No. 22-566

In the Supreme Court of the United States

WILLIAM YEATMAN,

Petitioner,

v.

KATHRYN HYLAND, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

There was a cert-worthy circuit split of great importance when this Court granted certiorari in *Frank v. Gaos* in 2018. Courts have since fractured further, including here and in *Jones v. Monsanto*. 38 F.4th 693 (8th Cir. 2022), *cert. pending sub nom. St. John v. Jones*, No. 22-554. Plaintiffs argue (Br.18) that, because standing issues in *Gaos* and *Lowery v. Joffe* prevented this Court from reaching the merits, it should never resolve a circuit split on *cy pres*. Bosh and nonsense: a per curiam reversal on other grounds is not a decision to dismiss the writ as improvidently granted.[1]

Respondents' arguments center (Pl.Br.16–17; Def.Br.11–14) on the certification of the settlement class under Rule 23(b)(2), rather than (b)(3). But—with the small exception of Rule 23(b)(3)'s superiority requirement—that is a distinction without a difference. Yeatman identified many *cy pres* problems (Pet.26–36); the *Marek v. Lane* and *Joffe v. Google* concurrences identify additional "fundamental concerns." 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting denial of cert.); 21 F.4th 1102, 1122 (9th Cir. 2021) (Bade, J., concurring). Each of these problems and circuit splits exists in both (b)(2) and (b)(3) settlements.

For example, the Second and Fifth Circuits split over whether class members have a property interest in the settlement relief—a constitutionally recognized interest

[1] The revised post-remand *Gaos* settlement proposes paying Google class members $23 million instead of zero.

that does not depend on the certification rule. *Cy pres* diverts "the value of the class members' claims." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). Even if other settlement relief would be "independently sufficient" (Pl.Br.11), it doesn't excuse the diversion. For example, a settlement of $12,000,000 for the class and $28,000,000 for the attorneys is an unfair allocation even if $12,000,000 would be "independently sufficient[ly]" adequate. The settlement doesn't become fairer if the $28,000,000 is split between attorneys and third-party *cy pres*. The principle doesn't change under (b)(2) when a settlement's injunctive relief reflects a similar compromise of potential settlement benefit.

The decision below also exacerbates splits over the *cy pres* conflict-of-interest standard. While respondents deny a split exists (for two mutually exclusive reasons, mind you), they don't try to claim that (b)(2) certification allows courts to approve conflicted *cy pres* recipients under Rule 23(e).

Nor does (b)(2) certification dissolve the recurring violation of class members' First Amendment rights when *cy pres* goes to groups whose work they oppose. From a First Amendment perspective, class members' inability to opt out from a (b)(2) action only makes things worse. *Cf. J.D. v. Azar*, 925 F.3d 1291, 1345 (D.C. Cir. 2019) (Silberman, J., dissenting).

No respondent defends the lower courts' abdication of Rule 23(e)(2)(C)(ii) standards, which do not turn on class certification. Pet.26.

Respondents don't mention, much less dispute, that the case was wholly organized by a politically active union that recruited its own members as class representatives, hired its own lawyers, paid them millions, and settled class members' claims for millions of dollars that they then directed to their friends' organization to support their policy causes. Pet.9–10; App.128a–129a. This is a new paradigm of *cy pres* abuse that other circuits would forbid, but the Second Circuit permitted, and will reoccur without this Court's guidance.

I. The circuits are fractured over *cy pres*.

Respondents dodge the issue when they assert that the circuits "apply[] the same legal requirement" to analyze class-action settlements that provide for *cy pres* remedies. Def.Br.2. No surprise: *all* class-action settlements, with or without *cy pres*, must be "fair, reasonable, and adequate" under Rule 23(e).[2] But the circuits' *application* of identically worded standards varies tremendously. *Compare*, *e.g.*, Def.Br.10 *and* Pl.Br.19 *with* Pet.18–21.

Examining each conflict where circuits are fractured reveals that these conflicts don't turn on how a court certified a class.

First, the Fifth Circuit is explicit: "Each class member has a constitutionally recognized property interest in the

[2] Plaintiffs criticize (Br.16) Yeatman's supposed challenge to settlement "adequacy," but that was neither the focus of his objection, his appeal, nor this petition. Yeatman doesn't argue that the settlement's size should have been greater, but objects to how it's allocated. *Cf. In re Dry Max Pampers Litig.*, 724 F.3d 713, 717–18 (6th Cir. 2013).

claim or cause of action that the class action resolves." *Klier*, 658 F.3d at 474. Thus, "a class settlement generates property interests" for the class members. *Id.* This principle is not confined to (b)(3). The value of the settlement naturally derives from claims that class members release in the settlement, and thus belongs to the releasing class members. In *any* settlement, treating *cy pres* as legitimate consideration for that release diverts that settlement value to third parties and the world at large. *Accord Joffe*, 21 F.4th at 1134 (Bade, J., concurring) (citing cases). That's true whether *cy pres* relieves the defendant from paying compensation or, in the (b)(2) context, ameliorates its settlement injunctive relief obligations. Pl.Br.19. Without strict rules, class counsels will prefer *cy pres* to direct relief (Pet.28–29); a defendant can use the *cy pres* carrot to negotiate reductions of an injunction's burden.

The Second Circuit split with this principle below by holding that "the settlement funds never belonged to class members." App.18a. The court found relevant to the inquiry how the *defendant* viewed the funds that it was paying. App.18a ("there is no evidence to suggest that Navient would have otherwise agreed to distribute the funds to the class."). This non sequitur proves too much: satisfying Rule 23(e) can't turn on proving whether a defendant would consent to a more fairly allocated settlement. Courts applying appropriate scrutiny hold without further inquiry that attorneys can't negotiate $2 million for themselves and a tiny fraction of that for the class. *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014). But the

Second Circuit uniquely holds that whether class members have a property interest in a settlement that releases their claims turns on settling parties' subjective beliefs about future negotiations. They do this without mentioning *Klier*.

Confronted with this diametric disagreement between the circuits, respondents assert (Def.Br.14; Pl.Br.20) that a fund that results from a (b)(2) settlement is intended to "benefit the class *as a whole*, and d[oes] not belong to individual class members." But a *cy pres* recipient will bestow its benevolence to the world at large without regard to class membership. If the beneficiary were an organization designed to benefit "the class as a whole," it would be a direct class benefit, rather than a putative indirect benefit. Compare the class-targeted organization in *Marshall v. NFL*. 787 F.3d 502, 521–23 (8th Cir. 2015) (Smith, J., concurring). Sidetracking money to *cy pres* does not redress injuries the class suffered. *Dukes* (Def.Br.10; Pl.Br.16–17) neither suggests *cy pres* is a proper nonmonetary (b)(2) remedy, nor forecloses pecuniary distribution just because the defendant paid it to settle (b)(2) claims. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). A settlement may provide relief unavailable in litigation. *Firefighters v. Cleveland*, 478 U.S. 501 (1986).

Second, the Second Circuit diverged from the Third Circuit by rejecting ALI Principles § 3.07, which disallows *cy pres* if there is "a significant prior affiliation with any party, counsel, or the court." *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 331 (3d Cir. 2019). While *Google Cookie* took a case-by-case approach, it repudiates respondents' suggestion that

(b)(2) certification bars an objector from challenging inappropriate *cy pres*. Rule 23(a)(4)'s, Rule 23(g)'s, and the Constitution's adequate-representation requirements don't evaporate upon (b)(2) certification. *Cf. Gaos*, 139 S. Ct. at 1047 (Thomas, J., dissenting) (noting (a)(4) and (g)(4) problems).

Respondents' mischaracterizations of the opinion below are telling. Plaintiffs tendentiously claim (Br.23) that the district court's off-hand comments about the structure of Public Service Promise and American Federation of Teachers' "motive" somehow equate to a "significant prior affiliation" standard. There was no such analysis. Had either lower court examined the conflicts in any depth, they would have noted exactly what Yeatman objected to. Public Service Promise will be run by activists who have overlapping relationships with class counsel and its "partner" AFT—the union that recruited from its members every class representative, funded the litigation, and retains class counsel in other cases. Class counsel and those running Public Service Promise have a financial incentive to remain in AFT's good graces rather than to act independently in the class's best interest. Pet.24; App.128a.

Unlike Hyland, Navient admits (Br.15) that the Second Circuit "didn't mention" this standard. An understatement: the court didn't apply the standard at all, though Yeatman advocated for it. Navient claims (Br.18–19) that courts have "narrowed the circumstances" when *cy pres* is available, but the Second Circuit undertook no such analysis—and the Ninth Circuit expressly disclaims it. *Joffe*, 21 F.4th at 1119–20. No analysis took place last

month when a court approved a settlement sending $100 million to third parties instead of shareholders, without the words "feasibility" or "conflict" appearing once. *In re Altria Grp., Inc. Derivative Litig.*, 2023 U.S. Dist. LEXIS 27959 (E.D. Va. Feb. 20, 2023).

Navient misstates (Br.15) the Second Circuit's adoption of § 3.07 in other cases. *Masters v. Wilhelmina Model Agency, Inc.* did not analyze *cy pres* conflicts of interest at all. 473 F.3d 423, 436 (2d Cir. 2007). In (the later-vacated) *Citigroup*, a district court approved *cy pres* recipients who affirmatively worked against the shareholder class's interests, seeking to prevent the company from prioritizing "investors." *In re Citigroup Inc. Sec. Litig.*, 199 F. Supp. 3d 845, 849, 853 (S.D.N.Y. 2016). In short, respondents are incorrect (Def.Br.15; Pl.Br.24) that the Second Circuit adopted the Third Circuit's "significant prior affiliation" test. Moreover, the court's refusal to apply the standard below opens the door to the innovative abuse seen here, where politicized groups fund class-action litigation and then use the settlement of oblivious class members' claims to fund policy aims.

Third, the decision below sharpens the conflicts at the heart of *cy pres*: What standards should a court apply when class counsel diverts settlement funds to third parties?

Respondents can't be right that Rule 23(b)(2) certification alone gives *carte blanche* to *cy pres*. *E.g.*, *Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071 (9th Cir. 2017) (reversing order approving (b)(2) certified *cy pres*-only settlement). Certainly not when the defendant is settling for millions of dollars in cash that the parties could feasibly

distribute to the class, much less when the settling parties or their attorneys have ties to the recipient of the settlement funds. But that happened here. Confronted with *cy pres* running amok, the Second Circuit put up a traffic cone, requiring objectors to generate *evidence* of bad faith among the conflicted parties. It's the wrong inquiry, for good faith is necessary but not sufficient. Settling parties need no smoke-filled-room collusion to agree at arm's length to act self-interestedly at the class's expense. *Dry Max Pampers*, 724 F.3d at 717–18.

Courts don't normally require collateral litigation to resolve facial conflicts in class settlements. *E.g.*, *Eubank v. Pella Corp.*, 753 F.3d 718, 723–24 (7th Cir. 2014); *cf. also Ortiz v. Fiberboard Corp.*, 527 U.S. 815 (1999). Courts should hold *cy pres* to a stricter, rather than more lenient, standard given the "justified concerns" about illusory "indirect benefit." *Joffe*, 21 F.4th at 1123–24 (Bade, J., concurring) (citing cases and authority).

Finally, circuits split over how to determine whether further individual distributions are economically infeasible. Pet.18–23. Respondents cannot bury these differences.

For example, Hyland scolds (Br.24–25) Yeatman for not citing *Hughes v. Kore of Indiana Enterprise, Inc.* in his description of the split between the Second and Seventh circuits, but *Hughes* is not a Rule 23(e) case. 731 F.3d 672 (7th Cir. 2013). In *Hughes*, 15 U.S.C. §1693m(a)(2)(B)(ii) set Kore's maximum class-wide exposure at $10,000, so it immediately conceded liability and went away. *Id.* at 674. *Hughes*'s sole holding in an *ex parte*

Rule 23(f) appeal was that the district court did "not provide adequate grounds" in decertifying the class. *Id.* at 678. One year later, *Hughes*'s author wrote *Pearson*, precluding using *cy pres* to inflate settlement value in *any* class action. *Pearson* held the district court erred in permitting residual *cy pres* of $1.1 million when distribution to some of the 12 million class members was feasible. 772 F.3d at 781, 784. (In contrast, *EasySaver* shrugged at millions of dollars of "residual" *cy pres* for a much smaller class where the settlement already contemplated that every class member was known and would be distributed coupons. *In re EasySaver Rewards Litig.*, 906 F.3d 747, 761 (9th Cir. 2018).) The Seventh Circuit does not base its prioritizing direct relief over *cy pres* on a case's factual minutiae: "There is no indirect benefit to the class from the defendant's giving the money to someone else." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004). *Contra* Pl.Br.24. In any event, parties' incentives, and the legal rules needed to cabin those incentives, are tremendously different between frictional rounding errors like $10,000 and the millions of dollars here and in *St. John*.

Similarly, plaintiffs' reimagining (Br.25) of *Jones* only demonstrates another split. *Klier* (658 F.3d at 475) looks at the face of the complaint's allegations; *Jones* (38 F.4th at 699) contemplates a court adjudicating the underlying claims. (That rule suggests that parties may agree to all-*cy pres* settlements if they stipulate to the complaint's meritlessness.) *Pearson* and the Third Circuit never mention "windfalls," much less suggest that they preclude distribution. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163

(3d Cir. 2013). Again, even if some courts use similar language, *how* courts define those terms in their analys varies widely. Pet.18–21.

II. The questions presented are important and recurring.

A. Respondents don't dispute that class-action *cy pres* creates problems.

Respondents admit *cy pres* is a problem. *E.g.*, Pl.Br.15; Def.Br.19–20. Yeatman identified (Pet.26–36) several ways in which *cy pres* undercuts fairness for class members specifically and for the legal system broadly, and respondents' response (Def.Br.20; Pl.Br.15, 27–28) is to incorrectly claim that courts are already addressing it.

These same problems led the Court to grant certiorari in *Frank v. Gaos* in 2018; the continued permissiveness of some courts means that millions of consumers and shareholders are unknowingly sacrificing hundreds of millions of dollars of settlement funds to support third parties, some of which conflict with their interests and beliefs. Respondents pretend (Def.Br.18–19) that this is ancient history, but ignore more recent cases Yeatman cited. Pet.34–35; *Altria*, *supra*. Just this month, a concurrence raised the specter of a judge becoming a "munificent philanthropist[]" distributing billions of dollars of residual *cy pres* from a poorly designed settlement. *Fikes Wholesale, Inc. v. Visa U.S.A., Inc.*, – F.4th –, 2023 U.S. App. LEXIS 6170, at *42 (2d Cir. Mar. 15, 2023) (Jacobs, J., concurring).

Respondents contort themselves to claim that this case is outside the *Gaos* circuit split. Of course, it is a Rule 23

problem when the parties select a conflicted *cy pres* recipient—even if the court itself is unconflicted. Pl.Br.28. Of course, the decision below will encourage future forum-shopping at the Second Circuit—not retrospectively. The district court declined to award fees here based on class counsel's "misleading" statements about its financial relationship with AFT. App.45a. Nothing in that decision's affirmance will dampen the rampant use of *cy pres* to inflate attorneys' fees.

Plaintiffs mischaracterize (Br.28 n.2) Yeatman's standing argument: he questioned only whether a class that includes members with only past injuries had standing to seek injunctive relief in a unitary (b)(2) class. App.133a. The Second Circuit decided the question. App.9a–11a. While that resolution suggests Rule 23(a)(4) class certification issues (Pet.i; Pet.28), no one here argues that that decision creates a vehicle or Article III problem.

Navient reads too much (Br.20–21) into the Advisory Committee on Civil Rules' decision not to specifically address *cy pres* in Rule 23(e). The page before Navient's quote notes that if *cy pres* "is not legitimate, it would be unwise to attempt to legitimate it by court rule." Advisory Committee on Civil Rules, *Agenda Book* 60 (Nov. 5–6, 2015) (Apr. 9, 2015 Draft Minutes 38). The Rules Committee's forbearance contemplates the judiciary's engaging Rule 23 issues. "It may be that the best response is [to] 'let the jurisprudence develop.'" *Id.* at 247 (Jul. 15, 2015 Conf. Call Notes 7). It also reflected Rules Enabling Act concerns. Advisory Committee on Civil Rules, *Report to the Standing Committee* 25–26 (Dec. 11, 2015).

In any event, failed legislative proposals are not a basis to assume the Court cannot interpret a legal provision, much less resolve an important circuit split. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187–88 (1994); *see also Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017).

B. *Cy pres* raises First Amendment concerns that the Second Circuit improperly dismissed.

The First Amendment problem *cy pres* creates is another recurring issue that does not turn on (b)(2) or (b)(3) certifications. If anything, (b)(2) certification exacerbates the constitutional harm, by turning (b)(3)'s default association to mandatory (b)(2) class participation. Neither respondent disputes that constitutional due process rights underlie Rule 23 provisions, including notice and opt-out rights. Pet.26–36. Respondents fail to explain why courts should not equally protect First Amendment rights. Due process requires courts to ensure that class members are protected in mandatory class actions that adjudicate and extinguish constitutionally protected property rights. Thus, courts must treat class actions differently than a mere judicial determination of private contractual rights. Consent may not be implied or "presumed." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018).

CONCLUSION

The Court should grant the petition; grant the petition in *St. John v. Jones*, No. 22-554, and hold this petition pending *St. John*; or grant both petitions.

Respectfully submitted,

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March 28, 2023