No. 22-389

In the Supreme Court of the United States

CHARLES T. JOHNSON, PETITIONER

vs.

JENNA DICKENSON, RESPONDENT

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

BRIEF FOR RESPONDENT JENNA DICKENSON IN SUPPORT OF GRANTING WRIT OF CERTIORARI

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QUESTION PRESENTED

"Since the decisions in *Trustees v. Greenough,* 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885), this Court has recognized consistently that a litigant or a 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." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980).

Those decisions hold, however, that as a matter of equity any payment compensating representative plaintiffs for their own "personal services" in litigating a case on behalf of a class is both "decidedly objectionable" and "illegally made." *Greenough,* 105 U.S. at 537-38. A named plaintiff's "claim to be compensated, out of the fund ... for his personal services" was "rejected as unsupported by reason or authority." *Pettus,* 113 U.S. at 122.

Having honored these holdings for a century, lower courts began in the late 1980s to ignore them, approving "incentive awards" or "service awards" compensating representative plaintiffs for personal service on behalf of Rule 23 settlement classes. Such awards have lately become commonplace. Bucking that trend, the Eleventh Circuit soundly held in this case that "Supreme Court precedent prohibits incentive awards." Pet.App.51a. Yet the First, Second, and Ninth Circuits all have rejected that conclusion.

The question presented is:

Does Rule 23 somehow abrogate the holdings of *Greenough* and *Pettus* that payments in common-fund class actions to compensate representative plaintiffs for their personal services are inequitable, "illegal," and "decidedly objectionable"?

PARTIES TO THE PROCEEDING

Petitioner Charles T. Johnson was the named Plaintiff and sole class representative in the District Court proceedings, and was Plaintiff-Appellee before the Court of Appeals.

Respondent NPAS Solutions, LLC ("NPAS") was the Defendant in the District Court proceedings and was Defendant-Appellee before the Court of Appeals.

Respondent Jenna Dickenson is a class member who timely appeared through counsel and objected in the District Court to the proposed class-action settlement, attorney's fees, and incentive award for the named plaintiff. She was the Interested-Party Appellant before the Court of Appeals, and filed her own petition for certiorari on December 1, 2022. *Jenna Dickenson, Petitioner v. Charles T. Johnson, et al.,* No. 22-517.

LIST OF PROCEEDINGS

Charles T. Johnson v. NPAS Solutions, LLC, United States District Court for the Southern District of Florida, No. 9:17-cv-80393;

Charles T. Johnson v. NPAS Solutions, LLC, Eleventh Circuit No. 18-12344;

Charles T. Johnson, Petitioner v. Jenna Dickenson, Respondent, U.S. No. 22-389, petition for certiorari filed October 21, 2022;

Jenna Dickenson, Applicant v. Charles T. Johnson, et al., No. 22A343, application for extension of time to petition for certiorari, filed October 21, 2022 (extension granted to December 1, 2022);

Jenna Dickenson, Petitioner v. Charles T. Johnson, et al., No. 22-517, petition for certiorari filed December 1, 2022.

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The Court of Appeals' order denying rehearing, along with a concurring opinion of Judge Newsom, and dissenting opinion of Judge Jill Pryor joined by Judges Wilson, Jordan, and Rosenbaum, is published as *Johnson v. NPAS Solutions,* 43 F.4th 1138 (11th Cir.2022), and is reprinted at Pet.App.1a-33a.

The underlying decision of the District Court is unreported. It is reprinted at Pet.App.81a-89a.

JURISDICTION

The decision and judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 17, 2020. Pet.App.34a-80a.

The Court Appeals granted motions to extend the time for filing petitions for rehearing and for rehearing en banc, and timely rehearing petitions were filed on October 22, 2020. Nearly two years later, the Court of Appeals issued a published Order denying rehearing on August 3, 2022. Pet.App.1a-33a. The Court of Appeals' mandate issued on October 25, 2022.

Johnson timely filed his certiorari petition on October 21, 2022.

This Court has jurisdiction under 28 U.S.C. §1254(1) to review, by writ of certiorari, the decision of the Court of Appeals.

INTRODUCTION

"Since the decisions in *Trustees v. Greenough,* 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885), this Court has

recognized consistently that a litigant or a 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." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980); *accord, e.g., US Airways, Inc. v. McCutchen,* 569 U.S. 88, 104 (2013); *Alyeska Pipeline Serv. Co. v. Wilderness Society,* 421 U.S. 240, 257-58 (1975). *Greenough* held that "allowances of this kind, if made with moderation and a jealous regard to the rights of those who are interested in the fund, are not only admissible, but agreeable to the principles of equity and justice." *Greenough,* 105 U.S. at 536-37.

But *Greenough* and *Pettus* also specifically prohibited any payment compensating representative plaintiffs for their own "personal services" in litigating a case on behalf of a class, holding that any such payment is "decidedly objectionable" and "illegally made." *Greenough,* 105 U.S. at 537-38. A named plaintiff's "claim to be compensated, out of the fund ... for his personal services" was "rejected as unsupported by reason or authority." *Pettus,* 113 U.S. at 122. As Harvard Professor John P. Dawson observed:

> The Court in *Greenough* ... drew a sharp distinction .... While [Francis] Vose, the active litigant, was held to be entitled to a "charge" for the reasonable value of his lawyers' services, which the lower court would fix with a wide discretion, it had no discretion to award an allowance to Vose himself for his own time and expenses.

John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds,* 87 Harv.L.Rev. 1597, 1602 (1974).

For a century, lower Courts honored that holding. Writing in 1974, Professor Dawson could find "no case that uses the *Greenough* doctrine to reimburse the litigants themselves for their own time, travel, or personal expenses, however necessary their efforts may have been to litigation that conferred gains on others." *Id.* But that changed when district courts and circuit courts began in the late 1980s to ignore *Greenough*'s explicit prohibition, and to approve of payments from common-fund recoveries designed to compensate representative plaintiffs for their personal service as class representatives settling Rule 23 class actions. Such awards to settling plaintiffs in Rule 23 class actions are now commonplace.

But the Eleventh Circuit bucked the overwhelming trend in this case, by soundly holding in that "Supreme Court precedent prohibits incentive awards." Pet.App.51a, 975 F.3d at 1255; *accord, e.g., In re Equifax Inc. Customer Data Security Breach Litig.,* 999 F.3d 1247, 1257 (11th Cir.2021)("such awards are prohibited"); *Medical & Chiropractic Clinic, Inc. v. Oppenheim,* 981 F.3d 983, 994 n.4 (11th Cir.2020) ("service awards are foreclosed by Supreme Court precedent").

Since then, however, three circuits have issued published opinions holding the exact opposite. Explaining that "*Greenough* was decided decades before the adoption of Rule 23," the Second Circuit refused to apply its holding to incentive awards in litigation subject to Rule 23. *Hyland v. Navient Corp.,* 48 F.4th 110, 124 (2d Cir.2022). The Second Circuit cited no provision in Rule 23 that might authorize such a departure.

The Ninth Circuit then held that notwithstanding *Greenough*'s explicit rejection of payments from a

common-fund recovery to compensate representative plaintiffs for personal services on behalf of a class, such payments are now permitted "[s]o long as they are reasonable." *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 787 (9th Cir. 2022). The Ninth Circuit asserted that "we have previously considered this nineteenth century caselaw in the context of incentive awards and found nothing discordant." *Id.* at 785. It failed to specify which of its prior decisions had in fact analyzed incentive awards in light of *Greenough*.

Most recently, the First Circuit acknowledged that "[t]he Supreme Court did hold, well before the advent of Rule 23, that a court cannot allow a 'creditor, suing on behalf of himself and other creditors' to recover 'personal services and private expenses' out of a common fund." *Murray v. Grocery Delivery E-Services USA Inc.,* __F.4th__, 2022 WL 17729630, at *9 (1st Cir. Dec. 16, 2022). The First Circuit nonetheless concluded that *Greenough* no longer controls, because lower courts approving Rule 23 class-action settlements "have blessed incentive payments for named plaintiffs in class actions for nearly a half century." *Id.*

Those three opinions present a clear precedential conflict with the Eleventh Circuit's determination that this Court's decisions in *Greenough* and *Pettus,* which prohibited awards in common-fund cases to compensate the representative plaintiffs for personal service as litigants, continue to bind lower courts.

This issue is an extraordinarily important one, given the deleterious effects that incentive awards can have. They are presented by their proponents as encouraging plaintiffs to file claims that as litigants they really do not much care about, and that they would not pursue without the incentive of extra compensation for themselves at the expense of the class. Even worse,

incentive awards create a conflict of interest by giving representative plaintiffs an incentive to abandon the class's interest for their own—as in this case, in which Johnson's lawyers arranged for him to receive a $6,000 incentive award under a settlement that recovered less than $8 apiece for other class members but provided for the lawyers to receive hundreds of thousands of dollars in attorney's fees.

This case squarely presents an extraordinarily important conflict among the circuits that can only be resolved by this Court's review. The Eleventh Circuit reached the proper conclusion with respect to incentive awards. This Court should grant certiorari to affirm its decision, and to bring other courts back into line with this Court's foundational common-fund precedents.

STATEMENT OF THE CASE

This case was filed as a class action asserting claims under the Telephone Consumer Protection Act ("TCPA"). Pet.App.104a (Complaint); Pet.App.90a (Amended Complaint). The District Court's jurisdiction over a case asserting claims under the TCPA was conferred by 28 U.S.C. §1331. *See Mims v. Arrow Financial Services, LLC,* 565 U.S. 368, 371-72 (2012).

The TCPA prohibits unconsented phone calls placed to cell phones using an automatic telephone dialing system ("ATDS") or using an artificial or prerecorded voice. Section 227(b)(1)(A)(iii) makes it unlawful "to make any call" to a cell phone "(other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice." 47 U.S.C. §227(b)(1)(A)(iii).

The statute provides a private right of action and imposes liability of $500 per violative call—trebled to

$1,500 per call for willful (i.e., knowing or reckless) violators. *See* 47 U.S.C. §227(b)(3)(B) ($500 statutory damages for each violation); 47 U.S.C. §227(b)(3)(C) (permitting trebling, to $1,500 each for "willful" violations). Johnson's Amended Complaint asked for "statutory damages pursuant to 47 U.S.C. §227(b)(3) in an amount up to $1,500 per violation." Pet.App.101a ¶55(c).

Johnson alleged that Defendant NPAS Solutions, LLC ("NPAS") violated the TCPA both by using an ATDS to place calls to cell phones, and also by using an artificial or prerecorded voice in those calls. Pet.App.94a-95a ¶¶23-25. He alleged that NPAS called his own cellular phone number "on, among other dates, February 27, 2017, March 3, 2017, March 7, 2017, and March 13, 2017," and that NPAS's "records show additional calls made by it to Plaintiff's cellular telephone number with an [ATDS] or an artificial or prerecorded voice, starting in January 2017." Pet.App.93a ¶¶14-15 & n.6. The calls continued even after Johnson asked NPAS to stop. Pet.App.94a ¶¶19-20.

Johnson sought to represent a class of persons who received similar calls on their cell phones, and NPAS itself conceded that 179,642 unique cellular telephone numbers fell within the certified class definition. Pet.App.37a n.1, 40a, 84a. Assuming that 179,642 class members received but one violative phone call apiece, TCPA statutory damages at $500 to $1,500 per call ranged from a low of $89,821,000 for negligent violations to $269,463,000 if the violations were willful—which is to say, reckless. As many class members doubtless received multiple violative calls, just as Johnson did, the class's statutory damages might exceed a billion dollars.

Named Plaintiff Charles T. Johnson nonetheless agreed to settle and bar fellow class members' claims for just $1.432 million—which is less than two percent of the lowest statutory damages figure that would have been awarded had NPAS's violations been proved to be merely negligent, and that each class member had received but one violative call. Assuming a class of 179,642, which NPAS conceded, the $1.432 million settlement comes to just $7.97 apiece. Johnson agreed to the settlement, however, expecting to receive a bonus "service award" or "incentive award" of $6,000 to himself for acting as a class representative compromising other class members' claims for less than $8 apiece. *See* Pet.App.86a.

The only documentation submitted to support Johnson's $6,000 incentive award was class counsel's declaration averring that:

> 74. Mr. Johnson has been a model class representative.
>
> 75. Mr. Johnson has been actively involved in this case throughout the proceedings, including regularly conferring with his counsel and responding to NPAS Solutions' written discovery requests.
>
> 76. Without Mr. Johnson's efforts and dedication to this case, the class settlement would not have been possible.
>
> 77. Given this, and considering the time and effort Mr. Johnson devoted to this case, I firmly believe the incentive award requested in the amount of $6,000 is fair and reasonable.

Declaration of Michael L. Greenwald in Support of Motion for Attorney's Fees, Costs, Expenses, and an Incentive Award, DE44-1 at 13, ¶¶74-77.

No effort was made to quantify how much time Johnson actually expended on the case. It appears that Johnson never even sat for a deposition. In fact, class counsel's declaration's description of the attorney's work on the case references no depositions of any kind taken in the case, which settled after minimal discovery, with minimal work by class counsel, and little effort from Johnson as named plaintiff. *See generally* Declaration of Michael L. Greenwald in Support of Motion for Attorney's Fees, Costs, Expenses, and an Incentive Award, DE44-1 at 8-13, ¶¶42-77.

Presenting nothing to indicate how many hours they had worked on the case, what their hourly billing rates were, or what the reasonable value of their services might be, Johnson's attorneys requested 30% of the $1.432 million fund as attorney's fees. The District Court complied, awarding "Plaintiff's attorneys' fees in the amount of 30 percent of the Settlement Fund," and directing that the representative plaintiff "Charles T. Johnson will receive $6,000 as acknowledgement of his role in prosecuting this case on behalf of the Class Members." Pet.App.86a (Final Order).

Class member Jenna Dickenson, who had appeared through counsel and objected before the District Court, appealed to the Eleventh Circuit, which held that "service award" or "incentive award" payments to representative plaintiffs are illegal under this Court's foundational common-fund decisions, *Trustees v. Greenough,* 105 U.S. 527, 537-38 (1882), and *Central RR & Banking Co. v. Pettus,* 113 U.S. 116, 122 (1885). *See* Pet.App.35a, 51a-62a, 69a.

The Court of Appeals also held that the District Court's rulings approving the settlement and attorney's fee award provided insufficient explanations

to permit meaningful appellate review. Pet.App.63a-69a. But it rejected

> Dickenson's argument that the district court's fee award is unlawful because the Supreme Court's decision in *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542 (2010), overruled *Camden I Condominium Ass'n v. Dunkle,* 946 F.2d 768 (11th Cir.1991), which instructs courts to calculate a common-fund award as a percentage of the fund using a 12-factor test.

Pet.App.65a n.14. The Court of Appeals held that "*Camden I,* therefore remains good law, and the district court should apply it in the first instance on remand." *Id.*

The Eleventh Circuit accordingly remanded to the District Court to apply *Camden I,* which requires district courts to calculate common-fund attorney's fees as a percentage of the fund rather than based on the reasonable value of the services rendered, and which mandates that the percentage be determined using the twelve "*Johnson* factors" from *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir.1974).[1]

Both Johnson and Dickenson filed petitions for rehearing, with Johnson seeking en banc rehearing on whether incentive awards are inconsistent with this Court's decisions in *Greenough* and *Pettus,* and Dickenson seeking en banc rehearing on whether the Eleventh Circuit's *Camden I* decision, mandating

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[1] *See Camden I,* 946 F.2d at 775; *see also, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig.,* 999 F.3d 1247, 1278 (11th Cir.2021)("The percentage method requires a district court to consider a number of relevant factors called the *Johnson* factors in order to determine if the requested percentage is reasonable.").

percent-of-fund attorney's fees based on the *Johnson*-factor analysis violates this Court's precedents—including *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 551-52 (2010), which rejected the *Johnson* factors as too subjective to cabin trial courts' discretion or even "to permit meaningful judicial review." *Id.*

The Eleventh Circuit denied rehearing on September 17, 2022, over the dissent of Judge Jill Pryor, joined by Judges Wilson, Jordon, and Rosenbaum, who urged en banc rehearing on the incentive-awards issue. Pet.App.1a-33a.

On October 21, 2022, Johnson filed a petition for a writ of certiorari, correctly noting that both the Second Circuit and the Ninth Circuit have rejected the Eleventh Circuit's conclusion that this Court's decisions in *Greenough* and *Pettus* preclude incentive awards compensating named plaintiffs for personal service as representative plaintiffs. *See Johnson v. Dickenson,* No. 22-389, Pet.11-13; *compare* Pet.App. 51a, 975 F.3d at 1255 ("Supreme Court precedent prohibits incentive awards") *with Hyland v. Navient Corp.,* 48 F.4th 110, 123-24 (2d Cir.2022)(rejecting that position), *and In re Apple Inc. Device Performance Litig.,* 50 F.4th 769, 785-87 (9th Cir.2022)(same). After Johnson had filed his petition, the First Circuit issued a published opinion joining the Second and Ninth Circuits, and specifically rejecting the Eleventh Circuit's opinion in this case. *Murray v. Grocery Delivery E-Services USA Inc.,* __F.4th__, 2022 WL 17729630, at *9-*10 (1st Cir. Dec. 16, 2022).

On October 26, 2022, Justice Thomas granted Dickenson an extension of time to December 1, 2022, in which to file her petition for a writ of certiorari. *Jenna Dickenson, Applicant v. Charles T. Johnson, et al.*, No. 22A343 (Oct. 26, 2022). Dickenson filed her

petition, seeking review of the Eleventh Circuit's holding on common-fund attorney's fees, on December 1, 2022. *See Dickenson v. Johnson,* No. 22-517.

ARGUMENT

Johnson is unquestionably correct that the Eleventh Circuit's opinion in this case conflicts irreconcilably with decisions of several other circuits. For the First, Second, and Ninth Circuits all have expressly rejected the conclusion that this Court's decisions in *Greenough* and *Pettus* continue to limit district courts' awards to representative plaintiffs in common-fund cases. *See Murray v. Grocery Delivery E-Services USA Inc.,* No. 21-1931, 2022 WL 17729630, at *9 (1st Cir. Dec. 16, 2022); *Hyland v. Navient Corp.,* 48 F.4th 110, 124 (2d Cir.2022); *In re Apple Inc. Device Performance Litig.,* 50 F.4th 769, 787 (9th Cir. 2022).

Johnson also is correct that the question is an extraordinarily important one—and it is all the more so for reasons that Johnson's Petition omits.

First and foremost, Johnson's Petition overlooks the importance of lower courts honoring this Court's precedents, as the Eleventh Circuit did in this case, and as the First, Second, and Ninth Circuits have failed to do—instead discounting *Greenough* and *Pettus* as "nineteenth century" decisions of no relevance to "our twenty-first century precedent allowing such awards." *Apple Device Performance*, 50 F.4th at 785. Certiorari is particularly appropriate where, as here, several courts of appeal (and numerous district courts) have "decided an important federal question in a way that conflicts with relevant decisions of this Court."[2]

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[2] Supreme Court Rule 10(c) (certiorari appropriate where lower courts have "decided an important federal question in a way that

Rather than acknowledging their clear conflict with this Court's precedents, Johnson insists that the First, Second, and Ninth Circuit decisions have justifiably ignored this Court's foundational common-fund precedents.

Johnson even asserts that the common-fund holding of "*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*." Pet. at 3. That is a strange contention, given this Court's many decisions recognizing *Greenough*'s continuing validity as a foundational common-fund precedent. *See, e.g., US Airways, Inc. v. McCutchen,* 569 U.S. 88, 104 (2013); *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980); *Alyeska Pipeline Serv. Co. v. Wilderness Society,* 421 U.S. 240, 257-58 (1975); *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 168-69 (1939). *Greenough* clearly established law that continues to exist, and to bind all federal courts.

Until quite recently, the circuit courts themselves uniformly recognized *Greenough* and *Pettus* as binding precedents defining the common-fund doctrine under which the district court applied to award attorney's fees in this very case.[3] The First Circuit acknowledged:

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conflicts with relevant decisions of this Court"); *see, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 509 (1991)(certiorari granted "to resolve an apparent conflict with this Court's precedents").

[3] *See, e.g., Brundle on behalf of Constellis Emp. Stock Ownership Plan v. Wilmington Tr., N.A.,* 919 F.3d 763, 785-86 (4th Cir.2019); *Goldberger v. Integrated Resources*, 209 F.3d 43, 47 (2d Cir.2000); *Brytus v. Spang & Co.,* 203 F.3d 238, 242 (3d Cir.2000); *Lindy Bros. Builders of Philadelphia v. American Radiator & Standard Sanitary Corp.,* 540 F.2d 102, 110 (3d Cir. 1976); *Lindy Bros.*

"Later Supreme Court opinions have cemented *Greenough's* place in our jurisprudence." *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.,* 982 F.2d 603, 609 (1st Cir.1992)(citing, *e.g., Boeing* and *Sprague v. Ticonic Bank*). But with the First, Second, and Ninth Circuit's more recent decisions on incentive awards, *Greenough* and *Pettus* have been displaced as binding precedent. The circuit courts' disregard of this Court's longstanding precedents is a compelling reason for this Court to grant review and restore order.

The need for this Court to do so is in no wise diminished by the fact that *Greenough* and *Pettus* were decided decades before Rule 23 was promulgated to govern class actions in 1938, and long before its 1966 2018 amendments. That *Greenough* was decided "well before the advent of Rule 23," *Murray*, __F.4th__, 2022 WL 17729630, at *9, is entirely beside the point. For Rule 23 says nothing at all to authorize incentive payments to representative plaintiffs. It says nothing to overturn this Court's decisions in *Greenough* and *Pettus*—both of which were themselves class actions.

Rule 23 was amended in 2018, moreover, to require district courts evaluating the settlement of Rule 23 class actions to determine whether "the proposal treats class members equitably relative to each other." Fed.R.Civ.P. 23(e)(2)(D). This necessarily incorporates the holdings of *Greenough* and *Pettus* that service payments to representative plaintiffs are inequitable, and thus unlawful.

Although Johnson denies it, (Pet.3), both *Greenough* and *Pettus* were themselves common-fund class

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Builders of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 165-66 (3d Cir.1973).

actions. The representative plaintiff in *Greenough,* Francis Vose, prosecuted the case as a class action "on behalf of himself and the other bondholders." *Greenough,* 105 U.S. at 528. The action "was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal interest in the fund." *Id.* at 532. He was "suing on behalf of himself and other creditors," in what amounted to a securities class action. *Id.* at 537.

Pettus also was a common-fund class action.[4] The opinion opens: "In *Trustees v. Greenough*, 105 U.S. 527, we had occasion to consider the general question as to what costs, expenses, and allowances could be properly charged upon a trust fund brought under the control of court by suits instituted by one or more persons *suing in behalf of themselves and of all others having a like interest* touching the subject-matter of the litigation." *Pettus,* 113 U.S. at 122 (emphasis added). The rule these cases establish is one of equity that explicitly prohibits service awards in common-fund class actions. *Pettus*, 113 U.S. at 122; *Greenough,* 105 U.S. at 537-38.

Lower court decisions too have long recognized that *Greenough* and *Pettus* were class-action suits: "In *Pettus*, the Court upheld the award of fees directly to attorneys who had conducted *a class action* resulting in the establishment of a fund from which numerous creditors of the defendant railroad could be paid."[5]

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[4] *See Pettus,* 113 U.S. at 119-20, 127; Dawson, *Lawyers and Involuntary Clients,* 87 Harv.L.Rev. at 1603 (*Pettus* "was a class action").

[5] *Lindy Bros. Builders of Phila. v. Am. Radiator & Standard Sanitary Corp.,* 487 F.2d 161, 165 (3d Cir.1973)(emphasis added); *see also, e.g., Tenney v. City of Miami Beach,* 152 Fla. 126, 130, 11 So.2d 188, 190 (1942)(*Greenough* and *Pettus* "were class suits"); *Goodrich v. E.F. Hutton Group,* 681 A.2d 1039, 1049 (Del.

Nothing in Rule 23 changes these decisions' controlling authority as common-fund class-action precedents. This Court certainly applies them to Rule 23 class actions. *See, e.g., Boeing,* 444 U.S. at 478.

Thus, decisions of the First, Second, and Ninth Circuits not only conflict with the Eleventh Circuit's opinion in this case, they also conflict with this Court's foundational common-fund decisions, heightening the need for this Court's review to resolve the precedential conflict.

The precedential conflict is extraordinarily important for the further reason that incentive awards seriously impair class representatives' ability to provide the adequate representation required both by Rule 23 and fundamental due process. The Sixth Circuit has warned that incentive awards to representative plaintiffs provide "'a *disincentive* for the [named] class members to care about the adequacy of relief afforded unnamed class members[.]'" *Shane Group, Inc. v. Blue Cross Blue Shield,* 825 F.3d 299, 311 (6th Cir. 2016)(quoting *In re Dry Max Pampers Litig.,* 724 F.3d 713, 722 (6th Cir.2013)(court's emphasis)). The Ninth Circuit has recognized that incentive awards raise "red flags that the defendants may have tacitly bargained for the named plaintiffs' support for the settlement by offering them significant additional cash awards." *Roes 1-2 v. SFBSC Mgmt., LLC,* 944 F.3d 1035, 1057 (9th Cir.2019)(vacating settlement where two named plaintiffs were to receive incentive awards of $20,000 apiece). "Indeed, '[i]f class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at

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1996)("[i]n *Pettus*, attorney's fees were awarded also in a class action").

the expense of the class members whose interests they are appointed to guard.'" *Staton v. Boeing Co.,* 327 F.3d 938, 975 (9th Cir. 2003)(quoting *Weseley v. Spear, Leeds & Kellogg*, 711 F.Supp. 713, 720 (E.D.N.Y. 1989)).

Thus, the very integrity of class-action litigation is at stake, as well as the precedential authority in lower courts of this Court's longstanding common-fund decisions. This Court's immediate intervention is warranted.

CONCLUSION

Although the Eleventh Circuit's decision in this case is correct, this Court should grant the petition for a writ of certiorari so that it may resolve a precedential conflict among the circuits that is both clear and extraordinarily important.

Respectfully submitted,

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