# No. 21-2292

## IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LISA JONES; HORACIO TORRES BONILLA; KRISTOFFER YEE,
*Plaintiffs-Appellees,*

v.

MONSANTO COMPANY,
*Defendant-Appellee*

ANNA ST. JOHN,
*Objector-Appellant*

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On Appeal from the United States District Court
for the Western District of Missouri
Case No. 19-cv-00102
District Chief Judge Beth Phillips

# BRIEF OF AMICI CURIAE STATE OF MONTANA AND 10 OTHER STATES SUPPORTING OBJECTOR-APPELLANT'S PETITION FOR REHEARING *EN BANC*


AUSTIN KNUDSEN
Montana Attorney General

MONTANA DEPARTMENT OF JUSTICE
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026
Fax: (406) 444-3549
david.dewhirst@mt.gov
kathleen.smithgall@mt.gov

DAVID M.S. DEWHIRST
*Solicitor General*

KATHLEEN L. SMITHGALL
*Assistant Solicitor General*
**Counsel of Record*

*Counsel for Amicus-Curiae State of Montana Supporting Objector-Appellant*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Other Authorities**

## STATEMENT OF AMICI CURIAE

The Attorneys General of Montana, Alabama, Arizona, Arkansas, Indiana, Louisiana, Kansas, Mississippi, South Carolina, Texas and Utah, file this amicus brief because the class settlement approved by the panel doesn't protect the consumers and consumer class members in their respective States. *See* 28 U.S.C. § 1715*; see also* S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 6 (requirement "that notice of class action settlements be sent to appropriate state and federal officials" exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens."); *id.* at 34 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements"; "Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties."). The States' Attorneys General are essential third parties in the class settlement schema—they champion the public interest, generally, and the interests of absent and unrepresented consumers. They are rightfully troubled, then, when interested parties at the bargaining table reach terms that maximize class counsel returns while frittering away the rights of injured consumers. These parties often do so by diverting large settlement sums

to *cy pres* groups, subscribing to the fiction that these nonprofits will advance the absent consumers' interests. The panel's decision affirmed a settlement agreement inconsistent with this Court's precedent and with the very purpose of class action settlement agreements.[1] This Court should grant Objector St. John's petition for rehearing en banc to clarify "when, if ever, [*cy pres*] relief should be considered." *Marek v. Lane*, 571 U.S. 1003 (2013) (Roberts, C.J., respecting the denial of certiorari).

## ARGUMENT

The purpose of class action settlements is to "compensate class members." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169 (3d Cir. 2013). Complex class settlements run the risk of misaligning incentives and trifling away the interests of the class members. And while this Court sometimes endorses the use of *cy pres* to distribute otherwise unclaimed funds, *cy pres* awards exacerbate the problem with complex settlements, generally, by creating an "*illusion* of class compensation."

[1] The Attorneys General take no position on the merits of the underlying claims, and this submission doesn't prejudice any State's ability to enforce its consumer protection laws or otherwise investigate claims related to this dispute. The Attorneys General certify that no party's counsel authored this brief, and no person or party other than named amici or their offices made a monetary contribution to the brief's preparation or submission.

Redish, Julian, & Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 623 (2010) (emphasis added); *see also Caligiuri v. Symantec Corp.*, 855 F.3d 860, 866 (8th Cir. 2017); *Oetting v. Green Jacobson, P.C.* (*In re BankAmerica Corp. Sec. Litig.*), 775 F.3d 1060, 1067 (8th Cir. 2015) ("BankAmerica"). At the outset of litigation, the parties are at their most adversarial. But by the time the parties are discussing *cy pres* awards, the parties have worked together to negotiate an agreement, and *cy pres* relief "creates the risk that class counsel will sell out the class." Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 Geo. Wash. L. Rev. 767, 772, 782 (2014). Only class counsel—the ones who benefit from large attorney fee payouts—represent injured consumers at the bargaining table .

In some instances, the settlement may reflect the best-case scenario for the class members. But courts should be skeptical when the best settlement agreement to which the parties can agree gives twice as much money to class counsel, the fund administrator, and non-class third-party organizations than it gives the injured class members.

Class action settlements like this one—where less than 30% of the funds accrue to injured class members—fail to adequately compensate those class members. While district courts retain significant discretion in approving these settlement agreements, they still must follow "rigorous standards" when it comes to *cy pres* distribution. *See BankAmerica*, 775 F.3d at 1067. And many judges across the country, in dissents and concurrences, have cautioned against the growing reliance on these distributions as sloppy substitutes for directly compensating class members

and illusory mechanisms to inflate attorney fee awards.[2] This Court, en banc, has the opportunity to clarify the "rigorous standard" class action settlements must satisfy; whether *cy pres* awards feature into the deal or not, these settlements must advance the superseding goal of compensating class members. *See BankAmerica*, 775 F.3d at 1067.

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[2] *See, e.g.*, *Frank v. Gaos*, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting) (noting that "c*y pres* payments are not a form of relief to the absent class members and should not be treated as such (including when calculating attorney's fees)"); *Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., dissenting from denial of certiorari) (noting that "the use of [cy pres] remedies in class action litigation" raise "fundamental concerns," including whether this type of relief should ever be considered); *Joffe v. Google, Inc.* (*In re Google Inc. St. View Elec. Comms. Litig.*), 21 F.4th 1102, 1122–23 (9th Cir. 2021) (Bade, J., concurring) (writing "separately to express some general concerns about *cy pres* awards"); *Keepseagle v. Perdue*, 856 F.3d 1039, 1060 (D.C. Cir. 2017) (Brown, J., dissenting) (identifying conflicts of interest between class counsel and absent class members); *Lane v. Facebook, Inc.*, 696 F.3d 811, 831 (9th Cir. 2012) (Kleinfeld, J., dissenting) (noting incentives for collusion between defendants and class counsel); *Klier v. Elf Atochem*, 658 F.3d 468, 480 (5th Cir. 2011) (Jones, J., concurring) (noting the *cy pres* doctrine is "inherently dubious"); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 363 (3d Cir. 2010) (Weis, J., concurring in part and dissenting in part) (questioning the propriety of incorporating trust law into class action litigation); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1312 (9th Cir. 1990) (Fernandez, J., concurring) ("[*Cy pres*] is a very troublesome doctrine, which runs the risk of being a vehicle to punish defendants in the name of social policy, without conferring any particular benefit upon any particular wronged person.").

## I. Class Action Settlements Must Compensate Class Members First.

*Cy pres* payments to third-party organizations do not compensate class members, *see Gaos*, 139 S. Ct. at 1047 (Thomas, J., dissenting), which is why courts prefer further distributing class funds to participating class members unless these class members have a liquidated damages claim and will receive a windfall. *BankAmerica*, 775 F.3d at 1064 (quoting A.L.I., Principles of the Law of Aggregate Litigation § 3.07(a) (2010)). *Cy pres* is and should be, therefore, a last resort. Yet the panel's interpretation of *BankAmerica* turns this principle on its head and encourages *cy pres* distribution *whenever the parties claim* the class members have been "full compensated." Opinion, *Jones v. Monsanto*, No. 21-2292, at 7 (8th Cir. June 29, 2022) ("Opinion"). This Court must right this wrong and ensure that class members' compensation remains the top priority in class action litigation. *See In re Baby Prods. Antitrust Litig.*, 708 F.3d at 169.

In *BankAmerica*, this Court held that parties may agree to a *cy pres* award only when they cannot make any further distributions to class members. 775 F.3d at 1064 (quoting *Klier*, 658 F.3d at 475). The exception to this rule exists when (1) the class members have liquidated

damages and (2) will receive a windfall. *Id.* Only when these two factors exist may *cy pres* be appropriate even though further distributions are feasible.

Here, the class members don't bring liquidated damages claims. Even if the district court correctly determined that compensation up to 100% of the purchase price would constitute a windfall—how could it?—this rationale applies only in cases involving liquidated damages. *BankAmerica*, 775 F.3d at 1064. Where—as here—the parties bring unliquidated damages claims, the court shouldn't approve *cy pres* awards unless and until no further direct class distributions are possible. State Amici Brief, *Jones v. Monsanto*, No. 21-2292, at 7–8 (8th Cir. August 9, 2021).

And the district court failed to consider the proper standard for determining the feasibility of further payments. It's not enough, per *BankAmerica*, that further distributions would be "costly and difficult." 775 F.3d at 1065. Instead, the district court must consider "whether the amounts involved are too small to make individual distributions economically viable." *Id.* (quoting A.L.I. § 3.07(a)). The class's "hardly unusual" 3% claim rate doesn't absolve the district court of its duty to consider

further distributions. And the fact that both parties simply represented the infeasibility of additional distributions shouldn't settle the matter. Parties don't get to settle away class members' rights just because it is easier. *See Lane*, 696 F.3d at 830 (Kleinfeld, J., dissenting) ("It is hard to imagine a real client saying to his lawyer, 'I have no objection to the defendant paying you a lot of money in exchange for agreement to seek nothing for me.'"); *Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003) (stating that "it seems somewhat distasteful to allow a corporation to fulfill its legal and equitable obligations through tax-deductible donations to third parties").

Even if the panel's interpretation of *BankAmerica* was correct, this Court should clarify that *cy pres* is, indeed, a last resort. Looking at the distribution breakdown—with less than 30% directed to class members and 40% directed to non-class third parties—one must question whether these types of agreements undermine the very purpose of class actions. *See In re Baby Prods. Antitrust Litig.*, 708 F.3d at 169 ("Cy pres distributions, while in our view permissible, are inferior to direct distributions to the class because they only imperfectly serve the purpose of the underlying causes of action—to compensate class members").

Cy pres distributions should be the exception, not the rule. The en banc Court should reaffirm that principle.

## II. *Cy Pres* Constitutes Compelled Speech.

But *cy pres* distributions pose a separate, pernicious threat to class members. The Supreme Court has routinely held that the government cannot compel speech. *United States v. United Foods*, 533 U.S. 405, 411 (2001) ("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."); *see also Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) ("The government may not … compel the endorsement of ideas that it approves."). Judicial approval of a *cy pres* award forces class members to fund "the speech of other private speakers or groups" with whom they may disagree, thus "present[ing] the same dangers as compelled speech." *Harris v. Quinn*, 573 U.S. 616, 647 (2014).

Courts recognize that settlement funds "belong solely to the class members." *Klier*, 658 F.3d at 474; *see also BankAmerica*, 775 F.3d at 1064. And they also recognize that donations to third parties express support and endorsement of that third party's communications and

activities. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976).[3] Diverting class members' funds to third parties implies those class members support or endorse those groups' activities. *See Janus*, 138 S. Ct. at 2464 (requiring affirmative consent to donate funds to third parties).

The panel, though, disagreed. First, it held that *cy pres* only involves residual funds after class members have been fully compensated. Opinion, at 8. Second, it held that residual funds don't belong to any member of the class who received his or her portion of the settlement fund or any class member who failed to file a claim. *Id.* In other words, once the parties wash their hands of their duty to make further distributions (based on their own determinations), the residual funds belong to no one, and the parties can distribute as they see fit.

But this can't be right. As an initial matter, the funds belong to all class members, not just the class members who stepped forward to collect. *See Klier*, 658 F.3d at 474 (noting "the settlement funds are the property of the class"); *accord BankAmerica*, 775 F.3d at 1064. The panel

[3] Similarly, *cy pres* awards offend "the right to eschew association for expressive purposes …." *Crowe v. Or. State Bar*, 989 F.3d 714, 729 (9th Cir. 2021) (per curiam) (quoting *Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018)).

simply got that wrong. Its conclusion rests entirely on the assumption that the parties could make no further distributions. But again, the class members here were not fully compensated, receiving only 50% of their purchase price, and the parties *could* have upped that to 100%, for starters. They just didn't want to. Opinion, at 6 (noting that parties' counsel concluded that the objector's proposed notice scheme "would not have been a most effective form" of notice).

Courts, like the district court here, play an important role in approving class action settlement agreements. This is not simply two parties negotiating a private agreement—they are negotiating on behalf of an absent host of allegedly injured consumers. And these absent class members should never be dragooned into making unwanted or disagreeable charitable contributions—charitable contributions they may, in fact, oppose. *Janus*, 138 S. Ct. at 2464; *Knox*, 132 S. Ct. at 2288. Like in *Janus*, class members should be allowed to affirmatively consent before their property is diverted to third parties. *Janus*, 138 S. Ct. at 2486.

* * *

The increased use of *cy pres* awards undermines class-action settlements' superseding purpose: compensating injured class members. But

despite the growing alarm judges and justices have roundly expressed, courts continue to double down on the use of *cy pres* awards. Although this Court attempted to "clarify the legal principles" underlying its previous *cy pres* decisions, the panel's decision suggests that the "rigorous standards" set forth in *BankAmerica* aren't so rigorous after all. *Compare BankAmerica*, 775 F.3d at 1064, 1067 *with* Opinion, at 7.

## CONCLUSION

This Court should grant Objector St. John's petition for rehearing en banc and clarify when—if ever—*cy pres* is appropriate.

DATED July 20, 2022.

Austin Knudsen
MONTANA ATTORNEY GENERAL

David M.S. Dewhirst
*Solicitor General*

*s/Kathleen L. Smithgall*
Kathleen L. Smithgall
*Assistant Solicitor General*
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026
Fax: (406) 444-3549
david.dewhirst@mt.gov
kathleen.smithgall@mt.gov
*Counsel for Amicus Curiae*
*State of Montana*

## ADDITIONAL COUNSEL

Steve Marshall
ALABAMA ATTORNEY GENERAL

Mark Brnovich
ARIZONA ATTORNEY GENERAL

Leslie Rutledge
ARKANSAS ATTORNEY GENERAL

Todd Rokita
INDIANA ATTORNEY GENERAL

Derek Schmidt
KANSAS ATTORNEY GENERAL

Jeff Landry
LOUISIANA ATTORNEY GENERAL

Lynn Fitch
MISSISSIPPI ATTORNEY GENERAL

Alan Wilson
SOUTH CAROLINA ATTORNEY GENERAL

Ken Paxton
TEXAS ATTORNEY GENERAL

Sean Reyes
UTAH ATTORNEY GENERAL

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(b)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,340 words.

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/s/ *Kathleen L. Smithgall*
KATHLEEN L. SMITHGALL

## CERTIFICATE OF SERVICE

I certify that on this date, an accurate copy of the foregoing document was served electronically through the Court's CM/ECF system on registered counsel.

Dated: July 20, 2022

/s/ *Kathleen L. Smithgall*
KATHLEEN L. SMITHGALL