No. ___

In the Supreme Court of the United States

CHARLES T. JOHNSON, PETITIONER

v.

JENNA DICKENSON, RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Applying general federal common law, this Court held in *Trustees v. Greenough*, 105 U.S. 527 (1881) that a creditor could recover attorney fees, but not personal expenses, from a trust supervised by a court. More than a century later, in the distinctly modern context of court-approved class-action settlements, parties routinely include a negotiated term providing for moderate incentive payments to named plaintiffs to compensate them for their efforts protecting absent class members' interests. The question presented is:

Are incentive payments in Rule 23 class-action settlements *per se* unlawful under the rule from *Greenough*, as the Eleventh Circuit held, or sometimes permissible subject to judicial oversight, as is the rule in every other circuit that has reviewed incentive payments?

PARTIES TO THE PROCEEDING

Petitioner Charles T. Johnson was a named Plaintiff and the sole class representative in the district court proceedings and was Plaintiff-Appellee in the court of appeals proceedings.

Respondent Jenna Dickenson was the sole objector in the district court and was the Appellant in the court of appeals proceedings.

NPAS Solutions, LLC was the Defendant in the district court proceedings and was Defendant-Appellee in the court of appeals proceedings.

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OPINIONS BELOW

The Eleventh Circuit's order denying en banc review (Pet. App. 1a) is reported at 43 F.4th 1138. The panel opinion (Pet. App. 34a) is published at 975 F.3d 1244. The opinion of the District Court for the Southern District of Florida (Pet. App. 81a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2020. A timely petition for rehearing en banc was denied on August 3, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23(e) governs the approval of class-action settlements. That rule provides, in relevant part:

> (2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e).

INTRODUCTION

Named plaintiffs in class-action lawsuits incur the substantial burdens of litigation for the principal benefit of thousands of similarly situated absent class members. Without these exertions, no class action could be successful. Recognizing the value of these efforts on behalf of classes, negotiated settlements have long included modest incentive payments for class representatives, usually of a few thousand dollars, but potentially more in hard-fought cases. Courts must and do scrutinize these payments under Rule 23(e) to ensure complete fairness to the absent class members. After a fulsome review (and an opportunity for objections), district courts in every circuit have approved these so-called incentive awards. Courts of appeals in every circuit have affirmed settlements containing incentive awards.

In a sharp break from this careful consensus (and its own prior practice), a split panel of the Eleventh Circuit ruled in the opinion below that incentive awards are illegal *per se*, no matter how much time the named plaintiff spent, no matter how much the class benefitted, and no matter how fair the settlement is. Its opinion was based not on the Federal Rules of Civil Procedure, nor on any federal statute, but on a pair of century-old cases applying general federal common law to bar a grasping litigant from paying himself an exorbitant amount exceeding one *million dollars* in today's money. *See Trustees v. Greenough*, 105 U.S. 527 (1882); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *In re Apple Inc. Device*

Performance Litig., __ F.4th __No. 21-15758, 2022 WL 4492078, at *12 (9th Cir. Sept. 28, 2022) (calculating the equivalent payment amount).

This reasoning is erroneous for multiple reasons. To start, *Greenough* is entirely inapposite, since it fashioned general federal common law, a type of law that, since *Erie*, this Court has held *does not exist*. Beyond that, *Greenough* did not involve a settlement, fiduciary duties, or a class action, and the amount of money is orders of magnitude more than what named plaintiffs in consumer class actions receive. Moreover, the standard set forth in Rule 23—which the Rules Committee has modified over time and which Congress has adopted—gives an adequate rule of decision without reaching for distant analogies to a defunct law of trusts.

The reaction to the opinion below within the Eleventh Circuit and beyond has been immediate. Dozens of district courts in the Eleventh Circuit have dutifully applied the rule, leaving named plaintiffs not-even-modest compensation for their efforts. Outside the Eleventh Circuit, every court has continued their longstanding acceptance of incentive awards. Already, the Second and Ninth Circuits have expressly disagreed with the Eleventh Circuit's holding, forming an acknowledged circuit split. *See Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir. 2019) (calling *Pettus* and *Greenough* "inapposite"); *In re Apple Inc. Device Performance Litig.*, 2022 WL 4492078, at *11 n.13 (9th Cir. Sept. 28, 2022) (citing and expressly disagreeing with the opinion below). Nevertheless, after considering the en banc petition for almost two years, the Eleventh Circuit denied en banc review, eliminating any hope that the circuit split will be resolved without this Court's intervention.

Incentive awards are critically important to class-action litigation. The class-action device exists to ensure that defendants face consequences when they unlawfully impose a large aggregate harm in small increments across a wide population. This case is illustrative. Each class member will receive about $80 under the settlement here, an amount small enough that few would be willing to shoulder the burdens of litigation to recover it. *See Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."). Incentive awards are one of the few tools available to spur meritorious small-dollar cases.

If incentive awards are available in every other circuit, large class actions that can avoid the Eleventh Circuit may begin to do so, undermining sound judicial administration. And would-be class actions that cannot escape the Eleventh Circuit may not be brought at all, ensuring that penalties for corporate misbehavior turn on the happenstance of defendants' residence.

This case is an ideal vehicle to resolve the sharp circuit split on this question. After this case, it is unlikely any named plaintiff will bother preserving a request for an incentive award in the Eleventh Circuit on the slim chance that this Court will grant review. Outside the Eleventh Circuit, the issue would arise if an objector wished to file a petition for certiorari, an uncertain prospect at most. The Court should grant the petition.

STATEMENT OF THE CASE

A. Incentive Awards Are Common in Class-Action Practice, and Widely Recognized as Warranted.

Class actions exist to vindicate broadly shared rights of relatively low monetary value. But unlike a legal entity such as a partnership or corporation, a class cannot litigate through its agents alone. It litigates through its champion, the named plaintiff. The named plaintiff supervises class counsel, serves as a fiduciary to the class, submits to depositions, participates in discovery, and bears the fickle travails of publicity. If the defendant retaliates, the named plaintiff is the target. If the case fails, he may need to pay the other side's fees or costs. And if the case succeeds he—well, he gets the same recovery as any other member of the class.

To counterbalance the disproportionate costs borne by named representatives, many class-action settlements include a modest incentive award. Incentive awards have "been present in class action law for close to a half century." William B. Rubenstein, 5 Newberg on Class Actions § 17:2 (6th ed.) [hereinafter, Newberg]. The most recent studies report that "courts provid[e] incentive awards in 71.3% of all cases." *Id.* § 17:7. The amounts range from a few thousand dollars for easier cases to tens of thousands for extraordinary efforts. *Id.* § 17:8.

Courts carefully scrutinize incentive awards and have long held that "a disparate distribution favoring the named plaintiffs requires careful judicial scrutiny into whether the settlement allocation is fair to the absent members of the class." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983). This scrutiny flows from Rule 23(e)(2)'s requirement that a settlement be "fair, reasonable, and adequate."[1] And since the rule requires fairness, not equality, a settlement may be approved with

[1] The language of Rule 23(e) was modified in 2018 to add further guidance, including 23(e)(2)(D)'s requirement that a settlement "treat[] class members equitably relative to each other."

a "showing that the higher allocations to certain parties are rationally based on legitimate considerations." *Holmes*, 706, F.2d at 1148. Before the opinion below, courts in every circuit have viewed incentive awards through the lens of Rule 23(e).

Following that lodestar, courts are sensitive to the concern that incentive "awards can misalign the interests of class representatives and other class members in certain circumstances." *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015). For that reason, courts disfavor conditioning a settlement on approval of an incentive award, agreeing upon an award "at the onset of litigation," or proposing particularly large awards, and generally will not approve settlements with such terms under Rule 23(e). *Id.* at 613-24 (citing cases); *see also* Newberg § 17:14-18 (surveying disfavored practices).

After screening for disfavored practices, courts have coalesced on examining the same general factors in assessing whether an award is equitable, focused on "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *see also Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003) (quoting this test); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (same). This Court has cited these cases and observed that "class representatives might receive a share of class recovery above and beyond her individual claim." *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1811 n.7 (2018) (citing *Cook*, 142 F.3d at 1016). Every circuit followed this general framework before the decision below, except for securities litigation.

That is because Congress specifically addressed incentive awards in two sections of the Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. §§ 78u-4 et seq. First, section 78u-4(a)(2)(A)(vi) requires named plaintiffs to certify that they "will not accept any payment for serving as a representative ... except as ordered or approved by the court in accordance with paragraph (4)." Second, section 78u-4(a)(4) requires that a class representative's share of the recovery must be "equal, on a per share basis" to other members of the class, *but also* that "[n]othing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of the class." In other words, awards are still available in securities cases, but largely limited to reimbursing lost wages, costs, and expenses. *See* Newberg § 17:19.

B. The Litigation Below Settles a TCPA Class Action.

Petitioner Charles Johnson filed a class-action lawsuit against Defendant NPAS Solutions, LLC in March 2017 alleging NPAS repeatedly robocalled thousands of individuals without prior consent, a violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227. NPAS strongly denied liability, asserting various defenses. Mr. Johnson spoke frequently with counsel and responded to written discovery requests from NPAS. After months of vigorous litigation, the parties negotiated a settlement agreement, which gained preliminary approval in December 2017.

The settlement provided for NPAS to contribute $1,432,000 to a fund to be distributed to class members after fees and administrative costs were deducted.

Relevant here, the settlement provided for "an incentive award to Mr. Johnson, not to exceed $6,000 and subject to Court approval." Pet. App. 86a. The settlement was not conditioned on approval of the incentive award, and it had not been predetermined at the outset of litigation.

No class member opted out of the settlement, and just one objected: Respondent here, Jenna Dickenson. As relevant here, Dickenson objected to the incentive award, which she contended is unlawful. The district court considered and rejected each objection. After notice and a hearing, it found the settlement fair, reasonable, and adequate under Rule 23(e). Dickenson appealed.

C. The Eleventh Circuit Applies *Greenough* to Bar Incentive Awards Categorically.

A split panel of the Eleventh Circuit vacated approval of the settlement on various procedural grounds, and reversed approval of the incentive award on purely legal grounds. *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1255 (11th Cir. 2020). Those grounds did not depend on Rule 23(e) or intra-class equity, but only on the court's reading of two nineteenth century common law cases: *Greenough* and *Pettus*.

The *Greenough* case focused on Frances Vose, a bondholder who sued the Florida Railroad Company. The bonds were supposed to be paid by proceeds from selling (or using) several million acres of land, but the trustees were wasting the land and selling it off at firesale prices. *Greenough*, 105 U.S. at 528. Vose prevailed, leading the court to appoint a receiver to oversee management of the land. *Id.* at 529. Vose petitioned the court for attorney fees and costs for the litigation ($34,192.62) and similar litigation in New York ($19,745.68), as well as $34,625 for "personal services" from him, and $15,003.35 for his own travel and lodging. *Id.* at 530. Notably, the amount Vose

sought *for himself* was just shy of the grand total for fees for every professional, plus costs and expenses for multiple lawsuits. This Court ruled that personal services and travel costs could not be recovered, but affirmed the reimbursement of the other costs. *Id.* at 538.

The *Pettus* case held that attorneys could recover directly from a court-administered fund (rather than, as in *Greenough*, requiring the client to pay, then be reimbursed). 113 U.S. at 125. The Court summarized *Greenough* by noting it held that "personal services and private expenses" could not be paid out of a court-administered trust, but that "expenses incurred in carrying on the suit" could be. *Id.* at 122.

Writing for the two-judge majority, Judge Newsom called both of these cases "on-point" Supreme Court precedents for the proposition that incentive awards under class-action settlements are illegal *per se*. *NPAS*, 975 F.3d at 1248. In his view, "the modern-day incentive award for a class representative is roughly analogous to a salary—in *Greenough*'s terms, payment for 'personal services.'" *Id.* at 1257. The majority acknowledged that "such awards are commonplace," but "that doesn't make them lawful, and it doesn't free us to ignore Supreme Court precedent." *Id.* at 1260.

Judge Martin dissented, reasoning that *Greenough* and *Pettus* do not address incentive awards, and prior Eleventh Circuit precedent—to say nothing of precedent in other circuits—already prescribe a test for evaluating disparate settlement allocation. *Id.* at 1264 (Martin, J., dissenting). Mr. Johnson filed a petition for rehearing en banc, which the court denied after two years. 43 F.4th 1138 (11th Cir. 2022).

Judge Jill Pryor dissented from the denial of rehearing en banc for herself and three other judges,

warning that the panel majority "broke with decisions from this and every other circuit." *Id.* at 1139. Not only that, Judge Pryor observed that the panel's reasoning "had never been embraced by any court" and that in the two years since it was published, "every court outside this circuit to have considered it has declined to follow it." *Id.*

The problem in *Greenough*, Judge Pryor explained, was the lack of any "general federal common law authorizing compensation for the type of collateral expenses Vose sought to recover." *Id.* at 1148. But courts applying Rule 23 today have no such obstacle, since the settlement contract authorizes payment, and the only question is whether the Court will veto it under Rule 23(e), which has a robust body of case law. *Id.* at 1148-50. But for the *per se* bar, Mr. Johnson easily merited an incentive award, since "[n]o one disputes" his efforts on behalf of the class, including reviewing "documents before his attorneys filed them and suppl[ying] information in response to NPAS's discovery requests." *Id.* at 1140.

The dissent closed with the consequences: the panel majority will have a "detrimental impact on class actions in this circuit, an impact that will be felt not least by the most vulnerable plaintiffs such as consumers and small businesses." *Id.* at 1152. It "struck a lasting blow to class actions," leaving matters "to the Supreme Court … to undo this problem of our making." *Id.* at 1153.

This petition followed.

REASONS FOR GRANTING THE WRIT

This petition meets this Court's traditional criteria for certiorari. Every other circuit allows incentive awards, and already, two circuits have expressly rejected the Eleventh Circuit's reasoning. The issue is vitally important for small-dollar class actions. The opinion

below is based on multiple errors. And this case is the ideal vehicle by which to consider the issue.

I. The Eleventh Circuit's *Per Se* Bar on Incentive Awards Conflicts with the Rule in Every Other Circuit.

The panel majority's reasoning had never before been accepted by any judge in any court in the United States. *See* 43 F.4th at 1139 (Pryor, J.) ("the majority opinion adopted a position that had never been embraced by any court"). Two years later, that remains true outside the Eleventh Circuit, though multiple courts have now considered and rejected it. The rest of the circuits scrutinized-but-accepted incentive awards before, and still do today.

A. The Opinion Below Expressly Conflicts with Decisions in the Second and Ninth Circuits.

The Court should grant this petition because the decision below conflicts with multiple decisions from the Second and Ninth Circuits, and the conflict will not resolve without this Court's intervention.

1. The Second Circuit held that *Greenough* and *Pettus* do not bar incentive awards. *See Melito, v. Experian Mktg. Sols., Inc.*, 923 F.3d 85 (2d Cir. 2019), *cert. denied sub nom. Bowes v. Melito*, 140 S. Ct. 677 (2019). There, an objector—represented by the same counsel as the objector below—argued that *Greenough* and *Pettus* categorically bar incentive awards. *Id.* at 96. The Second Circuit explained that both cases are "inapposite" because neither "provide factual settings akin to those here." *Id.* Ironically, the Second Circuit cited an Eleventh Circuit case that had similarly rejected the same argument before *NPAS* (which was vacated en banc on jurisdictional grounds). *Id.* (citing *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1196 (11th Cir.), *reh'g en banc*

granted, opinion vacated, 939 F.3d 1278 (11th Cir. 2019), and *on reh'g en banc*, 979 F.3d 917 (11th Cir. 2020)).

The opinion below acknowledged that the Second Circuit in *Melito* "directly confronted whether *Greenough* and *Pettus* prohibit incentive awards" and came to the opposite conclusion. 975 F.3d at 1258, n.8. Rather than proffer any distinction, the panel noted the stark conflict but stated it was "unpersuaded by the Second Circuit's position." *Id.* With the benefit of reading the opinion below, the Second Circuit returned the favor: "[objectors] argu[e] that [incentive] awards are prohibited under a pair of nineteenth-century Supreme Court cases .... We are not persuaded." *Hyland v. Navient Corp.*, 48 F.4th 110, 123 (2d Cir. 2022).

2. The Ninth Circuit carefully evaluated the *Greenough* argument, and unanimously rejected the opinion below. *In re Apple Inc. Device Performance Litig.*, 2022 WL 4492078, at *11-13 (9th Cir. Sept. 28, 2022). The Ninth Circuit explained that it had *already* rejected the argument: "we have previously considered this nineteenth century caselaw in the context of incentive awards and found nothing discordant." *Id.* at *11. Under its longstanding case law interpreting *Greenough*, "private plaintiffs who recover a common fund are entitled to 'an extra reward,' [but] they are limited to 'that which is deemed "reasonable" under the circumstances.'" *Id.* at *12 (quoting *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989)).

That master principle harmonizes *Greenough* and incentive awards in the class-action context. A large bondholder like Vose "needed no inducement to bring suit," much less the equivalent of "$76,000 per year" for ten years plus "$458,000" in railroad and hotel bills. *Id.* Such a reward "would present too great a temptation." *Id.*

(quoting *Greenough*, 105 U.S. at 538). By contrast, judicial scrutiny ensures incentive awards are not "special rewards" or "a salary," since amounts like that would not be approved under the Ninth Circuit standard. *Id.* ("'the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, the amount of time and effort the plaintiff expended in pursuing the litigation,' and any financial or reputational risks the plaintiff faced" (quoting *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1057 (9th Cir. 2019)).

3. The split of authority on this question is entrenched, and unlikely to resolve on its own. The Second and Ninth Circuits will not reverse course. The Second Circuit recently reaffirmed its *Melito* precedent, approving an incentive award. *See Hyland*, 48 F.4th at 123-24. The Ninth Circuit's reasoning is deeply rooted in decades of Ninth Circuit precedents applying *Greenough*, and the *In re Apple* panel opinion was cross-ideological with no dissent. And, of course, the Eleventh Circuit decided not to rehear this case en banc despite a spirited dissent, and likely will not get the opportunity again. Only this Court can resolve the split.

B. The Opinion Below Conflicts with Every Other Circuit as Well.

Beyond the Second and Ninth Circuits, which expressly disagree with the opinion below, the panel opinion conflicts with precedents in *every* circuit except the specialized federal circuit. This fact is not surprising, since, as the panel majority acknowledged, incentive awards have been common for decades. 975 F.3d at 1260 ("it's true that such awards are commonplace in modern class-action litigation"). Since each one is subject to judicial review, their prevalence entails a raft of

precedents allowing them. And, indeed, "there is near-universal recognition that it is appropriate for the court to approve an incentive award payable from the class recovery, usually within the range of $1,000-$20,000, and even more where exceptional, hands-on service is rendered." 2 McLaughlin on Class Actions § 6:28 (18th ed.); *see also* Newberg § 17:7 ("incentive awards are a quite common part of class action practice today").

First Circuit: Multiple district courts have allowed incentive awards in class-action settlements, for decades. *E.g.*, *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 352 (D. Mass. 2015) ($1,500 to $2,500 incentive awards); *In re Celexa & Lexapro Mktg. & Sales Pracs. Litig.*, No. MDL 09-2067-NMG, 2014 WL 4446464, at *9 (D. Mass. Sept. 8, 2014) ($10,000 incentive award); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 292 F. Supp. 2d 184, 189 (D. Me. 2003) ($2,500 incentive awards); *Bussie v. Allamerica Fin. Corp.*, No. CIV.A. 97-40204-NMG, 1999 WL 342042, at *4 (D. Mass. May 19, 1999) (approving $5,000 incentive awards and citing even earlier cases doing the same).

It appears no settlement with an incentive award was appealed to the First Circuit until the *Bezdek* case in 2015, which was affirmed. *Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 82 (1st Cir. 2015) (noting incentive awards).[2]

Third Circuit: Many Third Circuit precedents, from as early as 1974 to within the last few years, have affirmed incentive awards. *E.g.*, *Bryan v. Pittsburgh Plate Glass*

[2] In the context of deciding whether a litigant could retain an interest in a suit based on a hypothesized future incentive award, the First Circuit mused that it "has never ruled on when, if ever, such awards are valid," *Bais Yaakov of Spring Valley v. ACT, Inc.*, 798 F.3d 46, 50 (1st Cir. 2015), but this was months before the *Bezdek* panel affirmed a settlement with incentive awards.

Co. (PPG Indus.), 59 F.R.D. 616, 617 (W.D. Pa. 1973) ("$17,500 to those members of the plaintiff class who were most active in the prosecution of this case"), *aff'd*, 494 F.2d 799 (3d Cir. 1974); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 285 (3d Cir. 2009) ($10,000 incentive awards); *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 179 (3d Cir. 2012) ($10,000 incentive awards); *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 486 (3d Cir. 2017) ($10,000 incentive awards). Even the en banc Third Circuit has endorsed incentive awards. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011) (en banc) ("We also reject the sole objection pertaining to the District Court's decision to grant incentive awards to class representatives.").

Fourth Circuit: The Fourth Circuit conducted a detailed analysis of a $5,000 incentive award in *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015). The court found that no disfavored practice applied: "the incentive awards were not agreed upon ex ante, and they were not conditioned on the Class Representatives' support for the Agreement." *Id.* at 614. And so it affirmed, noting incentive awards are "fairly typical in class action cases." *Id.* at 513.

Fifth Circuit: The Fifth Circuit has repeatedly affirmed settlements with incentive awards. *E.g.*, *Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 296 (5th Cir. 2017) (vacating a class action settlement with an incentive award on other grounds and affirming the same settlement after district court provided further explanation in 742 F. App'x 846 (5th Cir. 2018)); *In re Combustion, Inc.*, 978 F. Supp. 673, 677 (W.D. La. 1997), *aff'd*, 159 F.3d 1356 (5th Cir. 1998); *Smith v. Tower Loan of Mississippi, Inc.*, 216 F.R.D. 338, 347 (S.D. Miss. 2003)

($2,500 incentive award), *aff'd sub nom. Smith v. Crystian*, 91 F. App'x 952 (5th Cir. 2004).

Sixth Circuit: The Sixth Circuit has reviewed incentive awards strictly based on Rule 23(e), sometimes allowing them, *Pelzer v. Vassalle*, 655 F. App'x 352, 360 (6th Cir. 2016); *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 351 (6th Cir. 2009), and sometimes not, *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013). Though not often recognized as an incentive award case, the case of *Thornton v. E. Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974) employed the same logic. There, a company did not honor transfer requests from city drivers (many of whom were minorities) to be higher-paid road drivers (all of whom were white). *Id.* at 419. The district court required the company to allow transfers and gave seniority (and concomitant backpay) to named plaintiffs, "who actively sought an end to the company's no-transfer policy." *Id.* at 420. The Sixth Circuit affirmed, agreeing that "there is something to be said for rewarding those drivers who protest and help to bring rights to a group of employees who have been the victims of discrimination." *Id.*

Seventh Circuit: The Seventh Circuit has analyzed and affirmed incentive awards many times, and its test for granting them is influential. *See, e.g.*, *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722-23 (7th Cir. 2001) ("Incentive awards are justified when necessary to induce individuals to become named representatives."); *Cook v. Niedert*, 142 F.3d at 1016 ($25,000).

Eighth Circuit: The Eighth Circuit has regularly affirmed incentive awards. *E.g.*, *Tussey v. ABB, Inc.*, 850 F.3d 951, 961 (8th Cir. 2017) ($25,000); *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 861 (8th Cir. 2017) ($10,000 and noting that "courts in this circuit regularly grant

service awards of $10,000 or greater"); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) ($2,000); *White v. Nat'l Football League*, 822 F. Supp. 1389, 1423 (D. Minn. 1993), *aff'd* 41 F.3d 402, 408 (8th Cir. 1994), *abrogated on other grounds by Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997).

Tenth Circuit: The Tenth Circuit has often allowed incentive awards. *E.g.*, *Tennille v. W. Union Co.*, 785 F.3d 422, 434-36 (10th Cir. 2015) ($7,500 incentive award for each of four named plaintiffs).

District of Columbia Circuit: The D.C. Circuit affirmed an incentive award of $2 million (though the attorney fee amount was $99 million). *See Cobell v. Salazar*, 679 F.3d 909, 916 (D.C. Cir. 2012); *Cobell v. Jewell*, 802 F.3d 12, 19, 24 (D.C. Cir. 2015). The *Cobell* case is particularly illuminating because it applied the Claims Resolution Act of 2010, Pub. L. No. 111–291, § 101(g)(1)(A), which expressly authorized "incentive awards and award of attorneys' fees … in accordance with controlling law …."

In short, the consensus allowing incentive awards extends across every circuit. In most circuits, multiple published decisions have endorsed incentive awards, and in every circuit far more district courts have done so. This Court has also acknowledged incentive awards, implying that they are acceptable under Rule 23. *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1811 n.7 (2018) (noting that "class representatives might receive a share of class recovery above and beyond her individual claim" and citing the $25,000 incentive award from *Cook*, 142 F.3d at 1016).

There is no reason to think that consensus will shift. Indeed, more than ten courts outside the Eleventh Circuit have now decided whether to allow incentive awards, and

not one has followed the Eleventh Circuit. *See NPAS*, 43 F.4th at 1139 n.2 (Pryor, J.).

II. Incentive Awards Are Exceptionally Important.

The question presented matters because the lower court's erroneous ruling will predictably reduce the number of meritorious class actions likely to be filed across a swathe of areas.

1. Class actions are the chief mechanism to vindicate small-dollar claims. The very purpose of class actions is "to pool claims which would be uneconomical to litigate individually." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). For claims like those here worth less than "$100 per plaintiff … most of the plaintiffs would have no realistic day in court if a class action were not available." *Id.* The class action is for many purposes "the most effective way to hold corporations accountable," presenting an alternative to centralized government regulators. Brian T. Fitzpatrick, *The Conservative Case for Class Actions* 3, 22-28 (2019).

But to have a class action, there must be "at least one plaintiff [] willing to take on the role of class representative." Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1305-06 (2006). Few representatives will arise if they will "experience a net loss from acting as class champion because the small recoveries normally gained from the case are not enough to cover the increased costs of serving as the named plaintiff." *Id.* Unlike bondholders like Francis Vose or major pension plans with millions of dollars at stake in securities litigation, most class representatives in TCPA cases can make at most a few thousand dollars (before attorney fees) for even the strongest of claims.

2. Providing a modest inducement for named plaintiffs to bring meritorious claims is the *sine qua non* of incentive awards. As Judge Easterbrook explained, "[i]ncentive awards are justified when necessary to induce individuals to become named representatives." *In re Synthroid Mktg. Litig.*, 264 F.3d at 722. They are consequently a key tool to maintaining vigor in class-action litigation, which is why they are awarded in 71.3% of all cases and 93% of consumer cases. Newberg § 17:7.

3. The opinion below erects an unscalable barrier between this key tool and the tens of millions of citizens in Alabama, Florida, and Georgia. Already, scores of cases in the Eleventh Circuit have stricken incentive awards out of class-action settlements. *See NPAS*, 43 F.4th at 1151 n.19 (Pryor, J.) (citing cases). Westlaw shows that nine Eleventh Circuit cases and sixty-three district courts in the Eleventh Circuit have cited the panel opinion. But the true effects will emerge prospectively, once *ex ante* incentives slowly affect that which is not seen. Small injustices will accumulate insistently, one auto warranty or debt collection call at a time.

III. The Panel Opinion Is Wrong.

The panel opinion turns on a "rough analogy" between Vose's expenses and an incentive award, but the analogy cannot bear the weight placed upon it for multiple independent reasons.

A. The Facts of *Greenough* Bear a "Rough Analogy" only to Excessive Incentive Awards, not to All Incentive Awards.

The salary and expenses Vose sought could never be awarded consistent with Rule 23(e).

Three facts stand out. First, Vose sought $49,628.35, which exceeds one million dollars today. Second, that

amount came close to what he requested ($53,938.30) for *all* fees, costs, and expenses for the litigation, "other suits in New York," appeals, "resisting fraudulent coupons," and "investigating fraudulent grants of the trust lands." *Greenough*, 105 U.S. at 530.[3] Third, the work and travel the special master evaluated covered every act that helped the trust, even if not related to the litigation:

> By the instrumentality of the suits already mentioned as having been instituted by him, by the agencies he employed and sustained, and by his own vigiliance [sic] and personal efforts he has saved from spoliation and subjected to the decrees of this court a vast domain of over ten millions of acres of land….

Id. In that light, the Court's concern about the "temptation to parties to intermeddle in the *management* of valuable property or funds in which they have only the interest of creditors" is more salient. *Id.* at 538 (emphasis added).

None of these facts are true for named plaintiffs in Rule 23 class actions. The amounts are far lower. *See* Newberg § 17:8. Mr. Johnson is seeking $6,000, less than half-of-one percent of the overall settlement amount ($1.432 million) and worlds away from a salary for the duration of this suit (plus interest). An incentive award approaching the amount spent on fees, administration costs, and other expenses would be deemed absurdly extravagant. And, of course, an incentive award targets only the *litigation*, not, for example, the extraneous management of the fund that Vose was undertaking. If a company sold property to cover a judgment, no court

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[3] Notably, the lower court "disallow[ed]" an unspecified amount of the $53,938.30 because it went to "advisory counsel and other items not directly connected with the suit." *Id.* at 531.

would allow a named plaintiff to serve as the real estate broker (much less base his incentive award on that work).

The standards that have developed in the lower courts to police incentive awards would properly deny a request like Vose's while granting one like Mr. Johnson's. Under Rule 23(e)(2), to be fair, reasonable, and adequate and treat "class members equitably relative to each other," settlements are limited to incentive awards that are appropriate to reward the efforts linked to the lawsuit, and no further.

B. Contract Law and Rule 23 Provide Authority to Approve Negotiated Incentive Awards.

Because *Greenough* involved the administration of a preexisting trust under general federal common law, the key question was the authority of the court under that source of law to enter the relief that Vose sought. There was no affirmative authority to take from the trust, which ended the case. No analogous constraints apply to class-action settlements, which are creatures of *contractual consent*.

Because settlements are based on consent, the key question is not the power to *pay from a trust*, but the limits on *collusive settlements*. NPAS agreed to a settlement in which it would pay a certain amount of money to Mr. Johnson, a certain amount of money to attorneys, administrators, and every member of the class that filed a claim. The *court* does not need legal authority to take the money and give it to Mr. Johnson. Instead, the court is relevant only because NPAS and Mr. Johnson need the court's approval to consummate the settlement. The court's approval, however, matters not because it authorizes payment, but because, under Rule 23, an approved settlement binds the class.

This framing makes clear why *Greenough* is inapposite. If the settlement agreement did not provide for an incentive award, such an award may require independent legal authority. *See, e.g.*, *In re S. Ohio Corr. Facility*, 24 F. App'x 520, 529 (6th Cir. 2001) (rejecting incentive award not "authorized by the parties' contract"). But the agreements generally do so provide. Unlike in *Greenough*, where the background law of trusts limited the court's power (which limited what Vose could get), here the settlement (and the law of contract) fully authorizes the allocation.

Since allocating $6,000 to Mr. Johnson is authorized by the settlement contract, the only question is whether the Court has a source of law that *requires* it to overrule that authorization (when only one person out of thousands objected to it, and none opted out). *Greenough* has nothing at all to say about that modern question, and the panel opinion pointed to no other source of law impelling it to negate the parties' contractual agreement. Normally, a court would lack any authority to disturb a privately negotiated settlement contract. But Congress adopted Rule 23(e) expressly to ensure that a settlement allocation is fair, reasonable, and adequate, and treats class members equitably relative to each other. The only relevant source of federal law requires incentive awards to be scrutinized, not categorically barred.

C. If Trust Law Applies, It Must Be Class-Action Trust Law, Which Treats Class Representatives as Fiduciaries.

Because modern class action representatives owe fiduciary duties to the class, paying some degree of compensation to them would be fully compatible with declining to compensate Vose.

Vose was not eligible for compensation because he was a creditor, not a trustee. *Greenough* explained that a trustee could be paid to "induce persons of reliable character and business capacity to accept the office of trustee." 105 U.S. at 537-38. But "considerations" of inducement "have no application to the case of a *creditor seeking his rights*." *Id.* (emphasis added). That is because, unlike a trustee, a creditor owes no duties to the other creditors, and acts solely for his own benefit. If the Defendant had wished to settle with Vose, it could have, at whatever amount he would accept. He could have stopped pursuing the suit for good reason, bad reason, or no reason.

Modern class-action precedent has made clear that class representatives owe fiduciary duties to the class, unlike standard creditors. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549-50 (1949). This legal duty imposes real limits on class representatives that did not apply to Vose. They must supervise class counsel. *Eubank v. Pella Corp.*, 753 F.3d 718, 719 (7th Cir. 2014) (Posner, J.) ("The named plaintiffs are the representatives of the class—fiduciaries of its members—and therefore charged with monitoring the lawyers who prosecute the case on behalf of the class (class counsel)."). Even after collecting their own money, class representatives can litigate remaining issues, such as "the manner in which the remainder of the NationsBank settlement fund is distributed" because, as a fiduciary, they are "not only entitled to represent the interests of the class, but ha[ve] a duty to do so." *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1063 n.1 (8th Cir. 2015). They have disclosure duties as well. *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 715 (7th Cir. 2015) (As "fiduciaries for the class" plaintiffs "should have known to

disclose their relationship and the potential conflict it posed.").

Most significantly, class representatives cannot *end litigation* whenever they wish, on whatever terms they choose:

> The parties, who are settling their individual claims, are not merely members of a putative class; they are the representative parties, without whose presence as plaintiffs the case could not proceed as a class action. Had the appellees been other than the representative parties, there would be no objection to a voluntary settlement of their claim. But, by asserting a representative role on behalf of the alleged class, these appellees voluntarily accepted a fiduciary obligation towards the members of the putative class they thus have undertaken to represent. They may not abandon the fiduciary role they assumed at will or by agreement with the appellant . . . .

Shelton v. Pargo, Inc., 582 F.2d 1298, 1305 (4th Cir. 1978) (citations omitted).

There is equitable logic to saying that Vose—who could have stepped away or settled whenever he wished, and who owed no duties to the other bondholders—cannot demand to be paid exorbitant sums for travel and personal efforts no one asked of him. That logic does not apply to class representatives with a fiduciary duty not to end the lawsuit or settle at their pleasure, and who even have a duty to pursue the class's interest after recovering themselves.

IV. This Case Is an Ideal Vehicle to Decide the Question Presented.

The question presented was preserved, briefed, and argued below, and likely will not be again in the Eleventh

Circuit. Few class counsel will suggest adding a futile term that can only irritate the court; few named plaintiffs will think to preserve the issue in district court on the dream of appealing to the Eleventh Circuit and then this Court.

This case is also fairly typical of incentive awards. Mr. Johnson assisted (as the record supports), but did not suffer extraordinary risks beyond what most named plaintiffs endure. The amount of the award is modest, both in absolute terms and as a percentage of the total recovery. There are no jurisdictional issues such as standing, and no complications in the relief such as *cy pres*. The class will receive real money.

This Court should resolve the clearcut circuit split on the legality of this common practice, and nothing in this case would prevent the Court from reaching that issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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