No. 22-___

In the Supreme Court of the United States

ANNA ST. JOHN,

Petitioner,

v.

LISA JONES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Eighth Circuit affirmed Rule 23(e)(2) approval of a class-action settlement that distributed roughly $16 million to uninjured nonprofits as so-called *cy pres*, $12 million to class members (with about 98% of the class—about ten million members—receiving no cash), and $10 million to attorneys. The Eighth Circuit rejected First Amendment and fairness challenges to the settlement subsidizing left-leaning organizations without consent of class members because absent class members had no property interest in the settlement funds, breaking with decisions of the Fifth and Seventh Circuits that such settlement funds belong to the class, rather than the attorneys.

The question presented is:

> Whether, or in what circumstances, a court may approve a settlement as "fair, reasonable, and adequate" under Rule 23(e)(2) when it pays a substantial *cy pres* award to third parties from the settlement fund.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Anna St. John is a member of the plaintiff class and was an objector in the district court proceedings and the appellant in the court of appeals proceedings.

Respondents Lisa Jones, Horacio Torres Bonilla, and Kristopher Yee were the named plaintiffs in the district court proceedings and appellees in the court of appeals proceedings.

Respondent Monsanto Company was the defendant in the district court proceedings and appellee in the court of appeals proceedings.

Because St. John is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

Jones v. Monsanto Co., No. 21-2292 (8th Cir.) (opinion issued June 29, 2022; order denying rehearing and rehearing *en banc* entered Aug. 16, 2022)

Jones v. Monsanto Co., No. 19-0102-CV-W-BP (W.D. Mo.) (order and opinion granting motion for final approval of class settlement entered May 13, 2021; order of dismissal entered May 27, 2021).

Along with this petition, St. John's counsel is filing later this week a *certiorari* petition in *Yeatman v. Hyland*, No. 22-___, which raises related issues of the propriety of *cy pres* under Rule 23(e)(2).

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PETITION FOR WRIT OF CERTIORARI

The Eighth Circuit upheld approval of a nationwide consumer class-action settlement that created a $39.5 million settlement fund. Such a result seems generous, but the parties structured the settlement so that class members would receive less than a third of it, and over 97% of the class would receive no cash. Much more, roughly $16 million, would instead go to left-leaning non-party organizations such as the Center for Consumer Law & Economic Justice at the University of California, Berkeley as so-called *cy pres*.

If an attorney diverted $16 million of a client's funds to nonprofits because he felt the nonprofits could make better use of the money, he'd be disbarred and prosecuted for the embezzlement—even if the client were an odious billionaire like Jeffrey Epstein. The clients of class counsel here were innocent class members; worse yet, many would disagree with the nonprofits' political goals. But the Eighth Circuit signed off on this diversion, known as *cy pres*, holding that the class members had no property interest in the settlement fund. In so doing, it exacerbated an existing circuit split started by the Ninth Circuit, conflicting with decisions of the Fifth and Seventh Circuits. *E.g.*, *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011) (settlement money belongs to the class); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (rejecting settlement that permitted $1.13 million residual *cy pres* to politically neutral charity). *See generally* Jeremy Kidd & Chas Whitehead, *Saving Class Members from Counsel*, 58 SAN DIEGO L. REV. 579, 600 (2021) (noting circuit split). The Second Circuit has since joined in on the side of permissive *cy pres*. *Hyland v. Navient Corp.*, 48 F.4th

110 (2d Cir. 2022), *cert. pending sub nom. Yeatman v. Hyland*, No. 22-___.

Many courts recognize that *cy pres* awards require special scrutiny because they can facilitate tacit or explicit collusion between defendants, who are eager to settle at the lowest price and with a minimum of fuss, and class counsel, who are seeking to maximize their fees and may be willing to accommodate defendants' interests in exchange for illusory relief. They recognize that, in this way, *cy pres* awards present a heightened risk of conflict between class counsel and their putative clients, the members of the class. They recognize that *cy pres* awards may provide little or no benefit to class members. And above all else, they recognize that *cy pres* awards to third parties are not appropriate when any reasonable opportunity exists to compensate class members directly for their injuries—always the first-best use of settlement funds that, after all, are the property of the class. Judges in lower courts, including circuits that have signed off on *cy pres*, have repeatedly criticized or expressed skepticism about the legitimacy of *cy pres*. *E.g.*, *Joffe v. Google, Inc.*, 21 F.4th 1102, 1122 (9th Cir. 2021) (Bade, J., concurring); *Keepseagle v. Perdue*, 856 F.3d 1039, 1060 (D.C. Cir. 2017) (Brown, J., dissenting); *Lane v. Facebook, Inc.*, 696 F.3d 811, 826, 834 (9th Cir. 2012) (Kleinfeld, J., dissenting); *Klier*, 658 F.3d at 481 (Jones, J., concurring); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 363 (3d Cir. 2010) (Weis, J., concurring in part and dissenting in part).

By contrast, the Eighth Circuit's opinion here paves the way to divert that class property to third parties in just about every instance, so long as settling parties say the

right magic words, no matter how facially absurd, about the difficulty of paying class members instead of third parties. And the Ninth Circuit's standard is even more permissive, not even requiring district courts to make the inquiry. *E.g.*, *In re EasySaver Rewards Litig.*, 906 F.3d 747 (9th Cir. 2018); *cf.* D. Brooks Smith, *Class Action and Aggregate Litigation: A Comparative International Analysis*, 124 Penn St. L. Rev. 303, 337 (2020) (former Chief Judge of Third Circuit criticizing Ninth Circuit *cy pres* jurisprudence).

Politicized recipients exacerbate the inherent problems of *cy pres* by "direct[ing] money to groups whose interests are purportedly aligned with the class members, but whom they have likely never heard of or may even oppose." *Joffe*, 21 F.4th at 1124 (Bade, J., concurring) (calling for "reconsideration" of Ninth Circuit's permissive *cy pres* standards). Such payments implicate the First Amendment because of the absence of affirmative consent for class counsel to divert each class member's money to a third party. *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2486 (2018). Regrettably, the Eighth Circuit nullified *Janus*'s consent requirement, and the resulting *cy pres* makes petitioner St. John worse off by funding groups—including a program at a university with billions of dollars in endowments—that work against her political beliefs.

In this way, the decision below deepened a circuit split that already created an enormous incentive for forum-shopping by plaintiffs' attorneys seeking to bring and settle nationwide class actions like this one. Bringing suit within the footprint of the right circuit guarantees that

minor things like compensating class members for their injuries, holding defendants liable to the extent that the law allows, and preventing defendants from injuring class members in the same manner will not impede reaching a quick settlement to the mutual benefit of defendants and class counsel, at the expense of class counsel's putative clients. This permissiveness has not gone unnoticed among the plaintiffs' bar, judging by the explosion in consumer class-action settlements featuring *cy pres* awards within the Ninth Circuit, and we can expect the same in the Second and Eighth Circuits now.

The Chief Justice correctly observed that the need for the Court to address the "fundamental concerns" raised by *cy pres* relief, including "when, if ever, such relief should be considered" and "how to assess its fairness as a general matter." *Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting denial of cert.). He suggested that "[i]n a suitable case, this Court may need to clarify the limits on the use of such remedies." *Id.* The Court granted review on these issues in 2018 but did not reach the merits because of Article III standing concerns. Justice Thomas dissented, and would have struck the use of all-*cy pres* settlements under Rule 23. *Frank v. Gaos*, 139 S. Ct. 1041, 1047–48 (2019) (Thomas, J., dissenting). This case has no Article III standing vehicle problems, and the need for clarification is greater than ever.

The Court should grant *certiorari* to resolve the circuit conflict, provide guidance to the lower courts on when (if ever) *cy pres* remedies are permissible, and correct a serious abuse of the class-action mechanism that puts the

interests of those it is intended to protect, class members, dead last.

OPINIONS BELOW

The Eighth Circuit's decision is reported at 38 F.4th 693, and is reproduced at App.1a. The district court's decision approving the class-action settlement under Rule 23 is reported at 2021 U.S. Dist. LEXIS 91260, 2021 WL 2426126, and is reproduced at App.13a.

JURISDICTION

The judgment below was entered June 29, 2022. The Eighth Circuit denied rehearing *en banc* (by a 6-to-5 vote) on August 16, 2022. On November 7, 2022, Justice Kavanaugh extended the time for this petition to December 14, 2022. *See* No. 22A395.

This Court has jurisdiction under 28 U.S.C. §1254(1).

RULES INVOLVED

Rule 23(e) is reproduced at App.44a.

STATEMENT OF THE CASE

A. Plaintiffs sue Monsanto over labeling of its Roundup-brand weedkiller products, seeking full refunds, and the parties settle.

A consumer class action alleged that certain Roundup Weed & Grass Killer products contained false or misleading representations on their labels. On behalf of themselves and putative class members, Plaintiffs sought, among other things, compensation equal to the amount they paid for the Roundup products "that they would not have purchased had they known the truth." App.102a.

The case settled for $39.55 million in exchange for a nationwide class releasing all of their consumer claims. Most of the class received only publication notice. Class members received nothing unless they participated in a claims process, and less than 3% of the class did so. As a result, the settlement would distribute roughly $16 million to uninjured nonprofits as *cy pres*, $12 million to class members, and $10 million to the class's attorneys. App.5a. Though the parties augmented payments to class members to ameliorate what was an even worse ratio originally, the payments remained a compromise of the complaint's demand for a full refund. The uninjured third-party organizations receiving settlement funds are the National Consumer Law Center; the National Advertising Division of the Better Business Bureau; and the Center for Consumer Law & Economic Justice at the University of California, Berkeley. App.3a–4a.

B. St. John objects to the *cy pres*.

Class member Anna St. John objected, challenging the fairness of the proposed settlement on Rule 23 and First Amendment grounds, and class counsel's fee request. App.85a.

St. John objected that the settlement improperly favored a third party chosen by conflicted representatives over class members through its *cy pres* provision. Citing Rule 23(e)(2)(C)(ii), which after 2018 amendments requires courts to consider the "effectiveness" of distribution before approving a settlement, St. John objected to the resort to *cy pres* before such mechanisms as direct notice and further augmenting distribution to class members. St. John provided unrebutted evidence demonstrating that settling parties could reach out to big-box retailers–and, if necessary, subpoena them–to obtain class-member purchase information, and then make direct distributions to class members. St. John detailed many consumer class actions that used this process to identify and provide direct relief to class members. App.103a.

Further, by providing settlement funds to be paid to organizations that engage in contentious advocacy, the *cy pres* violated class members' First Amendment rights to refrain from supporting or associating with a third party's agenda and activities without explicit consent. App.105a. St. John also objected that class counsel's $10 million fee represented at a minimum a 4.85 multiplier of its arguably exaggerated lodestar, and was excessive relative to the class's actual recovery.

C. The district court approves the settlement.

At the hearing, counsel for Monsanto represented that the administrator estimated that a supplemental outreach process to retailers would cost between $300,000 and $600,000. R. Doc. 74 at 16.

The district court rejected St. John's objections. Though the court observed that the "*cy pres* award in this case is large, not only in magnitude but in terms of the percentage of the settlement fund," it determined that it still had discretion to approve the settlement. App.21a.

First, it concluded that "further efforts to identify class members or increase the claims rate is not feasible." App.23a. Relying on oral representations from class counsel, it found that "pursuing information from retailers was unlikely to be effective (much less cost-effective) given (1) privacy restrictions placed on retailers, (2) the inability to track customers who paid with cash, and (3) the numerous 'smaller retail outlets' that sold products bearing the label." App.23a.

Second, it held that distributing more settlement funds to existing claimants would be a windfall as claimants had already received full compensation under the settlement. App.26a. Based on its assessment of Missouri, California, and New York law, it held that the full measure of class damages was the price premium generated by the allegedly false labeling. App.27a–28a. According to the court, "the class members' recovery was never going to be 100% of the purchase price" despite the refund relief sought in a complaint that no one contended was frivolous. App.28a. The court did not address the fact that the class definition

contemplates a purchase price refund as the measure of complete recovery.

Third, the court overruled St. John's First Amendment objection to the compelled subsidy of advocacy groups for two reasons. One, "the *cy pres* is created by the private agreement of the parties" rather than through "government compulsion," taking it outside the First Amendment's ambit. App.31a. Two, "it cannot fairly be said that the remainder [of the fund] belongs to any one member" and so a single class member cannot use *Janus* to "exercise veto power over its disposition." App.32a.

Its decision did not mention Rule 23(e)(2)(C)(ii).

The district court approved the attorneys' fees in full, crediting the *cy pres* as part of the settlement benefit, while acknowledging that the Seventh Circuit holds otherwise. App.33a–35a & n.18.

St. John appealed.

D. The Eighth Circuit affirms, and denies *en banc* review by a 6-5 vote.

On St. John's appeal, the Eighth Circuit affirmed.

As for the feasibility of distributing the remaining funds to class members by identifying them through customer data held by retailers, the panel "d[id] not doubt that there are circumstances in which pursuing records from retailers is a reasonable and effective way to get relief to class members, especially because it might allow for direct payments to affected customers without a cumbersome claims process." App.7a. It still held that the district

court did not abuse its discretion, though the only evidence in the record about the feasibility of this approach was a few sentences spoken by plaintiffs' counsel at the hearing noting that the data was "imperfect" and did not include purchasers who paid with cash or bought from smaller retailers, where the notice plan had been targeted and "revised twice in an effort to reach more consumers." *Id.* The panel did not mention Rule 23(e)(2)(C)(ii) or its standard requiring evaluation of objective effectiveness, rather than subjective efforts.

The panel also rejected St. John's argument that because class members' damages are unliquidated, they should be able to recover up to the full damages demanded by the complaint before a compromise distributes funds as *cy pres* to third parties. Instead, the district court must "make its own assessment of the damages 'that would be recoverable' by class members" before *cy pres* distribution. App.9a. Here, however, the panel found, the district court had conducted such an analysis, and it did not abuse its discretion in concluding that a payment to claiming class members of 50% of the average weighted retail price for the products "fully compensated" the class members. *Id.*

The panel also rejected St. John's argument that the *cy pres* distribution violated class members' First Amendment rights by compelling them to subsidize speech of organizations they might find objectionable. The panel held that the residual funds did not belong to any individual class member who had received his or her portion of the settlement fund, or to those class members who had not received their portion, because they had failed to file a

claim or opt out of the settlement. App.10a. It did not reconcile this conclusion with *Klier*'s holding that settlement funds are the property of the class, or with the Eighth Circuit's earlier endorsement of that holding. *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064, 1065 (8th Cir. 2015) (quoting *Klier*, 658 F.3d at 475).

St. John petitioned for *en banc* review, which the Eighth Circuit denied in a vote of 6-5 without opinion. App.42a.

REASONS FOR GRANTING THE PETITION

Among the lower courts, it has become a truism that *cy pres* settlements raise "fundamental concerns" in the nearly ten years since the Chief Justice made that observation in *Marek v. Lane*, 571 U.S. 1003 (2013), (Roberts, C.J., respecting denial of cert.). Without guidance from this Court, however, the lower courts have struggled to impose uniform or even effective rules, and the use of *cy pres* in class-action settlements has proliferated.

Below, the Eighth Circuit held that diversion to *cy pres* of residual settlement funds greater than what the class will receive is acceptable even when distribution of the funds to *some* of the class is feasible; and even when the recipient engages in advocacy work that many class members oppose.

The lower courts are fractured. The Eighth's Circuit's approach to *cy pres* differs materially from that taken in the First, Second, Third, Fifth, Seventh, and Ninth Circuits. The issue of how courts should analyze class-action settlements that provide for *cy pres* relief, and when to

approve such settlements, is a recurring question of law and policy that the lower courts confront repeatedly. Yet none seems to have found a solution on which they can agree.

Without this Court's intervention, *cy pres* settlements will continue to direct millions of dollars in class-member damages to third parties selected by class counsels and defendants rather than provide direct relief to the injured class members. The Court recognizes that this is a problem. Along with Chief Justice's comment in *Marek*, the Court granted *certiorari* in *Frank v. Gaos*, 139 S. Ct. 1041 (2019), to review whether *cy pres* settlements satisfy Rule 23's standard, but remanded for the Ninth Circuit to address standing, with only Justice Thomas reaching the issue. Notwithstanding Justice Thomas's clarification that "*cy pres* payments are not a form of relief to the absent class members and should not be treated as such," *id.* at 1047 (Thomas, J., dissenting), this case is just one of many class-action settlements that have abused *cy pres* since *Gaos*. *See, e.g.*, *Hyland*, 48 F.4th 110 (2d Cir. 2022) (*cert.* pending *sub nom. Yeatman v. Hyland*, No. 22-___); *Joffe,* 21 F.4th 1102 (9th Cir. 2021) (Google settlement); *see also In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316 (3d Cir. 2019) (vacating approval of all-*cy pres* settlement that Google has since resubmitted to the district court on remand).

This case is an ideal vehicle for addressing *cy pres*. The class of Roundup purchasers seeking economic damages indisputably have Article III standing, avoiding the issues that hamstrung review in *Gaos* and that respondents raised in successfully opposing review in *Lowery v. Joffe*,

No. 21-1535. St. John fully raised the Rule 23 and First Amendment *cy pres* issues below.

I. The circuits are fractured over several dimensions of *cy pres*.

The Eighth Circuit joins the Second and Ninth Circuits in rejecting the holding of the Fifth and Seventh Circuits that settlement funds belong to the class. But it also requires more scrutiny that the Second and Ninth Circuits do, while less scrutiny than the Third Circuit has provided.

The fracture is across many dimensions.

First, do class members have a property interest in the settlement proceeds resulting from the aggregation of their claims? *Cf.* American Law Institute, *Principles of the Law of Aggregate Litig.* § 3.07 cmt. b ("presumptively" yes).

The decision below gives lip service to the idea that settlement proceeds are the property of the class, but then makes this unenforceable and inapplicable to residual funds (App.10a), splitting with the Fifth and Seventh Circuits. *Klier* rejected *cy pres* of unclaimed funds from a class-action settlement, holding that such awards are impermissible if it is "logistically feasible and economically viable to make additional pro rata distributions to class members" so long as it is not a windfall. 658 F.3d at 475. (As discussed below, the circuits also split on the definition of a windfall.) Under this test, a *cy pres* award may be made "only if it is not possible to put those funds to their very best use: benefitting the class members directly." *Id.* As the court stressed, "[t]he settlement-fund

proceeds, having been generated by the value of the class members' claims, belong solely to the class members" and "*[c]y pres* comes on stage only to rescue the objectives of the settlement when the agreement fails to do so." *Id.* at 475–76. The Seventh Circuit similarly holds that settlement funds belong to class members, "the intended beneficiaries." *Pearson*, 772 F.3d at 784.

In contrast, the Second Circuit holds that a "settlement fund never belonged to class members as damages" even when the consideration includes impeding class members' damages claims. *Hyland*, 48 F.4th at 122. *Hyland* affirmed the diversion of an entire settlement fund to a nonprofit established to work hand in hand in advocacy with the teachers' union that funded class counsel's litigation.

The Third Circuit suggested in dicta that a *cy-pres* only settlement can be acceptable for a Rule 23(b)(2) settlement class, because in that scenario the settlement funds "'belong' to the class *as a whole*, and not to individual class members as monetary compensation." *Google Cookie*, 934 F.3d at 328. The Third Circuit nevertheless cautioned that where a settlement's "*only* monetary distributions are to class counsel, class representatives, and *cy pres* recipients, as in this case," there is a risk of "a greater misalignment of interests: the settlement clearly benefits the defendant (who obtains peace at a potentially reduced cost), class counsel (who are guaranteed payment in the settlement), and the named representatives (who are given an incentive award in the settlement)." *Id.* at 327. Meanwhile, "any benefit to other class members is indirect and inconsequential monetarily." *Id.* The Third Circuit vacated and remanded because, despite seeking

(b)(2) certification, the parties obtained a release of claims for money damages and attorneys' fees calculated as a percentage of the settlement fund without the protections provided by (b)(3). *Id.* at 329-30.

The Third Circuit is not so kind to Rule 23(b)(3) *cy pres* distributions like the one here. It has rejected the Second and Ninth Circuit's permissive approach to *cy pres* relief in settlements of damages claims. In *In re Baby Products Antitrust Litigation,* the court vacated district court approval of a Rule 23(b)(3) class-action settlement that, because of a low claims rate, would have distributed the bulk of the settlement fund to *cy pres* recipients. 708 F.3d 163 (3d Cir. 2013). "*Cy pres* distributions," the court emphasized, "are inferior to direct distributions to the class because they only imperfectly serve the purpose of the underlying causes of action—to compensate class members." *Id.* at 169. "Barring sufficient justification," the court held, "*cy pres* awards should generally represent a small percentage of total settlement funds." *Id.* at 174. By contrast, the Eighth Circuit now broadly condones settlements where 40% of the proceeds go to *cy pres*—and the Second and Ninth Circuits have affirmed all-*cy pres* settlement approvals.

"[E]xcept perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014). When courts deny that class members have any rights in the settlement funds, they are quick to permit diversions that would normally be a breach of fiduciary duty and a violation of *Janus*'s requirement of affirmative consent

(and not just failure to object) before individuals can be compelled to subsidize speech they disagree with.

Second, while many of these courts use a "feasibility" standard, they differ wildly on what "feasibility" means. The Eighth Circuit now joins the Ninth Circuit in holding that a court can consider distribution infeasible if it cannot be made to *every* class member, rather than some class members. This exception swallows the rule, because no modern consumer or shareholder class-action settlement distributes recovery to every class member; claims rates are usually well below 10%, and often below even a fraction of a percent. *Pearson*, 772 F.3d at 782.

But in the Eighth Circuit's view, all a district court need do is accept settling parties' self-serving representations, no matter how empirically baseless they are. App.7a. A court therefore need not require direct distribution. *Id.* Class counsel and a defendant can thus grease the skids for a quick and easy *cy pres* deal that sells class members "down the river." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004).

The Ninth Circuit in a series of cases reached its rule that courts may consider settlement funds eligible for *cy pres* distribution whenever a settlement fund cannot be spread among *every* member of the class. First, in *Lane v. Facebook, Inc.*, the Ninth Circuit affirmed approval of a *cy pres*-only arrangement because it would result in only "*de minimis*" payments if the fund was distributed to the entire class. 696 F.3d 811, 821 (9th Cir. 2012), *cert. denied sub nom. Marek v. Lane*, 571 U.S. 1003 (2013). The Ninth Circuit reaffirmed this holding in *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 742 (9th Cir.

2017), *vacated and remanded on other grounds sub nom. Frank v. Gaos*, 139 S. Ct. 1041 (2019). Then, in *EasySaver*, the Ninth Circuit held that even when it is "technically feasible" to distribute funds to every class member, a court can decide that millions of dollars was "*de minimis*" and approve *cy pres* to local schools in a judge's home district establishing chairs in the defendant's name. 906 F.3d at 761–62. Most recently, the Ninth Circuit reaffirmed its vacated *Google Referrer* analysis and held *cy pres* permissible when a defendant chose to insist on a burdensome proof of claim process. In such cases, a *cy pres* award need only bear "a direct and substantial nexus to the interests of absent class members." *Joffe*, 21 F.4th at 1112 (quoting *Lane*, 696 F.3d at 821), *cert. denied sub nom. Lowery v. Joffe.*

In comparison, the Seventh Circuit rejected a settlement that allocated $1.13 million of unclaimed funds from a $2 million fund to *cy pres*, even though there were 12 million class members. *Pearson,* 772 F.3d at 780, 784. This holding necessarily implicitly condones distribution to some class members being better than distribution to no class members. And it recognizes that "[t]here is no indirect benefit to the class from the defendant's giving the money to someone else." *Mirfasihi*, 356 F.3d at 784.

Third, the decision below holds that a district court must "make its own assessment of the damages 'that would be recoverable' by class members" before *cy pres* can be awarded from a residual settlement fund. App.9a. If the court concludes that class members have not been fully compensated, and further distribution to class members is feasible, then *cy pres* is not permissible. App.8a;

In re BankAmerica Corp. Secs. Litig., 775 F.3d 1060, 1064-66 (8th Cir. 2015); *accord In re Lupron Mktg. Litig.*, 677 F.3d 21, 34 (1st Cir. 2012). This holding is questionable. It tasks the district court with a vague analysis—in particular, the requirement that district courts conduct a damages assessment rather than to require further distributions to the class when feasible and when damages sought in a complaint are unliquidated. Settling parties will, as they did here, have a perverse incentive to tell the court to shortchange the litigation value of the class's causes of action to maximize *cy pres* contributions—but the defendant still gets the benefit of the release of supposedly valueless causes of action.

In contrast, the Fifth Circuit's "windfall" analysis holds it only a windfall on the face of the complaint's allegations where liquidated-damages claims are "100 percent satisfied by the initial distribution." *Klier*, 658 F.3d at 475. This makes the most sense: in no other instance does a settling defendant get to relitigate causes of action it settled to try to prove that it overpaid. *E.g.*, *Eberhard v. Verizon Wireless*, 609 F.3d 590 (3d Cir. 2010). Perhaps Jones's claims against Monsanto are entirely meritless, and a single peppercorn would fully compensate the class and anything above that is a "windfall." But having agreed to pay $39.5 million to settle the class's claims, Monsanto has no right of remorse to complain that class members are getting too much—and courts should not allow class counsel to breach its fiduciary duty to argue for less class recovery. Furthermore, any "windfall" to class members is less inequitable than a windfall to a *cy pres*

beneficiary with billions of dollars who didn't even allege injury.

Meanwhile, the Second Circuit's (*Hyland*) and Ninth Circuit's (*Google Referrer*) approach doesn't require *any* consideration of the relative compensation recovered by the class.

Fourth, though not at issue in this particular case, the circuits split on the scrutiny required to avoid conflicts of interest in *cy pres*. The Second and Ninth Circuits reject the Third Circuit's and *ALI Principles* § 3.07's standard making *cy pres* a disfavored remedy that should not be ordered if there is "a significant prior affiliation with any party, counsel, or the court." *Compare Google Cookie*, 934 F.3d at 331 *with Joffe*, 21 F.4th at 1120 (rejecting "significant prior affiliation" test citing egregious conflicts in *Lane*) *and Hyland*, 48 F.4th at 123 (asserting lack of independent evidence of actual bad faith beyond the face of the settlement dispositive).

Conflicts of interest are inherent in *cy pres* at the settlement stage. It is thus unsurprising that multiple settlements have involved *cy pres* recipients who were intertwined with the defendants' and class counsel's interests. *See, e.g.*, *Google Cookie*, 934 F.3d at 330; *Google Referrer*, 869 F.3d at 744 (*cy pres* recipients included class counsel's *alma maters* and had previously received funding from defendant); *Joffe*, 21 F.4th at 1119 (*cy pres* recipients had previously received funding from the defendant, one had a preexisting relationship with class counsel, and another supported plaintiffs in an earlier appeal in the case and threatened to object). Unlike the Second and Ninth, the

Third Circuit would not permit approval of a *cy pres* remedy without investigation of "the nature of the relationships between the *cy pres* recipients and [the defendant] or class counsel." *Google Cookie*, 934 F.3d at 330.

Finally, the Eighth Circuit's position ignores Rule 23(e)(2)(C)(ii)'s requirement that district courts consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." The district court treated a settlement that diverted $16 million to *cy pres* as equivalent to one that paid 100% of a $39.5 million settlement fund to the class. So too *Joffe*. If courts permit settling parties to dispense with class claims on their own say-so, it erases Rule 23(e)(2)(C)(ii) from the books by making it automatic to clear the "effectiveness" bar. A settlement that leaves over 97% of the class uncompensated while paying 40% of the settlement fund to unrelated third parties on its face flunks "effectiveness" when other consumer cases have successfully distributed smaller amounts without resorting to *cy pres*, demonstrating that individual distributions were "economically viable." *Baby Prods.*, 708 F.3d at 173 (quoting *ALI Principles* § 3.07(b)); *see also* Section II.D below (listing some examples).

Settling parties continue to include *cy pres* as settlement relief to their own advantage but to the detriment of class members, who recover less than they could and are even harmed further when settlement funds meant to compensate them are sent to third parties selected by often conflicted counsel and who engage in work that many class members oppose.

II. The questions presented are important and recurring.

The Rule 23 questions presented here are important and recurring. As *cy pres* festers in class-action jurisprudence without clear rules, the fundamental concerns about its use that many courts and the Chief Justice's *Marek* opinion voiced show that courts should sharply curtail if not flatly prohibit application of the *cy pres* doctrine to class-action settlements.

A. Application of *cy pres* to class-action settlements is a poor fit for the doctrine.

Cy pres was never intended to be a form of relief in class-action settlements. *Gaos*, 139 S. Ct. at 1047 (Thomas, J., dissenting). The original use of *cy pres*—or, properly, *cy près comme possible*, meaning "as near as possible"—was to permit "a benefit to be given other than to the intended beneficiary or for the intended purpose because changed circumstances make it impossible to carry out the benefactor's intent." *Pearson*, 772 F.3d at 784. The doctrine originated in the area of charitable trusts and allowed, for example, the March of Dimes to shift to addressing birth defects once vaccines conquered polio. *Id.*

But *cy pres* is a poor fit for class actions when courts permit settlements to be gamed to divert material amounts of money away from the class. There are no "changed circumstances" in these class-action settlements. There is no original "benefactor" whose wishes must be accommodated "as near as possible," once the

true beneficiary purpose ceased to exist. Even more fundamentally, there is no "charitable" objective in a Rule 23 class action. *Pet Food Prods.*, 629 F.3d at 363 (Weis, J., concurring and dissenting in part). Rather, a class action is a procedural device to aggregate private claims for compensation to class members—not to create a charitable trust. *Cf. Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). In short, application of *cy pres* to Rule 23 class settlements unquestionably extends the doctrine far beyond its original roots and rationale into an area where the doctrine's premises are not only absent but *contrary* to the purposes of Rule 23.

The settlement here epitomizes this. The purchasers of weed-killer products are largely suburban homeowners, and surely very few endorse the extreme positions of Berkeley's clinic's zero-carbon advocacy, even if class counsel finds such advocacy appealing.

B. *Cy pres* creates improper incentives for class counsels and district judges.

Cy pres creates two types of improper incentives for class counsel. First, *cy pres* is one way to create the illusion of relief that class counsel then can use to justify an excessive attorneys' fee. When courts award attorneys' fees based on the size of the *cy pres* fund rather than on the amount the class directly received, *cy pres* will "increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefiting the plaintiff." Martin H. Redish *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 661

(2010). As a result, class attorneys are financially indifferent over whether a settlement is structured to compensate their clients or to funnel settlement proceeds to third parties.

Second is lawyers' use of *cy pres* to promote their own personal, financial, political, or charitable preferences. It is not uncommon to see publicity photographs of attorneys handing oversized checks to their selected *cy pres* recipients or to see recipients issue public statements of gratitude to the class attorneys. *E.g.*, Chris J. Chasin, *Modernizing Class Action Cy Pres Through Democratic Inputs*, 163 U. Penn. L. Rev. 1463, 1484 & n.114 (2015); Staff, *Empowering Law School Antitrust Scholarship Through Unique Philanthropic Support*, U. Chi. L. Alumni Mag. (Dec. 2021) (celebrating alumnus class counsel whose settlement made his *alma mater* a *cy pres* beneficiary).

Class attorneys are tempted to shirk their constitutional and fiduciary duties to adequately defend class members' legal rights because their compensation is no longer tied to their recovery. Chasin, *supra*. When courts treat a dollar of *cy pres* as equivalent to a dollar of direct class recovery, class attorneys' all-too-human predilection will prefer to fund their favorite nonprofits or causes—or support their paying clients, as here—over millions of anonymous and less grateful class members.

Cy pres similarly creates the appearance of impropriety for district court judges. It tempts judges to play benefactor with someone else's money. Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007); *see, e.g.*, *EasySaver*, 906 F.3d at 761–62; *cf. also* Kidd

at 613–14 (case of *cy pres* to nonprofit where judge's spouse sat on board); *In re Google Buzz Privacy Litig.*, No. C 10-00672, 2011 WL 7460099, at *3 (N.D. Cal. June 2, 2011) (district court without notice to class *sua sponte* redirected proposed *cy pres* to local university where judge taught as visiting law professor).

These apparent conflicts of interest undermine broader confidence in our judicial system and have no place in it. St. John's arguments below focused on application of Rule 23(e)(2)(C)(ii), *BankAmerica*, and *Janus* and admittedly did not raise issues of similar conflicts in this case. But these potential conflicts in future *cy pres* cases (and in the soon-to-be-pending *Yeatman* petition) demonstrate the public-policy need for bright-line rules restricting *cy pres*.

C. *Cy pres* raises First Amendment concerns that the Eighth Circuit improperly dismissed.

Cy pres awards, approved and enforced by federal courts, also infringe on the First Amendment rights of class members by requiring them to subsidize political organizations or charities, chosen by the district court, class counsels, or defendants, but which individual class members may not support or approve. Such forced payments require the "affirmative[] consent" of the class member and that consent may not be implied or "presumed." *Janus*, 138 S. Ct. at 2486 (2018).

But that is exactly what the Eighth Circuit did. It presumed that over 97% of the class consented to the *cy pres* diversion by failing to file a claim or opt out from the class.

App.10a. *Contrast also Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 574 (2013) (Alito J., concurring) (failure to respond to "opt-out notices" is not consent). "Ascribing any meaning to silence in response to publication notice is untenable." Debra Lyn Bassett, *Class Action Silence*, 94 B.U. L. Rev. 1781, 1799 (2014); *accord Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014).

Governmental power (in the form of a district court order binding class members) may not sanction the redirection of property (a monetary recovery belonging to class members) to third parties to engage in expressive activity without the affirmative consent of the persons to whom those funds belong. "'The government may not prohibit the dissemination of ideas that it disfavors, *nor compel the endorsement of ideas that it approves*.'" *Harris v. Quinn*, 573 U.S. 616, 647 (2014) (quoting *Knox v. SEIU*, 567 U.S. 298, 309 (2012)) (emphasis added). *Knox* established that "compelled funding of the speech of other private speakers or groups" is unconstitutional in all but the most limited of circumstances, none of which are present in the context of *cy pres*. 567 U.S. at 309–11.

Class counsel did not obtain the "affirmative consent" of each class member for to this *cy pres* award. Instead, the Eighth Circuit allowed a class action brought for the benefit of petitioner St. John to fund an organization that works against her policy preferences. App.106a. Even beyond the First Amendment implications, the selection of politicized beneficiaries implicates the fairness of *cy pres* settlements. Smith, *supra*, at 337 (*cy pres* "especially troubling" when it goes to "powerful interest group" that

"conducts political activity in many fields wholly unrelated" to the facts of the litigation).

The district court also held that the First Amendment was not implicated because its order approving the settlement was not state action. App.31a. But class-action settlements approved and enforced by courts, and constitutional due process rights underlie many provisions of Rule 23, including notice and opt-out rights. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (mandatory class actions aggregating damages claims implicate due process); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985). Class-action procedures must protect class members' First Amendment rights just as they must protect other constitutional guarantees.

This case, in combination with *Joffe* and *Hyland*, means that three circuits now refuse to apply *Janus* and instead allow settlement parties to choose who receives the proceeds from the settlement of class members' claims—often based on their personal financial, charitable, or policy preferences—when class members actively oppose or are made worse off by the choice in recipients.

D. Class members benefit when courts preclude *cy pres* abuse.

When courts limit the ability of class counsel to profit from *cy pres*, class counsel will respond to this incentive to "maximize the settlement benefits actually received by the class." *Pearson*, 772 F.3d at 781. That is more than abstract theory: experience bears it out:

- While *Baby Products* left open the possibility of approving *cy pres*, it reversed a settlement approval

and ordered the district court to consider whether class counsel had adequately prioritized direct recovery. 708 F.3d at 178. On remand, the parties arranged for direct distribution of settlement proceeds, paying another $14.45 million to over one million class members instead of *cy pres*, an "exponential increase" in class recovery. *McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 660 (E.D. Pa. 2015).

- After objection to a claims-made settlement of a consumer class action over aspirin labeling where nearly all funds would have gone to *cy pres*, the parties used subpoenaed third-party retailer data to identify over a million class members and paid another $5.84 million to the class, increasing class compensation from the less than $100,000 the original settlement provided. Order 4, *In re Bayer Corp. Litig.*, No. 09-md-2023, Dkt. 254 (E.D.N.Y. Nov. 8, 2013); *id.* Dkt. 218-1.
- A similar successful objection to residual *cy pres* in an antitrust settlement increased class recovery from $2.2 million to $13.7 million. *Pecover v. Electronic Arts, Inc.*, No. 08-cv-2820, 2013 WL 12121865 (N.D. Cal. May 30, 2013); *id.* Dkt. 466.
- After this Court decided *Gaos*, Google broke its streak of four consecutive *cy pres*-only privacy class settlements with a successful direct electronic distribution of funds and a claims process for a class of tens of millions of members, though only $7.5 million was in the settlement fund. *In re Google Plus Profile Litig.*, No. 5:18-cv-06164-EJD, 2021 WL 242887

(N.D. Cal. Jan. 25, 2021). (Google has since reverted to its old ways in the *Google Cookie* remand.)

- On remand in *Pearson*, a renegotiated settlement gave class members over $4 million more in cash. Settlement ¶¶7–8, No. 1:11-cv-07972, Dkt. 213-1 (N.D. Ill. May 14, 2015).

In short, as *Pearson* reasoned, if courts make lawyers direct money to clients to get paid, that is *exactly* what happens. Alison Frankel, *By Restricting Charity Deals, Appeals Courts Improve Class Actions*, Reuters (Jan. 12, 2015). And as discussed in the next section, the difference in recovery compared to a world where the Court fails to check this abuse will not be trivial.

E. The circuit split encourages forum-shopping and has cost class members hundreds of millions of dollars.

The problem of the circuit split is especially acute because class-action settlements—being both nationwide and non-adversarial—can be easily forum-shopped. Class-action settlements often feature a new complaint alleging a larger class to facilitate global settlement; little stops settling parties from relocating such a complaint in a more favorable jurisdiction for the breezier review. *Cf. Adams v. USAA Cas. Ins. Co.*, 863 F.3d 1069 (8th Cir. 2017) (reversing district court's sanctions of counsel for abuse of process for dismissing federal action "for the improper purpose of seeking a more favorable forum and avoiding an adverse decision").

While the effects of the Second Circuit's decision are still developing, the experience of other circuits after loosening restrictions on *cy pres* offers a guidepost. After the Ninth Circuit began analyzing the feasibility of direst distribution to the class by reference to the number of class members, a district court issued an order permitting class counsel to divert *$76.1 million* of a Volkswagen-owner class's settlement fund to *cy pres* with no penalty to their previously awarded fee. The Ninth Circuit's permissive approach meant that there was no effort to provide direct distribution to the vast majority of class members (who received direct notice but failed to jump through the hoops of making a claim); no new notice to the class of the 55 newly identified *cy pres* recipients; no disclosure of potential conflicts of interest; no press coverage; and thus no objections before the court's rubber stamp of a short proposed order. *In re Volkswagen "Clean Diesel" Litig.*, No. 3:15-md-02672-CRB, Dkt. 7961 (N.D. Cal. May 16, 2022).

In another district, the court approved a settlement that paid $142 million to *cy pres*; $5 million to the class; and $50 million to the class attorneys. *Krueger v. Wyeth, Inc.*, No. 3-cv-2496, 2020 WL 6688838 (S.D. Cal. Nov. 12, 2020). The examples go on. Other recent decisions in the Ninth Circuit have too readily accepted contentions that *cy pres* is appropriate because distributing $28/class member is too "burdensome and inefficient" or because $9.71 checks are "*de minimis*." *See respectively Beaver v. Tarsadia Hotels*, No. 11-cv-01842, 2020 U.S. Dist. LEXIS 40415, at *5, *7 (S.D. Cal. Mar. 9, 2020), *and Knell v. FIA Card Servs, N.A.*, No. 3:12-cv-00426, 2020 U.S. Dist.

LEXIS 217452, at *4 (S.D. Cal. Nov. 19, 2020); *see also Norcia v. Samsung Telcoms. Am., LLC,* No. 14-cv-00582, 2021 U.S. Dist. LEXIS 135256, *6 (N.D. Cal. Jul. 20, 2021) ($74,680 to class; over $2 million *cy pres* to Berkeley law school clinic); *cf. also Keepseagle*, 856 F.3d 1039 (affirming judgment of $380 million of *cy pres* in settlement with federal government because of appellants' lower-court waiver).

Courts in other parts of the country have suggested "un-certainty as to the legitimacy of *cy pres* distributions in class action settlements" in the wake of *Gaos*. *Ward v. Flagship Credit Acceptance LLC*, No. 17-cv-2069, 2020 U.S. Dist. LEXIS 25612, at *66 n.31 (E.D. Pa. Feb. 13, 2020); *see also Poblano v. Russell Cellular Inc*., 543 F. Supp. 3d 1293, 1296 (M.D. Fla. 2021). Simply put, "[t]he U.S. class action system has yet to fully come to grips with the misuse of cy pres." Smith, *supra*, at 339. And, in three circuits now, the doctrine has unfortunately "run wild." *Id*.

As the circuit split grows, plaintiffs' attorneys have more options to forum-shop their cases to circuits such as the Second, Eighth, and Ninth that are more permissive of *cy pres*. Unfortunately, these precedents will encourage class counsel to breach their fiduciary duties to class members and forum-shop settlements to these circuits for higher attorneys' fees and the opportunity to divert millions of dollars of their clients' recovery to ideological causes that they or their paying clients and allies support, at the expense of the absent class members. It is time for the Court to step in.

CONCLUSION

The Court should grant the petition in this case; grant the petition in *Yeatman v. Hyland*, No. 22-___, and hold this petition pending *Yeatman*; or grant both petitions and consider consolidating the cases.

Respectfully submitted,

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