No. 22-554

In the Supreme Court of the United States

ANNA ST. JOHN,

Petitioner,

v.

LISA JONES, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE STATE OF MONTANA AND 15 OTHER STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE[1]

The Attorneys General of Montana, Alabama, Arkansas, Idaho, Iowa, Kansas, Louisiana, Mississippi, Missouri, Nebraska, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, file this amicus brief because the Eighth Circuit's decision fails to protect consumers and consumer class members in their respective States. As their respective States' chief law enforcement officers, the Attorneys General have a responsibility to protect consumers within their jurisdictions, and they play a significant role in the class action settlement approval process. *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 ap-propriate 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"). Their presence in actions like this is essential to "deter collusion between class counsel and defendants" in crafting settlement agreements that don't benefit class members.

The Attorneys General are, understandably, concerned when the parties at the bargaining table reach settlement terms that maximize returns to class counsel and non-class third-party organizations while frittering away the rights of injured consumers. The

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[1] Pursuant to Supreme Court Rule 37.2(a), the States notified counsel of record of their intent to file an *amicus curiae* brief in support of Petitioner.

Eighth Circuit's decision subscribes to the fiction that these non-class third-party organizations will advance the consumers' interests more so than paying the consumers directly.

The State Attorneys General urge this Court to grant *certiorari* to clarify the applicable standard for approving class action settlement agreements containing *cy pres* awards and address the "fundamental concerns" raised by this type of relief. *Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting denial of cert.).[2]

SUMMARY OF ARGUMENT

Although *cy pres* awards are prominent features in many class action settlements, their legitimacy has been called into question. Chief Justice Roberts noted that "the use of [*cy pres*] remedies in class action litigation" raise "fundamental concerns," including whether this type of relief should ever be considered, how courts should assess their fairness, how recipients should be selected, and how closely the goals of the recipient organizations must correspond to the class's interests. *Lane*, 571 U.S. at 1006 (Roberts, C.J., respecting the denial of certiorari). Justice Thomas has likewise expressed concern, noting that "*cy 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)." *Frank v.*

[2] 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.

Gaos, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., concurring).

Other judges across the country have similarly sounded the alarm against the growing reliance on *cy pres* awards. *See, e.g., 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); *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 (9th Cir. 2012) (Kleinfeld, J., dissenting) (noting incentives for collusion between defendants and class counsel); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011) (Jones, J., concurring) *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 (6) 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."). Despite this cacophony of alarm bells, courts still approve large *cy pres* distributions. The Court should use this opportunity to clarify the standard by which courts measure a settlement's fairness, reasonableness, or adequacy in the face of a *cy pres* award.[3]

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[3] The undersigned Attorneys General have also filed an amicus brief in support of the *certiorari* petition in *Yeatman v. Hyland*, No. 22-566.

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). While this Court has not prohibited the use of *cy pres* in complex class action settlements, *cy pres* awards misalign incentives by creating an "*illusion* of class compensation." 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).

The *cy pres* award in this case violates Rule 23 and threatens class members' First Amendment rights. Even so, the district court and the Eighth Circuit concluded that such an award was appropriate because any further distributions would result in a windfall for the class members. But the Eighth Circuit's analysis and resulting conclusion create further confusion among courts as to the appropriate standard and ultimately undermine the very purpose of class action settlements: to compensate class members.

I. Large *cy pres* distributions violate Rule 23.

In this case, the district court approved a $39.55 million settlement that allocated only 30% of this fund to the actual claimants—the individuals actually suffering the purported harm. A settlement agreement like this that sets aside nearly three-quarters of the fund for non-class third-party organizations cannot possibly be fair, reasonable, or adequate under Rule 23(e)(2).

Rule 23(e)(2) "protects unnamed class members from unjust or unfair settlements … when the representatives become fainthearted … or are able to secure satisfaction of their individual claims by a compromise." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997) (internal quotations omitted). To determine whether a proposed settlement agreement satisfies this standard, Rule 23(e) directs courts to consider, among other things, whether class counsel adequately represented the class, whether the proposal was negotiated at arm's length, and whether the distribution of relief to the class is effective. Fed. R. Civ. P. 23(e). The duty of adequate representation exists at every stage of the proceeding—from the filing of a complaint to final settlement—and it is owed to every class member. *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812 (1985) (noting that adequate representation is a due process requirement).

The role of the court in enforcing Rule 23(e)(2) is paramount. At the outset of litigation, the parties are at their most adversarial. But by the time the parties reach a proposed settlement agreement, the parties have agreed to a class definition, agreed to the parameters for identifying and reaching class members, agreed to the terms of the settlement, and agreed to the beneficiaries of *cy pres* awards. In other words, the parties that started as adversaries are now in complete agreement. This misaligns incentives and "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). Thus, a court must critically evaluate the full scope of the agreement, including *cy pres* awards, to determine that the Rule 23(e) requirements are met.

Courts, though, vary significantly in the standard used to evaluate these requirements. Below, the Eighth Circuit determined that because "further efforts to identify class members or increase the claims rate is not feasible," the parties could bypass further distributions to absent class members and instead move directly to *cy pres* awards. App.23a. The Eighth Circuit further concluded that further distribution could not be made to participating class members because this would result in a windfall. According to the court, even though the participating class members did not receive 100% of their purchase price, they received full compensation for their harm as defined by class counsel. This reasoning, though, undermines the purpose of class action settlements. First, it guarantees that in nearly every class action the parties can simply state they did their best to identify class members and the court cannot require any further distributions. Second, this reasoning suggests that the parties can, again, simply state that the participating class members were fully compensated and the court, likewise, cannot require any further distributions. But making further distributions to class members—whether to newly identified class members or already participating class members—should always be the preferable remedy than giving awards to non-class third-party organizations that don't even allege an injury.[4]

[4] It's unclear why the parties and the courts place so much emphasis on *cy pres* distribution over so-called "windfall"

Like the Eighth Circuit, the Ninth Circuit has approved large *cy pres* awards in a variety of scenarios. In *Lane v. Facebook, Inc.*, the Ninth Circuit affirmed a *cy pres* award where the distribution of the remaining settlement funds given to each individual class member would be *de minimis*. 696 F.3d 811, 821 (9th Cir. 2012); *see also In re Google Referrer Header Priv. Litig.)*, 869 F.3d 737, 742 (9th Cir. 2017), *vacated and remanded on other grounds sub nom. Frank v. Goas*, 139 S. Ct. 1041 (2019) (approving *cy pres* where the individual recovery would have been *de minimis*); *In re Easysaver Rewards Litig.*, 906 F.3d 747, 761 (9th Cir. 2018) (noting that even where further distribution is "technically feasible," *cy pres* awards supersede *de minimis* distributions). Like the Eighth Circuit, the Ninth Circuit adopts the view that even where further distributions are possible, parties can agree to *cy pres* awards where such distributions are difficult or would lead to *de minimis* distributions.

The Seventh Circuit, in stark contrast, explains why this reasoning is wrong. The Seventh Circuit rejected a settlement that awarded over half of a fund to *cy pre* because this award "did not benefit the class." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014). The court noted that the parties could have simplified the claims process or simply mailed checks directly to those class members who they notified. *Id.*

distributions. At the end of the day, the defendant has already paid fully into the fund based on the alleged harm perpetrated by the defendant. Where those funds ultimately go has no bearing on this initial payment, nor does the distribution scheme work to the defendant's detriment. The only parties who may conceivably suffer are the non-class third-party organizations otherwise awaiting their own windfalls.

The court determined that the parties failed to demonstrate that further distributions were truly infeasible. *Id.*

Based on these cases, courts are left with little guidance as to when *cy pres* is appropriate. What courts seem to have forgotten is that *cy pres* is only appropriate as a last resort. It isn't permitted simply because it is the easier or preferred method of distribution. *See Gaos*, 139 S. Ct. at 1047 (Thomas, J., dissenting) ("[*C*]*y pres* payments are not a form of relief to the absent class members and should not be treated as such"); *Pearson*, 772 F.3d at 784 ("A *cy pres* award is supposed to be limited to money that can't feasibly be awarded to the intended beneficiaries…."); *Klier*, 658 F.3d at 475 (*Cy pres* arises as an option "only if it is not possible to put those funds to their very best use: benefitting the class members directly").

Certainly in some instances, the resulting 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 could 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.

II. *Cy pres* awards threaten class members' First Amendment rights.

Cy pres awards pose another pernicious problem to class members. They divert settlement funds to non-class third-party advocacy organizations that promote certain viewpoints while depriving class members of the funds owed to them. And the court—

rather than the class members—decides whether to approve this diversion of funds, meaning the court ultimately exercises the power to compel class members to support the charitable organizations. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012) ("Closely related to compelled speech … is compelled funding of the speech of other private speakers or groups"); *see also Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) ("[T]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves"). These selected charitable organizations unsurprisingly mirror the views of class counsel and the defendants—the parties who selected the *cy pres* distributions.[5] But not so for class members, who are frozen out of the *cy pres* process and left to foot the bill to fund organizations they do not support. *Cy pres* distributions to third parties—like the distributions in this case—constitute compelled speech because they force class members to involuntarily affirm the beliefs of the charitable organizations selected by class counsel.

As this Court has stated, "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay

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[5] Federal Rule of Civil Procedure 23(a)(1) requires that a class be "so numerous that the joinder of all members is impracticable." The only requirement for these members is that they have common legal issues—there is no requirement that they have similar political or social viewpoints. *Cy pres* distributions, therefore, will always be problematic because there will always be class members who disagree with the designated recipients of their property. These decisions are made without the input of the class, and as a result of a court order approving the settlement terms.

special subsidies for speech on the side that it favors." *United States v. United Foods*, 533 U.S. 405, 411 (2001); *see also Knox*, 567 U.S. at 309 ("The government may not … compel the endorsement of ideas that it approves."). Judicial approval of a *cy pres* award, therefore, likely forces class members to fund "the speech of other private speakers or groups" with whom they may disagree, and that "presents the same dangers as compelled speech." *Harris v. Quinn*, 573 U.S. 616, 647 (2014).

Just as individuals have the right to make charitable contributions to groups of their choosing, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958), they also have the right to refrain from making charitable contributions to groups and messages they oppose. *See, e.g.*, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018) ("Forcing free and independent individuals to endorse ideas they find objectionable is *always demeaning*…."); *Knox*, 567 U.S. at 309. "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." *A Bill for Establishing Religious Freedom*, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis deleted and footnote omitted).

Courts, like the district court here, play a crucial role in class action settlement agreements. Courts approve these funds—which belong to class members—to go directly to these non-class third-party organizations, which engage in expressive activities. In other words, through the courts—and *only* through the courts—class members are compelled to endorse the funding of these organizations. *But see Knox*, 567 U.S.

at 309 (noting that the government cannot "compel the endorsement of ideas that it approves").

Here, the Eighth Circuit seemingly agreed that settlement funds belong to the class, but nevertheless concluded that residual funds don't belong to individuals who already received their portion—as determined by class counsel—of the fund. App.10a. Because the residual funds don't belong to those who already stepped forward, and because no further distributions were feasible—as determined, again, by class counsel—the remaining funds could appropriately be distributed to non-class non-party organizations. So even though the funds belong to the class members, these funds could be used to endorse expressive activity. Those who already received their share of the settlement no longer had a claim over those funds, and therefore had no say in their ultimate distribution. And as for the remaining 97% of the class that did not file a claim or affirmatively opt out of the class, the Eighth Circuit found that they implicitly consented to the *cy pres* distribution by failing to show up. *Compare id. with Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 574 (2013) (Alito, J., concurring) (silence, through failure to respond to an opt-out notice, is not consent). But if the settlement funds belong to the class as the Eighth Circuit purported to conclude, then *Janus* mandates that all class members provide "clear[] and affirmative[] consent before any money" is given to these non-class third-party organizations. *Janus,* 138 S. Ct. at 2486.

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 v. AFSCME*, 138 S. Ct. at 2464 (2018); *Knox*, 567 U.S. at 309. Packaging compelled speech as a remedial benefit for claimants adds insult to already existing injury. Like in *Janus*, class members must affirmatively consent before their property is diverted to non-class third-party organizations. *Janus*, 138 S. Ct. at 2486.

CONCLUSION

This Court should grant the petitions in this case and *Yeatman v. Hyland*, No. 22-566.

Respectfully submitted.

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