No. 22-566

IN THE

Supreme Court of the United States

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 *AMICUS CURIAE* THE CENTER FOR AMERICAN LIBERTY IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The Center for American Liberty (CAL) is a 501(c)(3) non-profit law firm dedicated to protecting free speech and civil liberties. CAL has represented litigants across the country, including in this Court, and has an interest in ensuring that courts apply the correct legal standard in cases involving constitutional rights—particularly those implicating the First Amendment. This includes ensuring courts correctly identify when a constitutional violation can fairly be attributed to state action. Identifying state action in the context of *cy pres* distributions is increasingly important to CAL and our clients given the growing use of this judicially created mechanism to reach swift and efficient settlements in large class actions. These settlements often result in windfalls for advocacy organizations who advance causes at odds with class members' views. CAL has a direct interest in ensuring that any claim by a future client as a result of such a settlement can reach proper adjudication. For the following reasons, CAL urges the Court to grant certiorari.

SUMMARY OF THE ARGUMENT

Cy pres distribution raises serious concerns about the fairness of the settlements and the

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Supreme Court Rule 37.6. Counsel for all parties were notified of amicus curiae's intention to file this brief at least 10 days prior to the deadline to file this brief.

purported benefits to class members, as the Chief Justice and several courts have recognized. Pet. 26-30. Those constitutional concerns become even more concrete when significant sums of absent class member money are distributed—purportedly for their "benefit"—to non-parties to promote speech that is contrary to the present class members' views. Lower courts have dodged the important constitutional questions raised by *cy pres* distribution by simply disavowing state action, despite significant judicial oversight, approval, and enforcement of class settlement. That disavowal cannot be squared with this Court's precedent or the constitutional duty to protect absent class members' interests.

It is established law that judicial approval and enforcement of private agreements is state action. While this Court has already extended the rule to other constitutional rights, including First Amendment free speech, some circuit courts, including the Second Circuit below, nonetheless reject state action in all but the narrowest contexts.

Class action litigation is a creature of the rules of civil procedure. And the very mechanism for settlement of absent class members' money—*cy pres* distribution to a nonparty—was judicially imported from trust law. Courts cannot create the mechanism to distribute class members funds, approve specific disbursements of these funds to specific third parties, and then wash their hands of any state action simply because it originated as an agreement by private actors. Stated another way, there would be no class action or *cy pres* distribution *but for* state action.

This Court should grant the petition and resolve whether absent class members' settlement funds may be diverted to third parties to promote a message with which absent class members fundamentally disagree.

ARGUMENT

This case presents questions of fundamental importance for fair, reasonable, and adequate class-action settlements. Increasingly, absent class members' settlement funds are diverted to *cy pres* recipients who may be at odds with those absent class members' interests and viewpoints. Distribution of settlement funds through *cy pres* is a novel approach that courts borrowed from trust law, and it has evaded consistent application by lower courts. Among other issues, circuit courts disagree about whether a district court's approval of *cy pres* awards implicates state action requiring protection of absent class members' constitutional rights.

This should not be a difficult question to resolve because this Court's longstanding precedent has already done so. The Court has long held that judicial approval of an agreement by private parties can be state action affecting constitutional rights. *Shelley v. Kraemer*, 334 U.S. 1 (1948). And the Court has recognized that class action settlements involving absent class members are subject to constitutional constraint. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846–48 (1999). It is also now settled law that waiver of First Amendment rights cannot be presumed by silence. *Janus v. Am. Fed'n of State, Cty., & Mun. Emp., Council 31*, 138 S. Ct. 2448, 2486 (2018). In

short, when a district court approves *cy pres* distribution of absent class members' funds under Rule 23, it is exercising state power—even if the agreement was initially negotiated by private parties. This state action implicates class members' First Amendment rights, including the protection against compelled speech.

I. A court's approval of settlement and distribution of absent class members' funds is state action that implicates constitutional rights, including the First Amendment.

This Court long ago confirmed that an agreement by private parties can be subject to constitutional scrutiny when a court approves it. "The judicial action in each case bears the clear and unmistakable imprimatur of the State." *Shelley*, 334 U.S. at 20. Absent parties do not forfeit their constitutional rights "simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement"; on the contrary, these rights remain protected. *Ibid.* That is because "state action" refers to "exertions of state powers in all forms," including judicial enforcement of private agreements. *Ibid*. While private parties have wide latitude to make agreements, a district court's approval and enforcement of that agreement invokes the power of the state. This Court's "cases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972).

Some courts have attempted to limit *Shelley*'s holding solely to discrimination cases, as the Second Circuit did below. Pet. App. 19a; *see also Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 998 (9th Cir. 2013). That is plainly incorrect. There is no logical reason that *only* discrimination claims under the Equal Protection Clause would implicate state action when enforced by a court order, but judgments implicating other constitutional rights would not.

Indeed, this Court has already rejected the argument. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), the Court applied *Shelley*'s rationale to First Amendment rights affected by court judgments, holding that a court's action cannot be shielded from constitutional scrutiny simply because the dispute is between private parties. *See also Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991) (enforcing legal obligations through the "official power" of the courts is state action that implicates the First Amendment). More recently, Justice Sotomayor observed that the relevant inquiry is whether the judicial action is a "necessary component[]" to the deprivation of the constitutional right. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 548 (2021) (Sotomayor, J., concurring in part) (discussing *Shelley*). And several lower courts have followed suit, recognizing that *Shelley*'s rationale applies to more than only discrimination claims. *See, e.g., Edwards v. Habib*, 397 F.2d 687, 691 (D.C. Cir. 1968) ("There can be no doubt that the application by the judiciary of the state's common law, even in a lawsuit between private parties, may constitute state action which must conform to the constitutional strictures which

constrain the government.") (citing *Shelley* and *Sullivan*); *DeBruin v. St. Patrick Congregation*, 816 N.W2d 878, 885 (Wis. 2012) ("[T]he constitutional principles that underlie *Shelley* are analogous to other constitutional protections, including those afforded by the First Amendment.").

These constitutional principles should apply with even more force to class actions. This Court long ago established that a district court's approval of class action settlements implicates absent class members' constitutional rights. *See Hansberry v. Lee*, 311 U.S. 32, 42–43, 45 (1940) (due process); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846–48 (1999) (due process and Seventh Amendment). The Second Circuit's conclusion that a private class settlement "may be enforced, without implicating the First Amendment" cannot be squared with this Court's precedent nor the rationale underlying the holdings. Pet. App. 19a (citation and quotation omitted). Certainly, nothing supports carving out the First Amendment for less protection than other constitutional rights.

That is especially so because application of *cy pres* in class actions strays so far from its roots in trust law. It is one thing for a court to shift a charitable trust's beneficiary to a similar charity after changed circumstances. Pet. 27. It is quite another for a court to approve distribution of class funds to create a nonparty entity that engages in controversial discourse with which class members disagree. This distinction is all-the-more apparent when the third-party beneficiary of the *cy pres* distribution is connected to both a well-known activist organization and class counsel. Pet. App. 17a-19a.

Nonetheless, the conflict among lower courts on this issue persists, which is particularly highlighted by recent decisions involving *cy pres* distributions in class actions. For example, as noted, the Second Circuit altogether reject that a settlement is state action implicating absent class members' First Amendment rights. Pet. App. 18a-19a. The Tenth Circuit reached a similar conclusion. *In re Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094, 1113-14 (10th Cir. 2017). The Eighth Circuit, by contrast, appears to have assumed that a court's approval of the settlement was state action implicating First Amendment protections (despite the district court's conclusion it was not). *Jones v. Monsanto*, 38 F.4th 693, 699–700 (8th Cir. 2022). Although the Eighth Circuit ultimately determined (incorrectly) that the *cy pres* distribution was not compelled speech in violation of the First Amendment, its understanding of what constitutes state action conflicts with the Second and Tenth Circuits. *Ibid*. The Ninth Circuit took yet another approach in *In re Google Inc. Street View Electronic Communications Litigation*, 21 F.4th 1102 (9th Cir. 2021). There, the Court avoided the state action question, holding that *cy pres* distribution was not compelled speech because class members were allowed to opt out of the class. *Id.* at 1118.

These disparate approaches to the question mirror the general confusion over whether a district court's approval and enforcement of a settlement is state action. This Court should grant certiorari to resolve the conflicting approaches among the circuits and clarify that a district court's *cy pres* distribution of

class funds implicates absent class members' constitutional rights.

II. Court approval of class action settlements through *cy pres* distributions is distinctly state action, even if approval of other settlements is not.

A district court's approval of class action settlement—and especially *cy pres* distribution of absent class members' settlement proceeds—fundamentally differs from typical settlement agreements. The mechanism's mass resolution of absent parties' claims was created by state action, and class action settlements uniquely require intricate court involvement.

To start, the concept of class action litigation and settlement was created by the federal rules of civil procedure. Rule 23 uniquely allows litigation to be filed and settled in absent third parties' names, which is a "fundamental departure from the traditional pattern in Anglo-American litigation." *Mars Steel v. Continental Illinois Nat'l Bank & Trust*, 834 F.2d 677, 678 (7th Cir. 1987). Because of that, Rule 23 requires an "expanded role of the court in class actions (relative to conventional bipolar litigation)" that explicitly requires a judge's approval of the settlement. *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 785 (3d Cir. 1995); Fed. R. Civ. P. 23(e). Settlement agreements in other contexts do not *require* court approval in *every* case.

Rule 23's mandatory judicial approval is a "clear and unmistakable imprimatur of the state,"

especially when the terms of the class settlement require ongoing judicial involvement. *Shelley*, 334 U.S. at 20. A common feature of *cy pres* distribution through a class action settlement is the court's continuing jurisdiction to *enforce* the settlement. *See, e.g,* Pet. App. 31a ("The Court reserves continuing and exclusive jurisdiction over Plaintiffs, Defendants, and the Settlement Class with respect to the Settlement Agreement and this Order."). When ongoing judicial oversight itself is a *term* of the settlement agreement, like it is here, state action becomes a "necessary component[]" to the resolution of the dispute between the parties. *Whole Woman's Health*, 142 S. Ct. at 548. If resolution of the dispute between the parties is the source of the constitutional violation—*e.g.,* a compelled-speech claim stemming from a court-approved *cy pres* distribution—the violation may then be fairly attributed to the state because the court both *approved* the settlement and it committed to ongoing involvement in the dispute. *Ibid.* (citing *Shelley*, 334 U.S. at 20). The private parties could not have achieved the settlement without "extensive use of state procedures" and "the overt, significant assistance of state officials." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 622 (1991) (citation omitted).

Cy pres distribution of absent class members' funds is even more novel—and thus distinct from typical settlements—because it was judicially imported from trust law. *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n*, 84 F.3d 451, 455 n.1 (D.C. Cir. 1996). *Cy pres* distributions are not simply bilateral agreements by private parties.

Rather, they transform "the judicial process from a bilateral private rights adjudicatory model into a trilateral process," which potentially give strangers to the litigation intervention rights. *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468, 481 (5th Cir. 2011) (Jones, J., concurring). Those third-party benefits and potential rights are created with class members' property. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807–08 (1985) (each class member has a recognized property right in the action); Am. Law Inst., Principles of the Law of Aggregate Litigation § 3.07 cmt.b (2010) (recognizing that "funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members.").

In light of the unique nature of these cases, judges are not simply neutral arbiters over a dispute. Rather, a judge has a fiduciary duty to hold "the interests of absent class members in close view." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 629 (1997); *see also In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534 (3d Cir. 2004) ("[T]he district court acts as a fiduciary who must serve as a guardian of the rights of absent class members."). As a guardian of the absent class members' rights, a district court has an obligation to protect absent class members *constitutional* rights, including their rights against compelled speech.

Of course, one of the most fundamental First Amendment principles is that no person may be compelled to subsidize speech with which he or she disagrees. *Harris v. Quinn*, 573 U.S. 616, 656 (2014). Before a person can be forced to subsidize speech, he

or she must give "clear[] and affirmative[] consent." *Janus*, 138 S. Ct. at 2486. But the Petition illustrates the common problem with *cy pres* distribution. In this case, class members will receive $0, while $2.25 million of absent class members' funds will be distributed to non-party organizations that advocate positions to which Petitioner opposes. Pet. 1, 13; Pet. App. 132a. The sad irony is that this distribution is purportedly for Petitioner's "benefit." *In re Google*, 21 F.4th at 1117. In reality, it is unconstitutional compelled speech.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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