No. 17-961

IN THE
SUPREME COURT OF THE UNITED STATES

THEODORE H. FRANK and MELISSA ANN HOLYOAK,
Petitioners,
v.

PALOMA GAOS, *on behalf of herself and all others similarly situated, et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE STATES OF OREGON, CALIFORNIA, CONNECTICUT, HAWAII, ILLINOIS, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW YORK, NORTH CAROLINA, VERMONT, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

In a class action where distributing funds to the class is not feasible, can a settlement that distributes those funds on a *cy pres* theory to third-party organizations working on issues that benefit the class be "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)(2)?

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INTEREST OF THE AMICI STATES

This case concerns whether a settlement agreement in a class action is "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)(2) where the settlement provides *cy pres* funds to third-party organizations that indirectly benefit the class when direct distribution to class members is not feasible. The states have a strong interest in protecting their residents from tortious or illegal conduct, including through *cy pres* relief when warranted. In appropriate circumstances, *cy pres*-only relief protects the interests of class members because it allows a remedy for the injuries class members have suffered when the available funds are too small for individual distribution. *Cy pres* distribution of residual funds vindicates the interest of the class by directing those amounts to entities that will indirectly benefit the class instead of returning the funds to the defendant. By providing a remedy to injured class members, *cy pres* relief also holds defendants accountable for their wrongdoing. Moreover, the Class Action Fairness Act provides an express role for the states in evaluating class action settlements in federal court. Under CAFA, the states have frequently alerted courts to class action settlements that are inadequate, including those that misuse *cy pres* relief. The courts, with help from the states, can ensure that class action settlements that provide for *cy pres* relief are fair, reasonable, and adequate under Rule 23.

The states also have a strong interest in protecting state laws governing *cy pres* relief from unfounded constitutional challenges. Although the question

presented here concerns only the proper interpretation of a federal rule, some of the arguments made by petitioners and their *amici* go beyond the question presented and address the constitutionality of *cy pres* relief in class actions generally. Those arguments, if accepted, could affect the law in the majority of states that have made a policy decision to recognize *cy pres* relief in class actions in certain circumstances. Twenty-three states expressly authorize the distribution of residual class action funds to *cy pres* recipients. In a substantial number of other states, state courts have approved class action settlements containing *cy pres* relief under the applicable statutes and rules even where those states do not have an express *cy pres* statute. Those state laws and court rulings are constitutional, and the states have an interest in explaining why.

The states provide this brief to explain the importance of *cy pres* relief as a tool for disbursing residual class-action funds and as an appropriate substitute remedy when it is not feasible to distribute funds to class members. Beyond the merits of the particular *cy pres* provision at issue in this case, the states have a compelling interest in supporting the availability of *cy pres* relief under their own laws and as approved by their own courts.

SUMMARY OF ARGUMENT

Cy pres relief is a vital tool for providing a remedy that benefits class members when a direct disbursement is not feasible and for distributing re-

sidual class action proceeds. State legislatures, state courts, Congress, and the federal courts have all recognized that *cy pres* relief has a role to play in class actions. Many states expressly authorize *cy pres* disbursements of residual class action funds, and Oregon and New Mexico expressly authorize *cy pres*-only disbursements. In other states, the courts have permitted—under more general state laws—*cy pres*-only settlements and *cy pres* disbursement of remainder funds when appropriate. In CAFA, Congress expressly authorized *cy pres* disbursements in coupon settlements. And the federal courts have long recognized that *cy pres* relief is consistent with Rule 23 when it provides a fair, reasonable, and adequate remedy for class members. In those federal class actions, the states have served as a check against improper *cy pres* awards by alerting the courts to inappropriate or inadequate settlements.

The lesson from the experience of the states is that *cy pres* relief is an important remedy in class actions when employed in the appropriate circumstances and under close supervision by the courts. *Cy pres* relief prevents defendants from retaining damages or restitution amounts that were properly awarded but not claimed or not amenable to distribution, affords an adequate remedy to injured class members when direct compensation is impractical or impossible, and helps the parties craft efficient settlement agreements. This Court should affirm because *cy pres* relief can be a legitimate and appropriate remedy in class actions under state and federal law, and be-

cause the lower courts correctly held that the settlement here was fair, reasonable, and adequate.

In addition to petitioners' challenge under Rule 23, petitioners and several *amici* argue that *cy pres* distributions violate the Due Process Clause and the First Amendment. But those arguments were not raised in the courts below, and this Court should decline to address them in the first instance. In any event, the constitutional objections are misplaced.

First, *cy pres* distributions do not pose any inherent due process problems. Rather, such distributions merely require courts to evaluate the same considerations that apply to class actions generally to protect the rights of absent class members.

Second, *cy pres* distributions do not violate the First Amendment by compelling speech. The concerns that animate the Court's compelled speech jurisprudence are wholly absent from the *cy pres* context, both generally and on the facts of this case. A *cy pres* distribution in a federal class action cannot be a compelled subsidy for speech because class members have the opportunity to opt out of the class. Moreover, for *cy pres* distribution of remainder funds, those funds could have been claimed by class members but were not. Class members are not compelled to subsidize anyone's speech when those residual funds are directed to *cy pres* recipients. But even if the compelled speech doctrine were applicable, *cy pres* relief is permissible under that doctrine because it is a narrowly tailored remedy that vindicates the states' and

class members' interests in obtaining redress, albeit indirectly, for injuries caused by a defendant and in holding such a defendant accountable.

ARGUMENT

A. *Cy pres* disbursements are authorized under state and federal law as a way to afford relief to class members when direct compensation is infeasible.

Cy pres relief originated as a common law doctrine for distributing funds from a charitable trust to a substitute beneficiary when the original intent of the testator could not be fulfilled. In the 1970s, courts began to apply the doctrine in class actions as a way of distributing funds that are left over after class claims have been fulfilled or when distribution to the class would not be feasible. *In re Baby Products Antitrust Litigation*, 708 F.3d 163, 171-73 (3d Cir. 2013) (discussing development of *cy pres* distributions in class actions). As detailed below, the majority of states have expressly authorized *cy pres* disbursements in class actions either through legislative act or court decision. Under CAFA, federal law expressly authorizes *cy pres* distributions for funds remaining in coupon settlements. The states also receive notice when their residents will be subject to a class action settlement in federal court and have the opportunity to inform the court when the settlement is inadequate, an opportunity that states have frequently used.

Cy pres relief plays an important role in vindicating the rights of injured class members. One purpose of class action litigation is to provide a remedy to the class when it would be impossible or impracticable for an individual litigant to pursue a claim. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Class actions augment and amplify the ability of the states to enforce substantive law by providing an avenue for private enforcement. *Cy pres* relief is an important component of that private enforcement because it provides a remedy when individual recovery would be impossible. Without the option of *cy pres* relief, particularly *cy pres*-only distributions, meritorious cases would not be brought and class members would have no recourse, simply because the size of their injury was small relative to the costs of disbursing an award. By providing a remedy for class members with a small individual injury, *cy pres* relief furthers the core function of class actions. This Court should affirm that *cy pres* remedies, including *cy pres*-only settlements, are permissible under Rule 23.

1. State legislatures and state courts recognize the validity of *cy pres* remedies in appropriate circumstances.

Twenty-three states have statutes or court rules that authorize, and in some cases require, *cy pres* distributions of residual funds that result from a class action settlement or judgment:

- **California:** California Code of Civil Procedure § 384

- **Colorado:** Colorado Rule of Civil Procedure 23(g)
- **Connecticut**: Connecticut Superior Court Rules § 9-9(g)
- **Hawaii**: Hawaii Rule of Civil Procedure 23(f)
- **Illinois**: Illinois Code of Civil Procedure § 2-807
- **Indiana**: Indiana Rules of Trial Procedure 23(f)
- **Kentucky**: Kentucky Rules of Civil Procedure 23.05(6)
- **Louisiana**: Louisiana Supreme Court Rule XLIII
- **Maine**: Maine Rule of Civil Procedure 23(f)
- **Massachusetts**: Massachusetts Rule of Civil Procedure 23(e)
- **Minnesota**: Minnesota Rule of Civil Procedure 23.05(e)
- **Montana:** Montana Rule of Civil Procedure 23(i)(3)
- **Nebraska**: Nebraska Revised Statutes 30-3839
- **New Mexico**: New Mexico Rule of Civil Procedure 1-023(G)
- **North Carolina:** North Carolina General Statute § 1-267.10 (a)
- **Oregon**: Oregon Rule of Civil Procedure 32 O

- **Pennsylvania**: Pennsylvania Rule of Civil Procedure 1716
- **South Carolina**: South Carolina Rule of Civil Procedure 23(e)
- **South Dakota**: South Dakota Codified Law 16-2-57
- **Tennessee**: Tennessee Rule of Civil Procedure 23.08
- **Washington**: Washington Rule of Civil Procedure 23(f)
- **West Virginia**: West Virginia Rules of Civil Procedure 23(f)
- **Wisconsin**: Wisconsin Statute 803.08(10)

Some states also have statutes that authorize *cy pres*-only remedies in particular circumstances. For example, Oregon and New Mexico expressly authorize *cy pres*-only relief when it would be impracticable to distribute damages to the class directly. Or. R. Civ. P. 32 O ("If any amount awarded as damages is not claimed within the time specified by the court, or if the court finds that payment of all or part of the damages to class members is not practicable" the court shall order *cy pres* disbursements); N.M. R. Civ. P 1-023(G) (authorizing *cy pres* disbursement "if it is impossible or economically impractical to distribute the common fund to the class at all").

In other states and the District of Columbia, courts have approved the use of *cy pres* distribution of residual funds or *cy pres*-only settlements:

- **Arizona**: *Charles I. Friedman, P.C. v. Microsoft Corporation*, 141 P.3d 824, 828 (Ariz. Ct. App. 2006) (describing settlement containing *cy pres* distribution of residual funds).

- **District of Columbia**: *Boyle v. Giral*, 820 A.2d 561, 570 (D.C. 2003) (approving *cy pres*-only settlement)

- **Iowa**: *Zaber v. City of Dubuque*, 902 N.W.2d 282, 292 (Iowa Ct. App. 2017) (approving *cy pres* distribution of residual funds)

- **Kansas**: *Premier Pork, Inc. v. Rhone-Poulenc, S.A.*, No. CV2000-3, 2006 WL 1388464, at *4 (Kan. Dist. Ct. Jan. 31, 2006) (approving *cy pres* distribution of residual funds)

- **Michigan**: *Cicelski v. Sears, Roebuck & Co.*, 348 N.W.2d 685, 690-91 (Mich. Ct. App. 1984), *rev den*, 369 N.W.2d 194 (Mich. 1985) (concluding that *cy pres* relief is permissible in appropriate circumstances)

- **Missouri**: *Columbia Cas. Co. v. HIAR Holding, L.L.C.*, 411 S.W.3d 258, 262 (Mo. 2013) (approving *cy pres* distribution of residual funds)

- **New Jersey**: *Muise v. GPU, Inc.*, 851 A.2d 799, 823–24 (N.J. Super. Ct. App. Div. 2004) (noting availability of *cy pres* relief, but reject-

ing argument that possibility of such relief warranted certification of the class)

- **New York**: *Klein v. Robert's Am. Food*, 28 A.D.3d 63, 74 (N.Y. App. Div. 2006) (rejecting coupon settlement when court did not consider availability of *cy pres* distribution)

- **Texas**: *Northrup v. Sw. Bell Tel. Co.*, 72 S.W.3d 16, 22 (Tex. Ct. App. 2002) (approving *cy pres*-only settlement)

We are unaware of any state court or state legislature that has categorically rejected *cy pres* disbursements as an available tool in class actions.

Some states have adopted detailed criteria for selecting *cy pres* recipients. *See*, *e.g.*, 735 Ill. Comp. Stat. 5/2-807(a) (defining organizations eligible to receive distributions of residual funds). Some states require a minimum percentage of the *cy pres* funds to be distributed to legal aid organizations. *See, e.g.*, Or. R. Civ. P. 32 O; Mont. R. Civ. P. 23(i)(3). Other states give the trial court discretion in selecting *cy pres* recipients, but acknowledge that legal aid organizations are an appropriate recipient. *See* Tenn. R. Civ. P. 23.08. Uniformly, the state laws, court rules, and court decisions limit *cy pres* disbursements to organizations that would further the interests of the class or further the state's interest in justice. *See*, *e.g.*, Cal. Civ. P. Code § 384(a); *Zaber*, 902 N.W.2d at 291-92.

Additionally, state courts have effectively supervised *cy pres* relief in class actions. State laws governing class actions impose similar requirements to federal law concerning court approval of settlements and class awards, and the due process requirements that animate the federal rules extend to state law as well. Like the federal courts, the state courts scrutinize proposed *cy pres* relief to ensure that class interests are protected and adequately remedied.

A recent Oregon class action, *Scharfstein v. BP West Coast Products, LLC*, 2016 WL 9735513 (Or. Cir. May 9, 2016), *aff'd*, 292 Or. App. 69 (2018), provides an example of how a trial court can effectively monitor the creation and distribution of a *cy pres* fund. In that consumer protection case, following a jury verdict and claims process, the trial court conducted several days of hearings and received extensive testimony to determine the appropriate *cy pres* recipients of approximately $66 million in residual funds. *Id.* at *1. Under Oregon Rule of Civil Procedure 32 O, the court was required to distribute at least half of the remainder fund to the Oregon Legal Services Program. The other half could be distributed to that same program or to a third-party organization for purposes "directly related to the class action or directly beneficial to the interests of class members." Or. R. Civ. P. 32 O.

After hearing from the parties and an array of expert witnesses in the relevant areas—including testimony on *cy pres* awards generally, the provision of

legal services for low income clients, consumer protection, and non-profit management—the court entered a detailed order adopting a *cy pres* plan to distribute the funds. 2016 WL 9735513 at *2. The court first determined that half of the funds should go to consumer protection, because that was the basis of the class action. *Id*. at *3 Because no entity existed in Oregon that could serve class interests and make good use of the large award, the court authorized use of the majority of the *cy pres* funds to create a consumer protection nonprofit that would serve the interests of the class. *Id*. at *4-5. The court included a detailed process for establishing the Oregon Consumer Protection Center, including an appointment of the Oregon Community Foundation, a nonprofit organization with extensive experience in asset management, to manage the *cy pres* funds. *Id*. at *5-6. The court also authorized a distribution to the University of Oregon School of Law for research into consumer issues. *Id*. at *6. The court issued a detailed *cy pres* plan to guide the formation of the new nonprofit and to guide use of the *cy pres* funds. *Id*. at *6-7.

The process followed in *Scharfstein* shows that the state courts, with the involvement of the parties, can effectively and fairly manage the distribution of *cy pres* funds to serve the interests of class members even in unusually large or complex cases. Courts in other states have engaged in similar processes in granting *cy pres* relief. *See, e.g.*, *In re Microsoft I-V Cases*, 37 Cal. Rptr. 3d 660, 676-77 (Cal. Ct. App. 2006) (holding that the trial court did not abuse its discretion in approving a settlement agreement con-

taining a provision for *cy pres* distribution of residual funds when the trial court found—based on extensive testimony—that the distribution would provide a benefit to class members).

By contrast, state courts have not hesitated to rejected *cy pres* distributions proposed by the parties when they were inappropriate. *See, e.g.*, *Kansas Ass'n of Private Investigators v. Mulvihill*, 159 S.W.3d 857, 862 (Mo. Ct. App. 2005) (holding that the trial court abused its discretion when, among other things, it distributed *cy pres* funds to charities unrelated to the activities of the parties in the suit and in a county where none of the class members lived); *Ousmane v. City of New York*, 22 Misc. 3d 1136(A), 880 N.Y.S.2d 874 (N.Y. Sup. Ct. 2009) (rejecting a motion for *cy pres* distribution of residual funds where the defendant was a government entity and the residual funds belonged to "a relatively small number of readily identifiable" plaintiffs); *Cavalier v. Mobil Oil Corp.*, 898 So.2d 584 (La. Ct. App. 2005) (holding that the trial court erred by disbursing twenty percent of remainder funds to a nonprofit that did not serve the area where class members lived).

The states allow *cy pres* disbursements in appropriate circumstances because they provide a benefit to class members by directing funds to groups that have similar interests to the class or to legal aid organizations that promote access to justice. A majority of states have determined that *cy pres* relief is preferable to other methods of distributing remainder funds, such as returning undistributed funds to the

defendant, increasing the pro rata share to class members who make claims, or giving those funds arbitrarily to some portion of the class. The states' experience shows that *cy pres* relief can be administered in a fair manner that adequately protects the rights of the class. We do not suggest that *cy pres* relief is always appropriate or that the doctrine cannot be misapplied. But the potential problems that can accompany *cy pres* relief are largely the same problems that relate to all mass litigation. The courts—with the help of the states—can ensure that the interests of class members are adequately represented and that settlement agreements, whether they include *cy pres* relief or not, are "fair, reasonable, and adequate."

2. In federal class actions, the states play a role in ensuring the adequacy of settlements, including those providing *cy pres* relief.

Like the state legislatures and state courts, every circuit court to address *cy pres* relief in class actions has concluded that such relief may be appropriate in the right case.[1] And in the Class Action Fairness Act, Congress expressly authorized federal courts to require *cy pres* distributions in class action

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[1] *See, e.g.*, *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34 (1st Cir. 2009); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007); *In re Baby Products*, 708 F.3d at 173; *Klier v. Elf Autochem N. Am., Inc.*, 658 F.3d 468, 475 & n.15 (5th Cir. 2011); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004); *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706 (8th Cir. 1997).

settlements that provide coupon remedies. 28 U.S.C. § 1712(e).[2] Although that provision is limited in scope, it shows that Congress has recognized that *cy pres* is a needed tool for distributing class action proceeds in some circumstances.

When a federal class action settles, the states can help the courts apply Rule 23 to ensure that the settlement is a good deal for their respective citizens. Under CAFA, 28 U.S.C. § 1715, the states receive notice of proposed class action settlements, which allows the states to "provide a check against inequitable settlements." S. Rep. No. 109-14, at 35 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 34. The notice provision also serves to "deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties." *Id*. The states have been actively involved in monitoring class action settlements and notifying the district courts when those settlements are improper. *See, e.g.*, *Radosti v. Envison EMI, LLC*, 717 F. Supp. 2d 37, 49-50 (D. D.C. 2010) (discussing opposition to *cy pres* award raised by Attorneys General).

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[2] 28 U.S.C. § 1712(e) provides, in relevant part: "The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties."

3. The Court of Appeals correctly affirmed the district court's ruling approving the *cy pres* relief in this case.

With respect to the *cy pres* relief in this case, the district court and the Court of Appeals were correct to approve the settlement. Determining whether a settlement agreement is "fair, reasonable, and adequate" under Rule 23 is entrusted to the discretion of the trial court. *In re Baby Products*, 708 F.3d at 175. There is nothing in Rule 23 to suggest that a *cy pres*-only settlement cannot satisfy that standard so long as the district court meets its duties to scrutinize the settlement and ensure that class members' interests are protected. For the reasons explained by respondents, the trial court did not abuse its discretion by concluding that (1) the settlement fund was the appropriate size in view of the harms to class members and strength of the legal claims; (2) distribution to the class was not practicable; (3) this *cy pres* distribution would provide meaningful, if indirect, benefit to the class as a whole; and (4) the recipients of the *cy pres* funds were appropriate.[3] *See* Class Res. Br. 48-53; Google Br. 29-56. Accordingly, this Court should affirm the Ninth Circuit's decision.

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[3] A group of states filed an *amicus* brief in support of petitioner. That brief, however, objects only to *cy pres* relief or *cy pres*-only settlements in general; it does not argue that there was anything wrong in particular with the settlement in this case. As explained above, neither Rule 23's fairness requirement nor CAFA categorically prohibits *cy pres*-only settlements.

B. *Cy pres* disbursements do not violate the Due Process Clause or the First Amendment.

Although the validity of state law is not before the Court, several *amici* (and petitioners very briefly) assert that *cy pres* relief has constitutional flaws that could, if their arguments were accepted, impact the states' authorization of *cy pres* relief. Specifically, *amici* argue that *cy pres* distributions raise concerns under the Due Process Clause and that such distributions violate the First Amendment by compelling the speech of absent class members. Those arguments are without merit and should not affect this Court's analysis of the Rule 23 issue.

To begin, *amici*'s due process and First Amendment arguments were not raised in the courts below and thus are not properly presented for the first time here. *See Atl. Marine Constr. Co. v. Dist. Ct. for the Western Dist. of Texas*, 571 U.S. 49, 61 (2013) (declining to address argument by *amicus* that had not been raised by the parties "at any stage of this litigation"); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). *Amici* do not explain why it would be appropriate for this Court to address the constitutional questions in the first instance, when their arguments were not developed previously. In any event, if the Court were to consider the constitutional challenges, it should reject them.

1. *Cy pres* relief does not violate the Due Process Clause.

The Court has long held that aggregate litigation—when properly supervised by the trial court—can provide adequate representation and protection for the rights of absent class members. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Hansberry v. Lee*, 311 U.S. 32, 43-44 (1940). In light of the duty to protect absent class members and the burdens of aggregate litigation, class actions require "rigorous analysis" by the trial court to ensure compliance with the rules and with due process. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351-52 (2011). In considering a *cy pres* distribution, state and federal courts can and do engage in that same rigorous analysis to ensure that the distribution is appropriate under state or federal law.

Amici assert that *cy pres* relief raises a host of due process problems. Cato Br. 4-24; Lawyers for Civil J. Br. 20-21. But most of the concerns they raise actually go to whether class treatment was appropriate, whether the representation was adequate, and whether counsel and the court behaved ethically. None of those issues concern whether there are inherent due process problems with *cy pres* relief. Moreover, on appeal, no one challenged the district court's decision on class certification, the adequacy of representation, or the adequacy of class notice. *See* Pet. App. 17-21, 59-60.

Amici also assert that *cy pres*-only settlements violate due process because they provide no direct benefit to the class, and so a class member has given up a meaningful property interest in the form of a claim against the defendant and gotten nothing in return. Cato Br. 21-22. But that argument disregards the foundational principles underlying both class actions and *cy pres* relief. As noted earlier, one purpose of class action litigation is to allow aggregate claims to be brought when individual claims would be impossible to litigate. *Amchem*, 521 U.S. at 617. Relatedly, *cy pres* relief serves as a way to afford relief to the class when direct disbursement to class members is impossible or impracticable. When many plaintiffs have suffered a small harm and distribution to the class would be impossible, *cy pres* relief may be the only realistic remedial option, aside from leaving the plaintiffs with no remedy whatsoever. *Cy pres* relief also makes it possible to hold defendants accountable for inflicting small injuries on millions of people.

Stated simply, *cy pres* relief does not raise any intractable due process concerns. Rather, *cy pres* relief requires only that the trial court consider the same procedural issues and perform the same rigorous analysis as in any class action settlement.

2. *Cy pres* relief does not violate the First Amendment.

Several *amici*, and petitioners very briefly, also assert that *cy pres* relief in any form violates the First Amendment because that relief compels absent class

members to subsidize the speech of groups—the *cy pres* recipients—with whom class members may not agree. *See* Cato Br. 29-34; Center for Ind. Rights Br. 3-10; Center for Const. Juris. Br. 6-8; Lawyers for Civil J. Br. 21-22; Pet. Br. 36-37. The Court should reject that argument.

As a threshold matter, court approval of a settlement agreement is not state action that implicates the First Amendment. Here, the *cy pres*-only settlement is an agreement between private parties to resolve their dispute. Although the court is required to ensure that the interests of absent class members have been protected, court approval of the agreement does not transform the actions of private parties into state action for First Amendment purposes. *See In re Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094, 1113-14 (10th Cir. 2017), *cert. denied sub nom. Speedway LLC v. Wilson*, 138 S. Ct. 1299 (2018) (rejecting a compelled-speech challenge to the distribution of settlement funds to state regulators on that basis).

Beyond that, *cy pres* relief does not involve compelled speech. The First Amendment generally prevents the government "from compelling certain individuals to pay subsidies for speech to which they object." *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (citations omitted). But *cy pres* distributions do not compel absent class members to subsidize the speech of recipients of the funds even though class members may not agree with that speech. *Cy pres* distributions are not analogous to a compelled

subsidy, because class members in a federal class actions are free to opt out of class at the outset or at the time of settlement. But even if *cy pres*-only relief could compel speech, it would survive First Amendment scrutiny.

a. *Cy pres* relief does not compel speech.

Amici rely on *United Foods* as well as recent cases concerning union fees charged to nonmembers, *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298 (2012), and *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018). But those cases do not suggest that *cy pres* relief is a form of compelled speech.

In *United Foods*, the Court addressed whether a mandatory assessment for mushroom advertising violated the First Amendment when the assessment was used for generic advertising to which a producer objected. The Court concluded that compelling an unwilling producer to subsidize advertisements with which it disagreed violated the First Amendment. 521 U.S. at 413. In reaching that conclusion, the Court emphasized that the producer had no choice but to subsidize the advertisements and noted that the producer had to remain a member of the group engaging in the offensive speech. *Id.*

Similarly, in *Knox* and *Janus*, public employees who had declined to join the union were required by state law to pay union fees, which were then used by the unions to engage in speech that the nonmembers did not support. In both of those cases, the Court re-

lied on the premise that nonmembers of unions had made their unwillingness to support union activities clear—by declining to join—but were nevertheless compelled to support union activities, which necessarily involved political advocacy and other speech. *Knox*, 567 U.S. at 312; *Janus*, 138 S. Ct. at 2460.

Unlike the producer in *United Foods* or the employees forced to pay agency fees in *Knox* and *Janus*, class members here were free to leave the class. In a class action under Rule 23(b)(3), class members have the right to opt out at the time of class certification, Fed. R. Civ. P. 23(c)(2)(B)(v), and the district court can require an additional opportunity to opt out at the time of settlement, Fed. R. Civ. P. 23(e)(4). The ability to opt out of a federal class action—which affords sufficient protection for members' rights under the Due Process Clause—necessarily means that a *cy pres* disbursement is not "compelled" in any meaningful sense.

Amici assert that the opt-out process in federal class actions is inadequate in light of the infringement on class members' First Amendment rights, again relying on *Knox* and *Janus*. Center for Ind. Rights Br. 6-10; Cato Br. 31. That argument is based on a misreading of *Knox*. That case does not stand for the proposition that opt-out notices are per se impermissible if a constitutional right is implicated. Rather, in *Knox*, the nonmembers had already declined to join the public employee unions and thus had made clear that they did not wish to support union activities. *Knox*, 567 U.S. at 312. In that context, requir-

ing nonmembers to opt out of a fee that would be used for political purposes to which nonmembers had already objected violated the First Amendment. *Id.* at 313-14. The Court in *Janus* began from a similar position: state employees who had already rejected the union could not be compelled nevertheless to support union speech by default. The opt-out process for class actions is different. In contrast to *Knox* and *Janus*, the class members in this case had multiple opportunities to opt out, and a class member needed to make that decision only once to be removed from the class. That opt-out process is not analogous to compelling a nonmember to pay union fees unless the nonmember affirmatively opts out a second time.

Again, this Court has expressly approved the opt-out process in class actions. *Phillips Petroleum*, 472 U.S. at 814. Moreover, a class member who wants to remain in the class but objects to a specific *cy pres* recipient can raise those concerns before the trial court. By providing class members the ability to opt out and to object, class members' First Amendment rights—to the extent they are implicated at all—are sufficiently protected.

Amici's argument that *cy pres* relief compels speech also fails because *cy pres* distributions necessarily involve funds that were not or could not be disbursed to class members, who had the opportunity to opt out of the class. *Amici*'s argument is premised on the notion that *cy pres* relief takes funds from class members and gives those funds to third parties. To be sure, class members have a property interest in

their claims that extends to funds resulting from a settlement or judgment. *Klier v. Elf Autochem N. Amer., Inc.*, 658 F.3d 468, 475 (2011). But the property interest in a class member's claim can only be reduced to actual funds through the class action process. When a court authorizes a *cy pres* distribution, the court necessarily determines that the funds are either unclaimed or cannot practicably be distributed. *See id*. *Cy pres* distribution of those funds does not compel an absent class member to transfer any property interest to a third party.

b. Even if *cy pres*-only relief compelled speech, it would survive First Amendment scrutiny.

In *Janus*, the Court applied "exacting scrutiny" in concluding that mandatory agency fees violated the First Amendment and declined to address whether strict scrutiny may be a more appropriate standard. *Janus*, 138 S. Ct. at 2465. But even if this Court were to apply strict scrutiny, *cy pres* relief does not violate the First Amendment. To survive strict scrutiny, the regulation of speech must be narrowly tailored to serve a compelling government interest. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015).

To the extent that a *cy pres*-only distribution could impact speech, it is narrowly tailored relief that serves a compelling government interest. In keeping with the purpose of mass litigation, the states (and the federal government) have a compelling interest in ensuring that injured class members can litigate their

claims and receive an adequate remedy, even when the value of a claim may be small, and in ensuring that wrongdoers are held accountable. *See Hansberry,* 311 U.S. at 41-42 (class actions are an "an invention of equity" that enables a suit to proceed to a judgment despite procedural barriers); *Amchem*, 521 U.S. at 617 (noting the importance of class actions in obtaining relief when individual recovery is small). That interest in ensuring the availability of an adequate remedy is no less compelling when direct disbursement of settlement funds is not feasible. *Cy pres*-only relief can provide an adequate remedy for injuries to class members who would otherwise have no recourse, and, in so doing, hold defendants accountable for conduct that causes widespread injury. The states have a compelling interest in both of those results. And because *cy pres*-only relief is appropriate in very limited factual circumstances—when funds cannot be feasibly distributed—and with court oversight, it is by definition a narrowly tailored remedy.

Nor does the record in this case support an argument that any *cy pres* funds in fact subsidized speech with which class members disagreed. *Amici*'s argument is entirely speculative, based on assumptions that members of a large class must have divergent political views and that those class members would not exercise their right to opt out or object. This Court has never applied the compelled speech doctrine as abstractly as *amici* suggest—nor could it, consistent with Article III's requirement that this Court adjudicate only cases and controversies. And the notion that the Court can assume that members

of any given class have speech-based objections to a *cy pres* distribution finds no support in this Court's cases. This case does not present a situation like *United Foods*, *Knox*, or *Janus*, where the record showed both that the challengers objected to the subsidy supporting speech and that the subsidy would, in fact, be used for objectionable speech. To the extent that a *particular* proposed *cy pres* distribution in a *particular* case raised concerns about the uses to which a recipient would put the funds, trial courts are capable of dealing with those situations as they arise.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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