No. 17-961

In the

Supreme Court of the United States

THEODORE H. FRANK, *et al.*,
Petitioners,

v.

PALOMA GAOS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether, or in what circumstances, a class-action settlement that provides a *cy pres* award of class-action proceeds but no direct relief to class members comports with the requirement that a settlement binding on class members must be "fair, reasonable, and adequate" and supports class certification.

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INTEREST OF AMICI CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the fundamental separation of powers principles implicated by this case. The Center has previously appeared before this Court as *amicus curiae* or counsel of record in several cases addressing compelled speech issues similar to those at issue here, including *Janus v. Am. Fed. of State, County, and Mun. Employees*, 138 S. Ct. 2448 (2018); *National Institute of Family and Life Advocates*, (*NIFLA*) 138 S. Ct. 2361 (2018); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); and *Knox v. Service Employees International Union Local 1000*, 567 U.S. 298 (2012).

Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm that provides legal representation and advice, without fee, to scientists, educators, parents, other individuals, companies and trade associations. Atlantic Legal Foundation's leadership includes distinguished legal scholars and practitioners from across the legal community.

Atlantic Legal Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice,

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[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

and sound science. Atlantic Legal Foundation is guided by a basic but fundamental philosophy: Justice prevails only in the presence of reason and in the absence of prejudice; accordingly, Atlantic Legal Foundation promotes sound thinking in the resolution of legal disputes and the formulation of public policy.

Atlantic Legal Foundation has an abiding interest in the protection of property rights, as one of the essential elements of a democratic and productive society.

Atlantic Legal Foundation has an abiding interest in the appropriate balance between vindication of rights of persons with modest claims through the class action mechanism and the protection of the due process and equal protection rights of defendants in class actions. To that end, Atlantic Legal has appeared as amicus or as counsel for amici in numerous cases in this Courts, various federal courts of appeal, and state appellate courts in cases involving class actions and the procedural rights of litigants, including, for example, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and *American Express Company v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

SUMMARY OF ARGUMENT

The court below approved a settlement that deprived the class plaintiffs of the remedy provided by Congress and that authorized the defendant to continue to engage in the conduct that was the subject of the litigation. Assuming that the conduct at issue actually violated the statute, the approval of the settlement by the court below permitted private parties to rewrite federal law in order to deny the benefits of that law to the very individuals Congress sought to

protect, while protecting conduct that Congress sought to prohibit. All of this was done in the context of a settlement that awarded no relief to the plaintiff class.

While a federal court may have broad powers to shape appropriate remedies, it can only do so in in a case that triggers its jurisdiction under Article III of the Constitution. This requires an active case or controversy which is not apparent where class members – the individuals who allegedly suffered a harm – receive no relief and are barred from seeking relief from similar conduct in the future. If the plaintiff class members are to receive nothing, then the court cannot redress the alleged injury and the court cannot certify a class where the class members would have no standing. Further, the *cy pres* award recipients in this case have no standing because they have not suffered any injury. The requirements of Article III have not been met.

The settlement also violates the First Amendment rights of the unnamed class members. By directing the settlement funds away from unnamed members of the injured plaintiff class to advocacy groups such as AARP, Inc. and the World Privacy Forum, the courts below forced the plaintiff class to provide financial support to organizations with which they may not agree in violation of the First Amendment's prohibition on compelled speech. Compelling the plaintiff class to subsidize the speech of others raises similar concerns to compelled speech, *Janus*, 138 S. Ct. at 2464, and compelling individuals to speak a particular message "violates … [a] cardinal constitutional command," *id.*; *see NIFLA*, 138 S. Ct. at 2371.

ARGUMENT

I. The Lower Court's Interpretation of Rule 23(e)(2) Is in Opposition to Article III Case or Controversy Requirements.

Article III "confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright,* 468 U.S. 737, 750 (1984) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 471-76 (1982)). To determine whether there is actual case or controversy, courts look to standing doctrine to see "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' "as to warrant his invocation of federal-court jurisdiction to justify exercise of the court's remedial power *on his behalf*." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (*Baker v. Carr*, 369 U.S. 186, 204 (1962). Standing will only be found if "[plaintiff] can show that he himself has suffered or will suffer injury whether economic or otherwise." *Sierra Club v. Morton*, 405 U.S. 727, 728 (1972).

Injury alone, however, is not sufficient. The plaintiff must also show that a favorable ruling by the court will actually redress the injury. *Sprint Communications Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 286-87 (2008). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998). This is part of the "irreducible minimum" that is required for federal courts to exercise jurisdiction under Article III. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

This Court has recognized standing in some instances where the plaintiffs themselves will not receive any financial relief. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000), this Court ruled that a plaintiff had standing to sue for civil penalties that would be paid to the federal government if such a sanction "effectively abates … [the] conduct and prevents its recurrence." *Id*. at 185-86; *see Sprint Communications*, 554 U.S. at 287. The key requirement, however, is that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561. The relief at issue in this case, however, does not meet this irreducible constitutional minimum.

The class action settlement approved by the Ninth Circuit below does not involve the exercise of the court's remedial power on "behalf" of unnamed class members, because it provided no relief to them. Indeed, the settlement in this case permits defendant to continue to engage in the conduct complained of in the complaint *and* precludes the plaintiff class from bringing a complaint against that conduct under the federal law in the future. Assuming that there was a violation of the federal law, the settlement essentially nullifies that law. Private parties used the federal court to preclude those injured from taking advantage of the remedy that Congress provided and immunized conduct that Congress sought to prohibit. This in no way "redresses" the claimed injury that is the basis for this action.

Nor did the *cy pres* recipients of the settlement funds have a "personal stake in the outcome" of the litigation, because they were not even parties to it and

had alleged no injury. The Ninth Circuit's interpretation of Rule 23(e)(2) to allow such a settlement therefore exceeds the court's authority under Article III.

These *cy pres* award settlements violate the adversarial model of adjudication and the requirements of Article III by granting relief to nonparties who have suffered no injury. As Northwestern University Law Professor Martin Redish has correctly observed, the distribution of *cy pres* awards to nonparties transforms the "judicial process from a bilateral private rights adjudicatory model into a trilateral process." Martin H. Redish, *et al.*, *Cy Pres & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L.Rev., 617, 641 (2010). The settlement approved in this case actually deprived the court of jurisdiction – it had no power to certify a class whose members would receive no relief. The class members received no damages and the alleged illegal activity was not halted.

II. Interpreting Rule 23(e)(2) to Permit a Binding Settlement that Redirects Class Action Settlement Funds from Class Members to Third Parties (Often Advocacy Groups) Violates the First Amendment.

The federal statute at issue in this case provides for minimum damage awards of $1,000 per person. 18 U.S.C. § 2707(c). Members of the plaintiff class, all 129 million of them, receive nothing in this settlement. Instead, the *cy pres* settlement redirects class action settlement funds away from the unnamed class members to outside organizations, including advocacy organizations, that admittedly were not injured by the defendant's conduct.

In the context of a case such as this, the redirecting of compensatory funds (rather than just excess funds) from class members to nonparty entities effectively appropriates damages rightly due to the class members for injuries they suffered, to advocacy organizations that had no such harms and that are committed to advocating for causes that particular class members might not approve. Money belonging to the members of the plaintiff class is, by force of law, redirected to groups whose advocacy some (or all) members of the plaintiff class oppose.

The settlement at issue here compels class members to support causes advocated by AARP and the World Privacy Forum with which class members disagree. As this Court ruled in *Janus*, compelled subsidization of the speech of private groups is a serious infringement of First Amendment rights. *Janus*, 138 S. Ct. at 2464. Although *Janus* was decided just last term, the notion that the First Amendment protects against compelled speech is nothing new. Indeed, such compelled speech is contrary to the original understanding of the First Amendment.

The founding generation voiced its concerns through debates over compelled financial support of churches in Massachusetts and Virginia, the Virginia debate being the most famous. And this Court has often quoted Jefferson's argument that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), in 5 The Founders Constitution, University of Chicago Press (1987) at 77 (quoted in, *e.g., Keller v. State Bar*, 496 U.S. 1, 10 (1990); *Chicago Teachers Union v. Hudson*,

475 U.S. 292, 305, n.15 (1986); *Abood v Detroit Board of Education*, 431 U.S.209, 234-35 n.31 (1977); *Everson v. Board of Education*, 330 U.S. 1, 13 (1947)). Jefferson went on to note "[t]hat even forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." Jefferson, Religious Freedom, *supra* at 77.

Although these statements were made in the context of compelled religious assessments, this Court has noted their applicability to compelled subsidies of private political speech as well. *Janus*, 138 S. Ct. at 2464. These same principles can be applied to compelled financial support of court-endorsed *cy pres* recipients. The Petitioners in this case objected to the recipients of the *cy pres* award because "[t]he AARP takes political positions opposed by many class members, including" Petitioners. Pet. App. 131. Requiring Petitioners to give their settlement funds to AARP to engage in advocacy with which Petitioners disagree violates their First Amendment rights. *Janus*, 138 S. Ct. at 2464. Accomplishing the same thing by way of a *cy-pres*-only settlement does not obviate the First Amendment violation.

CONCLUSION

This Court should rule that federal district courts have no power under Article III to approve class settlements that do not redress the injury claimed in the complaint and that redirect funds away from the allegedly injured members of the class to advocacy groups with which some class members may disagree. The decision of the Ninth Circuit below should be reversed.

July 2018 Respectfully submitted,

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