No. 22-14191

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Andrea Thomas, et al.,
on behalf of themselves and those similarly situated**,**
Plaintiffs – Appellants,

v.

JSTC, LLC et al.,
Defendants – Appellees.

On Appeal from the United States District Court
for the Middle District of Florida
Case No. 6:19-cv-01528-RBD-DAB

BRIEF OF AMICUS CURIAE PUBLIC JUSTICE AND NATIONAL EMPLOYMENT LAWYERS' ASSOCIATION IN SUPPORT OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for *Amici* hereby disclose the following list of known persons, associated persons, firms, partnerships or corporations that have a financial interest in the outcome of this case, including all subsidiaries, conglomerates, affiliates, parent corporations, and other identifiable legal entities related to a party in this case:

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- Amazon.com Services LLC (formerly known as Amazon.com Services Inc.)
- Amazon Logistics, Inc.
- Berger Montague PC (Law firm representing Appellants)
- Bernstein, Max (Attorney representing Amazon Logistics, Inc., Amazon.com Services Inc., and Amazon.com LLC)
- COEI LLC
- Commercial Express, Inc.
- Connon, Krysten (Attorney for Appellants)
- Dalton, Roy (United States District Court Judge)
- Drop a Box, Inc.
- Fowler, Jennifer (Attorney representing Drop a Box, Inc, AG Plus Express

LLC, COEI LLC, and Commercial Express, Inc)

- Hancock, Ryan (Attorney for Appellants)
- JSTC LLC
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- Leighton, Shelby (Counsel for amici)
- Morgan Lewis & Bockius LLP (Law firm representing Amazon Logistics, Inc., Amazon.com Services Inc., and Amazon.com LLC)
- National Employment Lawyers' Association (Amicus Curiae)
- Peterson, Matthew (Attorney representing Appellants)
- Public Justice (Amicus Curiae)
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May 26, 2023

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INTEREST OF AMICI CURIAE

Public Justice is a national public interest organization that uses litigation and advocacy to fight against abusive corporate power and predatory practices, the assault on civil rights and liberties, and the destruction of the earth's sustainability. Public Justice specializes in precedent-setting, socially significant civil litigation, one focus of which is fighting to preserve access to justice for workers and other victims of corporate and governmental misconduct. Class and collective actions are important tools that victims of corporate misconduct—including workers harmed by violations of the Fair Labor Standards Act—can use to join together to obtain justice. As such, Public Justice has extensive experience representing consumers, employees, and others in cases seeking to preserve access to class and collective actions, including filing an amicus brief in this Court in support of rehearing *en banc* in *Johnson v. NPAS Solutions, LLC* to advocate for the importance of service awards in class actions. Public Justice is particularly concerned that extending the holding of *Johnson* to the FLSA settlement in this case will negatively impact the ability of workers to challenge their employers' illegal practices by joining together in a collective action, effectively denying workers access to justice.[1]

[1] No party's counsel authored this brief in whole or in part nor did a party, its counsel, or any other person contribute money to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4). All parties consented to the filing of this brief.

The National Employment Lawyers Association (hereafter "NELA") is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. This membership includes residents of Eleventh Circuit states who would be adversely impacted by a ruling against Plaintiffs-Appellants. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Johnson v. NPAS Solutions, LLC*, a case involving an opt-out class action under Fed. R. Civ. P. 23, this Court reviewed a common-fund settlement and concluded that the service award sought by the named plaintiff from the fund was not permissible under *Trustees v. Greenough*, 105 U.S. 527 (1882) and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885). 975 F.3d 1244, 1260 (11th Cir. 2020). The district court in this case—an opt-in collective action under the

FLSA—concluded that *Johnson*'s holding prohibited the parties' separately negotiated payments to Plaintiffs-Appellants, even though the payments were negotiated as consideration for general releases entirely apart from the settlement of the collective action. As explained in Appellants' brief, there is no basis for treating those separate contractual payments as service awards. But *amici* file this brief to explain why, even if the payments are considered service awards, *Johnson* should not be extended to apply here because this case is an opt-in collective action under the FLSA, not an opt-out class action under Rule 23, and because it does not involve payment of a service award from a common fund.

District courts in the Eleventh Circuit have substantial discretion when deciding whether to approve an FLSA settlement. *Lynn's Food Stores, Inc. v. United States* ("*Lynn's Food*"), 679 F.2d 1350 (11th Cir. 1982). The district court below scrutinized the collective action settlement agreement, applied the *Lynn's Food* factors, and concluded the settlement was "fair and reasonable." Order, D.E. 123 at 3, Appendix ("Appx.") IV p. 688. But after reaching that conclusion, the district court erroneously raised an additional hurdle to settlement approval by holding that separate payments to the named plaintiffs negotiated in exchange for a general release were prohibited by *Johnson*. By applying *Johnson* to the FLSA settlement here, the district court ignored key differences between the *Lynn's Food* standard for opt-in FLSA settlements and the Rule 23 review at issue in *Johnson*,

including the purposes behind each type of settlement review. Moreover, even if *Johnson*'s reasoning could be imported into the *Lynn's Food* review for some FLSA settlements that, like *Johnson*, involve common settlement funds, there is no reason to apply *Johnson* to a separately negotiated service award that has no impact on the amount recovered by members of the class or collective.

ARGUMENT

I. Johnson Should not be Extended to Review of FLSA Settlements under Lynn's Food.

Because FLSA collective actions and Rule 23 class actions provide for entirely different standards for sending notice and approving settlement, with entirely different underlying rationales, *Johnson*'s prohibition on service awards in Rule 23 class actions should not be extended to FLSA collective action settlements like the one at issue here.

Rule 23 allows for representative actions in which class members' interests are litigated by the named plaintiff. Fed. R. Civ. P. 23(a). In certifying a class action under Rule 23, the court defines the scope of the class, and anyone who meets that definition becomes a part of the class, except that, only in an action for damages maintained under Fed. R. Civ. P. 23(b)(3), a putative class member may choose to affirmatively opt out of the class. *See* Fed. R. Civ. P. 23(c)(2)(B)(v) (explaining that "the court will exclude from the class any member who requests exclusion"); Fed. R. Civ. P. 23(c)(2)(B)(vii), (c)(3)(B). Once a class is certified,

class members "are bound by the judgment, whether favorable or unfavorable, unless they affirmatively 'opt out' of the suit." *Cameron–Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1248 (11th Cir. 2003) (per curiam).

In Rule 23 class actions, there are usually many class members who are bound by any judgment or settlement but who are not participating in the proceeding and may not even be aware of the existence of the action or their rights. In part to protect the due process rights of those absent class members, the district court must initially approve the creation of a class and the appointment of an adequate class representative. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985). And when a settlement of a Rule 23 class action is reached, the Court typically conducts a hearing on preliminary approval of the settlement, approves a notice and opt-out process to inform absent class members of the settlement and their rights, and then conducts a final approval hearing, during which class members may present objections to the settlement. *See, e.g.*, Fed. R. Civ. P. 23(e).

Under the FLSA, by contrast, members of a collective action must affirmatively **opt in** to be bound by any judgment or settlement, ensuring that they are aware of the action and their rights. And unlike class certification under Rule 23, "conditional certification" of a collective action under the FLSA does not produce a class with an independent legal status or join additional parties to the

action. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013). The sole consequence of conditional certification is the sending of court-approved written notice to other similarly situated employees, who in turn become parties only by choosing to file written consent with the court. Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b). Because every opt-in Plaintiff in an FLSA settlement has affirmatively consented to participate, FLSA settlements do not implicate the same due process concerns as Rule 23 settlements.

As a result of these key differences, although opt-out class actions under Rule 23 and opt-in collective actions under the FLSA both require court approval, the purpose behind that approval and the factors courts consider are tailored to the fairness concerns unique to each type of action.

Rule 23(e) requires the district court to ensure that a class action settlement is "fair, reasonable, and adequate" based on four enumerated factors. Fed. R. Civ. P. 23(e)(2).[2] In addition to those factors, district courts in the Eleventh Circuit consider the *Bennett* factors when determining whether a Rule 23 settlement warrants approval. *See Bennett v. Behring Corp.*, 737 F.2d 982 (11th Cir. 1984). Those factors include (1) "the likelihood of success at trial"; (2) "the range of

[2] Those factors are whether (1) "the class representative and class counsel have adequately represented the class"; (2) "the proposal was negotiated at arm's length"; (3) "the relief provided for the class is adequate"; and (4) "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2).

possible recovery"; (3) "the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable"; (4) "the complexity, expense and duration of litigation"; (5) "the substance and amount of opposition to the settlement"; and (6) "the stage of proceedings at which the settlement was achieved." *Id*. at 986.

A primary purpose behind that review is ensuring that the absent class members have had their interests adequately represented by the class representative and that their rights were protected in settlement negotiations. *See* Fed. R. Civ. P. 23(e)(2)(D) (requiring court to find that "the class representative and class counsel have adequately represented the class" and that the settlement "treats class members equitably relative to each other"). When a settlement is reached on behalf of a Rule 23 class, the district court acts as "a type of fiduciary" for the entirety of the class, including any "absent" class members. *See In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1282 (11th Cir. 2021). In this context, judges must exercise "careful scrutiny" to "guard against settlements that may benefit the class representatives or their attorneys at the expense of absent class members." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) (quotation marks omitted). Because the review is focused on the interests of absent class members, there is an opportunity for class members to object to the settlement, and objections trigger even closer judicial scrutiny by the court. *See*

Bennett, 737 F.2d at 986 (requiring courts to consider "the substance and amount of any opposition to the settlement").

In contrast, the standard for approval of FLSA settlements requires that district courts analyze whether the settlement is a fair and reasonable resolution of a *bona fide* dispute. *Lynn's Food*, 679 F.2d 1350 (11th Cir. 1982); *see also Nall v. Mal-Motels, Inc.*, 723 F.3d 1304, 1307 (11th Cir. 2013) (reaffirming holding of *Lynn's Food* as to a district court's approval of stipulated judgment to settle FLSA claims); *Padilla v. Smith*, 53 F.4th 1303, 1309 n.8 (11th Cir. 2002) (FLSA suits may be settled only upon a district court's granting of a motion for settlement approval) (citing *Lynn's Food* at 1355).[3]

As *Lynn's Food* explains, unlike Rule 23 class actions, the authority for settlement approval under the FLSA is a creature of the statute itself. [4] The provisions of the FLSA "are not subject to bargaining between employers and employees," and cannot be waived by contract. *Lynn's Food*, 679 F.2d at 1352. Thus, if an employee wishes to compromise or settle a FLSA claim, there are only two ways they can do so. "First, under section 216(c), the Secretary of Labor is

[3] Numerous other Circuit Courts likewise apply *Lynn's Food* to approval of FLSA settlements. *See, e.g., Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986); *Seminiano v. Xyris Enter., Inc.*, 602 F. App'x 682, 683 (9th Cir. 2015).

[4] The original version of Fed. R. Civ. P. 23 went into effect shortly before the original version of FLSA Section 16(b). *See* Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 Buff. L. Rev. 53, 167 (1991).

authorized to supervise payment to employees of unpaid wages owed to them." *Id.* at 1352-53. Second, "[w]hen employees bring a private action for back wages under the FLSA, and present to the district court a proposed settlement, the district court may enter a stipulated judgment after scrutinizing the settlement for fairness." *Id.* at 1353. That latter procedure is the sole authority for court approval of FLSA settlements.

When reviewing an FLSA settlement for fairness under *Lynn's Food*, there are no absent class members for the court to consider. Instead, because FLSA rights cannot be waived by contract, the court's focus is ensuring that the settling employees—who have all consented to join the action—are not waiving their right to wages they are owed under the FLSA. *Barrentine v. Arkansas–Best Freight Sys.*, 450 U.S. 728 (1981). Therefore, when making a "fairness" determination under *Lynn's Food*, the court must decide whether the settlement either compensates each employee fully for wages owed or is a fair and reasonable resolution of a *bona fide* dispute over the amount of wages owed. *Lynn's Food*, 679 F.2d at 1354. For example, the court might consider whether there is a *bona fide* dispute over coverage under the FLSA, whether the plaintiff qualifies for FLSA protections, or whether the plaintiff was misclassified as exempt. *See id.* at 1354 (stating that approval is appropriate where a suit "reflect[s] a reasonable compromise over issues, such as FLSA coverage or computation of back wages, that are actually in

dispute"); *Collins v. Sanderson Farms, Inc.*, 568 F.Supp.2d 714, 719 (E.D. La. July 9, 2008) (discussing the meaning of *bona fide* dispute under *Lynn's Food*). That analysis takes into account the wages that will be paid under the settlement to each member of the collective action, but the "fairness" inquiry is focused on "ensuring that an employer does not take advantage of its employees in settling their claim for wages," not on the relationship between the named plaintiff and the other members of the class. *Id. at* 719.

Because *Johnson* concerned an opt-out class action under Federal Rule of Civil Procedure 23, the district court's expansion of its holding to the unique FLSA settlement context is both a mistake and unnecessary. *Johnson's* formal prohibition against service awards is contrary to the substance-over-form focus of *Lynn's Food* review. "*Lynn's Food* does not stand for the proposition that any valid settlement of a FLSA claim must take a particular form. It means only that the district court must take an active role in approving the settlement agreement to ensure that it is not the result of the employer using its superior bargaining position to take advantage of the employee." *Rakip v. Paradise Awnings Corp.*, 514 Fed. Appx. 917, 919-20 (11th Cir. 2013); *Rodrigues v. CNP of Sanctuary, LLC*, 523 F. App'x 628, 629 (11th Cir. 2013) (declining to impose "a categorical rule" regarding the propriety of certain non-monetary provisions in FLSA settlements, including confidentiality provisions and general releases). As applied, if the settlement is fair in the sense

that it does not improperly waive any employee's substantive rights under the FLSA, the inquiry should end. Because every employee affected by the settlement must choose to affirmatively opt in to be bound by it, the concerns about fairness to other class members that are the focus of Rule 23 settlement approval simply are not present in the same degree. As a result, there is no need to import--and strong reasons to not import--the rule from *Johnson* into the unique context of approval of FLSA settlements under *Lynn's Food*.

II. Johnson Also Should Not Be Extended to Prohibit Service Awards that Are Negotiated Separately and Do Not Reduce the Amount Recovered by the Class.

Apart from the distinct context of FLSA settlement approval, this Court also should not extend *Johnson* to service awards that were separately negotiated after a settlement of the plaintiffs' wage claims had been reached, and thus were not paid out of a common fund.

Unlike the settlement here, the settlement agreement in *Johnson* established a common "settlement fund," out of which the named plaintiff, Mr. Johnson, sought a $6,000 service award and class counsel sought their attorney's fees. 975 F.3d at 1250. As a result, if the court permitted Mr. Johnson to be paid the service award, the settlement recovery for the remaining class members would be reduced. The objector in *Johnson* argued that paying Mr. Johnson a service award out of the

settlement fund "created a conflict of interest between Johnson and other class members." *Id.*[5]

This Court agreed with the objector, holding that the Supreme Court's decisions in *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v Pettus*, 113 U.S. 116 (1885), prohibited a payment to Mr. Johnson out of the common settlement fund. As the Court explained, *Greenough* and *Pettus* are known primarily for establishing that a party who recovers a "common fund" for the benefit of herself and others may obtain reasonable attorney's fees from the fund. *Johnson*, 975 F.3d at 1256. But this Court explained that *Greenough* and *Pettus* "also establish limits on the types of awards that attorneys and litigants may recover from the fund." *Id.* In *Greenough*, the Court concluded that it was fair to reimburse a creditor out of the common fund for "his reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit," but it denied his request to be paid from the fund a substantial personal salary and reimbursement for personal expenses. 105 U.S. at 537-38. In doing so, the Supreme Court emphasized that decisions about what payments from the fund were appropriate must be made "with moderation and a jealous regard to the rights

[5] This reasoning, again, was grounded in Rule 23 (not FLSA) principles focused on the relationship between the class representative and absent class members.

of those who are interested in the fund." *Id.* at 536-37.[6] Thus, *Greenough* was a case about the limits of the common fund doctrine and ensuring that the rights of people who were not involved in the case but had interests in the fund were protected. Likewise, *Johnson* involved a common fund and Rule 23's concern with protecting the rights of absent class members, so there was logic in the Court applying *Greenough*'s prohibition on payment of personal salary or expenses from a common fund to Mr. Johnson's request for a service award from the common settlement fund.[7]

But there is no reason that *Johnson* or *Greenough* should be extended to the distinct context of settlements that **do not** involve a common fund, as the conflict-of-interest concerns that animated those decisions are not present when a service award is negotiated separately and does not impact the recovery of the other class

[6] The Court in *Pettus* simply quoted the holding in *Greenough* without further expanding on it. *See* 113 U.S. at 122.

[7] There were, however, several notable differences between the facts of *Greenough* and the facts of *Johnson* that were not addressed by this Court but arguably rendered *Greenough* inapplicable even to the common fund settlement in *Johnson*. To begin with, *Greenough* did not involve a settlement agreement, and thus, unlike in *Johnson*, there was no agreement between the parties that the defendant would make the payments sought. Additionally, *Greenough* did not involve a class action but an "equity receivership," which in modern terms would be similar to a Chapter 11 bankruptcy, making the creditor in *Greenough* more similar to a bankruptcy creditor than a class representative. While class representatives have duties to the rest of the class, a creditor in a bankruptcy reorganization does not have duties to the other creditors, and thus the Greenough court's concern that a creditor with a small interest would "intermeddle" in the reorganization at the expense of creditors with much larger interests did not apply in *Johnson*. To the contrary, class actions are specifically designed to aggregate small claims to promote efficiency, and it is common for a class representative to have a small claim. *See generally* Benjamin Gould, *On the Lawfulness of Awards to Class Representatives*, 2023 Cardozo L. Rev. de novo 1 (2023).

members. In many FLSA cases, including this one, the amount of the collective action wage settlement is negotiated separately from the incentive award and attorney's fees, meaning that the members of the collective action will recover the same amount individually, regardless of any service award paid to the named plaintiff.

Indeed, due precisely to the conflict-of-interest concerns the objector and this Court identified in *Johnson*, courts in this circuit consider whether a FLSA settlement was reached separately from a settlement of attorney's fees or a service award as a key factor supporting approval of the settlement. *See, e.g.*, *Bonetti v. Embarq Mgmt. Co.*, 715 F. Supp. 2d 1222, 1228 (M.D. Fla. 2009) ("the Court finds that the best way to ensure that no conflict has tainted the settlement is for the parties to reach agreement as to the plaintiff's recovery before the fees of the plaintiff's counsel are considered"); *Hurt v. RT Pizza Inc.*, 2021 WL 5413668, at *4 (M.D. Ga. Feb. 12, 2021) (declining to approve a FLSA settlement because "the common-fund approach proposed here causes the damages award to be improperly reduced by counsel's fees"); *see also Foreman v. Solera Holdings, Inc.*, 2019 WL 1880042, at *2-3 (M.D. Fla. Apr. 11, 2019) (approving settlement where parties separately negotiated attorney's fees and a service award "*after* the settlement in principal as to the benefits due the class" and thus those payments "in no way diminish[] the monetary or non-monetary benefits due the class").

In short, because the conflict-of-interest concern in *Johnson* and *Greenough* applies only in the context of common-fund settlements, the holdings in those cases should not impact the approval of a settlement in which a payment to the named plaintiff was negotiated between the parties after the amount to be paid to the class or collective was already agreed upon. And that is particularly true in this case, where the payment to the named plaintiff was not only negotiated separately, but was made as consideration for signing a broader release.

CONCLUSION

For these reasons, and the reasons stated in Plaintiffs-Appellants' brief, this Court should reverse the district court's order voiding the General Release Agreements.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because this brief contains 4,142 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated using the "word count" function of Microsoft Word. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a) because this brief has been prepared in proportionally spaced typeface using 14-point Times New Roman font.

May 26, 2023

/s/ *Clif Alexander*
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CERTIFICATE OF SERVICE

I certify that on May 26, 2023, the foregoing document was filed with the Clerk of the United States Court of Appeals for the Eleventh Circuit via the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

May 26, 2023

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