No. 22-566

In the Supreme Court of the United States

WILLIAM YEATMAN,

Petitioner,

v.

KATHRYN HYLAND, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND 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 Second 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 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"). 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 pay $0 to the class of student loan borrowers while paying $2.25 million to form a new nonprofit. The Second Circuit's decision

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

subscribes to the fiction that a non-class third-party advocacy organization will advance the class members' interests more so than paying the class members 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 "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)." *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 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 *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 *St. John v. Jones*, No. 22-554.

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 Second Circuit concluded that the settlement fund never belonged to class members and that *cy pres* was appropriate. But the Second 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 settlement agreement that allocated $2.25 million to an organization closely tied with both class counsel and a union that helped recruit named plaintiffs and pay class counsel's fees. It did so while providing no money to the actual class members. This type of settlement agreement 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.

Here, the concerns raised by the settlement agreement are readily apparent. First, the Second Circuit implied—and the evidence showed—that the funds could be distributed to class members. App.18a. In other words, it wasn't a question of feasibility. Second, the *cy pres* organization selected engages in blatant political activity and had a significant, preexisting relationship with class counsel by helping recruit plaintiffs and fund the litigation.

The Second Circuit's approach ignores the question of whether further distribution is feasible, splitting from approaches taken in other circuits. The Eighth Circuit, for example, recently determined that only when class members have been fully compensated and further distribution is not feasible is *cy pres* permissible. *Jones v. Monsanto Co.*, 38 F.4th 693, 699 (8th Cir. 2022). Taking a somewhat different approach on the question of feasibility, the Ninth Circuit has approved large *cy pres* awards even where further distribution is "technically feasible" but would result in *de minimis* distributions. *In re Easysaver Rewards Litig.*, 906 F.3d 747, 761 (9th Cir. 2018); *see also Lane v. Facebook Inc.*, 696 F.3d 811, 821 (9th Cir. 2012) (affirming a *cy pres* award where further distributions would be *de minimis*); *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*). But both the Eighth and Ninth Circuit, unlike the Second Circuit, still consider—in some capacity—whether further distributions are feasible before resorting to *cy pres*.

Other circuits, still, place more of an emphasis on further distributions and require that remaining settlement funds go to class members whenever feasible. For example, the Seventh Circuit rejected a settlement because further distributions were feasible, and the parties could have simplified the claims process or simply mailed checks directly to those class members who they notified. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014). The court determined that the parties failed to demonstrate that further distributions were truly infeasible and that the *cy pres* award "did not benefit the class." *Id.* Likewise, the Fifth Circuit held *cy pres* distribution "is permissible only when it is not feasible to make further distributions to class members." *Klier*, 658 F.3d at 475 (internal quotations omitted).

Even in the Eighth and Ninth Circuits—both of which are friendly to *cy pres* awards—the question of feasibility plays an important role in the court's review of the settlement agreement. Here, the Second Circuit bypassed that inquiry altogether and concluded that the *cy pres* award provides a benefit to the class members and is therefore permissible, regardless of whether further distributions were feasible. But *cy pres* awards should be appropriate only as a last resort, not simply because it is the easier or preferred method of distribution. *See Gaos*, 139 S. Ct. at 1047 (Thomas, J., dissenting) ("*Cy 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 the entire settlement fund—excluding attorneys' fees—to a non-class third-party organization with close ties to class counsel.

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"). The selected third-party organization here unsurprisingly mirrors the views of class counsel and the defendants, who benefited from that organization's participation and

funding throughout litigation.[4] But class members don't necessarily share these views. Instead, they're 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 distribution 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 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 force 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).

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[4] 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.

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).

The Second Circuit disagreed. First, the court concluded that the settlement funds did not belong to the class members. App.18a. Second, even if the class members had some claim over the funds themselves, the court concluded that the district court's order did not constitute state action. Both conclusions depart from other circuits and seemingly ignore this Court's decisions on compelled speech.

The Second Circuit's conclusion that the settlement funds did not belong to the class members splits with other circuits. App.18a. For example, the Fifth Circuit held that "[t]he settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members." *Klier*, 658 F.3d at 474. The Eighth Circuit, while agreeing that settlement funds belong to the class, nevertheless concluded that residual funds don't belong to individuals who already received their portion of the fund. *Jones*,

38 F.4th at 699. The Eighth Circuit, while ultimately departing from the Fifth Circuit, still determined that the class as a whole had some claim over the settlement funds. *Id.* The Second Circuit's conclusion not only stands in stark contrast, but it also undermines the very purpose of class action settlement agreements. These funds must, on some level, belong to the class, and these class members must play some role in the distribution of these funds—whether through direct distributions to class members or affirmative consent of *cy pres* awards. *See 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).

The Second Circuit's conclusion that the district court's order didn't constitute state action, moreover, ignores the unique nature of class action settlement agreements. Courts, like the district court here, play a crucial role. Courts approve these funds 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").

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 (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 *St. John v. Jones*, No. 22-554.

Respectfully submitted.

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