No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,
Petitioners,
v.
PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,
Respondents.

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

BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, or in what circumstances, a *cy pres* award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate."

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INTEREST OF THE *AMICUS CURIAE*[1]

The Center for Individual Rights ("CIR") is a public interest law firm. It has represented parties in numerous cases concerning issues related to the First Amendment, including *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016), *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995), and *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002). It has also represented *amici* and submitted *amicus* briefs in cases involving important First Amendment issues, including *Janus v. Am. Fed'n of State, County, & Mun. Employees Council 31*, 138 S. Ct. 2448 (2018).

CIR believes that the Ninth Circuit's practice of approving *cy pres* settlement agreements in class action litigation in which the proceeds are awarded to third parties implicates the First Amendment rights of class members because such settlements compel class members to subsidize speech. CIR submits this *amicus* brief to point out the constitutional infirmity of such settlements and to urge the Court to reverse the Ninth Circuit's judgment.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, financially contribute to preparing or submitting this brief. All parties have consented in writing to this filing.

SUMMARY OF ARGUMENT

Money awarded pursuant to a class action settlement belongs to the class members. Thus, when a court permits a *cy pres* award to third parties, it is endorsing a transfer of value from the class members to the third parties; in this case, charities chosen by class counsel and the defendants. The *cy pres* funds may then be used to engage in speech or political activity with which class members may very well disagree, in violation of their First Amendment rights.

An affirmative opt-out requirement for class members is not carefully tailored to minimize the infringement of free speech rights and does not satisfy the requirements of the First Amendment. To the contrary, class members are required to bear the entire burden of complying with the opt-out procedure or risk subsidizing speech with which they disagree. The desires of class counsel and defendants to settle cases expediently and cheaply do not qualify as compelling interests sufficient to justify this infringement.

ARGUMENT

I. USE OF *CY PRES* AWARDS IN CLASS ACTION SETTLEMENTS COMPELS CLASS MEMBERS TO SUPPORT SPEECH WITH WHICH THEY MAY DISAGREE

All damages awarded upon settlement of a class action belong to the class members. *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). When the court permits a *cy pres* award, therefore, it is ratifying a mandatory transfer of value from class members to a third party. That third party can then use the funds provided by the settlement agreement to pursue goals, including (understandably) by engaging in various forms of speech. In effect, when it permits a *cy pres* award in a class action, the court forces class members to support groups with whose views class members may disagree. *See Knox v. SEIU*, 567 U.S. 298, 309 (2012) ("Closely related to compelled speech . . . is compelled funding of other private speakers or groups."). Here, petitioners objected to being forced to subsidize the AARP's advocacy and lobbying on controversial issues related to privacy. Pet. Br. 12.

This court has held "time and again," that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Janus v. Am. Fed'n of State, County, & Mun. Employees Council 31*, 138 S. Ct. 2448, 2463 (2018) (quoting *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977)). *See also Riley* v. *National Fed'n of Blind of N. C., Inc.*, 487 U. S. 781, 796-97 (1988); *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 559 (1985); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256–57

(1974); accord, *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 9 (1986) (plurality opinion). As this Court recently reiterated in *Janus*: "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and *in most contexts*, any such effort would be universally condemned." *Janus*, 138 S. Ct. at 2463 (emphasis added). And this concept is not new; rather, this Court has often quoted Thomas Jefferson's view that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Keller v. State Bar*, 496 U.S. 1, 10 (1990) (quoting I. Brant, James Madison: The Nationalist 354 (1948)). *See also Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 n.15 (1986); *Everson v. Board of Education*, 330 U.S. 1, 13 (1947).

As this Court recognized, a law "[f]orcing free and independent individuals to endorse ideas they find objectionable is *always demeaning*. . . . and would require 'even more immediate and urgent grounds' than a law demanding silence." *Janus*, 138 S. Ct. at 2464 (quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633 (1943)) (emphasis added).

Here, the court below awarded *cy pres* funds to Harvard Law School, Stanford Law School, the MacArthur Foundation, and AARP, Inc. The only conditions attached were that the recipients agree to "devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." Pet. App. at 84. The settlement agreement does not otherwise limit the use of the *cy pres* funds, or even define "initiatives." Nor is there any sort of continuing

supervision on the use of funds after they are distributed to the recipients. Under the settlement agreement approved here, an "initiative" could be virtually anything and it could take place many years from now.

Thus, the AARP (or any other recipient) might support an initiative relating to internet privacy which makes internet use marginally more difficult or costly. Under the settlement agreement, AARP could use *cy pres* funds to lobby Congress or state legislatures for that initiative.[2] Should AARP use *cy pres* funds to support a similar initiative in the future, a class member is left completely without recourse.

This type of *cy pres* award raises serious First Amendment problems because the Court has held that the government "may not . . . compel the endorsement of ideas that it approves." *Knox*, 132 S. Ct. at 2288. "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001). "Because the compelled

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[2] This concern is not imaginary. For several years, AARP has lobbied Congress and the F.C.C. in favor of net neutrality, a fairly controversial set of rules regulating internet service providers, with which many disagree. *See* Neil Walters, *The Importance of the Internet to Older Americans*, AARP Public Policy Institute (Oct. 2, 2017), https://www.aarp.org/ppi/info-2017/importance-of-an-open-internet-to-older-americans.html; Anne Broache, *Push for Net Neutrality Mandate Grows*, CNet (March 30, 2006), https://www.cnet.com/uk/news/push-for-net-neutrality-mandate-grows/. While "net neutrality" may not itself be an issue involving internet privacy, the AARP's activities on that topic demonstrate that it does not shy away from controversial political issues. And given that money is fungible, the funding of any privacy "initiatives" will leave more available for overtly political efforts even if the privacy initiatives would not be so characterized.

subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed." *Janus*, 138 S. Ct. at 2464.

The Court has approved a narrow class of compelled speech which might not violate the First Amendment—compelled contributions to a trade or professional association pursuant to a comprehensive regulatory scheme. *Id.* But even then, mandatory contributions are only permitted "insofar as [it is] a necessary incident of the larger regulatory purpose which justified the required association." *Knox*, 567 U.S. at 310 (internal quotation marks omitted).

Forced subsidies to charities resulting from *cy pres* awards in class action settlements are not incident to a comprehensive regulatory scheme. Class actions are governed by Rule 23 along with numerous state and federal laws governing the underlying claims in the litigation, not a single comprehensive regulatory scheme covering a discrete subject matter.

II. REQUIRING CLASS MEMBERS TO AFFIRMATIVELY OPT OUT VIOLATES THE FIRST AMENDMENT

This Court recently held that opt-out systems are unconstitutional in the context of compulsory union subsidies imposed upon government employees. *Janus*, 138 S. Ct. at 2486. In *Janus*, Illinois law permitted an employer to automatically deduct union agency fees from non-members' wages, without first obtaining any form of employee consent. Previously in *Knox*, the Court cast serious doubt on so-called opt-out systems

and pointed out that "acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment priciples." *Knox*, 567 U.S. at 311. "Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union's political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment?" *Id.* at 312. In *Janus*, the Court came full circle and held that neither agency fees, nor any other payments to the union could be deducted without the employee's prior affirmative consent. *Janus*, 138 S. Ct. at 2486. "By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Id.* In order to be valid, a waiver of First Amendment rights "must be freely given and shown by clear and convincing evidence." *Id.* (quoting *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 145 (1967)) (plurality opinion). *See also College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 680-82 (1999) (refusing to find a constructive waiver of sovereign immunity).

The First Amendment rights at stake are identical here to those at stake with regard to compulsory union fees, and courts "do not presume acquiescence in the loss of fundamental rights." *Knox*, 567 U.S. at 312. Class members should not be forced to subsidize class counsel's or the court's preferred charities or the initiatives these charities engage in. Whether or not an opt-out mechanism is sufficient in a traditional class action, once a *cy pres* award is contemplated, particularly of the open-ended kind at issue here, the First Amendment precludes requiring members to opt out or risk supporting political activities with which they disagree.

Put simply, the requirement that a class member affirmatively object to subsidizing a charity's political or ideological activities is in no way "'carefully tailored to minimize the infringement' of free speech rights," as the First Amendment requires. *Knox*, 567 U.S. at 313 (quoting *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 (1986)).

In *Knox*, the Court reviewed the First Amendment claims of dissenting public-sector workers who were charged an "Emergency Temporary Assessment to Build a Political Fight–Back Fund." *Id.* at 304. Because "a special assessment billed for use in electoral campaigns" went beyond anything the Court had previously considered, it declined to simply rely on its prior cases' implicit approval of opt-out schemes for dissenting employees. *Id.* at 314-15. Instead, it considered the question *ab initio*.

The reasoning in *Knox* shows that opt-out schemes like the one here are constitutionally untenable because they violate dissenting class members' free speech rights. The First Amendment requires that "any procedure for exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement' of free speech rights." *Id.* at 313 (quoting *Hudson*, 475 U.S. at 303). Accordingly, "measures burdening the freedom of speech or association must serve a 'compelling interest' and must not be significantly broader than necessary to serve that interest." *Id.* at 314. *See also Janus,* 138 S. Ct. at 2465 ("a compelled subsidy must serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.").

Applying these principles, the Court in *Knox* held that a public-sector union imposing a special assessment or dues increase "may not exact any funds from

nonmembers without their affirmative consent." *Knox*, 567 U.S. at 322. An opt-out scheme, the Court recognized, "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Id.* at 312. Against this risk, there is simply no "justification for putting the burden on the nonmember to opt out of making such a payment." *Id.* Instead, any such risk must be borne by "the side whose constitutional rights are not at stake"—in *Knox*, the labor union. *Id.* at 321. Thus, rather than presume non-members' willingness to fund a union's political or ideological activities, the law requires their affirmative consent. After all, the courts do not presume waiver of fundamental rights. *Id.* at 312. Later in *Janus*, the Court extended this rationale to hold that no payments to unions may be deducted from employee's wages unless the employee affirmatively consents. *Janus*, 138 S. Ct. at 2486.

A fortiori, requiring class members in a *cy pres* settlement to opt out of the class or risk subsidizing some unknown "initiative" in the future cannot withstand First Amendment scrutiny. Such "initiatives" could very well include political or ideological activities with which class members may disagree. Worse, class members have no way of knowing what they will be subsidizing—unlike unions, the third parties may have no track record on which the class members could even make such a judgment. The desires of class counsel and defendants to settle the case expediently and cheaply do not qualify as a compelling interest.

Further, the defendants in the class action, meanwhile, have no freedom of speech rights at risk. (On the contrary, they along with class counsel chose the benefiting charities.) The Ninth Circuit's presumption

that these charities are entitled to a presumption of financial support is just wrong.

CONCLUSION

For the reasons given above, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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