No. 22-566

# In the Supreme Court of the United States

WILLIAM YEATMAN, PETITIONER

vs.

KATHRYN HYLAND, ET AL., RESPONDENTS

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF RICHARD ESTLE CARSON III IN SUPPORT OF WILLIAM YEATMAN'S PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Second Circuit affirmed Rule 23(e)(2) approval of a *cy pres* class-action settlement that paid no money to the class of student-loan borrowers, but millions of dollars to form a new organization operated by individuals affiliated with class counsel and the teachers' union secretly funding the litigation. Class members will receive no pecuniary benefit from the $2.4 million settlement fund, no incremental benefit from the formation of the new organization, and many will not even realize any benefit from the settlement's prospective injunctive relief because they no longer do business with the defendant.

The question presented is:

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

## STATEMENT OF RELATED PROCEEDING

Respondent Richard Estle Carson III, who like William Yeatman was an appellant before the Court of Appeals, filed his own certiorari petition in *Carson v. Hyland, et al.*, No. 22-____, on January 5, 2023.

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## STATEMENT SUPPORTING WILLIAM YEATMAN'S PETITION FOR A WRIT OF CERTIORARI

Respondent Richard Estle Carson and William Yeatman both were objectors in the District Dourt, and appellants before the Court of Appeals. Carson respectfully submits that Yeatman's certiorari petition should be granted.[1] The issue is an important one that deserves this Court's attention, and this case provides the ideal vehicle.

Yeatman's petition describes how this case was settled on terms that provide no meaningful benefit to the vast majority of class members, instead creating a new nonprofit public-advocacy organization to engage in "educational" activities including political lobbying. All that is true. But some points may bear further emphasis.

It bears emphasis, for example, that the Settlement Agreement, and the nonprofit education, public-advocacy, and lobbying organization that its *cy pres* provisions create, are not in any significant respect designed to serve the interests of the Settlement Class whose equitable claims and aggregate-damages claims are released and barred. It was designed primarily to advance AFT's ideological public-policy agenda by creating and funding its pet project, Public Service Promise, while paying $15,000 apiece to each of the ten Named Plaintiffs who acquiesced in the arrangement.

The record shows that Public Service Promise, to which *nearly all* of the $2.4 million settlement fund has

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[1] Counsel of record for all parties were given notice of Carson's intention to file this brief within 20 days after the case was placed on the docket. Rule 12.6.

been allocated, is not designed to serve the Settlement Class of some 300,000 individuals. The Term Sheet for the proposed *cy pres* organization estimated that, beyond its public-policy advocacy and lobbying activities, Public Service Promise would reach only 7,000 to 11,250 borrowers annually.[2] The record also demonstrates that vanishingly few of that small number will be Settlement Class members.

Public Service Promise is designed not to serve the interests of the Settlement Class, as such, but to work primarily on behalf of *future* borrowers. Named Plaintiff Jessica Saint-Paul's declaration supporting approval of the settlement (and her own $15,000 incentive award) explained: "I am proud that as a result of this settlement, *a nonprofit will be created for future borrowers* that are interested in pursuing PSLF." Dist.Ct.DE134:12¶46[Ct.App.Appx.458¶46] (Saint-Paul Decl.)(emphasis added). The *cy pres* organization would, Saint-Paul explained, "help build an infrastructure for future borrowers." Dist.Ct.DE134:12¶46[Ct.App.Appx.458¶46]. "I hope that when the time comes for my students to choose a loan repayment plan, that they will be able to do so with an accurate understanding of how it will impact

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[2] Pet.App.99a-100a, Dist.Ct.DE125-8:4[Ct.App.Appx.357] (Term Sheet chart, p.4). Named Plaintiffs' papers seeking approval of the Settlement confirmed: "In total, Public Service Promise expects that PSLF Project activities will reach as many as 11,250 borrowers annually." Dist.Ct.DE120:18 (Final Approval Memorandum); *see also* Dist.Ct.DE97:16 (Preliminary Approval Memorandum: "In total, the cy pres recipient expects that PSLF Project activities will reach as many as 11,250 borrowers annually."). Record citations to "Dist.Ct.DE" reference docket entries in the district court, with page or paragraph numbers, or both, following a colon.

their future." Dist.Ct.DE134:14¶53[Ct.App.Appx. 460¶53].

It also is worth noting that Saint-Paul, and the other Named Plaintiffs who acquiesced in the settlement, will be paid $15,000 from the $2.4 million common fund that it creates. Yeatman's petition states that "every penny of the net settlement fund is being paid to *cy pres* recipient Public Service Promise." Pet.18. But that is after the deduction of $150,000 to be paid directly to the ten named plaintiffs in the form of "service awards" or "incentive awards" of $15,000 apiece. Indeed, the Settlement Agreement creating the $2.4 million common fund specifies: "The Settlement Administrator will draw from the Settlement Fund to cover the distribution to the Cy Pres Recipient, the Fee Award, and the Incentive Awards." §V.A.1, Pet.App.60a.

This is important because it underscores and intensifies the Named Plaintiffs' conflict of interest in agreeing to a Settlement that pays them $15,000 each in cash, while allocating not a penny to the rest of a class whose interests the Named Plaintiffs were supposed to represent.

Yeatman correctly observes: "The class representatives are not an independent check: Every named plaintiff in this case is a member of AFT," Pet.14, which secretly funded the litigation and which, though it never formally appeared in the case, is identified in the Settlement Agreement as a "Releasing Class Representative Party."[3] That AFT, which never

[3] Although AFT never appeared as a named party in the case, and although Named Plaintiffs failed until the final-approval hearing to disclose to the District Court—or to the class—that AFT was paying their attorneys, those lawyers included AFT in

appeared as a party in the litigation that it secretly funded, is identified as a releasing party in the Settlement Agreement is troubling. The payments of $15,000 cash to each of the ten Named Plaintiffs who acquiesced in the arrangement is a further red flag demonstrating that the Named Plaintiffs' representation of the class was conflicted, and sorely inadequate.

The Sixth Circuit has warned that such incentive awards to representative plaintiffs provide "'a *disincentive* for the [named] class members to care about the adequacy of relief afforded unnamed class members[.]'" *Shane Group, Inc. v. Blue Cross Blue Shield,* 825 F.3d 299, 311 (6th Cir.2016)(quoting *In re Dry Max Pampers Litig.,* 724 F.3d 713, 722 (6th Cir.2013)(court's emphasis)). The Ninth Circuit has recognized that incentive awards raise "red flags that the defendants may have tacitly bargained for the named plaintiffs' support for the settlement by offering them significant additional cash awards." *Roes 1-2 v. SFBSC Mgmt., LLC,* 944 F.3d 1035, 1057 (9th Cir.2019)(vacating settlement where two named plaintiffs were to receive incentive awards of $20,000 apiece). "Indeed, '[i]f class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept

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the Settlement Agreement as one of the "Releasing Class Representative Parties":

> 40. "Releasing Class Representative Parties" means each Class Representative and any executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns of the Class Representatives, including AFT.

Pet.App.54a ¶40, Dist.Ct.DE98-1:4¶40 & DE125-4¶40[Ct.App. Appx. 315¶40].

suboptimal settlements at the expense of the class members whose interests they are appointed to guard.'" *Staton v. Boeing Co.,* 327 F.3d 938, 975 (9th Cir.2003)(quoting *Weseley v. Spear, Leeds & Kellogg*, 711 F.Supp. 713, 720 (E.D.N.Y. 1989)).

This Court's foundational common-fund precedents prohibit payments from a common fund to compensate representative plaintiffs for personal service rendered in the case. "Since the decisions in *Trustees v. Greenough,* 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885), this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980). But any payment to compensate representative plaintiffs for their own "personal services" on behalf of a class is both "decidedly objectionable" and "illegally made." *Greenough,* 105 U.S. at 537-38. A representative plaintiff's "claim to be compensated, out of the fund ... for his personal services" was "rejected as unsupported by reason or authority." *Pettus,* 113 U.S. at 122.

The Eleventh Circuit accordingly holds that "Supreme Court precedent prohibits incentive awards." *Johnson v. NPAS Solutions,* 975 F.3d 1244, 1255 (11th Cir.2020), *en banc rehearing denied,* 43 F.4th 1138 (11th Cir.2022); *accord, e.g., In re Equifax Inc. Customer Data Security Breach Litig.,* 999 F.3d 1247, 1257 (11th Cir.2021)("such awards are prohibited"); *Medical & Chiropractic Clinic, Inc. v. Oppenheim,* 981 F.3d 983, 994 n.4 (11th Cir.2020) ("service awards are foreclosed by Supreme Court precedent").

But the First Circuit, the Second Circuit (in this case), and the Ninth Circuit all have rejected that conclusion, dismissing this Court's foundational common-fund class-action decisions as wholly inapposite nineteenth-century precedents that have been impliedly superseded by Federal Rule of Civil Procedure 23. *See Murray v. Grocery Delivery E-Services USA,* 55 F.4th 340, 352-54 (1st Cir.2022); Pet.App.22a-24a, *published as Hyland v. Navient Corp.,* 48 F.4th 110, 124 (2d Cir.2022); *Melito v. Experian Mktg. Solutions, Inc.,* 923 F.3d 85, 96 (2d Cir.2019); *In re Apple Inc. Device Performance Litig.,* 50 F.4th 769, 787 (9th Cir.2022).

On January 5, 2023, Carson filed a petition for certiorari seeking review of the Second Circuit's decision approving the incentive awards in this case. *See Carson v. Hyland,* No. 22-_____ (filed Jan. 5, 2023). The named plaintiff in *Johnson v. NPAS Solutions* has filed a certiorari petition seeking review of the Eleventh Circuit's holding disapproving of incentive awards. *See Johnson v. Dickenson,* No. 22-389 (filed Oct. 21, 2022).

The issue concerning *cy pres* awards raised by Yeatman's petition for a writ of certiorari is an extraordinarily important issue. "In a suitable case, this Court may need to clarify the limits on the use of such remedies." *Marek v. Lane,* 571 U.S. 1003, 1006 (2013)(statement of Roberts, Ch.J., on denial of certiorari). This is a suitable case. Carson urges this Court to grant Yeatman's petition for certiorari.

The time is ripe, considering the "dramatic turn in modern class actions toward the use of cy pres relief." Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class*

*Action: A Normative and Empirical Analysis,* 62 Fla. L.Rev. 617, 620 (2010).

That dramatic growth in *cy pres* class-action settlements has paralleled a "stunning" increase in settlements that also feature "service award" or "incentive award" payments compensating the settling class representatives for their personal service as representative plaintiffs. 5 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* §17:7, at 622 (6th ed. 2022). One study shows that district courts approved payment of incentive awards to settling class representatives "in nearly 80% of all cases (78.6%) by 2011." *Id.*

The issues are linked. *Cy pres* settlements typically fail to provide meaningful relief to class members, while "service awards" or "incentive awards" give representative plaintiffs a powerful reason to agree to the settlements because they, at least, will get cash. This case presents an ideal vehicle for resolving both of them. It can do so by granting both Yeatman's certiorari petition on *cy pres* relief, and Carson's on incentive awards.

## CONCLUSION

This Court should grant Yeatman's petition and resolve issues concerning *cy pres* settlements of class actions. It should take the opportunity, as well, to resolve the inter-circuit conflict on incentive awards that is presented by Carson's certiorari petition filed January 5, 2023. *See Carson v. Hyland,* No. 22-_____ (Jan. 5, 2023).

Respectfully submitted,

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January 6, 2023