No. 18-12344

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLES T. JOHNSON,
on behalf of himself and others similarly situated,
Plaintiff–Appellee

JENNA DICKENSON,
Interested Party–Appellant,

v.

NPAS SOLUTIONS, LLC,
Defendant–Appellee

On Appeal from the United States District Court
for the Southern District of Florida

AMICUS BRIEF OF IMPACT FUND AND 14 NON-PROFIT LEGAL AND ADVOCACY ORGANIZATIONS IN SUPPORT OF PLAINTIFF–APPELLEE'S PETITION FOR REHEARING EN BANC

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(Additional amici curiae listed on next page)

ADDITIONAL AMICI CURIAE

- American Civil Liberties Union
- Bet Tzedek
- Civil Rights Enforcement and Education Center
- Disability Rights Advocates
- Equal Justice Center
- Equality Florida Institute, Inc.
- Florida National Organization for Women
- Justice Catalyst Law
- LatinoJustice PRLDEF
- Legal Aid at Work
- National Women's Law Center
- Public Citizen
- Public Justice Center
- Washington Lawyers' Committee for Civil Rights and Urban Affairs

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3 and 29-2, the Impact Fund, counsel for proposed Amicus Curiae, hereby certifies that, upon information and belief, the following persons and entities, in addition to those set forth in Plaintiff-Appellee Charles T. Johnson's Petition for Rehearing En Banc, have or may have an interest in the outcome of this appeal:

1. American Civil Liberties Union – Amicus Curiae
2. Bet Tzedek – Amicus Curiae
3. Civil Rights Education and Enforcement Center – Amicus Curiae
4. Davidson, James L. – Counsel for Plaintiff-Appellee
5. Davis, John W. – Counsel for Appellant Jenna Dickenson
6. Debevoise & Plimpton LLP – Counsel for Defendant-Appellee
7. Dickenson, Jenna – Appellant
8. Disability Rights Advocates – Amicus Curiae
9. Ehren, Michael L. – Counsel for Defendant-Appellee
10. Equality Florida Institute, Inc. – Amicus Curiae
11. Equal Justice Center – Amicus Curiae
12. Florida National Organization for Women – Amicus Curiae
13. Goldberg, Martin B. – Counsel for Defendant-Appellee

14. Greenwald Davidson Radbil PLLC – Counsel for Plaintiff-Appellee
15. Greenwald, Michael L. – Counsel for Plaintiff-Appellee
16. Heinz, Noah S. – Counsel for Plaintiff-Appellee
17. Hopkins, Honorable James M. – Magistrate Judge
18. Impact Fund – Amicus Curiae
19. Isaacson, Eric Alan – Counsel for Appellant Jenna Dickenson
20. Issacharoff, Samuel – Counsel for Plaintiff-Appellee
21. Johnson, Charles T. – Plaintiff-Appellee
22. Johnson, Jesse S. – Counsel for Plaintiff-Appellee
23. Justice Catalyst Law – Amicus Curiae
24. Keller, Ashley C. – Counsel for Plaintiff-Appellee
25. Keller Lenkner LLC – Counsel for Plaintiff-Appellee
26. LatinoJustice PRLDEF – Amicus Curiae
27. Lash, Alan David – Counsel for Defendant-Appellee
28. Lash & Goldberg LLP – Counsel for Defendant-Appellee
29. Law Office of John W. Davis – Counsel for Appellant Jenna Dickenson
30. Legal Aid at Work – Amicus Curiae
31. Lenkner, Travis D. – Counsel for Plaintiff-Appellee
32. Monaghan, Maura K. – Counsel for Defendant-Appellee
33. National Women's Law Center – Amicus Curiae

34. Nako, Lindsay (Impact Fund) – Counsel of Record for Amicus Curiae
35. Nahmias, David S. (Impact Fund) – Counsel for Amicus Curiae
36. NPAS Solutions LLC – Defendant-Appellee
37. Nutley, C. Benjamin – Counsel for Appellant Jenna Dickenson
38. Postman, Warren D. – Counsel for Plaintiff-Appellee
39. Public Citizen – Amicus Curiae
40. Public Justice Center – Amicus Curiae
41. Radbil, Aaron D. – Counsel for Plaintiff-Appellee
42. Rosenberg, Honorable Robin L. – District Court Judge
43. Stahl, Jacob W. – Counsel for Defendant-Appellee
44. Van Wey, Lorelei Jane – Counsel for Defendant-Appellee
45. Washington Lawyers' Committee for Civil Rights and Urban Affairs – Amicus Curiae

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure Rules 26.1 and 29(a)(4)(A) and Eleventh Circuit Rules 26.1-1 and 29.2, amici curiae listed below represent that they do not have parent corporations or publicly held companies holding 10% or of any stock.

- Impact Fund

- American Civil Liberties Union
- Bet Tzedek
- Civil Rights Enforcement and Education Center
- Disability Rights Advocates
- Equal Justice Center
- Equality Florida Institute, Inc.
- Florida National Organization for Women
- Justice Catalyst Law
- LatinoJustice PRLDEF
- Legal Aid at Work
- National Women's Law Center
- Public Citizen
- Public Justice Center
- Washington Lawyers' Committee for Civil Rights and Urban Affairs

Date: October 29, 2020

By: /s/ Lindsay Nako
Lindsay Nako
IMPACT FUND
Counsel for Proposed Amici Curiae

CIRCUIT RULE 35-5(C) CERTIFICATION

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court: *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983); *Carter v. Forjas Taurus, S.A.*, 701 F. App'x 759 (11th Cir. 2017); *Poertner v. Gillette Co.*, 618 F. App'x 624 (11th Cir. 2015); *Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429 (11th Cir. 2012).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: Whether the common practice of awarding incentive payments to named plaintiffs to compensate them for their efforts protecting absent class members' interests is per se unlawful.

Date: October 29, 2020

By: /s/ Lindsay Nako
Lindsay Nako
IMPACT FUND
Counsel for Proposed Amici Curiae

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INTERESTS OF AMICI[1]

Amici curiae are non-profit legal and advocacy organizations that use or participate in class actions to enforce the legal rights of vulnerable communities. Amici's statements of interests are provided in the accompanying motion for leave to file this brief.

STATEMENT OF THE ISSUE WARRANTING EN BANC CONSIDERATION

Class action settlement agreements routinely contain a negotiated term providing, subject to court approval under Rule 23, for service awards to named plaintiffs to compensate them for their efforts protecting absent class members' interests. Are such payments *per se* unlawful?

SUMMARY OF ARGUMENT

The panel rests its opinion on the idiosyncratic view that service awards are akin to a "prize to be won." *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1258 (11th Cir. 2020). The court's characterization, however, contrasts with the actual evidentiary records from federal class action lawsuits, which document the real-world burdens and risks borne by class representatives. This rich factual resource, critical to this petition, exists because district courts typically require named plaintiffs to document, through sworn testimony, the work they have performed in

[1] No one other than amici and their counsel authored this brief in whole or in part or contributed money to fund its preparation and submission.

support of their cases. Amici write separately to provide the Court a snapshot of this evidence, which vividly demonstrates the critical role that class representatives play in class actions, the arduous work they sometimes undertake, and the financial and reputational risk they bear for the broader public interest.

By wrongly portraying service payments as "bounty," *id.*, the panel opinion denigrates the essential role that Federal Rule of Civil Procedure 23 confers on class representatives. Its decision will cast a chilling effect on class actions by requiring named plaintiffs to take on responsibilities and financial risks that would outweigh any potential benefits of representing the class. As a result, plaintiffs will be less willing to step forward to serve as class representatives. The decision will also distinguish this Circuit as the only Court of Appeal to categorically bar service awards. *See* Pl.-Appellee's Pet. For Reh'g En Banc at 8-11. Because of the exceptional importance of the matter, en banc rehearing should be granted.

ARGUMENT

I. Service Awards Compensate Named Plaintiffs for Their Unique Contributions to Class Action Litigation and for the Greater Public Benefit of Their Work.

Service awards are "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015).

Such awards are "fairly typical," *id.*, and "routinely approve[d]," *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006). Contrary to the panel's description of service awards as a "prize" or "bounty," *Johnson*, 975 F.3d at 1258, courts carefully review award requests and supporting evidence to ensure that awards are "proportional" to the work, *Chieftain Royalty Co. v. Enervest Energy Inst'l Fund XII-A, L.P.*, 888 F.3d 455, 468 (10th Cir. 2017). This inquiry generally disfavors awards that compensate plaintiffs for simply "becoming 'figureheads' and pursuing careers as class representatives." *Mahoney v. TT of Pine Ridge, Inc.*, No. 17-80029-CIV, 2017 WL 9472860, at *13 (S.D. Fla. Nov. 20, 2017) (quoting *Allapattah*, 454 F. Supp. 2d at 1220).

Class representatives play a unique role and assume a fiduciary duty to the class and its absent members. *See London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1254 (11th Cir. 2003); *see also* Fed. R. Civ. P. 23(a)(4). This duty obligates them to complete weighty tasks for the benefit of others while they incur substantial risks. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *Morefield v. NoteWorld, LLC*, No. 1:10-CV-00117, 2012 WL 1355573, at *4 (S.D. Ga. Apr. 18, 2012) ("Service awards compensate class representatives for services provided and risks incurred during the class action litigation on behalf of other class members."). Service awards properly reflect the "existence of special circumstances," such as the "personal risk," "time and effort expended," "factual

expertise," and "any other burdens sustained by th[e] plaintiff in lending himself or herself to the prosecution of the claim, and, of course, the ultimate recovery." *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 200 (S.D.N.Y. 1997).

Also, our nation's civil rights laws have long relied on private enforcement through class actions to challenge unlawful and discriminatory behavior. *See, e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 (1971) ("Congress provided, in Title VII of the Civil Rights Act of 1964, for class actions for enforcement of provisions of the Act[.]"). The authors of modern Rule 23 largely envisioned it to vindicate the rights of groups that otherwise lacked the power to do so on an individual basis. *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997). Service awards recognize the role and risks that class representatives assume on behalf of these groups and their "salutary purpose" as private attorneys general. *Roberts*, 979 F. Supp. at 201 n.25; *see also, e.g.*, *Sawyer v. Intermex Wire Transfer, LLC*, No. 19-CV-22212, 2020 WL 5259094, at *2 (S.D. Fla. Sept. 3, 2020) (approving service award as "a matter of policy" because "[p]rivate class action suits are a primary weapon in the enforcement of laws designed for the protection of the public"); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1089-90 (S.D. Tex. 2012) (agreeing with counsel's statement that incentive awards may be warranted because named plaintiffs "advanced society's interest in the truth of the matter in solving problems").

II. Named Plaintiffs Play a Critical Role in the Litigation Process.

The contributions of class representatives are critical to effective litigation of complex cases. Class representatives routinely engage in all aspects of the litigation, including:

- coordinating decision-making among class members;
- working closely with lawyers and other professionals in investigating and developing the case and claims;
- reviewing the complaint and other major filings;
- responding to interrogatories and reviewing documents; and
- preparing for and participating in depositions and mediations, including travel.

See, e.g., *Cabot E. Broward 2 LLC v. Cabot*, No. 16-61218-CIV, 2018 WL 5905415, at *10-11 (S.D. Fla. Nov. 9, 2018); *Carter v. Forjas Taurus S.A.*, No. 13-CV-24583-PAS, 2016 WL 3982489, at *15 (S.D. Fla. Jul. 22, 2016), *aff'd*, 701 F. App'x 759 (11th Cir. 2017). Class representatives can be a "principal source of information about the case facts," a "principal means of obtaining information" about class members, and one of the "main sounding-boards for evaluating potential remedies." Decl. of Timothy B. Garrigan ¶ 6, *McClain v. Lufkin Indus., Inc.*, No. 9:97-CV-063 (E.D. Tex. Oct. 2, 2009), ECF No. 674-3; *see McClain*, No. CIV.A. 9:97CV63, 2010 WL 455351, at *2 (E.D. Tex. Jan. 15, 2010), *aff'd*, 649 F.3d 374 (5th Cir. 2011) (approving "Participation Awards").

The responsibilities borne by class representatives can be arduous and time-consuming. In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, a

landmark class of Black financial advisors alleged that Merrill Lynch's teaming and account distribution policies discriminated based on race. No. 05-C-6583, 2012 WL 5278555, at *1 (N.D. Ill. July 12, 2012) (certifying class). Lead class representative George McReynolds declared that "[d]uring the past nine years, hardly a day passed when I did not spend time on this case." Decl. of George McReynolds ¶ 2, *McReynolds*, No. 05-C-6583 (N.D. Ill. Nov. 8, 2013), ECF No. 595-1; *see* Min. Order of 12/6/2013, *McReynolds*, No. 1:05-cv-06583 (N.D. Ill. Dec. 6, 2013), ECF No. 615 (approving service award). Mr. McReynolds testified, "As the lead plaintiff and Steering Committee member, I worked closely with Class Counsel to explain my experiences at Merrill Lynch and to develop the underlying evidence necessary to develop and prosecute the case." *Id.* ¶ 21. This included attending meetings and conference calls with counsel, the class member Steering Committee, and experts; reviewing documents, including personally drafting many responses to interrogatories; preparing for and attending depositions and seven days of mediation; and repeatedly traveling out of state. *Id.* ¶¶ 21-37.

Similarly, in a class action alleging price-fixing by Exxon, one class representative was required to participate in multiple depositions and mediations in which defense counsel threatened that the plaintiffs would be "driven into personal bankruptcy." Decl. of Robert Lewis ¶¶ 32-36, 49-52, *Allapattah*, No. 91-0986-CIV-GOLD (S.D. Fla. Aug. 2, 2005), ECF No. 2121. The court approved service

awards for Mr. Lewis and other class representatives "with much admiration" for their "unusual courage and commitment." *Allapattah*, 454 F. Supp. 2d at 1220 (observing that class representatives "brought Exxon's breach to the attention of the lawyers . . . were involved in selecting and replacing trial counsel, communicating with the Class, gathering information from the Class, and participating in decision-making," and took "risk . . . to see the case through to a successful conclusion").

Courts have specifically recognized the importance of class representatives' involvement in settlement proceedings, including negotiation of strong systemic reforms. *See, e.g.*, *Fla. Educ. Ass'n v. Dep't of Educ.*, 447 F. Supp. 3d 1269, 1278-79 (N.D. Fla. 2020) (approving service award in part for "participating in mediation and settlement discussions"); *Hosier v. Mattress Firm, Inc.*, No. 3:10-CV-294-J-32JRK, 2012 WL 2813960, at *5 (M.D. Fla. June 8, 2012) (approving award for "participating in the investigation, discovery, and mediation which make a settlement possible"); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (approving award for Class Representatives who "directly participated in the mediation process" and "fulfilled . . . the class's interest in effecting fundamental change"). Lance Slaughter, named plaintiff in an employment discrimination class action, received a service award in part for attending numerous meetings with experts and the parties "in an attempt to resolve difficult issues regarding policy

reforms and injunctive relief." Slaughter Decl. ¶¶ 8, 13, *Slaughter v. Wells Fargo Advisors, LLC*, No. 13-cv-06368 (N.D. Ill. April 28, 2017), ECF No. 107-4; *see Slaughter*, No. 13-CV-06368, 2017 WL 3128802, at *3 (N.D. Ill. May 4, 2017) (approving awards). In a recent disability access class action, plaintiff Artie Lashbrook, who uses a wheelchair for mobility, received a service award in part for identifying inaccessible city curb ramps to be remedied in a consent decree. Decl. of Artie Lashbrook ¶¶ 2, 18-21, *Lashbrook v. City of San Jose*, No. 5:20-cv-01236 (N.D. Cal. April 21, 2020), ECF No. 10-3; *see* Order Granting Final Approval of Class Action Settlement ¶ 15, *Lashbrook*, No. 20-cv-01236-NC (N.D. Cal. Sept. 2, 2020), ECF No. 25 (approving service award).

These are just a few examples of the significant responsibilities class representatives undertake to defend their rights and those of their fellow class members through often lengthy and hard-fought litigation.

III. Class Representatives May Experience Reputational Risk and Other Harms.

Because of their heightened exposure, named plaintiffs are frequently subjected to threatened or actual retaliation and professional isolation, which can take a significant toll on them and their families. Multiple courts have approved awards to class representatives who risked retaliation for their involvement in class

actions. For example, in *Cook v. Niedert*, the Seventh Circuit affirmed a service award not only for the class representative's "hundreds of hours" of work in an ERISA lawsuit, but "[m]ost significantly" for the risk of workplace retaliation he "reasonably feared." 142 F.3d at 1016. Likewise, the *Roberts* court approved service awards in part due to retaliation against class representatives by both supervisors and employees "ranging from hostility to threats to assignment changes." 979 F. Supp. at 202. The court noted that "most, if not all of the plaintiffs were aware from the outset that [their employer] had previously retaliated against employees charging discrimination," including firing an African-American attorney for trying to initiate a race discrimination class action. *Id.*

Service awards can serve to acknowledge the risk to long-term career prospects and professional status that many class representatives take because of their high-profile role in class litigation. *See, e.g.*, *Fla. Educ. Ass'n*, 447 F. Supp. 3d at 1278-79 (approving service award to a class of Black and Latino teachers who challenged an allegedly discriminatory scholarship program and faced "reputational risk"). In *Velez v. Novartis Pharmaceuticals Corp.*, the court approved service awards to named plaintiffs and other class members who testified at a highly publicized trial and were "publicly identified as parties who sued their employer for gender-based discrimination in the pharmaceutical industry, which present[ed] a risk for their future careers." No. 04 CIV 09194(CM), 2010 WL

4877852, at *26 (S.D.N.Y. Nov. 30, 2010). The class representatives and testifying witnesses, whose "pictures and testimony made their way into mainstream media," were exposed to "great risk and emotional upheaval, overcoming fears regarding possible scorn of friends and colleagues and, in some cases, the displeasure of their own family members." Joint Decl. of David W. Sanford & Katherine M. Kimpel ¶¶ 38, 40, *Velez*, No. 04 CIV 09194(CM) (S.D.N.Y. Nov. 15, 2010), ECF No. 309. Indeed, some of them struggled to find subsequent employment. *Id.* ¶ 40.

Other courts have recognized the danger that the significant press coverage of high-profile litigation can pose to class representatives. The court in *Seaman v. Duke University* approved a service award for the named plaintiff because she "put her professional career on the line" and endured significant repercussions representing a class of medical employees in an antitrust dispute. No. 1:15-CV-462, 2019 WL 4674758, at *7 (M.D.N.C. Sept. 25, 2019) (describing "significant publicity about Dr. Seaman's role and coverage in the local press"). She testified that her name is "forever publicly associated with the case, such that if a future prospective employer searches for [her] on the internet, one of the first hits they will see is a page to do with the lawsuit." Decl. of Danielle Seaman ¶ 10, *Seaman*, No. 1:15-CV-462 (M.D.N.C. May 20, 2019), ECF No. 358. *See also, e.g.*, *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at

*17 (N.D. Cal. Sept. 2, 2015) (stating class representative's "objection received considerable media coverage, with his picture appearing in the *New York Times*. As a result, [he] will likely have an even more difficult time becoming employed in the tech industry again.") (citation omitted).

Class representatives may also face emotional, physical, and financial harm. Plaintiff McReynolds described the personal toll of his participation in his discrimination case against Merrill Lynch over nine years. McReynolds Decl. ¶ 32, *McReynolds*, No. 05-C-6583 (N.D. Ill. Nov. 8, 2013), ECF No. 595-1. His extensive participation in the litigation "required time away from servicing [his] clients and developing new business[, which] had a direct impact on [his] family's finances." *Id.* ¶ 36. His deposition left him "feeling like a failure as a Financial Advisor" and "took a real toll on [his] physical well-being." *Id.* ¶ 32. Similarly, one class representative in the *Allapattah* class action described that he "paid a horrible personal price for pursuing this litigation," "suffered from severe depression," and confronted a "financial struggle" from which he "could not recover." Decl. of Alberto Gonzalez ¶¶ 46-48, *Allapattah*, No. 91-0986) (S.D. Fla. Aug. 2, 2005), ECF No. 2121.

Class representatives provide an invaluable service to hundreds or thousands of absent class members and bear a significant burden in doing so. Courts review and approve requests for service awards to recognize their contributions.

Eliminating service awards will leave critical work uncompensated, which may ultimately leave foundational rights unenforced.

CONCLUSION

For the foregoing reasons, Amici urge the Court to grant rehearing en banc.

Dated: October 29, 2020

Respectfully submitted,

By: /s/ Lindsay Nako

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel for amici curiae, certifies that this brief complies with the word of limit of Fed. R. App. P. 29(b)(4) and 11th Cir. R. 29-3 and contains 2,570 words according to the word processing program used to prepare it, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: October 29, 2020

By: /s/ Lindsay Nako

Lindsay Nako
Counsel for Proposed Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2020 I electronically filed the foregoing **AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING EN BANC** with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify that the following participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that on October 29, 2020 I caused the required number of bound copies of the foregoing motion to be filed via first-class mail with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit.

I declare under penalty of perjury, under the laws of the United States and the State of California, that the foregoing is true and correct.

Executed on October 29, 2020 at Berkeley, California.

/s/ David S. Nahmias
David S. Nahmias
IMPACT FUND

RECORD NO. 18-12344

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLES T. JOHNSON,
on behalf of himself and others similarly situated,
Plaintiff–Appellee

JENNA DICKENSON,
Interested Party–Appellant,

v.

NPAS SOLUTIONS, LLC,
Defendant–Appellee

On Appeal from the United States District Court
for the Southern District of Florida

BRIEF OF MAIN STREET ALLIANCE AS AMICUS CURIAE IN SUPPORT PLAINTIFF–APPELLEE'S PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Federal Rule of Appellate Procedures 26.1 and Eleventh Circuit Rule 26.1-1, counsel for Amicus Curiae hereby certifies that the following is a complete list of all trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

- Buchanan, Martin N. – Counsel for Amicus Curiae
- Business Education Fund – Amicus Curiae
- Davidson, James L. – Counsel for Plaintiff-Appellee
- Davis, John W. – Counsel for Appellant Jenna Dickenson
- Debevoise & Plimpton LLP – Counsel for Defendant-Appellee
- Dickenson, Jenna – Appellant
- Ehren, Michael L. – Counsel for Defendant-Appellee
- Goldberg, Martin B. – Counsel for Defendant-Appellee
- Greenwald Davidson Radbil PLLC – Counsel for Plaintiff-Appellee
- Greenwald, Michael L. – Counsel for Plaintiff-Appellee
- Heinz, Noah S. – Counsel for Plaintiff-Appellee

- Hopkins, Honorable James M. – Magistrate Judge
- Impact Fund – Amicus Curiae
- Isaacson, Eric Alan – Counsel for Appellant Jenna Dickenson
- Issacharoff, Samuel – Counsel for Plaintiff-Appellee
- Johnson, Charles T. – Plaintiff-Appellee
- Johnson, Jesse S. – Counsel for Plaintiff-Appellee
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- Lash, Alan David – Counsel for Defendant-Appellee
- Lash & Goldberg LLP – Counsel for Defendant-Appellee
- Law Office of John W. Davis – Counsel for Appellant Jenna Dickenson
- Law Office of Martin N. Buchanan, APC – Counsel for *Amicus Curiae*
- Lenkner, Travis D. – Counsel for Plaintiff-Appellee
- Main Street Alliance – Amicus Curiae
- Monaghan, Maura K. – Counsel for Defendant-Appellee
- NPAS Solutions, LLC – Defendant-Appellee
- Nako, Lindsay – Counsel for Amicus Curiae
- Nahmias, David S. – Counsel for Amicus Curiae
- Noble, Ellen– Counsel for Amicus Curiae

- Nutley, C. Benjamin – Counsel for Appellant Jenna Dickenson
- Postman, Warren D. – Counsel for Plaintiff-Appellee
- Public Citizen – Amicus Curiae
- Public Justice Center – Amicus Curiae
- Public Justice, P.C. – Amicus Curiae
- Radbil, Aaron D. – Counsel for Plaintiff-Appellee
- Rosenberg, Honorable Robin L. – District Court Judge
- Rubenstein, William B. – Amicus Curiae
- Shiel, Cecily – Counsel for Amicus Curiae
- Stahl, Jacob W. – Counsel for Defendant-Appellee
- Tousley Brain Stephens, PLLC – Counsel for Amicus Curiae
- Van Wey, Lorelei Jane – Counsel for Defendant-Appellee
- Villano, Emily– Counsel for Amicus Curiae

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae states that it has no parent corporation and that no publicly held corporation holds 10% or more of its stock.

Dated: October 29, 2020

s/ Cecily C. Shiel
Cecily C. Shiel

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Main Street Alliance

RULE 35-5(C) STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance: Whether the common practice of granting service awards to named plaintiffs to compensate them for their efforts protecting absent class members' interests is per se unlawful?

Dated: October 29, 2020

Respectfully submitted,

s/ Cecily C. Shiel
Cecily C. Shiel

Counsel for Amicus Curiae
Main Street Alliance

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STATEMENT OF INTEREST[1]

Main Street Alliance ("Main Street") is a national network of state-based small-business coalitions that provides small business owners with a platform to express views on issues affecting their businesses and local economies. Its work encompasses a broad range of public policy issues that impact the small business community. Main Street has affiliates in thirteen states, and its members include approximately 30,000 small businesses across the country.

Amicus submits this brief out of concern that the panel's decision to prohibit service awards in class actions will have a broad impact on the availability of class actions for small businesses. Class actions are a crucial tool for small businesses, providing a mechanism for them to challenge unfair and anticompetitive conduct. In class actions, service awards exist to compensate class representatives for their service and to incentivize them to perform this role. The question presented in this case is of exceptional importance to Main Street, as it has the potential to impact vital class action procedures for small businesses.

Pursuant to Federal Rule of Appellate Procedure 29(b)(2), this brief is accompanied by a motion for leave to file.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and no person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE ISSUE

Whether the common practice of granting service awards to named plaintiffs to compensate them for their efforts protecting absent class members' interests is per se unlawful?

SUMMARY OF ARGUMENT

Small businesses are the lifeblood of the nation's economy, employing tens of millions of Americans and making outsized contributions to innovation and local economies. Yet small businesses frequently lack the financial means to pursue litigation on an individual basis. Accordingly, Rule 23 provides small businesses with an essential tool to protect themselves from fraud and anticompetitive conduct by larger corporations.

Class actions can exist only when a qualified representative is willing to step forward to litigate for the class. With limited resources and employees, many small businesses may be loath to undertake the added burdens and risks of litigation on behalf of a class, particularly when it comes at the expense of time and resources that could be spent running their businesses.

While the immediate case concerns a service award granted to an individual, the majority's decision to enact a categorical ban on service awards is of vital concern to small businesses. Service awards incentivize small businesses to step forward and bring class cases, and they compensate those businesses when their

efforts provide a meaningful benefit to a class. Eliminating this common practice not only runs counter to precedent, but would disincentivize and undermine the ability of small businesses to utilize Rule 23. Given that the issue of whether service awards are per se unlawful is of exceptional importance to small businesses serving as class representatives, Amicus respectfully asks this Court to grant rehearing en banc.

ARGUMENT

I. SMALL BUSINESSES ARE CRITICAL TO THE NATION'S ECONOMY.

Small businesses[2] are a central pillar of our nation's economy, accounting for 44 percent of the United States economy. Kathryn Kobe & Richard Schwinn, *Small Business GDP 1998–2014*, U.S. Small Bus. Admin. 4 (Dec. 2018), https://cdn.advocacy.sba.gov/wp-content/uploads/2018/12/21060437/Small-Business-GDP-1998-2014.pdf. They employ nearly half of the private workforce (over 59 million people). U.S. Small. Bus. Admin., *2019 Small Business Profile* 1 (2019), https://cdn.advocacy.sba.gov/wp-content/uploads/2019/04/23142719/2019-Small-Business-Profiles-US.pdf. Almost 90 percent of employer businesses have

[2] The U.S. Small Business Administration Office of Advocacy defines a small business as "an independent business having fewer than 500 employees." *See* U.S. Small Bus. Admin., *Frequently Asked Questions* 1 (Oct. 2020), https://cdn.advocacy.sba.gov/wp-content/uploads/2020/10/22094435/Small-Business-FAQ-2020.pdf [hereinafter Small Business FAQs].

just 20 or fewer employees. *Facts & Data on Small Business and Entrepreneurship*, Small Bus. & Entrepreneurship Council, https://sbecouncil.org/about-us/facts-and-data/ (last visited Oct. 26, 2020).

Small businesses contribute significantly to net job growth, accounting for over 65 percent of net new job creation since 2000. Small Business FAQs at 1. They also drive innovation, employing over 40 percent of high-tech workers and producing more patents per employee than larger firms. *See* Karen Mills & Brayden McCarthy, *The State of Small Business Lending: Credit Access During the Recovery and How Technology May Change the Game* 10 (Harvard Bus. Sch. Working Paper, No. 15-004, July 22, 2014), http://www.hbs.edu/faculty/Publication%20Files/15-004_09b1bf8b-eb2a-4e63-9c4e-0374f770856f.pdf.

Small businesses also invest in local communities. They are more likely, for example, to buy goods and services locally, hire locally, and pay taxes to local governments, creating a "virtuous cycle of local spending" benefitting communities with more jobs and investments in infrastructure and education. Am. Booksellers Ass'n & Civic Econs., *Indie Impact Study Series: Las Vegas, New Mexico*, Las Vegas First Indep. Bus. All. (Summer 2012), http://www.lvfiba.org/Las_Vegas_Client_120717.pdf.

II. CLASS ACTIONS BENEFIT SMALL BUSINESSES.

A. Class actions are a critical tool for small businesses to combat harm from unfair and anticompetitive business practices.

While small businesses are a powerful force in our economy, they remain vulnerable to exploitation by larger corporations. Like consumers, small businesses benefit from the availability of class actions, which help small businesses level the playing field and secure access to justice to protect their rights against powerful corporate interests.

Class actions filed on behalf of small businesses are a critical force for enforcement of antirust and consumer protection laws. *See, e.g.*, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 32 (E.D.N.Y. 2019); *Bradburn Parent Teacher Store, Inc. v. 3M (Minn. Mining & Mfg. Co.)*, 513 F. Supp. 2d 322, 342 (E.D. Pa. 2007); *In re Navistar MaxxForce Engines Mktg., Sales Practices & Prods. Liab. Litig.*, 1:14-CV-10318, 2020 WL 2477955, at *1 (N.D. Ill. Jan. 21, 2020); *In re Visa Check/Mastermoney Antitrust Litig.*, 192 F.R.D. 68, 71 (E.D.N.Y. 2000), *aff'd*, 280 F.3d 124 (2d Cir. 2001).

By enabling private enforcement of state and federal laws, class actions protect small businesses and economic growth. Antitrust class actions have "produced tens of billions of dollars worth of compensation and deterrence." Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 1, 78 (2013). Moreover, "[p]rivate

enforcement is virtually the only way for victims of antitrust violations to be compensated for their losses." *Id.* at 79.

Businesses also rely on Rule 23 to as a crucial means to fight back against harms caused by fraud and defective products. *See, e.g.*, *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1112 (9th Cir. 2017) (affirming class certification for small businesses and owners alleging fraud in credit and debit card processing equipment leases and services); *In re Navistar*, 2020 WL 2477955, at *1 (approving class action settlement of action brought by businesses that purchased or leased trucks with defective engines).

Recently, small businesses hit hard by the economic downturn from the COVID-19 pandemic relied on Rule 23 to take on the big banks, and filed class actions alleging the banks favored companies seeking higher loan amounts in reviewing PPP loan applications. *See* Nizan Geslevich Packin, *In Too-Big-to-Fail We Trust: Ethics and Banking in the Era of Covid-19*, 2020 Wis. L. Rev. Forward 101, 110 (2020); Grace Dixon, *Chase, Wells Fargo Kept PPP Loans From Small Shops: Suits*, Law360 (Apr. 20, 2020, 8:12 PM), https://www.law360.com/articles/1265363.

B. Small businesses often lack resources to pursue individual litigation.

Small businesses often lack the financial resources to individually litigate complex cases. Most antitrust claims, for example, "are simply too expensive and

complicated to prosecute as individual actions." Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 Geo. Mason L. Rev. 969, 1006 (2010). Such cases "often involve millions of dollars in hard costs, additional millions of dollars in attorney time, and years of battle." *Id.* at 981.

Small businesses tend to have far fewer cash resources and liquid assets on hand as compared to large corporations. *See* David Kaufman, *Small Businesses Repurpose Lessons from the 2008 Recession*, N.Y. Times (June 23, 2020), https://www.nytimes.com/2020/06/23/business/coronavirus-great-recession-2008-lessons.html. Recent studies show that the median small business "with more than $10,000 in monthly expenses had only about 2 weeks of cash on hand." Alexander W. Bartik, et al., *The Impact of COVID-19 on Small Business Outcomes and Expectations*, PNAS (July 28, 2020), https://www.pnas.org/content/117/30/17656.full. And as the COVID-19 pandemic has demonstrated, even short periods of reduced income or operations can be catastrophic. In a recent survey on the pandemic's economic impact, "[a]bout half of small employers say they can survive for no more than two months, and about one-third believe they can remain operational for 3-6 months." NFIB, *COVID-19 Impact on Small Business: Part 3* (Apr. 10, 2020), https://www.nfib.com/assets/Final-Coronavirus-write-up-pt-3-1.pdf.

For this reason, small businesses are one of the prime intended beneficiaries of Rule 23. The "risks, small recovery, and relatively high costs of litigation" are at the heart of why the Rules allow for class actions. *Just Film*, 847 F.3d at 1123. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quotation omitted). In many cases, the alternative to a small businesses class action may be no action at all.

III. ELIMINATING SERVICE AWARDS WOULD BE PARTICULARLY HARMFUL TO SMALL BUSINESSES.

While class actions are a vital tool for small businesses, class actions can function only if at least one plaintiff is willing to step forward to litigate. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) ("Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit.").

In declaring service awards per se unlawful, the majority overlooked the impact service awards have on small businesses. The usual costs and benefits of class representation do not incentivize participation—particularly for small businesses. Named plaintiffs must prepare and sit for depositions and respond to discovery, which can be time consuming and stressful. Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical*

Study, 53 UCLA L. Rev. 1303, 1305 (2006). "In some cases . . . small recoveries normally gained from the case are not enough to cover the increased costs of serving as the named plaintiff." *Id.* at 1305–06. In other cases, "free-rider effects" encourage a class member to sit on the "sidelines in hopes that someone else will incur the costs of representing the class." *Id.*

Service awards are thus both a common and important tool to encourage class representatives to step forward. *See* Rubenstein, 5 Newberg on Class Actions § 17:1 (5th ed.); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1357 (S.D. Fla. 2011) ("Service awards compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." (quotation omitted)); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722–23 (7th Cir. 2001) ("Incentive awards are justified when necessary to induce individuals to become named representatives. . . . We see no reason why this rationale would not apply equally to corporations and other organizations.").

The panel's holding that service awards are *never* allowed will have far reaching negative consequences for small businesses. For small businesses serving as class representatives, litigation is "time that they otherwise would have devoted to their business." *Abante Rooter & Plumbing, Inc. v. Pivotal Payments Inc.*, 3:16-CV-05486-JCS, 2018 WL 8949777, at *7 (N.D. Cal. Oct. 15, 2018) (approving service award of $2,000 to the named plaintiff, a plumbing business, whose owner

and wife spent over 75 hours on the class litigation). Additionally, they must devote resources in discovery for the benefit of the class. Small businesses serving as class representatives are often required to submit their own employees and owners for multiple depositions. For example, in *Bradburn Parent Teacher Store, Inc.*, 513 F. Supp. 2d at 342, the court approved a service award to a small business plaintiff after its efforts over four years of litigation ultimately led to settlement of the claims. Although the plaintiff was a "small business, [its] representatives underwent nine depositions," provided testimony at the class certification hearing, and were "preparing to attend and give testimony at the trial." *Id.*

Similarly, in *Marchbanks Truck Service, Inc. v. Comdata Network, Inc.*, CV 07-1078-JKG, 2014 WL 12738907, at *3–4 (E.D. Pa. July 14, 2014), the court granted service awards to four independent truck stops serving as named plaintiffs in a case alleging that national and regional truck stop chains engaged in anticompetitive conduct. In doing so, the court noted the independent truck stop plaintiffs put in hundreds of hours of work that resulted in benefit to the class, including submitting their owners and employees for multiple depositions, assisting counsel in the investigation and development of the complaint, and in responding to numerous document requests and interrogatories. *Id.*

And in *In re Navistar*, where several small trucking businesses sued the defendant over defective truck engines, "[t]he Named Plaintiffs were required to,

and did, search for and produce hundreds or thousands of documents each in discovery detailing their purchase, use, and sometimes sale of the trucks in question; each sat for at least one deposition, often requiring travel; and most presented their trucks for inspection." Pls.' Mem. ISO Mot. for Service Awards, *In re Navistar*, Case No. 1:14-cv-10318, ECF No. 669 at 31 (N.D. Ill. Sept. 10, 2019). They also "reviewed key documents, kept in regular touch with Class Counsel, and advised Class Counsel based on their trucking expertise." *Id.* All of this took considerable dedication and sacrifice, which the court recognized when granting service awards of $25,000 to the named plaintiffs. *In re Navistar*, 2020 WL 2477955, at *4.

Service awards also address the risk of retaliation small businesses may face in litigation, particularly when suing suppliers. *See, e.g.*, *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1220 (S.D. Fla. 2006) (granting service awards to gasoline dealers serving as named plaintiffs in suit against Exxon over alleged overcharges, and noting the plaintiffs endured a threat of relation from Exxon); *In re Auto. Refinishing Paint Antitrust Litig.*, MDL NO 1426, 2008 WL 63269, at *7 (E.D. Pa. Jan. 3, 2008) (businesses granted service awards where they "not only conferred benefits on all of the Class members, but also risked jeopardizing their existing relationships with their suppliers"); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 751 (E.D. Pa. 2013) (awarding service

awards and noting "class representatives launched this litigation despite the risk of retaliation inherent in suing a supplier. This risk should be recognized.").

For small businesses, service awards encourage meaningful participation in class actions and provide some assurance that their businesses will not be left worse off because they came forward to vindicate the rights of absent parties. "Courts have consistently found service awards to be an efficient and productive way to encourage members of a class to become class representatives." *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1357 (citing cases). The panel's outlier decision declaring these service awards per se unlawful should be reviewed.

CONCLUSION

The panel's decision to prohibit the use of service awards in class actions is of vital concern to small businesses. Amicus respectfully requests that this Court rehear the case en banc.

Dated: October 29, 2020

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Federal Rule of Appellate Procedure 29(b)(4) and Eleventh Circuit Rule 29-3 because it contains 2,573 words, after excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 29-3.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in a 14-point Times New Roman font.

Dated: October 29, 2020

s/ Cecily C. Shiel
Cecily C. Shiel

Counsel for Amicus Curiae
Main Street Alliance

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2020 I electronically filed the foregoing Brief of the Main Street Alliance as Amicus Curiae in Support of Plaintiff–Appellee Charles T. Johnson's Petition for Rehearing En Banc using the Court's Appellate PACER system, which will automatically send notification to counsel of record.

s/ Cecily C. Shiel
Cecily C. Shiel

4837-9059-2207, v. 7

No. 18-12344

In the United States Court of Appeals for the Eleventh Circuit

CHARLES T. JOHNSON,
on behalf of himself and others similarly situated,
Plaintiff–Appellee,
JENNA DICKENSON,
Interested Party–Appellant,

v.

NPAS SOLUTIONS, LLC,
Defendant–Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

MOTION OF PROFESSOR WILLIAM B. RUBENSTEIN FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING *EN BANC*

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Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, *amicus* provides the following Certificate of Interested Persons and Corporate Disclosure Statement.

- Buchanan, Martin N. – Counsel for *Amicus Curiae*
- Davidson, James L. – Counsel for Plaintiff-Appellee
- Davis, John W. – Counsel for Appellant Jenna Dickenson
- Debevoise & Plimpton LLP – Counsel for Defendant-Appellee
- Dickenson, Jenna – Appellant
- Ehren, Michael L. – Counsel for Defendant-Appellee
- Goldberg, Martin B. – Counsel for Defendant-Appellee
- Greenwald Davidson Radbil PLLC – Counsel for Plaintiff-Appellee
- Greenwald, Michael L. – Counsel for Plaintiff-Appellee
- Heinz, Noah S. – Counsel for Plaintiff-Appellee
- Hopkins, Honorable James M. – Magistrate Judge
- Isaacson, Eric Alan – Counsel for Appellant Jenna Dickenson
- Issacharoff, Samuel – Counsel for Plaintiff-Appellee
- Johnson, Charles T. – Plaintiff-Appellee

- Johnson, Jesse S. – Counsel for Plaintiff-Appellee
- Keller, Ashley C. – Counsel for Plaintiff-Appellee
- Keller Lenkner LLC – Counsel for Plaintiff-Appellee
- Lash, Alan David – Counsel for Defendant-Appellee
- Lash & Goldberg LLP – Counsel for Defendant-Appellee
- Law Office of John W. Davis – Counsel for Appellant Jenna Dickenson
- Lenkner, Travis D. – Counsel for Plaintiff-Appellee
- Monaghan, Maura K. – Counsel for Defendant-Appellee
- NPAS Solutions, LLC – Defendant-Appellee
- Nutley, C. Benjamin – Counsel for Appellant Jenna Dickenson
- Postman, Warren D. – Counsel for Plaintiff-Appellee
- Radbil, Aaron D. – Counsel for Plaintiff-Appellee
- Rosenberg, Honorable Robin L. – District Court Judge
- Rubenstein, William B. – *Amicus Curiae*
- Stahl, Jacob W. – Counsel for Defendant-Appellee
- Van Wey, Lorelei Jane – Counsel for Defendant-Appellee

1. NPAS Solutions, LLC is wholly owned by National Patient Accounts Services, Inc., which is wholly owned by Parallon Business Solutions, LLC. The ultimate parent of Parallon Business Solutions, LLC is HCA Healthcare, Inc., a publicly traded company.

2. No publicly held corporation owns 10% or more of NPAS Solutions' stock.

Dated: October 29, 2020

Respectfully submitted,

/s/ *Martin N. Buchanan*
Martin N. Buchanan
Counsel for Amicus Curiae

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF REHEARING *EN BANC*

Pursuant to Federal Rule of Appellate Procedure 29(b)(3) and Eleventh Circuit Rule 29-3, Professor William B. Rubenstein respectfully requests leave to file the accompanying *amicus curiae* brief in support of rehearing *en banc* in this matter. In support of this request and in demonstration of good cause, *amicus* states as follows:

1. *Amicus* is the Bruce Bromley Professor of Law at Harvard Law School and (since 2008) the sole author of *Newberg on Class Actions*, the leading treatise on class action law in the United States.

2. Professor Rubenstein respectfully submits this brief for three independent reasons. *First*, Professor Rubenstein believes the Panel decision to be of exceptional importance because the vast majority of class action settlements involve incentive awards and they have been approved in every other Circuit in the country. *Second,* the Panel's critical decision cites to and relies on the *Newberg* treatise. The Panel's discussion of Professor Rubenstein's work could be read to suggest that he opposes the practice of incentive awards. Professor Rubenstein seeks to ensure that the record accurately reflects his position on incentive awards. *Third*, *amicus* addresses issues not covered in the briefing to

date by examining (a) the facts underlying *Greenough*; (b) the relevance of Congress's approach to incentive awards in the securities field; and (c) the effect of recent changes to Rule 23 on judicial review of incentive awards.

CONCLUSION

For these reasons, *amicus* respectfully requests leave to file his *amicus curiae* brief in support of rehearing *en banc*.

Dated: October 29, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this motion was prepared in 14-point Century Schoolbook, a proportionally spaced typeface, using Microsoft Word 2016. *See* Fed. R. App. P. 27(d)(1), 32(g)(1); 11th Cir. R. 29-1. This motion complies with the type-volume limitation of Rule 27(d)(2) because it contains 261 words, excluding the parts exempted under Rule 32(f).

/s/ *Martin N. Buchanan*
Martin N. Buchanan

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2020, a true and correct copy of this motion was served via the Court's CM/ECF system on all counsel of record.

/s/ *Martin N. Buchanan*
Martin N. Buchanan

No. 18-12344

In the United States Court of Appeals for the Eleventh Circuit

CHARLES T. JOHNSON,
on behalf of himself and others similarly situated,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF PROFESSOR WILLIAM B. RUBENSTEIN AS *AMICUS CURIAE* IN SUPPORT OF REHEARING *EN BANC*

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- Greenwald Davidson Radbil PLLC – Counsel for Plaintiff-Appellee
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- Heinz, Noah S. – Counsel for Plaintiff-Appellee
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- Rubenstein, William B. – *Amicus Curiae*
- Stahl, Jacob W. – Counsel for Defendant-Appellee
- Van Wey, Lorelei Jane – Counsel for Defendant-Appellee

1. NPAS Solutions, LLC is wholly owned by National Patient Accounts Services, Inc., which is wholly owned by Parallon Business Solutions, LLC. The ultimate parent of Parallon Business Solutions, LLC is HCA Healthcare, Inc., a publicly traded company.

2. No publicly held corporation owns 10% or more of NPAS Solutions' stock.

Dated: October 29, 2020

Respectfully submitted,

/s/ *Martin N. Buchanan*
Martin N. Buchanan
Counsel for Amicus Curiae

RULE 35-5(C) STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance: Whether the common practice of awarding incentive payments to named plaintiffs to compensate them for their efforts protecting absent class members' interests is *per se* unlawful.

Dated: October 29, 2020

Respectfully submitted,

/s/ *Martin N. Buchanan*
Martin N. Buchanan
Counsel for Amicus Curiae

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[*]

Amicus curiae Professor William Rubenstein is the Bruce Bromley Professor of Law at Harvard Law School and the author of *Newberg on Class Actions*, the leading American class action law treatise. In 2015, Professor Rubenstein wrote treatise Chapter 17, a 98-page treatment of incentive awards. This review encompassed a range of issues including new empirical evidence about incentive awards.

Amicus respectfully submits this brief for three reasons. *First*, *amicus* believes the Panel's categorical rejection of incentive awards to be of exceptional importance because most class actions involve such awards and because they have been approved in every other Circuit. *Second,* as the Panel's decision relies on the *Newberg* treatise, *amicus* seeks to ensure that the record accurately reflects his position. *Third*, *amicus* addresses issues not covered in the briefing to date by examining (a) the facts underlying *Greenough*; (b) the relevance of Congress's approach to incentive awards in the securities field; and (c)

[*] This brief was not authored in whole or in part by counsel for any party. No party, party's counsel, or person—other than *amicus curiae* or his counsel—contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

the effect of recent changes to Rule 23 on judicial review of incentive awards.

Under Federal Rule of Appellate Procedure 29(b)(2), *amicus* may file this brief only by leave of court. By the accompanying motion, *amicus* has so moved.

STATEMENT OF THE ISSUE WARRANTING *EN BANC* REVIEW

Plaintiff-Appellee Johnson's petition demonstrates that the Panel's decision is of exceptional importance warranting *en banc* review because it misapplies applicable Supreme Court and Eleventh Circuit precedent, conflicts with the holding of every other Circuit on this question, and, in categorically barring incentive awards, affects every class action in this Circuit.

This brief adds three points: the Panel's decision (1) fails on its own terms (as a matter of equity) because it never compared the ***facts*** in *Greenough* to those in this case or in class actions generally; (2) fails to account for Congress's approach to incentive awards in the Private Securities Litigation Reform Act of 1995, an approach which undermines its holding; and (3) fails to acknowledge 2018 congressionally approved changes to Rule 23 that explicitly require a

court reviewing a proposed settlement to ensure "the proposal treats class members *equitably* relative to each other." Fed. R. Civ. P. 23(e)(2)(D) (emphasis added). That amendment squarely places review of incentive awards within Rule 23's settlement approval provision going forward and hence renders the Panel's decision—even if permitted to stand—irrelevant to current class action practice. The Panel stated that "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 v. NPAS Sols., LLC*, 975 F.3d 1244, 1260 (11th Cir. 2020), but it appeared unaware of the actions of Congress and the Rules Committee directly on point.

ARGUMENT

The Panel's prohibition on incentive awards is an issue of exceptional importance, but its decision failed to consider the applicable facts and relevant aspects of federal law and Rule 23.

I. The Panel's decision fails as a matter of equity.

The Panel found *Greenough* controlling without a full review of the case's facts. Those show that Vose, the active litigant, sought attorney's fees and expenses amounting to $53,938.30 and an additional $49,628.35 for himself. *See Trustees v. Greenough*, 105 U.S. 527, 530

(1881). Specifically, Vose sought payment of "an allowance of $2,500 a year for ten years of personal services," *id.,* plus $9,625 in interest, as well as another $15,003.35 for "railroad fares and hotel bills." *Id.*

Those numbers are staggering: inflation calculators suggest that $1 in 1881 is worth $26.49 in 2019 dollars.[1] Thus, Vose sought a "salary" of $66,225 per year for 10 years,[2] plus interest—or a total of $917,216—as well as $397,439 for hotel bills and travel expenses. This amounts to roughly $1.31 million current dollars. It was also equivalent to (92% of) his attorney's fees and expenses.

Is it any wonder that equity balked?

Here the named plaintiff seeks $6,000 in total (0.46% of what Vose sought), none of it a yearly salary of any kind, and all of it amounting to about 1.3% of what the attorneys seek. Any true ***equitable*** analysis

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[1] *See Consumer Price Index, 1800-*, Federal Reserve Bank of Minneapolis (last visited Oct. 25, 2020), https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator/consumer-price-index-1800-.

[2] This $66,225 number is perfectly confirmed by the fact that Vose's $2,500 annual salary constituted 25% of the 1881 Supreme Court justice salary of $10,000, while 25% of a current justice's salary ($265,000) is $66,400. *See Judicial Salaries: Supreme Court Justices,* Federal Judicial Center (last visited Oct. 26, 2020), https://www.fjc.gov/history/judges/judicial-salaries-supreme-court-justices.

would find *Greenough* inapposite on the numbers alone. *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 167 (1939) ("As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility.").

Even if the Panel's decision is read as one of type not degree—limiting "salaries" and "personal expenses" regardless of their level—this factual review nonetheless undermines its logic. Vose truly sought a salary—a fixed regular payment, *see Salary*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/salary (last visited Oct. 27, 2020)—while this incentive award ($6,000) and the typical incentive awards are never a fixed regular payment and they hardly amount to a salary. Professor Rubenstein's empirical analysis shows the average incentive award to be $11,697 in 2011 dollars (or $13,299 in 2019 dollars).[3] *See* 5 William B. Rubenstein, *Newberg on Class Actions* § 17:8 (5th ed., June 2020 update) [hereinafter *Newberg on Class Actions*]. These facts undermine the Panel's declaration that,

[3] *See Inflation Calculator*, Federal Reserve Bank of Minneapolis (last visited Oct. 25, 2020), https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator.

"It seems to us that the modern-day incentive award for a class representative is ***roughly*** analogous to a salary." *Johnson*, 975 F.3d at 1257 (emphasis added). Far too much rides on the word "roughly" for that analogy to land.

Nor is *Greenough's* objection to the category of Vose's request labelled "personal expenses" particularly apposite—again, those payments were for $397,439 in hotel bills and travel expenses, amounts the Court might rightly have found extravagant and hence "personal." The modest level of the typical modern incentive award belies any sense that the representative is dining out at the class's expense.

These facts render *Greenough's* concern—that it "would present too great a temptation to parties to intermeddle in the management of valuable . . . funds . . . if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid," *Greenough*, 105 U.S. at 1157—inapplicable to the modern incentive award and render nonsensical the Panel's conclusion "that modern-day incentive awards present even more pronounced risks than the salary and expense reimbursements disapproved in *Greenough*," *Johnson*, 975 F.3d at 1258.

* * *

These objector's counsel proffered this same *Greenough* argument to the Second Circuit, but that Court rejected it on the grounds that *Greenough's* facts were inapposite. *See Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir.), *cert. denied sub nom. Bowes v. Melito*, 140 S. Ct. 677 (2019). The Panel declared itself "unpersuaded by the Second Circuit's position," *Johnson*, 975 F.3d at 1258 n.8, but this review has demonstrated that the Second Circuit got it right and the Panel's conflicting conclusion should be reviewed (and reversed) *en banc*.

II. The Panel's decision fails to account for Congress's approach to incentive awards in an analogous setting.

Far closer in context and time than *Greenough*, is Congress's 1995 approach to incentive awards in the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §§ 78u-4 et seq.

With the PSLRA, Congress aimed to transfer control of securities class actions from small-stakes clients to large institutional investors. Limiting excess payments to named plaintiffs was a critical part of that effort. The PSLRA contains several provisions on point. *First*, the PSLRA requires a putative lead plaintiff to aver that it "will not accept any payment for serving as a representative party on behalf of a class

beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4)." 15 U.S.C. § 78u-4(a)(2)(A)(vi). *Second*, the Act states that the representative's fund allocation "shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class." 15 U.S.C. § 78u-4(a)(4). *Third*, the Act explicitly does ***not*** "limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class." *Id.; see also* S. Rep. No. 104-98, at 10 (1995) (explaining that "service as the lead plaintiff may require court appearances or other duties involving time away from work").

These provisions demonstrate three pertinent points:

1. Congress sees incentive awards as a question of fair settlement allocation, not attorney's fees.
2. Congress is aware of incentive awards, knows how to limit them when it wants to do so, and has limited them only in securities cases.
3. Even while limiting incentive awards, Congress acknowledges and permits repayment for lead plaintiffs' efforts.

These points undermine the Panel's decision. The majority declined to analyze the incentive award in terms of intra-class equity, as the dissent would have; failed to appreciate that Congress has limited incentive awards only in securities cases; and failed to acknowledge Congress's approval of repayment of expenses, even when otherwise limiting incentive payments.

The PSLRA post-dates *Greenough* by 114 years, and, as a law about modern class action practice, is far closer in context than the trust law at issue in *Greenough*. The Panel should have considered its relevance before holding that *Greenough* categorically bars incentive awards in today's class action.

III. The Panel's decision fails to account for relevant 2018 amendments to Rule 23.

Quoting Professor Rubenstein's treatise, the Panel held that Rule 23 has nothing to say about incentive awards:

> [The] argument [in support of the incentive award] implies that Rule 23 has something to say about incentive awards, and thus has some bearing on the continuing vitality of *Greenough* and *Pettus*. But it doesn't—and so it doesn't: "Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards." The fact that Rule 23 post-dates *Greenough* and *Pettus*, therefore, is irrelevant.

Johnson, 975 F.3d at 1259 (quoting *Newberg on Class Actions* § 17:4) (footnote omitted).

Professor Rubenstein wrote that sentence in 2015. Congress subsequently approved amendments to Rule 23 that render the sentence out of date.[4]

Prior to December 1, 2018, Rule 23(e) directed a court reviewing a settlement agreement to ensure that the agreement was "fair, reasonable, and adequate." That was the entire standard, although each Circuit developed factors pertinent to that review. Congress approved amendments to Rule 23(e) in late 2018 that codified elements of the Circuit tests. *See* Fed. R. Civ. P. 23(e)(2), advisory committee's note to 2018 amendment ("The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.").

One of the new Rule 23 prongs requires a Court reviewing a settlement to ensure that the proposal "treats class members *equitably*

[4] Regardless, the fact that Rule 23 did not mention incentive awards explicitly hardly dictates the Panel's conclusion that the Rule was therefore "irrelevant" in making an equitable evaluation of incentive awards. *See infra* Section III.

relative to each other." Fed. R. Civ. P. 23(e)(2)(D) (emphasis added). The Advisory Committee noted that this prong "calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others." Fed. R. Civ. P. 23(e)(2), advisory committee's note to 2018 amendment.

New Rule 23(e)(2)(D) should now govern review of incentive awards. An incentive award constitutes an extra allocation of the settlement fund to the class representative and a court asked to approve a settlement agreement encompassing such an allocation would need to ensure that it nonetheless "treats class members *equitably* relative to each other."

The facts of this case are exemplary. The parties' settlement established a fund (Doc. 37-1 at Pg. 17 ¶5.1), stated how the fund would be allocated (¶5.2), and noted that the "class plaintiff" would seek "an incentive payment (in addition to any pro rata distribution he may receive [from the fund])." (¶6.2). Counsel then sought settlement approval, including of the incentive award, under Rule 23(e) (Docs. 38, 43).

The objector challenged the incentive award, alleging that it exceeded the amounts recovered by the other class members (Doc. 42 at Pg. 15), then argued to the Panel that the incentive award was a "settlement allocation[] that treat[s] the named plaintiffs better than absent class members," App. Br. at 52, and that "the [d]isparity in this case between [the representative's] $6,000 bonus and the relief obtained for the rest of the class . . . casts doubt on . . . the adequacy of the Settlement," *id.* at 53; *see also id.* at 57 (characterizing award as a "disproportionate payment").

Thus, although counsel lodged the request for judicial approval of the incentive award with their fee petition (Doc. 44 at Pgs. 15–16), they were not seeking a fee award governed by Rule 23(h). They were seeking judicial approval of their settlement agreement allocating extra money to the representative—and Rule 23(e)'s settlement approval provisions govern review of that request.

When an incentive award is properly scrutinized as a question of intra-class equity, its fairness comes into focus. Class representatives and absent class members are differently situated with regard to the litigation, as their titles suggest. A court can—indeed should—take

account of that fact in reviewing a proposed settlement. As Professor Rubenstein explains in the *Newberg* treatise:

> Incentive awards surely make it look as if the class representatives are being treated differently than other class members, but . . . [they] are not similarly situated to other class members. They have typically done something the absent class members have not—stepped forward and worked on behalf of the class—and thus to award them only the same recovery as the other class members risks disadvantaging the class representatives by treating these dissimilarly-situated individuals as if they were similarly-situated . . . . In other words, incentive awards may be necessary to ensure that class representatives are treated equally to other class members, rewarded both for the value of their claims (like all other class members) but also for their unique service to the class.

5 *Newberg on Class Actions* § 17:3.

That is not to say that all incentive awards are equitable—an excessive award, such as that sought in *Greenough*, would surely be inequitable. *See id.* at § 17:18. But it is to say that Congress has now given judges the explicit authority to scrutinize the equity of incentive awards through the lens of Rule 23(e).

Thus, even if the Court were inclined to leave in place the Panel's reasoning as to this pre-2018 settlement, the full Circuit should clarify the inapplicability of the holding to judicial review of settlements after December 1, 2018.

CONCLUSION

For these reasons, the Court should grant the petition for rehearing *en banc*.

Dated: October 29, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this brief was prepared in 14-point Century Schoolbook, a proportionally spaced typeface, using Microsoft Word 2016. *See* Fed. R. App. 29(a)(4), 32(g)(1). This brief complies with the type-volume limitation of Eleventh Circuit Rule 29-3 because it contains 2,594 words, excluding the parts exempted under Rule 32(f). *See* Fed. R. App. 29(b)(4).

/s/ *Martin N. Buchanan*
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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2020, a true and correct copy of this brief was served via the Court's CM/ECF system on all counsel of record.

/s/ *Martin N. Buchanan*
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No. 18-12344

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLES T. JOHNSON,
on behalf of himself and others similarly situated,
Plaintiff-Appellee

JENNA DICKENSON,
Interested Party-Appellant,
v.

NPAS SOLUTIONS, LLC,
Defendant-Appellee

On Appeal from the United States District Court
for the Southern District of Florida

BRIEF OF 26 PROFESSORS OF LAW, AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING EN BANC

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Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for Amici Curiae hereby certifies that the following is a complete list of all trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

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Dated: October 29, 2020

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RULE 35 STATEMENT OF COUNSEL

Pursuant to Eleventh Circuit Rule 35-5, I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance: whether the modern-day practice of granting service awards to named plaintiffs in Federal Rule of Civil Procedure 23(b) class actions, to account for the time and resources spent advancing a class action on behalf of absent class members, is unlawful on account of nineteenth century federal common law.

Dated: October 29, 2020

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STATEMENT OF THE ISSUE MERITING EN BANC CONSIDERATION

Amici Curiae 26 Professors of Law ("Amici") write in support of en banc consideration of an issue of exceptional importance: whether the modern-day practice of granting service awards to named plaintiffs in Federal Rule of Civil Procedure 23(b) class actions, to account for the time and resources spent advancing a class action on behalf of absent class members, is unlawful on account of nineteenth century federal common law.[1]

ARGUMENT

The Panel's decision risks eliminating large swaths of small-value claim class actions in the Eleventh Circuit, effectively reading much of Rule 23(b)(3) out of the Federal Rules.

It does so despite decades of Supreme Court and heretofore unanimous Circuit authority recognizing that "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citation omitted). That is so because, as Judge Posner put it with characteristic pith, "only a lunatic or a

[1] No counsel for a party authored any part of this brief or contributed money that was intended to fund preparing or submitting the brief. No person, other than Amici or their counsel, contributed money that was intended to fund preparing or submitting this brief.

Amici are listed in the Index and file in their individual capacity as scholars. They provide their institutional affiliation solely for purposes of identification.

fanatic sues for $30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

It does so based on scant briefing and argument on the key issues, and without answering—or even really meaningfully engaging with—multiple knotty questions about the application of pre-twentieth century federal common law to modern rule-based jurisprudence.

Such a far-reaching change in the law should be enacted only after full briefing and argument and careful consideration of these complex issues. Amici would welcome the opportunity to share their academic perspective should the Court grant Plaintiff-Appellee's petition for rehearing en banc.

I. The Panel's decision is a sea change that likely would all but eliminate most small-value class actions.

The modern class action was created by amendments to the Federal Rules of Civil Procedure in 1966, the most significant of which was the creation of Rule 23(b)(3). Under the Rule, class members are now included in class actions seeking money damages unless they "opt out"; before the amendment, such class members had to "opt in." This change was significant because it opened the door to "small stakes" class actions, *i.e.*, those where class members each suffered an injury so small they would never pursue court action on their own. As the reporter to the Advisory Subcommittee put it, Rule 23(b)(3) would be "the small man's rule," and was intended to "enable small people with small claims to vindicate their rights

when they could not otherwise do so." Minutes, Meeting of the Federal Rules Advisory Committee, at 5, 14 (May 15-17, 1965), *available at* CIS No. CI-8002-83 (Cong. Info. Serv.).

Since then, the Supreme Court has repeatedly recognized that "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem*, 521 U.S. at 617 (citing and quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). Like nearly every Circuit, the Eleventh Circuit long has acknowledged this same "core" policy of Rule 23. *See, e.g., Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1184 (11th Cir. 2010).[2] Congress, too, recognized the utility of small-claims class actions, by providing for federal jurisdiction over such actions so long as the aggregate amount in controversy exceeds $5,000,000, regardless of whether each class member meets the ordinary threshold of $75,000. *See* 28 U.S.C. § 1332(d)(2) (abrogating *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973)).

[2] *See also, e.g., Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 41 (1st Cir. 2003); *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 81 (2d Cir. 2015); *Byrd v. Aaron's Inc.*, 784 F.3d 154, 174 (3d Cir. 2015) (Rendell, J., concurring); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 426 (4th Cir. 2003); *Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452, 463 (6th Cir. 2020); *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 759 (7th Cir. 2014); *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1095 (9th Cir. 2009).

This policy has been effective. Research finds small-stakes class actions commonplace: the median class recovery per class member is only around $500. *See* Theodore Eisenberg & Geoffrey P. Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529, 1546 (2004).

But small-stakes class actions pose a special challenge. For the same reason that individual class members would not pursue court action over small-value claims on their own, it is also not rational for any one of them to step forward and serve as the representative plaintiff in a class action over such claims. That is, "the effort and cost of investigating and initiating a claim may be greater than many claimants' individual stake in the outcome[.]" *In re Charter Co.*, 876 F.2d 866, 871 (11th Cir. 1989). Thus, "the *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits." *Carnegie*, 376 F.3d at 661 (emphasis in original).[3] Without a mechanism to encourage one class member to come forward to take on the burden of representing the class, the promise of the 1966 amendments to Rule 23 would be illusory.

The mechanism developed by courts in every Circuit is the "service award": a special payment to class representatives to compensate them for taking on the

[3] *See also, e.g.*, *In re Nexium Antitrust Litig.*, 777 F.3d 9, 23 (1st Cir. 2015) (same); *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 446 (3d Cir. 2017) (Fuentes, J., concurring) (same); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 992 (9th Cir. 2007) (same).

burdens and risk of coming forward and representing the rest of the class. *See China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1811 n.7 (2018) ("The class representative might receive a share of class recovery above and beyond her individual claim.").

The Panel's decision holds that service payments are illegal. Not only does this unravel decades of national case law, but it risks ending small-stakes class actions—across all substantive areas of law—in the Eleventh Circuit. At best, only cases brought by "lunatics and fanatics" might survive. We do not think that such a sea change in the law should be undertaken lightly. For this reason alone, en banc rehearing is warranted.

II. The Panel did not explore important questions about the viability of pre-twentieth century federal common law decisions.

The Panel assumed that the legal authority for service awards was derived from nineteenth-century decisions applying the federal common law of trusts. *See Trustees v. Greenough*, 105 U.S. 527 (1882); *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885). But this assumption raises more questions than it answers; none of which was addressed by the Panel.

First, class actions are not trusts. Is there another strand of federal common law that more appropriately governs service awards? A potential source of authority is the common law of unjust enrichment; does that common law apply here? If so, were *Greenough* and *Pettus* construing the common law of unjust

enrichment, and how has that common law changed in the intervening 138 years?

Second, even if the federal common law of trusts is the best strand, is that common law the same today as it was in the nineteenth-century? Or has the common law changed to account for the small-stakes class actions that have arisen since 1966?

Third, is federal common law even the right place to look to begin with? Since 1938, there has been a comprehensive Federal Rule of Civil Procedure governing class actions: Rule 23. Many decades of decisions have interpreted that Rule to permit service awards. The antecedents of modern class actions proceeded in equity until 1939, when the Federal Rules revamped federal court practice, including a specific rule for class actions further modernized in 1966. Thus, for over 80 years, class actions proceeded not under the common law of trusts, or in a separate equity court, but under a tailor-made Rule that prompted the creation of its own body of jurisprudence.

Fourth, *Greenough* and *Pettus* pre-dated the prohibition in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) against "general" federal common law. Are these decisions, which purported to state the "general" common law, still good law after *Erie*?

In a case with effects as potentially far-reaching as this one (*i.e.*, the potential elimination of most small-stakes class actions in this Circuit), the Court

would benefit from full briefing and argument on these issues. Here, the Panel had the benefit of neither. In light of the other issues on appeal in this matter, Plaintiff-Appellee devoted only one paragraph to this issue in her opening briefing and did not address it in any more depth at oral argument. The Panel was therefore deprived of significant relevant information and perspective before issuing its decision.

CONCLUSION

Amici respectfully submit that the Court would benefit from closer evaluation of the application of *Greenough* and *Pettus* to modern-day class action practice, and would welcome the opportunity to participate in that briefing. Amici therefore respectfully submit this brief in support of Plaintiff-Appellee's petition for rehearing en banc.

Respectfully submitted,

Dated: October 29, 2020

/s/ *Jonathan D. Selbin*

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4), because it contains 1,633 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared using 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2020 I electronically filed the foregoing Brief of Amici Curiae Law Professors in Support of Plaintiff-Appellee's Petition for Rehearing En Banc using the Court's Appellate PACER system, which will automatically send notification to counsel of record.

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RECORD NO. 18-12344

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLES T. JOHNSON,
on behalf of himself and others similarly situated,
Plaintiff-Appellee,

JENNA DICKENSON,
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v.

NPAS SOLUTIONS, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE, P.C. IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae Public Justice, P.C. states that it has no parent corporation and that no publicly held corporation holds 10% or more of its stock. Other identifiable interested parties to the action are:

- American Civil Liberties Union – Amicus Curiae
- Bet Tzedek – Amicus Curiae
- Buchanan, Martin – Counsel for Amicus Curiae William B. Rubenstein
- Civil Rights Enforcement and Education Center – Amicus Curiae
- Davidson, James L. – Counsel for Plaintiff-Appellee
- Davis, John W. – Counsel for Appellant Jenna Dickenson
- Debevoise & Plimpton LLP – Counsel for Defendant-Appellee
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- Impact Fund – Amicus Curiae
- Isaacson, Eric Alan – Counsel for Appellant Jenna Dickenson
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- Rosenberg, Honorable Robin L. – District Court Judge
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- The Committee to Support the Antitrust Laws – Amicus Curiae
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- Washington Lawyers' Committee for Civil Rights and Urban Affairs – Amicus Curiae
- William B. Rubenstein – Amicus Curiae

Dated: October 29, 2020

/s/ Ellen Noble
Ellen Noble
Public Justice
Counsel for Amicus Curiae

RULE 35 STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance: Whether it is unlawful to grant service awards to class representatives to compensate them for their efforts protecting absent class members' interests.

/s/ Ellen Noble
Ellen Noble
Public Justice
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STATEMENT OF ISSUE

Are service awards authorized by class-action settlement agreements to compensate class representatives for their efforts per se unlawful?

INTRODUCTION

This Court should grant plaintiff's petition for rehearing *en banc* because the panel's decision declaring service awards unlawful conflates two distinct authorities: a court's equitable power to prevent unjust enrichment under *Trustees v. Greenough*, 104 U.S. 527 (1882), and a court's Rule 23 authority to approve service awards authorized by class-action settlements. The limits *Greenough* placed on a court's equitable power don't apply because service awards arise from the power to contract, cabined by Rule 23.

Even if the rules governing unjust enrichment in *Greenough* apply to contracts governed by Rule 23, its logic supports service awards because class representatives' efforts are necessary litigation expenses made in a representative capacity that serve the purpose of the class action mechanism. Finally, the panel decision unjustifiably usurps the role of Congress and the Rules Committee – both of which have declined to prohibit service awards.[1]

[1] Counsel for the parties did not author this brief in whole or in part, and no entity or person other than Public Justice and its counsel contributed money that was intended to fund the preparation or submission of this brief.

ARGUMENT

I. *Greenough* has no bearing on a court's authority to approve service awards authorized by class action settlements.

In outlawing service awards, the panel relied on a decision that explored courts' common law power to prevent unjust enrichment – a power that simply does not apply when courts approve service awards authorized by class action settlements. Courts' authority to approve these awards comes not from any common law doctrine, but from the authority granted by Rule 23 to ensure "fairness" of class action settlements.

Greenough held that a court has equitable authority to award attorneys' fees from a common fund secured by attorneys' efforts. 105 U.S. at 535-36. A bondholder-plaintiff recovered trust assets fraudulently conveyed by trustees, obtaining a "considerable amount of money" for fellow bondholders. *Id.* at 528-29. The Court, relying on restitution cases from chancery courts, awarded attorneys' fees to the plaintiff from the resulting fund, reasoning that to deny reimbursement would "give…other parties entitled to participate in the benefits of the fund an unfair advantage." *Id.* at 531, 533-36.

The common-fund doctrine articulated by *Greenough* "reflects the traditional practice in courts of equity," *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980), and its "deep roots…are set in the soil of unjust enrichment." *US*

Airways, Inc. v. McCutchen, 569 U.S. 88, 100 (2013). Without an external source of authority for the attorneys' fee award – like an agreement, or positive law – the Court filled the gap with judge-made rules. But the Court in *Greenough* could identify "no authority whatever" to reimburse the bondholder-plaintiff's "personal services and private expenses." *Greenough*, 105 U.S. at 537. The Court thus cabined courts' equitable power to prevent unjust enrichment, finding it did not extend to rewarding a "creditor [for] seeking his rights." *Id.* at 538.

Since *Greenough*, a separate authority has arisen empowering courts to approve service awards: class action settlements. A class action settlement is "nothing more or less than a contract between the parties to resolve a piece of litigation." William B. Rubenstein, *Newberg on Class Actions* § 13:4 (5th ed.). Still, the court plays an important "supervisory role." *Dikeman v. Progressive Express Ins. Co.*, 312 Fed. App'x 168, 172 n.3 (11th Cir. 2008). Class settlements must be approved as "fair, reasonable, and adequate" by a court. Fed. R. Civ. P. 23(e).

This case involves a class action settlement that authorizes a service award to the class representative. *Greenough* did not involve any contract or agreement; that case was litigated to final judgment. By contrast, the parties here negotiated a $1.432 million recovery for class members in exchange for the release of potentially meritorious claims against NPAS. *Johnson v. NPAS Sols., LLC*, 975

F.3d 1244, 1250 (11th Cir. 2020). The settlement contract also authorized Johnson to "petition the Court to receive an amount not to exceed $6,000 as acknowledgement of his role" as class representative." *Johnson v. NPAS Sols., LLC*, 2017 WL 6060778, at *3 (S.D. Fla. Dec. 4, 2017).

As is often the case, the parties did not condition the settlement agreement on approval of Johnson's service award. That would risk incentivizing the class representative to "compromise the interest of the class" for a monetary award. *Berry v. Schulman*, 807 F.3d 600, 613-14 (4th Cir. 2015). Instead, the parties delegated to the court the decision regarding whether and how much of an award would be "fair" under the "totality of circumstances." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983).

Courts routinely assess whether to grant service awards authorized by settlement agreements according to Rule 23's "fair, reasonable, and adequate" standard. *See, e.g.*, *Montoya v. PNC Bank, N.A.*, 2016 WL 1529902, at *18 (S.D. Fla. Apr. 13, 2016) ("significant contributions" by representatives made award "fair, reasonable, and adequate"); *Palmer v. Dynamic Recovery Sols., LLC*, 2016 WL 2348704, at *8-11 (M.D. Fla. May 4, 2016) (award to representative who expended "minimal" effort was "unfair, inadequate, [and] unreasonable"). Making that determination falls within a court's Rule 23 supervisory role. *See, e.g.*, *Cobell*

v. Salazar, 679 F.3d 909, 922 (D.C. Cir. 2012) (affirming award where parties left the decision and amount of any award to court's discretion).

In short, service awards are creatures of contract, negotiated by private litigants in the course of settling class claims. In approving these awards, courts are constrained by their duty to ensure fair settlements under Rule 23(e), but not by the judge-made *Greenough* doctrine. Since contract and Rule 23 provide the applicable sources of law, there is no place for the Court to craft a rule regarding a court's inherent equitable power to approve service awards.

II. Even if *Greenough* applied, the Court's holding justifies service awards for class representatives.

Courts' authority to grant service awards derives from settlement contracts and Rule 23, but even if *Greenough* governed, its principles fully justify – even mandate – approval of service awards. And at minimum, *Greenough* does not prohibit such awards.

A. *Greenough*'s logic justifies reimbursement for class representatives' efforts because their efforts are necessary expenditures made on behalf of the class.

In *Greenough*, the Supreme Court drew a distinction between the plaintiff's necessary expenditures, which could be reimbursed, and his personal services and private expenses, which could not. 105 U.S. at 537. Even if the common law rubric of *Greenough* applied, service payments to class representatives still

properly fit within the compensable expenses, as the class representative's work is necessary, made in a representative capacity, and born out of a fiduciary duty.

Service awards fall within *Greenough*'s provision for compensable "necessary expenditures." *Id.* at 530. In the 1800s, such "necessary expenditures" encompassed "costs incident to taking proof," including witness fees. 2 Thomas Atkins Street, *Federal Equity Practice* § 2025 (1909); *see Kane v. Luckman*, 131 F. 609, 622 (C.C.N.D. Iowa 1904). Just as a case cannot go forward without witnesses producing evidence, a class action cannot go forward without a class representative satisfying Rule 23's requirements. "[A] class action can be maintained only if 'the representative parties will fairly and adequately protect the interests of the class.'" 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1765 (3d ed. 2020). An adequate class representative must be willing and able to produce discovery. *See* 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:29, n.18 (7th ed. 2019). Indeed, "it is often necessary for a district court to consider…a deposition of a named plaintiff to determine whether Rule 23(a)'s commonality and typicality requirements are met." *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 723 (11th Cir. 1987).

Costs to class representatives often go far beyond a single deposition. *See, e.g.*, *In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *30 (N.D. Cal. Aug. 17, 2018) (where representatives provided "invasive details about personal

and financial information" and "had their computers forensically examined" in a "burdensome" process); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1220 (S.D. Fla. 2006) (where representatives accepted liability for "substantial taxable [litigation] costs" should defendants prevail). A class representative's work is thus not "personal" at all; it's a necessary cost of the case. *See Matter of Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992) (equating service awards with "lawyers' nonlegal but essential case-specific expenses").

Moreover, a class representative formally acts on behalf of others in a fiduciary role, and according to *Greenough*, such services should be compensated from the common fund. In *Greenough*, the Court recognized that trustees are compensated for their services in order to "induce persons of reliable character and business capacity to accept the office." *Greenough*, 105 U.S. at 537-38. In the 1800s, this reasoning applied to litigators acting in a representative capacity. *See* Edmund Robert Daniell, *Chancery Pleading and Practice* (2d ed. 1846) at 1431 (recognizing trustee "is entitled not only to his costs, but to his charges and expenses" and "[s]o, also, is the next friend of an infant; for…if [charges and expenses] cannot be claimed as just allowances…persons will deliberate before they accept the office"); 2 Street, *Federal Equity Practice* § 2041 ("[W]here a person occupying a trust relation, or acting *en autre droit* [in another's right], sues…, his costs will usually be charged to the trust fund.").

Class representatives, like trustees or the next friend of an infant, act in a formal representative capacity on behalf of others and in a fiduciary role. As the Supreme Court recognized over 70 years ago, a class representative "assumes a position, not technically as a trustee perhaps, but one of a fiduciary character" by suing "not for himself alone, but as a representative" where "[t]he interests of all…are taken into his hands, dependent upon his diligence, wisdom and integrity." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949); *see also Kirkpatrick*, 827 F.2d at 726 (recognizing "fiduciary role of class representative"). Service awards are therefore justified under the common law of the 1800s because class representatives are just another type of litigant formally acting on behalf of others.

Therefore, the Court's holding in *Greenough* that parties may not be reimbursed for the personal expenses of a private, non-representative plaintiff with no obligation to others – and who only *incidentally* benefited others – says nothing about the provision of service awards to class representatives.

B. The policy rationale in *Greenough* supports – and certainly does not prohibit – the provision of service awards.

The provision of service awards ensures diligent performance of fiduciary obligations and serves the core policy behind class actions: inducing competent,

knowledgeable, and engaged individuals to serve as class representatives where individual recovery would provide little impetus otherwise.

In *Greenough*, the Court denied the plaintiff compensation for his own expenses because the rationale for compensating a trustee – to ensure diligent stewardship and to induce persons of reliable character and capacity to accept the office – had "no application" and compensation would "tempt[] parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors." *Greenough*, 105 U.S. at 537-38.

But here, the rationale for compensating a trustee *does* apply. Rule 23 recognizes the importance of diligent class representatives of reliable character and capacity. *See Berger v. Compaq Comput. Corp.*, 257 F.3d 475, 479 (5th Cir. 2001) (noting "adequacy" requires "the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of absentees"). Service awards will induce more qualified persons to accept the role, ensuring that class actions are directed by competent representatives rather than lawyers.

And in the class action context, there is not "too great a temptation to parties to intermeddle." *Greenough*, 105 at 538. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action…by aggregating the

relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). By ensuring that class representatives' costs do not exceed their expected benefits, service awards "serve both the public interests in the private enforcement of various regulatory schemes…and the private interests of the class members." *Kirkpatrick*, 827 F.2d at 727.

C. *Greenough* does not prohibit service awards because equitable principles must be applied in a context-specific, discretionary manner.

Greenough, at minimum, cannot prohibit service awards because it is rooted in equitable principles that courts apply in a flexible and context-specific manner. The Supreme Court, in discussing the *Greenough* doctrine just one year after Rule 23 was enacted, explained:

> As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility. In the actual exercise of the power to award costs 'as between solicitor and client' all sorts of practical distinctions have been taken...

Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 167 (1939). In other words, the Court saw the equitable powers of courts as flexible, and evolving, rather than a rigid set of rules that is frozen-in-time.

Sprague establishes that a decision like *Greenough* should not be blindly extended to prohibit different conduct, in a different legal context, 139 years later.

Our "flexible, evolutionary common-law system" is one that "by definition, evolves and develops over time." *Hamdan v. Rumsfeld*, 548 U.S. 557, 691 (2006). Accordingly, the panel's wooden application of *Greenough* to prohibit service awards in class actions contravenes the equitable considerations that underlie *Greenough*.

III. The panel decision interferes with Congress and the Rules Committee's tacit approval of service awards.

By abolishing service awards, which have been accepted in thousands of cases throughout the country, the panel arrogated to itself a role properly reserved to Congress and the Advisory Committee on Civil Rules. Both have declined to prohibit service awards, despite repeated invitations and decades of experience with the practice. The panel decision should give way to Congress and the Committee's considered judgment.

From 1994-95, the Federal Judicial Center conducted an empirical analysis of service awards in class action settlements at the request of the Committee and discussed the factors courts consider in deciding whether to grant service awards. *See* Thomas E. Willging, et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 101 (1996). Despite studying the issue at length, the Committee has never amended Rule 23 to limit service awards.

Congress has also explicitly contemplated the propriety of service awards. In the securities litigation context, Congress ended the practice of "professional plaintiffs…rac[ing] to the courthouse to file the complaint," H.R. Rep. No. 104-369, at 32 (1995), by prohibiting class representatives from obtaining unequal shares of settlement awards. 15 U.S.C. § 78u-4(a)(4). Even so, Congress expressly allowed for "award[s] of reasonable costs and expenses…directly relating to the representation of the class." *Id*. And while an early draft of the Class Action Fairness Act included similar language, S. 1751, 108th Cong. § 1715(a) (2003), the final version expressed only generalized concern over "unjustified awards," Pub. L. No. 109-2, § 2(a)(3), 119 Stat. 4 (2005).

Congress and the Committee know how to limit service awards, yet have largely left courts' discretion untouched. The panel decision unjustifiably usurped, and misused, their prerogative.

CONCLUSION

For the reasons above, the Court should grant plaintiff's petition for rehearing *en banc.*

Dated: October 29, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 29, 2020, this amicus brief in support of plaintiff-appellee's petition for rehearing *en banc* was served on all parties or their counsel through the CM/ECF system.

Dated: October 29, 2020

/s/ Ellen Noble
Ellen Noble
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CERTIFICATE OF COMPLIANCE

I certify that this motion to intervene complies with the type-volume limitation under Rule 29(b)(4) because this brief contains 2,595 words. This brief complies with the typeface and type style requirements because it has been prepared in Microsoft Word using 14-point Times New Roman font.

Dated: October 29, 2020

/s/ Ellen Noble
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No. 18-12344

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLES T. JOHNSON, behalf of himself and others similarly situated,

Plaintiff-Appellee,

JENNA DICKENSON,

Interested Party –Appellant,

v.

NPAS SOLUTIONS, LLC,

Defendant-Appellee.

On Appeal from the United States District Court for the
Southern District of Florida
Civ. No. 16-cv-3348

MOTION OF THE COMMITTEE TO SUPPORT THE ANTITRUST LAWS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* FAVORING REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, *Amicus curiae* agrees that the Certificates of Interested Persons and Corporate Disclosure Statements filed by Plaintiff–Appellee on October 22, 2020, Defendant-Appellant on July 2, 2018, and Interested Party – Appellant on June 15, 2018 and October 22, 2020 are correct, and it adds the following attorneys, law firms, and associations who may have an interest in the outcome of this case:

- Bruckner, W. Joseph – Counsel for *Amicus Curiae* COSAL
- Buchanan, Martin – Counsel for *Amicus Curiae* William B. Rubenstein
- Erickson, Justin R. – Counsel for *Amicus Curiae* COSAL
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No publicly traded company or corporation has an interest in the outcome of the case or appeal.

Dated: October 29, 2020

/s/ Charles N. Nauen

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MOTION

Pursuant to Federal Rules of Appellate Procedure 27 and 29, the Committee to Support the Antitrust Laws ("COSAL") moves this Court for leave to file the attached brief as *amicus curiae* in support of Plaintiff-Appellee Charles T. Johnson's petition for rehearing *en banc*. In support, COSAL states:

1. The Committee to Support the Antitrust Laws (COSAL) is an independent nonprofit corporation devoted to promoting and supporting the enactment, preservation, and enforcement of strong antitrust laws in the United States.

2. The proposed brief will aid this Court by supplementing Plaintiff-Appellee's argument that it is crucial to grant service awards to named plaintiffs in class actions in order to compensate them for their efforts in protecting absent class members' interests by situating the issue within the precedents of this Court and the Supreme Court. The proposed brief would further assist this Court by explaining why service awards are necessary to recognize the significant risk, time, and expense that class representatives incur in fulfilling their duties. Finally, the proposed brief would aid the Court by explaining that private class actions, which require competent, diligent, and engaged class representatives, are critical to enforcing many areas of federal law, including federal antitrust law. *Hawaii v.*

Standard Oil Co., 405 U.S. 251, 266 (1972); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985).

3. Because the panel did not consider important factors in rendering its decision, including the significant time, risk and expense of serving as a class representative, and because the panel's decision concerns a question of exceptional importance regarding the enforcement of federal law, the proposed brief argues that rehearing *en banc* is warranted.

WHEREFORE, proposed *amicus curiae* respectfully request that the Court grant this motion for leave to file the attached brief in support of Plaintiff-Appellee's petition for rehearing *en banc*.

Dated: October 29, 2020

Respectfully submitted,

/s/ Charles N. Nauen

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CERTIFICATE OF COMPLIANCE

1. This motion complies with type-volume limitation, as provided in Fed. R. App. P. 27 and 11th Cir. R. 27-1, because, exclusive of the exempted portions, it contains 302 words.

2. This motion complies with the type-face requirements, as provided in Fed. R. App. P. 32(a)(5), and the type-style requirements, as provided in Fed. R. App. P. 32(a)(6), because it has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

3. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: October 29, 2020

/s/ Charles N. Nauen
Counsel for *Amicus Curiae* the Committee to Support the Antitrust Laws

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Charles N. Nauen
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No. 18-12344

UNITED STATES COURT OF APPEALS
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BRIEF OF *AMICUS CURIAE* THE COMMITTEE TO SUPPORT THE ANTITRUST LAWS IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING *EN BANC*

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No publicly traded company or corporation has an interest in the outcome of the case or appeal.

Dated: October 29, 2020

/s/ Charles N. Nauen

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STATEMENT OF COUNSEL

I, Charles N. Nauen, express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Whether the common practice of awarding service awards to named plaintiffs to compensate them for their efforts protecting absent class members' interests is *per se* unlawful.
2. Whether the panel decision is contrary to the following decisions of this circuit: *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983); *Carter v. Forjas Taurus, S.A.*, 701 F. App'x 759, 763 (11th Cir. 2017); *Poertner v. Gillette Co.*, 618 F. App'x 624 (11th Cir. 2015); *Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429 (11th Cir. 2012).

Dated: October 29, 2020

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STATEMENT OF THE ISSUE MERITING *EN BANC* CONSIDERATION

Amicus curiae agrees with Plaintiff–Appellee's statement of the issue meriting *en banc* consideration by the Court.

INTEREST OF *AMICUS CURIAE*

The Committee to Support the Antitrust Laws (COSAL) is an independent nonprofit corporation devoted to promoting and supporting the enactment, preservation, and enforcement of strong antitrust laws in the United States. *See* https://supportantitrustlaws.com/. COSAL is governed by its Board of Directors, which elects officers, consisting of the President, Vice President, Secretary, and Treasurer, who supervise and control its day-to-day operations.[1]

Private enforcement plays a crucial role in enforcement of the federal antitrust laws. Given the economic disparities between typical antitrust defendants and their victims, the often diffuse nature of the harms, and the costs involved in litigating antitrust cases, the class mechanism is integral to ensuring private actions remain a viable mechanism to challenge anticompetitive conduct.

SUMMARY OF ARGUMENT

Class actions are critical for administering civil justice in the United States. Class actions allow litigants to combine their limited resources into a "more

[1] Amicus states that no counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity—other than COSAL— has contributed money that was intended to fund its preparation or submission. In addition, no COSAL member whose firm is counsel for a party had any involvement in the organization's decision to file this amicus brief.

powerful litigation posture," making them more effective in enforcement schemes that rely on private litigants to deter misconduct. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972). Class actions thus create substantial economies of scale by allowing courts to resolve hundreds, even thousands, of claims in a single action. In short, class actions provide substantial public benefits.

Classwide resolution is possible only through class representatives. Courts nationwide, including this one, recognize that competent, engaged class representatives are crucial to class litigation. *See Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987). But the role is not an easy one. Class representatives spend substantial time on the litigation and place their reputations and business relationships on the line to file suit. They do this not only for themselves, but also so others similarly wronged may also recover.

The Court should rehear this matter *en banc* and vacate the panel's decision prohibiting class representative service awards (sometimes called incentive awards). If left to stand, the panel's decision will severely hamper the ability of businesses and consumers to use class actions to redress anticompetitive and other misconduct. Rather than prohibit such payments, this Court should uphold the longstanding and important role service awards play in ensuring that class members have informed, competent, and diligent class representatives.

ARGUMENT AND AUTHORITIES

In vacating the district court's order approving the settlement, a divided panel relied on 19th-century Supreme Court precedent that predates the adoption of the Federal Rules of Civil Procedure to categorically bar courts from granting service awards to class representatives. In reaching this extreme result, the majority ignored the modern-day context in which courts approve these awards and their importance to effective class actions.

Amicus curiae COSAL urges the Court to consider several issues the majority overlooked. Businesses and individuals who serve as class representatives incur substantial risk, time, and expense in litigating cases, which benefits all class members. Absent fair compensation for class representatives' efforts, the viability of using class actions to redress wrongful conduct will be jeopardized. The Court should rehear this matter and re-join every other circuit by permitting courts to approve service awards to class representatives when appropriate.

I. CLASS REPRESENTATIVES INCUR SUBSTANTIAL RISKS AND COSTS TO BRING SUIT.

The panel opinion failed to provide any analysis of the costs and risks class representatives incur when bringing suit, thus failing to consider the nature of the class representative role. The *en banc* Court should consider these factors and redress this failure.

A. Risks to Class Representatives

Class representatives risk their livelihoods and reputations when they file suit. In antitrust cases, the class representative is often a small business suing a major supplier or competitor, and filing suit creates an "inherent" risk of retaliation. *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 751 (E.D. Pa. 2013); *see also In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-md-1775, 2015 WL 5918273, at *5 (E.D.N.Y. Oct. 9, 2015) ("[T]he class representatives conceivably put their businesses in risk of potential retaliation by air cargo suppliers."). That is particularly so where the business operates in a highly concentrated market, where the loss of a single customer or supplier can be the difference between success and failure. *See Flonase*, 951 F. Supp. 2d at 741, 751 (noting that when suit was filed, defendant was monopoly supplier of product at issue). Indeed, the same market concentration that exacerbates these risks for potential class representatives often underlies the anticompetitive conduct itself: the ability to monopolize or allocate markets, or to enforce price-fixing conspiracies. As a result, stepping forward as a class representative in antitrust cases often jeopardizes the very relationships the plaintiff businesses need to remain viable.

In antitrust claims arising from employment relationships—for example, where competitors in the same industry agree not to hire away each other's

employees, or agree to fix a ceiling for their employees' compensation—class representatives face the same retaliation risks faced by their counterparts in employment-discrimination class actions. *See Nitsch v. DreamWorks Animation SKG Inc.*, No. 14-cv-4062, 2017 WL 2423161, at *14 (N.D. Cal. June 5, 2017) (in "no-poach" antitrust case, permitting service award to class representatives who work in a "tight knit and fluid" industry because of the risk they took in filing suit); *In re High-Tech Employee Antitrust Litig.*, No. 11-cv-2509, 2015 WL 5158730, at *17 (N.D. Cal. Sept. 2, 2015) (recognizing that class representatives might be deemed "troublemaker[]"). Class representatives may lose their jobs. *See Horn v. Associated Wholesale Grocers*, 555 F.2d 270, 275 (10th Cir. 1977) (noting that class members are understandably concerned about the impact the suit will have on "the welfare of their families"); *Allen v. Isaac*, 99 F.R.D. 45, 53 (N.D. Ill. 1983) (certifying class in employment discrimination case in part because employees' abilities to pursue their own claims were "complicat[ed]" by fear of retaliation), and they may find it difficult to obtain work elsewhere; *Nitsch*, 2017 WL 2423161, at *14. Even those who do not lose their jobs may face retaliation. *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 188 (S.D.N.Y. 1997) (noting in civil rights case that "the litigant who remains on the job can expect . . . that lower level co-workers and supervisors may perceive his or her actions as disloyalty and evidence of an attitude contrary to the common good"); *see also Cook v. Niedert*, 142 F.3d 1004,

1016 (7th Cir. 1998) (affirming $25,000 service award based in part on "the risks [the class representative] faced in bringing the case").

Class representatives also confront heightened risks in litigation. For example, if defendants make a settlement offer under Federal Rule of Civil Procedure 68(b), and the class ultimately recovers less, the class representative could be ordered to pay defendants' costs—which, in a class action, are significant. *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (noting such risk can be considered in assessing appropriate service award to class representative).

B. Time and Expense of Litigation

The panel opinion also gave little attention to the work required for class representatives to effectively represent their peers' interests in addition to their own. Class representatives must be informed and engaged in the case. *See* Fed. R. Civ. P. 23(a)(4). Considering the demands of modern litigation, that is no easy task.

Class representatives take on many responsibilities. Typically, class action lawsuits require multiple rounds of discovery. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 1917, 2016 WL 153265, at *2 (N.D. Cal. Jan. 13, 2016). In each round, class representatives must search for and produce documents. *Id*. They must respond to interrogatories, requests for admission and, when appropriate, written deposition questions. *Id*. They must prepare and sit for oral depositions,

which can be stressful. *Bogosian v. Gulf Oil Corp.*, 621 F. Supp. 27, 32 (E.D. Pa. 1985). They may also attend trial and testify.

Class representatives also work extensively with counsel to develop the case. *Id*. In antitrust cases, they consult with counsel on critical questions, including relevant market definition and operation, how defendants colluded to fix prices or allocate markets, and how the unlawful conduct affected absent class members. They monitor counsel's work, review pleadings, and stay informed of the status of the case. *See generally* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1305 (2006) ("Eisenberg"). At class certification, their evidence is critical to establishing both their adequacy as a representative and that there are legal or factual questions common to the class. They participate in mediations and settlement conferences. Sometimes, they assist counsel in determining how to notify absent class members of developments. In short, class representatives work vigorously to prosecute the lawsuit and obtain the best result for absent class members.

This takes time that the class representative could spend running its business. A class action may last several years. *See In re Air Cargo*, 2015 WL 5918273, at *5 (providing service award to class representative for litigation that lasted nearly nine years). And a class representative may spend hundreds of hours

at these tasks. *See Bogosian*, 621 F. Supp. at 32 (approving service award for class members who spent more than 500 hours on the litigation). This involvement comes at substantial cost, particularly for small businesses that have a limited workforce and face challenges devoting so much time to litigation.

The risks and expense of serving as class representative are substantial. Yet, in categorically barring service awards, the panel opinion failed to consider the risks and expense of modern-day litigation. The Court should grant rehearing so it can address these issues. *Amicus* respectfully submits that if the Court does so, it will find that in general, service awards are reasonable and necessary given the time and risk incurred by class representatives.

II. SERVICE AWARDS ARE SCRUTINIZED AND TYPICALLY MODEST.

In focusing on the benefit of service awards to class representatives and the hypothetical conflict of interest they might create, the panel opinion failed to consider the manner in which courts make service awards, including the relationship between the size of such rewards and the recoveries to class members, as well as the oversight courts provide.

Service awards are commonly awarded. A recent study found they were awarded in 71 percent of class actions. Charles R. Korsmo and Minor Myers, *Lead Plaintiff Incentives in Aggregate Litigation*, 72 Vand. L. Rev. 1923, 1929 (2019) ("Korsmo") (citing 4 William B. Rubenstein, Newberg on Class Actions §§ 17:7

tbl. 1 (5th ed. 2019)) (reviewing nearly 1,200 awards from 2006 to 2011). When awarded, they are dwarfed by the classwide benefit – typically comprising less than one quarter of one percent of the total class recovery. Eisenberg, 53 UCLA L. Rev. at 1308. And they are thoroughly scrutinized. Courts diligently review service awards to ensure they do not create a real or apparent conflict between class representatives and class members, and to confirm that the amount is commensurate with the risk, time, and expense incurred by the class representative in bringing suit. *See id*. at 1348 (finding that courts "seem to be policing the grants of incentive awards reasonably"); 2 McLaughlin on Class Actions § 6.28 n. 3 (16th ed.) (collecting cases detailing scrutiny that courts give service awards). In short, there is "little evidence of systematic abuse in incentive awards." Eisenberg, 53 UCLA L. Rev. at 1303. In light of all these factors, and the importance of these payments to consumers and businesses alike, it is far more appropriate for courts to assess service awards on a "case-by-case" basis, rather than categorically banning them by applying cases that predate Rule 23. *Id*. This Court should allow courts flexibility to make service awards when appropriate.

III. BY RECOGNIZING THE COSTS AND BURDENS TO CLASS REPRESENTATIVES, SERVICE AWARDS PROMOTE EFFICIENT CLASS LITIGATION.

Class cases could not exist without class representatives. Despite this, the class action system is not "optimally designed" to recognize the service a class

representative provides. Eisenberg, 53 UCLA L. Rev. at 1305–06. In non-class litigation, the plaintiff incurs all the cost and reaps all the benefit from the suit. In class litigation, however, the class representative incurs all the cost, but shares the overwhelming majority of the benefit with other class members. *Id*. The class context presents a "free-rider" problem, where class members may decide that, without any possibility of compensation for their time and risk, it is better to sit on the sideline and hope that somebody else serves as a class representative. *Id*. The possibility of service awards helps resolve this problem by permitting courts to recognize and compensate class representatives for their service.

This effect is particularly pronounced when the class representative is a small business. *Cf. In re Air Cargo*, 2015 WL 5918273, at *5. As noted above, antitrust cases often involve small businesses challenging the most powerful entities in their respective industries, including those with monopoly power. These class representatives face perhaps the greatest risks; an unforgiving defendant can refuse to purchase the representative's products or otherwise disrupt its supply chain. *See In re CRT Litig.*, 2016 WL 153265, at *2 ("A Class Representative could reasonably have been concerned about a backlash from Defendants, reducing that Representative's business opportunities with respect to products manufactured, sold, or otherwise controlled by Defendants."). Yet societal interest in pursuing classwide justice is strongest in these cases. *See Flonase*, 951 F. Supp. 2d at 741–

42 (explaining that class representatives challenged conduct that increased the price nationwide of commonly used medication). Service awards are crucial to ensuring potential plaintiffs are able to step forward as class representatives in such cases.

The public benefits class representatives provide are clear. Class representatives not only recover for themselves, they recover for others, often including *their own competitors*. They allow courts to resolve thousands of claims in one action. They are vital to exposing wrongful conduct and managing subsequent litigation. *See* Korsmo, 72 Vand. L. Rev. at 1975. But without any possibility of recompense for their time, risk, and expenses, fewer injured parties will be willing to vindicate classwide harms, and class actions will become less viable to challenge widespread wrongful conduct. This will hinder the enforcement of federal laws that rely on private actions to deter unlawful conduct. *See* Steve Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 Nev. L.J. 571, 578 (2012) ("Since the time of the Sherman Antitrust Act, and more prominently since the New Deal, Congress has entrusted the enforcement of many laws to private litigation.") (citing Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* 3 (2010)); Margaret H. Lemos, *Special Incentives to Sue*, 95 Minn. L. Rev. 782, 788 (2011) (explaining the private enforcement of federal law offers "several advantages").

This Court should rehear this matter *en banc* so it can consider these critical realities of modern class litigation and contemporary service awards. Should it do so, *amicus* respectfully submits that it will recognize these awards are crucial to effective Rule 23 litigation.

CONCLUSION

For these reasons, the Court should rehear this matter *en banc* and vacate the panel's decision.

Respectfully Submitted,

Dated: October 29, 2020

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CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limitation, as provided in Fed. R. App. P. 29(b) and 11th Cir. R. 29-3, because, exclusive of the exempted portions of the brief, it contains 2,596 words.

2. This brief complies with the type-face requirements, as provided in Fed. R. App. P. 32(a)(5), and the type-style requirements, as provided in Fed. R. App. P. 32(a)(6), because the brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

3. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: October 29, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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