No. 25-1411

In the

Supreme Court of the United States

ERIC ALAN ISAACSON,

Petitioner,

v.

MARIBEL MOSES, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

MICHAEL H. MCGINLEY
BRIAN A. KULP
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104

GARY M. DREYER
DECHERT LLP
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036

STEVEN A. ENGEL
Counsel of Record
RILEY D. COMPTON
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
(202) 261-3369
steven.engel@dechert.com

JENNIFER B. DICKEY
KATHERINE M. FERAZZI
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Counsel for Amicus Curiae

September 18, 2026

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a significant interest in this case. Its members are frequent defendants in federal class actions. And, in recent years, that litigation has been increasingly driven by incentive awards for named plaintiffs—particularly in cases involving low-value claims. Plaintiffs' lawyers use the prospect of such awards to entice individuals to serve as named plaintiffs. They can thus pursue cases that no plaintiff would otherwise bother with. These lawyer-driven actions are often meritless. But the sheer cost to litigate them creates enormous settlement pressure. Allowing the decision below to stand will therefore

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund this brief's preparation or submission. Counsel for all parties received timely notice of the intention to file this brief.

harm businesses that comply with the law, while spurring further litigation that hurts our economy.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is a prime candidate for review. Whether federal courts may authorize incentive awards to named class action plaintiffs is a critically important issue. It has squarely divided the lower courts. And the decision below falls on the wrong side of this openly acknowledged circuit split.

This issue is exceptionally important and recurring. Far too often, "class actions that plaintiffs lack incentive to bring are class actions that need not be brought." *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 730 (2d Cir. 2023) (Jacobs, J., concurring). These cases saddle defendants, the judicial system, and the broader economy with the steep costs of complex litigation over paltry claims. And the goal of bringing these actions is rarely to provide meaningful recovery for class members, but rather, to line the pockets of plaintiffs' counsel. Incentive awards fuel that dynamic. The plaintiffs' bar uses the prospect of such awards to solicit named plaintiffs for the cases they have concocted. Then, that anticipated incentive award ironically "provide[s] a *disincentive* for the [named] class members to care about the adequacy of relief afforded [to] unnamed class members." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013). After all, the named plaintiff may not care if she and her fellow class members receive $1 or $10 for their claims, where she stands to receive a $5,000 bounty for lending her name to the litigation regardless.

If Congress wants to experiment with that hazardous regime, then it may do so. But this practice is inconsistent with laws on the books. Congress forbade incentive awards in securities class actions when it enacted the Private Securities Litigation Reform Act in 1995. *See* 15 U.S.C. § 78u-4(a)(2)(A)(vi). Then it reiterated those misgivings a decade later in the Class Action Fairness Act, finding that "unjustified awards" made "to certain plaintiffs at the expense of other class members" were among the most prevalent "abuses of the class action device." Class Action Fairness Act, Pub. L. No. 109-2, § 2(a), 119 Stat. 4, 4 (2005) (codified as a note to 28 U.S.C. § 1711).

The decision below not only conflicts with Congress's stated skepticism of incentive awards, but also with this Court's precedent. Over a century ago, this Court established the common-fund doctrine that still applies in class actions today. In doing so, it held that a representative plaintiff may recover his "reasonable costs, counsel fees, charges, and expenses incurred" out of the common fund. *Trustees v. Greenough*, 105 U.S. (15 Otto) 527, 537 (1882). But, this Court emphasized, any fees disbursed for "personal services and private expenses" are "decidedly objectionable" and "illegally made." *Id.* at 537–38. The Court reaffirmed that holding in *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116, 122 (1885), explaining once again that issuing such incentive awards to named plaintiffs is "unsupported by reason or authority."

Nothing has changed since. Congress has never authorized named plaintiffs to recover incentive awards. And the Federal Rules of Civil Procedure could not create that substantive right either. *See* 28 U.S.C. § 2072(b). Even if they could, "Rule 23 does not currently make, and has never made, any reference to incentive awards." *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244, 1259 (11th Cir. 2020), *reh'g en banc denied*, 43 F.4th 1136 (11th Cir. 2022) (citation omitted). There is accordingly no basis to depart from *Greenough* and *Pettus*.

Over the past few decades, however, many lower courts have done just that. They have uncritically allowed incentive awards to creep into class actions, without pausing to consider the legality of issuing such bounty payments. Then inertia took over. Courts across the country—including the court below—permitted their own "practice and usage" to "supersed[e] *Greenough*," even while acknowledging that incentive awards "are likely impermissible under Supreme Court precedent." *Fikes Wholesale*, 62 F.4th at 721 (majority op.).

Those decisions are wrong. The lower courts "are not at liberty to sanction a device or practice, however widespread, that is foreclosed by Supreme Court precedent." *Johnson*, 975 F.3d at 1260. So, unlike several of its sister circuits, the Eleventh Circuit has rightly held the line that this Court drew long ago. This Court should grant certiorari and reverse to uphold its precedent and close the entrenched circuit split.

ARGUMENT

I. This Case Presents an Exceptionally Important and Recurring Question.

Incentive awards invite exploitation of the class action system. They provide enterprising class action attorneys with a mechanism to induce named plaintiffs to sign on to low-value class actions that they otherwise would not bring. Then the awards enable class counsel to exploit conflicts of interest through settlements that do not benefit the entire class. This has led to a class action system where the winners are class action attorneys and paid class representatives, and the losers are class members, American businesses, and the public. This case therefore presents an exceptionally important question that warrants this Court's review.

A. The Availability of Incentive Awards Encourages Abuses of the Class Action System.

Courts have long recognized that "incentive awards may lead named plaintiffs to expect a bounty for bringing a suit" and thereby "compromise the interest of the class for personal gain." *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003). These payments, which exist in part to "induce [named plaintiffs] to participate in the suit," *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992), multiply lawyer-driven class action proceedings and create ethical issues, including misaligned interests between the named plaintiff and her fellow class members. This case presents a prime example, though it is not alone.

Here, Ms. Moses, the named plaintiff, brought her claims against the New York Times on behalf of herself and those similarly situated. Pet.App.2a–3a. Eventually, she and class counsel agreed to a settlement of $2.375 million, where class counsel would receive one-third, Ms. Moses would receive $5,000, and each class member would receive a paltry $1.81. Pet.5–6. The few members of the class that even filed a claim will thus receive less than the cost of the print version of the Times—and 2,762 times less than what Ms. Moses received. *See* Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 Emory L.J. 399, 419 (2014) (noting that "very small percentages of class members actually file and receive compensation from settlement funds"). And that was only after Petitioner objected. The initial settlement disparity was even worse. *See* Pet.3.

This discrepancy exemplifies a troubling dynamic that has infected class action litigation across the country. Consider *T.K. ex rel. Leshore v. Bytedance Tech. Co.*, 2022 WL 888943 (N.D. Ill. Mar. 25, 2022), as another example. There, the district court approved incentive awards for the two named plaintiffs of $1,000, when the few class members who actually filed claims each received a mere $3.06. *Id.* at *14, *16, *26. The attorneys, for their part, took home over $215,000 in fees and costs. *Id.* at *29. The court recognized the "sizeable disparity between the named Plaintiffs and claimants who will likely receive $3.06." *Id.* at *16. But it forged ahead anyways because these incentive awards "induce[d] individuals to become named representatives." *Id.* (citation omitted).

So too in *Graves v. United Industries Corporation*, where each class member was set to receive less than $7 in remuneration, while the class representatives were paid out a handsome $3,000 to $5,000. 2020 WL 953210, at *8–9 (C.D. Cal. Feb. 24, 2020). Class counsel walked away with $625,000. *Id*. at *8.

Other examples abound. Indeed, in some cases, the named plaintiff has secured an incentive award that exceeded the *total* amount actually paid out to the rest of the class. *See* U.S. Chamber of Commerce Institute for Legal Reform, *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform* 16–17 & n.55 (2022), bit.ly/4ilmhap. In *Spillman v. RPM Pizza, LLC*, the unnamed class members filed claims totaling just $3,795, the class representative received a $5,000 incentive award, and his attorneys pocketed $2.5 million in fees and costs. *See* Ex Parte Motion, Ex. 3, at 1, *Spillman v. RPM Pizza, LLC*, No. 3:10-cv-00349-BAJ-SCR (M.D. La. July 16, 2013), ECF 244-4.

These gross disparities were not always the norm. "Courts once tended to limit incentive awards to cases where the representative plaintiff had provided special services to the class." Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1310 (2006). As these courts warned, "[i]f class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard." *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 720 (E.D.N.Y. 1989). Nevertheless, "[b]y the turn of the century, some considered these awards to be 'routine.'" Eisenberg & Miller, *supra*, at 1311 (citation omitted). Indeed, one study found that these cash bounties for named plaintiffs were paid out in "71.3% of all cases." 5 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 17:7 (6th ed. 2026).

Not only is this problem widespread and recurring, but litigants can readily exploit it through forum shopping. In many class actions, "plaintiffs' attorneys can essentially cherry-pick whom they wish to make a named plaintiff and decide for themselves" where to file suit. *Allapattah Servs., Inc. v. Exxon Corp.*, 362 F.3d 739, 764 (11th Cir. 2004) (Tjoflat, J., dissenting from the denial of rehearing en banc), *aff'd sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005). These attorneys will thus have little trouble flocking to Circuits that permit generous incentive awards. And that underscores why this Court's immediate intervention is necessary. An "intolerable conflict" exists in the law "when litigants are able to exploit [the] conflict[] affirmatively through forum shopping." Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 725 (1984).

B. The Availability of Incentive Awards in Class Actions Ultimately Harms American Businesses and Consumers.

Lower courts have allowed incentive awards because they "encourage class representatives to participate in class action lawsuits." Pet.App.45a. But that is exactly the problem. The availability of these awards increases the number of class action filings—especially for low-value claims—that should have never been filed in the first place.

This needless multiplication of class actions harms businesses, consumers, and the broader economy. After all, class action litigation is notoriously expensive. Defending against class actions already costs America's largest employers over $4.5 billion per year. *See* 2026 Carlton Fields Class Action Survey 6 (2026), bit.ly/4iT2kIc. And the cost to defend a single large class action can run into eight figures or more. These staggering "litigation costs are not just bad for business." U.S. Chamber of Commerce Institute for Legal Reform, *supra*, at 26. Companies "have no choice but to pass these expenses on to consumers by raising the prices of goods and services." *Id.* at 12. This "ultimately harm[s] the very people the litigation purportedly benefits." *Id.* at 26.

The true beneficiaries of all this litigation are class counsel. It is "well known that [class actions] can unfairly 'place pressure on the defendant to settle even unmeritorious claims.'" *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 524 (2018) (alteration adopted; citation omitted). For even when individual claim values are low, class actions exponentially "increase the defendant's potential damages liability and litigation costs." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). As a result, defendants often "find it economically prudent to settle and to abandon a meritorious defense." *Id.*; *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail" (citation omitted)). While Rule 23 provides some fairness review of class-action settlements, such settlements routinely result in awards for class counsel that dwarf the individual relief of claimants. *See, e.g.*, U.S. Chamber of Commerce Institute for Legal Reform, *supra*, at 12–13. To obtain these awards, the plaintiff's lawyer may need to do little more than find a client willing to affix her name to his class action complaint. That is where incentive awards come in. And that is why the question presented warrants this Court's attention now.

II. The Decision Below Is on the Wrong Side of an Acknowledged Circuit Split.

In addition to being exceptionally important, the question presented is the subject of an open and clearly acknowledged "circuit split on whether incentive awards for class representatives are authorized by law." *Chieftain Royalty Co. v. SM Energy Co.*, 100 F.4th 1147, 1161 n.20 (10th Cir. 2024); *see* Pet.App.46a. The Court should grant this petition to resolve that split and reverse the lower court. The Eleventh Circuit has it right, *see Johnson*, 975 F.3d at 1260, and the other Circuits have it wrong, *see Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 353 (1st Cir. 2022); *Moses v. N.Y. Times Co.*, 79 F.4th 235, 256 (2d Cir. 2023); *Scott v. Dart*, 99 F.4th 1076, 1088 (7th Cir. 2024); *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785–87 (9th Cir. 2022); *Nat'l Veterans Legal Servs. Prog. v. United States*, 170 F.4th 1353, 1364 (Fed. Cir. 2026). The en banc Eleventh Circuit has also refused, over a dissent, to reconsider its position. *See Johnson*, 43 F.4th at 1138–39. Therefore, only this Court can restore uniformity in the law.

A. The Decision Below Conflicts with *Greenough* and *Pettus*.

This Court's decisions in *Greenough* and *Pettus* are squarely on point. That is why Judge Jacobs has recognized that the Second Circuit sits "on the wrong side of a circuit split." *Fikes Wholesale*, 62 F.4th at 729 (Jacobs, J., concurring).

In *Greenough*, a plaintiff filed suit "on behalf of himself and the other bondholders" of the Florida Railroad Company. 105 U.S. at 528. He "bore the whole burden of this litigation, and advanced most of the expenses which were necessary for the purpose of rendering it effective and successful." *Id.* at 529. He then sought to recover for "his expenses and services" out of the common fund that he secured. *Id.* Drawing from a long history of equity practice, *Greenough* held that federal courts could generally "make such allowance to [named] parties out of the fund as justice and equity may require." *Id.* at 535.

At the same time, however, any allowance for "personal services and private expenses" was "decidedly objectionable." *Id.* at 537. The court could "find no authority whatever for any such charge." *Id.* Nor was there any good reason to issue an incentive award. While it might make sense to award trustees with a salary "for their personal services," which would "secure greater activity and diligence in the performance of the trust" and "induce persons of reliable character and business capacity to accept the office of trustee," those considerations did not apply to a party "seeking his [own] rights in a judicial proceeding." *Id.* at 537–38. Allowing an award above that plaintiff's pro rata share would "present too great a temptation to parties to intermeddle in the management of valuable property or funds." *Id.* at 538. The Court thus held that the disbursement of an award to the plaintiff for his personal services was "illegally made." *Id.*

Three years later, Justice Harlan reaffirmed and reapplied those principles in a unanimous decision for the Court. In *Pettus*, he drew the same distinction between (1) a lead plaintiff's "claim to be compensated, out of the fund of property recovered, for personal services and private expenses," and (2) allowances for "reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit." 113 U.S. at 122–23. Only the latter were permissible in "suits instituted by one or more persons suing in behalf of themselves and of all others having a like interest touching the subject-matter of the litigation." *Id.* at 122.

The modern class action is just that—a representative suit instituted by one or more persons on behalf of themselves and similarly situated parties. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348–49 (2011). Indeed, this Court has continued to apply the "common-fund doctrine" as set forth by *Greenough* and *Pettus* in modern class actions. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). That is because the doctrine "reflects the traditional practice in courts of equity." *Id.* (citing *Greenough*, 105 U.S. at 532–37). It is a narrow "exception to the general principle that requires every litigant to bear his own attorney's fees," which "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Id.* But the exception goes no further. Unlike attorneys' fees, incentive awards do not provide a proportional benefit to all members of a class, and their provision to the lead plaintiff is not necessary to prevent unjust enrichment.

Therefore, the principles articulated in *Greenough* and *Pettus* resolve this case. "[M]odern-day incentive award[s]" are no different from the "payment[s] for 'personal services'" that this Court rejected. *Johnson*, 975 F.3d at 1257. They perpetuate the exact same ills. If anything, they pose "even more pronounced risks than the salary and expense reimbursements disapproved in *Greenough*," since they "are intended not only to compensate class representatives for their time (*i.e.*, as a salary), but also to promote litigation by providing a prize to be won (*i.e.*, as a bounty)." *Id.* at 1258. This Court's precedent "prohibits" such awards. *Id.* at 1259.

B. The Lower Court's Reasoning Is Unpersuasive.

The Second Circuit offered a few rejoinders. But none is persuasive.

First, the lower court reasoned that "practice and usage" have "superseded" *Greenough* and *Pettus*. Pet.App.48a. But this Court's precedent controls over lower court practice. *See, e.g.*, *United States v. Hatter,* 532 U.S. 557, 567 (2001) ("[I]t is this Court's prerogative alone to overrule one of its precedents." (citation omitted)). That is especially true here, where incentive awards have grown "like dandelions on an unmowed lawn—present more by inattention than by design." *In re Dry Max Pampers Litig.*, 724 F.3d at

722. "The uncomfortable fact is that '[t]he judiciary has created these awards out of whole cloth,'" with few courts stopping until recently "to consider the legal authority for incentive awards." *Johnson*, 975 F.3d at 1259 (citation omitted). The ubiquity of incentive awards thus cannot save them. On the contrary, the fact that courts so routinely award them underscores the need for this Court's review.

Second, the Second Circuit observed that Rule 23 "creates a much broader and more muscular class action device than the common law predecessor that spawned" *Greenough* and *Pettus*. Pet.App.48a. Yet Rule 23 displaces neither the precedential value nor the logic behind those decisions. More to the point, the text of Rule 23 has nothing to say about incentive awards, so "[t]he fact that Rule 23 post-dates *Greenough* and *Pettus*" is "irrelevant." *Johnson*, 975 F.3d at 1259.

The lower court thought that Rule 23(e)(2)(D)'s command is at least "harmonious" with incentive awards. Pet.App44a. But, as that hedging language might imply, the Rule does not *authorize* such awards. Nor could it do so under the Rules Enabling Act. *See* 28 U.S.C. § 2072(b). Instead, Rule 23(e)(2)(D) merely directs courts to consider whether a class action settlement "treats class members equitably relative to each other," such as where they have claims for different amounts.

Besides, *Greenough* and *Pettus* already struck the equitable balance *against* incentive awards. Those decisions offered "transsubstantive guidance on . . . fundamental equitable principles" that dictate what types of allowances a named plaintiff may take from a common fund. *See Liu v. SEC*, 591 U.S. 71, 81 (2020) (citation omitted).[2] Rule 23's reference to equity must be read "consistent with [those] equitable principles," rather than in conflict with them. *Id.* at 90.

Third, the court below thought that this Court recently "left *Greenough* and *Pettus* in the rear view." Pet.App.48a–49a (citing *China Agritech, Inc. v. Resh*, 584 U.S. 732, 747 n.7 (2018)). Yet that reads way too much into way too little. *China Agritech*'s passing remark that a named plaintiff "might" receive a payment "above and beyond her individual claim," *China Agritech*, 584 U.S. at 747 n.7—in a case that had nothing to do with incentive awards—is not an endorsement of the practice. It is no more than a casual observation in "footnoted dicta." *Johnson*, 975 F.3d at 1260 n.12.

In short, *Greenough* and *Pettus* remain good law, and the lower court erred in refusing to follow them. This Court should grant certiorari to reaffirm the rule it laid down in those cases and resolve the circuit split over incentive awards.

---

[2] This Court's bankruptcy precedents reflect similar equitable principles. Filing for bankruptcy creates a common fund or "pot out of which creditors' claims are paid." *Mission Prod. Holdings v. Tempnology, LLC,* 587 U.S. 370, 373 (2019). The law then requires distribution from that pot "in accordance with established principles rather than on the basis of the inside influence or economic leverage of a particular creditor." *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017) (citation omitted). So, too, in class action settlements. They create common funds with "definitely ascertained limit[s]," which are "distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841 (1999).

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

STEVEN A. ENGEL
Counsel of Record
RILEY D. COMPTON
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
(202) 261-3369
steven.engel@dechert.com

MICHAEL H. MCGINLEY
BRIAN A. KULP
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104

GARY M. DREYER
DECHERT LLP
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036

JENNIFER B. DICKEY
KATHERINE M. FERAZZI
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Counsel for Amicus Curiae

September 18, 2026