No. 22-634

In the Supreme Court of the United States

RICHARD ESTLE CARSON III, PETITIONER,

vs.

KATHRYN HYLAND, MELISSA GARCIA, JESSICA SAINT-PAUL, REBECCA LAWSON, MICHELLE MEANS, ELIZABETH KAPLAN, JENNIFER GUTH, MEGAN NOCERINO, ELIZABETH TAY- LOR, ANTHONY CHURCH, NAVIENT CORPORATION, AND NAVIENT SOLUTIONS LLC, RESPONDENTS

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Recognizing that "Supreme Court precedent prohibits incentive awards," the Eleventh Circuit held in *Johnson v. NPAS Solutions, LLC,* 975 F.3d 1244 (11th Cir.2020), that "we are not at liberty to sanction a device or practice, however widespread, that is foreclosed by Supreme Court precedent." *Id.* at 1255, 1260. The Second Circuit, in stark contrast, has held the opposite, expressly choosing to follow its own decision below in this case, and in *Melito v. Experian Mktg. Sols., Inc.,* 923 F.3d 85, 96 (2d Cir.2019), while acknowledging that they conflict with this Court's holdings in *Trustees v. Greenough,* 105 U.S. 527, 537-38 (1882), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116, 122 (1885). Not only is there a conflict among the circuits: the Second Circuit has explicitly rejected following this Court's precedents in favor of following its own ruling below in this case. That challenge to this Court's authority is a compelling reason to grant certiorari in order to remove all doubt about the continuing authority of this Court's decisions.

Decided March 15, 2023, the Second Circuit's precedential opinion in *Fikes Wholesale* bluntly refuses to follow this Court's decisions. The unanimous panel opinion explains:

> Service awards are likely impermissible under Supreme Court precedent. The Supreme Court has held that it was "decidedly objectionable" for cash allowances to be "made for the personal services and private expenses" of a creditor who brought suit on behalf of himself and other similarly situated bondholders. *Trustees v. Greenough,* 105 U.S. 527, 537

> (1881). Such allowances, the Court reasoned, "would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount." *Id*. at 538.
>
> Appellants argue that *Greenough* precludes the granting of service awards in this case, and in virtually all other cases—as the Eleventh Circuit held in *Johnson v. NPAS Solutions, LLC,* 975 F.3d 1244 (11th Cir.2020). True, *Greenough*'s holding was not about persons designated as class representatives under the later-formulated class action rules; but it "involved an analogous litigation actor." *Id.* at 1259. Finally, appellants argue that although Rule 23 post-dates Greenough, it makes no reference to service awards, and is thus "irrelevant." *Id.*
>
> But practice and usage seem to have superseded *Greenough* (if that is possible). *See Melito v. Experian Mktg. Sols. Inc.,* 923 F.3d 85, 96 (2d Cir.2019); *Hyland v. Navient Co.,* 48 F.4th 110, 123-24 (2d Cir.2022). And even if (as we think) practice and usage cannot undo a Supreme Court holding, *Melito* and *Navient* are precedents that we must follow.

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation (Fikes Wholesale, Inc. v. HSBC Bank USA), No. 20-339, __F.4th__, 2023 WL 2506455, at *8-*9 (2d Cir. March 15, 2023)("*Fikes Wholesale*").

Fikes Wholesale thus holds that $900,000 in payments to eight lead plaintiffs' service as class representatives must be sustained under the decision

below in this case *despite* this Court's contrary rule prohibiting such payments. *Id.* at *8-*9. While acknowledging "the Supreme Court's precedent in apparent opposition to the practice," the Second Circuit remains committed to "the standardless use of it nevertheless." *Id.* at *9.

Judge Dennis Jacobs, the unanimous *Fikes Wholesale* panel opinion's author, supplements it with a concurring opinion that explains:

> The named plaintiffs in this case are deemed private attorneys general. Yet they are getting a total of $900,000 as a kind of tip. That is $900,000 more than permitted under Supreme Court authority. *See Trustees v. Greenough,* 105 U.S. 527 (1882). The Eleventh Circuit held as much in *Johnson v. NPAS Solutions, LLC,* 975 F.3d 1244 (11th Cir.2020), and I am in accord with the views set forth in that thorough and well-reasoned opinion.
>
> But this Court has twice come out the opposite way. First, *Melito v. Experian Marketing Solutions, Inc.,* 923 F.3d 85 (2d Cir.2019) affirmed the grant of so-called service awards, stating, without elaboration, that *Greenough* (and the Supreme Court's less relevant decision in *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885)) did not "provide factual settings akin to those here." *Id.* at 96. Then, recently, *Hyland v. Navient Corp.,* 48 F.4th 110, 124 (2d Cir.2022) over-read *Melito* to hold that "Rule 23 does not per se prohibit service awards like the one at issue here."
>
> *Melito* can be best understood as an attempt to avoid a split with the Eleventh Circuit, which had held—in an opinion later vacated—

> that *Greenough* did not categorically prohibit service awards. *See Muransky v. Godiva Chocolatier, Inc.,* 922 F.3d 1175, 1196 (11th Cir.2019), *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). But because the Eleventh Circuit changed course in *Johnson,* we now find ourselves on the wrong side of a circuit split.

Fikes Wholesale, 2023 WL 2506455, at *17 (Jacobs, J., concurring).

The Second Circuit's position is far worse than merely being on "the wrong side of a circuit split." *Id.* For the *Fikes Wholesale* panel expressly follows *Melito* and the decision below in this case in preference to this Court's otherwise controlling precedents.[1] This Court's immediate intervention is needed, for "[u]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal appellate courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis,* 454 U.S. 370, 375 (1982).

Even if the case involved only conflict among the circuits, however, the conflict already is well developed and clearly articulated. The continuing authority of this Court's decisions in *Greenough* and *Pettus* have been thoroughly debated in lengthy majority, concurring, and dissenting opinions, in the courts below. Nothing will be gained by delaying action.

Judge Newsom's majority opinion in *Johnson v. NPAS Solutions* not only is careful, detailed, and well-reasoned—it is accompanied by Judge Beverly B.

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[1] *See Fikes Wholesale,* 2023 WL 2506455, at*8-*9.

Martin's correspondingly comprehensive and thoughtful dissent.[2] Judge Jill A. Pryor then devoted nearly two years to writing an exhaustive four-judge dissent from denial of en banc rehearing, concluding that "it will be up to the Supreme Court to overrule or clarify *Greenough* and *Pettus*."[3]

To that already extensive discourse the First Circuit and Ninth Circuit each have added their own serious and substantial discussions of their reasons for rejecting *Greenough* and *Pettus*.[4] Each explicitly rejects the Eleventh Circuit's holding in *Johnson v. NPAS Solutions* that *Greenough* and *Pettus* still prohibit payments to representative plaintiffs.[5] And if that were not enough, the Second Circuit's opinion below in this case, and unanimous panel opinion in *Fikes Wholesale*—supplemented by Judge Jacobs's concurring opinion—flesh things out even further.

The academic commentary also is well developed. Harvard Professor John P. Dawson's authoritative 1974 article on the common-fund doctrine clearly articulated *Greenough*'s rule against compensating litigants for service as representative plaintiffs—a rule that he noted lower courts by then had honored for

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[2] *Compare Johnson v. NPAS Solutions,* 975 F.3d at 1255-61 (majority opinion); *with id.* at 1264-69 (Martin, J., dissenting).

[3] *Johnson v. NPAS Solutions, LLC,* 43 F.4th 1138, 1139-53 (11th Cir.2022)(Jill A. Pryor, Cir. J., joined by Charles R. Wilson, Adlaberto Jordan, and Robin S. Rosenbaum, Cir. JJ., dissenting from denial of en banc rehearing).

[4] *See Murray v. Grocery Delivery E-Services USA Inc.*, 55 F.4th 340, 352-54 (1st Cir.2022); *In re Apple Inc. Device Performance Litig.,* 50 F.4th 769, 785-87 (9th Cir.2022).

[5] *See Murray,* 55 F.4th at 352; *Apple Device,* 50 F.4th at 785 n.13.

nearly a century.[6] Other scholars noted lower courts' subsequent adoption of a contrary rule despite the "lack of specific authorization for incentive awards in the relevant statutes or court rules."[7]

In *Johnson v. NPAS Solutions* itself, the Eleventh Circuit relied on the leading class-actions treatise—authored and edited by Harvard Professor William B. Rubenstein—which in its Fifth Edition candidly acknowledged that "'[t]he judiciary has created these awards out of whole cloth.'"[8] Responding to contentions that Rule 23 overturned *Greenough's* holding, the Eleventh Circuit quoted from the Fifth Edition of Professor Rubenstein's treatise (as updated through 2020): "'Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards.'"[9]

Unhappy to find his treatise so influential in the Eleventh Circuit's decision, Professor Rubenstein filed an amicus brief urging en banc rehearing and arguing *in favor* of incentive awards.[10] Professor Rubenstein

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[6] John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds,* 87 Harv.L.Rev. 1597, 1601-02 (1974).

[7] Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 U.C.L.A. L. Rev. 1303, 1312-13 (2006).

[8] *Johnson v. NPAS Solutions*, 975 F.3d at 1259 (quoting 5 William B. Rubenstein, *Newberg on Class Actions* §17:4 (5th ed., updated through 2020)).

[9] *Id.* (quoting 5 William B. Rubenstein, *Newberg on Class Actions* §17:4 (5th ed., as updated through 2020)).

[10] Brief of Professor William B. Rubenstein as Amicus Curiae in Support of Rehearing En Banc, *Johnson v. NPAS Solutions, LLC,* No. 18-12344 (11th Cir. Oct. 29, 2020); *see* 5 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* §17:4 at 606 n.5 (6th ed. 2022)("the Treatise's author (Professor Ruben-

then set about thoroughly revamping and rewriting Chapter 17 of his treatise, presenting the best case that he can for incentive awards.[11] Rubenstein's Sixth Edition now dismisses *Greenough* as "the old equity case," that may safely be ignored because it "seems distant in both time and fact."[12] It is unlikely that the leading scholar's defense of incentive awards, in the leading treatise on class actions, can be much improved upon.

Though Respondents suggest that opposition to incentive awards arose only recently, moreover, courts and commentators long recognized that this Court's common-fund doctrine, as laid down in *Greenough* and *Pettus,* from its very beginning barred compensating litigants for personal service as representative plaintiffs. Harvard Professor Dawson said so in his 1974 article, noting that lower courts had until then complied with *Greenough*'s rule.[13] Federal appellate

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stein) filed an *amicus* brief on his own behalf supporting rehearing").

[11] *Compare* 5 William B. Rubenstein, *Newberg on Class Actions*, Chapter 17, at 491-589 (5th ed. 2015)(repeatedly disparaging incentive awards as unauthorized judicial fabrications made "of whole cloth"), *with* 5 William B. Rubenstein, *Newberg and Rubenstein on Class Actions*, Chapter 17, at 583-692 (6th ed. 2022)(entire chapter rewritten to defend the propriety of incentive awards).

[12] 5 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* §17:4, at 606, (6th ed. 2022).

[13] John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds,* 87 Harv.L.Rev. 1597, 1601-02 (1974).

decisions recognized the rule.[14] So did district courts.[15] *Greenough*'s ban on service awards for representative plaintiffs was no secret even as hundreds—and soon thousands—of district court rulings ignored it in the following decades.

Respondents insist that this Court nonetheless should delay its review because, whatever their legality, the payments now are made according to consistent standards across the circuits. "With the sole exception of the recent *Johnson* decision from the Eleventh Circuit," the Hyland Class Representative Respondents say, "the circuit courts have applied consistent standards."[16] But that is not true.

The Second Circuit's recent *Fikes Wholesale* opinion candidly states: "We have articulated no standard by which district courts can consider the grant of service awards." *Fikes Wholesale,* 2023 WL 2506455, at *9. "Given the Supreme Court's precedent in apparent opposition to the practice and the standardless use of it nevertheless, it is unsurprising that, as has been said, 'the decision to grant the [service] award, and the amount thereof, rests solely within the discretion of the

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[14] *See, e.g., Granada Investments, Inc. v. DWG Corp.,* 962 F.2d 1203, 1207 (6th Cir.1992); *Zucker v. Westinghouse Electric,* 374 F.3d 221 226 (3d Cir.2004), *overruled sub silentio by Sullivan v. DB Investments, Inc.,* 667 F.3d 273, 333 n.65 (3d Cir.2011)(en banc), *Crutcher v. Logan,* 102 F.2d 612, 613 (5th Cir.1939).

[15] *See, e.g., Gortat v. Capala Bros.,* 949 F.Supp.2d 374, 379 (E.D.N.Y. 2013), *overruled sub silentio by Melito v. Experian Mktg. Solutions, Inc.,* 923 F.3d 85 (2d Cir.2019); *In re Westinghouse Sec. Litig.,* 219 F.Supp.2d 657, 660-61 (W.D.Pa.2002), *aff'd sub nom. Zucker v. Westinghouse Electric,* 374 F.3d 221 226 (3d Cir.2004), *overruled sub silentio by Sullivan v. DB Investments, Inc.,* 667 F.3d 273, 333 n.65 (3d Cir.2011)(en banc).

[16] Brief in Opposition of Class Representative Respondents at 29.

[District] Court.'" *Id.* at *9 (quoting *Dial Corp. v. News Corp.,* 317 F.R.D. 426, 439 (S.D.N.Y. 2016)). "Given that the basis for any service award in a class action is at best dubious under *Greenough,* and that, unsurprisingly calculation of such an award is standardless, it is difficult to find traction for a ruling that this award is an abuse of discretion." *Id.* at *10. The Second Circuit's *only* limitation on incentive awards is *Fikes Wholesale*'s holding that "[t]he class should not pay for time spent lobbying for changes in law that do not benefit the class." *Id.* at *10.

Asserting that "the circuit courts have applied consistent standards," the Hyland Class Representatives cite Professor Rubenstein's Sixth Edition of *Newberg*.[17] Yet Rubenstein candidly acknowledges that various federal courts have "fashioned different tests," and that "no one test has emerged as particularly salient."[18] Most present a mélange of subjective factors no more suited to consistent decision-making than were the so-called "*Johnson* factors" which, when used to set attorney's fees, "'gave very little actual guidance to district courts. Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results.'"[19]

The Sixth Circuit stands out for enforcing meaningful limitations. It holds, for example, that

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[17] Brief in Opposition of Class Representative Respondents at 29 (citing 5 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* §17:13 (6th ed. 2022).

[18] 5 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* §17:13, at 642-43 (6th ed. 2022).

[19] *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 551 (2010)(quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 563 (1986)).

when class representatives' special payments greatly exceed what each would receive as ordinary class members, this precludes findings of adequate representation. In *Dry Max Pampers*, for example, the Sixth Circuit reversed approval of a settlement that gave the named plaintiffs, but not other class members, "$1000 per 'affected child'" because, as the court explained:

> The $1000-per-child payments provided a disincentive for the class members to care about the adequacy of relief afforded unnamed class members, and instead encouraged the class representatives "to compromise the interest of the class for personal gain." ... The result is the settlement agreement in this case. The named plaintiffs are inadequate representatives under Rule 23(a)(4), and the district court abused its discretion in finding the contrary.

In re Dry Max Pampers Litig., 724 F.3d 713, 715, 722 (6th Cir.2013).

Other courts have been remarkably indifferent to representative plaintiffs' incentive to sell out the class they supposedly represent in return for a generous "service award." Take *Fikes Wholesale,* for example. The Second Circuit notes that "the district court bestowed a total of $900,000 in service awards to the eight lead plaintiffs, with the two highest awards in the amount of $200,000." *Fikes Wholesale,* 2023 WL 2506455, at *9.

> Appellants argue that the lead plaintiffs cannot adequately represent the class because the service awards dwarf the recovery for the lead plaintiffs and the average class member. As Appellants point out, certain lead plaintiffs

> will receive service awards that are about 100 times as large as their expected settlement recovery. Thus, Photos Etc., with an estimated claim of about $2,000, gets a service award of $200,000—more than 400 times the average recovery, which is less than $500. We recognize that certain district courts have relied on these sorts of comparisons; but we have never required their use, and we decline to do so now.

Id. at *10 (footnote omitted).

Wide discrepancies—between paltry relief for class members, and rich service payments for class representatives—are the norm. [20] In *Johnson,* No. 22-389, the district court awarded the representative plaintiff $6,000 as part of a settlement that recovered less than $8 per class.[21] In this case, representative plaintiffs were awarded $15,000 apiece for agreeing to a common-fund settlement from which other class members receive not a penny. Incentive awards like these are quite typical, but they have corrosive effects on representative plaintiffs' ability to adequately represent other class members' interests.

For its part, the Second Circuit in *Fikes Wholesale* rejected contentions that such awards need bear any clear relation to the representative plaintiffs' actual efforts on behalf of the class:

> Payless reported that participation in this case cost it $70,000 in salary and wages; and CHS

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[20] *See, e.g., In re Online DVD-Rental Antitrust Litig.,* 779 F.3d 934, 941, 943 (9th Cir.2015)(affirming settlement paying representtative plaintiffs $5,000 apiece for their service in agreeing to a settlement giving other class members "roughly $12 each").

[21] *See* Brief for Respondent Jenna Dickenson, *Johnson v. Dickenson,* No. 22-389, at 7.

> reported $39,000. Appellants contend that service awards should have been directly tied to those losses, and that the district court's failure to do so amounted to an abuse of discretion. Service awards have been limited to lost wages and out-of-pocket expenses in the context of private federal securities litigation. ... The district court in this antitrust case was not bound by the limitation.

Fikes Wholesale, 2023 WL 2506455, at *11 (citation omitted). The *only* standard limiting service awards in the Second Circuit is that they may not be paid for "time spent lobbying for changes in law that do not benefit the class." *Id.* at *10.

CONCLUSION

The issue is an important one, affecting most class actions. The conflict with this Court's common-fund precedents is real, as is the conflict among the circuits. The Petition should be granted.

Respectfully submitted,

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