No. 23A-_____

IN THE

SUPREME COURT OF THE UNITED STATES

ERIC ALAN ISAACSON,

Petitioner,

vs.

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

Respondents.

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to this Court's Rules 13.5, 22, 30.2, and 30.3, Eric Alan Isaacson respectfully requests a 60-day extension of time, to and including August 30, 2024, to file a petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in *In re Facebook, Inc., Internet Tracking Litigation (Davis v.*

Meta Platforms, Nos. 22-16903, 22-16904 (App. A hereto), an unpublished disposition that is reported as *In re Facebook, Inc. Internet Tracking Litig.,* No. 22-16903, 2024 WL 700985 (9th Cir. Feb. 21, 2024).

Timely petitions for rehearing were denied in orders entered on April 1, 2024. (Apps. B & C hereto).

The appeal arose from a common-fund settlement of a consumer class action against Facebook (now known as Meta Platforms, Inc.) for violating Facebook users' rights to privacy by spying on their Internet usage after they had logged out of Facebook. Although the District Court dismissed the case, the Ninth Circuit in a published opinion sustained a variety of claims, including claims for violations of the Wiretap Act, providing statutory damages of $10,000 per class member, and claims under the California Invasion of Privacy Act ("CIPA"), which provides statutory damages of $5,000 per violation.[1]

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[1] *See In re Facebook, Inc. Internet Tracking Litig.,* 956 F.3d 589 (9th Cir. 2020)(sustaining Wiretap Act and CIPA claims); 18 U.S.C. §2520(c)(2) (providing for recovery of "the greater of—(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000"); California Penal Code §637.2(a)(1) (providing for recovery of "Five thousand dollars ($5,000) per violation.").

Although the class comprised 124 million individuals, and individual class members' claims for statutory and other damages were obviously very substantial, on remand from the Ninth Circuit the representative plaintiffs, guided by Class Counsel, agreed to settle the entire class action for a common fund of just $90 million—thereby releasing the 124 million class members' claims in return for a common-fund recovery of roughly 73 cents per class member.[2] In light of the small recovery, only "approximately 1,558,805 total Class Members" bothered to "submit[] valid claims by September 22, 2022." 1-ER-010(DE289:9). In the end, only one-and-a-quarter percent of the class did so. 4-ER-640(DE290:13(lines6-15)). As a result, the few who filed claims might receive as much as $39.21 apiece for Facebook's unlawful invasions of their privacy rights. 4-ER-639(DE290:12(lines14-15)). Thirty-nine or forty dollars still is but a tiny fraction of class members' claims for statutory damages $10,000 apiece under the Wiretap Act or $5,000 per violation under CIPA.

[2] The District Court's final-approval order notes that "[a]fter deductions from the common fund for fees, costs, and service awards, approximately $61,124,415.87, will remain," which amounts to just under 50 cents apiece for the 124 million class members. 1-ER-005(DE289:4).

The seven representative plaintiffs, used as namesakes to prosecute and settle the case, received much more than did other class members. They asked that the District Court, in addition to approving the settlement and release of class members' claims for 73 cents apiece, award each of them $3,000 to $5,000 as "incentive awards" or "service awards" from the $90 million common fund. Ostensibly, these awards were to compensate and reward the representative plaintiffs for their service in representing a class of 124 million whose claims they agreed to release at less than a dollar per class member. Class Counsel, for their part, asked for $26.1 million in common-fund attorney's fees to compensate them at more than three times their claimed reasonable hourly rates.

The District Court approved the class-action settlement as fair, reasonable, and adequate under Federal Rule of Civil Procedure 23(e), awarded Class Counsel the requested $26.1 million in common-fund attorney's fees under Rule 23(h), and—without express authority in any Federal Rule or statute—approved "service award" or "incentive award" payments of $5,000 apiece to the named representative plaintiffs in the

federal proceeding, and $3,000 apiece to three representative plaintiffs in a related state-court proceeding. 1-ER-002–03(DE289:1-2).

A member of the bar of this Court, Applicant Eric Alan Isaacson is a class member who appeared pro se below as an objector before the District Court, and then before the U.S. Court of Appeals for the Ninth Circuit, challenging the settlement on several grounds. Isaacson objected that the filing of the operative complaints under seal, with material allegations and many exhibits redacted, violated public rights of access to court records—rights he contended should be deemed particularly strong when sealed and redacted documents relate to the settlement and release of class-action claims. 2-ER-062–65(DE269:1-3). Isaacson also objected that the $90 million settlement, recovering only 73 cents per class member, was inadequate, 2-ER-065–67(DE269:3-6), that the attorney's fee award of $26.1 million was excessive, 2-ER-069–73(DE269:8-12), and that the payment of "incentive awards" or "service awards" to representative plaintiffs is barred by this Court's decisions in *Trustees v. Greenough,* 105 U.S. 527, 537 (1882), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116, 122 (1885). 2-ER-67–69(DE269:6-8). Although *Greenough* approved of paying a

representative plaintiff's reasonable attorney's fees from a common-fund recovery, provided the award is "made with moderation and a jealous regard to the rights of those who are interested in the fund," *Greenough,* 105 U.S. at 536-37, it rejected as "decidedly objectionable" any compensation "for the personal services" rendered by the representative plaintiff in recovering the fund. *Id.* at 537. As this Court explained in *Pettus*:

> In *Trustees v. Greenough,* 105 U. S. 527, we had occasion to consider the general question as to what costs, expenses, and allowances could be properly charged upon a trust fund brought under the control of court by 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. That suit was instituted by the holder of the bonds of a railroad company, on behalf of himself and other bondholders, to save from waste and spoliation certain property in which he and they had a common interest. It resulted in bringing into court or under its control a large amount of money and property for the benefit of all entitled to come in and take the benefit of the final decree. His claim to be compensated, out of the fund or property recovered, for his personal services and private expenses was rejected as unsupported by reason or authority.

Pettus, 113 U.S. at 122. Representative plaintiffs' reasonable attorney's fees could be paid from a common fund recovery that their litigation produces, but they cannot be paid for service in a representative capacity. *Id.*

Isaacson objected, moreover, that departing from the rule of *Greenough* and *Pettus* to pay "service awards" or "incentive awards" in connection with the settlement of Rule 23 class actions creates perverse incentives for representative plaintiffs to abandon their duty to maximize recovery for the classes whose interests they are supposed to represent. 2-ER-068(DE269:7) (quoting *In re Dry Max Pampers Litig.,* 724 F.3d 713, 722 (6th Cir.2013), and *Shane Group, Inc. v. Blue Cross Blue Shield,* 825 F.3d 299, 311 (6th Cir.2016)). Such awards may create, "in fact 'a ***disincentive*** for the [named] class members to care about the adequacy of relief afforded unnamed class members[.]'" *Shane Group,* 825 F.3d at 311 (quoting *Dry Max,* 724 F.3d at 722 (emphasis in original)).

After the district court entered its order and judgment overruling Isaacson's objections, approving the settlement, awarding $26.1 million (29% of the settlement fund) in attorney's fees, and approving "service award" or "incentive award" payments of $3,000 to $5,000 apiece to the representative plaintiffs, Isaacson filed a timely notice of appeal. Two other objectors, Sarah Feldman and Hondo Jan, also timely appealed,

objecting to approval of the settlement. The Ninth Circuit consolidated the appeals.

The Ninth Circuit entered its memorandum disposition and final judgment of affirmance on February 21, 2024 (App. A hereto), reported as *In re Facebook, Inc. Internet Tracking Litig.,* Nos. 22-16903, 22-16904, 2024 WL 700985 (9th Cir. Feb. 21, 2024). That decision follows existing Ninth Circuit precedent which directly conflicts with Eleventh Circuit decisions which follow *Greenough* and *Pettus* and hold that "Supreme Court precedent prohibits incentive awards."[3]

Although *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 550 (2010), imposes a strong presumption that class-action lawyers working on a contingent-fee basis are adequately compensated by an award of their "lodestar"—which is to say, their hours reasonably billed times their reasonable hourly billing rates—the Ninth Circuit approved of

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[3] *Johnson v. NPAS Solutions,* 975 F.3d 1244, 1255 (11th Cir.2020), *reh'g denied,* 43 F.4th 1138 (11th Cir.2022); *accord, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig.,* 999 F.3d 1247, 1257, 1281-82, 1284 (11th Cir.2021)(following *Johnson v. NPAS*); *Medical & Chiropractic Clinic, Inc. v. Oppenheim,* 981 F.3d 983, 994 n.14 (11th Cir.2020) ("such awards are prohibited") ("service awards are foreclosed by Supreme Court precedent"); *see also Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.,* 62 F.4th 704, 721 (2d Cir.2023)("Service awards are likely impermissible under Supreme Court precedent.")(dictum).

paying Class Counsel in this case more than three times their lodestar. The Ninth Circuit acknowledged that Class Counsel's $26.1 million 29%-of-fund "attorneys' fee award represents a multiplier of 3.28" times Class Counsel's lodestar, but whatever limitations this Court's precedents have placed on "reasonable attorney's fees," the Ninth Circuit held that paying Class Counsel more than three times their reasonable hourly rates "is well within the permissible bounds of this Circuit's decisions." App. A at p.5.

"Awarding modest service awards of $3,000 to $5,000 each to seven named Plaintiffs was also not an abuse of discretion," the Ninth Circuit held, App. A at p.5, citing its precedential decision in *In re Apple Inc. Device Performance Litig.,* 50 F.4th 769, 785-87 (9th Cir. 2022)), which rejected contentions that "our twenty-first century precedent allowing such awards conflicts with Supreme Court precedent from the nineteenth century—*Trustees v. Greenough,* 105 U.S. 527 (1881), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885)." *Apple Device,* 50 F.4th at 785. The Ninth Circuit acknowledged that the Eleventh Circuit had held to the contrary, "that *Greenough* and *Pettus* prohibit any incentive award to class representatives." *In re Apple Inc.*

Device Performance Litig., 50 F.4th 769, 785 n.13 (9th Cir. 2022) (citing *Johnson v. NPAS Sols., LLC,* 975 F.3d 1244, 1255 (11th Cir. 2020)).

Appellants Sarah Feldman and Hondo Jan filed a timely petition for rehearing on March 5, 2024, and Isaacson filed his own timely petition for rehearing on March 6, 2024. On April 1, 2024, the Ninth Circuit entered orders denying both rehearing petitions. (Apps. B & C).

A petition for certiorari would be timely under this Court's rules if filed within ninety days from the April 1, 2024, denials of rehearing. *See* Rules 13.1, 13.3. As the ninetieth day after April 1, 2024, is Saturday June 29, 2024, without an extension of time Isaacson's petition for certiorari seeking review of the Ninth Circuit's decision would be timely filed by Monday July 1, 2024. *See* Sup.Ct.R. 30.1. This application is being filed more than ten days before that date. *See* Sup.Ct.R. 13.5.

The extension that Isaacson seeks, to Friday August 30, 2024, amounts to an extension of 60 days from Monday, July 1, 2024.

This Court has jurisdiction under 28 U.S.C. §1254(1) to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

Reasons for Granting an Extension of Time

Based on the following factors, good cause exists to extend the time to file a petition for a writ of certiorari:

1. Applicant Eric Alan Isaacson, a member of the California bar since 1985, and of the bar of this Court since 1995, is preparing his own petition for a writ of certiorari in this matter.

2. Isaacson is a solo practitioner who also is responsible for preparing pleadings, briefs, and arguments in many other matters which demand his time as a professional, two of which have due dates in the next few weeks.

3. Isaacson is responsible for drafting and filing an Eleventh Circuit reply brief due June 21, 2024, in *Johnson v. NPAS Solutions,* No. 23-12353, a matter in which Isaacson represents a class member and objector in an appeal from a district court's award of attorney's fees to plaintiff's counsel in that matter following the remand from the Eleventh Circuit in *Johnson v. NPAS Solutions,* 975 F.3d 1244, 1255 (11th Cir.2020), *reh'g denied,* 43 F.4th 1138 (11th Cir.2022), *cert. denied sub nom. Johnson v. Dickenson,* No. 22-389, *and cert. denied sub nom. Dickenson v. Johnson,* No. 22-517 (April 17, 2023).

4. Isaacson also is responsible for filing an opening brief in the Federal Circuit in *National Veterans Legal Services Program, et al. v. United States,* No. 2024-1757, a matter in which Isaacson is appealing from the approval of a settlement and award of attorney's fees and incentive awards in a prominent Little Tucker Act class action.

5. Isaacson has in recent weeks been engaged on behalf of a client in the mediation of another matter currently on remand from the Eleventh Circuit.

6. In addition, it may be noted that Isaacson underwent heart-valve surgery in February of this year, and was hospitalized for several days at the end of April.

7. As a consequence of Mr. Isaacson's professional and other responsibilities, he cannot complete an adequate petition for a writ of certiorari in this case by the current due date of July 1, 2024.

8. This case presents an issue of national importance, on which the federal circuits are in conflict, concerning whether courts may award special payments to litigants to compensate them for service as representative plaintiffs in class actions producing common-fund settlements.

9. The Eleventh Circuit has concluded that that "Supreme Court precedent prohibits incentive awards." *Johnson v. NPAS Sols.,* LLC, 975 F.3d 1244, 1255 (11th Cir.2020), *reh'g denied,* 43 F.4th 1138 (11th Cir.2022), *cert. denied sub nom. Johnson v. Dickenson,* No. 22-389, *and cert. denied sub nom. Dickenson v. Johnson,* No. 22-517 (April 17, 2023). Acknowledging that "[s]ervice awards are likely impermissible under Supreme Court precedent," the Second Circuit has held that precedential authority of this Court's foundational common-fund opinions nonetheless has been eclipsed by intervening Second Circuit decisions approving of such awards. *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.,* 62 F.4th 704, 721 (2d Cir. 2023) (following *Melito v. Experian Mktg. Sols. Inc.,* 923 F.3d 85, 96 (2d Cir.2019), and *Hyland v. Navient Corp.,* 48 F.4th 110, 123-24 (2d Cir.2022)).

10. The Second Circuit has since reiterated that, in its view, this Court's holdings in "*Greenough* and *Pettus* have been superseded, not merely by practice and usage" in the lower courts, "but by Rule 23, which creates a much broader and more muscular class action device than the common law predecessor that spawned nineteenth-century precedents." *Moses v. New York Times Co.,* 79 F.4th 235, 254-55 (2d Cir.

2023). Thus, according to the Second Circuit's most recent decision on the point, this Court's common-fund precedents—explicitly prohibiting payments to compensate litigants for their service as representative plaintiffs—were implicitly overruled by Federal Rule of Civil Procedure 23, which says nothing at all on the subject.

11. Several other circuits have similarly repudiated the Eleventh Circuit's conclusion that incentive awards are prohibited by this Court's decisions in *Greenough* and *Pettus*.

12. The Ninth Circuit did so with its published decision in *In re Apple Inc. Device Performance Litig.,* 50 F.4th 769, 785 & n.13 (9th Cir.2022), which explicitly rejected the Eleventh Circuit's conclusion that "that *Greenough* and *Pettus* prohibit any incentive award to class representatives." The decision below in this case follows *Apple Device*. Appx. A at 5.

13. The First Circuit reached a similar conclusion in *Murray v. Grocery Delivery E-Services USA Inc.,* 55 F.4th 340, 352-54 (1st Cir.2022), which "cho[se] to follow the collective wisdom of courts over the past several decades that have permitted these sorts of incentive

payments," this Court's previously precedential decisions notwithstanding.

14. The Seventh Circuit, in *Scott v. Dart,* 99 F.4th 1076, 1085 (7th Cir. 2024), has joined the First, Second, and Ninth Circuits by holding that this Court's decisions in "'*Greenough* and *Pettus* have been superseded, not merely by practice and usage, but by Rule 23, which creates a much broader and more muscular class action device than the common law predecessor that spawned nineteenth-century precedents.'" *Scott,* 99 F.4th at 1085 (quoting *Moses v. New York Times Co.,* 79 F.4th 235, 254–55 (2d Cir. 2023)). Like the First, Second, and Ninth Circuits, the Seventh Circuit failed to specify precisely when or how Rule 23 effected the overruling of this Court's foundational common-fund precedents.

15. Thus, whether this Court's foundational common-fund precedents prohibit, or permit, payments to litigants for their personal service as representative plaintiffs currently is the subject of an intractable conflict among the circuits, with the Eleventh Circuit holding that this Court's foundational common-fund precedents prohibit such awards, while the First, Second, Seventh, and Ninth Circuits hold

that practice in the lower courts under Federal Rule of Civil Procedure 23 has rendered *Greenough* and *Pettus* obsolete.

16. The question that Isaacson will present is an extraordinarily important because it involves not only the authority of this Court's precedents, and a conflict among the circuits, but also because incentive awards affect most class-action cases, and may seriously undermine the integrity of class-action litigation. Indeed, the Sixth Circuit has warned that incentive awards to representative plaintiffs provide "'a disincentive for the [named-plaintiff] class members to care about the adequacy of relief afforded unnamed class members[.]'" *Shane Group, Inc. v. Blue Cross Blue Shield,* 825 F.3d 299, 311 (6th Cir.2016)(quoting *In re Dry Max Pampers Litig.,* 724 F.3d 713, 722 (6th Cir.2013)(court's emphasis)).

17. This case, in which the representative plaintiffs agreed to release other class members' claims for 73 cents apiece, while also applying for their lawyers to receive an award of common-fund attorney's fees at more than three times the lodestar that this Court holds is the presumptively reasonable attorney's fee for contingent-fee

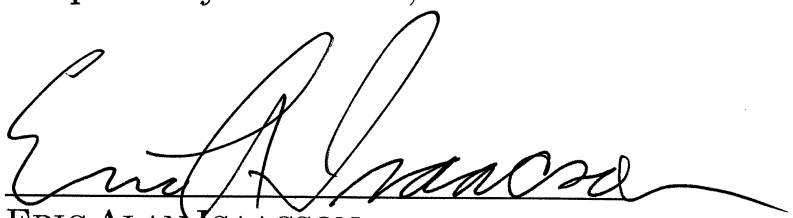
class-action lawyers, presents a particularly attractive vehicle for this Court to address and resolve an intractable conflict among the circuits.

CONCLUSION

In light of the Applicant's status as a pro se litigant challenging the payment of incentive awards in this case, and also as a solo practitioner who is representing litigants in other appellate matters, and who has multiple court filings due in the coming weeks, preparing an adequate petition for a writ of certiorari will require an extension of time. Good cause exists to extend the time for Isaacson to file a petition for a writ of certiorari by 60 days, to and including August 30, 2024.

DATED: June 12, 2024

Respectfully submitted,



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