

No. 18-12344

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UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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

JENNA DICKENSON,  
*Interested Party–Appellant,*

v.

NPAS SOLUTIONS, LLC,  
*Defendant–Appellee*

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

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**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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- 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
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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
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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
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42. Rosenberg, Honorable Robin L. – District Court Judge
43. Stahl, Jacob W. – Counsel for Defendant-Appellee
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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<sup>1</sup>

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

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<sup>1</sup> 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,

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Work, National Women's Law Center,  
Public Citizen, Public Justice Center, and  
Washington Lawyers' Committee for Civil  
Rights and Urban Affairs*

## 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