No. 22-554

In the Supreme Court of the United States

ANNA ST. JOHN, PETITIONER

v.

LISA JONES, ET AL., RESPONDENTS

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

MONSANTO COMPANY'S BRIEF IN OPPOSITION TO CERTIORARI

JOHN J. ROSENTHAL
Counsel of Record
WINSTON & STRAWN LLP
1901 L Street, N.W.
Washington, DC 20036
(202) 282-5000
jrosenthal@winston.com

JEFF WILKERSON
WINSTON & STRAWN LLP
300 S. Tryon Street
Charlotte, NC 28202
(704) 350-7700

Counsel for Respondent Monsanto Company

QUESTION PRESENTED

This case does not implicate any circuit split. The District Court approved the settlement (and the Eighth Circuit affirmed) only after making factual findings that would have warranted settlement approval in any federal court. Those findings were supported by the record, and Petitioner does not meaningfully challenge them. There is no reason for this Court to intervene.

The question presented is whether the Eighth Circuit erred in holding that the District Court did not abuse its discretion by approving the settlement, including the dispersal of unclaimed funds to three third-party organizations, after finding that (1) the robust notice program and simple claims process complied with Rule 23's requirements, (2) further distributions to claimants would constitute a windfall, (3) further distributions to non-claiming class members were not feasible, and (4) the *cy pres* recipients met the Eighth Circuit's well-established requirement for the "next best use for indirect class benefit and for uses consistent with the nature of the underlying action and the judicial function."

CORPORATE DISCLOSURE STATEMENT

Respondent Monsanto Company is an indirect, wholly owned subsidiary of Bayer AG, a publicly held corporation. No other publicly held corporation owns 10% or more of Monsanto's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT 4

A. Monsanto settled after years of litigation in several related actions. 5

B. The District Court preliminarily approved the settlement and the parties proceeded with extensive class notice and a claims process. 7

C. Plaintiffs moved for final approval and Petitioner was the sole objector. 9

D. The District Court rejected Petitioner's arguments and approved the settlement. 10

E. The Eighth Circuit unanimously affirmed. 13

REASONS TO DENY THE PETITION 15

I. Petitioner's "circuit split" is illusory. 15

A. There is no circuit split on whether class members have a property interest in the settlement funds. 17

B. There is no circuit split on what constitutes "feasibility." 19

C. There is no circuit split on what would be a windfall. 22

D. This case does not implicate any circuit split on conflicts of interest..... 24

E. Neither the District Court nor the Eighth Circuit "ignored" Rule 23(e)(2), and this Court need not review this case to address that putative error. 25

II. The questions presented are fact-bound and unworthy of review under Rule 10, and Petitioner's broad objections to *cy pres* were not raised below and, in many cases, are not implicated by this case. 26

A. The per se permissibility of *cy pres* awards is not at issue in this case..... 27

B. Whether *cy pres* in the class-action context is analogous to the trust context is irrelevant. 28

C. This case does not raise Petitioner's concerns about misplaced incentives. 28

D. Courts have uniformly rejected Petitioner's First Amendment arguments. 29

E. Other cases in which courts have rejected premature *cy pres* distributions show only that this Court need not intervene..... 31

F. Petitioner's claims of forum-shopping are unfounded..... 33

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

Cases

In re Baby Prods. Antitrust Litig.,
708 F.3d 163 (3d Cir. 2013)..... 15, 19, 31

In re BankAmerica Corp. Secs. Litig.,
775 F.3d 1060
(8th Cir. 2015)..... 1, 3, 9, 12, 13, 14, 16, 17, 23

In re Bayer Corp.,
No. 09-md-2023, Dkt. 218 (E.D.N.Y.
Mar. 1, 2013)..... 32

Blair v. *Monsanto Co.*,
No. 3:17-cv-50123 (N.D. Ill. filed
Apr. 24, 2017) 5

Blitz v. *Monsanto Co.*,
2019 WL 95440 (W.D. Wis.
Jan. 2, 2019) 5

Blitz v. *Monsanto Co.*,
No. 3:17-cv-00473 (W.D. Wis. filed
June 20, 2017) 5

Blum v. *Yaretsky*,
457 U.S. 991 (1982) 30

Bristol-Myers Squibb v. *Superior Court*,
137 S. Ct. 1773 (2017) 5

Frank v. *Gaos*,
203 L. Ed. 2d 404, 139 S. Ct. 1041
(2019) 15, 21

In re Google Inc. Cookie Placement,
934 F.3d 316 (3rd Cir. 2019) 19, 24

In re Google Inc. Street View Elec. Commc'ns Litig.,
21 F.4th 1102 (9th Cir. 2021), cert. denied sub nom. *Lowery* v. *Joffe*, 214 L. Ed. 2d 25,
143 S. Ct. 107 (2022) 2, 15, 22, 25, 29, 30

In re Google Referrer Header Privacy Litig.,
869 F.3d 737 (9th Cir. 2017) 21, 23

Hyland v. *Navient*,
48 F.4th 110
(2d Cir. 2022) 18, 19, 23, 25, 29, 30

Ira Holtzman, CPA v. *Turza*,
728 F.3d 682 (7th Cir. 2013) 15, 16

Jones v. *Monsanto Co.*,
2019 WL 9656365 (W.D. Mo. June 13, 2019) 6

Keil v. *Lopez*,
862 F.3d 685 (8th Cir. 2017) 26

Klier v. *Elf Atochem N. Am. Inc.*,
658 F.3d 468
(5th Cir. 2011)..... 1, 14, 15, 16, 17, 18, 22, 23

Lane v. *Facebook*,
696 F.3d 811 (9th Cir. 2012) 21

In re Lupron Mktg. & Sales Pracs. Litig.,
677 F.3d 21 (1st Cir. 2012)..... 15, 19

Marek v. *Lane*,
571 U.S. 1003 (2013) 27, 28

Masters v. *Wilhelmina Model Agency, Inc.*,
473 F.3d 423 (2007) 16

In re Motor Fuel Temp. Sales Pracs. Litig.,
872 F.3d 1094 (10th Cir. 2017), cert. denied, 138 S. Ct. 1299 (2018) 2, 13, 29

Nachshin v. AOL, LLC,
663 F.3d 1034 (9th Cir. 2011) 16

Pearson v. *NBTY, Inc.*,
772 F.3d 778 (7th Cir. 2014) 32

Pecover v. Electronic Arts,
2013 WL 12121865 (N.D. Cal. May 30, 2013) 32, 33

Perkins v. *Linkedin Corp.*,
2016 WL 613255 (N.D. Cal. Feb. 16, 2016)..... 30

In re Pharm. Ind. AWP Litig.,
588 F.3d 24 (1st Cir. 2009)..... 16

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 30, 31

In re Polyurethane Foam Antitrust Litig.,
178 F. Supp. 3d 621 (N.D. Ohio Apr. 13, 2016) 29

Six (6) Mexican Workers v. *Arizona Citrus Growers*,
904 F.2d 1301 (9th Cir. 1990) 25

Travelers Cas. & Sur. Co. v. *Pac. Gas & Elec.*,
549 U.S. 443 (2007) 3, 27

Washington v. *Monsanto Co.*,
No. 2:17-cv-02216 (E.D.N.Y. filed Apr. 12, 2017) 5

Other Authorities

Nicholas A. Bergara, *Nipping it in the Bud: Fixing the Principal-Agent Problem in Class Actions by Looking to Qui Tam Litigation* NYU L. Rev. 275, 278 (2022) 29

INTRODUCTION

Petitioner Anna St. John, represented by a serial objector to class-action settlements, argues that the Eighth Circuit's opinion below implicates a circuit split on the application of *cy pres* to class-action settlements. But there is no split—courts evaluating settlements of this type apply the same legal standard. The circuit courts agree that *cy pres* distributions of unclaimed funds to organizations aligned with a lawsuit's purpose are permitted if further distributions to class members (1) are infeasible or (2) would effect a windfall. The District Court found that both were true here. Pet. App. 22a. And the Eighth Circuit affirmed, finding no abuse of discretion. Pet. App. 9a. The decision below did not depart from the legal standard employed by other circuits (or prior Eighth Circuit precedent). To the contrary, it relied on the same cases that Petitioner claims are on the "other side" of the supposed circuit split. Pet. App. 8a (citing *Klier* v. *Elf Atochem N. Am. Inc.*, 658 F.3d 468 (5th Cir. 2011) (*Klier*)); *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015) (*BankAmerica*)). The courts of appeals simply do not recognize the split that Petitioner attempts to gin up.

Seeking to mask this consensus on the standard for approving *cy pres* distribution of residual funds, Petitioner distorts both the factual record and the Eighth Circuit's holdings. She claims, for example, that the courts below relied simply on "magic words" from the parties about the feasibility of further distributions to class members. Pet. 3. But in fact, the District Court considered a well-developed record showing that (1) the parties completed an extensive notice program across more than a dozen different media, with class members exposed to notice *hundreds of millions* of

times; (2) the claim form was easy to complete, readily available, and did not require proof of purchase; and (3) before any *cy pres* distributions, all claimants will receive payments amounting to more than three times Plaintiffs' estimate of the *best-case* result at trial. It was the District Court's application of accepted legal standards to this factual record that led to settlement approval. Petitioner's disagreement with those factual findings does not justify this Court's intervention.

Petitioner also argues that the use of *cy pres* violates class members' First Amendment rights. Petitioner and her counsel have presented this same argument repeatedly in courts around the country. Those courts have uniformly rejected it, holding that (1) where the *cy pres* provisions are included in the settlement agreement, as they were here, the implementation of the settlement is not state action subject to the First Amendment; and (2) in any event, *cy pres* distributions do not compel speech because Rule 23(b)(3) class actions, by their nature, provide class members with the ability to opt out. See, *e.g.*, *In re Motor Fuel Temp. Sales Pracs. Litig.*, 872 F.3d 1094, 1113-14 (10th Cir. 2017), cert. denied, 138 S. Ct. 1299 (2018) (*Motor Fuel*); *In re Google Inc. Street View Elec. Commc'ns Litig.*, 21 F.4th 1102, 1118-19 (9th Cir. 2021), cert. denied sub nom. *Lowery* v. *Joffe*, 214 L. Ed. 2d 25, 143 S. Ct. 107 (2022) (*Google Street View*). The Court should not grant certiorari on this issue, considering that it has recently and repeatedly denied review of this question in other cases, and every lower court to consider Petitioner's First Amendment argument has rejected it.

Petitioner's other arguments largely focus on purported risks that *cy pres* could skew class counsel's and

district courts' incentives to protect absent class members. But those issues are not presented here for two reasons.

First, Petitioner did not argue below that *cy pres* is inappropriate in all cases. Because broad questions about the permissibility of *cy pres* were not addressed below, they are not ripe for this Court's review. *Travelers Cas. & Sur. Co.* v. *Pac. Gas & Elec.*, 549 U.S. 443, 455 (2007) ("[W]e ordinarily do not consider claims that were neither raised nor addressed below.") (*Travelers*). Rather, the primary focus of both the parties' briefing and the Eighth Circuit's opinion was the interpretation of a single Eighth Circuit case, *BankAmerica.*

Second, despite positing that *cy pres* could theoretically create skewed incentives or conflicts of interest, Petitioner does not and cannot point to any evidence of malfeasance by class or defense counsel or the District Court in this case. To the contrary, the record shows that class counsel made repeated efforts to increase claims rates.

Moreover, the circuits have already uniformly recognized and addressed the potential for unfair or premature *cy pres* distributions of unclaimed funds. Indeed, the legal standard the Eighth Circuit applied in this case—requiring a preference for feasible and fair distributions to class members—is expressly designed to ensure that class counsel are vigorously representing class members' interests and to combat unwise or unfair *cy pres* distributions. Petitioner's argument that some circuit courts have rejected *cy pres* distributions in other cases only reinforces that this legal standard has teeth, *not* that there is a split regarding what the standard is or should be. And other appellate

decisions she points to for the purported "fracture" address different legal questions, and therefore do not represent a "fracture" at all.

The District Court made dispositive factual findings based on a thorough review of the record, applying a legal standard that is uniform among the circuits. The Eighth Circuit affirmed, applying that same legal standard. Petitioner did not even *argue* below that this legal standard was incorrect or should be revisited, nor that the standard applied by other circuits conflicted with Eighth Circuit law—issues it now asks this Court to address in the first instance. This is a court of final, not first, review. Certiorari should be denied.

STATEMENT

The District Court found that the settlement was fair, reasonable, and adequate to protect class members' interests. Its rejection of Petitioner's challenge to the settlement's *cy pres* provision, in particular, turned on two important findings: (1) "further efforts to identify class members or increase the claims rate [were] not feasible"; and (2) the amount paid to claimants "constituted at least full (if not more) compensation for the class members' damages." Pet. App. 23a, 26a. The Eighth Circuit, in turn, relied on these two findings to affirm the District Court's approval. Pet. App. 7a-9a.

These findings were justified based on the nature of Plaintiff's claims, the course of the proceedings, and the record. Settlement approval based on those findings conforms with the law of every circuit to have addressed the issue. There is no reason for this Court to intervene.

A. Monsanto settled after years of litigation in several related actions.

Plaintiffs allege that Monsanto misled consumers by stating on labels for certain of its Roundup®-brand herbicide products that their active ingredient, glyphosate, "targets an enzyme found in plants but not in people or pets" ("Label Statement"). Pet. App. 14a. The United States Environmental Protection Agency ("EPA") repeatedly approved the Label Statement because the enzyme in question, EPSPS, is *not* found in human and animal cells. But because certain *bacteria* contain EPSPS, and some of those bacteria can live in human and animal gastrointestinal tracts, Plaintiffs alleged the Label Statement was false and misleading. *Ibid*. Plaintiffs asserted only economic loss—they did not claim personal injury.

Plaintiffs' counsel filed the first cases asserting this theory in April 2017. See *Washington* v. *Monsanto Co.*, No. 2:17-cv-02216 (E.D.N.Y. filed Apr. 12, 2017); *Blair* v. *Monsanto Co.*, No. 3:17-cv-50123 (N.D. Ill. filed Apr. 24, 2017). Those plaintiffs, combining with several others, then filed a new action, *Blitz* v. *Monsanto Co.*, No. 3:17-cv-00473 (W.D. Wis. filed June 20, 2017).[1] Discovery proceeded in *Blitz* for over a year, but the district court ultimately denied class certification, and the Seventh Circuit then denied interlocutory appeal. 2019 WL 95440, at *5 (W.D. Wis. Jan. 2, 2019) (petition for perm. app. denied).

---

[1] After this Court's decision in *Bristol-Myers Squibb* v. *Superior Court*, 137 S. Ct. 1773 (2017), however, five of the six plaintiffs in the *Blitz* matter voluntarily dismissed their claims, leaving only the Wisconsin claims.

Not to be deterred, in February 2019, Plaintiffs' counsel filed this action, asserting highly similar claims on behalf of a putative nationwide class. Monsanto moved to dismiss, but the District Court held that the case could proceed to discovery. *Jones* v. *Monsanto Co.*, 2019 WL 9656365 (W.D. Mo. June 13, 2019).

Facing the prospect of years of additional, costly litigation of claims it had already successfully litigated, Monsanto agreed to mediate. Pet. App. 2a. In anticipation of mediation, the parties independently commissioned experts to analyze whether the removal of the Label Statement would impact the products' price. Plaintiffs' expert concluded there was a 7.9 to 15.9 percent price premium. Pet. App. 3a. Monsanto's expert found no statistically significant difference in the perceived value of the products with or without the Label Statement and, at worst, a 2.5 percent potential price premium. *Ibid*.

The parties ultimately reached an arms-length settlement. *Ibid*. The settlement created a non-reversionary common fund of $39.55 million, against which class members could make claims for 10 percent of the average retail price of products they bought during the class period. *Ibid*. The settlement permitted *cy pres* distributions of unclaimed funds only if class members' claims, notice costs, attorney's fees, and any other awards did not exhaust the common fund.[2] Pet. App. 73a-74a.

---

[2] The settlement agreement also provided that Monsanto would remove the Label Statement from the products and replace it with an alternative statement, subject to EPA approval. Pet. App. 60a.

B. The District Court preliminarily approved the settlement and the parties proceeded with extensive class notice and a claims process.

In March 2020, Plaintiffs moved for preliminary approval of the settlement. Pet. App. 3a. But before the District Court ruled on that motion, the parties slightly revised the settlement to, among other things, (1) lengthen the proposed notice and claims periods to "address concerns that, in light of the current public-health situation, consumers may be less attuned to non-pandemic-related media/publicity"; and (2) specify the recipients of any *cy pres* distribution that may occur to ensure that class members would have notice of the potential recipients. D. Ct. Doc. 52, at 3-4 (May 12, 2020). The District Court preliminarily approved the settlement in May 2020. Pet. App. 15a.

The parties, via an experienced claims administrator and notice expert, immediately began class notice and opened the claims process. Notice was broad and multifaceted, including print media, online displays, social media ads, streaming radio ads, online video ads, search-engine ads, a national press release, a toll-free settlement hotline, and a dedicated settlement website. Pet. App. 16a. The claims process was simple, and class members could complete the claim form either online or on paper. Class members could submit claims without proof of purchase and simply attest which product(s) they bought. Pet. App. 70a-71a.

In July 2020, given the ongoing media attention on COVID-19 and nationwide protests, the parties agreed to *further* supplement their notice efforts. These supplemental notice efforts—not required by the preliminary approval order—included (1) purchasing an

email list of millions of likely class members and sending them direct email notice of the settlement; (2) disseminating new email notices via digital newsletters catering to likely class members; and (3) purchasing ads on two leading websites that publicize class-action settlements. D. Ct. Doc., 58-2 ¶¶ 12-22 (October 14, 2020).

In October 2020, as the original claims period waned, the parties agreed—again, without prompting by the District Court—to additional notice to stimulate more claims.[3] The parties extended the claims period an additional 120 days and provided 90 more days of supplemental notice, including new national television and radio advertising campaigns. See D. Ct. Doc. 58 at 4 (October 14, 2020). They also revised the settlement agreement to, among other things, increase potential recovery to 50 percent of the average retail price of the products claimed (more than *three times* Plaintiffs' estimate of best-case damages)—a 500 percent increase. Pet. App. 61a. Updated notice materials advised class members of these changes. D. Ct. Doc. 58-2, at 142, 146 (October 14, 2020).

Ultimately, the parties' notice plan led to more than *500 million* notices delivered. See D. Ct. Doc. 65-2 (February 5, 2021). Class members filed more than 240,000 claims (net of duplicate claims) for more than

---

[3] To be clear, the existing notice program was legally adequate and had proceeded as planned, reaching more than 80 percent of the class with hundreds of millions of instances of notice. D. Ct. Doc. 58-2 ¶ 25 (October 14, 2020). The parties agreed to further extend the notice period (and to use additional forms of notice) only to ensure that as many class members as possible would have the opportunity to claim payments from the common fund.

a million products, worth up to $13.35 million. *Id.* ¶¶ 21-22. Given the size of the fund, however, and despite the parties' repeated efforts to stimulate claims, much of the common fund remained unclaimed and subject to *cy pres* distribution.

C. Plaintiffs moved for final approval and Petitioner was the sole objector.

With the notice and claims process complete, Plaintiffs moved for final approval of the settlement. D. Ct. Doc. 64 (February 25, 2021). Petitioner—an attorney at the same organization that represents her, the Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF")—was the sole objector.[4] Petitioner made two relevant arguments, both focused on the settlement's *cy pres* provisions.

First, Petitioner argued that the Eighth Circuit's decision in *BankAmerica*, 775 F.3d 1060, permitted *cy pres* distributions as a "last resort" only if it was infeasible to make distributions to more class members and additional distributions to existing claimants would more than fully compensate them for liquidated damages claims. Pet. App. 100a-105a. She asserted that further efforts to distribute funds were feasible because the parties could either "subpoena the records of big-box retailers" to provide additional notice or make further distributions to existing claimants. Pet. 103a-105a.

Second, Petitioner argued that the proposed *cy pres* distributions would compel speech in violation of the First Amendment because she did not agree with the

[4] CCAF is a serial objector to class-action settlements.

policy positions of the proposed recipients. Pet. 105a-107a.[5]

Petitioner did *not* argue that *cy pres* distributions of unclaimed funds are impermissible per se or that the Eighth Circuit's legal standard for reviewing such awards conflicted with other circuits' standard. Nor did she argue that (1) payments to claimants were unfair or inadequate; (2) the parties' notice efforts failed to meet Rule 23(c)(2)(B)'s requirement for the "best notice practicable under the circumstances"; (3) the method of processing class-member claims was onerous or otherwise impermissible under Rule 23; or (4) the proposed *cy pres* recipients did not meet the Eighth Circuit's requirement of a sufficient nexus to the action.[6]

D. The District Court rejected Petitioner's arguments and approved the settlement.

After a final-approval hearing, the District Court approved the settlement. Pet. App. 19a. It found that the parties negotiated the settlement "at arms-length" and that the "process used to identify and pay class members and the amount paid to class members" were "fair and reasonable for settlement purposes." Pet. App. 20a. It noted that there was only one objection and "even the Objector ha[d] not suggested that the amount of the settlement [was] inadequate or that the

---

[5] Petitioner also objected to class counsel's attorney's fees, but she does not pursue that issue in the Petition.

[6] Petitioner also did not argue, and there is no evidence to support, that the parties or their counsel had any special relationship with the proposed *cy pres* recipients that would implicate any potential conflict of interest.

notice or method of disseminating the notice was inadequate to satisfy the requirements of the Due Process Clause or was otherwise infirm." *Ibid.*

Addressing Petitioner's objections to the *cy pres* provisions, the District Court began by recognizing that Eighth Circuit law permits *cy pres* distributions of unclaimed funds only when it is infeasible to make further distributions to class members and additional distributions to existing claimants would effect a windfall. Pet. App. 22a. It then concluded that both were true in this case.

As to feasibility, the District Court found "that further efforts to identify class members or increase the claims rate [were] not feasible." Pet. App. 23a. It noted the evidence that the parties had engaged in extensive notice efforts and made several efforts to increase claims rates. *Ibid.* It found that any information obtained via Petitioner's suggested subpoenas to retailers would be "substantially duplicative" and that Petitioner had not shown that her proposal "would increase the percentage of class members aware of the settlement or otherwise increase the claims rate."[7] Pet. App. 23a-24a.

---

[7] Petitioner's claim that Monsanto stated at the final-approval hearing that "a supplemental outreach process to retailers would cost between $300,000 and $600,000" (Pet. 8) is false. Monsanto's counsel stated that the settlement administrator estimated it would cost $300,000 to $600,000 to send additional direct notice *assuming it already had the contact information in hand*. D. Ct. Doc. 74, at 16 (March 15, 2021). This was not an estimate of what it would cost to obtain that information, nor an affirmation that such information was attainable or would affect the claims rate.

The District Court next concluded that additional distributions to existing claimants would constitute a windfall because claimants were already receiving full compensation (likely *more* than full compensation). Pet. App. 24a-30a. It reached this conclusion in two steps.

First, the District Court rejected Petitioner's contention that Eighth Circuit law limited the "windfall" rule to cases with liquidated damages. Pet. App. 24a-26a. *BankAmerica*, it held, concluded that "when damages are liquidated, full compensation is necessarily 100% of those damages." *Id.* at 25a. That did not mean that further distributions were never a windfall in cases without liquidated damages. *Ibid.*

Second, the District Court found that the payments to claimants "constituted at least full (if not more) compensation." *Ibid.* Surveying relevant state laws, it held that the "appropriate measure" of damages was the "difference between what [class members] bargained for and what they received." *Id.* at 29a. Payments to claimants were more than that using either parties' expert's analysis, and Petitioner "did not profess to having any evidence on this issue." *Ibid.* The District Court thus concluded that further distributions to claimants would "constitute a windfall" and that the use of *cy pres* "to distribute unclaimed funds [was] permissible." *Id.* at 30a.

Finally, the District Court considered and rejected Petitioner's First Amendment arguments, noting that

---

Quite the contrary—counsel explained that the settlement administrator "d[id] not believe the [claims] numbers would materially change" and was "not sure we could readily get that [retailer] information." *Ibid.*

Petitioner did not contest that that the proposed recipients met the Eighth Circuit's requirement of a nexus to the action. *Id.* at 30a-31a. It held that because the *cy pres* provisions were created by the settlement agreement itself rather than by court order, there was no government compulsion as required to implicate the First Amendment. *Id.* at 31a (citing *Motor Fuel*, 872 F.3d at 1113-14).

E. The Eighth Circuit unanimously affirmed.

Petitioner appealed to the Eighth Circuit, which affirmed. Pet. App. 2a-12a. The Eighth Circuit explained that "unclaimed funds may only be distributed *cy pres* where existing class-member claimants have been fully compensated [such that further payments to claimants would effect a windfall] and further distribution to remaining class members is not feasible." Pet. App. 8a. And it concluded that the District Court's finding that those conditions were met was not an abuse of discretion.

First, it held that the District Court's finding that further efforts to increase class notice were infeasible was not an abuse of discretion given "the notice plan that had already been implemented, which advertised the settlement in a targeted way across numerous platforms and was revised twice in an effort to reach more consumers." *Ibid.*

Second, it agreed with the District Court that *BankAmerica* did not limit the use of *cy pres* to cases with fully-compensated liquidated damages. *Id.* at 9a. Rather, it "requires the district court to make its own assessment of the damages 'that would be recoverable' by class members before approving distributions of residual funds *cy pres*." *Ibid.* "The reversible error in *BankAmerica*," the Eighth Circuit explained, was

"that the district court had not determined the measure of class members' damages and whether they had been fully compensated before granting a *cy pres* distribution" of residual funds. The District Court, it explained, had done precisely that, and there was "no abuse of discretion in its conclusion" that claimants were fully compensated given the record before it. *Ibid.*

Finally, the Eighth Circuit rejected Petitioner's First Amendment arguments, because "class members have not been compelled to subsidize speech." *Id.* at 10a. While it recognized that residual settlement funds are the "property of the class," it noted that they "do not belong to any individual class member who has received his or her portion of the settlement fund." *Ibid.* And class members who did *not* file claims were not "compelled" to do anything, because they "could have filed a claim to collect the funds themselves or opted out of the settlement."[8] *Ibid.*

Petitioner sought *en banc* review, which the Eighth Circuit denied.[9]

---

[8] Petitioners' assertion that the Eighth Circuit did not "reconcile" this holding with Fifth Circuit's opinion in *Klier*, or the Eighth Circuit's endorsement of *Klier* in *BankAmerica* (Pet. 11) is pure fiction. Neither *Klier* nor *BankAmerica* addressed First Amendment issues at all. And, in any event, the panel specifically addressed both cases. App. 10a.

[9] Petitioner's request for *en banc* review, like her briefs before the Eighth Circuit panel, did *not* argue that *cy pres* distributions of unclaimed funds are categorically impermissible. Like Petitioner's brief to the panel, the *en banc* petition argued that the panel had misread existing Eighth Circuit

REASONS TO DENY THE PETITION

I. Petitioner's "circuit split" is illusory.

The Petition rests on the assertion that there is a "fracture" among the circuits along "several dimensions" that this Court must intervene to address. Pet. 13. But there is no circuit split, much less a split implicated by this case. Any purported "fracture" is of Petitioner's own making.

"Courts in every circuit, and appellate courts in most, have approved the use of *cy pres* for unclaimed class action awards."[10] Newberg & Rubinstein on Class Actions § 12:32. Courts likewise agree that payments to class members are preferable to *cy pres* distributions, and so unclaimed funds should be distributed *cy pres* only when further distributions to class members are either infeasible or unfair (such as when they would effect a windfall). See *Klier*, 658 F.3d at 475; *In re Lupron Mktg. & Sales Pracs. Litig.*, 677 F.3d 21, 32, 35 (1st Cir. 2012) (*Lupron*); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 176 (3d Cir. 2013) (*Baby Products*); *Ira Holtzman, CPA* v. *Turza*, 728 F.3d 682, 690 (7th Cir. 2013); McLaughlin on Class Actions § 8:15; see also *Google Street View,* 21 F.4th at 1115

---

precedent regarding the circumstances in which such distributions are permitted. Appellate Ct. Doc. 5177201 (July 13, 2022).

[10] This case involves the use of *cy pres* to distribute unclaimed funds and *not* so-called *cy pres*-only settlements. See *Frank* v. *Gaos*, 203 L. Ed. 2d 404, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting) ("Whatever role *cy pres* may permissibly play in disposing of unclaimed or undistributable class funds …. [t]his *cy pres*-only arrangement failed several requirements of Rule 23.").

(9th Cir. 2021) ("If it were feasible to distribute the settlement fund to class members, a *cy pres* settlement would not be employed.")

This consensus grew out of the American Law Institute's 2010 Principles of the Law of Aggregate Litigation ("ALI Principles"), which set forth the relevant standard succinctly:

> If the settlement involves individual distributions to class members and funds remain after distributions (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.

ALI Principles 3.07(b). Since then, court after court has adopted and cited the ALI Principles. See, *e.g.*, *BankAmerica*, 775 F.3d at 1063-65 (reciting and adopting the ALI Principles); *In re Pharm. Ind. AWP Litig.*, 588 F.3d 24, 35 (1st Cir. 2009) (reciting the ALI Principles (then in draft form) and holding that the *cy pres* distribution at issue complied with them); *Klier*, 658 F.3d at 475 & nn. 15-16 (reciting and applying ALI Principles); *Turza*, 728 F.3d at 689-90 (citing ALI Principles for proposition that unclaimed funds should be used for the class's benefit "to the extent that is feasible"); *Masters* v. *Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2007) (relying on ALI Principles (then in draft form)); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 n.2 (9th Cir. 2011) (citing ALI Principles). No

circuit has meaningfully departed from these principles, and the Eighth Circuit's opinion here certainly did not do so.

Each of the "dimensions" along which Petitioner claims there is a circuit split is illusory.

A. There is no circuit split on whether class members have a property interest in the settlement funds.

Petitioner's argument that the decision below split from the Fifth Circuit's opinion in *Klier* as to whether "class members have a property interest in the settlement proceeds" (Pet. 13) is baseless. The Eighth Circuit agreed with *Klier* nearly a decade ago that "settlement funds are the property of the class." *BankAmerica*, 775 F.3d at 1064. And the decision below *expressly* reaffirmed that principle. App. 10a (quoting *Klier* for the proposition that "settlement funds 'are the property of the class'").

This holding was not mere "lip service" to *Klier* as Petitioner suggests. Instead, it was an application of the same legal standard to different facts. *Klier* held that district courts may approve *cy pres* distributions of unclaimed funds when it is not "logistically feasible and economically viable" to make additional distributions and further payments to claimants would be a "windfall." See Pet. 13 (quoting *Klier*, 658 F.3d at 475). That is *precisely* what the Eighth Circuit held here: "[U]nclaimed funds may only be distributed *cy pres* where existing class-member claimants have been fully compensated [such that additional payments would be a windfall] and further distributions to remaining class members is not feasible." App. 8a. That represents legal uniformity between the Fifth and Eighth Circuits, not a circuit split, and certainly not a

split that any lower court recognizes. That *Klier* reversed the approval of a *cy pres* distribution does not mean there is a circuit conflict. Different outcomes sometimes—often—represent merely the application of uniform law to different facts.

Nor does the decision below create a split with the Second Circuit's decision in *Hyland* v. *Navient*, 48 F.4th 110 (2d Cir. 2022) (*Navient*). That decision addressed a different legal question. Petitioner suggests that *Navient* held settlement funds "never belonged" to the class. Pet. 14. If that were true, it would mean that *Navient* departed from the consensus position. But it is not true. *Navient* held that, in *that case*, the settlement fund did not belong "to class members *as damages*." 48 F.4th at 122 (emphasis added). That was because, under the 23(b)(2) settlement in *Navient*, class members "reserved their individual right to later sue for money damages." *Ibid.*

This case cannot represent a split from *Navient* because the decisions address different legal questions. The settlement under review in *Navient* did not use *cy pres* to distribute unclaimed funds in a 23(b)(3) class action, but was a 23(b)(2) action that funded a nonprofit with money never available for class-member claims. *Id.* at 121-22. The Second Circuit was presented with the question whether the "feasibility" analysis used by courts (including the Eighth Circuit) to address unclaimed funds applied in the 23(b)(2) context. *Id.* at 122 (concluding that objectors' argument that distributions to class members were feasible "misconstrue[d] the settlement fund as a damages award that was redistributed … through the *cy pres* doctrine"). That question is not relevant here, where all parties have always agreed the feasibility standard applies.

Petitioner's suggestion that there is a split with the Third Circuit fares no better. Petitioner first points to *In re Google Inc. Cookie Placement*, 934 F.3d 316 (3rd Cir. 2019) (*Google Cookie Placement*). Pet. 14. But that decision's discussion of whether money paid in settlement "belongs" to the class was dicta and, more importantly, like *Navient*, it was cabined to the context of a 23(b)(2) settlement. 934 F.3d at 328 ("[W]e see no reason why a *cy pres*-only (b)(2) settlement that satisfies Rule 23's certification and fairness requirements could not 'belong' to the class *as a whole*.") (emphasis added). That is not the situation here.

Petitioner's supposed split with *Baby Products* (Pet. 15) is even less compelling. There, the Third Circuit "joined other courts of appeals" in holding that *cy pres* could, under appropriate circumstances, be used to distribute unclaimed funds. *Baby Prods.*, 708 F.3d at 172 (citing cases from the First, Fifth, Seventh, and Ninth Circuits). The Third Circuit relied heavily on the ALI Principles—the same principles relied on by other circuits. *Id.* at 172-73. And it accepted the same rule that *cy pres* distributions are "most appropriate where further individual distributions are economically infeasible" and "where all class members submitting claims have already been fully compensated for their damages by prior distributions." *Id.* at 173, 176 (citing *Lupron*, 677 F.3d at 34-35). In short, the Third Circuit adopted the same legal principles that guided the decisions below in this case.

B. There is no circuit split on what constitutes "feasibility."

Implicitly recognizing the circuit courts' fundamental agreement that *cy pres* distributions of unclaimed

funds are appropriate when those funds cannot be feasibly distributed without a windfall, Petitioner next tries to manufacture a circuit split on what constitutes "feasibility." Pet. 16-17. But Petitioner misrepresents the holdings of both this case and the other cases she cites.

Petitioner first asserts that the Eighth Circuit's decision below held "that a court can consider [further] distribution infeasible if it cannot be made to *every* class member, rather than some class members." Pet. 16. That is not what the decision below held.

As to non-claiming class members, the decision below held that the District Court did not clearly err by finding that further efforts to induce claims were infeasible given the evidence showing that the parties had already expended millions of dollars on an extensive notice program that generated *hundreds of millions* of notice impressions.[11] Pet. App. 7a-8a ("Based on this record, however, the district court did not abuse its discretion by not requiring the parties to pursue this approach [retailer subpoenas] in addition to the notice plan that had already been implemented, which advertised the settlement in a targeted way across numerous platforms ...."). Its analysis in no way relied on whether it was possible to identify "every class member."

---

[11] Petitioner's assertion that the Eighth Circuit simply relied on the parties' "self-serving representations" (Pet. 16) is belied by the record. Plaintiffs submitted two detailed affidavits from the claims administrator describing the parties' extensive notice efforts. D. Ct. Doc. 58-2 (October 14, 2020); D. Ct. Doc. 65-2 (February 25, 2021). Petitioner submitted no evidence that her proposal would increase the claims rate.

As to existing claimants, the panel's analysis did not address "feasibility" at all. That is because the relevant question was not whether it was feasible to pay more to claimants—it plainly was—but whether such payments would constitute a windfall. The panel's analysis thus appropriately focused on whether claimants were "fully compensated." App. 9a.

Petitioner's description of the Ninth Circuit's law in this regard is not correct. She claims the Ninth Circuit holds that "courts may consider settlement funds eligible for *cy pres* distribution whenever a settlement fund cannot be spread among *every* member of the class." Pet. 16. None of the cases she cites support that assertion.

Lane v. *Facebook*, 696 F.3d 811, 821 (9th Cir. 2012) (*Lane*), for example, did not hold (as Petitioner claims) that class members distributions were infeasible because not every class member would receive payment. It did not need to address that question, because even the objectors "*concede[d]* that direct monetary payment to the class of remaining settlement funds would be infeasible …." *Id.*

In re Google Referrer Header Privacy Litig., 869 F.3d 737, 742 (9th Cir. 2017) (*Google Referrer*), which Petitioner says "reaffirmed" *Lane*'s holding, was vacated by this Court in *Frank* v. *Gaos*, so it is not even good law. *Frank* v. *Gaos*, 203 L. Ed. 2d 404, 139 S. Ct. 1041 (2019) (*Gaos*). But in any event, *Google Referrer* did not hold that payments to class member were infeasible, but that the average distribution would be *de minimis*. *Ibid.* To be sure, there remained questions about whether that justified a *cy pres*-only settlement—questions on which this Court granted certiorari in *Gaos*. But those questions are not presented

here, because this case does not involve a *cy pres*-only settlement.

Petitioner's reliance on *Google Street View* is also misplaced. That case did not hold that class member payments are feasible only when they can be made to every class member, but that, given the facts of that case, there was no "viable way to for a claims administrator to verify *any* claimant's entitlement to settlement funds." 21 F.4th at 1114. That was not, as Petitioner claims, because of defendant's insistence on a "burdensome claims process." Pet. 17. It was because, under the unique facts of that case, the court determined that the public could not know if they were class members, and thus even a *simple* claims process would be "pure speculation." 21 F.4th at 1115.

C. There is no circuit split on what would be a windfall.

Petitioner's assertion that there is disagreement between the Second, Fifth, Eighth, and Ninth Circuits on how to determine if distribution of unclaimed funds to existing claimants would be a windfall (Pet. 13-20) misreads all four circuits' decisions.

Petitioner first asserts that the Fifth Circuit held in *Klier* that courts determining whether further payments would be a windfall may consider only the "face of the complaint's allegations." Pet. 18. That is incorrect. In *Klier*, the relevant subclass—individuals that suffered serious personal injuries—had not received settlement payments sufficient to fully compensate them for their physical injuries. 658 F.3d at 477-78. The appellees did not contest that. The appellees argued that class members could be deemed "fully compensated" solely because they received the amount allocated to them in the settlement. *Id.* at 479. *Klier*

rejected that argument, explaining that the question is whether claimants are *actually* fully compensated, not just whether they received the amount contemplated by the settlement agreement. *Ibid.* *Klier* never held, or even suggested, that when considering whether claimants are fully compensated, courts must focus solely on the complaint and ignore unrebutted evidence as to the value of class members' claims.

Nothing in the Eighth Circuit's law—or the result in this case, which has nothing to do with physical injury—conflicts with *Klier*. To the contrary, the Eighth Circuit agreed with *Klier* nearly a decade ago that claimants are not "fully compensated" just because they receive the amounts due under a settlement agreement. *BankAmerica*, 775 F.3d at 1065. The decision below did not depart from that holding. The District Court expressly noted that its "full compensation" finding was "based on the claims and evidence presented," not simply the amount allocated to claimants by the settlement. App. 29a-30a. And as the Eighth Circuit held, that finding was supported by the record. Pet. App. 9a.

Petitioner's suggestion that the Second Circuit's decision in *Navient* and the Ninth Circuit's decision in *Google Referrer* further evidence a split in this regard (Pet. 19) makes even less sense. Both *Navient* and *Google Referrer* were 23(b)(2) settlements that did not involve the distribution of unclaimed funds. See *Navient*, 48 F.4th at 122; *Google Referrer*, 869 F.3d at 741. They therefore did not address what standard or evidence would be used to determine whether further payments to class members would be a windfall.

D. This case does not implicate any circuit split on conflicts of interest.

Petitioner briefly suggests that there is a circuit split on the "scrutiny required to avoid conflicts of interest in *cy pres*" and specifically whether courts may approve *cy pres* distributions when there is a "significant prior affiliation" between a proposed recipient and any party, counsel, or the court. Pet. 19.

Even if this could be categorized as a circuit split (and it should not be), this case is not the proper vehicle for the Court to address it, because Petitioner acknowledges that it is "not at issue" in this case. Pet. 19. No one has ever suggested that the *cy pres* recipients here lack the necessary nexus to the underlying case or were selected using improper or questionable methods. A putative circuit split that even the Petitioner admits this case does not implicate cannot justify granting certiorari.

Even this split is illusory. While the lower courts differ somewhat on how they articulate their standards for assessing *cy pres* recipients related in some way to the parties (which, again, are not implicated by this case), there is no circuit split. The Third Circuit does not hold, as Petitioner suggests, that *cy pres* "should not be ordered if there is 'a significant prior affiliation with any party, counsel, or the court.'" Pet. 19. Instead, it holds that, if there is such a prior affiliation, then the court should investigate to determine if there are "substantial questions about whether the recipients were chosen on the merits." *Google Cookie Placement*, 934 F.3d at 331. Such recipients thus can still be approved so long as the court finds that they were appropriate recipients on the merits. The Ninth Circuit, on the other hand, does not place any special

emphasis on prior relationships with the recipients and focuses solely on the nexus with the action—requiring a showing that the *cy pres* recipients align with "the objective of the underlying statute" and "the interests of the silent class members." *Google Street View*, 21 F.4th at 1120 (quoting *Six (6) Mexican Workers* v. *Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990)).[12]

E. Neither the District Court nor the Eighth Circuit "ignored" Rule 23(e)(2), and this Court need not review this case to address that putative error.

Lumped, for some reason, under her argument that there is a circuit split, Petitioner argues that the decision below "ignores Rule 23(e)(2)(C)(ii)'s requirement that district court consider 'the effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims.'" Pet. 20. Such a request for error correction does not merit this Court's review and, in any event, there was no error here.

The District Court specifically addressed "the provisions of Rule 23(e)(2)," including "the effectiveness of the claims process." App. 19a. And it found "with respect to the Rule 23(e)(2) factors," that "the process used to identify and pay class members and the amount paid to class members are fair and reasonable

---

[12] Petitioner's suggestion that *Navient* is relevant to this supposed split is incorrect. *Navient* did not address any relationship between the *cy pres* recipient and the parties or court, but an assertion that plaintiffs' counsel were in conflict with the class because a teacher's union had advanced counsel's fees. 48 F.4th at 122-23.

for settlement purposes." App. 20a. The Eighth Circuit affirmed, noting that the claims rate was consistent with claims rates seen in other consumer cases.[13] App. 6a; see also *Keil* v. *Lopez*, 862 F.3d 685, 687 (8th Cir. 2017) (noting that low claims rates are "hardly unusual" in consumer class actions and do not "suggest unfairness") (collecting cases). Neither court ignored Rule 23(e)(2).

II. The questions presented are fact-bound and unworthy of review under Rule 10, and Petitioner's broad objections to *cy pres* were not raised below and, in many cases, are not implicated by this case.

This case does not merit review on the basis of a circuit split, because there is no circuit split. Nor do the questions actually implicated by the decision below merit review on their own because they are fact-bound. Petitioner may disagree, for example, with the District Court's finding that further efforts to identify class members were infeasible, but that finding was unique to this case and the record before the District Court. Likewise, Petitioner may believe that further payments to claimants here would not be a windfall, but the District Court's finding in that regard was, *by its*

[13] Below, Petitioner largely cited Rule 23(e)(2) in arguments that the Parties should have subpoenaed retailers to gather more information for direct notice efforts. Pet. App. 100a. But Petitioner did not even *argue* that the parties' notice failed to meet with Rule 23(c)(2)(B)'s notice requirements for Rule 23(b)(3) class actions. See Pet. App. 23a ("The Court further reiterates that the Objector is not contending that the notice plan was inadequate or violated Due Process ….").

terms, based on the fact-bound "claims and evidence presented" in this case. Pet. 30a.

Recognizing this hurdle, Petitioner spends the back half of her Petition outlining several broad questions she claims the Court should address regarding *cy pres*. But none of those questions require this Court's review, and many are not implicated by this case.

A. The per se permissibility of *cy pres* awards is not at issue in this case.

Petitioner first argues that this Court should use this case as a vehicle to "sharply curtail if not flatly prohibit application of the *cy pres* doctrine to class-action settlements." Pet. 21; see also Pet. i (describing the question presented as "whether, or in what circumstances" a court may approve *cy pres* distributions). But the question whether *cy pres* distributions should be permitted at all is not at issue in this case. Petitioner did not argue below that *cy pres* distributions are per se impermissible (despite being represented by the same counsel), nor whether the Eighth Circuit's legal standard should be revisited. Instead, she disputed whether this case met with the Eighth Circuit's requirements for *cy pres*. This case is therefore not a good vehicle to address whether the Court should "sharply curtail" or "prohibit" the use of *cy pres* to distribute unclaimed funds. See *Travelers*, 549 U.S. at 455.

Petitioner also alludes to the Chief Justice's statement a decade ago in *Marek* v. *Lane*, 571 U.S. 1003, 1003 (2013) (*Marek*) that this Court "may need to clarify the limits" on *cy pres* in a "suitable case." Pet. 21. This is not a suitable case, because it does not raise many questions that *Marek* pointed to. The *cy pres* recipients in this case, for example, are well-established

entities, and this case would thus present no occasion to address "whether new entities may be established as part of such relief." *Marek*, 571 U.S. at 1003. Nor was there any challenge, by Petitioner or otherwise, to how the parties selected the *cy pres* recipients, their nexus to this case, or the District Court's role in that process. See *ibid.* (questions the Court may want to address include "how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on").

B. Whether *cy pres* in the class-action context is analogous to the trust context is irrelevant.

Petitioner's argument that *cy pres* developed in the trust context and does not "fit" in the class-action context (Pet. 21-22) is intellectually interesting, but it presents no meaningful question for this Court's review. The doctrine has been used in class actions for decades. And, as the discussion above shows, there is a well-developed body of case law about its use in that context to guide district courts' analysis. Any supposed mismatch between trust law and class-actions is theoretical, at best.

C. This case does not raise Petitioner's concerns about misplaced incentives.

Petitioner spends two pages arguing that *cy pres* can create improper incentives for class counsel. Pet. 22-24. But, as Petitioner herself concedes, she "did not raise issues of similar conflicts in this case." Pet. 24. Nor is there any evidence of a conflict here. This question, too, is not properly before the Court for review in this case.

Regardless, Petitioner's suggestion that *cy pres* poses some unique risk of conflict between class counsel and class members is unsupported. Certainly, there are principal-agent problems inherent in class-action cases (and, to some extent, in all cases). See Nicholas A. Bergara, *Nipping it in the Bud: Fixing the Principal-Agent Problem in Class Actions by Looking to Qui Tam Litigation*, 97 NYU L. Rev. 275, 278 (2022) ("[T]he very foundation of the class action system generates an inherent conflict of interest between class counsel and class plaintiffs…."). But there is already well-established law requiring district courts to scrutinize class-action settlements and independently determine whether they are fair, reasonable, and adequate. See, *e.g.*, 23(e)(2); Newberg & Rubinstein on Class Actions § 13:40 (summarizing the case law on the court's role in ensuring "that the class's own agents—its class representatives and class counsel—have not sold out its interests in settling the case"). Petitioner offers no reason why these standards are ill-suited to *cy pres* in particular. And, as discussed infra, her own authorities suggest that courts do not hesitate to step in if they feel the parties have prematurely resorted to *cy pres* distributions. There is no split of authority on this question, and it was not presented in this case, so this Court should not review it here.

D. Courts have uniformly rejected Petitioner's First Amendment arguments.

Petitioner and her counsel—echoed by amici—have raised the same First Amendment argument set forth in the Petition with courts around the country. Those courts have uniformly rejected it. See Pet. App. 9a-10a, 31a-32a, *Motor Fuel*, 872 F.3d at 1113-14; *Google Street View*, 21 F.4th at 1118-19; *Navient*, 48 F.4th at 122; *In re Polyurethane Foam Antitrust Litig.*, 178 F.

Supp. 3d 621, 624 (N.D. Ohio Apr. 13, 2016) ("CCAF's briefing on this novel issue is long on reasoning but noticeably short on supporting case law."); *Perkins* v. *Linkedin Corp.*, 2016 WL 613255, at *11 n.9 (N.D. Cal. Feb. 16, 2016).

There are two reasons for courts' unanimous rejection of the argument.

First, in cases like this one, there is no relevant state action that could violate the First Amendment—it is the parties' settlement agreement, not the court, that designates the recipients. See *Navient*, 48 F.4th at 122 ("The settlement agreement does not involve state action that implicates the First Amendment."); *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-05 (1982) ("Mere approval or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives ….").

Second, even if there were state action, there is no "compelled" speech because any class member who wishes to avoid "subsidizing" the *cy pres* recipients "can simply opt out of the class." *Google Street View*, 21 F.4th at 1118.

This Court recognized more than 30 years ago that an opt-out mechanism is enough to protect class members' rights so long as certain "minimal due process protection[s]" are provided, including notice, an opportunity to be heard, opt-out rights, and adequate representation. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). When those protections are provided—as they were here—absent class members are deemed by operation of Rule 23 to have consented to the class representatives acting on their behalf. *Id.* at 812-13. There is no reason, and no basis in the case

law, that such consent would not include the designation of *cy pres* recipients.[14] And there is no reason for this Court to take up a First Amendment argument that the lower courts have unanimously concluded lacks merit.

E. Other cases in which courts have rejected premature *cy pres* distributions show only that this Court need not intervene.

Petitioner cites several cases in which courts held that *cy pres* distributions were improper and additional funds were later distributed to class members. Pet. 26-28. But those cases show only that courts are effectively scrutinizing settlements to identify those instances in which further distributions to class members are feasible and fair. Those case apply settled law to different facts—they do not suggest any legal conflict this Court should resolve.

In *Baby Products*, for example, the parties did not provide the district court with any information on the amount of compensation distributed directly to the class. 708 F.3d at 175. And as the Third Circuit explained, most claimants were receiving less than 10 percent of their estimated damages. *Id.* at 176. It is thus no surprise that more payments were made to class members on remand. But that is a far cry from this case. Here, the claims administrator provided the district court with detailed information on the number

---

[14] In its amicus brief, the Manhattan Institute argues that this Court should revisit *Shutts* and consider whether to allow opt-out class actions at all. Manhattan Institute Amicus Br. 6-9. But no party argued—either below or in the Petition—that the opt-out class actions permitted by Rule 23(b)(3) are improper. That question simply is not presented by this case.

and amount of claims. D. Ct. Doc. 65-2 ¶ 22 (February 5, 2021). And no one disputes that claimants will receive more than three times Plaintiffs' estimate of best-case damages. D. Ct. Doc. 50-1 ¶¶ 7-8 (March 23, 2020).

Petitioners' other cases likewise reflect much different facts than this case, where it was clear that further distributions to non-claiming class members were feasible. In *Pearson* v. *NBTY, Inc.*, for example, the Seventh Circuit explained that the parties knew the identities and contact information for millions of class members that had not received payments, so that it was plainly feasible to make further distributions. 772 F.3d 778, 784 (7th Cir. 2014) (the *cy pres* recipient was "entitled to receive money … only if it's infeasible to provide that compensation to victims—which has not been demonstrated."). The same was true in *In re Bayer Corp.*, when the parties had purchase records and contact information for 700,000 class members and thus could feasibly distribute funds to them. No. 09-md-2023, Dkt. 218 at 1 (E.D.N.Y. Mar. 1, 2013). And the same was true in *Pecover v. Electronic Arts* (*Pecover*), when the parties knew names and addresses for 141,188 class members. 2013 WL 12121865, at *2 (N.D. Cal. May 30, 2013). That is not the situation here. Nothing in the record suggests that the parties have names, contact information, or purchase records for non-claiming class members that they have not tried to contact.[15]

[15] Despite lacking such information, and without the District Court's prompting, the parties purchased a list of millions of likely class members and sent them direct email no-

These cases show that courts are already scrutinizing class-action settlements and requiring further distributions to class members when they are receiving less than full compensation or there are feasible means to increase the number of claimants. That does not suggest error in *this* case nor any legal conflict between this decision and others.

F. Petitioner's claims of forum-shopping are unfounded.

Because Petitioner's claimed circuit split is illusory, her argument that this circuit split will lead to forum shopping makes little sense. She points to no evidence, nor even anecdotal examples, of class lawyers choosing their forum based on the law around *cy pres*. Her citations to a few cases in which the Ninth Circuit approved *cy pres* provisions do not suggest that plaintiffs are forum-shopping to move forward in the Ninth Circuit or, even if they are, that it has anything to do with the rules surrounding *cy pres*. In fact, her own authority shows that courts in that circuit, like in every circuit, have closely scrutinized allocation plans. See *Pecover*, 2013 WL 12121865, at *2 (cited at Pet. 27). That Petitioner can offer no evidence of forum shopping confirms that the supposed "fracture" among the courts of appeals is illusory.

CONCLUSION

There is no circuit split along the dimensions argued by Petitioner, and certainly none that the courts

---

tices *twice* in an attempt to ensure they had every opportunity to make claims. D. Ct. Doc. 58-2 ¶¶ 12-16 (October 14, 2020).

of appeals have recognized. The District Court's findings here would have warranted settlement approval in any federal court. Every court that has considered Petitioner's First Amendment argument has roundly rejected it. And Petitioner's attacks on the theoretical dangers of *cy pres* in skewing courts and parties' incentives were not raised below and, in any event, are not implicated by this case. The Court should deny the Petition.

Respectfully submitted.

JOHN J. ROSENTHAL
Counsel of Record
WINSTON & STRAWN LLP
1901 L Street, N.W.
Washington, DC 20036
(202) 282-5000
jrosenthal@winston.com

JEFF WILKERSON
WINSTON & STRAWN LLP
300 S. Tryon Street
Charlotte, NC 28202
(704) 350-7700

Counsel for Respondent Monsanto Company

FEBRUARY 2023