No. 24-259

IN THE

Supreme Court of the United States

ERIC ALAN ISAACSON,

Petitioner,

v.

META PLATFORMS, INC., FKA FACEBOOK, INC., *et al.*,

Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENTS PERRIN DAVIS, BRIAN LENTZ, CYNTHIA QUINN, MATTHEW VICKERY, RYAN UNG, CHI CHENG AND ALICE ROSEN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On November 10, 2022, after eleven years of litigation, the United States District Court for the Northern District of California approved an historic privacy class action settlement resolving multiple claims under California state law, and one federal law. The settlement provided a first-of-its-kind nationwide injunction requiring Respondent Meta Platforms, Inc. to delete data that plaintiffs contend was unlawfully collected, an injunction that the District Court hoped would be a "game changer" for the industry. The settlement also provided for a $90 million common fund for distribution to the class, which plaintiffs' damages expert calculated to be full disgorgement of the unjust enrichment plaintiffs could have proven at trial under California law. At the time, this common fund was the seventh-largest data privacy class action settlement in history. The settlement of the federal action also resolved a parallel state court action.

The District Court then awarded a percentage of the common fund to counsel and approved service awards for the seven lead plaintiffs (the individual respondents here) ranging from $3,000 to $5,000, for their eleven years of service to the class. Following an objector appeal, a unanimous panel of the United States Court of Appeals for the Ninth Circuit affirmed the District Court, and the full Ninth Circuit denied *en banc* review.

The questions presented by Objector-Petitioner are:

1. In a data privacy class action settlement resolving primarily California state law claims and establishing a $90 million common fund, did the

District Court impermissibly approve service awards to the lead plaintiffs for their eleven years of service to the class?

2. In a data privacy class action settlement resolving primarily California state law claims and establishing a $90 million common fund, did the District Court impermissibly calculate counsel fees based on a percentage of the common fund?

PARTIES TO THE PROCEEDING

Eric Alan Isaacson, Esq., the Petitioner, was an objector to the class action settlement.

Individual Respondents Perrin Davis, Brian Lentz, Cynthia Quinn, Matthew Vickery were the lead plaintiffs in the federal action, *In re Facebook Internet Tracking Litigation*, 5:12-md-02314-EJD (N.D. Cal.).

Individual Respondents Ryan Ung, Chi Cheng and Alice Rosen were the lead plaintiffs in the parallel state court action, *Ung, et al. v. Facebook, Inc.*, No. 112-cv-217244 (Santa Clara Superior Court).

Respondent Meta Platforms, Inc. (f/k/a Facebook, Inc.) was the sole defendant in the federal and state court actions.

Respondents Sarah Feldman and Hondo Jan were objectors in the District Court and filed appeals in the Ninth Circuit. Neither joined Isaacson as Petitioners here.

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STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A decade in the making, the path to final approval of this historic settlement began in 2012 with an MDL Transfer Order and consolidation of 24 separate actions. Pet.App.7a-8a. Plaintiffs alleged that Facebook (now known as Meta) tracked class members' internet use through "cookies" associated with web browsing activity while they were logged out of the Facebook accounts, despite Facebook's representation that it would not receive user-identifying information of logged out users. *Id.* at 8a.

The District Court dismissed the case on standing and other grounds, and Plaintiffs filed, briefed, and argued an appeal to the United States Court of Appeals for the Ninth Circuit. That appeal resulted in a ruling of first impression in the Ninth Circuit that "Facebook is not exempt from liability as a matter of law under the Wiretap Act or CIPA as a party to the communication." *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 608 (9th Cir. 2020). Further, that ruling found that Plaintiffs had sufficiently alleged economic harm related to the alleged violation of California state law in the form of a right to disgorgement of unjust profits. *Id.* Defendant filed a petition for a writ of *certiorari* to the United States Supreme Court on the Wiretap Act issue, which Plaintiffs opposed, and the Court denied. Pet.App.8a. The case was then remanded with seven California state law claims and one federal claim remaining for litigation.

II. THE PARTIES EXTENSIVELY MEDIATED WITH A RESPECTED NEUTRAL

Following substantial discovery, Plaintiffs and Defendant agreed to mediate the case before Randy Wulff, a highly respected mediator. Pet.App.9a. The Plaintiff mediation team included lead counsel in the MDL; a representative of counsel for the parallel California state court action; and the former Hawai'i Attorney General. In light of the Ninth Circuit's ruling on disgorgement and other monetary remedies under California law, Plaintiffs engaged an economic consultant to perform economic analyses of several alternative damages models, including net profits attributable to the information Plaintiffs contend Defendant improperly collected; royalty value of a license to monitor Internet browsing; and restitution models.

Having briefed their positions for Mr. Wulff, the parties engaged in mediation over the course of multiple sessions in the Spring and Summer of 2021. Mr. Wulff helped guide substantial additional document discovery in aid of mediation. The Parties then agreed to accept a Mediator's proposal and reached a settlement agreement in principle. The parties then spent approximately six months negotiating the contours of the injunctive relief, vetted claims administrators, and evaluated and confirmed the class member data set to transfer for claims processing. Pet.App.15a.

III. THE SETTLEMENT, THE CLAIMS PROCESS, AND THE DISTRICT COURT'S APPROVAL

The settlement provides the following key terms:

(1) *Monetary Consideration*—$90 million in a non-reversionary settlement fund, Pet.App.9a;

(2) *Injunctive Relief*—Defendant has sequestered and is required to expunge the data Plaintiffs alleged was impermissibly gathered, subject only to preservation of that data in a restricted-access location for this litigation pending final judgment and dismissal of all appeals and pledged not to use that data for any other purposes, Pet. App.9a-11a;

(3) *Notice*—class counsel employed a "belt and suspenders" approach that included publication notice and direct email notice, PetApp.12a-13a, 16a-17a;

(4) *Settlement Class Definition*—all persons who, between April 22, 2010 and September 26, 2011, inclusive, were Facebook Users in the United States that visited non-Facebook websites that displayed the Facebook Like button, with no attestation requirement that settlement class members with active accounts affirmatively state that they visited non-Facebook pages containing the Facebook Like button, Pet.App.9a;

(5) *Service Awards*—the named plaintiffs in the federal court action and in the state court action could receive service awards upon class counsel's application to the court (amount of the request may not exceed $5,000 per named plaintiff), Pet.App.10a;

(6) *Arms-Length Settlement*—the settlement was not conditioned on the court's award of attorneys' fees or expenses or any service awards, Pet.App.15a.

On March 31, 2022, following briefing and a hearing, the District Court granted preliminary approval of the settlement and authorized dissemination of class notice, finding that the settlement satisfied the requirements under Fed. R. Civ. 23. Pet.App.17a-18a. Comprehensive and understandable, the notices were jointly drafted by the parties and carefully reviewed by the District Court. The District Court found the proposed notice procedures provided the best notice practicable and were reasonably calculated to apprise Class Members of the Settlement and their rights to object or exclude themselves. Pet.App.17a.

Besides finding the notice program not just appropriate but impressive, at the final approval hearing, the District Court heard extensive argument for nearly three hours from Plaintiffs, Defendant, and objectors (including the Petitioner here). The District Court then made some observations on the record, including:

- "The $90 million is a lot of money. . . . And I cannot untether that with the injunctive relief. . . . I've never seen a case that had that injunctive relief where the party was, according to the settlement, they have agreed that we will delete, we'll destroy that data. That's significant. . . . That in and of itself is hopefully ***a game changer*** for the industry, and to inform the public, much like the Ninth Circuit informed the legal community about one of the issues in this case." (emphasis added). District Court Dkt. No. 290, Tr. 106:11-107:9.

- "$39, in today's world, $39 is—that's significant. . . . and that recovery I do think provides additional faith in Rule 23 for the affected class members and the public. . .". Tr. 108:21-109:6.

On November 10, 2022, the District Court issued its order granting the motion for final settlement approval, granting the motion for attorneys' fees, expenses, and service awards, and overruling the objectors' (including the Petitioner's) objections and arguments. Pet.App.6a. As to the motion for fees, expenses, and service awards, the District Court (1) awarded as fees 29% of the settlement fund, after considering whether a modest upward adjustment from the 25% benchmark was appropriate, particularly where Plaintiffs achieved a change in the law, and analyzing the request through a lodestar cross-check; (2) awarded reasonable out- of-pocket costs to class counsel, after noting that none of the objectors opposed the costs; and (3) awarded seven service awards to the named plaintiffs ($5,000 to some of the plaintiffs and $3,000 to others, totaling $29,000 (*i.e.*, a fraction of a fraction of 1% of the settlement fund)), after noting that they represented the data privacy interests of more than 124 million others "for over a ten year period with very little personally to gain." Pet.App.35a.

Three objectors, including Petitioner, subsequently appealed the District Court's final approval of the settlement to the Court of Appeals for the Ninth Circuit.

IV. THE COURT OF APPEALS FOR THE NINTH CIRCUIT AFFIRMS THE SETTLEMENT AND OVERRULES THE OBJECTORS', INCLUDING THE PETITIONER'S, CONTENTIONS

Following briefing and oral argument, the Ninth Circuit on February 21, 2024 issued an opinion affirming in full the District Court's approval of the settlement. Pet.App.1a. In doing so, the Ninth Circuit reached the following conclusions: (1) the district court applied the correct legal standard under Fed. R. Civ. P. 23 and the factors set forth in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998) for whether a class-action settlement is "fair, reasonable, and adequate"; (2) the district court did not abuse its discretion by determining that the $90-million settlement—in conjunction with injunctive relief benefitting the entire class—was fair and reasonable; (3) the district court did not impermissibly apply a "presumption of fairness" to the settlement; (4) the district court did not abuse its discretion in finding the proposed attorneys' fees reasonable and "well within the permissible bounds of this Circuit's decisions"; (5) "awarding modest service awards of $3,000 to $5,000 each to seven named Plaintiffs was also not an abuse of discretion"; and (6) class notice of settlement comported with Rule 23 and constitutional due process. Pet.App.3a-5a.

REASONS TO DENY THE PETITION

I. THIS CASE IS NOT A SUITABLE VEHICLE TO RULE ON THE PROPRIETY OF SERVICE AWARDS TO PLAINTIFFS IN CLASS ACTION SETTLEMENTS

The instant case is an unsuitable vehicle for this Court to address the propriety of service awards to class representatives under Fed. R. Civ. P. 23. This Court "often grants certiorari to resolve circuit splits that render the state of the law inconsistent and chaotic." *American Axle & Mfg., Inc. v. Neapco Holdings, LLC*, 977 F. 3d 1379, 1382 (Fed. Cir. 2020) (citing cases). Here, the only jurisdiction in which the law is "inconsistent" is a single outlier, the 11th Circuit, in which the law of service awards is still unsettled and developing; the case Petitioner frames for decision bears no relationship to the actual facts, rendering any opinion this Court would render purely advisory; and any ruling by the Court on the service awards at issue would have no effect on the overall settlement. Petitioner presents the wrong case, at the wrong time, for this Court to take up the service awards issue.

Decisional evolution within the 11th Circuit, and the robust rejection of *Johnson* by other Circuits and district courts, counsels this Court's abstention until the asserted "Circuit conflict" runs its course, resolves itself or becomes much more squarely presented. *Cf. Rogers v. Grewal,* 140 S. Ct. 1865 (Mem.) (2020) (Thomas, J. dissenting from denial of certiorari) (canvassing seriously inconsistent state of Second Amendment law in context of directly applicable Supreme Court precedents). The 11th Circuit is the only Circuit in which the state of the law

concerning service awards is inconsistent—and one of recent vintage and may resolve itself,[1] and no good reason merits this Court's involvement now.

A. PETITIONER'S ASSERTION OF A LOPSIDED CIRCUIT SPLIT IS LIKELY TO RESOLVE ITSELF WITHOUT SUPREME COURT INTERVENTION

Relying on *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020), *reh'g en banc denied*, 43 F. 4th 1138 (11th Cir. 2022), *cert denied sub nom. Johnson v. Dickenson*, 143 S. Ct. 1745 (2023), *and sub nom. Dickenson v. Johnson*, 143 S. Ct. 1746 (2023), Petitioner asserts "the circuits

1. The question of "issue class certification" under Fed. R. Civ. P. 23(c)(4) is another example of the wisdom of letting a disparity in legal rules work itself out through the lower courts. The Fifth Circuit's initial rejection of "issue class certification" in *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), was followed by Circuit court opinions elsewhere disagreeing with *Castano.* The Fifth Circuit subsequently backed away from *Castano* (*see, e.g., In re Rodriguez,* 695 F.3d 360 (5th Cir. 2012), *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620 (5th Cir. 1999)), and finally appeared to abandon *Castano. See In re Deepwater Horizon,* 739 F.3d 790 (5th Cir. 2014). The post-*Castano* cases led one commentator to say that the circuit split *Castano* had created "has all but vanished." P. Bronte, *et al.*, "'Carving at the Joints': The Precise Function of Rule 23(c)(4), 62 DePaul L. Rev. 745, 745-46 (2013)). Another example of a circuit split resolving itself is the "forum-defendant rule." *See Mannino v. McKee Auto Ctr., Inc.*, 2024 WL 4884440, at *1, n.1 (S.D. Iowa Sep. 5, 2024) (citing *Holbein v. TAW Enters., Inc.*, 983 F.3d 1049, 1053 (8th Cir. 2020), as "eliminating a 'lopsided circuit split' by holding that the forum-defendant rule is waivable, aligning with every other Circuit on the issue").

are now in clear conflict" (Pet.15) concerning whether the 142-year-old *Trustees v. Greenough*, 105 U.S. 527 (1882), and the 139-year-old *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885) govern the question of whether Courts may approve "payments from common-fund recoveries to compensate litigants for their service as representative plaintiffs, and to encourage others to file even more class actions." Pet.15.

But, until *Johnson*, no Circuit Court had ever applied *Greenough* and *Pettus* categorically to prohibit service awards. Only *one* Circuit, the 11th, over a vigorous and well-reasoned dissent (*Johnson*, 975 F.3d at 1264-1269), and over an equally compelling dissent from the Circuit's denial of rehearing *en banc* (*Johnson*, 43 F. 4th 1138 (11th Cir. 2022), has retroactively mapped *Greenough* and *Pettus* onto the modern Fed. R. Civ. P. 23, a Rule that did not exist when *Greenough* and *Pettus* were decided.

Since the recent *Johnson* decision, every other Circuit—the First, Second, Seventh and Ninth (*see* Pet.17)—that has squarely addressed service awards for Named Plaintiffs in class actions in light of *Johnson* has, upon careful reasoning, expressly rejected *Johnson's* categorical ban on service awards (this is in addition to this Court's twice denying petitions to review *Johnson* itself, as noted above). District courts in Circuits that have not expressly addressed *Johnson* have rejected *Johnson* and approved service awards under existing Circuit precedents.[2]

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2. *See, e.g., Wickens v. Thyssenkrupp Crankshaft Co., LLC*, 2021 WL 267852, at * 2 (N.D. Ill. Jan. 26, 2021); *Green v. FCA US LLC*, 2022 WL 3153777, at *2 (E.D. Mich. Aug. 8, 2022) (noting

B. PETITIONER IS SEEKING AN ADVISORY OPINION MAKING THIS CASE AN UNSUITABLE VEHICLE FOR THIS COURT TO ADDRESS SERVICE AWARDS

Petitioner pejoratively frames service awards to class representatives as "bounties" equivalent to "salaries" prohibited by *Greenough* and *Pettus,* as nefarious incentives used "to recruit representative plaintiffs" (Pet.13, 15) among other misdeeds.

But Petitioner seriously misrepresents the record of *this* case, posits a case or controversy far afield from the actual record, and invites a ruling that would give no meaningful guidance to the lower courts, making this case a seriously poor vehicle for the Court's analysis of service awards. *Cf. Moyle v. United States*, 603 U.S. ___, 144 S. Ct. 2015, 2023 (Mem.) (2024) (Jackson, J., concurring in part and dissenting in part) ("This Court typically dismisses cases as improvidently granted based on 'circumstances . . . which were not . . . fully apprehended at the time certiorari was granted'" (quoting *the Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959) (cleaned up)). Here, the case's actual facts differ materially from those the Petitioner presents, and the Court should deny the petition for certiorari in the first place.

6th Circuit has not "expressly disallowed" service awards); *Wood v. Saroj & Manju Invs. Phila. LLC*, 2020 WL 7711409, at *5 n.8 (E.D. Pa. Dec. 28, 2020) (noting *Johnson* but stating "we join our sister court, the District of New Jersey" in finding precedent approving service awards); *Halcom v. Genworth Life Ins. Co.*, 2022 WL 2317435, at *10, *13 (E.D. Va. June 28, 2022) (noting *Johnson* but stating "courts in the 4th Circuit have approved incentive payments").

Petitioner is asking the Court to issue what amounts to an advisory opinion, tethered only to Petitioner's personal conjurings about service awards but unmoored to the actual facts of this case. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("Federal courts may not…give 'opinions advising what the law would be upon a hypothetical state of facts'" (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (further citation omitted)). As this Court has often stated, a "federal court should never issue'" an advisory opinion. *Moody v. NetChoice, LLC*, __ U.S. __, 144 S. Ct. 2383, 2415 (2024) (quoting *Chicago v. Morales*, 527 U.S. 41, 77 (1999) (Scalia, J., dissenting); *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 176 (Roberts, C.J., dissenting) ("prohibition" on advisory opinions "has remained 'the oldest and most consistent thread in the federal law of justiciability'" (quoting *Flast v. Cohen*, 392 U.S. 83, 96 (1968)).

As the uncontroverted record clearly shows, contrary to Petitioner's generalized ruminations about service awards and speculative divergence of interests between class members and the Class Representatives, none of the class representatives *in this case* were informed they might be eligible for service awards until after they reviewed and approved the other terms of settlement. Pet.App.36a. Nor was the settlement conditioned upon approval of service awards, in any amount. Thus, the service awards here assiduously avoided the hypothetical conflict of interest concerns raised by Petitioner. *See Berry v. Schulman*, 807 F.3d 600, 613-14 (4th Cir. 2015) (no divergence of interest where "incentive awards were not agreed upon *ex ante* . . . were not conditioned on the Class Representatives' support for the Agreement . . . were not negotiated until after the substantive terms of the Agreement had been established").

Ignoring the concrete factual setting of the service awards in this case, Petitioner invites the court to adjudicate a "hypothetical or abstract dispute[ ]" (*Transunion LLC v. Ramirez*, 594 U.S. 413, 423-24 (2021)) grounded in generalized principles of Petitioner's choosing. This Court's precedents compel declination of that invitation. *Transunion LLC v. Ramirez*, 594 U.S. 413, 423-24 (2021). *See also id.*, 594 U.S. at 423 ("Federal courts do not possess a roving commission to publicly opine on every legal question."). *See generally United States v. Rahimi*, 602 U.S. 680, 775 (2024) (Thomas, J., dissenting) (noting "the dangers of approaches based on generalized principles").

Ignoring the facts of the settlement both the District Court and a Ninth Circuit approved, Petitioner invites this Court to take up this case and to establish an apodictic rule based centrally on *Johnson's* application of *Greenough* and *Pettus.* But as Judge Easterbrook stated concerning the petition for rehearing in *Scott v. Dart*, 108 F.4th 931, 932-33 (7th Cir. 2024), "*Johnson* does not present the best argument for curtailing incentive awards."[3] The instant case, the actual facts of which Petitioner either ignores or misrepresents in asking for an advisory opinion, is an even worse vehicle for this Court's analysis of service awards.

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3. Judge Easterbrook had no difficulty finding *Greenough* and *Pettus,* dealing with "the way multi-party litigation was handled in the Nineteenth Century," should not be "conclusive in the Twenty-First when dealing with a device invented more than halfway through the Twentieth. *Scott v. Dart*, 108 F.4th 931, 933 (7th Cir. 2024) (statement on petition for reh'g *en banc*). Nor did Judge Easterbrook have any quarrel with the long-established rule "that it is proper to pay representative plaintiffs for their contributions toward making class actions work." *Id.*

A ruling by this Court on the propriety of service awards will have no effect on the overall settlement, further highlighting the advisory nature of the ruling Petitioner seeks. *See generally In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1281-82 (11th Cir. 2021) (noting that *Johnson* recognized that service awards were common, "yet held that two Supreme Court cases from the 1880s" prohibit them, grudgingly noting that "*Johnson* binds us here," but declining "invitation to vacate the settlement as a whole" where, as here, settlement approval was not conditioned upon grant of service awards).

C. *JOHNSON* IS AN OUTLIER AND THIS COURT SHOULD ABSTAIN AT LEAST UNTIL THE LAW IS MORE FULLY DEVELOPED

Every other Circuit to have expressly considered *Johnson's* prohibition on service awards has, with careful analysis, emphatically rejected *Johnson's* rule. *See Murray v. Grocery Delivery E-Services USA, Inc.*, 55 F.4th 340, 352-53 (1st Cir. 2022) (rejecting argument by same Petitioner here); *Moses v. The New York Times Co.*, 79 F. 4th 235, 253-54 (2d Cir. 2023) (rejecting argument by same Petitioner here);[4] *Scott v. Dart*, 99 F. 4th 1076, 1082-1088 ((7th Cir. 2024); *In re Apple Inc. Device Performance Litig.*, 50 F. 4th 769, 785-787 (9th Cir. 2022). No reason exists to think other Circuits will not follow suit.

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4. *See also Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85 (2d Cir. 2019) (rejecting same argument by same Petitioner here). *Cf. Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F. 4th 704, 720-21 (2d Cir. 2023) (decided before *Moses v. The New York Times Co.*, 79 F. 4th 235, 253-54 (2d Cir. 2023) addressing *Johnson* but following Second Circuit precedent).

Not just the Circuit Courts but this Court, too, has found service awards can be appropriate. In in *China Agritech, Inc. v. Resh*, 584 U.S. 732 (2018), this Court stated that a "class representative might receive a share of class recovery above and beyond her individual claim." *Id.* at 747 n.7 (citing *Cook v. Niedert*, 142 F.3d 1004, 1006 (7th Cir. 1998), as "affirming class representative's $25,000 incentive award").

Petitioner tries to minimize *China Agritech's* endorsement of additional payments to class representatives as "passing dictum" (Pet.22).[5] But *Cook,* on which *China Agritech's* "passing dictum" relied, squarely addressed the propriety of the $25,000 service award in that case and approved it. As Petitioner notes (Pet.23), courts have cited that endorsement in approving service awards. *See, e.g., In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785 (9th Cir. 2022); *Middleton v. Halliburton Energy Servs., Inc.*, 2024 WL 1930691, at * 8 (E.D. Cal. May 2, 2024); *Hawes v. Macy's Inc.*, 2023 WL 8811499, at *13 (S.D. Ohio Dec. 20, 2023) (rejecting *Johnson*, and citing *China Agritech* for proposition "Supreme Court has hinted at [service awards] validity").

It is entirely reasonable to expect that other courts will accept *China Agritech's* endorsement of the principle that class representatives can be entitled to greater recoveries than other class members and that this single-

5. Petitioner argues that *China Agritech* neither cited nor discussed *Greenough* and *Pettus.* (Pet.22). That is likely because the Court correctly understood that "those cases have nothing to say about the lawfulness of incentive awards in settlements under Rule 23. *See Johnson v. NPAS Sols, LLC*, 43 F. 4th 1138, 1147 (11th Cir. 2022) (Pryor, J., dissenting from denial of reh'g *en banc*).

Circuit conflict will resolve itself as other Courts weigh in and reject *Johnson*.

Even within the 11th Circuit, the law is still evolving. The 11th Circuit's *Johnson* ruling made no meaningful effort to explain why the Circuit's previous approvals of service awards were wrong. Some sixteen months before *Johnson* was decided, a different 11th Circuit panel decided *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175 (11th Cir. 2019), *rev'd on different grounds*, 979 F.3d 917 (11th Cir. 2020). *Muransky* rejected Petitioner's *Greenough*—and *Pettus*—based challenge to a $10,000 service fee award. *Id.* at 1196 ("We do not view granting a monetary award as an incentive to a named class representative as categorically improper."). *Johnson* nowhere mentioned, let alone discussed or distinguished, *Muransky*.[6]

Illustrating the point, in *In Re: Checking Account Overdraft Litig.*, 2022 WL 472057 (11th Cir. Feb. 16, 2022), a different panel of the 11th Circuit panel let stand a service award of $10,000. While noting that *Johnson* "held . . . that such awards are unlawful," the panel nevertheless found that the objector neither objected to the service award in the District Court nor "properly presented any argument to us" that the award was invalid, and "decline[d] to vacate the award" on waiver grounds. *Id.* at *5, n.1. Judge Newsom, *Johnson's* author, was on the *Checking Account* panel.

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6. Further underscoring the 11th Circuit's own inconsistency, the opinion reversing *Muransky* on standing grounds after rehearing *en banc* (*Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917 (11th Cir. 2020), was issued a month after *Johnson*, but nowhere even mentioned *Johnson*.

Although the *Checking Account* objector had waived any challenge to the service award, in light of *Johnson's* categorical prohibition on service awards it is nonetheless at least surprising that the *Checking Account* panel, or at least Judge Newsom, did not reverse the service award as being a pure legal error under, or at least address its incompatibility with, *Johnson*. *See Johnson v. Bottling Grp., LLC*, 2024 WL 889260, at *1 (11th Cir. 2024) (circuit court can consider forfeited issues that "'involve[] a pure question of law and refusal to consider it would result in a miscarriage of justice . . . interest of substantial justice is at stake…the proper resolution is beyond any doubt; or . . . the issue presents significant issues of general impact or of great public concern'" (quoting *United States v. Campbell*, 26 F. 4th 860, 873 (11th Cir.) (*en banc*), *cert denied*, 143 S. Ct. 95 (2022)).

District courts within the 11th Circuit have either found *Johnson's* prohibition on service awards inapplicable in different contexts, employed workarounds to the *Johnson* prohibition, reserved ruling on service awards pending further adjudications in the 11th Circuit, or noted the need for further 11th Circuit explication of the issue.[7]

7. After *Johnson*, some district courts in the 11th Circuit approved service awards under the rubric that those awards were "general release payments" further underscoring the still-evolving landscape on this issue within the Circuit. *See, e.g., Sinkfield v. Persolve Recoveries, LLC*, 2023 WL 511195, at *n.2 (S.D. Fla. Jan. 26, 2023) ($1,500 payment to class representative was neither salary nor bounty "but in exchange for agreeing to a broader release of claims than the release the other Class Members have given, this payment doesn't violated the strictures of *Johnson*"); *Broughton v. Payroll Made Easy, Inc.*, 2021 WL 3169135, at *4, n.5 (M.D. Fla. July 27, 2021); *Dozier v. DBI Servs. LLC*, 2021 WL 6061742, at *9 (M.D. Fla. Dec. 22, 2021).

D. THE 11TH CIRCUIT SHOULD RECONCILE *JOHNSON'S* PROHIBITION WITH ERIE DOCTRINE PRINCIPLES BEFORE THIS COURT STEPS IN

Johnson's prohibition on service awards also creates numerous questions beyond the fundamental question of whether *Greenough* and *Pettus*, decided in 1882 and 1885, respectively, have anything to say about modern class action practice under Rule 23. For example, whether *Johnson* applies to settlements of diversity actions or cases based on state law claims, is dubious, as opinions from district courts in the 11th Circuit demonstrate. *See, e.g., Arnold v. State Farm Fire and Cas. Co.*, 2023 WL 7308098, at * 1 (S.D. Ala. Nov. 6, 2023) (affirming service awards under Alabama law in diversity case, noting *Johnson* was in the context of federal claims brought under the Telephone Consumer Protection Act" and that "[f]ollowing *Johnson*, a number of district courts in the Eleventh Circuit have found class representative service awards are still permitted under certain circumstances. The Court agrees with its several sister courts in this Circuit that *Johnson*…is inapplicable in diversity jurisdiction cases where the underlying claims arise under state law." (citing *Venerus v. Avis Budget Car Rental, LLC*, 2023 WL 4673481 (M.D. Fla. May 23, 2023), *report and recommendation adopted*, 2023 WL 4673481 (M.D. Fla. May 25, 2023); *Junior v. Infinity Ins. Co.*, 2022 U.S. Dist. LEXIS 154082 (M.D. Fla. Aug. 26, 2022); *Roth v. Geico Gen. Ins. Co.*, 2020 WL 10818393 (S.D. Fla. Oct. 8, 2020); *Smith v. Progressive Select Ins. Co.*, 2023 U.S. Dist. LEXXIS 58227 (S.D. Fla. Mar. 31, 2023)); *see also Tims v. LGE Cmty. Credit Union*, 2023 WL 11915734, at *1 (N.D. Ga. Nov. 29, 2023) (affirming $10,000 service award and

distinguishing *Johnson* because "state law governs the issue of Service Awards in diversity actions"); *Hunter v. CC Gaming, LLC*, 2020 WL 13444208, at *7-8, *8 n.1 (D. Colo. Dec. 16, 2020) (finding "unclear whether and to what extent the reasoning in *Johnson, Greenough* and *Pettus* would extend to modern diversity cases or to supplemental state-law claims under *Erie*"). The 11th Circuit has yet to address this jurisdictionally based disparity in service award availability.[8]

Similarly, the 11th Circuit should be permitted to sort out the arbitrariness concerning service award approval that results in cases that present a mix of state and federal law, as the instant case does. *See, e.g., Guyton v. Abrahamsen Gindin LLC*, 2023 WL 1824652, at *2 (M.D. Fla. Jan. 10, 2023) (FDCPA case discussing *Johnson's* uncertain applicability to cases involving statutory damages and citing cases); *Denning v. Mankin Law Grp., P.A.*, 2022 WL 16956527, at *1, n.2 (M.D. Fla. Nov. 15, 2022) (FDCPA and Florida Consumer Collection Practices

8. The settlement in this case was based on California state law principles of disgorgement, which was the basis for the original Ninth Circuit's ruling that alleged unlawful data collection can be the basis for establishing economic injury. *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d at 600. California state law, in turn, permits service awards. *See Cellphone Termination Fee Cases,* 186 Cal. App. 4th 1380, 1394 (2010) (overruling objections to $10,000 service awards to four class representatives, stating "they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class" and citing cases). Accordingly, under the rationale of the 11th Circuit district court cases, *Johnson* does *not* apply to the instant case, further showing its unsuitability as a vehicle for Supreme Court review of incentive awards.

Act case; "the Parties shall be prepared to discuss at the final fairness hearing the propriety of the $2,000 award to Plaintiff in light of . . . *Johnson*"). This Court should stay its hand until the 11th Circuit has allowed the issue to percolate more fully.

E. SERVICE AWARDS SHOULD BE FIRST ADDRESSED BY THE RULES COMMITTEE OR CONGRESS

Much to-and-fro in the case law addressing *Johnson* has concerned what Rule 23 says or does not say, implies or does not imply, about service awards. *Cf. Johnson*, 975 F.3d at 1259 (Rule 23 says nothing about service awards) with *Scott v. Dart*, 99 F. 4th 1076, 1086-87 (7th Cir. 2024) (service awards are "consistent" with Rule 23(e)'s mandate of equitable treatment of class members "because the named plaintiffs invest in the case more heavily than their unnamed counterparts") (citing *Moses v. New York Times Co.*, 79 F. 4th 235, 253 (2d Cir. 2023); *see also Mongue v. Wheatleigh Corp.*, 2024 WL 1659724, at * 5 (D. Mass. Apr. 16, 2024) ("$5,000 service award would compensate Plaintiff for 'bear[ing] the brunt of the litigation' without violating Fed. R. Civ. P. 23(e)(2)(D)'s requirement that the settlement treats class members equitably in relation to one another" (quoting *Murray v. Grocery Delivery E-Services USA Inc.*, 55 F. 4th 340, 353 (1st Cir. 2022)).

Given the important policy ramifications of the service awards issue, analysis and determination of the fit between service awards and Rule 23(e)(2)(D)'s requirement of equitable treatment of all class members is best left, in the first instance, to the Advisory Committee on the Civil Rules, on whose determinations this Court has historically

relied.[9] *Johnson* itself said "if either the Rules Committee or Congress doesn't like the result we've reached, they are free to amend Rule 23 or to provide for incentive awards by statute." *Johnson*, 975 F.3d at 1260.

As it has done many times before, the Advisory Committee can determine the issue in a broader context than the fact-bound situation a single service award case presents. *See generally Microsoft Corp. v. Baker*, 582 U.S. 23, 30 (2017) (discussing Rules Committee's "careful calibration" of Rule 23(f) governing interlocutory appeals); *Bell Atl. v. Twombly*, 550 U.S. 544, 559 (2007) (discussing implications for pleading standards in light of discovery burdens in antitrust cases and citing, *inter alia*, Memorandum from Chair of Advisory Committee to Chair of Committee on Rules of Practice and Procedure); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842-43 (1969) ("Advisory Committee looked cautiously at the potential for creativity under Rule 23(b)(1)(B)" and "crafted all three subdivisions of the Rule in general, practical terms" and relying on Advisory Committee's analysis); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 398 (1990) (relying on Advisory Committee letter and note in analyzing a Rule 11 sanctions issue); *Schiavone v. Fortune*, 477 U.S. 21, 30-31 (1986) (citing Advisory Committee Note as having eliminated "[a]ny possible doubt" about meaning of Rule 15(c) in deciding relation back limitations issue); *Marek v. Chesney*, 473 U.S. 1, 41-42, 43 (Brennan, J. dissenting)

9. After all, "[t]he Chief Justice appoints" the members of the Advisory Committee, who "rel[y] heavily on the services of its 'reporter,'" each of whom is a "prominent law professor" and "leading expert" also appointed by the Chief Justice. *See uscourts.gov/rules-policites/about-rulemaking-process/committee-membership-selection* (last visited Dec. 9, 2024).

(discussing Advisory Committee's "close consideration to a broad range of troubling issues that would be raised by application of Rule 68 to attorney's fees" and stating "Congress and the Judicial Conference are far more institutionally competent than the Court to resolve" ambiguity of Rule 68's scope).

Similarly, leaving the service awards issue, which Petitioner argues has serious policy ramifications (Pet.28; "corrosive effect" of service awards on "unconflicted representation") for legislative determination, as *Johnson* itself suggested (*Johnson*, 975 F.3d at 1260), is fully consistent with the separation of powers doctrine.

Leaving to Congress the question whether Rule 23's broad grant of discretion to district judges handling class litigation (*see* Fed. R. Civ. P. 23(d)(1), 23(g)(1)(B), (C) (D), (E), 23(g)(2),(3), 223(h)) and whether Rule 23(e)(2)(D)'s mandate of equitable treatment for all class member permits or prohibits service awards will avoid "forc[ing] judges to act more like legislators who decide what the law should be, rather than judges who 'say what the law is.'" *United States v. Rahimi*, 602 U.S. 680, 732 (2024) (Kavanaugh, J., concurring) (quoting *Marbury v. Madison*, 1 Cranch 137, 177, 5 U.S. 137, 21 L.Ed. 60 (1803); *see also Oklahoma v. Castro-Huerta*, 597 U.S. 629, 656 (2022) ("[T]his Court's proper role under Article III of the Constitution is to declare what the law is, not what we think the law should be.").

II. PETITIONER'S REQUEST FOR AN ADVISORY OPINION REGARDING COUNSEL FEES SHOULD BE REJECTED

This Court has held that when a plaintiff successfully obtains a common fund for the benefit of an identifiable class, counsel 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). This rule contrasts with the situation where a successful plaintiff is asking a Court to assess fees directly against a defendant pursuant to a federal fee-shifting statute, in which case the reasonable fee is calculated with respect to counsel's lodestar. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010).

This distinction between percentage of common funds vs. federal fee-shifting cost awards was recently highlighted by the Second Circuit in an objector appeal brought by Petitioner's family trust in an unrelated securities action. *Fresno County Employees' Ret. Ass'n v. Isaacson/Weaver Fam. Tr.*, 925 F.3d 63 (2d Cir. 2019). "In contrast to fees awarded pursuant to fee-shifting provisions, fees awarded pursuant to the common-fund doctrine do not extract a tax on the losing party but instead confer a benefit on the victorious attorney for her representation of her client and the class members." *Fresno County Emps.' Ret. Ass'n*, 925 F.3d at 68 (citing *Boeing*, 444 U.S. at 478). Thus, the Second Circuit held, the lodestar limitations in *Perdue* are not relevant to the District Court's analysis of reasonableness; instead, the relevant authority is *Boeing*.

Petitioner seeks Supreme Court review because, he complains, "lower courts are systemically ignoring" this Court's guidance in *Perdue* when assessing fees against a defendant pursuant to a federal fee-shifting statutes.

Pet.24 (citing *Perdue*). But as the Second Circuit clarified, the relevant Supreme Court authority is *Boeing* when the fees are assessed against a common fund, not *Perdue*, which applies when assessing fees directly against the defendant. And because the instant case is a non-reversionary common fund settlement, and not a situation where Plaintiffs sought to recover fees directly from Meta pursuant to a federal statute, *see* Pet.App.30a, Petitioner is essentially seeking an advisory opinion inapplicable to the facts of *this* case.

More importantly, Petitioner cites to no Circuit conflict nor indeed any case, at any level, failing to faithfully apply this Court's *Boeing*/*Perdue* distinction. Instead, Petitioner is seeking to change the rules—discarding *Boeing* and applying *Perdue* when a federal fee-shifting claim is settled on a common-fund basis. But even if the Court were inclined to consider changing the law, the instant case involves the settlement of a mix of state law claims (including California privacy torts, conversion, trespass, and various California consumer protection statutes) and one federal statute. Pet.App.8a. It is therefore not an appropriate vehicle for Petitioner's quest. *See, e.g., Houston Specialty Ins. Co. v. Vaughn*, 749 Fed. App'x 800, 804, n.4 (11th Cir. 2018) (*Perdue* only limits lodestar multipliers when fees are taxed against defendant pursuant to a federal statute, not state law).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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