2024-1757

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, ALLIANCE FOR JUSTICE, Plaintiffs-Appellees,

v.

UNITED STATES, Defendant-Appellee.

v.

ERIC ALAN ISAACSON, Interested Party-Appellant

Appeal from the United States District Court
for the District of Columbia
in 1:16-cv-00745-PLF
The Honorable Paul L. Friedman

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Because the Little Tucker Act limits a federal district's jurisdiction to a "civil action or claim against the United States, not exceeding $10,000 in amount," 28 U.S.C. §1346(a)(2), Class Members whose Class Period expenditures on PACER exceeded $10,000 should be excluded from the Settlement and their claims "dismissed for lack of jurisdiction," *Chula Vista City School District v. Bennett,* 824 F.2d 1573, 1579 (Fed.Cir.1987). Plaintiffs say that each download of a PACER document amounted to an "illegal exaction" that must be deemed a wholly separate and independent "claim" under the Little Tucker Act. But they defined the Class not in terms of downloads, but in terms of Class Members' quarterly payments. And their construction of the term "claim" is contrary to longstanding practice and precedent.

If claims of Class Members whose Class Period expenditures on PACER are not excluded from the Settlement and dismissed from the case, then the Settlement itself should be vacated because it treats Class Members inequitably by allocating too much to heavy users, including large law firms and class-action lawyers, who have already been reimbursed by clients or from settlement funds in other cases.

The award of attorney's fees at nearly four times Class Counsel's claimed billing rates should be vacated. The District Court had a fiduciary duty to make its own independent determination of reasonable attorney's fees, without deference to the amount requested by Class Counsel. And given Supreme Court and Federal Circuit precedent holding that Class Counsel's unenhanced lodestar ordinarily is a wholly sufficient fee, the multiplier of four times lodestar in this case was an abuse of discretion.

Finally, while the Class Notice indicated that the Named Plaintiffs would be seeking incentive awards of $10,000 apiece, such payments are proscribed by the Supreme Court's foundational common-fund precedents.

II. ARGUMENT

A. Claims of Class Members Whose Class Period PACER Expenditures Exceeded $10,000 Should Be Excluded from the Settlement and Dismissed from the Case for Exceeding the Little Tucker Act's Jurisdictional Limitation

The Little Tucker Act, 28 U.S.C. §1346(a), plainly limits the jurisdiction that it confers on a federal district to a "civil action or claim against the United States, not exceeding $10,000 in amount." 28 U.S.C.

§1346(a)(2). A class action complies with this limitation only if, throughout the litigation, "the 'claims of individual members of the clas[s] do not exceed $10,000' apiece." *United States v. Bormes,* 568 U.S. 6, 10 n.1 (2012)(quoting *United States v. Will,* 449 U.S. 200, 211 n.10 (1980)). "The claim of each member of the class must be examined separately to determine whether it meets the jurisdictional requirement," and any class member for whom complete relief sought would total over $10,000 must be "dismissed for lack of jurisdiction." *Chula Vista,,* 824 F.2d at 1579.

Plaintiffs' efforts to evade these strict limitations on District Court jurisdiction should be rejected.

That large PACER users paid quarterly bills adding up to tens of thousands of dollars is, in Plaintiffs' view, entirely beside the point. They say it cannot matter that the relief sought on behalf of the class's heaviest PACER users in this case well exceeded $10,000 because they have proceeded on an "illegal exactions" theory, under which each download of a document, at ten cents a page, gave rise to a separate "illegal exaction" claim at the time of the download, no one of which came close to $10,000.

Plaintiffs' theory is entirely at odds with how they and the District Court defined the Class—in terms of the ***payments made*** during the Class Period, rather than in terms of particular downloads. As approved by the District Court's judgment, the Settlement Agreement defines the Class in terms of ***payments*** that Class Members actually made over the course of an expanded eight-year Class Period, "regardless of when such persons or entities used the PACER system." Appx3993(DE149-2:1[ECFp2]) (First Amendment to Settlement Agreement). The Class is explicitly defined in terms of "the ***payment*** of PACER fees in the specified period rather than the use of PACER in the specified period." Appx3993(DE149-2:1[ECFp2]) (First Amendment to Settlement Agreement). Class Period payments are what matter, not individual downloads.

Plaintiffs blast past the fact that payment was never exacted upon download. The government chose instead to exact quarterly payments, charging nothing at all whenever fees came to less $15 for a quarter—a figure increased to $30 for each quarter. Plaintiffs acknowledge that in 2018 "the AO announced that it was doubling the $15 quarterly fee waiver for PACER, eliminating fees for approximately 75% of PACER

users." NVLSP Brief at 4. So it is clear that no overpayment was exacted with each download—and that any "illegal exactions" in this case were in fact exacted by the quarterly bills, which for large-scale users could run into many thousands of dollars.

Plaintiffs' contentions also are at odds with how the term "claim" is understood under the Tucker Act, of which the "Little Tucker Act" is part and parcel. Plaintiffs hope to draw a distinction between a "civil action" against the United States, and a "claim" against the United States, writing:

> The text of the statute covers a "civil action ***or claim*** ... not exceeding $10,000." 28 U.S.C. §1346(a)(2) (emphasis added). It thus confers jurisdiction "over each Little Tucker Act claim seeking $10,000 or less—even if those claims in aggregate seek[] more than $10,000." *Iosilevich v. United States,* 2024 WL 1211326, *7 (E.D.N.Y. 2024).

NVLSP Brief at 37 (Plaintiffs' emphasis).

This conflicts with the historical meaning of the term "claim" against the United States, which encompassed the aggregate amount sought in any proceeding. *See, e.g., Ex parte Skinner & Eddy Corp.,* 265 U.S. 86, 91 (1924). It conflicts, moreover, with the Supreme Court's interpretation of the term in *Keene Corp. v. United States,* 508 U.S. 200

(1993), a Tucker Act case that both favorably cites *Skinner & Eddy*'s expansive use of the term "claim" and rejects contentions that the legal theories under which relief has been sought are at all relevant to defining the "claim." *See Keene,* 508 U.S. at 207-14.

Keene holds that when determining whether two proceedings present the same "claim," a Court must look to the operative facts underlying a case—here the exaction of inflated quarterly fees—rather than to the legal theories under which litigants proceed. *Id.* That should be fatal to Plaintiffs' contention that their "illegal exaction" legal theory somehow exempts them from compliance with the $10,000 jurisdictional limitation on claims presented in a district court proceeding.

Keene interprets the term "claim" as it appears in 28 U.S.C.A. §1500, providing: "The United States Court of Federal Claims shall not have jurisdiction of ***any claim*** for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States." *Keene,* 508 U.S. at 205-06. "The rule is more

straightforward than its complex wording suggests. The CFC has no jurisdiction over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents." *United States v. Tohono O'Odham Nation,* 563 U.S. 307, 311 (2011).

In *Keene,* the Supreme Court observed that the "lineage of this text runs back more than a century to the aftermath of the Civil War," when Congress amended the Tucker Act "to prohibit anyone from filing or prosecuting in the Court of Claims 'any claim ... for or in respect to which he ... shall have commenced and has pending' an action in any other court against an officer or agent of the United States." *Keene,* 508 U.S. at 206 (quoting Act of June 25, 1868, ch. 71, §8, 15 Stat. 77). *Keene* and *Tohono O'Odham Nation* together hold that whether two cases involve the "claim" under the Tucker Act, turns not on the legal theories under which relief is sought, but on whether the two matters involve similar operative facts, which here would be the systematic quarterly overbilling exacted from each class member over the entire Class Period.

Keene is fatal to Plaintiffs' assertions that they are entitled to divide the total liability each Class Member seeks from the United

States into separately asserted items corresponding to each individual PACER download. *Keene* favorably cites *Skinner & Eddy* for giving the word "claim" an expansive meaning in Tucker Act litigation, encompassing the entire amount claimed against the government, rather than dividing it up into subparts or items. In *Skinner & Eddy,* the *Keene* explains, "'[t]he largest item of ***the claim*** was for anticipated profits on 25 vessels' covered by an order, later canceled, by the United States Emergency Fleet Corporation." *Keene,* 508 U.S. at 211 (quoting *Skinner & Eddy,* 265 U.S. at 91).

As it happens, the $17,493,488.97 "claim" against the United States in *Skinner & Eddy* included separate causes of action arising from independent contracts:

> The principle part of the claim grew out of the cancellation of two contracts between the petitioner and the United States Emergency Fleet Corporation 'representing the United States.' The largest item of the claim was for anticipated profits on 25 vessels.

Skinner & Eddy, 265 U.S. at 91. The "anticipated profits under the canceled contracts" provided "the basis for nearly half of the claim" against the United States for $17,494,488.97. *Id.* at 92. The aggregate "claim" asserted against the United States incorporated multiple

contractual causes of action, just as here each class member's "claim" against the United States incorporates all of the quarterly PACER billings that they paid for during the Class Period.

Plaintiffs think that they are entitled to a special rule because they proceed under an "illegal exactions" legal theory. But *Keene* explicitly holds that the legal theory of liability under which plaintiffs choose to proceed is immaterial to the definition of a "claim" under the Tucker Act. *See Keene,* 508 U.S. at 207-14. It observed that in *Skinner & Eddy,* "the Court of Claims action and the 'other' suit proceeded under different legal theories." *Keene,* 508 U.S. at 211. Under the Tucker Act they nonetheless involved the same "claim." *Id.*

Keene specifically approved of the Court of Claims' holding in *British American Tobacco Co. v. United States,* 89 Ct.Cl. 438,439-40 (1939), moreover, "that the word 'claim,'" as used in the Tucker Act "'has no reference to the legal theory upon which a claimant seeks to enforce his demand.'" *Keene,* 508 U.S. at 212 (quoting *British American,* 89 Ct.Cl. at 440). "Since Keene has given us no reason to doubt that these cases represented settled law when Congress reenacted the "claim for or in respect to which" language in 1948," the Supreme Court

applied "the presumption that Congress was aware of these earlier judicial interpretations and, in effect, adopted them." *Id.* at 212.

Keene's holding should be controlling here, given the "'"normal rule of statutory construction"' that words repeated in different parts of the same statute generally have the same meaning." *Law v. Siegel,* 571 U.S. 415, 422 (2014)(quoting *Department of Revenue v. ACF Industries,* 510 U.S. 332, 342 (1994)(quoting *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986)). A court should "not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes." *Azar v. Allina Health Services,* 587 U.S. 566, 574 (2019). Class members whose claims total more than $10,000 must be "dismissed for lack of jurisdiction." *Chula Vista,* 824 F.2d at 1579.

Hoping to avoid the Little Tucker Act's $10,000 limitation on District Court jurisdiction, Appellees emphasize that the United States has not objected to the exercise of jurisdiction in this case. "But consent of parties can never confer jurisdiction upon a Federal court. If the record does not affirmatively show jurisdiction in the circuit court, we must, upon our own motion, so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by

statute." *Minnesota v. N. Sec. Co.*, 194 U.S. 48, 62-63 (1904), *accord, e.g., Chicago, B.&Q. Ry. Co. v. Willard,* 220 U.S. 413, 420 (1911); *Stanley v. Schwalby,* 162 U.S. 255, 269-70 (1896)("Neither the secretary of war nor the attorney general, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court, in a suit brought against their officers"); *Green v. ICI Am., Inc.,* 362 F.Supp. 1263, 1267 (E.D.Tenn.1973).

B. Plaintiffs Rely on Precedents that Do Not Really Address the Jurisdictional Problem in this Case

Plaintiffs suggest that this Court considered and decided that this case complies with the Little Tucker Act's $10,000 limitation in the prior appeal in this case, or else that it reached essentially the same issue in *Alaska Airlines, Inc. v. Johnson,* 8 F.3d 791, 797 (Fed.Cir.1993). It clearly did not.

The Plaintiffs' opening brief in prior appeal in this case elided the Little Tucker Act's $10,000 limitation on district court jurisdiction. Citing *Areolineas Argentinas v. United States,* 77 F.3d 1564, 1572-74 (Fed.Cir.1996), which sustained Tucker Act jurisdiction over illegal-

exaction claims ***when asserted in the Court of Claims***, Plaintiffs asserted:

> The district court had subject-matter jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1346(a), which waives sovereign immunity and "provides jurisdiction to recover an illegal exaction by government officials when the exaction is based on an asserted statutory power," or when the money was "was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Aerolineas Argentinas v. United States,* 77 F.3d 1564, 1572-74 (Fed.Cir.1996).

Corrected Opening Brief, *NVLSP* Nos.2019-1081 & 19-1083, at 5.

Compliance with the Little Tucker Act's $10,000 jurisdictional limitation was simply presumed—it was neither briefed nor argued by the parties. Neither was it decided by this Court.

Plaintiffs insist otherwise, asserting that this Court addressed the issue in a footnote rejecting the government's argument that "to confer jurisdiction, the complaint [here] must identify precisely the amount each plaintiff has individually overpaid." NVLSP Brief at 39 (quoting *NVLSP v. United States,* 968 F.3d 1340, 1349 n.9 (Fed.Cir.2020). But this footnote had nothing to do with the Little Tucker Act's $10,000 limitation on district court jurisdiction. The panel was addressing the only jurisdictional issue that the United States raised in that appeal:

> 1. Whether the summary judgment order should be vacated for lack of Little Tucker Act jurisdiction because no statute expressly or by necessary implication gives PACER users a damages remedy for allegedly excessive PACER fees.

Brief for Cross-Appellant United States, *NVLSP,* Nos. 2019-1081 & 2019-1083, at 4 (Statement of the Issues).

The government's brief on this point suggested that Plaintiffs had to identify the specific amount that each plaintiff had paid in order to plead a cause of action for damages that could support Little Tucker Act jurisdiction. The government's brief argued:

> To establish jurisdiction under an illegal exaction theory, it is not enough for a claimant to allege that money was "improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Norman v. United States,* 429 F.3d 1081, 1095 (Fed.Cir.2005). "To invoke Tucker Act jurisdiction over an illegal exaction claim, a claimant must demonstrate that the statute or provision causing the exaction itself provides, either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" *Id.* (quoting *Cyprus Amax Coal Co. v. United States,* 205 F.3d 1369, 1373 (Fed.Cir.2000).

Brief for Cross-Appellant United States, *NVLSP,* Nos. 2019-1081 & 2019-1083, at 1-2; *see id.* at 17 (Summary of Argument); *id.* at 20 (Argument).

"Without a cause of action for damages," the United States insisted, "there is no Little Tucker Act jurisdiction." Brief for Cross-Appellant United States, *NVLSP,* Nos. 2019-1081 & 2019-1083, at 19. And it contended that jurisdiction could not be established because "Congress did not provide any mechanism by which a court could identify the 'correct' fee for a particular download by a particular user," the United States argued, asserting that for any illegal-exaction claim to be "cognizable, the statute would have to establish a specific fee for each download." Brief for Cross-Appellant United States, *NVLSP,* Nos. 2019-1081 & 2019-1083, at 23 (Argument). "Instead," the United States continued, "Congress explicitly contemplated that fees for downloads would vary from user to user, so there is no 'correct' fee that could form the basis of an illegal exaction claim." Brief for Cross-Appellant United States, *NVLSP,* Nos. 2019-1081 & 2019-1083, at 23 (Argument).

To this argument, footnote 9 of this Court's opinion responded: "We reject the government's argument that, to confer jurisdiction, the complaint must identify precisely the amount each plaintiff has individually overpaid." *NVLSP,* 968 F.3d at 1349 n.9. The footnote has nothing to do with the Little Tucker Act's $10,000 jurisdictional

limitation, and excuse neither Plaintiffs nor the court below from complying with it.

That this Court noted the district court's exercise of jurisdiction in its description of its class-certification order (which was not under review in the interlocutory appeal) does not amount to a holding of this Court on the $10,000 limitation. "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Arizona Christian Sch. Tuition Org. v. Winn,* 563 U.S. 125, 144 (2011). "The Court would risk error if it relied on assumptions that have gone unstated and unexamined." *Arizona Christian School,* 563 U.S. at 144. *See also, e.g., United States v. L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 38 (1952)("Even as to our own judicial power or jurisdiction, this Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio."); *Abuzeid v. Mayorkas,* 62 F.4th 578, 586 (D.C.Cir.2023); *Schindler Elevator Corp. v. Washington Metro. Area Transit Auth.,* 16 F.4th 294, 299 (D.C.Cir. 2021); *Kell v. Benzon,* 925 F.3d 448, 466 (10th Cir.2019).

The same is true of this Court's opinion in *Alaska Airlines, Inc. v. Johnson,* 8 F.3d 791, 797 (Fed.Cir.1993), which did not directly address or decide whether an "illegal exactions" theory of liability may be employed to frustrate the Little Tucker Act's $10,000 jurisdictional limitation on asserting claims in a federal district court. Its dictum concerning claims that were not at issue on appeal, that "the district court had concurrent jurisdiction with the Court of Federal Claims over the contracts," *id.* at 797, is not a precedential holding. *See, e.g., Terry v. Principi,* 367 F.3d 1291, 1295 (Fed.Cir.2004); *Co-Steel Raritan, Inc. v. Int'l Trade Comm'n,* 357 F.3d 1294, 1307-08 (Fed.Cir.2004).

Plaintiffs cannot fill this lacuna with the dissenting opinion of Judge Plager in *Williams v. United States,* 240 F.3d 1019 (Fed.Cir.2001). In a case involving judges' backpay, Judge Plager opined that a "claim" under the Little Tucker Act should be defined the same way a "claim" is defined for purposes of determining its timeliness under a statute of limitations. He thought "[i]t would be improper to treat the analogous question of the trial court's jurisdiction under the Little Tucker Act differently from the separate cause of action limitations theory enunciated in *Hatter* [*v. United States*, 203 F.3d 795

(Fed.Cir.2000)(en banc)]." *Williams,* 240 F.3d at 1060 (Plager, Cir.J., dissenting).

But the questions are not analogous. The term "'claim,' can carry a variety of meanings," *see Keene,* 508 U.S. at 210, and Plaintiffs offer no reason why its meaning in cases concerning timeliness under a statute of limitations may override its meaning in the Tucker Act's restriction of jurisdiction. Timeliness is an entirely different issue.

The majority in *Williams* accepted the government's concession that jurisdiction existed in that appeal only "for the 1995 year, since each individual judge would receive less than $10,000 for the unpaid COLA for that year." *Williams,* 240 F.3d at 1025. Accepting that concession without further discussion, the panel concluded that "the district court possessed Little Tucker Act jurisdiction at least to that extent, if not to the entirety of the complaint." *Id.* at 1025. "Because sufficient jurisdiction is established in the district court to authorize its ruling as to 1995, and because we hold that the Judges' case fails, we need not decide the full extent of the district court's jurisdiction over the Judges' complaint." *Id.* at 1025.

A footnote added: "If necessary, however, we adopt the jurisdictional analysis set out in the dissenting opinion." *Id.* at 1025 n.2. This, of course, is obiter dictum, as the panel had just held in text that the dissent's jurisdictional analysis was ***not*** necessary. Such dictum has no precedential effect. *Jama v. ICE,* 543 U.S. 335, 351 n.12 (2005)("Dictum settles nothing, even in the court that utters it."); *Curver Lux., SARL v. Home Expressions Inc.,* 938 F.3d 1334, 1342 (Fed.Cir.2019); *In re McGrew*, 120 F.3d 1236, 1238-39 (Fed.Cir.1997).

Neither does the dictum that Plaintiffs quote from the Ninth Circuit's opinion in *Baker v. United States,* 722 F.2d 517, 518 (9th Cir.1983), settle anything here. In *Baker,* where two plaintiffs sought damages for forfeited property, the Ninth Circuit observed that the Little Tucker Act's $10,000 "limit is not violated when plaintiffs [plural] combine a number of claims that are individually less than $10,000 but cumulatively exceed that amount." *Baker,* 722 F.2d at 518. The Ninth Circuit cited *United States v. Louisville & Nashville R.R. Co.*, 221 F.2d 698, 701 (6th Cir.1955), which Isaacson's Opening Brief discusses at length, and *Zahn v. International Paper Co.,* 414 U.S. 291, 294 (1973), which held that claims of class members must be evaluated individually

in order to determine whether they met the jurisdictional amount-in-controversy requirement.

But the plaintiffs in *Baker* had no claims at all to assert: "The plaintiffs are not 'claimants' because they have alleged no specific property interest in the forfeited items." *Baker,* 722 F.2d at 518. The case was dismissed for lack of Article III standing. *Id. Baker* does not stand as authority for exercising jurisdiction in this case with respect to the Class Members whose individual claims against the United States total more than $10,000 apiece.

No significant precedent supports Plaintiffs' contention that the District Court properly exercised jurisdiction with respect to Class Members whose Class Period PACER billings—and thus claims—exceeded $10,000 apiece.

C. Plaintiffs' Theory from the Outset was that PACER Charges Should Be Limited to Marginal Cost of Close to Zero

Plaintiffs suggest that the amount of individual class member's claims, for jurisdictional purposes, cannot be determined because they "have always conceded that the AO could charge *some* amount in fees." NVLSP Brief at 40 (emphasis in original). Yet their papers below, prior

to the district court's summary-judgment order, consistently asserted that the AO should charge no more than the "marginal cost" of providing PACER services which, according to Plaintiffs, approached zero. As their brief in this appeal puts it: "The plaintiffs took the position that PACER fees could be charged only to the extent necessary to reimburse the ***marginal costs*** of operating PACER and that the government was liable because the fees exceeded that amount." NVLSP Brief at 10 (citing Appx2607-2608(DE52:1-2[ECFpp5-6])(emphasis added).

According to their papers below, moreover, the relevant marginal cost "including the cost of data storage through a secure service used by many federal agencies—should be $0.0000006 per page (about one half of one ten-thousandth of a penny)," rather than the ten cents per page that PACER continues to charge. Appx2623(DE52:17[ECFp21]) (Plaintiffs' Motion for Summary Judgment as to Liability). Calculating the amount of the claims asserted requires considering Plaintiffs' theory of damages from the case's outset, under which users who paid more than $10,000 would have recovered virtually the entirety of their expenditures.

Plaintiffs' Complaint focused on PACER downloads' vanishingly small marginal cost. "Recognizing that, under 'existing law, users of PACER are charged fees that are ***higher than the marginal cost*** of disseminating the information,'" it alleged that "Congress amended the law 'to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible.'" Appx0112(DE1:6¶12) (quoting S.Rep. 107-174, 107th Cong., 2d Sess. 23 (2002)) (emphasis added).

Plaintiffs' Motion for Summary Judgment as to Liability insisted, moreover, that PACER downloads' marginal cost approach zero—making class members' PACER charges, in effect, almost fully recoverable:

> Indeed, our technical experts estimate that the true cost of retrieving a document from PACER—including the cost of data storage through a secure service used by many federal agencies—should be $0.0000006 per page (about one half of one ten-thousandth of a penny), meaning that the current fees actually collected by PACER could cover the costs associated with "215,271,893,258,900 requests, or approximately 1,825 pages per day for every person in the United States." Lee & Lissner Decl. ¶29.

Appx2623(DE52:17[ECFp21]).

In a declaration, Plaintiffs' technical experts, Thomas Lee and Michael Lissner, together averred:

> 29. The tremendous disparity between what the judiciary actually charges in PACER fees and what is reasonably necessary to charge is illustrated by two alternative calculations. The first considers what the per page fee could be if PACER was priced according to our calculations. Including storage costs, we estimate that the per page cost of retrieving a document from PACER could cost $0.0000006 (about one half of one ten-thousandth of a penny). The second alternate calculation considers how many requests PACER could serve if the fees it currently collects were used exclusively and entirely for providing access to its records. Assuming no change in the size of the dataset and using the storage costs calculated in association with that size, $146,195,637.40 in fee revenue remains to cover document requests and bandwidth. At the previously cited rates, this would cover the costs associated with serving 215,271,893,258,900 requests, or approximately 1,825 pages per day for every person in the United States.

Appx2848-2849¶29(DE52-15:9–10¶29).

By that math, a class member who paid $10,000 had they been billed only the marginal cost of its downloads, should have paid but $0.006. Which is to say, they should have received a full refund of the $10,000. That, of course, means that any class member who paid more than $10,000 had a claim, at the litigation's outset, against the United States for more than $10,000. The district court's grant of partial

summary judgment, and this Court's affirmance, reduced the damages that could ultimately be recovered. But that outcome doesn't change what was claimed in the first place.

When Plaintiffs moved for summary judgment, asserting that the government should return all charges exceeding downloads' marginal cost to the government, the District Court rejected their marginal-cost theory, observing that "there is no mention in the statute of PACER or its 'marginal cost.'" Appx3469(DE89:26). On appeal this Court too disagreed with Plaintiffs' contentions concerning marginal cost, and affirmed the District Court's determination that Plaintiffs properly challenged some but not all uses of PACER proceeds. *NVLSP,* 968 F.3d at 1351-52. This Court noted that "Plaintiffs' theory of jurisdiction rests on their 'illegal exaction' claim ***that the government*** unlawfully charged them excessive PACER fees and ***must return the amount found to exceed the marginal cost*** of operating PACER during the period in question." *Id.* at 1347 (emphasis added). This Court noted Plaintiffs' reliance on S.Rep. No. 107-174, at 23 (2002), disapproving fees "that are higher than the marginal cost of disseminating the information." *NVLSP,* 968 F.3d at 1353 & 1355.

Still, Plaintiffs' initial contention that PACER charges should be limited to downloads' marginal cost of "$0.0000006 per page (about one half of one ten-thousandth of a penny)," must be accepted for purposes of applying the Tucker Act's $10,000 limitation. And class members whose PACER fees exceeded $10,000 for that reason should be excluded from the class and their claims "dismissed for lack of jurisdiction." *Chula Vista,* 824 F.2d at 1579.

D. This Court Cannot Modify the Little Tucker Act's $10,000 Limitation on Jurisdiction to Ameliorate a Claimed Hardship

Claimed hardship is no basis for modifying a jurisdictional statute's requirements.

That should dispose of Plaintiffs' suggestion that applying the Little Tucker Act's jurisdictional limitation would be unfair to PACER users whose claims in this case come to more than $10,000 apiece. Particularly they worry that class members with claims exceeding $10,000 apiece might not be able to pursue those claims now in the Court of Claims. This Court approved of applying the *American Pipe* tolling rule to claims asserted under the Tucker Act, holding that "allowing class action tolling 'does not involve [the court's] power to

"liberalize" the statute of limitations but rather its power to avoid a multiplicity of suits through a representative action.'" *Bright v. United States,* 603 F.3d 1273, 1290 (Fed.Cir.2010)(quoting *Barbieri v. United States,* 15 Cl. Ct. 747, 752 (1988)(citing *Western Cherokee Indians v. United States,* 27 Ct.Cl. 1, 54 (1891))).

Plaintiffs rely on a recent Court of Claims decision, holding that this Court's decision in *Bright* was somehow overruled by the Supreme Court's holding in *CalPERS. v. ANZ Securities,* 582 U.S. 497, 508-09 (2017), that the *American Pipe* rule for tolling statutory limitations periods does not apply to the Security Act of 1933's three-year statute of repose for federal securities claims. *See Blue Cross & Blue Shield of Kansas City Welfare Benefit Plan v. United States,* 173 Fed. Cl. 132, 149 (2024). The Court of Claims acknowledged in *Blue Cross* that "[t]he Federal Circuit has not since had the occasion to address the validity of its holding in *Bright,*" in light of the Supreme Court's decision in *CalPERS* concerning tolling of the Securities Act's statute of repose. *Blue Cross,* 173 Fed.Cl. at 149. Given the fact that *CalPERS* says nothing at all about the Tucker Act's limitations period, this Court would have to convene en banc to reconsider *Bright.*

Bright's continuing vitality cannot, in any event, be reached in this appeal—for it would involve rendering an advisory opinion. In *Keene,* which concerned Tucker Act jurisdiction, the Supreme Court noted that

> Keene also asks the Court to "make clear that, if Keene refiles the same claims, equitable tolling would be available to eliminate any limitations bar." Brief for Petitioner 45. But any response to this request would be an advisory opinion.

Keene, 508 U.S. at 217 n.13.

Whatever that question's outcome might be, Class Counsel's failure to comply with a jurisdictional statute is inadequate basis for construing the statute to accommodate their failure. Jurisdictional limitations must be enforced, and federal courts "enjoy no 'liberty to add an exception ... to remove apparent hardship.'"*Id.* at 217-18 (1993)(quoting *Corona Coal Co. v. United States,* 263 U.S. 537, 540 (1924)); *accord, e.g., Tohono O'Odham,* 563 U.S. at 317; *Central Pines Land Co. v. United States,* 697 F.3d 1360, 1367 n.6 (Fed.Cir.2012). And, of course, "policy concerns cannot trump the best interpretation of the statutory text." *Patel v. Garland,* 596 U.S. 328, 346 (2022).

E. The Settlement Should be Vacated as Inequitable if Large Users' Claims of Over $10,000 Apiece are Not Excluded and Dismissed Pursuant to the Little Tucker Act's Jurisdictional Limitation

Rule 23(e)(2)(D) requires a District Court evaluating a proposed class-action settlement to consider whether "the proposal treats class members equitably relative to each other." Appellees can cite plenty of cases in which a pro rata distribution was equitable. But the facts of this case are different, for many of PACER's largest users are law firms whose expenditures have already been fully reimbursed by their own clients, or from settlements in other cases. It is fundamentally unfair for them to be reimbursed again from the settlement fund in this case—unless they agree to pass the money on to their clients who actually bore those costs.

If claims of the heaviest PACER users—whose Class Period PACER billings totaled over $10,000—are "dismissed for lack of jurisdiction." *Chula Vista,* 824 F.2d at 1579, this problem will be sufficiently addressed to allow the Settlement to stand.

F. The Attorney's Fee Award of Nearly Four Times Their Lodestar Should be Vacated

The Supreme Court's fee-shifting precedents do not directly address attorney's fees to be awarded under the common-fund doctrine. But they plainly do address the fees that are presumptively sufficient, in class-action litigation, to attract and adequately compensate plaintiffs' attorneys. *Perdue* holds "First, a 'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case," and "Second, the lodestar method yields a fee that is presumptively sufficient to achieve this objective." *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 552 (2010). "Indeed, we have said that the presumption is a 'strong' one." *Id.* The Court has "repeatedly said that enhancements may be awarded" only in "rare" and "exceptional" circumstances. *Id.*

This Court held in *Haggart v. Woodley,* 809 F.3d 1336, 1357-58 (Fed.Cir.2016), moreover, that an unenhanced lodestar fee award paid by a defendant under a fee-shifting statute adequately compensated class counsel who had proceeded to trial and won a common-fund judgment. *Id.* at 1354-55. The unenhanced lodestar, this Court held,

"provides class counsel with reasonable attorney fees." *Id.* at 1354. That is so even if the litigation creates a common fund.

Thus, Class Counsel's unenhanced lodestar would provide a presumptively reasonable attorney's fee award in this case. Yet they asked for nearly ***four times*** that, and the District Court—purportedly acting as a fiduciary for the Class—took Class Counsel's request as the starting point of its attorney's fee analysis. "That approach was improper." *Health Republic Ins. Co. v. United States,* 58 F.4th 1365, 1376 (Fed.Cir.2023). "[A]lthough a range of reasonableness undisputedly exists," the District Court's "task is ***to make its own determination*** of what fee to award," without any presumption that the fee Class Counsel propose is the appropriate award. *Id.* at 1377 (emphasis added). Acting as a fiduciary for the Class, the District Court should have asked first if an unenhanced lodestar is sufficient—as the Supreme Court holds it usually will be.

Health Republic emphasizes the absence of "any authority that defines the adjudicator's task," in awarding common-fund attorney's fees, "as determining the range of reasonableness and awarding the top end or whatever class counsel requests below that top end," as the

District Court did in this case. *Health Republic,* 58 F.4th at 1377. "[S]uch an approach would be contrary to the widespread recognition that the trial court has a 'fiduciary duty' to protect the interests of the class, given the general non-alignment of the interests of class counsel and the class when a common-fund fee is proposed." *Id.*

Plaintiffs respond to Isaacson's objection that the record does not adequately support their fee award by asking this Court to affirm on the basis of supplementary evidence that the District Court determined should be excluded from consideration. Plaintiffs write:

> Although Mr. Isaacson notes (at 63-65) that the government was initially concerned that information supporting class counsel's hourly rates was insufficient for a cross-check, that is only half the story. The other half, which Mr. Isaacson omits, is that the government later told the court that its concern "ha[d] been addressed" by "additional information" provided by counsel and that, as a result, there was "sufficient information in the record" for the cross-check. Appx4785, 4788. Indeed, after the government raised its concerns, class counsel further substantiated the reasonableness of their rates with supplemental declarations from their experts, Professor William Rubenstein of Harvard Law School and Professor Fitzpatrick of Vanderbilt Law School. Based on a large data set of class actions in D.C. (including DC-based Court of Federal Claims matters), Professor Rubenstein concluded that "data from commensurate cases provide strong empirical support for the conclusion that the hourly rates Class Counsel propose are within the normal range." Appx4390.

NVLSP Brief at 51-52.

Plaintiffs' story leaves out the fact that Isaacson objected to consideration of the two Supplemental Declarations—and that the District Court properly excluded them. They can provide no basis for affirming the District Court's attorney's fee award.

The District Court's opinion notes Isaacson's objection to consideration of the Supplemental Declarations:

> First, Mr. Isaacson argues that the Court should not consider the supplemental declarations of Professor William Rubenstein and Professor Brian Fitzpatrick because Class Counsel submitted these declarations after the deadline for class members to file objections. Isaacson Stmt. at 3. Second, Mr. Isaacson quibbles with the content of these supplemental declarations. *Id*. at 3-6.

Appx0038(DE169:38).

The District Court then held that the Supplemental Declarations would not be considered. The Court held that

> class members lack a meaningful opportunity to object to attorney's fees requests if counsel submits declarations raising new bases of support for the requested fees after the objection deadline. And the professors' supplemental declarations do just that. Professor Fitzpatrick's declaration provides information about why the Fitzpatrick Matrix should not be used as Mr. Isaacson suggests. See Fitzpatrick Supp. Decl. ¶¶4-6. Professor Rubenstein's declaration

> examines the data used in the Fitzpatrick Matrix and comes to certain conclusions about reasonable fees based on a subset of that data. See Rubenstein Supp. Decl. ¶¶13-26. Neither of these points was raised in the professors' original declarations, which accompanied Class Counsel's fees motion.
>
> Based on Mr. Isaacson's objections, the Court will not rely on the supplemental declarations of Professor Fitzpatrick or Professor Rubenstein in assessing the reasonableness of Class Counsel's requested fees. Because the Court will not rely on the declarations, it need not address Mr. Isaacson's arguments about their content.

Appx0039(DE169:39).

Class Counsel are not entitled to rely, on appeal, on materials that were properly excluded by the District Court. Their fee award should be vacated, and the matter remanded with instructions to award a reasonable fee to be determined, as required by *Health Republic,* independently of the amount requested by Class Counsel.

G. Plaintiffs' $10,000 Incentive Awards Should be Vacated as Contrary to Supreme Court Precedent

The Supreme Court's foundational common-fund precedents, *Trustees v. Greenough*, 105 U.S. 527, 532 (1882), and *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 128 (1885), hold that while a litigant may recover reasonable attorney's fees and litigation expenses

from a common fund, compensation for their service as a representative plaintiff is prohibited. The Eleventh Circuit accordingly holds that "Supreme Court precedent prohibits incentive awards." *Johnson v. NPAS Solutions, LLC,* 975 F.3d 1244, 1255 (11th Cir.2020). The Eleventh Circuit is correct. *See Fikes Wholesale, Inc. v. Visa U.S.A., Inc.,* 62 F.4th 704, 729 (2d Cir.2023)(Jacobs, Cir.J., concurring) (agreeing with the Eleventh Circuit's "thorough and well-reasoned opinion" in *Johnson v. NPAS Solutions*).

The Class Notice in this case indicated that Class Counsel would seek an award of attorney's fees, and that the Named Plaintiffs would seek incentive awards of $10,000 apiece. Assertions concerning "the future course of the litigation, when stated in a court-approved class notice ... must generally be respected." *Health Republic,* 58 F.4th at 1373. Plaintiffs' request for incentive awards cannot be recast as motions for attorney's fees in hopes of avoiding the bar of *Greenough* and *Pettus.*

The United States dismisses those decisions as "two Supreme Court cases from more than 135 years ago," that "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 the nineteenth-century precedents." U.S. Brief at 42 (quoting *Moses v. New York Times Co.*, 79 F.4th 235, 254-55 (2d Cir. 2023)).

Yet even courts that sustain them recognized that nothing in Rule 23 authorizes incentive awards. "No provision of rule or statute authorizes incentive awards ... in class actions." *Espenscheid v. DirectSat USA, LLC,* 688 F.3d 872, 877 (7th Cir.2012). And this Court honors both decisions as the basis for its own common-fund doctrine:

> The common fund doctrine is rooted in the traditional practice of courts of equity and derives from the equitable power of the courts under the doctrines of quantum meruit, *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 128 (1885), and unjust enrichment, *Trustees v. Greenough*, 105 U.S. 527, 532 (188[2]).

Haggart, 809 F.3d at 1352.

Although he later changed his tune, moreover, the Fifth Edition of William B. Rubenstein's treatise on class actions recognized that incentive awards were created of "whole cloth." 5 William B. Rubenstein, *Newberg on Class Actions* §17:1 at 492 (5th ed. 2015); *see id.* §17.4, Appx4561. Under the heading "**Legal basis for incentive**

awards," Rubenstein wrote: "It might be most apt to leave this section of the Treatise blank as Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards. The judiciary has created these awards out of whole cloth."[1]

The United States says ""the Supreme Court appears to have left *Greenough* and *Pettus* in the rear view"—in 2018, "without reference to either case, the Supreme Court acknowledged that a class representative 'might receive a share of class recovery above and beyond her individual claim.'" U.S. Brief at 42 (quoting *Moses,* 79 F.4th at 255 (citing *China Agritech, Inc. v. Resh,* 584 U.S. 732, 747 n.7 (2018)). Plaintiffs themselves add that "*China Agritech*— not *Greenough* or *Pettus*—is the more relevant source for guidance on the Supreme Court's view of incentive awards." NVLSP Brief at 55.

Yet the Supreme Court does not overrule its own decisions so nonchalantly. "The notion that [it] created a new rule sub silentio—and

[1] *Id.* §17-4, Appx4579. Rubenstein deleted these passages from the Sixth Edition of his treatise. *See* Appx4552-53(DE166-6:5-6).

in a case where certiorari had been granted on an entirely different question, and the parties had neither briefed nor argued the ... issue—is implausible." *Mickens v. Taylor,* 535 U.S. 162, 172 (2002). The Supreme Court "does not normally overturn, or so dramatically limit, earlier authority sub silentio." *Shalala v. Illinois Council on Long Term Care,* 529 U.S. 1, 18 (2000).

III. CONCLUSION

The judgment below should be reversed.

DATED: November 22, 2024

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CERTIFICATE OF COMPLIANCE

According to the software used to prepare it, this reply brief contains **7,022** words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word for Mac (Version 16.90(24101387) in 14-point Century Schoolbook font.

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