No. 24-464

IN THE

Supreme Court of the United States

THOMAS J. DART, SHERIFF, COOK COUNTY, ILLINOIS, ET AL.
Petitioners,
v.
QUINTIN SCOTT,
Respondent.

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

BRIEF OF THE DRI CENTER FOR LAW AND PUBLIC POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE DRI CENTER FOR LAW AND PUBLIC POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS[1]

INTEREST OF *AMICUS CURIAE*

The DRI Center for Law and Public Policy is the public policy "think tank" and advocacy voice of DRI, Inc.—an international organization of more than 12,000 attorneys who represent businesses in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation of the role of defense lawyers in the civil justice system; and anticipating and addressing substantive and procedural issues germane to defense lawyers and the fairness of the civil justice system. The Center participates as an *amicus curiae* in this Court, federal courts of appeals, and state appellate courts in an ongoing effort to promote fairness, consistency, and efficiency in the civil justice system.

This case fits those criteria. "No principle is more fundamental to the judiciary's proper role . . . than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)). Allowing a plaintiff to maintain a lawsuit after he settles his claims runs roughshod over that principle.

[1] This brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. DRI notified all parties of its intent to file this brief on November 15, 2024.

INTRODUCTION AND SUMMARY

This case presents a simple question: does a party who has settled her claims continue to have a sufficient personal stake for Article III's purposes to maintain a lawsuit on a putative class's behalf? As petitioners correctly explain, the answer is no. Regardless of whether incentive awards to class representatives are lawful, the prospect of such an award does not create a justiciable case or controversy as to the settling plaintiff.

The parties agree that incentive awards are paid by class members out of their recovery and are designed to compensate the named plaintiff for his service to the class, not to compensate him for an injury he suffered at the defendant's hands. The prospect of an incentive award thus gives the named plaintiff some stake in the case—the same stake someone who bets on the lawsuit's result would have. That type of interest, however, is insufficient to confer standing under this Court's precedents, which require the plaintiff's interest to follow from an injury in fact suffered at the defendant's hands.

The Court's dated precedents suggesting that named plaintiffs have a cognizable interest in shifting their attorney fees and costs or vindicating their supposed right to represent a class giving rise to standing in the absence of any other purported injury counsel in favor of granting the petition. The holdings in those cases have been overtaken by this Court's later decisions, and the Court should clarify that they are overruled.

The Court has repeatedly recognized that a plaintiff's desire to obtain the byproducts of litigation—

attorney fees and the like—does not satisfy Article III. Incentive awards are just another litigation byproduct. The petition should be granted.

REASONS FOR GRANTING THE PETITION

I. Incentive awards do not compensate for a preexisting injury, and defendants do not pay them.

The starting point for assessing whether the prospect of an incentive award may give rise to Article III standing is the basis for and source of such awards. No law or rule explicitly authorizes incentive awards; "they are like dandelions on an unmowed lawn—present more by inattention than by design." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013). One may nonetheless draw some conclusions from the case law.

Respondent synthesized below that incentive awards are designed to "pay" for a named plaintiff's "service" to the class—that is, for "serv[ing] as a fiduciary to the class, submit[ting] to deposition, participat[ing] in discovery, and tak[ing] on the risk that he will have to pay for the other side's costs if the case fails." C.A. Dkt. No. 43 at 3. And they "allocate part of a settlement fund to the named plaintiff" to do so. *Id.* at 8.

Respondent's summary of the basis for and source of incentive awards is consistent with how courts and commentators have long understood incentive awards. Courts roundly recognize that incentive awards compensate named plaintiffs for their service to the class. E.g., *Espenscheid* v. *DirectSat USA, LLC*, 688 F.3d 872, 877 (7th Cir. 2012) ("The incentive reward is designed to compensate him for bearing

the[] risks [of liability for the defendant's attorney fees and costs], as well as for as any time he spent sitting for depositions and otherwise participating in the litigation as any plaintiff must do." (citations omitted)); *Sullivan* v. *DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011) (" 'The purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation,' and to 'reward the public service of contributing to the enforcement of mandatory laws.' " (citation omitted)); *Rodriguez* v. *W. Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009) (recognizing that incentive 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"). Commentators agree. E.g., 5 William B. Rubenstein, *Newberg & Rubenstein on Class Actions* § 17.3 (6th ed.) ("[T]he payments aim to compensate class representatives for their service to the class and simultaneously serve to incentivize them to perform this function.").

As for the source of the payment, Judge Easterbrook cogently analyzed below the question of who pays incentive awards. He explained that the other plaintiffs do: "If prevailing plaintiffs pay the representative for services to the class, well and good; but a judge cannot order the defendant to pay more than the permissible level of damages, plus attorneys' fees and costs authorized by statute." App. 46a.

Judge Easterbrook's view generally prevails. For instance, in *Hadix* v. *Johnson*, 322 F.3d 895 (6th Cir. 2003), the Sixth Circuit rejected a request for an incentive award in a case that resulted in a consent

decree rather than a common fund. "Unsurprisingly," the court explained, "we are unable to find any case where a claim for an incentive award that is not authorized in a settlement agreement has been granted in the absence of a common fund." 322 F.3d at 898. Because the consent decree before the court did not authorize any incentive award and did not create a common fund, it was "plainly inappropriate to grant an incentive award." *Ibid.*

Similarly, the leading class-action treatise reports that "there is no statutory basis" to require a defendant to pay an incentive award in the absence of a common fund or a settlement agreement providing for an award. Rubenstein, *supra*, § 17.5. "[C]ourts have rejected awards on that basis." *Ibid.* (recognizing that "there are a few scattered reports of defendants being ordered to pay incentive awards in fee-shifting cases").

In short, incentive awards are paid not by the defendant but by other members of the plaintiff class. And they are paid to compensate the named plaintiff not for his injury at the defendant's hands but rather for his service to the class.

II. The prospect of an incentive award cannot underwrite Article III standing.

Because incentive awards do not compensate for an injury caused by the defendant and are simply a possible byproduct of litigation, incentive awards cannot support a named plaintiff's standing to pursue claims on behalf of a putative class after she settles

her claims.[2] Under this Court's precedents, a named plaintiff's "interest in . . . obtaining a class incentive award does not create Article III standing." *Campbell-Ewald Co.* v. *Gomez*, 577 U.S. 153, 178 n.1 (2016) (Roberts, C.J., dissenting).

"The 'law of Art. III standing is built on a single basic idea—the idea of separation of powers.'" *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 422 (2021) (quoting *Raines*, 521 U.S. at 820). Article III of the Constitution limits the power of federal courts to deciding "Cases" or "Controversies." U.S. Const. art. 3, § 2, cl. 1. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines*, 521 U.S. at 818 (quoting *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)).

"The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986). "For there to be a case or controversy under Article III, the plaintiff must have a 'personal stake' in the case—in other words, standing." *TransUnion*, 594 U.S. at 423 (quoting *Raines*, 521 U.S. at 819). "The exercise of judicial power . . . can so profoundly affect the lives, liberty,

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[2] Petitioners couch the question presented in terms of standing. One might also phrase it as a question of mootness—standing's cousin. Cf. *Friends of the Earth, Inc.* v. *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) ("The Constitution's case-or-controversy limitation on federal judicial authority . . . underpins both our standing and our mootness jurisprudence . . . ."). Respondent apparently had standing to sue at the outset of the case. He lost his personal interest in the outcome of the lawsuit, however, when he voluntarily settled with petitioners.

and property of those to whom it extends that the decision to seek review must be placed in the hands of those who have a direct stake in the outcome." *Diamond*, 476 U.S. at 62 (cleaned up). The plaintiff's personal stake "must continue" for the duration of the lawsuit; "it is not enough that a dispute was very much alive when suit was filed." *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

A plaintiff shows that he has a sufficient personal stake for Article III's purposes when "three conditions are satisfied": the plaintiff "must show that he has 'suffered an injury in fact' that is caused by 'the conduct complained of' and that 'will be redressed by a favorable decision.'" *Camreta* v. *Greene*, 563 U.S. 692, 701 (2011). "These requirements together constitute the 'irreducible constitutional minimum' of standing, which is an 'essential and unchanging part' of Article III's case-or-controversy requirement, and a key factor in dividing the power of government between the courts and the two political branches." *Vt. Agency of Nat. Res.* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000) (quoting *Lujan*, 504 U.S. at 560).

To state the rule is to recognize why a possible incentive award does not give a named plaintiff a cognizable personal stake for purposes of Article III. An incentive award compensates the named plaintiff for his service and is paid by the class; it does not compensate the plaintiff for an injury caused by the defendant's conduct. To be sure, the named plaintiff has a "concrete private interest in the outcome of [the] suit" insofar as he hopes to negotiate or receive an incentive award. *Vt. Agency of Nat. Res.*, 529 U.S. at 772 (quoting *Lujan*, 504 U.S. at 573). "An interest unrelated to injury in fact," however, "is insufficient

to give a plaintiff standing." *Ibid.* Otherwise, anyone "who has placed a wager upon the outcome" or who is being paid by someone for his service as named plaintiff would have Article III standing. See *ibid.*

This Court's companion decisions in *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980), and *U.S. Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980), arguably are in tension with this conclusion, but they are no impediment to granting the petition. If anything, their existence commends a grant because this Court's later decisions have superseded them and they should be overruled.[3]

In *Roper*, after the district court denied class certification, the defendant made an offer of judgment to the named plaintiffs of all amounts claimed in the plaintiffs' individual capacities. 445 U.S. at 327. Although the plaintiffs rejected the defendant's offer, the district court nonetheless entered judgment over their objection consistent with the offer. *Id.* The plaintiffs then sought appellate review of the denial of class certification. *Id.* at 330.

Notwithstanding the judgment on the merits entered in the plaintiffs' favor, this Court held that the plaintiffs continued to have a sufficient personal stake as to the "procedural ruling, collateral to the merits of [the litigation]," denying class certification. *Id.* at 336. To reach that conclusion, the Court accepted the plaintiffs' contention that "they

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[3] This Court has questioned *Roper*'s continuing validity but has not had occasion to resolve it. See *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 78 (2013) ("Because *Roper* is distinguishable on the facts, we need not consider its continuing validity in light of our subsequent decision in *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472 (1990).").

retain[ed] a continuing individual interest in the resolution of the class certification question in their desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails." *Id.* In other words, the plaintiffs' interest in being reimbursed for some of their attorney fees and costs gave them standing to appeal.

This Court decided *Geraghty* the same day. *Geraghty* was a challenge to the U.S. Parole Commission's Parole Release Guidelines. 445 U.S. at 390. After the district court denied class certification, the named plaintiff was released from prison, mooting his personal claim. *Ibid.* The question before this Court was whether the named plaintiff continued to have a personal stake for purposes of challenging the denial of class certification on appeal.

As in *Roper*, this Court answered affirmatively. "A plaintiff who brings a class action presents two separate issues for judicial resolution," the Court reasoned. *Id.* at 402. "One is the claim on the merits; the other is the claim that he is entitled to represent a class." *Ibid.* Although the Court recognized that "a 'legally cognizable interest' . . . in the traditional sense rarely ever exists with respect to the class certification claim," it nonetheless held[4] that "[t]he question whether class certification is appropriate remains as a concrete, sharply presented issue" sufficient to satisfy Article III. *Id.* at 402–03. In other words, the

[4] Curiously, the Court explicitly disclaimed opining on whether "the named plaintiff is entitled to continue litigating the interests of the class" assuming the reviewing court reverses the denial of class certification. 445 U.S. at 405.

denial of the "right to have a class certified" purportedly conferred by the Federal Rules of Civil Procedure gave the named plaintiff a sufficient personal stake even though his claim indisputably was moot. *Id.* at 403.

Whatever their merits on their unique facts in 1980, this Court's subsequent decisions have shown that *Roper* and *Geraghty* were wrongly decided. As for *Roper* and a named plaintiff's purported interest in having his fees and costs shared with a class, this Court has since repeatedly held that an interest in attorney fees or costs—even when authorized by statute—"is *insufficient* to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis*, 494 U.S. at 480 (emphasis added) (citing *Diamond*, 476 U.S. at 70–71); accord *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("[R]eimbursement of the costs of litigation cannot alone support standing."). "[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit." *Steel Co.*, 523 U.S. at 107. Rather, "[t]he litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself." *Id.* *Roper* is impossible to square with these later decisions.

So too is *Geraghty* and its reliance on a named plaintiff's purported procedural right to represent a class under the Federal Rules of Civil Procedure. This Court has since repeatedly held that "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 496 (2009); accord *TransUnion*, 594 U.S. at 427 ("[U]nder

Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court."); *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 341 (2016) ("Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.").

Applied here, that rule should mean that the purported procedural right to certify a class has no bearing on a named plaintiff's standing. Class "allegations are simply the means of invoking a procedural mechanism that enables a plaintiff to litigate his individual claims on behalf of a class." *Microsoft Corp.* v. *Baker*, 582 U.S. 23, 45 (2017) (Thomas, J., concurring in the judgment). "A class action . . . merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits"; "it leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring).

This Court's upholding of False Claims Act relator standing in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), likewise fails to support respondent's standing in this case. Just the opposite. Indeed, the Court explicitly recognized that "the bounty [the relator] will receive if the suit is successful" is *insufficient* to confer standing. 529 U.S. at 772. "The [plaintiff's] interest

must consist of obtaining compensation for, or preventing, the violation of a legally protected right," and a "*qui tam* relator has suffered no such invasion." 529 U.S. at 772–73. That rationale maps directly onto incentive awards and illustrates why the prospect of an incentive award does not confer standing.

What, then, gave the relator standing? Recognizing that the False Claims Act explicitly provides that a relator "may bring a civil action for a violation of [the False Claims Act] for [himself] and for the United States Government," 18 U.S.C. § 3730(b)(1), the Court explained that the False Claims Act "can reasonably be regarded as effecting a partial assignment of the Government's damages claim" to the relator, 529 U.S. at 773. As an assignee, the relator could stand in the Government's shoes for standing purposes. *Id.* at 774. The Court also heeded the centuries-old tradition of *qui tam* suits in England and the United States, demonstrating that "*qui tam* actions were 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Id.* at 777 (quoting *Steel Co.*, 523 U.S. at 102).

Neither of the predicates that supported relator standing in *Vermont Agency of Natural Resources* is present in this case. Incentive awards are not authorized by statute or rule but rather are a judicial invention. Incentive awards represent not an ex ante assignment of each class member's claim to the named plaintiff but rather post hoc compensation for service to the class. And incentive awards have no historical pedigree. See Rubenstein, *supra*, § 17.2 (noting that a 1987 decision appears to be the first to use the term "incentive award").

If class-action incentive awards are lawful, they are only byproducts of litigation that class members pay to named plaintiffs to compensate them for their service to the class. The Court should grant the petition to confirm that the prospect of an incentive award does not give a settling named plaintiff a sufficient personal stake for Article III's purposes to perpetuate a lawsuit. And in doing so, the Court should clarify that the *Roper* and *Geraghty* decisions have been superseded and are no longer good law.

CONCLUSION

For these reasons, and those stated by petitioners, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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