

In the
Supreme Court of the United States

ERIC ALAN ISAACSON,

Petitioner,

v.

MARIBEL MOSES, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION
OF RESPONDENT MARIBEL MOSES

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QUESTION PRESENTED

The courts of appeals have overwhelmingly held that district courts may, in the exercise of their equitable discretion, approve modest service awards to named plaintiffs from class-action common-fund settlements. Only the Eleventh Circuit has held otherwise, in a divided decision from which four judges dissented from the denial of rehearing en banc. *See Johnson v. NPAS Solutions, LLC*, 43 F.4th 1138 (11th Cir. 2022). Petitioner did not contest below that the \$5,000 award to respondent Moses was reasonable in amount; he argued only that such awards are categorically unlawful. The question presented is:

Whether this interlocutory-in-effect, lopsided, and acknowledged-in-fee-only disagreement warrants this Court's review where the decision below is an unpublished summary order that correctly applied settled circuit law, where the award's reasonableness was never disputed, and where the overwhelming majority of circuits are in agreement.

CORPORATE DISCLOSURE STATEMENT

The respondent filing this opposition brief, Maribel Moses, is an individual.

Note: The other respondent, the New York Times, who is not a signatory to this brief, is publicly traded with ticker NYSE: NYT.

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INTRODUCTION

This petition is petitioner Eric Alan Isaacson's latest effort to undo a class-action settlement that returns nearly \$2.4 million in cash to some 876,600 California consumers. Having twice objected below, and having twice been rejected by the Second Circuit, petitioner now asks this Court to grant certiorari on a question that the courts of appeals have answered with near unanimity, and that he himself framed below as a purely categorical one.

The petition should be denied for four independent reasons.

First, the asserted circuit conflict is real but profoundly lopsided. The First, Second, Seventh, Ninth, and Federal Circuits have all held that *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), do not bar service awards to class representatives under Federal Rule of Civil Procedure 23. Only the Eleventh Circuit disagrees, and it does so over a forceful dissent from the denial of rehearing en banc joined by four judges. A one-against-five split, in which the outlier's own judges have expressed doubt, is not the sort of entrenched and evenly balanced conflict that ordinarily merits this Court's intervention.

Second, this case is a poor vehicle. Petitioner argued below only that service awards are *per se* unlawful. He did not contend that the \$5,000 award to Ms. Moses was excessive in amount; to the contrary, the Second Circuit expressly noted that it was "presented with no argument that the award was excessive."

The question petitioner now presses is thus divorced from any fact-bound dispute this Court could resolve, and any ruling would leave the settlement itself untouched.

Third, the decision below is correct. *Greenough* and *Pettus* were nineteenth-century creditors' suits decided long before Rule 23 created the modern class action. Neither case addressed a modest, court-supervised award compensating a representative for the time and risk of serving the class. The majority of circuits have correctly declined to read those decisions as silently prohibiting a practice that Rule 23 practice has universally embraced.

Fourth, the decision below is an unpublished summary order resting on settled circuit precedent, and it comes in a posture in which the award represents a trivial component of a settlement that petitioner has litigated for more than five years. These features further counsel against review.



STATEMENT OF THE CASE

A. The Underlying Litigation

Respondent Maribel Moses brought this putative class action against The New York Times Company, alleging that it enrolled California consumers in automatically renewing subscriptions without the disclosures and authorizations required by California's Automatic Renewal Law, Cal. Bus. & Prof. Code §§ 17600 *et seq.* The class consists of California subscribers

who were charged and paid an automatic-renewal fee during the class period.

B. The First Settlement and *Moses I*

The parties initially settled for a \$1,650,000 cash fund supplemented by “Access Codes” for free one-month subscriptions. The district court granted final approval in September 2021, awarding \$1.25 million in fees and a \$5,000 award to Ms. Moses. Petitioner objected and appealed.

In *Moses v. New York Times Co.*, 79 F.4th 235 (2d Cir. 2023) (*Moses I*), the Second Circuit agreed with petitioner that the Access Codes were “coupons” under the Class Action Fairness Act and vacated the settlement for reevaluation. *Id.* at 243, 257. The court squarely rejected, however, petitioner’s contention that *Greenough* and *Pettus* categorically prohibit service awards, holding instead that those decisions have been “superseded . . . by Rule 23.” *Id.* at 254–56.

C. The Renewed Settlement and Final Approval

On remand, the parties negotiated a substantially improved settlement. The coupon component was eliminated, and the cash fund increased by roughly 44% to \$2,375,000, all non-reversionary. Class counsel reduced its fee request from \$1.25 million to one-third of the fund. Ms. Moses’s \$5,000 award remained unchanged.

Notice reached more than 95% of the roughly 876,600 class members. Of these, only two objected and ten opted out. After a fairness hearing on October 4, 2024, the district court (Abrams, J.) entered final approval on October 10, 2024, finding the settlement fair, reasonable, and adequate; approving the fee as a

percentage of the fund; and finding the \$5,000 award reasonable in light of class counsel's uncontradicted representations that Ms. Moses's active involvement "was critical to its ultimate resolution," including conducting pre-litigation investigation, assisting with the complaint, and producing documents in informal discovery.

D. *Moses II*

Petitioner again objected and appealed. On February 10, 2026, the Second Circuit affirmed in an unpublished summary order. *Moses v. New York Times Co.*, 2026 WL 364231 (2d Cir. Feb. 10, 2026) (*Moses II*). The panel reiterated that *Moses I* had "rejected Isaacson's claim that incentive awards are *per se* impermissible," declined to revisit that holding, and found no abuse of discretion in the \$5,000 award given Ms. Moses's contributions. The panel emphasized that it was "presented with no argument that the award was excessive, but only with Isaacson's argument that such awards are categorically prohibited." Rehearing was denied on March 20, 2026.



REASONS FOR DENYING THE PETITION

I. The Purported Circuit Conflict Is Lopsided and Does Not Warrant Review.

Petitioner’s central argument is that the circuits are intractably divided. They are not. The division is one-sided: five circuits permit service awards, and one prohibits them. That imbalance is dispositive against review.

The First, Second, Seventh, Ninth, and Federal Circuits have each held that *Greenough* and *Pettus* do not bar modest service awards in Rule 23 litigation. *See Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 352 (1st Cir. 2022); *Moses I*, 79 F.4th at 254–56; *Scott v. Dart*, 99 F.4th 1076, 1085–88 (7th Cir. 2024); *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785 & n.13 (9th Cir. 2022); *Nat’l Veterans Legal Servs. Program v. United States*, 170 F.4th 1353, 1367 (Fed. Cir. 2026). The Eleventh Circuit stands alone. *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244, 1255 (11th Cir. 2020).

Even the Eleventh Circuit’s position is unstable. Four judges dissented from the denial of rehearing en banc, concluding that the panel had misread this Court’s precedents. *Johnson v. NPAS Solutions, LLC*, 43 F.4th 1138, 1139–53 (11th Cir. 2022) (Jill Pryor, J., dissenting, joined by Wilson, Jordan, and Rosenbaum, JJ.). That dissent recognized the “near-universal recognition” that courts may approve service awards “usually within the range of \$1,000–\$20,000.” *Id.* at 1150. A conflict in which the sole outlier is internally

fractured, and in which the overwhelming weight of authority runs the other way, does not present the kind of mature, evenly divided split that ordinarily warrants certiorari.

Petitioner's reliance on stray language from the Second Circuit's *Fikes Wholesale* decision, 62 F.4th 704, 721 (2d Cir. 2023) (observing that service awards are "likely impermissible" under this Court's older precedents), does not help him. That observation was dictum, and the Second Circuit has since reaffirmed its settled rule permitting such awards. *See Moses II*, 2026 WL 364231, at *3. Intra-circuit tension, if any, is for the Second Circuit to resolve, not this Court.

II. This Case Is a Poor Vehicle Because the Award's Reasonableness Was Never Contested.

Even if the question warranted review in some case, this is not that case. Petitioner litigated the service award below solely as a categorical matter, contending that such awards are "*per se*" unlawful. He never argued that \$5,000 was excessive in amount. The Second Circuit said as much: it was "presented with no argument that the award was excessive, but only with Isaacson's argument that such awards are categorically prohibited." *Moses II*, 2026 WL 364231, at *3.

That posture makes the case an unsuitable vehicle. The only live question is the categorical one, decided on the pleadings-level abstraction petitioner chose; there is no developed factual record on reasonableness for this Court to review. And because the award is a fixed \$5,000 line item in a \$2.375 million common fund, its validity has no bearing on the settlement's overall fairness, which the district court

independently found and the Second Circuit affirmed. Granting review would allow petitioner to relitigate an abstract legal proposition without disturbing the judgment that actually aggrieves him.

Nor is the practical importance petitioner asserts borne out here. A \$5,000 award drawn from a fund benefiting some 876,600 class members is precisely the kind of modest, court-supervised payment that the near-universal practice contemplates. There is no suggestion that Ms. Moses’s award compromised her representation: the renewed settlement she helped secure increased the class’s cash recovery by roughly 44% while reducing counsel’s fee request.

III. The Decision Below Is Correct.

Certiorari is also unwarranted because the majority rule, which the decision below applied, is correct.

1. *Greenough* and *Pettus* arose from nineteenth-century creditors’ bills, decades before Rule 23 existed. In *Greenough*, the Court declined to allow a bondholder reimbursement for his personal time and expenses while approving compensation for his lawyers’ services from the fund. 105 U.S. at 537–38. *Pettus* likewise concerned an attorney’s fee claim. 113 U.S. at 122. Neither decision considered, much less prohibited, a court-supervised award compensating a modern class representative for the burdens of litigation undertaken on behalf of an absent class. As the First Circuit explained, these were “late-nineteenth-century creditor lawsuits” that cannot be taken to control “modern-day class actions under Rule 23.” *Murray*, 55 F.4th at 352.

2. The common-fund doctrine that *Greenough* and *Pettus* announced is equitable and flexible. *See*

Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980). Rule 23 built upon that equitable foundation to create, in the Second Circuit’s words, “a much broader and more muscular class action device” than its common-law predecessor. *Moses I*, 79 F.4th at 254. Within that framework, courts have long recognized that a representative who devotes time and bears risk for the benefit of the class may receive a reasonable award. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

3. Petitioner’s Rules Enabling Act theory, that Rule 23 cannot “abridge, enlarge or modify any substantive right,” 28 U.S.C. § 2072(b); *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612–13 (1997), inverts the analysis. A service award creates no substantive right; it is an exercise of the court’s equitable authority over a fund that the class’s litigation created. And this Court has itself acknowledged, without disapproval, that a class representative “might receive a share of class recovery above and beyond her individual claim.” *China Agritech, Inc. v. Resh*, 584 U.S. 732, 747 n.7 (2018). Petitioner reads that footnote as meaningless; the more natural reading is that the practice he attacks is unremarkable.

4. Petitioner’s remaining merits arguments, pressed below and abandoned or subordinated here, provide no basis for review. His Article III theory, that the class impermissibly includes uninjured members, was correctly rejected because all class members share Ms. Moses’s injury: each paid an automatic-renewal charge assessed without the disclosures California law requires. *See Moses II*, 2026 WL 364231, at *2; *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), is not to the contrary; it expressly reserved

whether every class member must demonstrate standing at certification. *Id.* at 431 n.4.

IV. The Interlocutory Posture and Unpublished Disposition Counsel Against Review.

Finally, two features of the decision below independently disfavor certiorari. The judgment rests on an unpublished summary order that announced no new rule but merely applied *Moses I*'s published holding. Summary orders of this kind are ordinarily unsuitable vehicles for resolving questions of national importance, precisely because they do not purport to develop the law.

Beyond that, granting review to reconsider a single \$5,000 award would be disproportionate to any conceivable benefit. The class-wide settlement has been finally approved, notice has issued to 876,600 members, and all but ten have chosen to participate. If this Court wishes to resolve the acknowledged disagreement over service awards, it may await a case in which the issue is outcome-determinative and squarely presented on a developed record. This case, in which the award's amount is uncontested and the settlement stands regardless, is not it.



CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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