Nos. 17-807, 17-897

IN THE
Supreme Court of the United States

DONIVAN CRAIG TINGLE,
Petitioner,
v.
SONNY PERDUE, Secretary, U.S. Dep't of Agriculture, *et al.*
Respondents.

KEITH MANDAN,
Petitioner,
v.
SONNY PERDUE, Secretary, U.S. Dep't of Agriculture, *et al.*
Respondents.

On Petitions for Writs of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the District of Columbia Circuit correctly held that Petitioners' constitutional and statutory challenges to the *cy pres* provision of a settlement agreement were both forfeited and waived.

2. Whether the Court should nonetheless entertain Petitioners' forfeited and waived challenges to the *cy pres* provision of a settlement agreement where Petitioners have identified no circuit split and the case presents factual circumstances that Petitioners admit are unlikely to recur.

PARTIES TO THE PROCEEDING

Petitioners, who were the appellants in the court of appeals and have separately petitioned this Court for certiorari, are Donivan Craig Tingle and Keith Mandan.

Respondents, who were appellees in the court of appeals, are Sonny Perdue, Secretary of the United States Department of Agriculture (defendant-appellee); H. Porter Holder and Claryca Mandan, on behalf of themselves and the *Keepseagle* certified class (plaintiffs-appellees); and Marilyn Keepseagle (plaintiff-appellee).

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INTRODUCTION

In 2011, a class of Native American farmers and ranchers reached a settlement with the United States Department of Agriculture ("USDA") to resolve claims of unlawful discrimination in the USDA's farm loan and loan servicing programs that took place from 1981 through 1999. The Settlement Agreement (the "Agreement") created a claims process by which individual class members could seek a share of the settlement fund. The Agreement also included a *cy pres* provision, providing that any remaining settlement funds not disbursed during the claims process would be distributed—for the benefit of all class members—to non-profits that provide agricultural, business assistance, or advocacy services to Native American farmers and ranchers. Neither of the Petitioners (nor any other party) objected to the inclusion of the *cy pres* provision in the Agreement. And no party appealed from the district court's approval of the Agreement. In fact, both Petitioners accepted distributions from the settlement fund and signed releases waiving their right to challenge those payments.

At the conclusion of the claims process, there was a much larger amount of unclaimed funds than anyone had anticipated. The parties therefore commenced protracted negotiations about the remainder. Eventually, Plaintiffs and the government reached an agreement to modify the Agreement such that all successful claimants would receive an additional payment. The Agreement's *cy pres* provision was also modified to immediately distribute $38 million to non-profits within six months as provided by the original

provision, and then to create a Trust to distribute the remaining funds for the benefit of the class over a period of up to twenty years.

Petitioners Keith Mandan ("Mandan") and Donivan Craig Tingle ("Tingle") now ask this Court to grant review on a number of questions related to the Agreement's inclusion of a *cy pres* provision. But as the Court of Appeals for the District of Columbia Circuit properly found, this case does not present those questions, which have been doubly waived and forfeited. Petitioners first forfeited and waived their claims when they failed to object to or appeal the inclusion of the *cy pres* provision in the original Agreement. And Petitioners again forfeited and waived their claims when they did not present them before the district court in their objections to the proposed modification of the Agreement. Petitioners raised the central questions upon which they now seek review for the first time in the Court of Appeals. The Court of Appeals properly declined to consider them, and there is no reason for this Court to be the first to opine on Petitioners' claims. The issues presented are fact-bound questions of first impression that even Petitioners admit are unlikely to recur, and therefore do not warrant this Court's review. The Petitions should be denied.

STATEMENT OF THE CASE

I. Factual Background.

1. In 1999, a class of Native American farmers and ranchers filed suit against the USDA alleging claims under, *inter alia*, the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f. The class alleged that since 1981

the USDA systematically discriminated against Native Americans in its farm loan programs by unlawfully denying loans and loan servicing. The USDA vigorously opposed the lawsuit, and motions practice and discovery spanned almost ten years. During the litigation, Plaintiffs presented an expert report from a 27-year veteran of the USDA's Economic Research Service. Plaintiffs' expert calculated that from 1981 through 2007 Native American farmers and ranchers had incurred, in total, at least $776 million in economic losses as a result of the USDA's allegedly discriminatory policies and practices in denying loans and loan servicing. Dkt. 551-4 at 6-7.[1]

2. In 2009, Plaintiffs moved to certify the class for economic damages and the district court stayed proceedings to allow the parties to pursue settlement negotiations. JA 295-96. After ten months of negotiations, the parties reached a settlement. JA 389. The Settlement Agreement provided for $680 million in monetary relief, JA 403, in addition to another $80 million to extinguish qualifying class members' farm loan debts and up to $20 million to cover the administration costs to implement the settlement, JA 417, 393, 402. The Agreement established a two-track process for claimants. Track A claimants, who were not required to prove their economic losses and could personally attest

[1] "Dkt." citations refer to the district court docket. "D.C. Cir. Dkt." citations refer to the D.C. Circuit docket. "JA" citations refer to the Joint Appendix submitted before the D.C. Circuit in consolidated Case Nos. 16-5189 and 16-5190. "Pet. App." citations refer to the Mandan Appendix in Case No. 17-897 in this Court.

to the circumstances causing their loss, were entitled to a maximum payment of $50,000, plus $12,500 paid to the Internal Revenue Service in tax relief. Track B claimants, who were required, among other things, to provide documentation of the circumstances causing their losses, could receive up to $250,000. JA 412-17, 420-21.

The Agreement also included a *cy pres* provision. That provision stated that any remaining funds left unclaimed following the six-month claims process were to be distributed in *pro rata* shares to non-profits in existence before November 2010 that had provided agricultural, business assistance, or advocacy services to Native American farmers and ranchers. JA 393, 422-23. Class counsel would select the organizations, subject to the district court's approval. JA 393, 423.

3. After potential class members were notified of the Agreement, objections were filed, a fairness hearing was held, and the district court granted final approval of the Settlement Agreement. JA 589-91. Although six putative class members opted out of the settlement and thirty-five objections were filed, no objections were raised to the *cy pres* provision or the possibility of a *cy pres* distribution of unclaimed funds.[2] Dkt. 585-1 ¶ 3; Dkt. 593 at 1-2; Dkt. 598.

No appeals were taken from the district court's approval of the Agreement. Per the Agreement's terms,

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[2] To the extent the "objections" referenced the *cy pres* fund at all, two objections suggested specific non-profits to which or purposes for which the *cy pres* funds could be distributed. Dkt. 589 at 62-63.

the district court retained continuing jurisdiction for a period of five years to supervise the implementation of the Agreement and oversee the administrative claims process. JA 593, 429-31.

4. Following the Agreement's approval, the claims process commenced. 5,191 claims were timely filed, of which 4,380 were completed Track A claims and 92 were completed Track B claims. Over 700 of the filed claims were incomplete and never cured, however, and therefore denied. 3,587, or 81.8%, of the Track A claims succeeded, while 14, or 15.2%, of the Track B claims succeeded. Dkt. 858-1 ¶ 7. Overall, the number of claims filed was approximately half of what the parties expected, and at the conclusion of the claims process, approximately $380 million in settlement funds remained unclaimed. JA 717-18 & n.2.

There are a number of explanations for the unanticipated shortfall in claims.

First, the conduct underlying the class's discrimination claims arose between 1981 and 1999. Thus, some individuals who would have been putative class members were deceased by mid-2011. And their heirs often lacked the information and knowledge about decedents' claims necessary to complete the claim form. JA 719 n.3.

Second, approximately 70 class members whose claims were denied as late or incomplete sought relief from the district court and showed good cause for the error—such as a failure to receive a defect notice from the claims administrator, or that the claimants had died during the period to cure defects (with defects that their

heirs could have cured). Dkt. 625-1. Because the Agreement specifically prohibited the district court from reviewing the determination of claims as untimely, incomplete, or non-meritorious, the court denied those claimants' relief. Dkt. 633 at 8. Therefore, a number of class members who fell within the class definition did not receive relief during the claims process.

Third, for historical reasons, many potential class members were distrustful of the federal government. As a result, it is likely many claimants did not submit claims. JA 719 n.3.

5. All parties agreed that an immediate, one-time distribution of $380 million—more than anyone expected would remain when the Agreement was approved—would not be in the class's best interest. In particular, there existed a limited number of organizations in existence before November 2010 eligible for the distribution, raising concerns about an immediate distribution of equal shares of $380 million to those organizations. JA 720-22.

The Agreement provided for modification of its terms with the consent of all parties and the approval of the district court. JA 438. Plaintiffs and the USDA therefore commenced discussions concerning potential revisions. Plaintiffs advocated that the remainder be used for additional payments to successful claimants and that a process be established for claimants with defective claims to cure. But the USDA repeatedly declined to reopen the claims process. Dkt. 685 at 3.

Plaintiffs therefore focused on improving the *cy pres* provision. Plaintiffs solicited information online,

mailed notice to all claimants, and conducted a series of in-person and telephonic listening sessions. Dkt. 709-1 at 23-24. Ultimately, Plaintiffs proposed creating a trust that would make grants to organizations benefitting Native American farmers and ranchers over a period of years. *Id.* at 1-2. The district court initially rejected that modification, leaving in place the original provision.[3] *Keepseagle v. Vilsack*, 118 F. Supp. 3d 98, 131 (D.D.C. July 24, 2015).

6. After further negotiations, the parties ultimately agreed to a "hybrid" proposal. JA 1169. The proposal provided for an additional distribution to successful claimants of $18,500 each, plus $2,775 in IRS tax relief. JA 1170-71. In addition, the proposal provided that $38 million would be directly distributed to qualifying non-profit organizations within six months in the manner contemplated by the Agreement's original *cy pres* provision.[4] JA 1169-70, 1172.

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[3] The district court rejected the modification in part because one class representative opposed it, based on the court's reading of a provision in the Agreement allowing modification only with the approval of the parties. *Keepseagle*, 118 F. Supp. 3d at 128-31. When it considered the parties' second proposed modification, however, the district court revisited its interpretation and concluded that consent by all named plaintiffs was not required. Pet. App. at 93a-99a. The D.C. Circuit affirmed that latter interpretation. *Id.* at 12a-16a.

[4] The modification only changed the definition of eligible organizations to no longer exclude legal services and educational institutions (although the use of funds for litigation activity was barred), and to expressly include non-profit tribal organizations. *Compare* JA 1169-70, *with* JA 393.

The remaining funds were to be allocated to fund a Trust, which would distribute those funds over a period not to exceed twenty years. JA 1172, 1181. Eligible organizations were defined as in the original Agreement, except that they were no longer limited to those already in existence or assisting Native American farmers and ranchers before November 2010. JA 1178. A Board of Trustees comprised of fourteen individuals—two-thirds of whom are required to have "substantial knowledge of agricultural issues, the needs of Native American farmers and ranchers, or other substantive knowledge relevant to accomplishing the Trust's Mission"—would decide how to distribute the Trust's funds. JA 1183-84. At least one Trustee would be required to have "professional finance and investment experience," and another must have "professional grantmaking experience." JA 1184. No Trustee would be permitted to serve more than two consecutive three-year terms or more than three total terms during the Trust's duration. JA 1183. And the Trust would be prohibited from lobbying, engaging in political activity, making grants to individuals or to support litigation, and engaging in self-dealing. JA 1180.

During listening sessions, Plaintiffs solicited and received a significant number of suggestions for Trustees. Class counsel researched each candidate's qualifications and nominated candidates who possessed the most relevant experience addressing the challenges Native American farmers and ranchers face. Class representatives Porter Holder, Marilyn Keepseagle,

and Claryca Mandan were among those nominated.[5] Dkt. 824-1 at 3 n.3; Dkt. 824-4.

II. Procedural Background.

1. On December 14, 2015, Plaintiffs filed an unopposed motion to modify the Agreement to implement this "hybrid" proposal. Dkt. 824. The district court issued an order requiring class counsel to notify the class, permitting class members to provide written comments addressing the modification, and scheduling a hearing for counsel and "any class member who wishes to speak" to address the modification. JA 1195-96.

2. Petitioners each filed brief comments. Tingle filed a two-page letter in which he stated that additional settlement funds "should be provided to the class members," and that it was "inappropriate" for funds to be awarded to "third party beneficiaries when there are primary beneficiaries (class members) that can be readily identified by class counsel." JA 1201. Despite failing to object to or appeal the original Agreement (which included a *cy pres* provision), Tingle argued that the provision of settlement funds to third parties "was inappropriate at the time the settlement agreement was contrived and it is inappropriate still." *Id.* And Tingle vaguely asserted—without evidence—that corruption would follow from creation of the Trust. *Id.*

Mandan also filed comments, in which he similarly argued that any remaining funds should be distributed

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[5] Once the Trust is operational, class counsel will have no association with the Trust. Future vacancies are to be filled by a majority vote of Trustees. JA 1183.

to claimants who had filed successful claims, rather than third parties. JA 1199. At the subsequent motion hearing, Mandan, represented by counsel, again argued that the full amount of remaining funds should be distributed to successful claimants. JA 1275.

During its discussion with Mandan's counsel at the motion hearing, the district court asked counsel's views about a separate lawsuit—*Smallwood v. Lynch*—that counsel had filed representing a separate individual, and which challenged the Agreement's *cy pres* distribution on that ground that it violated the Appropriations Clause. JA 1223-24. That case had been reassigned to a different judge because, as the district court explained, the merits of the Settlement Agreement "were determined a couple of years ago when the Court approved the agreement," and the case was therefore "not related" within the meaning of the district court's local rules. *Id.* Mandan's counsel confirmed that he was "completely satisfied with where the case [*Smallwood*] sits at this particular point." JA 1272. Counsel did not reference any Appropriations Clause claims when presenting Mandan's objections to modifying the Agreement's *cy pres* provision, nor did he make any mention of any objections based on the Judgment Fund Act or the Settlements Authority Statute. JA 1270-76.

3. On April 20, 2016, the district court approved the modification as fair, reasonable, and adequate under Federal Rule of Civil Procedure 23. The court explained that because it retained continuing jurisdiction only for the limited purposes defined in the Agreement, the court did not have authority to "fashion a different resolution such as ordering that the remaining funds be paid to

prevailing claimants on a *pro rata* basis." Pet. App. at 103a. Instead, as the court explained, if it found the proposed modification not fair, adequate, and reasonable, "then the provisions of the original Agreement would remain in place and the entire $380,000,000 of remaining funds would be distributed pursuant to what everyone now agrees is an unworkable *cy pres* provision." *Id.*

The court concluded that the modification represented a "compromise that was reached after hard-fought negotiations, and is certainly not the product of collusion between the parties," but acknowledged that it was "clear that not everyone agrees with the proposal." *Id.* at 105a. The court found the compromise modification fair, adequate, and reasonable for multiple reasons. First, the modification provided additional payments to prevailing claimants which, although not as high as many wished, constituted "an additional payment that was not contemplated in the existing Agreement." *Id.* at 103a. Second, the Trust, which was created to "serve the interests of the class *as a whole*," would be governed by "community leaders with relevant expertise" and pursuant to a defined process. *Id.* at 104a (emphasis added). As the court explained, it was required to consider the settlement's fairness to the entire class, not just the successful claimants. *Id.* at 105a. Finally, the court approved supplemental service awards, which the modification provided to three of the class representatives, as "justified based on these class representatives' service to the class." *Id.* at 104a.

4. Tingle and Mandan separately appealed the district court's judgment approving modification of the Agreement, and their appeals were consolidated.

A panel majority of the Court of Appeals for the District of Columbia Circuit affirmed the district court's approval of the modified Agreement. Pet. App. at 1a-32a. The majority concluded that the district court had not abused its discretion in approving the modification, finding that the court had "conducted an impressive and thorough review of the proposed addendum." *Id.* at 17a. The majority discerned "no good reason to second-guess the District Court's conclusion that, in providing both supplemental payments and reforming the *cy-près* process, the negotiated compromise fairly balances the parties' competing positions." *Id.* at 18a. The majority found no merit to Mandan's claims that the district court had equitable power to refashion the settlement or should have determined whether the prevailing claimants were readily identifiable before approving the *cy pres* provision. *Id.* at 18a-19a. As the majority explained, the district court had no "freewheeling jurisdiction" to modify the Agreement and, in any event, there existed no precedent for Mandan's claim that "parties cannot negotiate a settlement providing for *cy-près* distribution where prevailing claimants are identifiable and dispersal of funds is feasible." *Id.* at 19a-20a.

Although Mandan attempted for the first time on appeal to challenge the Agreement's *cy pres* provision on constitutional Appropriations Clause and related statutory grounds—arguing that Congress had not made a specific appropriation for *cy pres* awards through

the Judgment Fund Act, 31 U.S.C. § 1304—the majority found that Mandan had both forfeited and waived these claims. *Id.* at 26a. Mandan had not objected to or appealed the district court's initial approval of the Agreement, he had not challenged the *cy pres* provision during the first modification attempt, and he did not contest the legality of the *cy pres* provision before the district court when it considered and approved the modification. *Id.* at 22a-23a. Moreover, the court's colloquy with Mandan's counsel about the *Smallwood* case demonstrated that Mandan's counsel knew of potential constitutional or legal challenges to the *cy pres* provision, but explicitly declined to pursue those challenges on Mandan's behalf in this case. *Id.* at 23a-24a. Accordingly, the majority found that Mandan had expressly waived, or at the very least forfeited, his constitutional and statutory challenges, and rejected Mandan's argument that the putative constitutional nature of his objections insulated those claims from wavier or forfeiture. *Id.* at 26a, 28a-31a.

Finally, although noting that Tingle's arguments "overlap significantly" with Mandan's, the majority separately rejected Tingle's claims that class counsel had a conflict of interest and that class counsel and the class representatives breached their fiduciary duties to the class. *Id.* at 31a-32a. The majority noted that Tingle offered "no evidence in support of his allegations" and that "nothing in the record" supported either argument. *Id.* at 32a.

In a concurring opinion, Judge Wilkins emphasized that the large remainder was "an unanticipated state of affairs, not an intended result" of the settlement. *Id.* at

33a. Judge Wilkins also explained why Mandan's waived Appropriations Clause claim was not jurisdictional, and why the case did not present "extraordinary circumstances" warranting consideration of that claim. *Id.* at 34a-35a. In any event, Judge Wilkins explained, the question of whether Congress had authorized *cy pres* awards in the Settlements Authority Statute was not a "purely legal" question, and would involve resolution of factual issues that the Court of Appeals was not suited to undertake, given that no record had been developed below. *Id.* at 35a-36a.

Judge Brown dissented, contending that the Agreement's inclusion of a *cy pres* provision violated the Appropriations Clause, and that the issue raised either exceptional circumstances or structural, jurisdictional limitations that were not subject to waiver. *Id.* at 37a-80a.

5. In June 2017, Tingle and Mandan both petitioned for *en banc* review. Tingle argued that the Court of Appeals should hear the case *en banc* because, in the time since the case had been argued in January 2017, the "Executive Branch has made a complete turnaround regarding how settlement funds and *cy pres* provisions are to be managed in class action lawsuits." D.C. Cir. Dkt. 1681311-1 at 1. Plaintiffs and the government filed separate responses, both opposing the petitions and both emphasizing that Petitioners were seeking to relitigate narrow, fact-bound questions of waiver and forfeiture.

For its part, the government explained that it had recently reexamined its settlements in a number of cases and had adopted a new policy generally prohibiting the Department of Justice from entering into *cy pres*

settlements. The government nevertheless urged the D.C. Circuit to deny *en banc* review in this case. In light of its new policy, the government explained that the "general legal question of the validity of *cy pres* settlements with the Government is not a question of continuing importance." D.C. Cir. Dkt. 1689076-1 at 1. Moreover, the government argued that "the particular question of whether the [Petitioners] … forfeited and waived their objection to the *cy pres* distribution is a narrow and fact-bound inquiry." *Id.* at 2. The government thus characterized this case as "a poor vehicle for the en banc Court to address" questions about *cy pres* settlements "because the panel held only that Appellants had forfeited and waived the question, and that holding does not itself meet the standards for en banc review." *Id.* at 12. Mandan's arguments contesting the Court of Appeals' waiver and forfeiture holdings, the government noted, did not warrant *en banc* review because Mandan "would need to prevail on both waiver and forfeiture in order for [the Court of Appeals] to reach the merits of his *cy pres* objection." *Id.* at 12-13.

On September 20, 2017, the D.C. Circuit denied *en banc* review. Pet. App. at 110a-111a.

6. Petitioners have now filed separate petitions for writs of certiorari. Mandan's Petition seeks review of whether, using its Appropriations Clause authority, Congress has authorized the inclusion of *cy pres* provisions in settlements with the government through the Judgment Fund Act or the Settlements Authority Statute. Mandan Pet. at 12-24. Implicitly acknowledging his failure to raise that claim below,

Mandan also seeks this Court's review of whether waiver and forfeiture precludes consideration of what he contends is a jurisdictional or structural constitutional claim. *Id.* at 24-34.

Tingle's Petition additionally seeks review of the *cy pres* provision on non-constitutional grounds, asking this Court to resolve whether the Agreement was fair, adequate, and reasonable under Federal Rule of Civil Procedure 23, and whether *cy pres* is an appropriate remedy when the class members who successfully submitted claims during the claims process are identifiable. Tingle Pet. at 9-22. Tingle also seeks review of whether class counsel and the class representatives breached their fiduciary duties to the class and engaged in self-dealing, collusion, and fraud. *Id.* at 22-31.

REASONS FOR DENYING THE PETITIONS

Petitioners seek review of statutory and constitutional arguments that they doubly forfeited and expressly waived below, making this case an inappropriate vehicle to consider the questions presented. In addition, this case involves the fact-bound consideration of a particular *cy pres* provision in a specific settlement agreement, in circumstances that even Petitioners admit are unlikely to recur. And at bottom, the Court of Appeals' decision is correct.

The questions presented do not warrant this Court's review, and the petitions for writs of certiorari should be denied.

I. This Case Does Not Provide A Proper Vehicle To Consider The Inclusion Of *Cy Pres* Provisions In Settlement Agreements.

Given Petitioners' forfeiture and waiver below, this case is not a proper vehicle for consideration of the questions presented, which nevertheless were correctly decided.

A. Petitioners' Challenges To The Inclusion Of The *Cy Pres* Provision Were Both Forfeited And Waived.

Both Petitioners ask this Court to consider whether a *cy pres* provision can be included in a settlement with the government. Mandan Pet. at 14-24; Tingle Pet. at 9-22. That question is not properly before this Court. As the D.C. Circuit correctly held, the question was both forfeited and waived. Pet. App. at 26a.

First, when the district court considered the initial Agreement in 2011, no class member—including Petitioners—objected to the inclusion of the *cy pres* provision. And no party—again including Petitioners—appealed from the court's approval of the Agreement. Instead, Petitioners both submitted claims and accepted payments from the Agreement's initial distribution. In doing so, they signed a release of all claims against the government. JA 451 ¶ 1. And the Agreement further provided that class members released the government from all claims "related to the funds that the Secretary had paid"—even if the Agreement was voided. JA 435-36.

The proceedings below and at issue here—in which the parties sought to modify the Agreement—did not

present the district court with the question of whether to approve the inclusion of a *cy pres* distribution in the first instance. Instead, the Agreement provided the court with continuing jurisdiction for expressly defined purposes—none of which provided the authority to fashion a different distribution out of whole cloth. As the district court recognized, if no modification was approved, the Agreement's existing *cy pres* provision would continue to govern.

Rather than challenge the terms of the *modification*, in the Court of Appeals Petitioners attempted to challenge the inclusion of a *cy pres* provision in the Agreement at all. But that feature of the Agreement became final in 2011, after Petitioners failed to challenge or appeal the district court's approval of the Agreement. Petitioners waived and forfeited their challenge by failing to raise it during the district court's initial consideration of the Agreement.[6] Petitioners therefore could not collaterally attack that feature of the Agreement in the modification proceedings.

Second, and in any event, even when Petitioners objected to the *cy pres* modification in the district court, they failed to preserve the *cy pres*-related claims they later attempted to press in the Court of Appeals and now attempt to press in this Court.

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[6] Indeed, in his comments addressing the modification, Tingle conceded that his arguments regarding the *cy pres* provision could have been made in 2011. JA 1201 (stating that the *cy pres* provision "was inappropriate at the time the settlement agreement was contrived and it is inappropriate still").

Mandan's claims in the Court of Appeals and before this Court are based on the Judgment Fund Act, the Settlements Authority Statute, and the Appropriations Clause. But in his objection before the district court, Mandan never so much as referenced these statutory and constitutional provisions. Without citing any authority, Mandan made only one passing statement that "[p]ayments should not be made to third parties who have not suffered any injury and who have no claims against the United States." JA 1199. As the Court of Appeals correctly determined, this statement is consistent with Mandan's objection to *how* the remainder was to be distributed—and his contention that it should be distributed only to successful claimants. But the statement cannot reasonably be understood as a claim that it would be *unlawful* under particular statutes or constitutional provisions to distribute the remainder via *cy pres*. Pet. App. at 22a-23a.

In fact, the Court of Appeals noted that Mandan's counsel had recently filed a separate lawsuit directly challenging the initial Agreement on Appropriations Clause grounds—a case about which the district court specifically questioned Mandan's counsel during the hearing on the settlement modification. Pet. App. at 23a-24a. In that colloquy with the court, Mandan's counsel agreed that his separate Appropriations Clause suit was not related to the settlement modification proceedings then before the district court. *Id.* The Court of Appeals held that this discussion demonstrated Mandan's express waiver of any Appropriations Clause claim as to the modification. *Id.* at 26a. But even if this were insufficient to constitute waiver, at the very least

counsel forfeited his Appropriations Clause claims by failing to inform the court that Mandan, too, was pressing an Appropriations Clause claim to the proposed modification. These circumstances resolve any doubt about whether Mandan's vague allusion to "payment to third parties" hinted at a challenge to the *legality* of doing so under the Judgment Fund Act, the Settlements Authority Statute, and the Appropriations Clause.[7]

Tingle's objections to the modification likewise failed to raise the claims regarding the lawfulness of including a *cy pres* provision in the Agreement that he now attempts to press on appeal. Like Mandan, Tingle argued that all of the $380 million should be distributed to the successful claimants, but did not argue it would be *unlawful* to do otherwise. JA 1201-02. Otherwise, Tingle vaguely asserted challenges to the structure of the Trust, arguing that allowing the Trust to distribute the *cy pres* funds would lead to "corruption." JA 1201.

B. Petitioners' Claims Are Neither Jurisdictional Nor Structural.

Attempting to sidestep his clear failure to raise the questions presented below, Mandan alternatively

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[7] Although Mandan claims that the district court "specifically considered and rejected [his] argument in its opinion approving the Addendum," Mandan Pet. at 26, the district court did no more than quote Mandan's objection while summarizing the objections that had been made, Pet. App. at 101a. And neither the court's description of Mandan's objection nor the court's subsequent findings make any reference to the Appropriations Clause, the Settlements Authority Statute, or the Judgment Fund Act—demonstrating that the district court certainly did not understand Mandan to have raised such claims. *Id.* at 101a-105a.

suggests: (1) that his challenge is jurisdictional, and therefore cannot be waived or forfeited; (2) that his claims are structural arguments not subject to waiver or forfeiture; or (3) that this Court should nevertheless exercise its discretion to decide his challenge. Mandan Pet. at 24-34. But Mandan demonstrates no split of authority or recurring question of importance regarding the legal principles controlling these questions that would warrant this Court's review. And he is wrong on all three scores.

1. *First*, despite Mandan's attempt to cast the question as a jurisdictional one, Mandan Pet. at 28-30, there is no question that the district court had Article III federal question jurisdiction to hear Plaintiffs' Equal Credit Opportunity Act discrimination claims and to approve the Agreement settling those claims. *See* U.S. Const. art. III, § 2; 28 U.S.C. §§ 1331, 1343, 2201. That Mandan might have raised a question of whether the *cy pres* award was properly included in that Agreement—and whether the award "encroach[es] on the Legislative Branch's exclusive appropriations power," Mandan Pet. at 28—in no way impinges on the court's *jurisdiction* to either hear Plaintiffs' claims or to entertain that constitutional question, had Mandan raised it. Mandan's waived constitutional claim does not challenge the court's Article III jurisdiction.

2. *Second*, citing *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), and *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), Mandan briefly contends that his belated Appropriations Clause claim presents a "structural"

constitutional question not subject to waiver. Mandan Pet. at 31-32.

Yet, this Court has explained that "structural" constitutional claims involve purported attempts by Congress to "transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts"—attempts that federal courts might only prevent by prohibiting the parties from acquiescing (by consent) in the impingement of courts' Article III authority. *Wellness Int'l*, 135 S. Ct. at 1944 (internal quotation marks and brackets omitted) (quoting *Schor*, 478 U.S. at 850). In those circumstances, Article III serves to "prevent[] the encroachment or aggrandizement of one branch at the expense of the other." *Id.* (internal quotation marks omitted) (quoting *Schor*, 478 U.S. at 850).

Mandan's claim does not involve an attempt to transfer jurisdiction to a non-Article III tribunal. Nor is there any risk that *Congress* (the branch Mandan claims is disadvantaged) will be unable to "defend its turf," Pet. App. at 36a (Wilkins, J., concurring), or that courts, when presented with properly preserved challenges to *cy pres* provisions in the future, will be prevented from deciding those challenges.

Moreover, nowhere does Mandan argue that Congress is constitutionally *prohibited* from permitting the inclusion of *cy pres* provisions in settlement agreements. He simply contends that Congress has not done so in the Judgment Fund Act or the Settlements Authority Statute. In reality, Mandan's claim is not a structural concern at all, but a question of statutory interpretation that is fully subject to waiver and

forfeiture. In any event, whether described as a constitutional or statutory claim, Mandan's argument is subject to waiver and forfeiture like any other claim. *See, e.g.*, *Yakus v. United States*, 321 U.S. 414, 444 (1944); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143 (1967).

3. *Finally*, this is not "one of those rare cases" in which this Court should exercise its discretion to hear a challenge not raised below. *Freytag v. Comm'r*, 501 U.S. 868, 879 (1991). The question presented is not one "where the proper resolution is beyond any doubt." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). As the D.C. Circuit explained below, Mandan's arguments are "novel" and "have never been addressed by any federal appellate court, and they have been explored only tangentially in a single law review article." Pet. App. at 29a.

The question is also a fact-intensive and complex one, which cannot be considered in the abstract. The Settlements Authority Statute authorizes a compromise settlement to be settled and paid "in a manner similar to judgments in like causes." 28 U.S.C. § 2414. But—because of Mandan's failure to develop his claims below—the record is devoid of *any* discussion of or evidence concerning what causes would be considered "like" causes, or the frequency with which *cy pres* provisions are included in settlements and final judgments in those causes. *See* Pet. App. at 35a-36a (Wilkins, J., concurring).

The novelty and complexity of these questions counsel in favor of this Court—to the extent a subsequent split of authority were to develop—awaiting a case in which the claim is fully litigated and passed

upon below, in which case the Court would be provided with a developed record and the benefit of the lower courts' reasoning.[8]

C. Petitioners' Claims Are Meritless In Any Event.

Petitioners' claims are wrong in any event. Neither the Appropriations Clause, nor the Judgment Fund Act, nor the Settlements Authority Statute, nor Federal Rule of Civil Procedure 23 bar the inclusion of a *cy pres* award in a settlement agreement in order to compensate class members with claims against the government.

1. The Appropriations Clause simply requires that "the payment of money from the Treasury … be authorized by a statute." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990). In the Judgment Fund Act and the Settlements Authority Statute, Congress has expressly authorized the payment of money for settlements like the one at issue here.

The Judgment Fund Act authorizes the appropriation of "[n]ecessary amounts … to pay final judgments, awards, compromise settlements, and interest and costs" when "payment is not otherwise provided for," is "certified by the Secretary of the Treasury," and is payable under, among other statutes, the Settlements Authority Statute. 31 U.S.C. § 1304. The Settlements Authority Statute, in turn, authorizes the settlement and payment of "compromise settlements

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[8] For these same reasons, there is no basis to summarily reverse the Court of Appeals' decision, as Mandan alternatively requests. *E.g.*, Mandan Pet. at 25, 35.

of claims … in a manner similar to judgments in like causes." 28 U.S.C. § 2414.

The Settlements Authority Statute's plain language encompasses settlements that include *cy pres* provisions. First, the statute focuses on "compromise settlements *of claims*," not on payment to particular *parties*. *Id.* (emphasis added); *see Honeycutt v. United States*, 137 S. Ct. 1626, 1635 n.2 (2017) ("[T]he Court cannot construe a statute in a way that negates its plain text."). Here, there can be no question that the class pressed discrimination claims against the government. Nothing in the statute requires that all payments made to settle those claims be made only to specific injured parties. The statute authorizes any expenditures made to settle those claims. *See* Availability of Judgment Fund in Cases Not Involving a Money Judgment Claim, 13 Op. O.L.C. 98, 103 (1989) (concluding that a settlement requiring government expenditures but not involving a "money judgment" is nevertheless payable from the Judgment Fund through the Settlements Authority Statute so long as the underlying cause necessitating settlement "could have led to a money judgment").

Second, the inclusion of a *cy pres* provision is similar to other settlements and final judgments "in like causes." 28 U.S.C. § 2414. *Cy pres* provisions have long been a common feature of class action settlements and judgments. *See, e.g.*, 4 William B. Rubenstein, *Newberg on Class Actions* § 12:32, at 244 (5th ed. 2014) (explaining that *cy pres* distribution is "likely the most prevalent method for disposing of unclaimed funds," and that "[c]ourts in every circuit, and appellate courts in most, have approved the use of *cy pres* for unclaimed class

action awards"). And *cy pres* can be used as a method of allocating a judgment. *See, e.g.*, *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784, (7th Cir. 2004) (*cy pres* is intended to accommodate the "infeasibility of distributing the proceeds of the settlement (or the judgment, in the rare case in which a class action goes to trial) to the class members").[9]

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[9] Although Mandan argues that the government typically obtains congressional approval for payments to third parties or avoids a *cy pres* distribution, Mandan Pet. at 22 n.13, the cases he cites are distinguishable and do not demonstrate an established practice. In *Cobell*, the plaintiffs sought only equitable relief, not money damages payable from the Judgment Fund, and, in any event, the case was settled in the wake of specific congressional efforts to prevent the appropriation of funds for settlement of that case. *See Cobell v. Babbitt*, 30 F. Supp. 2d 24, 38-39 & n.15 (D.D.C. 1998) (explaining that sovereign immunity would bar money damages); *Cobell v. Salazar*, 573 F.3d 808, 811 (D.C. Cir. 2009) (detailing history). In the *Black Farmers* case (sometimes referred to as *Pigford II*), Congress had *already* appropriated $100 million to settle the plaintiffs' claims. Thus, the Judgment Fund Act's requirement that payment be "not otherwise provided for" was not satisfied—necessitating additional congressional action. 31 U.S.C. § 1304; *see Food, Conservation, and Energy Act of 2008*, Pub. L. No. 110-246, § 14012, 122 Stat. 1651, 2210; *Claims Resolution Act of 2010*, Pub. L. No. 111-291, § 201, 124 Stat. 3064, 3070-73; *In re Black Farmers Discrimination*, 820 F. Supp. 2d 78, 79-80 (D.D.C. 2011). And in the *Garcia* and *Love* cases, the government's voluntary decision to offer only an administrative claims process was reached only after courts *denied* class certification. The government's decision therefore likely is explained by that procedural history and the government's litigating position. *See Garcia v. Veneman*, 211 F.R.D. 15 (D.D.C. 2002); *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006).

Accordingly, the Agreement's inclusion of a *cy pres* provision settles the class's "claims … in a manner similar to judgments in like causes." 28 U.S.C. § 2414.[10]

2. The inclusion of a *cy pres* provision is also permissible under Federal Rule of Civil Procedure 23. Petitioner Tingle incorrectly suggests that because certain class members in this case submitted claims—and therefore are identifiable—all remaining funds *must* be distributed to those class members. Tingle Pet. at 9.

The cases Tingle cites are inapposite, and evidence no split of authority over the question of whether *cy pres* provisions are permissible in settlement agreements. The case upon which Tingle most heavily relies involved the district court's *sua sponte* attempt to employ *cy pres*, under a settlement agreement that *did not* provide for such a distribution. *See Klier v. Elf Atochem N. Am.*,

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[10] Petitioners invoke the district court's passing statement—when rejecting the parties' initial attempt to modify the Agreement—that "the Court doubts that the judgment fund from which [the $380,000] came was intended to serve such a purpose [distribution to non-profits]." *Keepseagle*, 118 F. Supp. 3d at 104. Context makes clear, however, that the court was commenting on the *government*'s initial refusal, in light of the unanticipated remainder, to make any modifications to the *cy pres* award that would include additional distributions to successful claimants—additional distributions that were ultimately made under the subsequent modification. Indeed, the court's very next sentence noted that because the considerations it had referenced "move beyond the realm of the law and into the realm of politics and policy" it could "only make observations, bound as it is to the final judgment in this case and the narrow legal doctrines for modifying a final judgment." *Id.* Accordingly, the court was not making any comment about the lawfulness of using funds for this purpose.

Inc., 658 F.3d 468, 476-77 (5th Cir. 2011). Indeed, the court of appeals there expressly recognized that limitation in its holding. *See id.* ("This is not a case where the settlement agreement itself provides that residual funds shall be distributed via *cy pres*. Quite the opposite: the district court's decision to distribute the unused funds via *cy pres* finds no support in the text of the settlement documents.").

Here, by contrast, the district court was confronted with a proposed modification to a governing Agreement that *already* included a *cy pres* provision which the court had previously found was fair, adequate, and reasonable. For similar reasons, many of the cases Tingle cites are distinguishable because they involved the courts' *initial* determination—at the time a settlement was proposed or class certification sought—of whether a *cy pres* remedy should be approved.[11]

Moreover, in *none* of the cases Tingle cites did a court conclude—as a categorical matter—that the inclusion of a *cy pres* provision violated Rule 23. Instead, each case turned on the court's fact-specific determination of whether, under the circumstances presented, resort to *cy pres* was fair, adequate, and reasonable. In some cases, the court's determination turned on its assessment of the nexus between

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[11] *See, e.g.*, *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 345 (7th Cir. 1997) (addressing *cy pres* in dicta after vacating and remanding district court's finding that a class could not be certified); *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 675 (7th Cir. 2013) (reversing decertification of class, and suggesting *cy pres* might provide a possible remedy).

particular *cy pres* recipients and the class and claims before the court.[12] In others, the court invalidated a *cy pres* provision that provided the court with authority to make a *cy pres* distribution in its "sole discretion," *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1066 (8th Cir. 2015), or where (unlike the Agreement here) the settlement made no provision for individual damage awards, *Molski v. Gleich*, 318 F.3d 937, 954-55 (9th Cir. 2003), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). And in still other cases, courts *upheld* the district court's approval of a *cy pres* provision.[13]

At bottom, these cases provide no support for Tingle's claim that *cy pres* awards are categorically inappropriate. Nor do they evidence any circuit split on that question.[14]

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[12] *See Dennis v. Kellogg Co.*, 697 F.3d 858, 866 (9th Cir. 2012) (concluding that *cy pres* beneficiaries, who provided food to the indigent, were not sufficiently connected to plaintiffs' consumer protection claims); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011) (finding that the proposed *cy pres* beneficiaries were unconnected to the objectives underlying plaintiffs' statutory claims and did not account for the class's broad geographic distribution).

[13] *See Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990); *see also In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) (remanding for further consideration but emphasizing that "a district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury").

[14] Tingle also relies on the American Law Institute's guidelines (which preference *pro rata* distribution to participating class

II. Review Is Not Warranted Because There Is No Circuit Split And This Case's Fact-Bound Circumstances Are Unlikely To Recur.

As both Plaintiffs and the government argued in their respective oppositions to rehearing *en banc* in the District of Columbia Circuit, the narrow, fact-bound circumstances of this case, and the fact that the government has changed its policy as to *cy pres* settlements, also counsel against any further review of this case.

1. *First*, this Court's review is unwarranted because this case's circumstances are fact specific and unlikely to recur. The district court and the parties were presented with an unusually large and unanticipated remainder. The *cy pres* award was intended to provide compensation, albeit indirectly, to a class compromised of many individuals who did not submit claims. Petitioners are wrong to suggest that successful

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members) and a law review article to claim that "[o]nly when further distributions to class members are no longer feasible does the court have the discretion to order *cy pres* distribution." Tingle Pet. at 10. But while some courts have applied the ALI approach in specific cases, courts have not endorsed the categorical rule Tingle suggests, nor has it been uniformly accepted. *See, e.g.*, *In re Baby Prods.*, 708 F.3d at 173, 176 (upholding *cy pres* provision, and explaining that "[a]lthough we agree with the ALI that *cy pres* distributions are most appropriate where further individual distributions are economically infeasible, we decline to hold that *cy pres* distributions are only appropriate in this context," and noting that "[s]ettlements are private contracts reflecting negotiated compromises"); 4 *Newberg on Class Actions*, *supra*, § 12:30, at 225 ("[T]he argument in favor of *pro rata* redistribution is less compelling than its proponents assume.").

claimants constitute the entire class, and that it was therefore improper to distribute funds for the benefit of the class. *See, e.g.*, Tingle Pet. at 9. The certified class is undoubtedly much larger than the 3,601 successful claimants, and it includes Native American farmers and ranchers who either did not file claims or whose claims were unsuccessful because they were untimely or incomplete.[15] Class counsel and the court must protect the interests of all class members in settlement—identified or not. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 595 (1997) ("Rule 23 … must be … applied with the interests of absent class members in close view.").

2. *Second*, and similarly, Petitioners have not identified any disagreement among courts concerning the factors that should be considered when determining whether a *cy pres* provision is fair, reasonable, and adequate. The district court's and Court of Appeals' fact-bound application of those standards does not warrant this Court's review.

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[15] The parties anticipated that over ten thousand class members would file claims, based on the federal government's estimates of Native American farmers and ranchers, and the government's prior experience with settlement in a discrimination case concerning black farmers. JA 718 n.2. Indeed, given that the government's then-most-recent Census of Agriculture reported that more than 61,000 Native American farm or ranch operations existed in the United States at the time the settlement was negotiated—and that the figure undoubtedly fails to capture Native Americans engaged in farming and ranching in prior periods that fell within the class period (beginning in 1981)—the class is likely multiples larger than the 3,601 successful claimants. *Id.*

Although Mandan repeatedly claims that the *cy pres* distributions were made to "uninjured non-parties without claims against the United States," *see, e.g.*, Mandan Pet. at 12, he is wrong. The *cy pres* awards here are to be made to particular organizations with a close nexus to class members and their claims as *a means to compensate* injured class members who were unable to file a successful claim. By providing "money to charities that work in the class's interest," *cy pres* is "compensatory, albeit indirectly so," and "[t]he class benefits from a *cy pres* distribution as it realizes the gains that its charitable contribution can accomplish." 4 *Newberg on Class Actions*, *supra*, § 12:32, at 240-41. In that respect, *cy pres* is "preferable to *pro rata* redistribution, as the absent class members realize no gain (other than deterrence) when their fellow class members are enriched at their expense." *Id.* at 241.

Tingle seeks this Court's review of the specifics of the Trust established under the *cy pres* modification. Tingle Pet. at 18-22. Not only did Tingle fail to raise these arguments below, but the legal standard for assessing the connection—or nexus—between *cy pres* beneficiaries and the class is consistent across circuits. *See, e.g.*, *In re Baby Prods.*, 708 F.3d at 172; *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 33-34 (1st Cir. 2012). Tingle does not identify any split of authority or recurring question of importance on this issue. The district court's fact-bound application of those standards to the Agreement and modification does not warrant this Court's review.

In any event, the strictures placed on the Board of Trustees, the recipient organizations, and the *cy pres*

awards satisfy those standards. The Trust must make awards to organizations that provide "business assistance, agricultural education, technical support, and advocacy services to Native American farmers and ranchers"—the exact class that brought the lawsuit. JA 1178. There is nothing to indicate that the "c*y pres* distribution all but ensures continuing conflicts of interest[], graft, self-dealing, and other forms of nefarious behavior." Tingle Pet. at 21. The Trust Agreement expressly forbids conflicts of interest, self-dealing, grants to individuals or earmarks, and altogether provides ample assurance that the distributions will benefit the class. JA 1180.

3. *Third*, Tingle's claims that class counsel and class representatives breached their fiduciary duties to the class do not warrant this Court's review. Tingle did not raise these claims before the district court. JA 1201-02. Nor has he identified any split of authority on these questions. Instead, they are fact-bound inquiries that were fully considered and rejected (despite Tingle's forfeiture) by the Court of Appeals. As the Court of Appeals found, Tingle offered "no evidence in support of his allegations." *See* Pet. App. at 32a.[16]

[16] The record also refutes each of Tingle's claims. The Agreement was not prepared and presented in a way that obscured class members' ability to consider and object to its terms or to eliminate opposition. Tingle Pet. at 3, 8-9. Instead, the detailed notice sent to class members and one-page summary notice *both* clearly stated that unclaimed funds would be disbursed to non-profits. JA 795, 805. Contrary to Tingle's allegation that class counsel misled class members by arguing that the USDA would demand its money back, and that class counsel did not listen to class members because most

4. *Finally*, the Appropriations Clause question Mandan belatedly attempts to raise is unlikely to recur in light of a recent policy memorandum issued by the Attorney General. Pet. App. at 154a-155a. As Petitioners admit, and as the USDA informed the District of Columbia Circuit in the government's opposition to the petitions for rehearing *en banc*, that memorandum prohibits the future inclusion of *cy pres* provisions in settlement agreements with the government. Mandan Pet. at 23; Tingle Pet. at 31; D.C.

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supported redistribution, Tingle Pet. at 5, the USDA stated *in open court* that it had not foreclosed demanding a return of the remainder, JA 747. The district court found that concern reasonable in assessing class representatives' loyalty to the class. Dkt. 772 at 18-19. Moreover, class counsel had a fiduciary duty to all class members, not just successful claimants. *Supra* at 31. Nor is there merit to Tingle's claim that the district court was denied access to or failed to probe class representatives' conduct or the service awards. Tingle Pet. at 5. The district court expressly approved the awards, which the Agreement disclosed. Pet. App. at 90a-91a, 104a. As the Court of Appeals explained, "nothing in the record … suggests that the service awards served any nefarious purposes." *Id.* at 32a. Tingle's contentions about the Trust and its Board are similarly meritless. The district court was able to consider the Trust's fairness because the Trust Agreement *was* presented to and approved by the court. *See* JA 1177-94; Pet. App. at 89a-90a. Indeed, the court's approval of the Trust Agreement and the first Board and Executive Director was required for the Trust to become operative. JA 1172. No board member has veto power. JA 1186. Nor is there a President of the Board (although the Trust does provide for an Executive Director, who is not a board member). *Id.* Thus, while there is no evidence that a board member who previously worked for the USDA would prove biased, Tingle nevertheless is wrong to suggest that a single member could block funding "that does not support the ideology of the USDA." Tingle Pet. at 6.

Cir. Dkt. 1689076. This policy change suggests that this Court's guidance on the question presented is not necessary. As the government informed the Court of Appeals: "The absence of continuing use of such *cy pres* agreements is sufficient reason for this Court to deny rehearing *en banc* on the question of their legal validity." D.C. Cir. Dkt. 1689076 at 12. And if this or a future administration were to change its policy, future challenges on Appropriations Clause or other grounds could be considered by lower courts in the first instance—and with the benefit of a fully developed record.

CONCLUSION

For the reasons set forth herein, the petitions for writs of certiorari should be denied.

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