Nos. 17-807 and 17-897

In the Supreme Court of the United States

DONIVON CRAIG TINGLE, PETITIONER

v.

SONNY PERDUE, SECRETARY OF AGRICULTURE, ET AL.

KEITH MANDAN, PETITIONER

v.

SONNY PERDUE, SECRETARY OF AGRICULTURE, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in declining to adjudicate the merits of a challenge that a *cy pres* provision in a class-action settlement agreement involving the federal government violated the Constitution's Appropriations Clause, Art. I, § 9, Cl. 7, based on the court's determination that the challenge had been waived or, at a minimum, forfeited.

2. Whether the district court abused its discretion in approving a modification of a previously approved class-action settlement agreement based on the court's findings that the modification was fair, reasonable, and adequate and that it was not the product of collusion among the parties.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-80a[1]) is reported at 856 F.3d 1039. The relevant memorandum opinion of the district court (Pet. App. 83a-107a) is not published in the Federal Supplement but is available at 2016 WL 9455764.

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 17-897.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 2017. Petitions for rehearing were denied on September 20, 2017 (Pet. App. 110a-111a). The petition for a writ of certiorari in No. 17-807 was filed on December 1, 2017. The petition for a writ of certiorari in No. 17-897 was filed on December 19, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1999, more than 200 Native American farmers and ranchers brought this suit against the United States Department of Agriculture (USDA) on behalf of a putative class. Pet. App. 4a. They alleged that USDA had discriminated against Native Americans who applied for credit and other benefits under various federal programs, and that it had failed to investigate complaints of discrimination, in violation of the Equal Credit Opportunity Act, 15 U.S.C. 1691 *et seq.*, and other statutes. Pet. App. 4a-5a; see *Keepseagle* v. *Veneman*, No. 99-3119, 2001 WL 34676944, at *1 (D.D.C. Dec. 12, 2001).

In 2001, after finding that the requirements of Federal Rule of Civil Procedure 23 were satisfied, the district court certified a class consisting of

> [a]ll Native-American farmers and ranchers, who (1) farmed or ranched between January 1, 1981 and November 24, 1999; (2) applied to the USDA for participation in a farm program during that time period; and (3) filed a discrimination complaint with the USDA individually or through a representative during the time period.

Keepseagle, 2001 WL 34676944, at *6; see *id.* at *6-*14. The court certified the class under Rule 23(b)(2), which governs declaratory and injunctive relief. *Id.* at *12-*14.

It reserved judgment on whether certification of a class seeking monetary relief under Rule 23(b)(3) would also be appropriate, but the court noted that it "maintain[ed] the power to revisit the definition of the class at any point" and that, if the plaintiffs subsequently showed that certification of a Rule 23(b)(3) class was appropriate, the court "w[ould] consider its certification at that time." *Id.* at *14; see Pet. App. 4a-5a.

b. In 2010, after more than a decade of discovery and negotiation, the parties reached a proposed settlement agreement. Pet. App. 5a. The proposed settlement provided for various forms of programmatic relief, including (*inter alia*) requirements that USDA collect and evaluate data on its Farm Loan Program and that it enhance its services and education for Native American farmers and ranchers. *Ibid.* The proposed settlement also provided for monetary relief to class members, through certification of a Rule 23(b)(3) class. *Id.* at 5a-6a. It required the United States to establish a $680 million fund from which class members could seek compensation. *Id.* at 6a. Individual class members could pursue relief through an administrative claims process, along one of two mutually exclusive avenues. *Ibid.* Claimants who presented "substantial evidence" that they met certain criteria could obtain $50,000 plus certain tax relief. *Ibid.* (citation omitted). Alternatively, claimants could seek to recover their actual damages, up to $250,000, by meeting a higher evidentiary standard. *Ibid.*; see C.A. App. 392-423. Class members also could elect to opt out of the settlement agreement, Pet. App. 5a-6a, and four individuals did so, see D. Ct. Doc. 607, at 1 (Apr. 29, 2011).

When the proposed settlement agreement was negotiated, substantial uncertainty and disagreement existed about the number of potential claimants, and thus the

appropriate size of the fund to pay individual claims. See C.A. App. 909-911. In light of that uncertainty, the proposed settlement agreement provided that, if the $680 million fund proved insufficient to pay all claims, then successful claimants' damage awards would be reduced on a pro rata basis. *Id.* at 419-420. Conversely, in the event that there were funds remaining after the completion of the claims process, the agreement contained a *cy pres* provision, which directed that any remaining funds would be distributed in equal shares to nonprofit organizations (excluding law firms, legal-services entities, or educational institutions) that served Native American farmers. *Id.* at 393, 422-423. The proposed settlement agreement provided that class counsel would designate (subject to the court's approval) organizations that met those criteria to receive funds. *Id.* at 393; Pet. App. 6a. It also contained a provision permitting modification of the settlement's terms, but "only with the written agreement of the Parties and with the approval of the District Court, upon such notice to the Class, if any, as the District Court may require." Pet. App. 6a (citation omitted).

c. The district court received objections to the proposed settlement. Pet. App. 7a. Of 35 objection letters, three addressed the *cy pres* provision; two of those suggested particular organizations or goals to which any remaining funds should be directed, and a third opposed any *cy pres* distribution to beneficiaries as designated by class counsel. *Ibid.* Neither the petitioner in No. 17-807 (Donivon Tingle) nor the petitioner in No. 17-897 (Keith Mandan) submitted any objection. *Ibid.*

In April 2011, after considering the objections submitted and conducting a fairness hearing, the district court approved the settlement. Pet. App. 7a. The court

found that the settlement's terms were fair, reasonable, and adequate and satisfied Federal Rule of Civil Procedure 23(e). *Ibid.* It entered a final order and judgment that dismissed the case with prejudice, but the court "retain[ed] continuing jurisdiction for a period of five years" thereafter to oversee compliance with the settlement's provisions. C.A. App. 593. No appeal from the court's order was taken. Pet. App. 7a.

2. a. Over the following two years, the administrative claims process proceeded. Pet. App. 8a. Although more than 3600 individuals submitted successful claims, when negotiating the settlement, the parties had anticipated a much higher number would do so. See *id.* at 8a-9a. As a result, at the conclusion of the administrative claims process, approximately $380 million of the fund had not been distributed. *Id.* at 8a.

The parties attributed the difference between the number of claims anticipated and the number submitted to different causes, see C.A. App. 1114 n.3, but they worked together to find a resolution, Pet. App. 8a. The parties initially negotiated a supplemental agreement under which, rather than immediately distributing the unclaimed funds in equal shares to nonprofit organizations that had assisted Native American farmers in the past, most of the unclaimed funds instead would be paid into a trust that would be distributed over 20 years to nonprofit organizations that had served or would serve Native American farmers. See *ibid.*; D. Ct. Doc. 709-1, at 1-2 (Sept. 24, 2014). In September 2014, class representatives accordingly filed a motion to modify the settlement agreement under the agreement's modification provision and Federal Rule of Civil Procedure 60(b)(5). *Ibid.*

The lead named plaintiff, Marilyn Keepseagle, opposed the proposed modification. Pet. App. 8a. With the district court's approval, she and her husband retained separate counsel and filed their own motion to modify the original settlement. *Ibid.*; see C.A. App. 1121-1123; D. Ct. Doc. 779-1 (May 19, 2015). The Keepseagles proposed instead a pro rata distribution of all remaining funds to the claimants who had already submitted successful claims. Pet. App. 8a.

In June 2015, after receiving briefing on the competing motions to modify the settlement agreement, the district court held a hearing. C.A. App. 1123-1126. Many other class members testified at the hearing in support of the Keepseagles' proposal. Pet. App. 9a. Neither Tingle nor Mandan testified. *Ibid.* In July 2015, the district court denied both motions to modify the settlement agreement and directed the parties to resume negotiations. *Ibid.*; C.A. App. 1098-1167.

b. The parties (including the Keepseagles) accordingly engaged in extensive additional negotiations. In December 2015, class counsel, USDA, and the Keepseagles reached a compromise that struck a balance between class counsel's and the Keepseagles' prior proposals. Pet. App. 9a. That compromise, reflected in a proposed Addendum to the original settlement agreement, provided that class members who had successfully pursued claims would receive additional compensation (an $18,500 direct payment plus a $2775 payment made to the Internal Revenue Service on the class member's behalf). Pet. App. 9a; C.A. App. 1170. It further provided that the funds still remaining after that distribution—approximately $300 million—would be distributed to nonprofit organizations that serve Native American farmers: $38 million would be distributed promptly to

nonprofit organizations proposed by class counsel and approved by the district court, and the remainder (estimated to be $265 million) would be placed in a trust to be distributed to nonprofit organizations over 20 years. Pet. App. 9a-10a; C.A. App. 1177-1188. A wide range of nonprofit organizations would be potentially eligible to receive grants from the trust under the Addendum, and the funds could be used "to fund the provision of business assistance, agricultural education, technical support, and advocacy services to Native American farmers and ranchers to support and promote their continued engagement in agriculture." C.A. App. 1178. The Addendum provided that class counsel would select (subject to the court's approval) the initial members of the board of trustees and the executive director for the new trust and that the trustees could appoint any replacements. *Id.* at 1170, 1183, 1186.

The plaintiffs filed an unopposed motion to modify the settlement agreement to incorporate the Addendum into the original settlement agreement. Pet. App. 9a; see D. Ct. Doc. 824-1 (Dec. 14, 2015). At the district court's direction, class counsel provided written notice of the proposed modification to the class. Pet. App. 10a. The court received and reviewed written comments from class members and, in February 2016, it held another hearing, at which many class members testified. *Ibid.*

"Many class members expressed their support for the proposed Addendum, but many did not." Pet. App. 92a. Class members who disagreed with the Addendum generally argued either that all of the funds should be distributed to successful claimants, or that the claims process should be reopened to allow unsuccessful claimants to submit new claims. *Ibid.* As relevant here, petitioner Mandan argued that all of the remaining funds

should have been distributed solely to the successful claimants and that the settlement could not be modified without his consent. C.A. App. 1197-1199; Pet. App. 10a-11a; D. Ct. Doc. 860, at 1-6 (Feb. 18, 2016). Mandan also testified at the hearing. Pet. App. 10a-11a. Petitioner Tingle submitted a letter asserting that the provision requiring distribution of the remaining funds to third parties "was inappropriate at the time the settlement agreement was contrived and [was] inappropriate still," that the agreement could not be modified without his consent, and that the negotiated addendum was the product of corruption. C.A. App. 1201-1202. Neither Mandan nor Tingle argued that the *cy pres* distribution violated the Appropriations Clause of the Constitution, Art. I, § 9, Cl. 7.

At the February 2016 hearing, the district court asked Mandan's counsel about a separate suit he had filed on behalf of a different class member (William Smallwood, Jr.). Pet. App. 11a. The complaint in Smallwod's suit alleged that the *cy pres* distribution was unlawful because (*inter alia*) it violated the Appropriations Clause of the Constitution, Art. I, § 9, Cl. 7, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," *ibid.* See Compl. ¶¶ 55-61, 71-78, *Smallwood* v. *Vilsack*, No. 16-cv-161 (D.D.C. Feb. 1, 2016); Pet. App. 11a. Counsel had initially designated Smallwood's suit as a related proceeding, but it had been reassigned to another district judge. Pet. App. 11a. The court in this case asked Mandan's counsel whether Smallwood's challenges to the legality of the *cy pres* provision should be heard as part of this litigation, but counsel declined, and

"[t]hereafter counsel never raised, briefed, or otherwise pressed any legal challenges to" the *cy pres* award. *Ibid.*[2]

c. In April 2016, the district court approved the Addendum's modification of the settlement agreement. Pet. App. 83a-107a. The court rejected arguments by objecting class members that the Addendum was improperly reached in contravention of the original settlement's modification provision. *Id.* at 93a-99a. The court then reviewed the "terms of the proposed Addendum and f[ound] that those terms are fair, reasonable, and adequate, and not the product of collusion between the parties." *Id.* at 103a; see *id.* at 103a-105a.

3. Petitioners each filed separate appeals, which were consolidated, and the court of appeals affirmed. Pet. App. 1a-80a.

a. The court of appeals held that the district court did not abuse its discretion in approving the modification of the original settlement agreement set forth in the Addendum based on the district court's finding that the modification was "fair, reasonable, and adequate." Pet. App. 16a; see *id.* at 16a-21a. The court of appeals observed that the district court had "conducted an impressive and thorough review of the proposed addendum," had held a lengthy hearing at which more than 30 class members testified, and had "concluded that the proposed addendum was a fair compromise." *Id.* at 17a. After reviewing the terms of the modification, the court of appeals determined that it "ha[d] no good reason to

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[2] Smallwood's separate suit accordingly proceeded separately, before a different district judge, and in January 2017 the district court in that case dismissed the suit for lack of standing. Pet. App. 11a. Smallwood appealed, but he subsequently voluntarily dismissed his appeal. See *Smallwood* v. *Sessions*, No. 17-5070 (D.C. Cir. July 27, 2017) (granting stipulated voluntary dismissal).

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 court of appeals found "no merit" in petitioner Mandan's challenges to the district court's findings and conclusion. *Id.* at 19a; see *id.* at 18a-21a.

On appeal, Mandan also "advance[d], for the first time in this case, constitutional and statutory challenges to the Settlement Agreement's *cy-près* provision," arguing that it is inconsistent with the Constitution's Appropriations Clause and that the provision is not authorized by the statute that governs the Judgment Fund, 31 U.S.C. 1304. Pet. App. 24a. The court of appeals did not address the merits of that argument, however, because it concluded that it had been waived or, alternatively, forfeited. *Id.* at 22a-31a. The court explained that neither Mandan nor any other class member had objected to the legality of the *cy pres* provision when the original settlement agreement was proposed and approved or when plaintiffs first proposed to modify the *cy pres* distribution several years later. *Id.* at 22a. The court further explained that, when the Addendum was proposed, Mandan not only failed to assert any constitutional objection to the *cy pres* provision, but (through counsel) "Mandan explicitly waived his claims." *Id.* at 26a; see *id.* at 22a-24a. In the alternative, the court determined that Mandan had "forfeited" those challenges "because he never raised his claims with the District Court in the first instance," despite multiple opportunities. *Id.* at 26a-27a. The court of appeals declined to overlook that forfeiture. *Id.* at 28a-30a.

The court of appeals also rejected petitioner Tingle's separate arguments that class counsel had a conflict of

interest and that the class representatives breached their fiduciary duty in negotiating the Addendum. Pet. App. 31a-32a. The court explained that "Tingle offer[ed] no evidence in support of his allegations," and "[n]othing in the record support[ed]" his various assertions that class counsel improperly offered trustee positions or incentive awards to class representatives to skew the outcome. *Id.* at 32a.

b. Judge Wilkins joined the court of appeals' opinion and also filed a concurring opinion, principally responding to a dissenting opinion filed by Judge Brown. Pet. App. 33a-36a. Judge Wilkins opined that the district court's fairness finding could be overturned only for "clear error," which had not been shown. *Id.* at 33a. He further disagreed with the dissent's view that the court should reach the merits of Mandan's constitutional and statutory challenges to the *cy pres* provision, opining that the rule that courts may overlook forfeiture of arguments in "extraordinary circumstances" is inapplicable to waived arguments and that in any event Mandan had not met that test. *Id.* at 35a; see *id.* at 34a-36a.

c. Judge Brown dissented. Pet. App. 37a-80a. In her view, the court of appeals should have reached the merits of Mandan's arguments that the *cy pres* provision violates the Appropriations Clause and the Judgment Fund statute, 31 U.S.C. 1304, both because "this case presents 'exceptional circumstances'" and because in her view Mandan's arguments "raise[d] structural, jurisdictional limitations on judicial power that cannot be waived." Pet. App. 41-42a; see *id.* at 41a-66a.

On the merits, Judge Brown opined that *cy pres* provisions in settlement agreements with the federal government violate the Appropriations Clause because Congress has not, in the Judgment Fund statute or any

other federal statute, appropriated funds for the purpose of paying *cy pres* awards. Pet. App. 66a-74a. She concluded that the funds remaining from the original settlement award that were not distributed in the administrative claims process should therefore be returned to the U.S. Treasury. *Id.* at 74a-77a.

4. Tingle and Mandan each filed petitions for rehearing. Pet. App. 110a-111a. In its response to the petitions, the government informed the court of appeals that the Department of Justice had recently reexamined its approach to settlement agreements that require payments to third parties, including the agreement in this case and others. Gov't C.A. Resp. to Pet. for Reh'g 1. The government further explained that, on June 5, 2017, the Attorney General had adopted a new policy prohibiting the Department in the future from entering settlement agreements that include *cy pres* provisions, subject to certain limited exceptions. *Id.* at 1-2, 11-12; see Pet. App. 154a-155a. The Department stated that the settlement in this case would not have been approved if it was proposed under the new policy, and that "the Department now views this settlement as regrettable." Gov't C.A. Resp. to Pet. for Reh'g 2. The court of appeals denied the petitions for rehearing, with no member of the court requesting a vote. Pet. App. 110a-111a.

ARGUMENT

Petitioner Mandan contends (Pet. 14-24) that the district court erred in approving the Addendum modifying the original settlement agreement because the *cy pres* distribution violates the Appropriations Clause. The court of appeals, however, appropriately declined to reach that issue based on its determination that Mandan had either waived or forfeited that argument. Contrary to Mandan's further contention (Pet. 24-34), the

court of appeals' factbound application of principles of waiver and forfeiture to the particular circumstances of this case does not warrant further review. At a minimum, the dispositive threshold issues of waiver and forfeiture, and the absence of any ruling below on the merits of the constitutional question Mandan raises, render this case an unsuitable vehicle to address that question. For his part, petitioner Tingle contends (Pet. 9-32) that the district court abused its discretion in approving the Addendum's modification of the *cy pres* distribution, but that factbound contention similarly does not merit this Court's review.

Review of petitioners' challenges to the *cy pres* provision here is additionally unwarranted in light of the Department of Justice's new policy, adopted by the Attorney General in June 2017, providing that the Department's attorneys going forward may not enter into a settlement agreement containing the type of *cy pres* provision at issue here. Such provisions raise several serious policy concerns. First, taxpayer funds may be directed to individuals or entities that lack claims against the United States. Second, there is no guarantee that *cy pres* distributions will provide redress to injured class members. Finally, *cy pres* distributions can give rise to a public perception that the parties to litigation have settled for an inflated amount to fund such distributions.

The Department views these concerns as serious and, in response, adopted a new policy that, with limited exceptions, prohibits its attorneys from entering into settlement agreements in the future that require payments to persons or entities that are not parties to the dispute absent congressional appropriation. That new policy will prevent the recurrence of circumstances like

those that led to the modified *cy pres* provision here, in turn eliminating any need for this Court's guidance regarding the principles that would govern the legality and administration of *cy pres* provisions in settlements involving the federal government.

1. Petitioner Mandan argues (Pet. 14-24) that the district court erred in approving the Addendum because its *cy pres* provision violates the Appropriations Clause. But the court of appeals appropriately did not reach or resolve that issue because it concluded that Mandan had either waived or forfeited that constitutional challenge. That conclusion does not warrant review.

a. Mandan contends (Pet. 14-21) that *cy pres* provisions in settlements violate the Appropriations Clause because Congress has not appropriated funds to make such payments. The Judgment Fund statute provides that "[n]ecessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law" when certain criteria are met. 31 U.S.C. 1304(a). Congress has further provided that, "[e]xcept as otherwise provided by law, compromise settlements of claims" by the Attorney General (or his delegees) "shall be * * * paid in a manner similar to judgments" pursuant to the permanent appropriation in the Judgment Fund. 28 U.S.C. 2414. Courts have consistently held that the Attorney General is vested "with virtually absolute discretion to determine whether to compromise or abandon claims made in litigation." *The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 60 (1982) (collecting cases).

Mandan contends (Pet. 16-21) that those statutes do not appropriate funds for the type of *cy pres* distribution at issue here. The court of appeals, however,

expressly "decline[d] to review" Mandan's argument because it determined that he had either "waived or forfeited" it. Pet. App. 25a. The court recognized the distinction between waiver and forfeiture, explaining that waiver "is the 'intentional relinquishment or abandonment of a known right,'" whereas forfeiture "'is the failure to make the timely assertion of a right.'" *Id.* at 26a (quoting *United States* v. *Olano*, 507 U.S. 725, 733 (1993)). Both the court and Judge Wilkins (in his concurring opinion) concluded that the distinction ultimately makes no difference here because "the result is the same" under either rubric. *Ibid.*; see *id.* at 34a-36a.

The court of appeals determined that Mandan "explicitly waived his claims" when (through counsel) he "'chose, in no uncertain terms, to refrain from interposing any challenge to the *cy-près* provision.'" Pet. App. 26a (quoting *Wood* v. *Milyard*, 566 U.S. 463, 474 (2012)) (brackets omitted). As the court explained, the district court was aware that Mandan's counsel had presented such a challenge on behalf of a different client and class member (Smallwood) in a separate case that counsel had marked as "related," and the district court "invited [counsel] to raise whatever concerns he had" in this proceeding. *Ibid.* The district court described Smallwood's contentions—including an Appropriations Clause challenge—and explained that, although the court had initially determined the cases were not related, the court was "interested in [counsel's] views" on whether it "should keep th[at] case and resolve it itself or not." C.A. App. 1224. As the court of appeals recounted, however, Mandan's "counsel told the District Court Judge that [Mandan] did not wish to pursue any challenges to the *cy-près* provision." Pet. App. 26a. Instead, counsel explained that he had marked Smallwood's case as

related "out of an abundance of caution," because the "allegations in that lawsuit potentially ha[d] a direct impact on whether what is being proposed here can actually be done lawfully." C.A. App. 1272. But counsel stated that he was "completely satisfied with where the case s[at] at th[at] particular point," with Smallwood's case assigned to a different judge. *Ibid.*

The court of appeals alternatively determined that, at a minimum, Mandan forfeited any Appropriations Clause challenge to the *cy pres* provision "because he never raised his claims with the District Court in the first instance." Pet. App. 26a-27a; see *id.* at 26a-29a. As the court of appeals explained, "Mandan d[id] not dispute" the fact "that his constitutional and statutory claims could have been raised in 2011, when the District Court approved the Settlement Agreement containing the *cy-près* provision." *Id.* at 27a. Yet he did not do so. "Quite the contrary," the court noted, "Mandan accepted the settlement and received a payout from the administrative claims process." *Id.* at 22a. Indeed, "at no time during th[e] twelve-year period" between the commencement of the litigation and approval of the original settlement "did any party challenge the legality of" that provision. *Ibid.* Nor did Mandan assert a constitutional challenge to the *cy pres* provision in any of the proceedings concerning the various motions to modify the settlement. *Id.* at 22a, 27a-28a. Although he was "on notice of the opportunity to put forward" such an argument, Mandan "never pursued th[ose] claims." *Id.* at 27a-28a.

The court of appeals acknowledged "that, in 'exceptional circumstances,' an appellate court may exercise discretion" to overlook a party's forfeiture and may consider an unpreserved (as opposed to waived) argument.

Pet. App. 31a (citation omitted). Exercising its discretion, however, the court held that, to the extent Mandan had merely forfeited his Appropriations Clause argument (and not waived it), in these circumstances it would be "entirely inappropriate" for the court of appeals to consider that argument. *Id.* at 30a. The court explained that deciding an issue that Mandan had multiple opportunities to raise (spread over several years) but had failed to preserve would "pervert the adversary process." *Id.* at 28a. It also would "require[] [the court] to engage in unduly weighty and cumbersome decision-making" to resolve "novel" theories that, "as far as [the court] c[ould] discern, * * * ha[d] never been addressed by any federal appellate court," and to do so without either "a decent record" or "the benefit of * * * a decision from the District Court." *Id.* at 28a-30a. The court concluded that "[t]he record in this case does not come close to establishing exceptional circumstances that would militate in favor of" deciding Mandan's constitutional argument despite his forfeiture. *Id.* at 31a.

In light of its conclusion that Mandan forfeited and indeed waived his Appropriations Clause argument, the court of appeals appropriately declined to consider that argument. Pet. App. 28a (citing, *inter alia*, *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 143 (1967) (plurality opinion), and *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). The court's determination that Mandan may not pursue that argument on appeal provides a compelling reason to deny review. Unless that threshold determination were overturned, that ruling would require affirming the court of appeals' judgment and thus eliminate any basis for addressing the merits of Mandan's constitutional challenge. At a minimum, the court of appeals' conclusion that Mandan waived or forfeited

his argument and the absence of any decision below on the merits of that argument make this case an unsuitable vehicle to consider it. Consistent with its ordinary practice as "'a court of review, not of first view,'" the Court should "decline to consider those questions in the first instance." *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (citation omitted).

b. Mandan contends (Pet. 24-34) that the court of appeals erred in concluding that he waived or forfeited his Appropriations Clause challenge. That highly factbound application of waiver and forfeiture principles to the specific circumstances of this case does not independently merit this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). Mandan's arguments, moreover, lack merit.

Mandan concedes (Pet. 25) that "no party challenged the *cy pres* provisions on constitutional grounds at the time of the original settlement approval or at the time of class counsel's first failed attempt to modify the agreement." He contends (Pet. 27), however, that he raised this argument in objecting to the Addendum and that the "district court specifically considered and rejected [his] objection in its opinion approving the Addendum without addressing waiver." See Pet. 26 (citing Pet. App. 101a). That is incorrect. The district court did briefly refer to Mandan's "object[ion] to any modification that allows for payment to 'third parties who have not suffered any injury and who have no claims against the United States.'" Pet. App. 101a (quoting D. Ct. Doc. 833, at 3 (Jan. 20, 2016)). But the court did not describe that objection in constitutional terms, *ibid.*, and in its ensuing "findings" the court neither discussed nor decided any constitutional issue, *id.*

at 103a-105a. Mandan's filing that the court quoted in describing his argument likewise did not mention the Appropriations Clause or the statutes on which he now relies. D. Ct. Doc. 833, at 1-3. And the court of appeals stated that it had no "decision from the District Court in the first instance" on Mandan's argument. Pet. App. 30a.

Mandan also disputes (Pet. 27) the court of appeals' reading of his counsel's exchange with the district court. He argues (*ibid.*) that his counsel's acquiescence in the court's decision not to treat Smallwood's case as "related" under the local rules should not be construed as waiving Mandan's constitutional argument. But he offers no sound reason to second-guess the court of appeals' assessment that, in the specific context of that colloquy and the posture of the case, Mandan's counsel was fairly understood as declining an invitation to present an Appointments Clause argument that Mandan theretofore had not asserted but that another of counsel's clients had raised. In any event, regardless of whether that colloquy and the local rules show that Mandan waived his argument, he could not pursue the argument now because, as the court of appeals held, he forfeited it.

Mandan alternatively argues that "the doctrines of waiver and forfeiture are inapplicable" to his Appropriations Clause challenge. Pet. 28 (capitalization and emphasis omitted); see Pet. 28-32. As the court of appeals explained, however, "constitutional objections" are not categorically immune to "[t]he doctrines of waiver and forfeiture." Pet. App. 28a (citing *Curtis Publ'g Co.*, 388 U.S. at 143 (plurality opinion), and *Yakus*, 321 U.S. at 444). Mandan argues instead that those doctrines do not apply to "[j]urisdictional constitutional challenges concerning Article III courts" or to "Article III non-

jurisdictional, structural arguments." Pet. 28, 31 (capitalization and emphasis omitted). But unlike the cases on which he relies (Pet. 31-32), Mandan's Appropriations Clause argument does not implicate the Article III limits on federal courts' power to decide cases and controversies; it concerns the lawfulness of the Executive's expenditure of funds purportedly beyond the scope of the relevant statutory appropriation. Cf. *Wellness Int'l Network Ltd.* v. *Sharif*, 135 S. Ct. 1932, 1942-1947 (2015) (Article III challenge to bankruptcy court's adjudication of particular type of claims); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848-858 (1986) (Article III challenge to federal agency's adjudication of certain disputes). Mandan cites no decision of this Court characterizing such an argument as implicating federal jurisdiction and therefore as immune to principles of wavier and forfeiture. He points (Pet. 29) to *Office of Personnel Management* v. *Richmond*, 496 U.S. 414 (1990), but the Court held there that the Appropriations Clause precludes a court from applying "the equitable doctrine of estoppel" against the government to award a party "a money remedy that Congress has not authorized"—not that arguments under that Clause are jurisdictional and not waivable. *Id.* at 426; see *id.* at 424-434.

Finally, Mandan contends (Pet. 32) that this Court should exercise its own discretion to consider his "structural, constitutional challenge." See Pet. 32-34. Although the Court has the authority to consider such claims, in the principal decision Mandan cites the Court made clear that it exercises that power only in "rare cases." *Freytag* v. *Commissioner*, 501 U.S. 868, 879 (1991). This is not such a case. It is not clear that Mandan's challenge is a "structural" one in the sense that *Freytag*

used that term. Although Mandan contends that the *cy pres* provision is inconsistent with the Appropriations Clause, at bottom the issue is whether payments pursuant to the *cy pres* provision are authorized by statute—31 U.S.C. 1304 and 28 U.S.C. 2414—because the Appropriations Clause expressly permits payments from the Treasury "in consequence of Appropriations made by Law." Art. I, § 9, Cl. 7. See Pet. App. 35a-36a (Wilkins, J., concurring); 17-897 Pet. 15-21.

In any event, the court of appeals here acknowledged its "discretion to address an issue that is subject to forfeiture" but identified multiple reasons why considering Mandan's unpreserved argument would be inappropriate—including the argument's novelty, his numerous opportunities to raise it, and the absence of a decision below or an adequate record. Pet. App. 31a (emphasis omitted); see *id.* at 28a-31a; pp. 16-17, *supra*. Mandan offers no sound reason why this Court should reach a different conclusion. He argues (Pet. 33) that the importance of safeguarding the public fisc against the expenditure of funds not properly appropriated in accordance with constitutional requirements warrants considering his unpreserved challenge. Yet the relief he requested below would not vindicate those interests; he urged that the remaining funds be distributed to claimants who had already received payments pursuant to the agreement, not that they be returned to the U.S. Treasury. See, *e.g.*, Pet. App. 10a. Mandan also points (Pet. 33) to the new policy adopted by the Attorney General prohibiting the Department of Justice's attorneys going forward from entering into settlement agreements that include *cy pres* provisions like the one in this case, but as discussed below, that development provides an additional, independently sufficient reason to deny

review. See pp. 23-24, *infra*. The Court should not decide in the first instance a constitutional question that Mandan never properly presented below and that the lower courts did not adjudicate.

2. Petitioner Tingle contends (Pet. 9-32) that the district court abused its discretion in approving the Addendum. He argues (*ibid.*) that *cy pres* distributions are inappropriate in general and in these specific circumstances, and that the district court erred in finding that the award here is fair, reasonable, and adequate and not the product of collusion. The court of appeals rejected those arguments, Pet. App. 16a-21a, 31a-32a, and its highly factbound determinations do not warrant review.

The court of appeals described the "impressive and thorough review" the district court had conducted and the extensive process it had afforded. Pet. App. 17a; see *id.* at 17a-18a. The court of appeals further summarized the district court's reasoning in concluding that the Addendum here was fair, reasonable, and adequate. *Id.* at 17a. It found "no good reason to second-guess the District Court's conclusion." *Id.* at 18a. And it explained that the cases from other circuits petitioners cited were "plainly distinguishable" on their facts. *Id.* at 21a.

The court of appeals also considered and rejected Tingle's further arguments that class counsel had a conflict of interest, and that the class representatives breached their fiduciary duties, in pursuing the adoption of the Addendum. Pet. App. 32a. Those arguments, the court explained, lacked merit because "Tingle offer[ed] no evidence in support of his allegations," and "[n]othing in the record" substantiated his accusations. *Ibid.* Tingle's disagreement with the court of appeals' factbound assessment of the evidentiary record does not warrant further review.

3. Review of petitioners' challenges to the *cy pres* provision in this case is unwarranted for the additional reason that a new Department of Justice policy, adopted in June 2017 while the case was pending in the court of appeals, prohibits such provisions going forward.

As the government informed the court of appeals, in a recent review of its approach to settlements, the Department identified several serious policy concerns that *cy pres* awards in settlements involving the federal government can raise. Gov't C.A. Resp. to Pet. for Reh'g 1-2, 10-11. *Cy pres* awards typically result in payment of taxpayer funds to individuals who either do not have or have not properly asserted claims against the United States. *Id.* at 10. To be sure, such awards "in fact settle claims against the United States * * * [by] the members of the class." Pet. App. 36a (Wilkins, J., concurring); see also *id.* at 29a (majority opinion). But it is nevertheless problematic for the government to enter into a settlement where, after all the claimants who satisfy the settlement conditions have received their agreed-upon compensation, remaining unclaimed funds will be directed to third parties that have not demonstrated injury. Gov't C.A. Resp. to Pet. for Reh'g 10. And although a primary aim of *cy pres* awards is to ensure that injured class members who, for whatever reason, failed successfully to submit a claim receive redress, there is no guarantee that *cy pres* payments do so. *Id.* at 10-11. Here, for example, the settlement and addendum identify a wide range of permissible recipients and expenditures. See *ibid.* Moreover, even when those concerns are not manifest, *cy pres* provisions in settlements with the government may give rise to a public perception that the parties have settled for an inflated amount in

order to fund such distributions, and thereby undermine public trust in the administration of justice. See *id.* at 11.

In light of these concerns, on June 5, 2017, the Attorney General issued a memorandum establishing a new prospective policy addressing such settlements. See Pet. App. 154a-155a. Under that policy, Department attorneys going forward may not enter into settlement agreements that "direct[] or provide[] for a payment or loan" by the government "to any non-governmental person or entity that is not a party to the dispute," including "*cy pres* agreements or provisions." *Id.* at 155a. The new policy is subject to three exceptions consistent with its rationale: the new policy does not prohibit a "lawful payment or loan that provides restitution to a victim or that otherwise directly remedies the harm that is sought to be redressed, including, for example, harm to the environment or from official corruption"; "payments for legal or other professional services rendered in connection with the case"; or "payments expressly authorized by statute, including restitution and forfeiture." *Id.* at 154a.

The Department's new policy further diminishes the need for review in this case because it effectively eliminates any ongoing practical importance that the challenges petitioners raise here might otherwise have in future settlement agreements involving the government. The policy will prevent the recurrence of circumstances like those that led to the *cy pres* provision at issue in this case. This development confirms that further review in this case is not warranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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