NOS. 22-554, 22-566

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

WILLIAM YEATMAN,

Petitioner,

v.

KATHRYN HYLAND, et al.,

Respondents.

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

BRIEF OF THE MANHATTAN INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Federal Rule of Civil Procedure 23(e)(2) requires that a settlement that binds class members be "fair, reasonable, and adequate." The Eight Circuit upheld approval of a settlement that disposed of absentee class members' claims while providing no meaningful relief to over 97% of the class. The Second Circuit upheld approval of a settlement that disposed of absentee class members' claims without providing any meaningful relief. In doing so, the Eight and Second Circuits broke with the Fifth and Seventh Circuits, effectively holding that class members had no property interest in the settlement fund, justifying distributing significant portions of the fund to unrelated third-parties under the trust-law doctrine of *cy pres*. The question presented is:

Whether the Due Process Clause of the Fifth Amendment, the Free Speech Clause of the First Amendment, and Federal Rule of Civil Procedure 23(e)(2) require courts to reject proposed *cy pres* class action settlements that deprive class members of their legal remedies and compel speech approved of by class counsel, defendants, and the court without meaningful consent by class members.

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INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting economic opportunity and opposing compelled speech and association. MI's constitutional studies program aims to restore constitutional protections for individual liberty.

This case interests MI because it involves the proper functioning of our civil-litigation system and thus the rule of law and, constitutionally speaking, class members' liberty interest in their legal claims.

SUMMARY OF ARGUMENT

The use of *cy pres* awards in class action settlements violates the rights of absent class members. Specifically, the Fifth Amendment's Due Process Clause protects class members' right both to adequate representation and to pursue legal claims against the defendant, while the First Amendment's Free Speech Clause protects the right of class members to be free from compelled speech—including being forced to fund charitable groups to which class members might be opposed.

The Constitution protects property rights, including the right to seek redress through the courts for their violation. That redress right includes, at

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No party's counsel authored this brief in whole or in part and that no person or entity other than *amicus* funded its preparation or submission.

minimum, the legal claim and the amount of the judgment attributable to the injury giving rise to the claim. Those rights are the personal property of individual plaintiffs—and class members are guaranteed due process through adequate representation in pursuing their claims. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). The aggregate nature of class action lawsuits interferes with the protection of individual class members' rights but may provide the only means of redress. Only a "rigorous analysis" can provide balance and maintain due process for class members. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2552 (2011).

Class action lawsuits operating with an opt-out mechanism increase the need for judicial oversight, because such a structure warps the traditional incentives of counsel for plaintiffs and defendants. Class counsel can generate a class without affirmative consent and can prosecute claims with an eye to personal enrichment, knowing that absent class members—the majority of the class—cannot police self-dealing and collusion with defendants.

Cy pres awards exacerbate these problems, as they effectively give the value of class members' claims to strangers without permission. Moreover, *cy pres* awards allow class counsel and defendants to appear publicly charitable while expending money that rightfully belongs to the class. *Cy pres* awards are substitutes for existing or planned charitable giving, incentivizing class counsel and defendants to choose *cy pres* instead of compensating those who

were actually wronged by defendants' actions. More troubling, *cy pres* settlements can be tailored to curry favor with the judges who must approve them, by directing funds towards alma maters and other preferred charities.

The judiciary's failing to provide meaningful oversight of class action settlements implicates the judiciary in the deprivation of class members' Due Process rights. The judiciary is also implicated in the deprivation of class members' First Amendment rights because *cy pres* settlements force class members to "endorse[] . . . ideas that [the court] approves." *Knox v. Service Emps. Intern. Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012).

The Court can correct serious flaws in the class action mechanism by demanding that lower courts engage meaningfully in the settlement-approval process, rigorously analyzing the proposed settlement with an eye to alternative solutions—such as dismissal of weak claims, disbursement of unclaimed funds to class members, reversion of excess damages to defendants, among others. Alternatively, the Court could reverse its previous pragmatic decision to permit opt-out class actions in the first place.

Regardless of the ultimate remedy it chooses, the Court should grant cert here to reconsider the serious issues that have arisen through the operation of opt-out class actions.

ARGUMENT

I. WITHOUT MEANINGFUL JUDICIAL OVERSIGHT OF PROPOSED *CY PRES* CLASS ACTION SETTLEMENTS, CLASS MEMBERS ARE DEPRIVED OF THEIR LEGAL CLAIMS WITHOUT DUE PROCESS

The Fifth Amendment's Due Process Clause protects an individual's right to their liberty and property. Few forms of property are as crucial to a free society as the right to pursue legitimate legal claims, seeking to obtain a redress of wrongs. This right encompasses both the right to bring the claim and, if successful, the right to damages sufficient to make the victim whole. Similarly, while there is no right to counsel in civil litigation, the Court has said that due process includes the right of litigants to have their claims adequately represented by whatever counsel is bringing claims on their behalf. U.S. Const., amend. V; *Shutts*, 472 U.S. at 812.

The current class-action regime has devolved into a morass of due-process concerns. By their aggregate nature, class actions obscure that individual rights are the foundation of the legal claims, providing cover for class counsel to engage in gross self-dealing and collusion with defendants. The Court's decision to allow opt-out class actions guarantees an inattentive class that cannot properly police bad counsel behavior. Judicially unchecked *cy pres* awards expand the opportunities and incentives for self-dealing, as well as raising the specter of judicial corruption as counsel curry judicial favor by choosing fund recipients favorable to judges' interests.

Until the Court puts teeth into the requirement that settlements be "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), and require courts to engage in rigorous analysis, class counsel and defendants will continue to engage in brazen rent-seeking to the detriment of class members.

A. Class actions are founded on individual rights and must be protected accordingly.

Class-action claims are brought in the aggregate, to facilitate their resolution on behalf of the class, but the claims which provide the legal basis are personal to the individual class members. When successful—through judgment or settlement—the pro-rata proceeds are derivative of those personal claims and are thus the personal property of each class member. The right to seek redress *becomes* the right to the proceeds, so giving those proceeds to another without consent violates due process.

The importance of protecting individual rights, as opposed to collective rights, is why the Court has held that class members—not "the class"—are entitled to adequate representation in a class action. *Shutts*, 472 U.S. at 812. Unfortunately, the years since *Shutts* have clouded the Court's clear declaration, opening the door for class counsel, defendants, and even many judges to ignore it. Class action settlements are now judged by the aggregate amount, rather than how they redress the wrongs inflicted on individuals. Class counsel, in particular, benefit from this aggregate focus, as their fee award is almost always judged against the total settlement award, not whether class members have been

reasonably made whole. Defendants benefit from a different aggregate measure: the total number of claims disposed of at a low per-claim cost.

Although the Court has applied First Amendment protections to individuals whose rights are aggregated in the corporate form in certain contexts, *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310, 349 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2768 (2014), it has inadequately wrestled with the rights of individuals aggregated in class litigation. *But cf. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) ("applying Article III constraints to Rule 23 class actions"). Granting the petition in this case would begin to remedy that omission, especially if the Court were willing to demand that lower courts engage in a "rigorous analysis," *Dukes*, 131 S.Ct. at 2552, to make sure that class counsel and defendants have not pursued their own goals at the expense of class members' individual rights.

B. Present opt-out mechanisms eliminate the most effective method of protecting individual rights.

The source of much of the degradation of individual rights in the class-action context is the Court's own decision to allow opt-out class actions. In *Shutts*, the Court appeared to recognize the potential for harm under an opt-out regime, but held that an opt-out process that was not "pro-forma" could still protect the due process rights of class members. 472 U.S. at 813. Unfortunately, the opt-out process is precisely the kind of regime that the Kansas regime

upheld in *Shutts* was not, and class members' due process rights have suffered.

The Court's choice was a pragmatic, rather than doctrinal one, allowing opt-out class actions because, otherwise, some important class actions would never be brought and society would suffer. *Id.* at 812-13 ("Requiring a plaintiff to affirmatively request inclusion would . . . impede the prosecution of those class actions involving an aggregation of small individual claims"). At the time, the technology simply did not exist to feasibly aggregate dispersed plaintiffs into a voluntary class, so opt-out class actions may have been necessary. But the decision was not cost-free. Specifically, an opt-out regime places greater distance between class counsel and the individuals they are duty-bound to represent.

The relatively small injuries that justify a class-action mechanism, Jeremy Kidd & Chas Whitehead, *Saving Class Members from Counsel*, 25 San Diego L. Rev. 579, 584-87 (2021) (describing how class actions reduce the per-claim costs of litigation), also make class members less likely to recognize the existence of a plausible legal claim. Inattentive clients enable class counsel to act without fear of client objection to counsel self-enrichment. *Id.* at 587-91. Class counsel will therefore be far less concerned with providing meaningful notice to all but the named plaintiffs. Notice, therefore, arrives in as inconspicuous a form as possible, often appearing exactly like junk mail, to be discarded by class members who do not realize that they are discarding their right to opt out. *See Sullivan v. DB Investments*, 667 F.3d 273, 329 n.60

(3d Cir. 2011) (en banc) (finding that response rates "rarely exceed seven percent"); *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 296 (6th Cir. 2016) (Clay, J., dissenting) ("the median response rate in a study of consumer class actions was 5-8%").

An opt-in mechanism provides far better protection for class members. Class counsel must reach out to each potential class member, explain their rights and opportunities, and obtain informed consent. The open nature of the process could generate additional competition for class-member consent, advancing class members' interests on price (lower fee award) and quality (better responsiveness, higher damages) dimensions. Class members thus informed would also have greater incentive to provide meaningful oversight to protect the rights that have been explained to them. Just as important, a process that leads to class members' being informed is required by other Court precedents. *See Richards v. Jefferson County, Ala.*, 517 U.S. 793, 799 (1996) (noting that "the right to be heard ensured by the guarantee of due process has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest").

The Court should grant the petitions here and revisit its pragmatic decision to allow opt-out class actions because the calculation that led to that pragmatic conclusion has changed in the intervening years. Technology has dramatically reduced the costs of contacting and informing potential class members, so opt-in class actions are now feasible. Moreover,

the abuses of class members' due process rights have increased on a scale that the *Shutts* Court could not have anticipated.

The abuse of class members by class counsel and defendants is nothing more than the judicial form of special-interest lobbying of government for special benefits—known as "rent-seeking" to public choice economists. The Court has already rejected one form of judicial rent-seeking when it mandated recusal of a state supreme court justice whose main campaign contributor had a case pending before that court, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009), and should take this opportunity to reject use of the courts for these unethical and corrupt practices. *Cy pres* settlements pose a particular danger, as the judges approving settlements might be swayed in their decisions by their sympathy for the organizations towards which settlement funds are directed. *See*, *e.g.*, *In re Google Referrer Header Privacy Litigation,* 869 F.3d 737, 743 (9th Cir. 2017) (citing *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038-39 (9th Cir. 2011)) (warning that the choice of *cy pres* recipients might "answer to the whims and self-interests of the parties, their counsel, or the court").

C. The abuses of class members' rights are escalating, necessitating the Court's response.

The attorney-client relationship is a classic principal-agent arrangement, subject to the standard dangers that the agent (class counsel) will look out for its own interests, rather than those of the principal (each class member). Due process,

professional standards, and economic efficiency all demand that the incentives of class counsel and individual members of the class be aligned, but current practice falls short of that goal, and the situation is worsening.

Professional standards and bar disciplinary actions have proven insufficient to ensure proper fiduciary behavior by lawyers, due to the perverse incentives created by the aggregate nature of class actions, the opt-out mechanism approved by the Court in *Shutts*, and repeated failure by the lower Courts to police self-dealing and collusion in settlement negotiations. Sadly, after creating those incentives, the Court has refused police any wrongdoing emerging from them, opening the door to a string of new class-action innovations.

We generally welcome innovations that emerge in competitive markets, because of the discipline that competition between producers provides and the fact that every consumer chooses whether to purchase the innovation. Accordingly, only those innovations that are welfare-enhancing will survive. Innovations in the class-action sphere should not be presumed to enhance welfare, however, either of the individual class members or of society at large. Class members are largely unaware of the existence of the class and are included without their knowledge or meaningful consent. Innovations are thus far more likely to benefit only class counsel and defendants, who create them as part of their self-interested behavior.

When *cy pres* awards were first proposed in the class-action context, they likely appeared to be a

harmless way to dispose of the unclaimed portion of the damages fund. *See generally* 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 (2010). But allowing that innovation created a new avenue for collusion and self-enrichment: Class counsel wish to increase the size of the class to justify larger fee awards, *see Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) ("Would it be too cynical to speculate that what may be going on here is that class counsel wanted a settlement that would give them a generous fee and Fleet wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself?"), while defendants benefit from increasing the number and scope of claims disposed of for pennies on the dollar. Only the class members—those whose legal claims justify the lawsuit—receive nothing of value for the resolution of their claims, *Mirfasihi*, 356 F.3d at 784 ("There is no indirect benefit to the class from the defendant's giving the money to someone else."), raising questions about the value of class action lawsuits, generally. *See Hoffer v. Landmark Chevrolet Ltd.*, 245 F.R.D. 588, 603 (S.D. Tex. 2007) (""A consumer class action is superior to individual suits because it allows people with claims worth too little to justify individual suits-so called negative-value claims-to obtain the redress the law provides. But if the consumer class action is likely to provide those with individual claims no redress . . . the consumer class action is likely not superior to individual suits.").

The incentive to increase the size of the class also includes the opportunity to be "benevolent" with the expected excess. *Cy pres* awards give class counsel and defendants an additional tool for enriching themselves, one that cloaks them a socially acceptable veneer of philanthropy. *See S.E.C. v. Bear, Stearns & Co. Inc.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) ("In general, defendants reap goodwill from the donation of monies to a good cause.") And yet, it is philanthropy with someone else's money and obscures the uglier reality that it comes through collusion.

Even more problematic are *cy pres*-only settlements, such as that approved by the Second Circuit in *Navient*. When class counsel and defendants are allowed to divert the full value of the class members' legal claims to strangers, there is no longer even a façade that it is being done for any other purpose than to enrich preferred strangers and further the "charitable" goals of class counsel, defendants, and possible even judges. On this last, disturbing possibility, consider *Fairchild v. AOL,* LLC, No. CV09-03568 CAS (PLAx) (C.D. Cal. 2009) (class action settlement agreement), where the *cy pres* award included payment to the Legal Aid Foundation of Los Angeles, a charity on whose board the trial judge's husband sat. *See also Bear, Stearns*, 626 F. Supp. 2d at 415 (noting that "the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety").

The Court has long accepted that due process is

violated when the named plaintiffs' interests are in line with those of the defendant, rather than the absent class members. *Hansberry v. Lee*, 311 U.S. 32, 45-46 (1940), but the present class action regime is rife with even more destructive misalignment of interests. Continued silence from the Court will only allow innovation along these lines to further erode confidence in our judicial system.

The Court rejected self-dealing by class counsel in *Dukes*, 131 S.Ct. at 2559 (rejecting an attempt to limit damages to back-pay claims to make the class action mandatory) and *Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345, 1348-49 (2013) (rejecting an attempt to stipulate to less than $5 million in damages in order to avoid federal jurisdiction). Lower courts, over time, have done the same. *See, e.g.*, *Arch v. Am. Tobacco Corp., Inc.*, 175 F.R.D. 469, 479-80 (E.D. Pa. 1997); *Pearl v. Allied Corp.*, 102 F.R.D. 921, 922-23 (E.D. Pa. 1984); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 602 (S.D.N.Y. 1982); *Kreuger v. Wyeth, Inc.*, No. 03-cv-2496, 2008 WL 481956, at *2-4 (S.D. Cal. Feb. 19, 2008). The willingness of the lower courts to police bad behavior appears to be waning, however, a trend that could be reversed by a strong statement from the Court that Rule 23 requires a "rigorous analysis" at each step of the class-action process, including settlement. *Dukes*, 131 S.Ct. at 2552.

The Court can and should make such a statement in these cases by granting the petitions, because these cases exhibit classic examples of the type of self-dealing that arises with the use of *cy pres*

awards. In *Jones v. Monsanto*, 38 F.4th 693, 697 (8th Cir. 2022), the Eighth Circuit approved a settlement that awarded attorney fees as if class counsel had achieved a remedy for the class when, by class counsel's own estimation, it achieved a meaningful result for a mere 2-3% of the class. Monsanto agreed to pay $39.55 million to resolve approximately eight million claims, yet anticipated paying damages to less than 243,000 of them. *Id.* The remaining funds—those not captured by class counsel in its fee award—are to be given to three unrelated nonprofits, all of whom will know that class counsel, Monsanto, and the approving judges are their benefactors.

In *Hyland v. Navient Corp.*, 2020 WL 6554826 (S.D.N.Y. Oct. 9, 2020), the district court below approved a settlement that provided precisely no remedy to class members but enriched class counsel and funneled Navient funds to an entity created for the sole purpose of receiving the funds. Disposing of the class's claims without providing any actual remedy would be problematic enough, but approval of the settlement is made more bizarre by the fact that the district court had already dismissed all but one claim and had indicated that the remaining claim would fail as a class action. *Hyland v. Navient Corp.*, 48 F.4th 110, 115-16 (2d Cir. 2022). There would thus appear to be nothing to settle, but Navient managed to preempt any future class action claims arising from its behavior by funding a brand-new nonprofit that was created for the sole purpose of accepting the *cy pres* settlement funds. *Id.* at 114.

If the Court continues to allow *cy pres* awards—which it does every time it refuses to police the lawlessness of the courts that approve them—it will be sanctioning ever-increasing self-dealing by class counsel. It will also be sanctioning a corresponding decrease in due process for individual class members, whose claims have been, and will continue to be, treated as little more than tools for enriching class counsel. Enhanced security is the only bulwark against self-dealing by class counsel, but these petitions show that many lower courts simply refuse to police self-dealing in the class-action context.

To put a finer point on it, the continued refusal of the Court to engage in these matters has allowed the lower courts to continually erode the due process rights of class members. It is unlikely that the lower courts will suddenly rediscover their fidelity to due process, so the Court must make clear that *cy pres* awards deprive individual class members of their property without due process.

D. *Cy pres* awards are never the only option available to resolve a class action.

Cy pres awards are not inappropriate here, but in every case; there are no circumstances under which *cy pres* awards are the only (let alone best) option. Indeed, our judiciary functioned well enough for most of its history without needing to resort to *cy pres* awards, and it is peculiar that they would gain popularity with class counsel in an era of advancing technology—with corresponding reduction in the cost of notifying and facilitating disbursement to the class. Peculiar, but not surprising, given the ability

of class counsel and defendants to use *cy pres* awards for self-enrichment at the expense of class members.

The Eighth Circuit below approved a *cy pres* distribution over Petitioner St. John's objection because it found no abuse of discretion in the district court's conclusion that class members were "fully compensated" at fifty cents on the dollar, allowing the remaining value to be given to strangers. *Jones*, 38 F.4th at 699. To be clear, the lower court expressly held that the class members had no equitable claim to more than 50% of the value of their *legal* claims, in order to clear the way for giving the funds to complete strangers who had no claim to the funds at all.

The Second Circuit below approved a *cy pres* only settlement over Petitioner Yeatman's objection that the settlement provided no direct benefit to the class, finding that an indirect benefit is sufficient. *Hyland*, 48 F.4th at 121. The Second Circuit is correct that other circuits have similarly held, *id.* (collecting cases), but that observation indicates only how far this virus has spread among the lower courts. Without any constraints, this "indirect benefit" standard would be sufficient to justify a *cy pres* award that conferred any broad benefit on the society in which class members lived. For example, student loan borrowers could benefit from a reduction in the overall interest rates in society, as that might translate into a reduced repayment rate for borrowers. An unconstrained "indirect benefit" standard would therefore justify a *cy pres* award to any group that would save a larger percentage of

their income than class members; that would increase the supply of loanable funds, which would lower the market interest rate.

Recognizing the absurdity of that conclusion, some circuits have attempted to circumscribe the "indirect benefit" standard, like the Ninth Circuit's requirement that *cy pres* awards have a "direct and substantial nexus" to the interests of the class, and that they "account for the nature of the plaintiff's lawsuit." *In re Google Inc. Street View Elec. Commc'ns Litig.*, 21 F.4th 1102, 1116 (9th Cir. 2021). Even with the Ninth Circuit's qualification, however, the standard cannot be saved, because it purports to allow lower courts to take property belonging to the class and give it to strangers, under the pretense that doing so *will* benefit the class. *Hyland*, 48 F.4th at 122 ("The *cy pres* award . . . thereby assists *all* class members") (emphasis added). In reality, the best we can hope for is that the *cy pres* recipients will benefit *some* of the class members; the more realistic assumption is that most of the value will be siphoned off for the benefit of unrelated parties.

In most circumstances, what class counsel and the defendant do—with express court approval—is nothing more than theft of the class's property. Neither the good deeds that might then be done by third parties, nor any philanthropic intent of class counsel, defendants, or the courts, do anything to negate the nature of the action. According to the Second Circuit, however, that critique does not apply here, because there was no plausible class action that could lead to money damages and so the settlement

fund does not belong to the class. *Id.* If money damages were never going to be available, then only injunctive relief would justify a class action, but injunctive relief would not justify giving money to a third party either. Respondent Navient can transfer its funds to whomever it chooses, but to do so under these circumstances smacks of another inappropriate action: extortion. In return for class counsel's ceasing to badger Respondent Navient with continued legal action in a case that all the courts admit was invalid, Respondent agreed to pay a third party that class counsel almost certainly participated in creating.

The lower courts rarely offer any justification for their approval of such collusive and potentially unethical behavior, but it is possible that they believe that their job is merely to effectuate the intent of the parties, once the parties have reached a settlement. *E.g.*, *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012) (refusing to inquire rigorously into an abusive settlement because to do so would be "an intrusion into the private parties' negotiations [that] would be improper and disruptive to the settlement process.") If so, however, the lower courts have ignored the Court's express requirement of a "rigorous analysis," *Dukes*, 131 S.Ct. at 2552, as well as the collusive nature of class action settlements. Because the vast majority of class members are simply not paying attention, a classic principal-agent problem arises, and class counsel are free to bargain on their own behalf, rather than on behalf of those they are duty-bound to protect. As a result, class action settlements cannot truly be seen as a voluntary agreement between the parties;

instead, they are a collusive form of rent-seeking between class counsel and defendants. Kidd & Whitehead, 25 San Diego L. Rev. at 588-91.

The Court should grant certiorari in these cases, not only to put an end to the lower courts' lawless disregarding of the Court's requirement of a rigorous analysis, but also to make clear that the lower courts have multiple options available when presented with a settlement that fails that rigorous analysis.

Instead of approving collusive and due-process-violating *cy pres* settlements—and especially *cy pres*-only awards—when claims are weak, courts should just dismiss the claims and force class counsel to craft legitimate lawsuits. *Id.* at 624-25. Instead of approving settlements that fail to fully compensate class members but give class property to strangers, lower courts should disburse leftover funds to those who rightfully own the fund: class members. If doing so would overcompensate individual class members, the lower courts should consider either a reversion to the defendant—as perhaps the settlement overestimated actual damages—or a granting of the excess funds to named plaintiffs, in the form of a quasi-qui-tam award. *Id.* at 619-20, 625.

II. USE OF *CY PRES* AWARDS IN CLASS ACTION SETTLEMENTS COMPELS CLASS MEMBERS TO SUPPORT SPEECH WITH WHICH THEY MAY DISAGREE, IN VIOLATION OF THE FIRST AMENDMENT

Class actions are brought on behalf of class members, whose suffering a legal harm provides the

foundation for any legal action. Settlement of the lawsuit is also done on class members' behalf and, importantly, in their name. For example, the settlement fund represents the combined value of the class members' claims, with each class member owning a portion. *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). Payment of reasonable fees to class counsel out of a reasonable settlement is acceptable, as an action taken in the name of class members who have been well served by their lawyers.

Approval of a *cy pres* award, however, raises significant questions because it forces class members to speak in the voice of the charitable organizations who receive the funds. Individual class members are joined to the opt-out class without their consent; only a small number will discover the existence of the class before the time to opt-out has expired. As a result, the vast majority of class members will have no choice to abstain from funding that speech. Trial courts are thus compelling individual class members to speak in the voice of those charitable organizations. *See Knox*, 132 S. Ct. at 2289 ("Closely related to compelled speech . . . is compelled funding of other private speakers or groups."). The Court has held that the government "may not . . . compel the endorsement of ideas that it approves." *Id.* at 2288. "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001). *See also Janus v. Am. Fed. of State, County & Mun. Emps.*

Council, 138 S.Ct. 2448, 2463 (2018) ("Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command [that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion].").

Only a narrow class of speech can be compelled without violating the First Amendment, but *cy pres* settlements do not satisfy the *United Foods* test. 553 U.S. at 411. Specifically, *cy pres* settlements do not arise as part of a comprehensive regulatory scheme, nor is any association between class members required by any regulatory scheme.

The only requirements for class certification are contained in Rule 23, including that the class be "so numerous that the joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The only required commonality between members of the class pertains to their legal claims, not their personal preferences, or political persuasion. It is therefore almost certain that members of the class will differ significantly in their preferences for charitable giving. The diversity of views among class members makes it inappropriate for class counsel and defendants to presume to speak for all class members in selecting "worthy" charities to be the recipients of cy *pres* funds.

In light of the strong incentive for class counsel and defendant to choose *cy pres* recipients that fit their preferences, rather than the indeterminable preferences of class members, class members are being compelled to speak in the voice of defendant—

the individual or entity that inflicted harm, in the first place—or class counsel. In the latter case, the standard attorney-client relationship is turned on its head. In either case, *cy pres* settlements cross the line into forcing class members to subsidize class counsel's, defendants' or judges charitable goals.

CONCLUSION

In the light of the serious issues raised in the petitions and further described above, the Court should grant the petitions.

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