus v. Spang & Co.*, 203 F.3d 238, 247 (3d Cir. 2000). They discourage risk-averse counsel from entering into quick agreements that amount to a small percentage of potential recovery. They incentivize counsel to prefer meritorious litigation over lottery-ticket litigation nuisance settlements of large claims. And they foreclose hourly windfalls that a functioning marketplace would not allow.

It is no answer to say that the panel majority's opinion is unpublished. The panel majority and district court expressly relied on Ninth Circuit precedent and that precedent includes multiple published decisions, including an *en banc* decision. App. 4a, 38a–39a. Moreover, "[n]onpublication must not be a convenient means to prevent review"; such decisions often create "lingering effect[s] in the Circuit." *Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, O'Connor & Souter, JJ., dissenting from the denial of certiorari). And indeed, courts in the Ninth Circuit are already citing the panel majority opinion as support for declining to conduct a lodestar crosscheck of their own. *See Kater v. Churchill Downs Inc.*, Nos. 15-cv-00612, 19-cv-00199, 2021 U.S. Dist. LEXIS 26734 (W.D. Wash. Feb. 11, 2021) (awarding fees of $38.75 million); *Wilson v. Playtika Ltd.*, No. 18-cv-5277, 2021 U.S. Dist.

LEXIS 26678 (W.D. Wash. Feb. 11, 2021) ($9.5 million). The Ninth Circuit's attempt to shield its splintered decision from further review is "yet another disturbing aspect of the [decision], and yet another reason to grant review." *Plumley v. Austin*, 574 U.S. 1127, 1131–32 (2015) (Thomas and Scalia, JJ., dissenting from the denial of certiorari).

The Court should take this opportunity to address the circuit split and ensure that Rule 23(h) is applied uniformly and with the "interests of absent class members in close view." *Amchem Prods., Inc v. Windsor*, 521 U.S. 591, 629 (1997).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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