

No. 25-1411

In the
Supreme Court of the United States

ERIC ALAN ISAACSON, PETITIONER,

vs.

MARIBEL MOSES,
THE NEW YORK TIMES COMPANY, D/B/A THE NEW YORK
TIMES, RESPONDENTS

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

REPLY BRIEF FOR PETITIONER

ERIC ALAN ISAACSON
Counsel of Record
LAW OFFICE OF
ERIC ALAN ISAACSON
6580 Avenida Mirola
La Jolla, CA 92037-6231
Telephone: (858) 263-9581
ericalanisaacson@icloud.com
Petitioner

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR RESOLVING AN IMPORTANT PRECEDENTIAL CONFLICT CONCERNING THE AUTHORITY OF THIS COURT’S PRECEDENTS.....	2
III. THE ELEVENTH CIRCUIT IS UNLIKELY TO REVISIT ITS HOLDING THAT THIS COURT’S DECISIONS PROHIBIT INCENTIVE AWARDS.....	6
IV. CONCLUSION.....	10

TABLE OF AUTHORITIES

CASES

<i>Central Bank v. First Interstate Bank</i> , 511 U.S. 164 (1994).....	10
<i>Central Railroad & Banking Co. v. Pettus</i> , 113 U.S. 116 (1885)(“ <i>Pettus</i> ”).....	1, 3, 7, 10–11
<i>China Agritech Inc. v. Resh</i> , 584 U.S. 732 (2018).....	10–11
<i>Devlin v. Scardelletti</i> , 536 U.S. 1 (2002).....	5–6
<i>Dial Corp. v. News Corp.</i> , 317 F.R.D. 426 (S.D.N.Y.2016).....	4
<i>In re Dry Max Pampers Litig.</i> , 724 F.3d 713 (6th Cir.2013).....	9
<i>In re Equifax Inc. Customer Data Security Breach Litig.</i> , 999 F.3d 1247 (11th Cir.2021).....	7
<i>Fikes Wholesale v. HSBC Bank USA</i> , 62 F.4th 704 (2d Cir.2023).....	1, 4, 9
<i>Golan v. Saada</i> , 596 U.S. 666 (2022).....	4
<i>Hadix v. Johnson</i> , 322 F.3d 895 (6th Cir.2003).....	9
<i>Johnson v. NPAS Solutions, LLC</i> , 975 F.3d 1244 (11th Cir.2020), <i>rehearing denied</i> , 43 F.4th 1138 (11th Cir.2022).....	2, 5, 7–9
<i>Johnson v. NPAS Solutions</i> , 43 F.4th 1138 (11th Cir.2022).....	2, 7–8

<i>Kemp v. United States</i> , 596 U.S. 528 (2022).....	4
<i>Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson</i> , 501 U.S. 350 (1991).....	4
<i>Liu v. SEC</i> , 591 U.S. 71 (2020).....	3
<i>Lora v. United States</i> , 599 U.S. 453 (2023).....	3, 10
<i>Manuel v. City of Joliet</i> , 580 U.S. 357 (2017).....	4
<i>Medical & Chiropractic Clinic, Inc. v. Oppenheim</i> , 981 F.3d 983 (11th Cir.2020).....	7
<i>Melito v. Experian Mktg. Sols., Inc.</i> , 923 F.3d 85 (2d Cir.2019).....	8
<i>Moses v. New York Times Co.</i> , 79 F.4th 235 (2d Cir.2023) ("Moses I").....	2
<i>National Veterans Legal Services Program v. United States</i> , 170 F.4th 1353 (Fed.Cir.2026), certiorari petition filed sub nom. <i>Isaacson v. National Veterans Legal Services Program</i> , No.26-302.....	2
<i>New York State Rifle & Pistol Ass’n v. Bruen</i> , 597 U.S. 1 (2022).....	3–4, 9
<i>Shane Group, Inc. v. Blue Cross Blue Shield</i> , 825 F.3d 299 (6th Cir.2016).....	9
<i>Trustees v. Greenough</i> , 105 U.S. 527 (1882).....	1–3, 5, 7, 10–11
<i>Tyson Foods, Inc. v. Bouaphakeo</i> , 577 U.S. 442 (2016).....	5

<i>United States v. Johnston</i> , 268 U.S. 220 (1925).....	4
--	---

STATUTES

Securities Exchange Act §10(b), 15 U.S.C. §78(j).....	10
--	----

RULES

Fed.R.App.P. 40(c).....	8
Fed.R.Civ.P. 23.....	1, 3, 10–11
SEC Rule 10b-5, 17 C.F.R. § 240.10b-5.....	10

SECONDARY AUTHORITIES

Rachel Brown, <i>et al.</i> , <i>Is Unpublished Unequal?</i> , 107 Cornell L.Rev. 1 (2021).....	4
--	---

REPLY BRIEF FOR PETITIONER

I. INTRODUCTION

This case presents an excellent vehicle for deciding whether the clearly stated and unqualified rule of *Trustees v. Greenough*, 105 U.S. 527, 537–38 (1882) (“*Greenough*”), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116, 122 (1885) (“*Pettus*”), prohibiting payments to compensate representative plaintiffs, may be superseded by the lower courts’ “practice and usage” under Federal Rule of Civil Procedure 23. *Fikes Wholesale v. HSBC Bank USA*, 62 F.4th 704, 721 (2d Cir.2023).

Respondent Moses acknowledges that the circuit conflict is “real” and that “[t]he only live question is the categorical one.” Moses BIO at 1, 6. Those concessions support granting review. The circuit courts disagree on whether this Court’s common-fund precedents barring compensation for representative plaintiffs’ personal service on behalf of a class have been superseded by lower courts’ practice under Rule 23. The judgment below awards such compensation, and the Court of Appeals has expressly and finally rejected Petitioner’s legal objection.

Far from being “interlocutory,” as Moses insists, the Court of Appeals has entered a final judgment sustaining Moses’ \$5,000 incentive award—citing its own earlier *published* opinion in the very same case. Whether the award was reasonable in amount cannot resolve whether the court had authority to make it. The Court of Appeals’ unpublished decision applying

settled circuit law provides a clear vehicle for reviewing that law. The Petition should be granted.¹

II. THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR RESOLVING AN IMPORTANT PRECEDENTIAL CONFLICT CONCERNING THE AUTHORITY OF THIS COURT’S PRECEDENTS

Respondents contend this case presents a poor vehicle for resolving undeniable conflict between the Court of Appeals’ holding in this case and the Eleventh Circuit’s well-reasoned conclusion that “Supreme Court precedent prohibits incentive awards.” *Johnson v. NPAS Solutions*, 975 F.3d 1244, 1255 (11th Cir.2020), *rehearing denied*, 43 F.4th 1138 (11th Cir.2022). But this case provides an excellent vehicle for resolving an intractable precedential conflict concerning the continuing authority of this Court’s common-fund precedents.

Moses’ assertions that the Court of Appeals’ decision is “interlocutory in effect,” and presents a poor vehicle given its “interlocutory posture,” Moses BIO at i, 9, make little sense—for the Court of Appeals has affirmed a final judgment of the District Court awarding Moses \$5,000 to reward her for filing and settling a class action that recovered less than three dollars per class member.

¹ Petitioner also has filed a petition for certiorari seeking review of the Federal Circuit’s recent decision sustaining incentive awards in *National Veterans Legal Services Program v. United States*, 170 F.4th 1353, 1364–68 (Fed.Cir.2026). That petition was docketed on September 8, 2026, as *Isaacson v. National Veterans Legal Services Program*, No.26-302. The United States is a respondent in that case.

The Court of Appeals’ 2023 ruling in this case, Pet.App.11a–53a, published as *Moses v. New York Times Co.*, 79 F.4th 235 (2d Cir.2023), was effectively interlocutory when it vacated Moses’ original \$5,000 incentive award along with the parties’ first attempted settlement, remanding the case for further proceedings that might—or might not—have produced an incentive award.

At that point the Court of Appeals’ effectively interlocutory holding that Rule 23 supersedes *Greenough* and *Pettus* would have presented a poor vehicle for this Court’s review, since there was no assurance that the parties would agree to, or that the District Court would approve, a further settlement and incentive award. As it happens, they did. On remand the parties entered and the District Court approved an improved class-action settlement, along with a new \$5,000 incentive award, this time entering a final judgment that the Court of Appeals has affirmed. Pet.App.1a–10a. There is nothing interlocutory about the Court of Appeals’ decision. The matter is ripe for this Court’s review.

Respondents together suggest the case remains a poor vehicle because the Court of Appeals final ruling is not itself published. Yet the Court of Appeals’ final judgment sustaining Moses’ renewed \$5,000 incentive award is based on its own prior published decision in this very case. See Pet.App.9a–10a. This Court has many times granted certiorari to review unpublished decisions resting upon published precedents presenting a conflict with decisions of this Court or with decisions of other circuits.²

² See, e.g., *Lora v. United States*, 599 U.S. 453, 456 & n.1 (2023); *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17–18

Moses insists this case is a poor vehicle nonetheless, because it presents simply a question of law, “divorced from any fact-bound dispute this Court could resolve.” Moses BIO at 2. This Court’s role, however, is to decide questions of law rather than to review factually intensive discretionary applications of law. As stated in *United States v. Johnston*, 268 U.S. 220, 227 (1925): “We do not grant a certiorari to review evidence and discuss specific facts.” That this Petition presents an uncomplicated question of law thus is a reason for granting review, not for denying it.

Moses nevertheless faults Isaacson for challenging service awards’ fundamental legality rather than arguing about whether her specific award meets some undefined standard of “reasonableness” on the facts of this case. How reasonableness should be determined Moses does not say. The Second Circuit, for its part, has “articulated no standard by which district courts can consider the grant of service awards.” *Fikes Wholesale v. HSBC Bank USA*, 62 F.4th 704, 721 (2d Cir.2023). As the Court of Appeals explained in *Fikes Wholesale*: “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

(2022); *Golan v. Saada*, 596 U.S. 666, 675–76 & n.6 (2022); *Kemp v. United States*, 596 U.S. 528, 532 & n.1 (2022); *Liu v. SEC*, 591 U.S. 71, 78 (2020); *Manuel v. City of Joliet*, 580 U.S. 357, 363–64 (2017); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 354 & n.1 (1991); see also Rachel Brown, *et al.*, *Is Unpublished Unequal?*, 107 Cornell L.Rev. 1, 81–83, 139–45 (2021)(cataloging cases in which this Court granted certiorari to review unpublished decisions between 2018 and 2021, and noting “many of the grants involve circuit splits”).

within the discretion of the Court.” *Id.* at 721–22 (appellate court’s brackets; 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 th[e] award is an abuse of discretion.” *Id.* at 723.

Isaacson accordingly chose to focus on a simple question of law—whether judicially created incentive awards are lawful in the first place. This Court has no reason to address potential standards of “reasonableness” governing incentive awards if, as the Eleventh Circuit soundly held in *Johnson v. NPAS Solutions*, incentive awards are unauthorized by law and barred by this Court’s precedents. Nor is there any apparent conflict among the circuits on the standard to be applied in awarding service awards. For, in truth, no circuit has established clear standards to constrain the district courts’ exercise of discretion in granting incentive awards.

Isaacson’s contention, rejected below, that the class definition improperly includes some class members who, expecting and desiring their newspaper subscriptions to renew automatically, got exactly what they wanted, presents no obstacle to reaching the question presented by this Petition. The case presents an Article III case or controversy whether or not the certified class includes some class members who were content with the automatic renewals of their *New York Times* subscriptions. Moses had standing to seek monetary relief on behalf of a class. As a class member bound by the resulting final judgment, Isaacson had standing to object to the settlement and incentive award. *See Devlin v. Scardelletti*, 536 U.S. 1,

14 (2002). No jurisdictional issues are present that could impair this Court’s ability to reach the question of whether the \$5,000 incentive-award payment to Moses—which came from common-fund proceeds that otherwise would have been distributed to the class—was improper.³

The New York Times argues that review should be denied so as not to delay the distribution of the \$2.275 settlement fund. The need for urgency is by no means apparent. Dividing the \$2.375 million settlement fund by the 876,606 class members yields a recovery of only \$2.71 per class member. Moses was richly rewarded for obtaining a paltry recovery. But neither class members nor the New York Times will be greatly inconvenienced by this Court’s review of an important recurring question that, as the Chamber of Commerce amicus brief points out, affects myriad cases.

The question presented is an extraordinarily important one, given plaintiffs’ lawyers extensive use of incentive awards both to recruit litigants to press claims they otherwise would not care to pursue, and to induce representative plaintiffs to settle on terms that may not be in the represented classes’ best interests.

³ Cf. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016) (deciding whether representative evidence can be used in class actions where the certified class likely included members who had suffered no injury).

III. THE ELEVENTH CIRCUIT IS UNLIKELY TO REVISIT ITS HOLDING THAT THIS COURT’S DECISIONS PROHIBIT INCENTIVE AWARDS

Moses contends the conflict among the circuits is “lopsided,” and that “the Eleventh Circuit’s position is unstable,” because “[f]our judges dissented from the denial of rehearing en banc, concluding that the panel had misread this Court’s precedents.”⁴ But the Eleventh Circuit has applied *Johnson v. NPAS Solutions* repeatedly to invalidate incentive awards granted before the decision came down.⁵ And the resulting inter-circuit conflict is highly unlikely to be resolved by en banc proceedings in the Eleventh Circuit.

Now-retired Judge Beverly B. Martin’s lengthy dissent from the original panel opinion, and Judge Jill Pryor’s dissent from denial of en banc rehearing nearly two years later—joined by Judges Wilson, Jordan and Rosenbaum—together show that the Eleventh Circuit has carefully considered the issue and rejected en banc review to align its decision with other circuits. *See Johnson v. NPAS Solutions*, 975 F.3d at 1264–69 (Martin, Cir.J., dissenting); *Johnson v. NPAS Solutions*, 43 F.4th 1138, 1139–53 (11th Cir.2022)(Jill Pryor, Cir.J., joined by Wilson, Jordan,

⁴ Moses BIO at 5 (citing *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.).

⁵ *See, e.g., In re Equifax Inc. Customer Data Security Breach Litig.*, 999 F.3d 1247, 1257 (11th Cir.2021)(“such awards are prohibited”); *Medical & Chiropractic Clinic, Inc. v. Oppenheim*, 981 F.3d 983, 994 n.4 (11th Cir.2020)(“service awards are foreclosed by Supreme Court precedent”).

and Rosenbaum, Cir.JJ., dissenting from denial of en banc rehearing).

Judge Pryor’s dissent from denial of en banc rehearing itself noted that “[t]he Second Circuit expressly considered and rejected the argument that *Greenough* and *Pettus* forbid incentive awards.” 43 F.4th at 1150 (citing *Melito v. Experian Marketing Solutions*, 923 F.3d 85, 96 (2d Cir.2019)). And in the nearly two years “since the majority opinion in this case issued,” she noted, “every court outside this circuit to have considered it has declined to follow it.” *Id.* at 1139 &n.2. Yet only four of the Eleventh Circuit’s twelve active judges thought en banc reconsideration a good idea.

Proceedings to reconsider the 2020 holding of *Johnson v. NPAS Solutions* would require a majority of the Eleventh Circuit’s twelve active judges to vote for en banc proceedings. *See* Fed.R.App.P. 40(c). That only four judges dissented from the 2022 denial of en banc rehearing leaves little prospect that a majority of the court’s active judges could be mustered to revisit the issue were they presented an opportunity to do so. Nor are they likely to have such an opportunity.

Any possibility that the Eleventh Circuit will revisit the issue is foreclosed by the fact that district judges and litigants in the Eleventh Circuit know they are bound by the holding in *Johnson v. NPAS Solutions*. That means that class-action plaintiffs and their counsel will seek to file in other circuits whenever they can. Any who end up settling cases before Eleventh Circuit district courts are unlikely to ask for incentive awards that the Eleventh Circuit holds are illegal. They know that the Eleventh Circuit’s district judges are loath to act in clear contravention of Eleventh Circuit precedent. And they know that an appeal to

the Eleventh Circuit that is staked on persuading the court to convene en banc is an extraordinary longshot. All of this makes it quite unlikely the Eleventh Circuit will have an opportunity to reconsider its decision in *Johnson v. NPAS Solutions*.

There is little reason, moreover, to think that a majority of the Eleventh Circuit’s active judges would conclude that *Johnson v. NPAS Solutions* is wrong. Although the very real 5-to-1 circuit split appears somewhat lopsided, the Second Circuit panel in *Fikes Wholesale* believed *Johnson v. NPAS Solutions* is correct, and that “[s]ervice awards are likely impermissible under Supreme Court precedent.” *Fikes Wholesale v. HSBC Bank USA*, 62 F.4th 704, 721 (2d Cir.2023). The *Fikes Wholesale* panel opinion’s author added, in a separate opinion, that “we now find ourselves on the wrong side of a circuit split.” *Fikes Wholesale*, 62 F.4th at 729 (2d Cir.2023)(Jacobs, Cir.J., concurring). The Sixth Circuit, moreover, has repeatedly “expressed a ‘sensibl[e] fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain.” *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir.2013)(quoting *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir.2003)); accord *Shane Group, Inc. v. Blue Cross Blue Shield*, 825 F.3d 299, 310-11 (6th Cir.2016).

That so many circuits are flouting this Court’s decisions in *Greenough* and *Pettus* actually intensifies the need for review. No deference is due to circuit courts when they err en masse by misunderstanding or failing to honor this Court’s precedents. In *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 15–17 (2022), after granting certiorari to review an unpublished Second Circuit decision, this Court noted

a 5-to-1 Circuit split, and then rejected the decisions of the lopsided majority that had sustained “proper cause” gun regulations. In *Lora v. United States*, 599 U.S. 453, 455–56 & n.1 (2023), this Court granted certiorari to review an unpublished Second Circuit decision to resolve a lopsided 4-to-1 circuit split—and unanimously reached the same conclusion that the Eleventh Circuit had reached as a lone outlier.

In *Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994), moreover, this Court rejected the circuit courts’ nearly unanimous conclusion that the private right of action under Securities Exchange Act §10(b) and SEC Rule 10b-5 encompassed liability of aiders and abettors. By 1994, “all 11 Courts of Appeals to have considered the question ha[d] recognized a private cause of action against aiders and abettors under §10(b) and Rule 10b-5.”⁶ “In hundreds of judicial and administrative proceedings in every Circuit in the federal system, the courts and the SEC ha[d] concluded that aiders and abettors are subject to liability under §10(b) and Rule 10b-5.” *Central Bank*, 511 U.S. at 192 (1994)(Stevens, J., dissenting). The lower courts had to be corrected despite their near unanimity.

They need to be corrected again, for they have misread Rule 23 as authority for abrogating the holdings of *Greenough* and *Pettus*. This Court’s intervention is all the more urgent given the fact that a bit of dictum from a footnote in *China Agritech v. Resh*, 584 U.S. 731, 747 n.7 (2018), is being misinterpreted by the circuit courts to put “*Greenough* and *Pettus* in the rear view.” Pet.App.48a–49a (citing

⁶ *Central Bank*, 511 U.S. at 192 & n.1 (Stevens, J., dissenting)(collecting citations).

China Agritech, Inc. v. Resh, 584 U.S. 732, 747 n.7 (2018)). This Court should address the question directly.

CONCLUSION

The rule of *Greenough* and *Pettus* is precisely stated and unqualified: a representative plaintiff who recovers a common fund may be reimbursed for his or her “reasonable costs, counsel fees, charges, and expenses,” but an additional allowance “for the personal services and private expenses of the complainant” is “decidedly objectionable,” has “neither reason nor authority for its support,” and “was illegally made.” *Greenough*, 105 U.S. at 537–38; *accord Pettus*, 113 U.S. at 122. Yet the circuits are in conflict on whether this Court’s foundational common-fund class-action precedents have been superseded by lower courts’ practice under Rule 23.

The question presented implicates this Court’s sole prerogative to reconsider or overrule its own decisions. It also implicates the integrity of class-action litigation, given incentive awards’ propensity both to encourage excessive litigation and to undermine class representatives’ ability to adequately represent absent class members’ interests.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERIC ALAN ISAACSON
Counsel of Record
LAW OFFICE OF
ERIC ALAN ISAACSON
6580 Avenida Mirola

12

La Jolla, CA 92037-6231
Telephone: (858) 263-9581
ericalanisaacson@icloud.com

October 2, 2026