No. 22-554

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

BRIEF IN OPPOSITION OF RESPONDENTS LISA JONES, HORACIO TORRES BONILLA, AND KRISTOFFER YEE

MICHAEL LIN BAUM
BAUM HEDLUND ARISTEI & GOLDMAN, P.C.
11111 Santa Monica Blvd., Suite 1750
Los Angeles, CA 90025
(310) 207-3233

KIM E. RICHMAN
P. RENÉE WICKLUND
Counsel of Record
RICHMAN LAW & POLICY
1 Bridge Street, Suite 83
Irvington, NY 10533
(914) 693-2018
rwicklund@richmanlawpolicy.com

Attorneys for Respondents Jones, Torres Bonilla, and Yee

February 2023

QUESTION PRESENTED

Whether the Eighth Circuit correctly held that the district court acted within its discretion in approving *cy pres* distribution of unclaimed class-settlement funds based on the district court's factual findings that class members who filed claims would be fully compensated and that prompting additional claims would be infeasible.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules

Other Authorities

INTRODUCTION

In this consumer-fraud class action brought under Federal Rule of Civil Procedure 23(b)(3), defendant Monsanto agreed after arms-length settlement negotiations facilitated by a professional mediator to pay $39.55 million into a common fund from which aggrieved class members could recover their damages. The parties engaged in two extensive, court-approved notice campaigns that informed an estimated 82 percent of class members about the settlement. Hundreds of thousands filed claims. After carefully reviewing expert evidence and the governing law, the district court found that the claimants will be "fully compensated" and, indeed, will receive more than they could have recovered at trial. Pet. App. 26a.

Out of a class of millions, a single class member, petitioner Anna St. John, objected to the settlement. St. John did not argue that the amount of the settlement is unreasonable or that notice was inadequate. Instead, she objected to the parties' agreement that residual funds that remain after all class members who submitted claims have been fully compensated will be distributed to *cy pres* recipients that serve the interests of the absent class members. St. John did not argue for a different choice of *cy pres* recipients. She argued instead that the parties should have provided for further direct distributions to class members and that *cy pres* relief is compelled speech that violates the First Amendment.

The district court carefully examined the evidence and concluded, as a factual matter, that all class members who submitted claims would be fully compensated and that, given the broad reach of the two notice programs, it would not be feasible to identify

additional class members or increase the claims rate. The court also rejected St. John's First Amendment argument, observing that no court had embraced it. The court accordingly approved the settlement, and the Eighth Circuit affirmed, holding that the district court had acted within its sound discretion.

Although St. John's petition raises a grab bag of policy arguments about hypothetical abuses of *cy pres*, her gripes are untethered from the facts of this case, in which the courts approved *cy pres* based on principles accepted throughout the Circuits. Indeed, the principles around which the courts of appeals have coalesced in determining when *cy pres* is an appropriate use of residual funds in a Rule 23(b)(3) class action are designed to guard against precisely the risks St. John posits. As the courts of appeals agree and the decisions below expressly recognize, *cy pres* distribution of unclaimed funds is proper only where it provides an indirect benefit to the class, claimants have been fully compensated, and direct distributions to additional class members are infeasible.

Those consensus requirements are fully satisfied here, as the Eighth Circuit held. And to the extent that St. John seeks to relitigate the facts—in particular, the district court's record-based findings that a third notice program would not be useful in attracting additional claimants and that the settlement will fully compensate the existing claimants—such case-specific fact issues are unworthy of this Court's review.

Despite the consensus among the lower courts, the petition alludes vaguely to "several dimensions of *cy pres*" that have supposedly "fractured" the circuits. Pet. 13. In reality, with respect to settlements—like

the one at issue here—that contemplate residual *cy pres* distributions if unclaimed funds remain after all claimants have been fully compensated, courts of appeals apply uniform legal standards. And because disagreements about *other* potential applications of *cy pres* are not presented on the facts here, this case would provide no occasion for resolving them.

As to her First Amendment theory, St. John does not even suggest a split of authority, and there is none. Every court of appeals that has considered St. John's argument has rejected it, recognizing that the compelled-speech precedents on which she relies address entirely dissimilar circumstances. As the Eighth Circuit correctly held, the distribution of money remaining in the settlement fund does not represent speech on behalf of class members, like St. John, who have claimed their full share of the fund or on behalf of absent class members who have abandoned any claim to payment from the fund.

Finally, St. John suggests that the Court hold her petition pending resolution of the petition in *Yeatman v. Hyland*, No. 22-566. The role of *cy pres* in that Rule 23(b)(2) class action, however—where the defendant agreed to *cy pres* relief as a remedial measure in exchange for the relinquishment of class members' *non*-monetary claims and where the settlement neither paid nor extinguished individual damages claims—differs materially from the role of *cy pres* in this Rule 23(b)(3) class action, in which *cy pres* represents the "next best" use of unclaimed damages funds. Regardless of how this Court disposes of the *Yeatman* petition, it should deny the petition in this case.

STATEMENT

Factual Background

Respondents Lisa Jones, Horacio Torres Bonilla, and Kristoffer Yee (Plaintiffs) filed a class-action lawsuit against respondent Monsanto Company in February 2019. Pet. App. 2a. The lawsuit raised claims based on Monsanto's allegedly deceptive labeling of certain weedkiller products. *Id.* Monsanto's label stated that the products' active ingredient "targets an enzyme found in plants but not in people or pets"; Plaintiffs alleged that the label was misleading because the targeted enzyme "is in fact present in gut bacteria in both humans and animals." *Id.*

Eventually, the parties reached a settlement agreement. *Id.* at 15a. In exchange for a release of the class members' consumer-misrepresentation claims—but without releasing any personal injury claims—Monsanto agreed to change the product's label, as well as to pay $39.55 million into a common fund. *Id.* at 60a, 74a–76a. Class members who did not opt out of the settlement could submit an online claim form, with or without proof of purchase, and receive payment from the fund. *Id.* at 70a.

To determine how much a claimant should recover, the parties relied on previously commissioned expert estimates of the class members' damages. *Id.* at 2a–3a. Monsanto's expert estimated that the allegedly fraudulent label was responsible for at most 2.5 percent of a product's retail value, while Plaintiffs' expert put the figure at 7.9–15.9 percent. *Id.* at 3a. Drawing on these percentages, the parties initially agreed that each claimant would receive 10 percent of the average retail price of the products he or she

purchased. *Id.* Later, the parties increased this amount, providing in the final agreement that, funds permitting, each claimant would receive up to 50 percent of the average retail price—more than treble Plaintiffs' own expert's estimate of a best-case recovery at trial. *Id.* at 4a.

The agreement further provided for payment of attorneys' fees, administrative costs, and incentive awards for the named plaintiffs. *Id.* at 60a–61a, 68a. After these expenses and payments on all class-member claims were drawn from the fund, any amount remaining would be distributed among non-profit organizations that the parties mutually negotiated and that the district court approved. *Id.* at 73a–74a. The agreed-upon nonprofits all specialize in consumer-protection issues related to the lawsuit's underlying claims. *Id.* at 30a–31a.

The parties conducted an extensive, court-approved notice campaign to inform class members about the settlement. For ninety days over the summer of 2020, the parties advertised a preliminary settlement agreement via print publications, nation-wide news releases, online radio services, a settlement website and toll-free hotline, and digital notices targeting search-engine and social-media users interested in lawn care and gardening. *Id.* at 4a. The parties supplemented their efforts midway through the notice period by purchasing email distribution lists and using them to contact individual potential class members directly. *Id.* The claims administrator estimated that this initial notice campaign succeeded in reaching about 82 percent of the class members an average of two to three times each. *Id.*

After the parties finalized the settlement agreement in October 2020, they conducted another court-approved, ninety-day notice campaign. *Id.* at 4a–5a. The second campaign employed all the same forms of notice as the first one, including the use of purchased email distribution lists, and also incorporated new television and radio advertising. *Id.*

By the end of the second notice period on February 16, 2021, the claims administrator had received 285,399 claims accounting for slightly more than one million products. *Id.* at 5a. The parties estimate that, after duplicative or deficient claims are rejected, the remaining claims—for which each claimant will receive the maximum payment called for by the agreement (50 percent of the retail price)—will draw between $11.72 million and $13.34 million from the common fund. *Id.* Following payment of the claims, attorneys' fees, incentive awards, and administrative expenses, $14 million to $16 million will remain in the fund for *cy pres* distribution. *Id.*

District Court Decision

At the end of the second notice period, Plaintiffs filed a consent motion for final approval of the settlement agreement pursuant to Federal Rule of Civil Procedure 23(e)(2). *Id.* at 13a. A single class member, petitioner Anna St. John, objected. *Id.*

St. John had purchased a Monsanto product with the challenged label *after* Plaintiffs had filed this lawsuit, reached a settlement, and begun publicizing the settlement to the class. *Id.* at 4a, 95a–96a. St. John made several arguments in opposition to the settlement, only two of which she presses here. First, she argued that the settlement was inequitable because it would be feasible to distribute a greater

share of the common fund to class members, either by finding more claimants or by increasing the amount paid to existing claimants. *Id.* at 5a. Second, she argued that the *cy pres* award violated the First Amendment rights of the class members by compelling them to donate to the recipient organizations without their affirmative consent.[1] *Id.*

Following a fairness hearing, the district court approved the settlement. *Id.* at 13a. The court first held that the case was appropriate for class settlement. *Id.* at 18a–19a. It then held that the settlement satisfied Rule 23(e)(2)'s specific requirements and was "fair, reasonable, and adequate." *Id.* at 19a–21a. Specifically, the court found that the settlement "was achieved at arms-length," that class members' recovery was "reasonable … given the difficulties and risks of litigating the case to conclusion," and that "the process used to identify and pay class members" was "fair and reasonable." *Id.* at 19a–20a. Although St. John asserts that the district court "did not mention Rule 23(e)(2)(c)(ii)," Pet. 9, which requires a court to consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," the district court specifically identified "the effectiveness of the claims process" as a factor "favor[ing] approval of the settlement," Pet. App. 19a.

The court then considered, and rejected, St. John's objections to the *cy pres* award. *Id.* at 21a–32a.

---

[1] St. John also objected to the amount of the attorneys' fees. The district court approved the amount as "comfortably below the range frequently approved in class action settlements," Pet. App. 33a, and the Eighth Circuit affirmed, *id.* at 11a–12a. St. John does not argue that this ruling warrants review.

Quoting the Eighth Circuit's opinion in *In re BankAmerica Corp. Securities Litigation*, 775 F.3d 1060 (8th Cir. 2015), which in turn adopted the American Law Institute's recommended criteria for approving *cy pres* relief, *see id.* at 1063–64, the district court observed that "[b]ecause the settlement funds are the property of the class, a *cy pres* distribution to a third party of unclaimed settlement funds is permissible *only* when it is not feasible to make further distributions to class members except where an additional distribution would provide a windfall to class members." Pet. App. 22a (alteration in original; quoting 775 F.3d at 1064). Based on the record before it, the district court held that these criteria were satisfied.

As to St. John's argument that a greater share of the common fund could have been distributed to class members, *id.* at 22a–30a, the court determined that "further efforts to identify class members or increase the claims rate [were] not feasible," *id.* at 23a. The court noted that more than 80 percent of the class members had already been informed about the settlement pursuant to a notice plan that *nobody* challenged as inadequate. *Id.* The district court explained that St. John's proposal that the parties try to increase the claims rate by subpoenaing big-box retailers would be "substantially duplicative" of measures already employed and "unlikely to be effective (much less cost-effective)" given the undisputed facts that retailers are legally restricted from divulging certain purchaser information and that the proposal would not capture customers who paid cash or who purchased from smaller retailers. *Id.* at 23a–24a. Although the petition asserts that St. John presented "unrebutted evidence" of feasibility,

Pet. 7, the district court recognized that her purported evidence consisted entirely of "anecdotal examples" from "distinguishable" cases, Pet. App. 24a.

As for paying more to each claimant, the court found that the settlement agreement already assured each person "at least full (if not more) compensation" for their injuries, such that they had no "equitable claim to the remaining funds." *Id.* at 26a. Basing its conclusion on the specific "claims at issue and the evidence and arguments presented," the court conducted a detailed review of the relevant state laws and determined that, under those laws, the class members would not be entitled to recover the full price of the products they purchased because they "received and used [the products]; that is, they received some value from their purchase," and that value "would have to be accounted for in the damage calculation." *Id.* at 26a–27a. The court explained that "the fact that Plaintiffs sought full refunds" in the complaint "d[id] not change the fact that the proper measure of damages did not permit full refunds." *Id.* at 28a–29a. Because St. John had presented *no* evidence rebutting the parties' experts, the court found no basis for concluding that the class members' damages exceeded 15.9 percent of the price of the products they purchased. *Id.* at 29a–30a. Thus, because the settlement offered class members *50 percent* of the purchase price, three times their maximum actual damages, the court found that the claimants would be "fully (or more than fully) compensated" and that "further distributions would constitute a windfall" beyond the one the claimants were already set to receive. *Id.* at 30a.

The court also rejected St. John's "novel" First Amendment argument, noting that she had cited "no

authority (other than cases about compelled speech in other contexts) to support" it. *Id.* at 32a. The court explained that the remaining portion of the settlement fund was not "the property of any single class member," so its distribution to *cy pres* recipients did not represent compelled speech on behalf of any class member. *Id.* In addition, agreeing with the Tenth Circuit's opinion in *In re: Motor Fuel Temperature Sales Practices Litigation*, 872 F.3d 1094 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1299 (2018), the court held that the *cy pres* award did not implicate the First Amendment because it arose from the parties' privately negotiated settlement agreement and not "government compulsion." *Id.* at 31a.

Court of Appeals Decision

St. John appealed, and the Eighth Circuit affirmed, holding that the district court had acted within its discretion in approving the settlement. "Based on th[e] record" before it, the court held that "[t]he district court did not abuse its discretion in concluding that notice to the class was sufficient in light of the comprehensive notice plan and the estimated results from the claims administrator." *Id.* at 6a–7a. Nor, the court held, was the district court required to reject the settlement for failing to award the claimants 100 percent of the purchase price of the products they bought. *Id.* at 8a–9a. Acknowledging that claimants must be "fully compensated" before *cy pres* distribution is appropriate, the court found "no abuse of discretion" in the district court's finding that claimants' receipt of 50 percent of the purchase price under the agreement *would* fully compensate them, especially given *undisputed* expert evidence that recoverable damages were no more than 15.9 percent of the purchase price. *Id.* at 9a.

The court of appeals also rejected St. John's First Amendment theory. *Id.* at 9a–11a. It observed that class members who had already claimed their share of the common fund had no claim on the remainder and that absent class members, all of whom "could have filed a claim to collect the funds themselves or opted out of the settlement," had forgone the opportunity to claim an ownership interest in any particular share of the residual funds. *Id.* at 10a. Accordingly, the court held, no class member had "been compelled to subsidize speech." *Id.* The court did not address Plaintiffs' and Monsanto's arguments that the *cy pres* distribution did not implicate the First Amendment because it was not state action.

The Eighth Circuit denied St. John's petition for panel rehearing and rehearing en banc. *Id.* at 42a.

REASONS FOR DENYING THE WRIT

I. This case implicates no split of authority.

The crux of St. John's position is that *cy pres* awards in a Rule 23(b)(3) settlement are "not appropriate when any reasonable opportunity exists to compensate class members directly for their injuries." Pet. 2. The courts of appeals, including the Eighth Circuit, agree with St. John's statement. Applying that uniformly accepted principle, the courts below found, based on the record, that the settlement will directly and fully compensate all claimants for their injuries, and that it would be infeasible to prompt additional claims. Pet. App. 6a–9a, 23a–26a. And although the lower courts rejected St. John's First Amendment theory, that issue has likewise generated no disagreement among the Circuits. Accordingly, this Court's intervention is unnecessary.

A. The courts of appeals agree that *cy pres* distribution of residual settlement funds must be limited to situations where existing claimants have been fully compensated and increasing the claims rate is infeasible.

1. As the Eighth Circuit recognized, there are "myriad possible reasons" why a class settlement might contain residual funds at the end of a claims process. Pet. App. 11a. Faced with the question of how to dispose of those funds, courts of appeals have uniformly accepted that *cy pres* distribution "to a charity whose mission coincide[s] with, or at least overlap[s], the interest of the class" can be an appropriate option. *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 676 (7th Cir. 2013). As the Third Circuit has explained, "[r]eversion to the defendant risks undermining the deterrent effect of class actions," while properly targeted *cy pres* relief "preserve[s] the deterrent effect" and serves "the interests of class members, including those absent members who have not received individual distributions." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013). St. John does not identify a single court that agrees with her suggestion that *cy pres* is categorically inappropriate in class-action settlements. Pet. 21–22.

That said, courts have been sensitive to the risk St. John emphasizes (but that "admittedly" is "not raise[d] here," *id.* at 24): that attorneys negotiating *cy pres* terms, like other class-settlement terms, might not always have incentives to act in the class's best interest. *Id.* at 22–24; *see, e.g.*, *In re Baby Prods.*, 708 F.3d at 173 (urging courts to apply "increased scrutiny" to *cy pres* awards where there may be "a potential conflict of interest between class counsel and

their clients"); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011) (cautioning against *cy pres* selection processes that "may answer to the whims and self interests of the parties, their counsel, or the court"); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) (reminding "district judges presiding over [class] actions" to "give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole"). But what St. John fails to mention is that lower courts—including the Eighth Circuit—have met this potential risk head-on by coalescing around a widely agreed set of principles that meaningfully address it. *See BankAmerica*, 775 F.3d at 1063–64 (citing Am. Law Inst., Principles of the Law, Aggregate Litigation § 3.07 (2010)).

First, rather than allowing attorneys to use *cy pres* to "promote their own personal, financial, political, or charitable preferences," Pet. 23, courts scrutinize proposed *cy pres* recipients—just as the district court did here—to ensure the settlement funds will be put "to [their] next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class," *Nachshin*, 663 F.3d at 1038 (quoting *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007)). The courts of appeals agree on this approach. *See, e.g.*, *Holtzman v. Turza*, 728 F.3d 682, 689 (7th Cir. 2013) (rejecting *cy pres* award to "a worthy organization" that nevertheless did not "directly or indirectly benefit … the victims" of the defendant's alleged misconduct); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 196 (5th Cir. 2010) (refusing to approve a *cy pres* award without a "specific proposal" that would allow the court to assess

the proposed recipient's suitability); *In re "Agent Orange" Prod. Liab. Litig. MDL No. 381*, 818 F.2d 179, 186 (2d Cir. 1987) (requiring that settlement funds be put to uses "consistent with the nature of the underlying action"). As the Eighth Circuit has explained, residual settlement funds "should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated." *In re: Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002).

Second, countering St. John's concern that attorneys may be "financially indifferent over whether a settlement is structured to compensate their clients or to funnel settlement proceeds to third parties," Pet. 23, courts recognize that "a *cy pres* distribution of unclaimed settlement funds is appropriate only when it is not feasible to distribute those funds to any party to the class action who has a persuasive equitable claim to those funds," *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 n.17 (5th Cir. 2011). On this point, too, the courts of appeals are in accord. *See, e.g.*, *In re Google Inc. Street View Elec. Commc'ns Litig.*, 21 F.4th 1102, 1115 (9th Cir. 2021) ("If it were feasible to distribute the settlement fund to the class members, a *cy pres* settlement would not be employed."); *BankAmerica*, 775 F.3d at 1064–65 (8th Cir.) (reversing approval of a class settlement with a *cy pres* component where, "from the perspective of administrative cost, a further distribution to the class was clearly feasible," albeit "costly and difficult"); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014) (limiting *cy pres* distributions to "money that can't feasibly be awarded [directly] to the intended beneficiaries"); *Masters*, 473 F.3d at 436 (2d Cir.)

(limiting *cy pres* distributions to circumstances where it is "onerous or impossible to locate class members" or where "each class member's recovery would be so small as to make an individual distribution economically impracticable"); *cf. In re Baby Prods.*, 708 F.3d at 173 (3d Cir.) (noting that "direct distributions to the class are preferred over *cy pres* distributions" and that "*cy pres* distributions are most appropriate where further individual distributions are economically infeasible").

Third, courts protect absent class members by allowing settlements to prefer indirect, "next best" *cy pres* relief for those class members over additional "windfall" payments to existing claimants who "have already been compensated for their losses." *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 34–35 (1st Cir. 2012). This principle is "well accepted" in the courts of appeals. *Id.* at 35; *see, e.g.*, *In re Baby Prods.*, 708 F.3d at 176 ("agree[ing]" with "[c]ourts of appeals [that] have approved *cy pres* distributions where all class members submitting claims have already been fully compensated for their damages"); *Klier*, 658 F.3d at 475 n.17 (noting that "[a] party whose liquidated-damages claim has been fully satisfied cannot make a persuasive equitable claim to any residual settlement funds," such that a settlement may choose *cy pres* relief over additional direct relief to such a party). And again, the Eighth Circuit agrees. *See BankAmerica*, 775 F.3d at 1064.

2. The decisions below reflect straightforward application of these consensus principles. First, the district court agreed that the *cy pres* distribution "must be for the next best use for indirect class benefit and for uses consistent with the nature of the underlying action." Pet. App. 30a–31a (quoting

BankAmerica, 775 F.3d at 1067). The court noted that St. John had "not contend[ed] that the recipients in this case fail to satisfy these standards," *id.* at 31a, and St. John did not challenge this point on appeal.

Second, both the Eighth Circuit and district court recognized that "unclaimed funds may only be distributed *cy pres* where existing class-member claimants have been fully compensated and further distribution to remaining class members is not feasible." *Id.* at 8a; *see id.* at 22a. The district court found as a factual matter that distribution to uncompensated class members would be infeasible here, *id.* at 23a, and the Eighth Circuit saw no abuse of discretion in that case-specific finding, *id.* at 6a–8a. Contrary to St. John's claim that the district court relied on the "settling parties' self-serving" and "empirically baseless" representations in reaching this holding, Pet. 16, the district court took considerable evidence on the parties' extensive notice programs, including from the neutral, third-party claims administrator. As for providing additional payments to the existing claimants, the district court relied on unrebutted expert evidence and a detailed review of the relevant state law to find that the settlement would assure the claimants "full (if not more) compensation," *id.* at 26a, and again the Eighth Circuit found "no clear error of judgment" in this factual ruling, *id.* at 9a. St. John apparently disagrees, but the case-specific application of established legal principles to a particular set of facts is not a matter that warrants this Court's review. S. Ct. R. 10.

3. Although St. John does not identify a single judicial opinion that has called into question the universally accepted principles that the district court

and Eighth Circuit applied, she alludes vaguely to "several dimensions" of *cy pres* that have "fractured" the courts of appeals. Pet. 13. The purported fractures are illusory and, in any event, largely go to issues that have little connection to the facts and circumstances of this particular case.

First, St. John contends that the Fifth and Seventh Circuits disagree with the decision below, as well as with the Second and Third Circuits, on whether residual settlement funds proceeds are the property of the class. Pet. 13–16. She is wrong. As the Fifth Circuit has explained, and as the decision below agreed, because "[e]ach class member has a constitutionally recognized property right in the claim or cause of action that the class action resolves," settlement funds in a Rule 23(b)(3) class action belong to the class members. *Klier*, 658 F.3d at 474; *see* Pet. App. 10a (citing *Klier*). Where existing claimants will be fully compensated and direct distributions to additional class members are infeasible, though, the circuits agree that *cy pres* is permissible because no class member who is fully compensated has an equitable property interest in an additional distribution. *See BankAmerica*, 775 F.3d at 1064 (8th Cir.); *Pearson*, 772 F.3d at 784 (7th Cir.); *In re Baby Prods.*, 708 F.3d at 172 (3d Cir.); *Klier*, 658 F.3d at 475 (5th Cir.); *Masters*, 473 F.3d at 436 (2d Cir.); *see also In re Citigroup Inc. Sec. Litig.*, 199 F. Supp. 3d 845, 848 (S.D.N.Y. 2016) (citing *Klier*).

St. John bases her claimed conflict regarding the ownership of Rule 23(b)(3) settlement funds principally on two Second and Third Circuit decisions addressing Rule 23(b)(2) settlements. Citing *Hyland v. Navient Corp.*, 48 F.4th 110 (2d Cir. 2022), *cert. pending sub nom. Yeatman v. Hyland*, No. 22-566, St.

John argues that the Second Circuit disagrees with the principle that settlement funds belong to the class. St. John quotes the court as saying that the "settlement fund" in that case "never belonged to class members as damages," Pet. 14 (quoting *Hyland*, 48 F.4th at 122), but neglects to explain that the funds did not belong to the class "as damages" because, under the terms of the Rule 23(b)(2) settlement at issue, "the class members expressly reserved their individual right to later sue [the defendant] for money damages," *Hyland*, 48 F.4th at 122. In the context of Rule 23(b)(3) class actions like this one, the Second Circuit limits the availability of *cy pres* distribution to the same circumstances as do the other courts of appeals. *See Masters*, 473 F.3d at 436.

St. John's assertion that *In re: Google Inc. Cookie Placement Consumer Privacy Litigation*, 934 F.3d 316 (3d Cir. 2019), departs from the view that class-settlement funds belong to the class is incorrect for the same reason. In that case, the Third Circuit observed that a settlement fund in a class action certified only under Rule 23(b)(2) "'belong[s]' to the class *as a whole*, and not to individual class members as monetary compensation" because a "(b)(2) class … does not involve individualized determinations of liability or damages, … or even require that individual class members be ascertainable." *Id.* at 328. The principles guiding settlements of Rule 23(b)(2) class actions are not at issue in this case, which settles damages claims in a Rule 23(b)(3) class action. The Third Circuit in *In re: Google Inc. Cookie Placement* recognized the important difference between Rule 23(b)(2) and Rule 23(b)(3) class settlements, reversing approval of the proposed Rule 23(b)(2) settlement because the

settlement purported to extinguish class members' individual damages claims. *See id.* at 331–32.

Indeed, when it comes to "Rule 23(b)(3) *cy pres* distributions like the one here," Pet. 15, St. John quickly contradicts her assertion that the Third Circuit does not treat a settlement fund as the property of the class. Citing *In re Baby Products*—a decision upon which *In re: Google Inc. Cookie Placement* expressly relied, *see* 934 F.3d at 328—St. John pivots to claim that the Third Circuit has actually *rejected* a more "permissive approach" because, in *In re Baby Products*, the Third Circuit reversed approval of a settlement and remanded for further fact finding on fairness. Pet. 15. The petition overlooks, though, that *In re Baby Products* "join[ed] other courts of appeals in holding that a district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury." 708 F.3d at 172. The court reversed not because of the fact or size of the *cy pres* distribution but because the attorneys had not provided the district court with information necessary to assess the settlement's fairness. *Id.* at 175–76.

Second, building off a mischaracterization of the decision below, St. John contends that courts "differ wildly" on the circumstances under which direct distributions to additional class members are infeasible. Pet. 16. The Eighth Circuit, however, did not hold "that a court can consider [further] distribution infeasible if it cannot be made to *every* class member, rather than some [additional] class members," as the petition suggests. *Id.* Rather, the court expressly acknowledged—in line with existing precedent of the

Eighth Circuit and other courts—that *cy pres* relief is appropriate only after the parties have pursued "reasonable and effective way[s] to get relief to class members." Pet. App. 7a; *see BankAmerica*, 775 F.3d at 1064–65 (requiring parties to pursue even "costly and difficult"—but feasible—means of identifying further potential claimants). And the Eighth Circuit held, "[b]ased on this record," that the district court did not abuse its discretion in making the factual finding that St. John's proposals for identifying additional potential claimants would be redundant and ineffectual. Pet. App. 7a–8a; *see id.* at 23a (basing a finding of infeasibility on the fact that "more than 80% of the class members ha[d] been notified of the settlement" and the lack of evidence that "there are feasible or cost-effective means of increasing the efficacy of notice or of increasing the response rate"). Contrary to St. John's characterization, the Eighth Circuit's opinion cannot reasonably be read to suggest that the court believed there were measures that would be effective in identifying more class members but rejected those measures because they would not identify "every" additional prospective class member.

Relatedly, St. John claims that the Ninth Circuit applies a different feasibility standard under which "a *cy pres*-only arrangement" is permissible where direct distribution "would result in only '*de minimis*' payments" to class members. Pet. 16 (citing *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012)). The merits of such a standard, however, are not implicated here. This case does not concern a "*cy pres*-only arrangement." The settlement in this case uses *cy pres* as a mechanism for distributing *residual* funds, and neither the parties nor the courts below relied on the

small size of class members' individual damages awards as a reason for *cy pres*.

Likewise, St. John errs in claiming that the decision below departed from the Fifth Circuit's decision in *Klier*—a decision with which both the Eighth Circuit and district court expressly agreed. Pet. App. 8a, 25a. According to St. John, *Klier* permits *cy pres* distribution of residual funds only where class members with "*liquidated*-damages claims are '100 percent satisfied,'" Pet. 18 (emphasis added; quoting *Klier*, 658 F.3d at 475), not where, as here, class members' *un*liquidated damages claims will be fully satisfied. Yet *Klier*'s holding that additional direct distributions to class members with fully satisfied *liquidated* damages claims represents a windfall—a holding explicitly endorsed by the court below, Pet. App. 8a—hardly implies that distributions to class members who have been fully compensated for *unliquidated* damages claims do *not* represent a windfall. *Klier* did not address unliquidated damages claims at all. Nothing in *Klier* suggests *cy pres* is always improper for such claims, and St. John identifies no opinion suggesting it is. To the contrary, courts of appeals—including the Fifth Circuit itself—regularly hold that class members who have been fully compensated for unliquidated damages claims are not entitled to additional pro rata payments from a common fund. *See, e.g.*, *In re Lupron*, 677 F.3d at 34 (1st Cir.) (holding that the district court did not abuse its discretion when it made a "reasonable estimate" of the class members' damages and found *cy pres* distribution appropriate after all claimants had been paid out according to this estimate); *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 811–12 (5th Cir. 1989) (holding that class members had "no

further legal rights" in a settlement fund after "all class members who presented their claims received the full payment due them" on their Title VII discrimination claims), *cited in Klier*, 658 F.3d at 475 n.17.

Finally, the other disagreements that St. John purports to identify are irrelevant here. She claims courts are "split on the scrutiny required to avoid conflicts of interest in *cy pres*" but admits that this question is "not at issue in this particular case." Pet. 19. She next maintains that "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,'" *id.* at 20, but the district court expressly referenced "the effectiveness of the claims process" in approving the settlement, Pet. App. 19a. St. John does not identify any way in which the district court's effectiveness assessment diverged from the approach of any other court. And while St. John briefly alludes in her statement of the case—but not in her argument—to a supposed split of authority as to whether district courts may factor the value of *cy pres* relief into the calculation of attorneys' fees, Pet. 9, St. John does not seek review of the Eighth Circuit's ruling that the district court acted within its discretion in approving the fee award.

B. Every court of appeals to have considered St. John's First Amendment theory has rejected it.

It is unclear whether St. John seeks review of the Eighth Circuit's First Amendment ruling. Pet. i (noting the constitutional ruling but seeking review

only of "[w]hether, or in what circumstances, a court may approve a settlement as 'fair, reasonable, and adequate' under Rule 23(e)(2)"); *id.* at 24–26 (suggesting the Eighth Circuit "improperly dismissed" St. John's First Amendment concerns). Assuming that she does, review is unwarranted. As the petition recognizes, Pet. 26, every circuit that has considered her compelled-speech argument has rejected it. *See Hyland*, 48 F.4th at 122 (holding that approval of a private settlement agreement is not state action that implicates the First Amendment); *In re: Motor Fuel*, 872 F.3d at 1113–14 (same); *see also In re Google Inc. Street View*, 21 F.4th at 1118–19 (holding that *cy pres* distribution is not compelled speech because class members may opt out of the settlement). The decision below, far from contributing to a circuit split, only reinforces judicial consensus.

II. The decision below is correct.

Review is also unwarranted because the Eighth Circuit's opinion was correct. Although St. John goes on at length about what she views as abuses of the *cy pres* mechanism, *see* Pet. 26–30, conspicuously absent is any argument that the district court's decision to approve the settlement in *this* case represented an abuse of discretion.

In reaching its conclusion that the settlement here was fair, reasonable, and adequate, the district court took seriously its "role as a guardian for the absent class members." Pet. App. 18a. It recognized the importance of "tailoring a *cy pres* distribution to the nature of the underlying lawsuit," *id.* at 30a (quoting *In re: Airline Ticket Comm'n*, 307 F.3d at 683), and observed that St. John had not challenged the court-approved *cy pres* recipients as inappropriate in this

respect, *id*. at 31a. The court acknowledged that *cy pres* relief is appropriate "*only* when it is not feasible to make further distributions to class members" without creating a windfall, *id*. at 22a (quoting *BankAmerica*, 775 F.3d at 1064), but it recognized that more than 80 percent of the class members had already been notified of the settlement, that St. John did not "contend[] that the notice plan was inadequate," and that St. John's proposed method of augmenting the notice plan would have been "substantially duplicative" of measures the parties had already adopted, *id*. at 23a–24a.

Further, the court took care to ensure that the existing claimants were "fully compensated" before authorizing *cy pres* distribution. *Id*. at 26a. In doing so, the court carefully surveyed unrebutted expert evidence and the relevant state law to reach a best-case estimate of class members' damages. *Id*. at 26a–30a. Finding no basis in the record for concluding that the class members could recover more than 15.9 percent of the relevant products' purchase price at trial, the district court reasonably concluded that the 50 percent payments the claimants will receive under the settlement will more than fully compensate them. *Id*. at 29a–30a. The court accordingly determined that the parties were not required to make additional payments to those individuals.

St. John does not meaningfully challenge any of this reasoning. Instead, she suggests that the settlement was unreasonable simply because of the size of the *cy pres* award and the fact that only 2–3 percent of the class members filed claims. Pet. 1. But for various reasons, the percentage of class members who file claims in consumer class actions is often low. *See In re Equifax Inc. Customer Data Sec. Breach*

Litig., 999 F.3d 1247, 1259 (11th Cir. 2021); *Pearson*, 772 F.3d at 782. Again, St. John offers no reason to doubt the district court's considered factual finding, based on the evidentiary record, that it would have been infeasible to increase the claims rate. Nor—that being so—does she explain how the parties should have disposed of the substantial unclaimed funds other than *cy pres* distribution, given the district court's well-supported factual finding that making additional pro rata payments to existing claimants would create a windfall.

The courts below also correctly rejected St. John's constitutional argument. As the Eighth Circuit recognized, no class member is compelled to subsidize speech under the terms of the settlement: those class members who have filed claims will be able to draw full compensation out of the fund and so have no property interest in the remainder, while those class members who have not filed a claim have no interest in a share of the fund. Pet. App. 10a. The residuum has to go *somewhere*. *See* Am. Law Inst., Principles of the Law, Aggregate Litigation § 3.07 cmt. b (stating that *cy pres* "is preferable to other options available to a court"—such as reversion to the defendant or escheat to the state—"when direct distributions are not viable"). When that is the case, the disposition of the funds, whoever receives them, cannot reasonably be described as a compelled subsidy from persons who have received full payment of their own interest in the funds or who have never asserted any interest in them—or who, like St. John, chose to take action that qualified her for class membership only after the settlement terms had been widely publicized. *See* Pet. App. 95a.

Although St. John characterizes the Eighth Circuit's ruling as inconsistent with this Court's opinion in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), Pet. 26, *Janus* is not analogous to this case. As the Eighth Circuit explained, *Janus* "involved automatic deductions taken from employees' pay-checks." Pet. App. 10a. In contrast, as the courts of appeals agree, a Rule 23(b)(3) *cy pres* distribution "involves funds that … could not feasibly be paid to class members." *Id.* (quoting *In re Google Inc. Street View*, 21 F.4th at 1118–19). The distributions of funds in this case, unlike the ones in *Janus*, do not represent "money 'taken' from any" person who would otherwise get it. *Id.* The petition does not address this obvious distinction.

In addition, St. John argues that the *cy pres* distribution constitutes state action. Pet. 26. The Eighth Circuit expressed no view on this point. In any event, this Court has held that a state actor's "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives." *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982). And while *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), held that "*mandatory* class actions" in which members have no right to opt out can "implicate … due process," *id.* at 846 (emphasis added), the petition does not make a due process argument, and *Ortiz* did not address either the First Amendment or the state-action doctrine. St. John cites no authority for the proposition that a district court's approval of a private agreement constitutes state action where, as here, class members have the opportunity to decide whether to be bound by its terms.

III. Regardless of the disposition of the petition in *Yeatman*, the Court should deny the petition in this case.

In the petition's conclusion, St. John suggests, as an alternative to granting the petition in this case, that the Court could hold the petition pending disposition of the petition in *Yeatman v. Hyland*, No. 22-566. Pet. 31. The *Yeatman* petition, like the petition here, asks "[w]hether, or in what circumstances, a court may approve a settlement as 'fair, reasonable, and adequate' under Rule 23(e)" where the settlement includes a *cy pres* award. *Compare* Pet. i, *with* Pet. i, *Yeatman v. Hyland*, No. 22-566. And the petitions, submitted by the same counsel, use much identical language throughout. These strategic similarities in drafting, however, obscure meaningful differences between the two cases.

Yeatman, unlike this case, involves a settlement of a class action that was certified under Federal Rule of Civil Procedure 23(b)(2), which provides only for injunctive or declaratory relief. As is to be expected in a Rule 23(b)(2) class action, the settlement does not provide damages payments to individual class members. *See Hyland*, 48 F.4th at 114. Rather, the defendant in *Yeatman* agreed to injunctive relief requiring implementation of several reforms to its business practices and to pay $2.25 million to "establish a nonprofit organization" to help counter ongoing effects of its past wrongdoing. *Id.*; *see id.* at 122 (explaining that the settlement fund was not "a damages award that was redistributed to [a nonprofit] through the *cy pres* doctrine," but was a remedy for class members who agreed to give up non-monetary claims). Thus, *Yeatman* presents fundamentally different questions than the petition in this case. *See*

Pet. 17–18, *Yeatman*, No. 22-566 (emphasizing that in that case "[t]he settlement is not a hybrid [form] of relief; rather, every penny of the net settlement fund is being paid to [the] *cy pres* recipient").

Here, the district court applied uncontroversial legal principles to approve *cy pres* distribution of unclaimed settlement funds after finding that it would be infeasible to increase the claims rate and that existing claimants had been fully compensated. Nothing this Court might say about the dissimilar circumstances in *Yeatman* will call that ruling into question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL LIN BAUM
BAUM HEDLUND ARISTEI & GOLDMAN, P.C.
11111 Santa Monica Blvd., Suite 1750
Los Angeles, CA 90025
(310) 207-3233

KIM E. RICHMAN
P. RENÉE WICKLUND
Counsel of Record
RICHMAN LAW & POLICY
1 Bridge Street, Suite 83
Irvington, NY 10533
(914) 693-2018
rwicklund@richmanlawpolicy.com

Attorneys for Respondents Jones, Torres Bonilla, and Yee

February 2023