No. 22-554

In the Supreme Court of the United States

ANNA ST. JOHN,

Petitioner,

v.

LISA JONES, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents don't dispute that there was a cert-worthy circuit split of great importance when this Court granted certiorari in *Frank v. Gaos* in 2018. Since then, courts have fractured further. Respondents don't dispute that judges across the country, including this Court, have called for review of *cy pres* permissiveness. Pet.2-4. The decision below adds to the uncertainty among the lower courts as to whether and under what circumstances settling parties may agree to a class-action settlement that pays more to third parties than to the class members releasing their damages claims. Respondents don't dispute, or even mention, that about 98% of the approximately 10-million-member class recovered $0 while unrelated charities will receive $16 million.

Although respondents argue that the Eighth Circuit simply applied tried-and-true standards, *Jones*'s analysis bears little resemblance to that of other circuits and will lead to greater abuse of *cy pres*. While every circuit may mention a "feasibility" standard, they split on what "feasibility" means as a matter of law. Similarly, they split on how to define and determine what constitutes an unfair "windfall" to class members.

The Eighth Circuit puts district courts in the position of adjudicating an ultimately litigated value of settled claims, untethered from any objective figure that existed before settlement. At the settlement stage, the parties can readily manipulate such a calculation and have every incentive to do so to maximize both chances of approval and payments to third parties. The Eighth Circuit standard would permit future settling parties to agree to argue

that the lawsuit is worthless and the entire settlement fund should go to *cy pres* lest class members receive a windfall instead of unrelated third parties. Similarly, the Eighth Circuit uniquely puts the burden of showing the feasibility of direct distribution on objecting class members, even when there is no evidence that such distribution is *infeasible*; and allows courts to ignore the experience of other courts that found it feasible to distribute relief directly to allegedly harmed class members instead of third parties. Thus, Monsanto's assertion (Br.15 n.10) that the residual *cy pres* award differs from the all-*cy pres* settlement in *Gaos* is a distinction without a difference to these circuit splits.

One can understand why class counsel and Monsanto would defend the settlement—one is handsomely compensated both directly and indirectly, and the other avoids liability risk at nuisance cost and avoids reputational cost from giving customers direct notice. Russell M. Gold, *Compensation's Role in Deterrence*, 91 Notre Dame L. Rev. 1997 (2018). But Rule 23(e)(2) demands more. The decision paves the way for further diversion of hundreds of millions of dollars from class recovery to lawyers' favorite nonprofits.

I. The circuits are fractured across several dimensions of *cy pres*.

Respondents attempt (Pl.Br.15; Def.Br.17) to sweep under the rug deep divisions among the circuits using generalized legal platitudes about courts' allowance of *cy pres* only when direct relief is infeasible or otherwise unfair. But the devil is in the details. When one looks at how

the circuits *apply* the feasibility and fairness (*i.e.*, "windfall") analyses, there is no doubt that the circuits take different approaches and reach different outcomes depending on whether a party seeks settlement approval in San Francisco or St. Louis or Chicago, even if some courts use the words "feasibility" and "windfall."

Monsanto is wrong claiming (Br.15) that circuits agree that "payments to class members are preferable to *cy pres* distributions": the Ninth Circuit disagrees. *In re EasySaver Rewards Litig.*, 906 F.3d 747, 761 (9th Cir. 2018) (approving *cy pres* though direct distributions of residual unclaimed funds "technically feasible"). But even among circuits that give lip service to that principle, the agreement is not borne out in their standards for reviewing *cy pres* under Rule 23. Instead, several have set such low standards for infeasibility and windfall determinations that *cy pres* becomes an exercise in unlimited discretion for settling parties and district courts. The Second Circuit examined whether the objecting class member had provided "evidence to suggest that [the defendant] would have otherwise agreed to distribute the funds to the class" in lieu of *cy pres*. *Hyland v. Navient*, 48 F.4th 110, 122 (2d Cir. 2022), *cert. pending sub nom. Yeatman v. Hyland*, No. 22-566. As this case demonstrates, all that some circuits require is that settling parties *allege* that direct outreach and payments would be less "effective" to provide class relief or that settling parties have hired experts to opine that payments provided for under the settlement exceed class members' potential damages even if far short of the claims in the complaint.

Beyond these divisions, Monsanto is also wrong (Br.16-17) that "no Circuit has meaningfully departed" from Section 3.07(b) of American Law Institute's 2010 Principles of the Law of Aggregate Litigation. Both *Hyland* and *EasySaver* ignore feasibility; Ninth Circuit district courts now rubber-stamp residual *cy pres* of tens of millions of dollars without any inquiry into feasibility or even additional notice to the class. Pet.29. And the Eighth Circuit below eviscerated its previous adoption of § 3.07 in *BankAmerica* by failing to require a district court to analyze whether it was economically viable to make further distributions.

More specifically, respondents fail to rebut the five dimensions of conflicts St. John identified among the Circuits.

First, respondents' analysis of precedent is superficial when it comes to class members' proprietary interest in the settlement funds. The Eighth Circuit rejected rather than "reaffirmed" (Def.Br.17) *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468 (5th Cir. 2011), stating that the settlement funds paid to *cy pres* here do not belong to any claiming class member and that non-claiming class members likewise "have no claim to residual funds." App.10a. The Eighth Circuit approach thus improperly allows settling parties to define the property interest of class members based on how they cap the class recovery in the settlement agreement. While *Jones* stated that settlement funds are the property of the "class," that statement is meaningless where the court also found that no class member can assert that property right. *Id.*

This Court has rejected such entity theory: Rule 23 is a procedural joinder device that aggregates real individuals with real claims into a class if certain prerequisites are satisfied. *E.g.*, *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). This device works to "provid[e] relief to claimants … who have suffered, or will imminently suffer, actual harm." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (cleaned up). *Cy pres* directed to the world at large is inconsistent with this principle because it provides no redress to the parties in interest—class members. By holding that neither claimants nor non-claiming class members had an interest in the funds and therefore allowing *cy pres*, the Eighth Circuit's approach is also contrary—no matter respondents' hollow protestation otherwise—to the Fifth Circuit's holding in *Klier* that residual "settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the *class members*." 658 F.3d at 474 (emphasis added). "*Cy pres* comes on stage only to rescue the objectives of the settlement when the agreement fails to do so." Plaintiffs do not defend the Eighth Circuit holding on this point, and for good reason.

Monsanto is further incorrect that *Hyland* did not split on the proprietary interest of class members in settlement proceeds because it involved a Rule 23(b)(2) settlement. The settlement in *Hyland* did preclude class members from bringing aggregated damages claims. 48 F.4th at 116. The Second Circuit thus conflicts with both *Klier* and the principle that a properly certified (b)(2) settlement class should not compromise (b)(3) damages claims

in the settlement release. *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 329-30 (3d Cir. 2019) (cited at Pl.Br.18-19). This conflict exists regardless of the scope of the particular damages claims released. Just as here, the settlement in *Hyland* selected *cy pres ex ante*—not merely as an *ex post* approach for unexpected residual funds—and therefore the decision to make the *cy pres* funds "never available for class-member claims" (Def.Br.18) was a deliberate choice made by the settling parties.

Second, while many circuits apply a feasibility standard, they use markedly different approaches in *how* they define and determine "feasibility." This split was relevant in the *Gaos certiorari* petition, and it's relevant here. The Eighth Circuit didn't simply apply the same standard as *Klier* to different facts (Def.Br.17); it used a fundamentally different analysis. The record below is devoid of evidence that direct distribution of the fund was infeasible. The court accepted a mere *ipse dixit* representation that the proposed settlement was "more effective" than St. John's proposal for reaching class members and thus shifted the burden to the objector to prove the feasibility of direct distribution. St. John presented unrebutted empirical evidence of the viability of such distribution in much smaller settlements, and the district court then held that she did not meet her burden. App.7a. The evidence Monsanto cites (Br.20 n.11) said only that the parties putatively tried hard to notify the class with web advertising, but nothing about the viability of direct notice and direct distribution. Both the Eighth Circuit (App.7a) and Monsanto (Br.11 n.7) admit that the record was otherwise

silent on the feasibility of direct distribution. A standard satisfied by a self-interested bald assertion contradicted by undisputed evidence is no standard at all.

While Monsanto counters (Br.11 n.7) that its fairness-hearing estimate of $300,000 to $600,000 for supplemental outreach relied on spending money beyond that, the undisputed bottom line is that the record is devoid of any estimate or court analysis into these costs to put funds into the hands of class members. Contrary to Monsanto's claim (Br.32), *Pearson v. NBTY, Inc.*, is precisely on point: potential direct distribution in that case was feasible only because plaintiffs subpoenaed third-party "pharmacy loyalty programs." 772 F.3d 778, 784 (7th Cir. 2014). That was not just feasible, but done for a much smaller amount in controversy. Here, plaintiffs refused to subpoena third parties, and lower courts refused to hold class counsel to their fiduciary duty to maximize recovery to the class, absurdly holding that direct distribution of checks would not "increase the claims rate" beyond that achieved by requiring affirmative response to web advertisements. App.23a-24a; Def.Br.11.

Respondents are left nitpicking at the Ninth Circuit's standard for feasibility without once mentioning *EasySaver*. Pet.17. Ultimately, Monsanto acknowledges (Br.21) that "there remained questions" as to whether *Google Referrer*'s holding that *cy pres* is justified where the distribution to *every class member* would be *de minimis* (*i.e.*, infeasible in practice)—an issue this Court deemed *cert*-worthy when reviewing that case in *Frank v. Gaos*—yet fails to explain why the Eighth Circuit's

equally libertine holding does not, or how this holding can be squared with other circuits' precedent.

Third, Monsanto entirely disregards the distinction between alleged liquidated and unliquidated damages in the windfall analysis. Contrary to Plaintiffs (Br.1), the district court did not make the factual finding that class members were "fully compensated" and would receive more than they could have recovered at trial. The court simply commented that the results were "very likely more than they could have achieved" at trial. App.38a. But the best-case recovery for class members was the full restitution of the purchase price that the complaint requested. App.102a. There is no dispute that the settlement compromised the class's restitution claim and that the court made a legal ruling on the validity of the already-compromised disputed claim (App.29a) instead of prioritizing class recovery and requiring class members to realize additional settlement recovery. That's not *cy pres* as a "last resort." *Klier*, 658 F.3d at 475 n.16; Pet.18-19.

Plaintiffs' stretch (Br.21) of *Klier*'s holding is wrong. *Klier*'s windfall analysis protects class members by looking to a set figure, rather than one that parties can manipulate after the fact to promote settlement. Of course it follows from *Klier* that the windfall analysis in a case of unliquidated damages should look to the adversarial complaint, which provides an objective pre-settlement measure of the maximum that class members seek. *Accord BankAmerica*, 775 F.3d at 1066. This approach is far more reliable than the Eighth Circuit's newfound approach of having a judge adjudicate the value of plaintiffs'

settled claims based on parties' self-serving *post*-settlement rationalizations.

Fourth, Monsanto is wrong (Br.25) that the Circuits merely "articulate their standards" differently as to the analysis for significant prior affiliations for *cy pres* recipients. *Google Cookie* expressly adopted ALI Principles § 3.07; *Joffe v. Google, Inc.*, 21 F.4th 1102, 1120 (9th Cir. 2021), rejected that standard; and *Hyland*, 48 F.4th 110, failed to address it at all as it approved a *cy pres* distribution that paid money to form an organization whose work coordinates with class counsel's "nonprofit partner."

Moreover, because of the prevalence of such conflicts (Pet.23-24), guidance from this Court as to how to root out conflicts and prioritize class members' interest is of paramount necessity. Granting *certiorari* in this case as well as *Yeatman* offers an opportunity to address the disturbing elements of *cy pres* holistically.

Fifth, Plaintiffs' shrug (Br.22) and Monsanto's claim of "error correction" (Br.25) on the Eighth Circuit's approach to Rule 23(e)(2)(C)(ii) disregard the legal question as to the effect of the 2018 Amendments on courts' approach to *cy pres* and, in particular, whether funds earmarked for *cy pres* instead could be feasibly distributed to the class. *Pearson* anticipated 23(e)(2)(C)(ii) by requiring courts to look at actual class recovery, 772 F.3d at 783, and post-amendment circuits' failure to address the amendment is a *de facto* split. The district court's subjective approach to "effectiveness" (App.19a-20a)—did the parties try hard enough?—contravenes the meaning of the word, which, as *Pearson* and *Briseño v. Henderson*

hold, requires objective assessment of actual, not just potential, class recovery. 998 F.3d 1014, 1026 (9th Cir. 2021).

Finally, Plaintiffs postulate (Br.14) that *In re "Agent Orange" Products Liability Litigation*, 818 F.2d 179, 186 (2d Cir. 1987), exemplifies courts' consensus approach, but the case further demonstrates the split. In *Agent Orange*, the court (1) required the *cy pres* foundation to be under "direct judicial supervision," and (2) prohibited funds to be spent on "political advocacy." *Id.* But the *Jones* settlement *cy pres* beneficiaries engage in political advocacy without direct judicial supervision (App.106a)—even assuming *Agent Orange*'s proposed supervision of a nonprofit is an appropriate judicial function. *Cf.* Pet.23-24.

The circuit split in *Gaos* is now more complicated across almost every dimension after *Jones*, *Google Cookie*, *EasySaver*, *Joffe*, and *Hyland*.

II. Respondents do not dispute the important and recurring nature of the questions presented.

The proliferation of *cy pres* in class-action settlements shows that courts often are not, contrary to Plaintiffs' assertion (Br.12), appropriately "sensitive" to the risk that attorneys negotiating *cy pres* might substitute their own preferences for the class's best interests. Instead, district courts continue to approve settlements where class members' interests are obviously not a foremost consideration. *See* Pet.29; *Yeatman*, No. 22-566. Thus St. John's suggestion that the Court grant review in both this case and *Yeatman*. That petition does present overlapping but "different questions" (Pl.Br.27) regarding *cy pres* and

thus demonstrates both the recurring nature of questions surrounding *cy pres* and the need for this Court's guidance. Considering both cases together would provide the Court with a fuller variety of the many permutations of *cy pres*.

Almost entirely absent from the respondents' briefs is any defense of the abusive nature of *cy pres*.[1] Here, non-party organizations will walk away with more money from the settlement that the class members whose injuries are the basis for the lawsuit. *Cf. Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (acknowledging "obvious" "potential for misuse" when "persons other than class members becom[e] the chief beneficiaries"). While this petition was pending, a Rule 23.1 suit settled for $0 to shareholders, a $100 million donation to third parties, and $15 million to attorneys—all at the shareholder class's expense without the word "feasibility" appearing once. *In re Altria Grp., Inc. Derivative Litig.*, 2023 U.S. Dist. LEXIS 27959 (E.D. Va. Feb. 20, 2023).

Justice Thomas in *Gaos*, numerous appeals courts (Pet.2); and countless legal scholars (Pet.22-23) have observed the unique risk of conflict between class counsel

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[1] Monsanto makes several assertions that make little sense about the scope of St. John's arguments below, but don't actually argue waiver. St. John need not argue that the Eighth Circuit's legal standard conflicted with other circuits' standards (Def.Br.10) because the previously controlling precedent, *BankAmerica*, was consistent with *Pearson* and *Klier*. Furthermore, *per se* permissibility is an antecedent question encompassed within St. John's objection. *Compare, e.g.*, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173 n.1 (2009); *U.S. Nat'l Bank of Oregon v. Ind. Ins. Agents of Am., Inc*, 508 U.S. 439, 447 (1993), *with* Def.Br.3.

and class members raised when class counsel may steer *cy pres* funds to preferred third parties. That accords with intuition; a novel "trilateral process" will naturally create more conflicts when class counsel is serving two masters. *Klier*, 658 F.3d at 481 (Jones, J., concurring); *Keepseagle v. Perdue*, 856 F.3d 1039, 1071 (D.C. Cir. 2017) (Brown, J., dissenting).

The decision below further fuels this abuse, as courts may rely only on the vague say-so of the settling parties while shifting the burden to objectors (if any class members even object) to prove direct distribution's effectiveness—with an unclear burden at that. All the while, forum shopping continues, and courts' approval of these settlements compels speech by class members in direct conflict with this Court's First Amendment precedents. *See* Jeremy Kidd & Chas Whitehead, *Saving Class Members from Counsel*, 58 San Diego L. Rev. 579, 599-600 (2021); Pet.24.

Review is warranted.

CONCLUSION

The Court should grant the petition in this case; grant the petition in *Yeatman v. Hyland*, No. 22-566, and hold this petition pending *Yeatman*; or grant both petitions and consider consolidating the cases.

Respectfully submitted,

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