No. 24-259

In the Supreme Court of the United States

ERIC ALAN ISAACSON, PETITIONER,

vs.

META PLATFORMS, INC. (F.K.A. FACEBOOK, INC.); PERRIN AKINS DAVIS; BRIAN K. LENTZ; CYNTHIA D. QUINN; MATTHEW J. VICKERY, RYAN UNG; CHI CHENG; ALICE ROSEN, ET AL., RESPONDENTS

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

REPLY BRIEF FOR PETITIONER

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Petitioner

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REPLY BRIEF FOR PETITIONER

The circuits are intractably split, the issues presented are extraordinarily important, and this case provides an excellent vehicle to resolve whether this Court's decisions in *Trustees v. Greenough,* 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885), have been superseded by more recent lower-court precedents—or remain binding, as the Eleventh Circuit soundly concluded in *Johnson v. NPAS Solutions, LLC,* 975 F.3d 1244, 1255 (11th Cir.2020), *en banc rehearing denied*, 43 F.4th 1138 (11th Cir.2022).

This case, which settled substantial claims for but 73 cents per class member, with the representative plaintiffs getting thousands of dollars apiece, and their lawyers attorney's fees at more than three times their reasonable hourly rates, provides an ideal vehicle for addressing important recurring questions concerning the common-fund doctrine of *Greenough* and *Pettus.*

This case presents a far better vehicle than the currently pending petition in *Dart v. Scott,* No. 24-464, where no class has been certified, where no common fund exists and no incentive award has been made—and, most importantly, where the question presented is whether the plaintiff has Article III standing to seek an incentive award:

> Does a putative class representative have Article III standing solely to seek an "incentive award" nowhere authorized by statute, rule, or historic principles of equity?

Dart v. Scott, No.24-464, Petition for Certiorari.

As a consequence, *Dart* does not directly present the question of whether *Greenough* and *Pettus* bar incentive awards. The *Dart* petitioners themselves

contend that even if incentive awards are available in common-fund cases, that conclusion would afford no basis for finding Article III standing in *Dart*:

> This Court has repeatedly held that neither an interest in costs, *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 107-08 (1998), nor an interest in attorney's fees, *Lewis v. Cont'l Bank* Corp., 494 U.S. 472, 480 (1990); *Diamond v. Charles,* 476 U.S. 54, 70-71 (1986), is an Article III injury-in-fact, because both are litigation byproducts. Under these holdings, the Chief Justice has explained, an individual has no Article III standing solely to pursue an incentive award.[1]

If a nonfrivolous claim to an incentive award might support standing, moreover, the mere likelihood that the claim lacks merit under *Greenough* and *Pettus* is no bar to subject-matter jurisdiction—for the intractable circuit split on incentive awards shows that Quintin Scott's claim in seeking one is at least arguable. "It is firmly established ... that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case." *Steel,* 523 U.S. at 89. "'[J]urisdiction ... is not defeated ... by the possibility that the [plaintiffs'] averments might fail to state a cause of action on which

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[1] *Dart v. Scott,* No.24-464, Petition for Certiorari, at 18 (citing *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 178 n.1 (2016) (Roberts, Ch.J., dissenting opinion observing that a putative class representative's "interest in sharing attorney's fees among class members or in obtaining a class incentive award does not create Article III standing."). *See also* Brief of DRI Center for Law and Public Policy as *Amicus Curiae* in Support of Petitioners in *Dart v. Scott,* No.24-464 (filed Nov. 25, 2024)("Regardless of whether incentive awards to class representatives are lawful, the prospect of such an award does not create a justiciable case or controversy as to the settling plaintiff.").

[they] could actually recover.'" *Id.* (quoting *Bell v. Hood,* 327 U.S. 678, 682 (1946)).

Dart v. Scott thus presents an extraordinarily poor vehicle for reaching the question of whether *Greenough* and *Pettus* bar incentive awards in common-fund cases. This case, in which class members' valuable federal claims were released for remarkably little, under a settlement creating a common fund from which thousands of dollars apiece were allocated to the representative plaintiffs—along with extravagant fees for their lawyers—is an ideal vehicle for this Court to consider the proper application of its common-fund doctrine.

"Sooner or later, the Supreme Court (either in litigation or through its power to amend the Rules of Civil Procedure) must address the propriety of incentive awards," Judge Easterbrook recently observed in *Jacks v. DirectSat USA, LLC,* 118 F.4th 888, 900 (7th Cir.2024)(Easterbrook, Cir.J., concurring). Revision of the federal rules won't do, considering the Rules Enabling Act's command that the "rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b); *see Amchem Products v. Windsor,* 521 U.S. 591, 612-13 (1997).

The time is ripe, and this case is an optimal vehicle.

ARGUMENT

I. The Conflict Among the Circuits is Real and Intractable

Plaintiffs say that the Eleventh Circuit precedent is "unsettled" and "still evolving" because, "some sixteen months before *Johnson* was decided, a different 11th Circuit panel ... rejected Petitioner's *Greenough*- and *Pettus*- based challenge to a $10,000 service fee award." Plaintiffs' BIO at 7, 15. The conflict between the two

panel opinions remains unresolved, Plaintiffs imply, because *Johnson v. NPAS Solutions* "nowhere mentioned, let alone discussed or distinguished, *Muransky,* [*v. Godiva Chocolatier,* 922 F.3d 1175 (11th Cir.2019)]." Plaintiffs' BIO p.15.

But the panel opinion in *Muransky* went unmentioned for good reason. It had been expressly vacated by an order granting en banc rehearing.[2] The en banc court then concluded that the plaintiff never had Article III standing to pursue claims on behalf of a class, let alone to seek an incentive award. *See Muransky v. Godiva Chocolatier,* 979 F.3d 917, 946 (11th Cir.2020)(en banc). The *Muransky* panel never possessed subject-matter jurisdiction to opine on his claim to an incentive award.

Judge Beverly Martin—who had authored the vacated *Muransky* panel opinion endorsing incentive awards—dissented both from the en banc court's holding that the *Muransky* panel lacked jurisdiction,[3] and also from the panel opinion in *Johnson v. NPAS Solutions* that bars incentive awards.[4]

But she knew very well that the *Muransky* panel opinion she authored "has no precedential value ... as it was vacated pursuant to granting of rehearing en banc." *United States v. McIver,* 688 F.2d 726, 729 n.5 (11th Cir.1982). In the Eleventh Circuit, "when panel

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[2] *See Muransky v. Godiva Chocolatier,* 939 F.3d 1278, 1279 (11th Cir.2019)("The panel's opinion is VACATED."); *cf.* Eleventh Circuit Rule 40-11 ("Unless otherwise expressly provided, the effect of granting a rehearing en banc is to vacate the panel opinion and the corresponding judgment.").

[3] *Muransky,* 979 F.3d at 946-56 (Martin, Cir. J., dissenting from en banc decision).

[4] *Johnson v. NPAS Solutions,* 975 F.3d 1264-69 (Martin, Cir.J., dissenting).

opinions are vacated they 'are officially gone,' and 'are void,' and none of the statements made in them 'has any remaining force and cannot be considered to express the view of this Court.'"[5]

That only four of the Eleventh Circuit's twelve active judges supported en banc rehearing in *Johnson v. NPAS Solutions* indicates that its law is settled: "Supreme Court precedent prohibits incentive awards."[6]

II. There is No Need to Wait and See What the Eleventh Circuit Does in Pure Diversity-Jurisdiction Cases

Having pleaded and settled a case asserting federal claims—and after obtaining common-fund attorney's fees and incentive awards under federal precedents—Plaintiffs now suggest the attorney's fees and incentive awards in this case are properly controlled by state law, rather than federal. They want this Court to delay resolving a clear conflict among the circuits concerning its common-fund doctrine until the Eleventh Circuit has decided a question that they never raised in this case—whether the common-fund doctrine of *Greenough* and *Pettus* can be ignored in diversity-jurisdiction cases asserting only state-law claims.

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[5] *CompuCredit Holdings v. Akanthos Capital Manaagement,* 698 F.3d 1348, 1349 (11th Cir.2012)(en banc)(quoting *United States v. Sigma International,* 300 F.3d 1278, 1280 (11th Cir.2002)(en banc); *Weidner v. Comm'r,* 81 F.4th 1341, 1345 (11th Cir.2023).

[6] *Johnson v. NPAS Solutions,* 975 F.3d at 1255; *accord, e.g., In re Equifax Customer Data Security Breach Litig.,* 999 F.3d 1247, 1257 (11th Cir.2021)("such awards are prohibited"); *Medical & Chiropractic Clinic v. Oppenheim,* 981 F.3d 983, 994 n.4 (11th Cir.2020)("service awards are foreclosed by Supreme Court precedent").

This case, however, was filed asserting federal claims and invoking federal-question subject-matter jurisdiction under 28 U.S.C. §1331.[7] Although amended MDL complaints brought supplemental state-law claims into the case, that did not abrogate the federal district court's inherent authority—indeed its obligation—to apply this Court's common-fund precedents to the settlement fund eventually created by federal proceedings.[8]

Plaintiffs sought common-fund attorney's fees and incentive awards in this case citing federal precedents. Even now they acknowledge that the common-fund attorney's fees here are governed by *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980), which held that *Greenough* and *Pettus* control common-fund recoveries in cases like this. *See* Plaintiffs' BIO at 22-23 ("the relevant Supreme Court authority is *Boeing*").

In *Boeing* this Court held that the common-fund doctrine of *Greenough* and *Pettus* applied to the entirety of a common-fund judgment recovered "under

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[7] Plaintiffs' initial complaint, as posted on their settlement web site, pleaded federal-question jurisdiction based on federal statutory claims:

> 7. This Court has subject matter jurisdiction over this action and Defendant Facebook pursuant to 28 U.S.C. §1331 because this action arises under federal statutes, namely the Federal Wiretap Act, 18 U.S.C. §2511 (the "Wiretap Act"), the Stored Electronic Communication Act, 18 U.S.C. §2701 ("SECA") and the Computer Frand and Abuse Act, 18 U.S.C. §1030 (the "CFAA") and pursuant to 28 U.S.C. §1332(d) because the amount in controversy exceeds $5,000.

Davis v. Facebook, No. 5:11-cv-04834, Complaint ¶7 (filed 09/30/11)[https://bit.ly/4gO6Fs8 & https://perma.cc/9RFG-L4TD].

[8] Those later complaints reiterated the District Court's federal-question subject-matter jurisdiction. DE93:2¶8 (Second Amended Complaint); DE157:3[ECFp6]¶12 (Third Amended Complaint).

the New York law of contracts." *Boeing,* 444 U.S. at 474. The *Boeing* plaintiffs had pleaded federal claims that, although only "colorable," were "sufficient for jurisdictional purposes" under *United Mine Workers v. Gibbs,* 383 U.S. 715, 724-25 (1966), to sustain the district court's exercise of pendent jurisdiction over trial of the remaining state-law claims.[9] Although the case came to this Court as one in which the common fund represented a recovery under New York law, it was governed by the common-fund doctrine set out in *Greenough* and *Pettus*. *See Boeing,* 444 U.S. at 478-81.

This case, of course, involves the settlement and release of federal claims. The fact the settlement also released some state-law claims cannot remove it from the federal common-fund doctrine of *Greenough, Pettus,* and *Boeing*.

III. The Circuits Are Blatantly Disregarding this Court's Precedents on Reasonable Attorney's Fees

This Court's review is further warranted because federal courts are systematically disregarding *Greenough*'s requirement that awards of common-fund attorney's fee are to be "made with moderation and a jealous regard to the rights of those who are interested in the fund." *Greenough,* 105 U.S. at 536-37. This Court's later decisions (in statutory fee-shifting cases) hold that attorneys' unenhanced lodestars provide a presumptively reasonable fee, generally sufficient to

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[9] *Van Gemert v. Boeing Co.,* 520 F.2d 1373, 1380, 1382 & n.19 (2d Cir.1975); *see Van Gemert v. Boing Co.,* 590 F.2d 433, 435 (2d Cir.1978)(en banc)("we decided that the New York law of contracts imposed an implied duty on Boeing not satisfied by its newspaper advertisements and 'eleventh hour' news release ... and remanded the case to Judge Ryan for a determination of damages"), *aff'd* 444 U.S. 472 (1980).

attract capable counsel in contingent-fee class actions such as *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 546, 552-53 (2010)(mandating "a strong presumption that the lodestar is sufficient"). Nothing in this Court's precedents authorizes routinely paying lawyers several times their reasonable hourly rates when class actions settle.

Plaintiffs insist *Perdue*'s holding concerning adequate compensation is irrelevant whenever class counsel eschew prosecuting claims so they can get multiples of their lodestar from a common-fund settlement. Plaintiffs' BIO at 22-23. The "relevant Supreme Court authority is *Boeing* when the fees are assessed against a common fund," they say, "not *Perdue*." Plaintiffs' BIO at 23. Plaintiffs insist "the lodestar limitations in *Perdue* are not relevant to the District Court's analysis of reasonableness; instead the relevant authority is *Boeing*." Plaintiffs' BIO at p.22.

But this Court's decision in *Boeing* says nothing to authorize large multiples of the fees that *Perdue* holds are generally sufficient to attract and compensate competent lawyers. This Court affirmed the Second Circuit's en banc holding that the attorney's fees in *Boeing* were to be assessed against the entire common fund, rather than just against the class members who submitted claims. *Boeing,* 444 U.S. at 478, 482. The amount of the attorney's fee had yet to be determined.

Following remand from this Court, the *Boeing* district court eventually ruled it "fair to increase the Lodestar fee calculation for all petitioners (except Steinman) by a multiplier of 1.7," and "to increase the Lodestar fee calculation for petitioner Steinman by a multiplier of 1.5." *Van Gemert v. Boeing Co.,* 516 F.Supp. 412, 420 (S.D.N.Y.1981). But this Court never blessed that post-remand enhancement. Its later

decisions hold that multipliers should be exceptional—because attorneys' unenhanced lodestar ordinarily will be sufficient to compensate class-action counsel for successfully litigating claims on behalf of a class. *See Perdue*, 559 U.S. at 552-53.

This Court's decisions concerning fees adequate to attract and compensate capable counsel, culminating in *Perdue*'s rejection of a multiplier of 1.75, *id.* at 556-57, are pertinent to the reasonableness of the fees awarded in this case, involving a settlement that released federal claims subject to fee-shifting had Plaintiffs prevailed.

Particularly relevant is *Perdue*'s condemnation of employing subjective factors to increase class counsel's fees. *Perdue* specifically repudiates using the 12-factor "*Johnson* factors" methodology of *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir.1974), for example, as too subjective to cabin trial courts' discretion or even "to permit meaningful judicial review" of attorney's fee awards. *Perdue,* 559 U.S. at 551-52. Yet federal appellate courts still require district courts to base common-fund fee awards on the *Johnson* factors, or other subjective tests, that *Perdue* rejects.[10] The Eleventh Circuit did so in *Johnson v. NPAS Solutions,* 955 F.3d at 1262 n.14.

Two circuits—the Eleventh Circuit and the District of Columbia Circuit—hold that attorneys' fees in common fund-cases must be awarded only as a percent-of-the-fund rather than being based on

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[10] *See, e.g., In re Syngenta AG MIR 162 Corn Litig.,* 61 F.4th 1126, 1141 & n.4 (10th Cir.2023); *Equifax,* 999 F.3d at 1278; *Union Asset Mgmt. Holding A.G. v. Dell, Inc.,* 669 F.3d 632, 644 (5th Cir.2012); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 775 (11th Cir.1991).

attorneys' lodestars.[11] Their decisions conflict with this Court's opinion in *Greenough,* which approved of a common-fund attorney's fee award based not on a percentage of the fund, but rather on the attorney's fees actually incurred and paid.[12] Other circuits permit, but do not require, percent-of-fund fee awards.[13]

Either way, objective restraints are absent. District judges awarding fees as a percentage of the fund may choose to "cross-check" the fees requested against the lawyers' lodestar, but these "cross-checks" are treated as purely optional.[14] Even if a cross-check is employed, only "[f]ee requests that deviate wildly from the

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[11] *See Camden I Condominium Ass'n v. Dunkle,* 946 F.2d 768, 774 (11th Cir.1991); *Swedish Hospital Corp. v. Shalala,* 1 F.3d 1261, 1265-71 (D.C.Cir.1993).

[12] *See Greenough,* 105 U.S. at 530 (citing an itemized "statement of expenditures made by Vose in the cause ... being for fees of solicitors and counsel, costs of court, and sundry small incidental items"); *see also Trustees v. Greenough*, [Oct. Term 1881 No. 601], Transcript of Record at 711-23, 770-78 (original) 228-32, 247-56 (print)(1881)(listing the itemized expenditures).

[13] *See, e.g., Goldberger v. Integrated Resources,* 209 F.3d 43, 50 (2d Cir.2000)(refusing to follow "the District of Columbia and Eleventh Circuits [which] mandate the exclusive use of the percentage approach in common fund cases"); *Gottlieb v. Barry,* 43 F.3d 474, 483 (10th Cir.1994); *Florin v. NationsBank of Georgia, NA,* 34 F.3d 560, 565-66 (7th Cir.1994); *In re WPPSS Litig.,* 19 F.3d 1291, 1295 (9th Cir.1994); *Rawlings v. Prudential-Bache Properties,* 9 F.3d 513, 515-16 (6th Cir.1993).

[14] *In re Flint Water Cases,* 63 F.4th 486, 499 (6th Cir.2023)("the district court was not required to conduct a lodestar cross-check"); *Voulgaris v. Array Biopharma,* 60 F.4th 1259, 1265 (10th Cir.2023)("the district court was not required to perform a lodestar cross-check"); *Keil v. Lopez,* 862 F.3d 685, 701 (8th Cir.2017)(cross-check "not required").

unenhanced lodestar fee are unlikely to pass this cross-check."[15]

Class-action lawyers routinely receive substantial multiples of their reasonable rates whenever they settle claims cheaply.

IV. The Incentive Awards and Attorney's Fees are Inextricably Intertwined with the Merits of the Settlement Itself

Meta strives to isolate the merits of the incentive awards and attorney's fees from the merits of the settlement providing those awards. The 2018 amendments to Federal Rule of Civil Procedure 23(e)(2), however, make both attorney's fees and incentive awards necessary considerations in evaluating any class-action settlement.

Rule 23(e)(2)(C)(iii) makes the propriety and "terms of any proposed award of attorney's fees, including timing of payment," a necessary consideration in evaluating a settlement's fairness and adequacy. Fed.R.Civ.P. 23(e)(2)(C)(iii); *see* Pet.App.46a. And Rule 23(e)(2)(D) requires a court evaluating whether to approve a proposed settlement to consider whether "the proposal treats class members equitably relative to each other." Fed.R.Civ.P. 23(e)(2)(D); Pet.App.47a.

Thus, a judgment of this Court invalidating the incentive awards and the attorney's fees in this case

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[15] *Fresno County Employees' Ret. Ass'n v. Isaacson/Weaver Family Trust,* 925 F.3d 63, 72 (2d Cir.2019); *see, e.g., Voulgaris,* 60 F.4th at 1265 (2.8 multiplier within range "routinely approved"); *Keil,* 862 F.3d at 701 (multiplier of 2.7); *Steiner v. Am. B'casting Co.,* 248 F.App'x 780, 783 (9th Cir.2007)(multiplier of 6.85 "well within the range ... allowed").

would require, at the least, a remand allowing the settlement itself to be reevaluated.[16]

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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[16] *See Moses v. New York Times Co.,* 79 F.4th 235, 243 (2d Cir.2023)("Isaacson argues that the district court erred by failing to evaluate the settlement's fairness, reasonableness, and adequacy in light of the attorneys' fee award and incentive award. We agree.").