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,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

Deepak Gupta
Counsel of Record
Gregory A. Beck
Linnet Davis-Stermitz
GUPTA WESSLER, PLLC
1900 L St. NW, Suite 312
Washington, DC 20036
(215) 772-1000
deepak@guptawessler.com

Counsel for Respondents

July 12, 2021

QUESTION PRESENTED

Does Federal Rule of Civil Procedure 23(h)'s provision allowing a district court to award "reasonable attorney's fees … authorized by law or by the parties' agreement" impose a requirement, not in the text of the rule, that the court conduct a "lodestar cross-check" before awarding fees?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

Class counsel in this case achieved what the district court described as a "remarkable" victory. In a "hard fought battle," they forced one of the largest banks in the nation to abandon its lucrative practice of charging allegedly unlawful fees to customers with negative account balances. That alone saves the bank's customers a "staggering" $1.2 billion in charges over five years. On top of that, the bank agreed to reimburse customers for tens of millions of dollars in past fees and to pay settlement costs—a total of more than $70 million in immediate relief for the class. The district court commended this result as "all the more remarkable" because class counsel faced an "adverse legal landscape," a "highly sophisticated and well represented defendant," and a "substantial risk" that they would never be compensated. The court obtained class counsel's time records for consideration in determining reasonable attorneys' fees. Ultimately, however, it exercised its discretion to award fees based on a percentage of the relief obtained for the class. The court approved $14.5 million in fees—representing 20.5% of the monetary relief and just 1% of the settlement's total value.

The petitioner argues that, before determining those fees to be reasonable, the district court was required to perform a so-called "lodestar cross-check" by comparing the fees to class counsel's lodestar—that is, their hourly rate across all the hours they worked on the case. The Ninth Circuit disagreed, holding that a cross-check is discretionary. The petition claims that the courts of appeals are split on that issue, in a "deep fracture" that pits courts holding that a lodestar cross-check is discretionary against those that treat it as mandatory.

The petitioner, however, only identifies a single Fifth Circuit decision that she claims has adopted a "mandatory" cross-check rule. And as the Fifth Circuit itself took care to note, the requirement it adopted is not a lodestar cross-check at all, but a *reasonableness* cross-check. That just means that the Fifth Circuit, like all the other courts of appeals, requires district courts to review fee awards for reasonableness. Although the decision happened to use the word "cross-check," it has nothing to do with the rule that the petitioner asks this Court to adopt.

The petitioner concedes that all the other circuits she claims have required a lodestar cross-check have done so "in less mandatory terms." The decisions, in fact, just "encourage" or "recommend" a cross-check. By using that permissive language, these courts—like the Ninth Circuit—adopted rules that are expressly discretionary. Indeed, the Ninth Circuit also "encourage[s]" district courts "to guard against an unreasonable result by cross-checking their calculations." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944 (9th Cir. 2011).

On the merits, the petitioner asks the Court to read a lodestar cross-check requirement into Rule 23(h)'s allowance of "reasonable" attorney's fees "authorized by law." Courts, however, lack the power to simply add a new requirement to the federal rules. And Rule 23(h)'s standard of reasonableness, in any event, is not grounded in the rule itself, but in the substantive law authorizing fees. In particular, the rule refers to the "common-fund doctrine"—an equitable rule frequently invoked in the class-action context that entitles class counsel to "reasonable" attorneys' fees out of any funds successfully obtained for the class. By limiting the question presented to Rule 23(h), the petition never asks the Court to decide whether

the common-fund doctrine—the only source of attorneys' fees here—requires a lodestar cross-check. To hold that it does would require the Court to revisit more than a century of cases awarding fees on a purely percentage basis. Yet, the petition hardly mentions the doctrine, much less provides a basis for reading into it a new mandatory cross-check rule. The petition's failure to even ask what the common-fund doctrine requires makes it a poor vehicle for deciding that question.

The petitioner does, however, ask the Court to import a *different* standard of "reasonableness" from fee-shifting statutes like 42 U.S.C. § 1988, which require defendants in certain cases to pay the prevailing plaintiff's lodestar fee. But that route, too, is foreclosed by precedent. Both this Court and the unanimous courts of appeals have held that the considerations underlying "reasonable" fees paid by defendants do not apply in this context, where the fees are paid by class members to their own counsel.

The petitioner's policy arguments fare no better. She argues that a lodestar cross-check is necessary to prevent class counsel from obtaining a "windfall." But the fact that percentage fees exceed counsel's lodestar rate does not mean that the fees are excessive or unreasonable. Courts have long understood that the percentage method, by basing fee awards on the relief obtained, more closely aligns the interests of class counsel and the class. That encourages class counsel to focus on efficiently obtaining the maximum relief for the class instead of racking up more hours. When class counsel's fees are higher than the lodestar, it means that counsel obtained valuable relief for the class. Everyone benefits.

Behind all these problems with the petition's arguments lurks a larger issue: The petitioner cannot

decide what rule she wants this Court to adopt. At some points, she asks the Court to require district courts to "consider" counsel's lodestar in awarding fees, but the district court here did request and receive class counsel's time records and lodestar for consideration before exercising its discretion to instead award percentage fees. At other points, the petitioner seems to propose a hard limit on the amount by which fees can exceed the lodestar, but without ever saying where that limit would come from or what it should be. And at still others, she suggests that the Court import decisions from its fee-shifting jurisprudence that would largely limit fees to the lodestar itself. Yet, at the same time, she argues (at 24) that fees should remain "tied to … class recovery."

The rule that the petitioner seeks not only lacks support in the law but is incoherent. This Court should deny the petition.

STATEMENT

A. Class counsel conduct a long and hard-fought nationwide campaign to challenge extended-overdraft charges as usurious interest under the National Bank Act.

When bank customers attempt to spend or withdraw money from their checking accounts in amounts that exceed available funds, a bank may honor the overdrawn transaction. App. 22a; *see* FDIC, *Study of Bank Overdraft Programs* 16 (Nov. 2008), https://perma.cc/K959-8CVE. Banks typically do that by automatically advancing (that is, loaning) the customer enough money to cover the amount of the overdraft plus a fee for the overdraft service. App. 22a; *see* Consumer Financial Protection Bureau (CFPB), *Study of Overdraft Programs* 14, 54 (June 2013), https://perma.cc/ZP3W-7KQA. But Bank of

America went further: It required customers to pay back that money, including a $35 overdraft fee, within five days or face an additional $35 charge. App. 22a. It was this second fee, known as an "extended-overdraft fee," that was at issue in this case. *Id.*; *see* CFPB, *Study of Overdraft* at 54.

Extended-overdraft fees are lucrative for banks, representing about 10% of all overdraft-related fees. *See* CFPB, *Data Point: Checking Account Overdraft* 10 (July 2014), https://perma.cc/GQP2-43GY. Until agreeing to cease the practice as part of the settlement here, Bank of America charged among the highest extended-overdraft fees in the industry—a practice that drew criticism from consumer advocacy groups because it effectively forced the bank's poorest customers to "unknowingly borrow" funds at "astronomical interest rates." Testimony of Travis Plunkett (Consumer Federation of America), U.S. S. Banking Comm., July 14, 2009, at 14, https://perma.cc/9QKU-46NJ. At one point, Bank of America imposed about $20 million in such fees *every month*. App. 24a; *see* CFPB, *Study of Overdraft* at 54.

In a series of complaints filed in courts across the country, bank customers—represented by the same counsel as the nationwide settlement class is in this case—challenged the imposition of extended-overdraft fees as a form of usurious "interest" prohibited by the National Bank Act. Early on, however, the decisions began to go against the plaintiffs. The first four district courts to reach the issue held that extended-overdraft fees are not "interest" under the Act and granted the banks' motions to dismiss. *See*, *e.g.*, *McGee v. Bank of Am., N.A.*, 2015 WL 4594582 (S.D. Fla. 2015).

Arising in that hostile legal climate, this case represents the culmination of class counsel's years of effort to hold banks accountable for the billions of dollars they earn in extended-overdraft fees. The complaint alleged that Bank of America's fees constituted usurious interest in violation of the National Bank Act. Doc. 1. The district court denied Bank of America's motion to dismiss. Doc. 20. The court acknowledged that the only courts to have decided the issue had gone the other way but found those decisions unpersuasive. *Id.* at 5–6. The court did, however, consider the contrary authority to be evidence of "reasonable grounds for a difference of opinion" and granted Bank of America's motion for certification of an interlocutory appeal under 28 U.S.C. § 1292(b). Doc. 61. Based on that certification, the bank successfully petitioned the Ninth Circuit for leave to appeal. Docs. 62, 63.

B. Counsel negotiate a settlement that includes more than $1 billion in relief.

While Bank of America's appeal was pending, the parties engaged in mediation and reached a nationwide settlement. Doc. 80-2 ¶¶ 18–23. Under the settlement's terms, the bank agreed to stop imposing extended-overdraft fees for at least five years. App. 23a–24a. That eliminates $20 million in such charges per month, for a total (according to Bank of America's business records) of at least $1.2 billion in fees. *Id.* The settlement also provides cash reimbursements totaling $37.5 million to all class members who paid extended-overdraft charges to Bank of America. App. 24a. Approximately 93% of all class members actually paid those charges and are thus entitled to cash payments. Docs. 128 at 8, 128–2 ¶¶ 3–4. And the settlement provides $30.3 in debt forgiveness to class

members with unpaid extended-overdraft charges. App. 24a; Doc. 128 at 8 & n.3. Unlike most class-action settlements, the settlement here requires no claims process for any of the cash benefits. Instead, class members automatically receive either a direct deposit to their bank accounts or a check in the mail. App. 24a; Doc. 124 at 8–9.

In sum, the settlement gave class members at least $1.2 billion in relief from future extended-overdraft charges and $67.8 million in immediate monetary relief (cash and debt forgiveness). On top of that, Bank of America agreed to pay administration and notice costs, bringing the total immediate monetary relief to $70.7 million. App. 25a.

C. The district court awards attorneys' fees at a minuscule percentage of the settlement's value.

The plaintiffs moved for final approval of the proposed class settlement and an award of attorneys' fees and costs. Doc. 80. Although they initially indicated to the court that they would request $16.65 million in fees, when they filed their fee petition class counsel in fact requested only $14.5 million, or 20.5% of the monetary relief. *See id.* ¶ 45; *see also* Doc. 124 at 11. That percentage does not include the value of eliminating $1.2 billion in future extended-overdraft fees—the most significant element of the relief and the "primary goal" of the litigation. Doc. 124 at 7. Considering that benefit, the fee request represented a minuscule percentage (about 1%) of the settlement's total value. Class counsel submitted time records with their fee request, establishing their reasonable hourly rates and lodestar. Doc. 80-1 at 25.

Following a hearing, the district court granted the motions for final approval and for an award of attorneys' fees. *Id.*

Settlement approval. As to the fairness of the proposed settlement, the court found that the circumstances "strongly support" approval here. App. 34a. "Most importantly," it wrote, "the injunctive relief, estimated at about $1.2 billion, is substantial." App. 35a. In addition, cash and debt relief amount to a "meaningful" recovery. *Id.* The conclusion that the settlement has significant value was bolstered by the fact that, out of a class of seven million, only one hundred class members chose to opt out. *Id.*

The court also found that the plaintiffs would face significant "risk and expense" in pushing forward with the case without a settlement. *Id.* Given that "every other court to consider the question" had rejected the plaintiffs' legal position, it reasoned, the plaintiffs would face a serious risk of losing on appeal. App. 34a. And because "Bank of America is a highly sophisticated and well represented defendant, Plaintiffs would almost certainly encounter substantial difficulty and expense in fully litigating this case." App. 35a.

The court thus approved the settlement "as fair, reasonable, adequate, and in the best interest" of the class. App. 36a.

Attorneys' Fees. The court next found that class counsel's requested fees were reasonable. It first noted that "the result obtained here by Class Counsel is remarkable." App. 37a. "[F]orcing a bank of [Bank of America's] stature to cease a lucrative banking practice," it wrote, is a "meaningful" victory. App. 38a. Although the cash and debt-forgiveness components of the settlement

themselves "support[] the requested fee," the $1.2 billion saved by eliminating future fees "makes the inquiry much easier." App. 37a–38a. Class counsel's accomplishment was particularly notable, the court found, given "the adverse legal landscape" on the question whether the challenged fees constitute interest. App. 38a. The court observed that "this was a hard fought battle" and that class counsel litigated with "tenacity and great skill," despite "a substantial risk of non-payment." *Id.*

The court also rejected the objector's argument that a formal lodestar cross-check was necessary. App. 38a–39a. Because class counsel's claimed hours and lodestar rate were provided in their motion for fees and prominently included in the objections, the court already had those numbers before it. ER 54, 81. But whether to conduct a cross-check based on those numbers, it noted, is a matter of discretion. App. 38a–39a. And, having already found a particularly strong showing of reasonableness under the percentage method, the court considered "it proper to exercise [its] discretion and not apply the lodestar cross check" here. App. 39a. That decision was consistent with the opinion of the plaintiffs' fee expert, Professor Brian Fitzpatrick, that "the court should not consider class counsel's lodestar at all," but that, if it does, "the lodestar here does not change … that the fee request is reasonable." SER 17 ¶¶ 25–26.

D. The Ninth Circuit affirms the fee award.

In an unpublished memorandum, the Ninth Circuit affirmed. It held that the district court did not abuse its discretion in awarding percentage fees. The district court, it held, "considered the most pertinent factors influencing reasonableness," including the "exceptional" results obtained by class counsel; their "tenacity and great skill";

and the "substantial" risks the burdens they faced. App. 4a–5a. It also concluded that the court, having found that the percentage awarded was reasonable, did not err in exercising its discretion not to conduct a lodestar cross-check. App. 6a.

REASONS FOR DENYING THE WRIT

I. Every circuit agrees that a lodestar cross-check is optional in evaluating the reasonableness of a percentage fee.

The petition claims a "stark" circuit split on the question whether, when determining reasonable attorneys' fees in a class action as a percentage of the amount recovered, a district court must also assess counsel's lodestar as a "cross-check" on the fee's reasonableness. The Ninth Circuit's holding below that lodestar cross-checks are discretionary, she argues, is on one "side of a deep fracture among the circuit courts." Pet. 16. On the other side, the petitioner primarily points to the Fifth Circuit, which she says has adopted "a mandatory approach" to lodestar cross-checks. *Id.* at 13–14. She also identifies the Second, Third, and Sixth Circuits as having adopted the lodestar cross-check, albeit "in less mandatory terms." *Id.* at 14–16.

The truth, however, is that the circuits are remarkably unified in their treatment of percentage-based fees and lodestar cross-checks. Every circuit holds that percentage of recovery, subject to a review for reasonableness, is the preferred method for calculating fees in common-fund cases like this one. And every circuit to have reached the question holds that a district court *may*, but is not required to, consider counsel's lodestar in awarding a reasonable fee.

A. The only decision that the petitioner even claims adopted a "mandatory" lodestar cross-check is the Fifth Circuit's decision in *Union Asset Management Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012). The petitioner, however, misreads that case. The "cross-check" that the Fifth Circuit requires is not a *lodestar* cross-check, but a "cross-check[] with the *Johnson* factors," *id.*—that is, a test of the fee award under the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717, 720 (5th Cir. 1974). In the Fifth Circuit, district courts apply *Johnson*'s twelve-factor test to ensure that both lodestar- and percentage-based fees are "reasonable." *Union Asset Mgmt.*, 669 F.3d at 639 n.11, 643 n.26. The test, in other words, is a "*reasonableness* cross-check." *Torres v. SGE Mgmt.*, 945 F.3d 347, 351 (5th Cir. 2019) (emphasis added).

The Fifth Circuit was careful to distinguish this "*Johnson* cross-check" from the "'lodestar cross-check' commonly referenced in other courts." *Union Asset Mgmt.*, 669 F.3d at 644 n.42. Some *Johnson* factors are *related* to the lodestar, including "the time and labor required" and "the customary fee for similar work in the relevant community." *Moench v. Marquette Transp. Co. Gulf-Inland, L.L.C.*, 838 F.3d 586, 596 n.8 (5th Cir. 2016). But district courts are not required to "recite or even mention" those, or any other, *Johnson* factors in applying the test. *Id.* at 596. They may rely instead on other factors, such as the "results obtained" or the "ability of the attorneys." *Id.* at 596 n.8. The Fifth Circuit in *Union Asset Management* itself affirmed the district court's award of an 18% fee without mentioning the lodestar. 669 F.3d at 644-45.

Far from creating a circuit split, the Fifth Circuit's "reasonableness cross-check" is just another way of stating the rule—universal among the courts of appeals—that fee awards must be reasonable. Every circuit agrees that, "whether calculated pursuant to the lodestar or the percentage method, the fees awarded in common fund cases may not exceed what is 'reasonable' under the circumstances." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000); *see also Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1265 (D.C. Cir. 1993) ("[F]ederal courts have a duty to ensure that claims for attorneys' fees are reasonable."). That district courts may *choose* to consider factors related to lodestar in their reasonableness determinations does not mandate a lodestar cross-check. Indeed, some circuits require district courts to evaluate reasonableness under the same *Johnson* test as the Fifth Circuit, while expressly holding that lodestar cross-checks are "not required." *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017); *see also In re Home Depot Inc.*, 931 F.3d 1065, 1091 n.25 (11th Cir. 2019) (holding that a "lodestar cross-check is a time-consuming exercise" that is not "required").

The Sixth Circuit, which the petitioner puts on the Fifth Circuit's side of the split, applies an equivalent reasonableness standard. In *Moulton v. United States Steel Corp.*, that court held that a 30% fee was not "on its face … unreasonable," but remanded for the district court to give its "reasons for adopting a particular methodology and the factors considered in arriving at the fee." 581 F.3d 344, 352 (6th Cir. 2009) (cleaned up). Those reasons, the court held, will "[o]ften, but by no means invariably," address six factors—one of which is the "value of the services on an hourly basis." *Id.* Again, that is not a mandatory lodestar cross-check, but a reasonableness

test. A district court is free to consider a lawyer's hourly rate as part of its reasonableness determination, but it may also rely instead on "the value of the benefit rendered to the plaintiff class," "whether the services were undertaken on a contingent fee basis," "the professional skill and standing of counsel," or other factors. *Id.*

The Ninth Circuit's rule is the same. A district court must consider relevant factors to ensure that a fee award is "reasonable." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 941. The district court has discretion in the method it uses to calculate a fee, so long as that discretion is used "to achieve a reasonable result." *Id.* at 942.

B. The remaining circuits that the petition claims to be part of the "stark" split with the Ninth Circuit hold, at most, that they "*encourage* the practice of requiring documentation of hours." *Goldberger*, 209 F.3d at 49-50 (emphasis added); *see also Williams v. Rohm and Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) ("[A] lodestar check is not [a] required methodology."); *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 199 (3d Cir. 2000) ("suggest[ing]" consideration of lodestar). These cases hold only that district courts *may* consider counsel's hours when doing so informs the reasonableness of percentage-based fees. Their language is not mandatory, but expressly permissive. They are thus consistent with the Ninth Circuit's optional cross-check rule.

The Second Circuit, for example, "encourage[s]" review of the lodestar as part of the required reasonableness review. *Goldberger*, 209 F.3d at 49-50. As long as the fee is found reasonable, however, the Second Circuit does not "compel district courts to undertake the cumbersome, enervating, and often surrealistic process of

lodestar computation." *Id.* (cleaned up). Likewise, the Third Circuit "recommend[s] that district courts use the lodestar method to cross-check the reasonableness of a percentage-of-recovery fee award." *In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006); *see also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (calling a cross-check "sensible"). But, given that "the lodestar cross-check is quite time consuming," it suggests that district courts "should first use" the traditional reasonableness factors to evaluate percentage fees. *In re Cendant Corp. Litig.*, 264 F.3d 201, 220–21 (3d Cir. 2001). Only "if the court cannot otherwise come to a resolution" should it "consider a lodestar cross-check." *Id.*

Again, the Ninth Circuit has the same rule. As part of the required reasonableness review, the Ninth Circuit "encourage[s]" district courts "to guard against an unreasonable result by cross-checking their calculations." *Bluetooth*, 654 F.3d at 942, 944. A cross-check is "[o]ne way that a court may demonstrate that its use of a particular method or the amount awarded is reasonable." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015). But as long as the district court finds the fee reasonable, the Ninth Circuit also permits it to avoid the "time-consuming task of calculating the lodestar" by simply "award[ing] attorneys a percentage of the common fund." *Bluetooth*, 654 F.3d at 942, 944. No decision by any circuit conflicts with that holding.

C. The petitioner's claimed circuit split, even if it existed, would not be implicated in this case. Those courts that "encourage" a lodestar cross-check do not require any sort of formal procedure that the district court failed to conduct here. *See Goldberger*, 209 F.3d at 50. The "cross-check" that they encourage is just "the practice of

requiring documentation of hours." *Id.* The reasonableness of those time records "need not be exhaustively scrutinized by the district court," but "can be tested by the court's familiarity with the case." *Id.* Similarly, the Fifth Circuit's review under the *Johnson* factors is informal and flexible. *See Moench*, 838 F.3d at 596 n.8. Consideration of "the time and labor required" does not require even a mention in the record, much less full consideration of counsel's lodestar. *See id.*

Here, the district court requested and received counsel's detailed time records and lodestar, and the court had those numbers before it when it awarded fees. ER 54, 81. The court also had adversary briefing between the petitioner and class counsel over what, if any, effect that the lodestar should have on the fee award. And it had the declaration of Professor Brian Fitzpatrick (the plaintiffs' fee expert), who analyzed the time records and offered his considered view that "the lodestar here does not change [his] opinion that the fee request is reasonable." SER 17 ¶ 26. Given all that, the court found that a percentage fee was reasonable, expressly exercising its discretion in declining to rely on the lodestar. ER 16.

The petitioner may disagree with the district court's decision. But 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. Because the district court, much more than an appellate court, "is intimately familiar with the nuances of the case," its discretion is at its strongest point when it comes to awarding attorneys' fees. *Goldberger*, 209 F.3d at 47-48. Although courts of appeals recognize that a lodestar cross-check "may be helpful," it is not "determinative" of the fee awarded. *In re Baby Prods.*

Antitrust Litig., 708 F.3d 163, 179-80 (3d Cir. 2013). The results of the cross-check do "not trump the [court's] primary reliance on the percentage of common fund method." *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d at 307. And the amount by which percentage fees exceeds the lodestar "need not fall within any pre-defined range." *Id.*

The district court's exercise of discretion here would thus have been proper in any circuit. And even if a split existed, this case would offer no opportunity to resolve it.

II. The Ninth Circuit, like every other circuit, correctly holds that an award of reasonable fees does not require a lodestar cross-check.

The question the petitioner asks this Court to decide is ambiguous: "Whether, and to what degree, a district court must consider counsel's lodestar in awarding 'reasonable attorney's fees' under Rule 23(h)." By asking "whether" a district court must consider counsel's lodestar, the petition seems to propose a procedural rule requiring district courts to "consider" the lodestar, but not necessarily to act on that information. On the other hand, by asking "to what degree" a district court must consider the lodestar, the petition seems to propose a substantive rule. That language, along with the tenor of much of the petition, suggests that what the petitioner is really asking this Court to do is to impose a new limit on the size of fee awards in comparison to the lodestar. What that limit should be, and how the Court should determine it, the petition does not say. In any event, the proposed rule—whether viewed as a procedural or substantive requirement—lacks any support in Rule 23(h) or in the decisions of this or any other court. There is simply no way, short of pulling it from thin air, for the Court to adopt the rule that the petitioner seeks.

A. Nothing in Rule 23(h)'s plain language supports a procedural requirement that district courts must "consult" counsel's lodestar before awarding fees. The text of the rule does not hint at such a requirement. Nor can it be read into the rule's use of the word "reasonable." Rule 23(h) does not require attorneys' fees to be "reasonable" in some general sense—it authorizes "reasonable attorneys' fees … that are *authorized by law or by the parties' agreement*." Fed. R. Civ. P. 23(h) (emphasis added). The rule does not provide its own "free-floating grant of authority … to award attorneys' fees in class actions." *In re Volkswagen and Audi Warranty Extension Litig.*, 692 F.3d 4, 15 (1st Cir. 2012). In other words, it is "not an independent source of law authorizing attorney fees." 5 *Newberg on Class Actions* § 15:2 & n. 2 (5th ed. June 2021). Rather, it just "provide[s] the process for federal courts' consideration of fee requests authorized by either the substantive law or the agreement of the parties." *Id.* What is "reasonable" under Rule 23(h), then, is what is reasonable under the substantive law or agreement authorizing the award of fees.

The Advisory Committee's notes on the rule leave no room for doubt on this point. The word "reasonable," the Advisory Committee explains, refers to the "customary term" used in the two most common sources of substantive law authorizing fees—the common-fund doctrine and fee-shifting statutes. Fed. R. Civ. P. 23(h), 2003 Advisory Committee's Notes. The rule itself does not purport to give substance to that term, or to resolve how courts should "approach[] the determination of what is reasonable." *Id.* Indeed, the Advisory Committee specifically disclaims any "attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable" in common-fund cases. *Id.*; *see*

Torres v. Oakland Scavenger Co., 487 U.S. 312, 316 (1988) (holding that the Advisory Committee's notes are "of weight" in construing the rules). Nor could the rule require a lodestar cross-check, given that, in some of its applications, the requirement would make no sense. A court could not, for example, reasonably apply a lodestar cross-check to contractual fees or to a fee-shifting statute that already requires lodestar fees.

Because Rule 23(h) does not itself require a lodestar cross-check, federal courts lack authority to read such a requirement into the rule. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622 (1997). Amendments to the rules can take effect only "after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress." *Id.* at 620. And courts "are not free to amend a rule outside the process Congress ordered." *Id.*

In this case, the question of the lodestar method's application in the common-fund context has already been the subject of serious judicial study, resulting in the unanimous conclusion of the courts of appeals that the method should not be required. In response to criticism that the lodestar method in class actions was "caus[ing] more problems than it solves," the Third Circuit in the 1980s "commissioned a blue ribbon task force to review the matter." *Goldberger*, 209 F.3d at 49; *see* Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237 (1985). The task force found that the lodestar method was "insufficiently objective," "subject to manipulation," and "create[d] a sense of mathematical precision that is unwarranted." *Court Awarded Attorney Fees*, 108 F.R.D. at 246-47. "Given the complexity of many class action

lawsuits," the method also made "considerable demands upon judicial resources" and caused "substantial delay in distribution of the common fund." *Swedish Hosp. Corp.*, 1 F.3d at 1269-70.

In response to these and other concerns, the task force "unequivocally recommended a return to the percentage method in common fund cases." *Goldberger*, 209 F.3d at 49. Over the following years, the courts of appeals gradually came to the same conclusion, each endorsing use of the percentage method in common-fund cases. *See In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 306 (1st Cir. 1995).

The rule that the petitioner seeks, in short, has already been the subject of considered rejection by the federal courts. The experience of those courts demonstrates that mandating a lodestar cross-check, even as a procedural requirement, would be far from costless. As the Second Circuit put it, mandatory application of the lodestar in class actions invites "an inevitable waste of judicial resources" by "compelling district courts to engage in a gimlet-eyed review of line-item fee audits." *Goldberger*, 209 F.3d at 49. If such a rule is to be imposed over the objections of the courts of appeals and district courts, it would be far better to do so with the benefit of the deliberation accompanying an amendment to Rule 23. See *Amchem Prods.*, 521 U.S. at 620.

In any event, a procedural cross-check requirement would not change the result in this case. The district court had class counsel's lodestar, the petitioner's argument that the court should reduce fees based on that lodestar, and Professor Fitzpatrick's opinion that the lodestar did not alter his conclusion that the fees were reasonable.

With all that before it, the court gave no hint that it thought the fee excessive in light of the lodestar. On the contrary, the court found that the facts here presented a particularly strong showing of reasonableness and expressly invoked its discretion in declining to rely on a lodestar cross-check. App. 37a–38a.

Although she is not clear on this point, the petitioner may be asking this Court to require some sort of formal statement by the district court on the record regarding the court's consideration of the lodestar in setting fees. As noted above, that is not what courts typically mean by a "lodestar cross-check." *See Goldberger*, 209 F.3d at 50; *supra*, at pp. 14–16. But even if it were required, nothing would be accomplished here by remanding to the district court just so it can add a few extra words to its order. *See id.* at 51 (affirming fee award where there was "no real indication in the record" that the district judge "would have awarded a more generous fee" under a different method). If failure to make a more formal statement was error, it was, at most, a "highly technical and totally harmless" one. *Great W. Sugar Co. v. Nelson*, 442 U.S. 92, 94 (1979).

B. The petitioner's proposed rule fares even worse when considered as a substantive limit on fees. As a rule of procedure, Rule 23(h) cannot abridge or modify a substantive right to attorneys' fees originating from outside the rule. *See* 28 U.S.C. § 2072(b). If a limit on fees exists, then, it must come from the substantive law authorizing the fees, which in this case is the common-fund doctrine. Under that doctrine, it is "well established that 'a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a

whole.'" *Swedish Hosp. Corp.*, 1 F.3d at 1265 (quoting *Boeing Co. v. Van Gemert,*444 U.S. 472, 478 (1980)). As this Court has explained, the right of individual class members to a share of the judgment fund "is a benefit in the fund created by the efforts of the class representatives and their counsel." *Boeing Co.*, 444 U.S. at 480. "Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Id.* at 478.

The petitioner identifies nothing in the common-fund doctrine supporting the imposition of a rigid cross-check requirement. On the contrary, the "doctrine is essentially a matter of equity, and gives courts significant flexibility in setting attorneys' fees." *In re Cendant Corp.*, 404 F.3d at 187–88; *see also Boeing Co.,* 444 U.S. at 478. "This Court has stressed that "individualization in the exercise of a discretionary power" to award fees is key to the rule's equitable nature. *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 167 (1939). There is thus "no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded as a fee." *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991). Rather, the "amount of any fee must be determined upon the facts of each case." *Id.*; *see also Swedish Hosp. Corp.*, 1 F.3d at 1265–66 (courts "exercised considerable discretion and applied a reasonableness standard"); *Court Awarded Attorney Fees*, 108 F.R.D. at 242.

Nor is there any hint in the common-fund doctrine's long history suggesting that it requires a lodestar cross-check in setting a reasonable fee. Since this Court first

recognized the doctrine more than a century ago, *see Trustees v. Greenough*, 105 U.S. 527, 532 (1881), neither it nor any other court has read it to include such a requirement. Rather, "every Supreme Court case addressing the computation of a common fund fee award has determined such fees on a percentage of the fund basis." *Camden I Condominium Ass'n,* 946 F.2d at 773; *see, e.g.*, *Boeing Co.*, 444 U.S. 472; *Sprague,* 307 U.S. at 161; *Cent. R.R. & Banking Co. v. Pettus,* 113 U.S. 116, 127–28 (1885); *Greenough*, 105 U.S. at 532. This Court in *Boeing Co.,* for example, approved a percentage-based fee from a common fund without any mention of lodestar. 444 U.S. 472.

Even if the doctrine could be read to support some limit on percentage fees as a multiple of an attorneys' lodestar, the petition gives no hint of what that limit might be—whether, for example, it is four times, six times, or some other multiple of an attorney's lodestar. Nothing in the common-fund doctrine suggests such a limit. Nor does the petition cite any court of appeals decision adopting a particular rule for this Court to consider. The petitioner, in short, asks the Court to manufacture, in the first instance, a new substantive rule based on nothing. The Court should decline the invitation.

C. Finding no support for her rule in the common-fund doctrine, the petitioner asks the Court to import into the doctrine the standard for "reasonable" fees governing fee-shifting statutes like 42 U.S.C. § 1988. As she acknowledges, however, "none" of the courts of appeals "follow the [fee-shifting] framework in the context of a common-fund award." Pet. 12. All, in fact, have held the opposite: that the common-fund doctrine is not limited to the lodestar but permits percentage fees. *See Union Asset*

Mgmt., 669 F.3d at 643 (becoming the last circuit to "endorse[] the percentage method for common fund cases"). And this Court, too, has recognized the distinction between what is "reasonable" in the fee-shifting and common-fund contexts. While a fee is reasonable under a fee-shifting statute when it "reflects the amount of attorney time reasonably expended on the litigation," the Court held, it is reasonable under the common-fund doctrine when it "is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984).

As numerous courts have explained, these different standards are required in the fee-shifting and common-fund contexts because of "several important, and ultimately decisive, differences between the two types of cases." *Swedish Hosp. Corp.*, 1 F.3d at 1268. Fee-shifting is an exception to the "general rule in our legal system … that each party must pay its own attorney's fees and expenses." *Perdue v. Kenny A.*, 559 U.S. 542, 550 (2010). Under fee-shifting statutes, a party is compelled by statute to bear the opposing party's fees. *See id.* It was in that context that this Court in *Perdue* adopted a "strong presumption that the lodestar figure is reasonable" that may be overcome only in "rare circumstances." 559 U.S. at 553–54.

But as the courts of appeals have observed, "*Perdue's* holding was founded primarily upon justifications that are unique to cases governed by § 1988 or other fee-shifting statutes." *In re Pilgrim's Pride Corp.*, 690 F.3d 650, 662 (5th Cir. 2012); *see also*, *e.g.*, *In re Diet Drugs*, 582 F.3d 524, 540 (3d Cir. 2009); *In re Thirteen Appeals*, 56 F.3d at 308. In particular, this Court in *Purdue* expressed concern that, if attorneys' fees are too uncertain, defendants in fee-

shifting cases may be reluctant to settle. 559 U.S. at 558–59. And it noted that the fees in those cases are "paid in effect by state and local taxpayers," diverting money from "programs that provide vital public services." *Id.* at 559. That outcome, it held, is "not consistent with the statute's aim." *Id.*

In contrast, the "common-fund doctrine," as applied to class actions, "is entirely consistent with the American rule against taxing the losing party with the victor's attorney's fees." *Boeing Co.*, 444 U.S. at 481. "Unlike statutory fee-shifting cases, … attorneys' fees in common fund cases are not paid by the losing defendant, but by members of the plaintiff class, who shoulder the burden of paying their own counsel out of the common fund." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300–01 (9th Cir. 1994); *see also Boeing Co.,* 444 U.S. at 478–79. There is no risk that defendants will be deterred from settling. "How the fund is divided between members of the class and class counsel is of no concern whatsoever to the defendants who contributed to the fund." *In re Wash. Pub. Power Supply Sys. Litig.*, 19 F.3d at 1301. Nor is there any possibility, in litigation between private parties, that the burden will ultimately fall on taxpayers. Because, in a common-fund case, "there is no direct or immediate danger of unduly burdening the defendant, a court has more latitude in exercising its equitable powers to determine whether the plaintiff class should compensate its attorneys." *Id.* at 1300–01.

Given these distinctions, the "overwhelming weight" of authority supports percentage fees in the common-fund context. *Goldberger*, 209 F.3d at 49; *see also, e.g.*, *In re Thirteen Appeals*, 56 F.3d at 307 (percentage fees "in common fund cases is the prevailing praxis"); *see Manual*

for Complex Litigation (Fourth) § 14.121 (2004). Today, "the lodestar method is ... used to award fees in only a small percentage of class action cases, usually those involving fee-shifting statutes or those where the relief is injunctive in nature and the value of the injunction cannot be reliably calculated." SER 6 ¶ 9.; *see also* Am. Law. Inst., *Principles of the Law, Aggregate Litigation* § 3.13(b) (2010) ("[A] percentage-of-the-fund approach should be the method utilized in most common-fund cases."). The petitioner gives no reason to abandon this well-established judicial consensus.

III. Requiring district courts to determine the lodestar in common-fund cases would serve no important purpose and do more harm than good.

Lacking any support in the law for a mandatory cross-check rule, the petitioner relies primarily on a policy argument. A lodestar cross-check, she argues, is necessary to prevent percentage-based fee awards from becoming "windfalls" for plaintiffs' counsel, of which she calls the fees here an example. Pet. 19. The argument is misplaced. Because percentage fees align the interests of class counsel with the interests of the class, class counsel benefits only when the class benefits too. That is exactly what happened in this case.

A. The petitioner's characterization of the attorneys' fees in this case as a windfall obtained at the class's expense cannot be squared with the record. Pet. 19. As the district court found, class counsel defeated the bank's efforts to get the case dismissed in a "hard fought battle," ultimately extracting the bank's agreement to stop charging the challenged fees. App. 38a. The court recognized that "forcing a bank of [Bank of America's] stature to cease a lucrative banking practice" was a

"staggering" victory—one that in this case will save the bank's customers $1.2 billion in charges over the next several years. App. 37a–38a. But class counsel got more: They also got the bank to pay tens of millions in cash, reimbursing customers for $37.5 million in past fees and completely forgiving $30.3 million in unpaid charges. App. 24a; Doc. 128 at 8 & n.3. Taken together, the district court found these to be "remarkable" results, achieved "through tenacity and great skill," that was "all the more remarkable" in the face of an "adverse legal landscape" in which every decision was against them, a "highly sophisticated and well represented defendant," and a "substantial risk" that they would not be compensated for years of litigation. App. 35a, 37a–38a.

Ignoring those findings, the petitioner claims, without citation to the record, that the settlement gave away 97% of the class's claims by awarding them only about $1 for each fee they were charged. Although it is unclear how the petitioner arrived at those figures, it is clear that she is wrong. Even counting only the monetary relief, the class received $67.8 million. That is an average of about $10 to each of the approximately seven million class members—a recovery of about 9% of their probable damages. Doc. 104-3 at 7. To be sure, that was a compromise, but one that the district court found was reasonable and in the class's interest given the serious risk that Bank of America's pending interlocutory appeal would imminently end the case. App. 34a (finding that the plaintiffs would face a serious risk of losing on appeal). Moreover, the petitioner ignores the value of the $1.2 billion in future fees that Bank of America will no longer charge. That relief was not included in the attorneys' fees calculation, but, as the district court found, it at least makes it "much easier" to conclude that the fees were fair. App. 38a.

The petitioner also seriously exaggerates the fee award, claiming that class counsel received "perhaps over $10,000 an hour" and a multiplier of more than 18. She arrives at those numbers by subtracting 758 hours from counsel's lodestar that she unilaterally deems excessive—including 300 hours spent on mediation, negotiation, and drafting that she considers "bloated"—to come up with her "real figure" for counsel's lodestar. Pet. 7. Even setting aside those edits to the record, the petitioner is wrong to claim that there is "no dispute" that the awarded fee is "at least a ten-fold multiplier" on class counsel's ordinary rate." At the time of their final fee motion, class counsel's lodestar represented a multiplier of at most 8.8, excluding numerous hours incurred by class counsel in parallel litigation that led to the settlement. Doc. 106 at 4. And, since then, they have spent many more hours on both class administration and litigation, including an entire Ninth Circuit appeal. Although those numbers are not in the record, the multiplier by now is likely close to 6 and continuing to drop.

B. While it is true that the fees in this case exceed counsel's lodestar rate, it does not follow that the fees are a "windfall" for class counsel or unfair to the class. Rather, percentage fees worked in this case the way they were supposed to work, by benefitting both class counsel and members of the class. Because of class counsel's efforts, each class member receives an average of $10 in monetary relief in exchange for an average of $2 in attorneys' fees. If class counsel had not brought this case, on the other hand, the class would have received nothing and would still be paying Bank of America the challenged fees. The class unquestionably benefitted from class counsel's efforts, and the attorneys' fees directly reflect that benefit.

A key reason why the percentage method is "generally favored" in common-fund cases is that "it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure." *In re AT&T Corp.*, 455 F.3d at 164. By linking "the value of an attorneys' fees award to the value of the class recovery," percentage fees help "ensure faithful representation" of the class by "tying together the interests of class members and class counsel." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178–79 (9th Cir. 2013). "A lawyer who stands to receive a share of every additional dollar paid to a client always has some incentive to prefer more to less." Charles Silver, *Due Process and the Lodestar Method: You Can't Get There from Here*, 74 Tul. L. Rev. 1809, 1817 (2000). And percentage fees also provide "a strong foundation for trust" by "giving the lawyer an interest in making the right call." *Id.* at 1817–18.

These incentives explain why, "[w]hen judges look to the market, they will see that the contingent percentage fee is the compensation arrangement of choice for plaintiff representations" and that "[p]laintiffs, including corporations, rarely engage lawyers on other terms." *Id.* at 1817. The vast majority of private fee agreements, including agreements with both sophisticated and unsophisticated consumers of legal services, use the percentage method. Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 Fordham L. Rev. 1151, 1159–63 (2021). And compensation based on the results achieved is also common in a variety of other professions precisely because it aligns incentives better than time-based alternatives. Real-estate agents, for example, earn percentage-based commissions to reward them for furthering their clients' interests by

finding a suitable property as quickly as possible. Paying them an hourly rate instead would discourage efficiency, rewarding them for wasting the time of prospective homebuyers by taking them to a large number of unacceptable homes. Likewise, investment-fund managers are paid more when they make successful investments for the fund. It would make no sense to reward them instead for spending many hours researching investment opportunities that only lose the fund money.

The lodestar method, in contrast, misaligns the interests of class counsel with the interests of the class because fees no longer depend on the class's recovery. SER 6 ¶ 9. Suppose, for example, that plaintiffs' attorneys in a class action have incurred a lodestar of $1 million and intend to seek a 25% fee. If the court adopts a cross-check rule limiting fee awards to four times the lodestar, the attorneys no longer have an economic interest in recovering any more than $16 million for the class. Whether the class recovers $20 million, $50 million, or $100 million makes no economic difference to them because the cross-check, in any case, limits their fees to $4 million.

With a lodestar cross-check, "there is simply no incentive to expend any additional effort, or take any additional risk, to increase the amount of the recovery" beyond that amount. Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 141 (2006). Lodestar cross-checks in that way can effectively "cap[] settlements, often at grossly suboptimal levels." *Id.* at 140. In a misguided effort to protect class members from "windfall" attorneys' fees, application of a cross-check instead provides them less

recovery overall. For that reason, a percentage-based fee with a lodestar cross-check is an economically irrational choice that does not exist in the private legal marketplace. *See* Fitzpatrick, *A Fiduciary Judge's Guide*, 89 Fordham L. Rev. at 1167. "If judges want to do what rational absent class members would want to do, then they should not do this." *Id.*

By tethering the lawyer's interest to the number of hours worked rather than the interests of the class, lodestar cross-checks also create other inefficiencies. For example, the "lodestar creates inherent incentive to prolong the litigation until sufficient hours have been expended." *Manual for Complex Litigation* § 14.121, at 188. In practice, "district courts found that it created a temptation for lawyers to run up the number of hours for which they could be paid" and "created an unanticipated disincentive to early settlements." *Goldberger*, 209 F.3d at 48. As a result, it is now "widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case" rather than to "achieve[] a timely result for class members in need of immediate relief." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 n.5 (9th Cir. 2002).

Understanding these incentives explains why the petitioner is off base in accusing class counsel (at 19) of settling a meritorious case "quickly on the cheap to maximize their recovery at the expense of their clients." With percentage fees, class counsel could not have maximized their recovery at the expense of the class because their interests and the class's interests were tied together. "The more valuable the class recovery, the greater the fees award." *In re HP Inkjet Printer Litig.*, 716 F.3d at 1178–79. And class counsel's incentive to settle "quickly" was also tied to the interests of the class. At the

time of settlement, Bank of America's interlocutory appeal to the Ninth Circuit was pending and, considering the weight of other decisions on the issue, stood a good chance of ending the plaintiffs' claims. A mandatory lodestar cross-check would have given counsel an incentive to continue litigating in the hope of more fees, risking disastrous results. With percentage fees, in contrast, counsel do not "receive a lesser fee for settling a case quickly" allowing them, when it makes sense, to obtain quick relief for the class by taking a settlement early in the case. *Vizcaino*, 290 F.3d at 1050 n.5.

Imposing a rule that requires lodestar cross-checks, in short, would exacerbate the very problems that the petitioner wants to avoid. That is all the more reason for this Court to reject her invitation to create a new rule that lacks any support in the law.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

Deepak Gupta
Counsel of Record
Gregory A. Beck
Linnet Davis-Stermitz
GUPTA WESSLER, PLLC
1900 L St. NW, Suite 312
Washington, DC 20036
(215) 772-1000
deepak@guptawessler.com

July 12, 2021

Counsel for Respondents