No. 17-897

IN THE

Supreme Court of the United States

KEITH MANDAN,

Petitioner,

v.

SONNY PERDUE, SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the District Of Columbia

REPLY BRIEF OF PETITIONER KEITH MANDAN

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INTRODUCTION

If this Court allows the *Keepseagle* Addendum's *cy pres* giveaway to stand, "hundreds of millions of dollars of the taxpayer's money will be spent in ways never appropriated by Congress, with virtually no oversight."[1] That was the conclusion of Rachel Brand on February 15, 2018, prior to leaving her post as Associate Attorney General, the Department of Justice's ("DOJ") third highest ranking official. In her view, this case illustrates "[o]ne of the worst examples"[2] of *cy pres* abuse. The government's opposition brief does not disagree. The government concedes that the Addendum's contemplated *cy pres* payment of over $300,000,000 to uninjured non-parties is "regrettable," and acknowledges that it would not agree to the payment if it could turn back time. Gov. Opp. at 12.[3] It never once contests Petitioner Keith Mandan's ("Petitioner") assertion that this massive *cy pres* handout violates the Constitution.

The government's opposition is half-hearted at best—a grab bag of the usual institutional reasons to deny certiorari that assiduously ignores the magnitude of

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[1] U.S. Dept. of Justice, *Associate Attorney General Brand Delivers Remarks to the Washington, D.C. Lawyers Chapter of the Federalist Society*, (Feb. 15, 2018), *available at* https://www.justice.gov/opa/speech/associate-attorney-general-brand-delivers-remarks-washington-dc-lawyers-chapter.

[2] *Id.*

[3] "CC Opp." citations refer to class counsel's opposition brief, "Gov. Opp." citations refer to the government's opposition brief, "Pet." citations refers to Petitioner Keith Mandan's petition for writ of certiorari, and "App" citations refer to his appendix submitted to this Court in Case No. 17-897. "JA" citations refer to the Joint Appendix submitted to the D.C. Circuit in consolidated Case Nos. 16-5189 and 16-5190.

the constitutional wrong committed here. The government contends that Petitioner waived and forfeited his constitutional argument, that a new DOJ policy will prevent a similar settlement from recurring, and that this case is a poor vehicle because the panel majority did not address the merits of the constitutional question.

This Court should reject the government's attempt to have it both ways, condemning the *cy pres* giveaway in this case while asking the Court to let it slide. *First*, Petitioner adequately preserved his objections to the constitutionally-infirm Addendum in the district court below. But even if he failed to do so, that is not an obstacle to this Court's review. *See* Pet. at 28-32; *infra* at 9-11. *Second*, DOJ's policy change does not undo the egregious constitutional violation at issue here and, moreover, could easily be reversed. *Third*, though the panel majority did not address the constitutional question, Judge Brown discussed the issue at length in her 43-page dissent.

This Court stands as the last bulwark against a violation of the appropriations power—one of the most critical cornerstones of the Constitution's separation of powers—at a cost of more than 300 million taxpayer dollars. This Court should grant certiorari or, at a minimum, summarily reverse the appellate court's finding of waiver and forfeiture and remand the case for a decision on the merits.

ARGUMENT

I. THE ADDENDUM VIOLATES THE APPROPRIATIONS CLAUSE, JUDGMENT FUND ACT, AND SETTLEMENTS AUTHORITY STATUTE.

The Addendum violates the Appropriations Clause, which grants Congress exclusive power to appropriate

funds. Neither the Executive Branch, by agreeing to the *cy pres* settlement terms, nor the Judicial Branch, by approving the settlement under FED. R. CIV. P. 23(e)(2), had constitutional authority to appropriate over $300 million for payment to uninjured non-parties with no claims against the United States. Pet. at 15-21; App.-66a-74a (Brown, J., dissenting).

DOJ avoids the merits of Petitioner's constitutional claims, contending that review is unwarranted due to its recent policy change prohibiting *Keepseagle*-like *cy pres* provisions from future settlements. It suggests this new policy eliminates "any need for this Court's guidance regarding . . . the legality . . . of *cy pres* provisions in [government settlements]." Gov. Opp. at 14. While DOJ admits it is problematic "to enter into a settlement where . . . remaining unclaimed funds will be directed to third parties that have not demonstrated injury," it nevertheless asks this Court to ignore distribution of over $300 million in *Keepseagle* to third parties with no "demonstrated injury." Gov. Opp. at 23. DOJ's commitment to the *Keepseagle cy pres* payment underscores the problem with relying solely on recent DOJ policy to prevent future *cy pres* abuse. DOJ can easily reverse this policy.

For their part, class counsel attempts to justify the Addendum's *cy pres* provisions by parsing the language of the Settlements Authority Statute in search of Executive Branch authority to make payments to non-parties where there is none. The statute provides in relevant part:

> compromise settlements of claims referred to the Attorney General for defense of imminent litigation or suits against the United States . . . shall be settled and paid in a manner similar to judgments in like causes

> and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.

28 U.S.C. § 2414.

Initially, class counsel focuses on the "compromise settlements of claims" language to the exclusion of the "settled and paid in a manner similar to judgments in like causes" language. They contend that DOJ can pay anyone as long as payment is made in the context of compromise settlements of claims, positing that the only requirement for payment is that the underlying cause of action could lead to a money judgment. The Settlements Authority Statute cannot be read so broadly. If that were the case, then DOJ's *Keepseagle* settlement of Equal Credit Opportunity Act ("ECOA") claims could have included payments to Vladimir Putin—an absurd result due to contravention of basic rules of statutory construction. *United States v. Turkette*, 452 U.S. 576, 580 (1981) ("absurd results are to be avoided").

To support its argument, class counsel mistakenly relies on an Office of Legal Counsel ("OLC") opinion, *Availability of Judgment Fund in Cases Not Involving a Money Judgment Claim* ("*Judgment Fund*"), 13 Op. O.L.C. 98 (1989). CC Opp. at 25. The OLC, however, explains that the manner of payment for a settlement approved by the Attorney General depends entirely upon the manner in which a judgment in a like cause would have been paid. If the underlying cause of action could have led to a money judgment, absent any settlement, "then the settlement, similar to the judgment, is payable from the Judgment Fund." *Judgment Fund*, 13 Op. O.L.C. at 103. In context, this means if the *Keepseagle* ECOA claims could not have

led to a money judgment payable to the *cy pres* beneficiaries, then the Judgment Fund also is unavailable to pay the *cy pres* beneficiaries within the context of a settlement. Relying on the same OLC opinion, Judge Brown correctly concludes that the Addendum's contemplated *cy pres* payment to uninjured non-parties is "not equivalent to a money judgment at trial" thereby rendering the Judgment Fund Act appropriation "unavailable for *cy pres* distributions." App.-71a (Brown, J., dissenting).[4]

Class counsel also misconstrues the Settlements Authority Statute's "**judgments** in like causes" language to mean "similar to other **settlements** and final judgments." CC Opp. at 25 (emphasis added). Citing Newberg on Class Actions, class counsel contends that *cy pres* provisions have long been a common feature of class action settlements and thus are authorized by the statute. Newberg, however, does not analyze the Settlements Authority Statute which requires government settlements to be similar to payment of **judgments** in like causes—**not settlements.**

Class counsel's reliance on *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) for the proposition that "*cy pres* can be used as a method

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[4] The Judgment Fund is unavailable not only because the *cy pres* distribution is not a money judgment, but also because the *cy pres* distribution would be paid to non-parties. Judgments, "by their terms, require the United States to pay specified sums of money to certain **parties**." *Judgment Fund*, 13 Op. O.L.C. at 101 (emphasis added). Likewise, compromise settlements under the statute can only be paid to parties. Despite class counsel's protestations (CC Opp. at 32), "particular organizations with a close nexus to class members" are not parties. *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (a party "is one by or against whom a lawsuit is brought, or one who becomes a party by intervention, substitution, or third-party practice") (internal citations omitted).

of allocating a judgment" in class actions generally misses the point. CC Opp. at 26. The Settlements Authority Statute requires settlements to be paid "in a manner similar to judgments in like causes"—not judgments in non-government class actions generally. *Judgment Fund*, 13 Op. O.L.C. at 103 (noting the Attorney General should examine the underlying cause of action when deciding if proposed settlement is payable from the Judgment Fund).

II. PETITIONER'S APPROPRIATIONS CLAUSE CHALLENGE IS NOT PRECLUDED.

A. Petitioner neither waived nor forfeited his Appropriations Clause challenge.

The panel majority's finding of waiver and forfeiture requires a tortured reading of the record that even escaped Respondents. Regardless, waiver and forfeiture do not preclude a decision on the merits where the challenge is of a structural jurisdictional nature. Moreover, Petitioner's Appropriations Clause challenge is of such importance that this Court must utilize its discretion to decide the argument on the merits. Pet. at 24-34.

Class counsel maintains that release language in the original *Keepseagle* settlement agreement ("Agreement") blocks Petitioner's challenge here. CC Opp. at 17. This language, however, provides no such barrier because it does not pertain to the *cy pres* provisions or *cy pres* payments outlined in § VIII of the Agreement. JA 435-36, JA 451 ¶ 1.

Class counsel further contends Petitioner's constitutional challenge was forfeited because it was not raised during the Agreement's initial approval; thus, the Addendum only affords him an opportunity to object to how—not whether—settlement money will be

paid to non-parties. They rely on the district court's limited retained jurisdiction under the Agreement which purportedly made it impossible for the court to fashion a different result. CC Opp. at 17-18. This argument misconstrues the district court's jurisdiction under both FED. R. CIV. P. 23(e)(2) and the Agreement. Petitioner's timely objection to the Addendum rendered any prior failure to object irrelevant. The Addendum, by its terms, completely replaced the *cy pres* provisions of the original Agreement,[5] necessitating the district court's subsequent review and approval under FED. R. CIV. P. 23(e)(2), and precluding the district court's approval of provisions in an Addendum which violate the Constitution. Pet. at 28-29. Not surprisingly, the D.C. Circuit likewise concluded that Petitioner could challenge the legality of the Addendum's *cy pres* provisions when they were proposed. App.-22a.

Furthermore, the district court necessarily retained jurisdiction to consider the validity and enforceability of the Addendum's *cy pres* provisions pursuant to the Agreement's severability clause. As the district court observed, "the [severance] provision can only be used with Court involvement and approval . . . so any interpretation of the Agreement as withholding jurisdiction to enforce the [severance] provisions would render that provision a complete nullity." *Keepseagle v. Vilsack*, 118 F. Supp. 3d 98, 129 (D.D.C. 2015).

Both Respondents contend that Petitioner never raised his claims in the district court. CC Opp. at 18-19; Gov. Opp. at 16. This unfairly characterizes Petitioner's objection below which was precisely on the same grounds argued here—that the contemplated *cy*

[5] App.-3a, 129-30a.

pres distribution could not occur because the settlement money should not be paid to "third parties who have not suffered any injury and who have no claims against the United States" App.-10a.[6] The district court considered and rejected Petitioner's challenge when approving the Addendum. App.-101a. The assertion that the district court "did not understand Mandan"[7] to have raised the constitutional challenge, or that he "did not describe [his] objection in constitutional terms,"[8] is nonsensical in light of the court's own remarks, doubting whether "the judgment fund from which this money came was intended to serve such a purpose" and that "[t]he public would do well to ask why $380,000,000" of taxpayer funds was set to be distributed inefficiently to third party groups that had no legal claim against the government. *Keepseagle*, 118 F. Supp. 3d at 104.

Both Respondents now rely on Petitioner's counsel's impromptu exchange with the district court at the Addendum's fairness hearing regarding a later-filed case as support for a finding of express waiver of the issues on appeal. The district court, however, had already made a pre-hearing determination per the local rule that the later-filed case was unrelated to *Keepseagle*. Pet. at 27. Furthermore, the local rule addressing related case designation exists solely to serve the interests of judicial economy—not to create waiver or forfeiture of legal arguments. *Id.* Neither

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[6] Despite DOJ's characterization, Petitioner's counsel never indicated in his colloquy with the district court that Petitioner "did not wish to pursue any challenges to the *cy-pres* provision." Gov. Opp. at 15.

[7] CC Opp. at 20, fn. 7.

[8] Gov. Opp. at 18.

Respondent disagrees, and tellingly neither raised this argument in their briefing before the D.C. Circuit.

B. Waiver and forfeiture are inapplicable to jurisdictional, constitutional challenges concerning Article III courts.

Whether Petitioner failed to adequately preserve his Appropriations Clause challenge below is of no moment—that challenge is jurisdictional and waiver and forfeiture cannot preclude a decision on the merits. Pet. at 24.

Respondents assert that Petitioner's constitutional challenge is non-jurisdictional because the district court possessed Article III federal question jurisdiction to hear the ECOA claims and approve their settlement. Gov. Opp. at 19-20; CC Opp. at 21. But federal question jurisdiction under Article III, Section 2 to entertain ECOA claims does not confer jurisdictional power on the court under Article III, Section 1 to encroach on the Legislative Branch's appropriations power. *Miller v. French*, 530 U.S. 327, 341-42 (2000); App.-62a (Brown, J., dissenting) (". . . no part of the appropriations process is within the judicial power."). Respondents never address this jurisdictional distinction. The Judicial Branch, by approving the constitutionally-infirm Addendum, exceeded its jurisdiction under Article III, Section 1 and encroached on the Legislative Branch's exclusive appropriations power. Pet. at 28-30.

C. Waiver and forfeiture are not dispositive of Article III non-jurisdictional, structural arguments.

Even if this Court construes Petitioner's Article III structural challenge as non-jurisdictional, that challenge still cannot be waived or forfeited. Waiver and

forfeiture cannot be dispositive of structural constitutional challenges. DOJ's agreement in *Keepseagl*e to make an appropriation from the Judgment Fund via *cy pres* payments, followed by the district court's approval of that agreement, amounts to an aggrandizement of the Executive Branch (and, through its approval of the Addendum, the Judicial Branch) at the expense of the Legislative Branch. Petitioner's objection strikes at the heart of Article III courts' structural jurisdiction and the separation of powers. Pet. at 28.

Class counsel, citing *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), asserts that Petitioner's challenge is non-structural and therefore waivable because it "does not involve an attempt to transfer jurisdiction to a non-Article III tribunal." CC Op. at 22. Counsel misunderstands *Sharif* which does not hold that a structural claim can only involve an attempt to transfer jurisdiction to a non-Article III tribunal. Rather, structural claims are construed broadly, and "[u]nder *Schor* and *Sharif*, a party can waive neither a separation-of-powers violation nor a separation-of-powers challenge." *Ali Hamza Ahmad Suliman Al Bahlul v. United States*, 792 F.3d 1, 5 (D.C. Cir. 2015) (concurrence reached on *en banc* reconsideration in *Ali Hamza Ahmad Suliman Al Bahlul v. United States*, 2016 U.S. App. LEXIS 18852 (D.C. Cir., Oct. 20, 2016)). Applying this principle here, "congressional control over the People's purse is a structural limit on both the Executive and Judicial Branches" and cannot be waived. App-37a (Brown, J., dissenting).

Both Respondents contend that Petitioner's objection is merely a question of statutory interpretation fully subject to waiver and forfeiture. Gov. Opp. At 21; CC Opp. at 22-23. This fundamentally misunderstands the constitutional issues raised in this appeal.

There is no statutory authorization allowing the Executive Branch to use Judgment Fund money for *cy pres* payments. The Judicial Branch also lacks statutory authority to approve the Addendum's *cy pres* payments which violate the Appropriations Clause. Class Counsel suggests that if this Court must consider the Judgment Fund Act or the Settlements Authority Statute to determine the constitutionality of the *cy pres* distribution, then Petitioner's challenge is not structural. However, when appropriate, this Court examines statutes to determine whether their application is constitutional. *See e.g. Freytag* v. *Commissioner*, 501 U.S. 868, 879 (1991).

D. This Court should exercise its discretion to decide Petitioner's constitutional challenge.

Petitioner's objection to the $300,000,000 *cy pres* giveaway is significant because it involves the structural integrity of our three-branch system of government. This Court may exercise its discretion to hear structural constitutional objections despite the appellate courts' avoidance of them under the guise of waiver and forfeiture. Pet. at 32.

Class counsel contends this Court should not exercise its discretion to decide Petitioner's constitutional challenge because it "is not one of those rare cases . . ." CC Opp. at 23 (internal citations omitted). This Court's discretion, however, turns on whether an appeal raises a structural "constitutional challenge that is neither frivolous nor disingenuous." *Freytag*, 501 U.S. at 879. Petitioner meets this standard. As Judge Brown concludes, Petitioner's challenge has been fully-briefed and is not fact-intensive. App.-71a (Brown, J., dissenting) (noting no factual dispute, and that "the concurrence looks for shadows where there

are none."). Thus, his legal challenge is well within the Court's purview to decide. Indeed, *Keepseagle* raises a structural constitutional challenge and presents this Court with 300 million reasons to protect and defend the fundamental constitutional pillars of separation of powers and the Appropriations Clause.

CONCLUSION

Certiorari should be granted to consider this massive unlawful appropriation. Alternatively, this Court should summarily reverse the appellate court's waiver and forfeiture decision, remanding with instructions to consider the merits of Petitioner's challenge.

Respectfully submitted,

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