Nos. 22-566, 22-634

In the Supreme Court of the United States

WILLIAM YEATMAN,

Petitioner,

v.

KATHRYN HYLAND, ET AL.,

Respondents.

RICHARD ESTLE CARSON, III

Petitioner,

v.

KATHRYN HYLAND, ET AL.,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NAVIENT RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

In *Yeatman v. Hyland*, No. 22-566, the question presented is whether a district court has discretion to approve a settlement of a Rule 23(b)(2) class action in which, in addition to agreeing to injunctive relief, the defendant provides money *cy pres* to an organization formed to address the harms alleged by the plaintiffs.

In *Carson v. Hyland*, No. 22-634, the question presented is whether reasonable incentive payments may be provided as part of a class-action settlement to class members who served as named plaintiffs and class representatives throughout the litigation.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Navient Corporation and Navient Solutions, LLC (together, "Navient") state as follows: Navient Solutions, LLC is a wholly owned, direct subsidiary of Navient Corporation, which is a publicly held company. Neither Navient Corporation nor Navient Solutions, LLC has any other parent company, and no publicly held company owns 10% or more of the stock of either.

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INTRODUCTION

After litigating this case for more than a year, the plaintiffs faced the prospect that their efforts to obtain classwide relief would be for naught. The district court (Cote, J.) dismissed on the pleadings all but one of their claims and made clear that the final remaining claim—a state-law claim alleging that Navient representatives provided inaccurate information in individual telephone conversations with student-loan borrowers about their eligibility for Public Service Loan Forgiveness ("PSLF")—was highly unlikely to be certified as a damages class. Pet. App. 5a-6a; *see* Fed. R. Civ. P. 23(b)(3).[1]

Despite the weakness of their case, plaintiffs managed to negotiate a settlement that provides meaningful relief to the class certified under Rule 23(b)(2). Without admitting liability, Navient has implemented and committed to maintaining specific measures to improve how it communicates with borrowers who may be eligible for PSLF. The company will also pay more than $2 million to fund the creation of Public Service Promise, a newly formed nonprofit solely dedicated to counseling and educating borrowers about PSLF. Plaintiffs released their claims for nonmonetary relief, but borrowers remain free to sue Navient individually for monetary relief.

Petitioners William Yeatman and Richard Carson are members of the class who raised a litany of objections to the settlement, two of which they now assert

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[1] All appendix citations refer to the appendix to the petition for certiorari in *Yeatman v. Hyland*, No. 22-566.

for this Court's review. Yeatman objects to the settlement's "*cy pres* award" and asks the Court to provide "overarching guidance" about whether and when *cy pres* remedies are ever permitted in class-action litigation. Carson objects to a provision of the settlement providing for $15,000 incentive payments for class members who were the named plaintiffs and served as representatives of the class throughout the litigation, to compensate them for the burdens they incurred litigating the case. The district court rejected petitioners' objections. The court upheld the settlement as fair, reasonable, and adequate, and in the best interests of the class. The court of appeals affirmed.

Yeatman contends that the courts of appeals are deeply divided about when courts may order *cy pres* remedies in class action settlements. But that division is largely illusory. Every court of appeals to consider the issue has concluded that courts may, in appropriate circumstances, approve class-action settlements that provide for *cy pres* remedies. For the most part, slight variances in how courts have described the limitations on *cy pres* are a reflection of those courts' being presented with different facts but applying the same legal requirement—*i.e.*, that class-action settlements must be "fair, reasonable, and adequate" under the circumstances presented. Fed. R. Civ. P. 23(e).

At bottom, Yeatman's petition misunderstands the settlement at issue and the decisions below. The district court certified the class under *Rule 23(b)(2)*, which provides for only unitary classwide relief, not for individual damages awards. By arguing that the decision below conflicts with cases addressing when

courts should approve *cy pres* remedies in individual-damages class actions certified under *Rule 23(b)(3)*, Yeatman compares apples to oranges. This distinction between (b)(2) and (b)(3) classes underscores why Yeatman's First-Amendment arguments lack merit: Even accepting Yeatman's unprecedented premise that approval of a class-action settlement constitutes state action, the money Navient agreed to pay Public Service Promise was never *his* money. And, at a minimum, this distinction makes this case, which involves a Rule 23(b)(2) class, the wrong vehicle for addressing his criticisms regarding the use of *cy pres* in damages actions under Rule 23(b)(3).

Carson seeks review based on a recent division in the courts of appeals regarding whether two nineteenth-century decisions by this Court categorically bar "incentive" or "service" payments to named plaintiffs in Rule 23 class actions. But only one court of appeals—the Eleventh Circuit—has held that incentive payments are categorically impermissible. The courts of appeals that have rejected Carson's categorical rule nevertheless prohibit *unreasonable* incentive payments. Thus, the split concerns only whether courts may approve *otherwise-reasonable* incentive payments, and remains narrow and lopsided. The Court should allow more courts of appeals to consider the arguments against incentive payments before deciding whether to take up the issue.

This Court should deny both petitions.

STATEMENT

A. Plaintiffs Sued Navient for Allegedly Misleading Student Borrowers About Eligibility for Public Service Loan Forgiveness (PSLF).

PSLF is a federal program, enacted with broad bipartisan support in 2007, that allows individuals who make qualifying payments for the requisite period of time while working in public service to cancel the remaining balance on student loans originated by the U.S. Department of Education ("Federal Direct" loans). 20 U.S.C. § 1087e(m). *See* College Cost Reduction and Access Act § 401, Pub. L. No. 110-84, 121 Stat. 784 (2007). In creating PSLF, Congress and the Department of Education imposed stringent criteria on who could obtain loan forgiveness and when they could do so. As a result, some public-service workers were unable to obtain loan forgiveness, including those who had taken out student loans other than Federal Direct loans, who failed to make the requisite number of payments, or whose jobs the Department of Education deemed not to qualify as "public service."

Plaintiffs here alleged that call-center representatives of the respondents Navient Corporation and Navient Solutions, LLC (together, "Navient") conveyed inaccurate information in phone conversations about whether they qualified for PSLF and what steps they needed to take to obtain loan forgiveness under this program. *See* Am. Compl., DC Dkt. 32 (Jan. 16, 2019).

At the pleading stage, the district court dismissed for failure to state a claim 14 of the 15 claims plaintiffs

asserted against Navient. Op. & Order, DC Dkt. 53 (July 8, 2019).

After the parties commenced discovery on the sole surviving claim, the district court observed an "enormous hurdle" to certifying a damages class under Rule 23(b)(3) because Plaintiffs' claims were based on "very individual conversation[s]" between borrowers and Navient call-center representatives. July 6, 2019 Hr'g Tr. 17:18-19, 19:2-3, DC Dkt. 63. A lawsuit, like this one, based on allegations of individualized misrepresentations and omissions, cannot satisfy Rule 23(b)(3)'s requirement "that the questions of law or fact common to class members predominate over any questions affecting only individual members." *See* Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment ("[A]lthough having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made ...."). The district court's comments echoed another district court's conclusion that nearly identical claims brought against Navient by different borrowers could not be certified as a class action under Rule 23(b)(3) because those claims were premised on alleged oral communications that varied from borrower to borrower. *See Daniel v. Navient Sols., LLC*, No. 8:17-cv-2503, 2019 WL 4671169, at *8 (M.D. Fla. Apr. 26, 2019).

B. Plaintiffs and Navient Reached a Settlement.

"Spurred in part by Judge Cote's comments" that certification of an individual-damages class under Rule 23(b)(3) was improbable, Pet. App. 6a, and by the prospect that Navient would likely have to defend

against the named plaintiffs' individual claims even if no Rule 23(b)(3) class were certified, the parties commenced settlement discussions. *See also id.* 41a. After mediation before a federal magistrate judge and months of hard-fought negotiations, the parties agreed in principle to settle the case.

The agreement that emerged from these arms' length negotiations was premised on certification of an injunctive-relief class for settlement purposes under Rule 23(b)(2). As part of the settlement, Navient agreed—without admitting liability—to implement certain servicing enhancements regarding communications with borrowers, to ensure that its representatives identify borrowers potentially eligible for PSLF and provide accurate information about the program, Pet. App. 61a-66a; and to pay $1.75 million to create Public Service Promise, a newly formed nonprofit dedicated to "provid[ing] education and student loan counseling to borrowers employed in public service," and which the parties estimated would reach 7,700-11,250 student-loan borrowers per year, Pet. App. 66a-68a, 93a-102a. Navient also agreed to make $15,000 incentive payments to the ten class members who served as class representatives. *Id.* 75a.

In exchange, class members released their ability to sue Navient based on these facts either for nonmonetary relief or in a class or other aggregate action, while the unnamed plaintiffs retained their right to sue Navient individually for damages. *Id.* 48a, 53a, 77a.

C. The District Court Certified a Rule 23(b)(2) Settlement Class and Approved the Settlement.

Following a hearing, the district court preliminarily approved the settlement. DC Dkt. 108 (June 19, 2020). After considering and rejecting objections to the settlement (including petitioners' objections), the district court later granted final approval and certified an injunctive-relief class pursuant to Rule 23(b)(2), concluding that the proposed settlement was fair, reasonable, and adequate. *See* Pet. App. 24a-31a, 39a-46a; DC Dkt. 183 (Oct. 2, 2020). The district court explained that there was "a grave risk that there would have been no recovery at all" and "certainly none for the class," given the enormous obstacles to certification of a Rule 23(b)(3) class. Pet. App. 43-44a; *see also id.* 42a (observing that there was "no sound argument" in favor of certification of Rule 23(b)(3) class "because the circumstances for each individual member differ so dramatically"). At the same time, Navient still would have faced the prospect of having to defend the named plaintiffs' individual actions through trial, with all the cost that would entail, even if no Rule 23(b)(3) class were certified. *Id.* 41a.

The district court carefully scrutinized the settlement's provision for incentive payments to the named plaintiffs who served as class representatives. DC Dkt. 183, at 49-53. The court observed that incentive payments can "encourage collusion" and that the court was generally "reluctant" to approve incentive payments that exceeded reimbursement for individual plaintiffs' out-of-pocket costs and lost wages. *Id.* 49:24-50:13. This case, however, presented "reduced

concern ... of collusion" because it cannot be certified as a damages class, and hence "there is little risk that the class representatives breached their duty in agreeing to this settlement." *Id.* 50:23-51:6. The court determined that the payments were reasonable given the extent to which the named plaintiffs "opened their lives to scrutiny," "laid bare their financial circumstances, their career choices, and their personal histories" and were subject to "attack personally" by third parties. *Id*. 52:5-7.

The court denied plaintiffs' request for attorney's fees because counsel had not disclosed a funding relationship with the American Federation of Teachers, of which the named plaintiffs were members. Pet. App. 44a-46a. As a result, the court ordered that $500,000 originally allocated for attorney's fees (8% of class counsel's lodestar fees) revert to Public Service Promise once the settlement becomes final.

D. The Court of Appeals Affirmed.

The court of appeals affirmed the district court's judgment in full against challenges by petitioners Yeatman and Carson.

As relevant here, the Second Circuit rejected the argument that *cy pres* payments are categorically barred in class-action settlements because they do not directly benefit class members. The court explained that class members in this case stood to benefit from the *cy pres* remedy because it "funds Public Service Promise and thereby assists all class members in navigating PSLF" Pet. App. 17a-18a. The court of appeals also rejected Petitioners' contention that the *cy*

pres remedy was inappropriate because the settlement fund could have been distributed directly to class members, explaining that "this argument ... misconstrues the settlement fund." *Id.* 18a. In the context of the Rule 23(b)(2) injunctive-relief class certified by the district court here, the fund did not represent damages that would otherwise be paid to individual plaintiffs, but was rather "more accurately described as a mandatory injunction to establish or contribute to a selected organization than as a refashioning of monetary relief." *Id.* 13a n.2.

The court of appeals further concluded that Carson's objection to the incentive payments was without merit. According to the court, circuit precedent foreclosed Carson's argument that *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), categorically prohibited payment of "incentive" or "service" awards to named plaintiffs in class actions. Pet. App. 21a-22a (citing *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir. 2019)). Insofar as Carson asserted that the incentive payments were excessive, the Second Circuit noted that the district court had "offered compelling reasons for compensating the class representatives," whom third parties had harshly criticized online for their personal choices and their efforts to obtain student loan forgiveness. Pet. App. 22a.

ARGUMENT

THE COURT SHOULD DENY BOTH PETITIONS.

I. Yeatman's Petition on *Cy Pres* Remedies Does Not Implicate a Circuit Split or Otherwise Merit This Court's Review.

Petitioner Yeatman fails to identify a conflict among the courts of appeals on his challenge to *cy pres* remedies. To the extent Yeatman implies that *cy pres* remedies are categorically impermissible in class-action settlements, the courts of appeals have uniformly accepted that *cy pres* remedies may be acceptable as a means of distributing unclaimed funds or when distributions of damages to individual class members are not feasible, while rejecting settlements that abuse the doctrine. And insofar as Yeatman's counsel once again asks this Court to provide "overarching guidance" about the circumstances in which federal courts may approve class-action settlements that provide for *cy pres* relief, the Court has twice rebuffed his previous attempts. *See* Yeatman Pet. 2; *Lowery v. Joffe*, 143 S. Ct. 107 (2022) (denying certiorari); *Frank v. Gaos*, 139 S. Ct. 1041 (2019) (per curiam) (remanding on other grounds). It should do the same here.

Even if circuit courts *were* divided over precisely when courts may approve *cy pres* remedies in lieu of individual damages awards, this case does not implicate any such split, and would be a poor vehicle for addressing that issue. The only class in this case was certified under Rule 23(b)(2), which does not allow for individual damages awards. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-361 (2011). In this context, as the Second Circuit observed, the *cy pres*

remedy functions "as a mandatory injunction to establish or contribute to a selected organization" to deliver prospective relief to the class. Pet. App. 13a n.2. This case thus simply does not present the question of when *cy pres* remedies can be used in lieu of damages awards to plaintiffs in individual-damages class actions certified under Rule 23(b)(3).

A. Yeatman's Purported Circuit Conflicts Are Illusory or Not Implicated Here.

Yeatman contends that the courts of appeals are "fractured" on the circumstances in which courts can order *cy pres* remedies in class actions. Yeatman Pet. 2, 18. But his claims of various circuit splits mischaracterize the decision below or the decisions of other courts, or elide key distinctions between (b)(2) and (b)(3) class actions.

1. Yeatman contends that the decision below adopted an "extreme" position in a six-way, "multi-Circuit split remarkable for its lack of uniformity" regarding when a court may approve a *cy pres* remedy if the court determines that making damages awards to individual class members would be infeasible. Yeatman Pet. 18-22. But every court of appeals to consider the issue—including the Second Circuit—has approved of *cy pres* remedies when it is infeasible to distribute damages to individual class members, as when there is no reliable method of identifying class members or when the amounts to be distributed to each class member would be *de minimis*.[2] Likewise,

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[2] *See In re Google Inc. St. View Elec. Commc'ns Litig.*, 21 F.4th

"[c]ourts in every circuit, and appellate courts in most, have approved the use of *cy pres* for unclaimed class action funds," 4 William B. Rubenstein, *Newberg & Rubenstein on Class Actions* § 12:32 (6th ed. 2022) ("*Newberg & Rubenstein*"), at least when redistributing the remaining funds to class members who have already been fully compensated would cause an inequitable windfall.[3]

The decision below does not conflict with these other decisions. As noted, this case could not be certified as an individual-damages class action because

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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."), *cert. denied sub nom. Lowery v. Joffe*, 143 S. Ct. 107 (2022); *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 327-28 (3d Cir. 2019); *In re Easysaver Rewards Litig.*, 906 F.3d 747, 761 (9th Cir. 2018); *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017); *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014); *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 675-76 (7th Cir. 2013); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34 (1st Cir. 2009); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007); *Fraley v. Batman*, 638 F. App'x 594, 599 (9th Cir. 2016) (Bea, J., dissenting) (*cy pres* acceptable if district court finds that distributions are infeasible or uneconomical); 4 William B. Rubenstein, *Newberg & Rubenstein on Class Actions* § 12:26 (6th ed. 2022).

[3] *E.g.*, *Jones v. Monsanto Co.*, 38 F.4th 693, 699 (8th Cir. 2022; *Baby Prods.*, 708 F.3d at 172; *In re Lupron Mktg. & Sales Pracs. Litig.*, 677 F.3d 21, 30 (1st Cir. 2012); *Klier*, 658 F.3d at 475; *Pharm. Indus. Average Wholesale Price*, 588 F.3d at 34; *Fears v. Wilhelmina Model Agency, Inc.*, 315 F. App'x 333, 336 (2d Cir. 2009).

Plaintiffs' claims relied on highly individualized factual questions about the telephone conversations each Plaintiff allegedly had with Navient call-center representatives. *See supra* p.4. As a result, the settlement provides for class certification only under Rule 23(b)(2) and for prospective relief that includes both business-practice enhancements by Navient and the counseling services that will be offered by Public Service Promise. *See supra* pp.5-6.

As the Second Circuit recognized, in this settlement, the *cy pres* remedy functions as a "mandatory injunction to establish or contribute to a selected organization," which will provide class members with additional prospective relief, and *not* "as a refashioning of monetary relief." Pet. App. 13a n.2. Because the members of a (b)(2) class are not entitled to individual monetary damages, there was no need for the courts below to consider whether it would be feasible to distribute the settlement fund to individual class members, *id.* at 18a, and the decision could not have created a circuit split with other decisions addressing prerequisites to *cy pres* relief in (b)(3) damages actions.

Indeed, Yeatman tacitly acknowledges that the only court of appeals decision discussing the propriety of *cy pres* in the settlement of a Rule 23(b)(2) class action comports with the decision below. In *Google Cookie Placement*, the Third Circuit rejected the argument that a *cy pres* award was improper because the money dedicated to the *cy pres* recipient could have been used to compensate at least a subset of class members, either by narrowing the class through a claims process or by awarding damages to individual class members selected through a lottery. *In re Google*

Inc. Cookie Placement Consumer Privacy Litig., 934 F.3d 316, 328 (3d Cir. 2019). As the Third Circuit explained, that argument flouted Rule 23(b)(2)'s purpose of providing remedies that benefit the class as a whole, not compensating individual class members. *Id.* (seeing "no reason why a cy pres-only (b)(2) settlement that satisfies Rule 23's certification and fairness requirements could not 'belong' to the class *as a whole*, and not to individual class members as monetary compensation"). Even if Yeatman were correct that the Third Circuit has taken a more restrictive approach to *cy pres* in settlements of (b)(3) class actions, Yeatman Pet. 22-23, that only underscores the poor vehicle for review that this (b)(2) class settlement presents.

The distinction between Rule 23(b)(2) and (b)(3) also explains why the decision below does not create a split with the Fifth Circuit's decision in *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468 (5th Cir. 2011), regarding whether the settlement fund "belonged to class members as damages." Because the class in this case was certified under Rule 23(b)(2), the fund that resulted from the settlement was to benefit the class *as a whole*, and did not belong to individual class members. *See Google Cookie Placement*, 934 F.3d at 328. The decision below is therefore not in conflict with the Fifth Circuit's decision about individual class members' rights to the settlement fund in a (b)(3) action.

2. Yeatman stretches further in contending that the Second Circuit "deepens an existing split" between the Third and Ninth Circuits by "rejecting" a comment to Section 3.07 of the American Law Institute's ("ALI") *Principles of the Law of Aggregate Litigation*. Yeatman Pet. 23 (citing *Google Cookie Placement*, 934 F.3d

at 331; *In re Google Inc. St. View Elec. Commc'ns Litig.*, 21 F.4th 1102, 1120 (9th Cir. 2021)).[4] But the Second Circuit neither discussed nor even cited Section 3.07 or the ALI's "significant prior affiliation" standard, and thus could not have created a circuit split on that ground. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 4:10 (11th ed. 2019) ("inconsistency in dicta or in the general principles utilized" does not create a circuit split).

To the contrary, both the Second Circuit and district courts in the Circuit have favorably cited the ALI's *Principles*, casting further doubt on Yeatman's contention that the court below "reject[ed]" this comment. *See Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (citing draft language); *In re Citigroup Inc. Secs. Litig.*, 199 F. Supp. 3d 845, 849 (S.D.N.Y. 2016) (collecting cases); *id.* at 854 (applying "significant prior relation" test).

3. Yeatman briefly adverts to First Amendment concerns with class-action settlements and suggests that the decision below created a circuit split by approving an award to an organization "engaged in political advocacy." Yeatman Pet. 18, 30-32.[5] But "[t]he Free Speech Clause of the First Amendment con-

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[4] The ALI comment states that "[a] *cy pres* remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits."

[5] *See also* Br. of Amicus Curiae Manhattan Inst. 19-22; Br. of Amici Curiae Montana et al. 8-12; Br. of Amicus Curiae Ctr. for Am. Liberty 4-11.

strains governmental actors," *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019), and Yeatman cites no decision holding that a district court's review of a class-action settlement is state action triggering the protections of the First Amendment, *see* Pet. App. 18a-19a; *In re Motor Fuel Temp. Sales Practices Litig.*, 872 F.3d 1094, 1113-1114 (10th Cir. 2017).

Even if approval of a settlement were state action, Yeatman fails to identify any decision holding that a member of a Rule 23(b)(2) class has standing to challenge on First Amendment grounds the relief the defendant in such an action agrees to provide the class as a whole. Navient's contribution of money to fund efforts to educate student-loan borrowers—like its agreement to adopt certain servicing enhancements—neither compels Yeatman to speak nor prevents him from doing so. Although Yeatman and his *amici* analogize this case to *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), their analogy rests on the mistaken premise that the settlement "divert[ed] *each class member*'s money to a third party." Yeatman Pet. 4. Because the class was certified under Rule 23(b)(2), the settlement fund was to benefit the class as a whole, and did not belong to individual class members, so no one class member has any constitutional right to veto the class settlement. *See Google Cookie Placement*, 934 F.3d at 328; *supra* p.13-14.

4. Yeatman's other attempts to try to identify a circuit conflict are similarly meritless. Yeatman asserts that the decision below created an "outlier rule that class member funds may be directed to third parties (i) engaged in political advocacy, (ii) selected by conflicted representatives, (iii) even when the funds

can feasibly be distributed to class members—just so long as there is no *evidence* of actual bad faith among the conflicted parties." Yeatman Pet. 18. The decision adopted no such "rule," but merely concluded that the district court did not abuse its discretion in concluding that the settlement—which the court of appeals characterized quite differently—satisfied Rule 23(e) under the particular circumstances of this case. *See* Pet. App. 9a, 16a-20a. Yeatman's highly factbound objection to the district court's and Second Circuit's application of Rule 23(e) to the facts of this settlement does not warrant certiorari.

Yeatman also incorrectly asserts that the decision below created a circuit split about whether class-action settlements must benefit the class. Even if this argument—raised only in a footnote, *see* Yeatman Pet. 19 n.1—were properly presented for this Court's review, the decision below unsurprisingly did not hold that district courts may approve class settlements that do not benefit class members. And Circuit precedent holds otherwise. *See, e.g.*, *Berni v. Barilla S.p.A.*, 964 F.3d 141, 147-149 (2d Cir. 2020); *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 97 (2d Cir. 2015). In keeping with that precedent, the Second Circuit described at length the benefits the class will obtain from the settlement. *See* Pet. App. 12a-13a & n.2; *see also* DC Dkt. 183, 55:21-56:10. Yeatman's factbound disagreement with those descriptions does not merit certiorari.

B. Yeatman's Dissatisfaction with *Cy Pres* Remedies Does Not Warrant This Court's Review, Which Should Once Again Be Denied.

Not only does Yeatman fail to allege a circuit split, but the question his petition presents is also declining in importance and can be addressed by another body. The Court has twice declined to review this issue and should do the same here.

1. Just last year, petitioner's counsel similarly sought "much-needed guidance" about "[w]hether, or in what circumstances," courts may approve class-action settlements that include *cy pres* relief. Pet. for Cert. ii, 16, *Lowery v. Joffe*, No. 21-1535 (U.S. Oct. 3, 2022). The Court denied review, however, without any noted dissent. That denial came only a few years after the Court had granted certiorari on a question similar to the one Yeatman presents here, Pet. for Cert., *Frank v. Gaos*, No. 17-961 (U.S. Mar. 20, 2019), but then remanded on standing grounds without reaching the merits. Having twice declined to review this question, the Court should also deny review here.

2. Review is particularly unwarranted because this issue continues to decline in importance. Statements by members of this Court and other jurists have led to increased scrutiny of *cy pres* in class-action settlements. *See, e.g.*, *Frank v. Gaos*, 139 S. Ct. at 1046-1048 (Thomas, J., dissenting); *Marek v. Lake*, 571 U.S. 1003 (2013) (Roberts, C.J., respecting the denial of certiorari); *Lane v. Facebook, Inc.*, 696 F.3d 811, 833-834 (9th Cir. 2012) (Kleinfeld, J., dissenting); *Klier*, 658 F.3d at 480-482 (Jones, C.J., concurring). In response, courts have narrowed the circumstances in

which a *cy pres* is available, including by requiring closer alignment between the *cy pres* payment and the claims asserted. 4 *Newberg & Rubenstein* § 12:32. As a result—and contrary to Yeatman's claim that "the use of *cy pres* in class action settlements has proliferated"—the leading class-action treatise notes "something of a trend away from *cy pres*." *Id.* Recent decisions enforcing Article III standing requirements may also reduce the perceived need for *cy pres* remedies in some cases, by making it less likely that cases will be pursued in which settlement funds are distributed *cy pres* because it is difficult to identify genuinely harmed plaintiffs. *See, e.g.*, *Transunion LLC v. Ramirez*, 141 S. Ct. 2190 (2021); *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016).

As a result of these shifts in the uses of *cy pres*, the abuses Yeatman alleges are increasingly unlikely to recur. It is telling that the examples he cites are at least a decade old. And it speaks volumes that Yeatman cites a law review article regarding a "case of *cy pres* to charity where judge's spouse sat on board," not the district-court case itself, which the Ninth Circuit reversed in a decision that restricted the use of *cy pres* and required a closer nexus between the plaintiffs' claims and the *cy pres* recipient. *Fairchild v. AOL, LLC*, No. 09-cv-03568, 2009 WL 10680758 (C.D. Cal. Dec. 31, 2009), *rev'd sub nom. Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011).

Yeatman objects that class counsel can use *cy pres* payments to justify outsized attorney's fee awards. Yeatman Pet. 28-29. But courts of appeals are aware of this possibility and have reminded district courts to reduce attorney's fee awards when appropriate. *See, e.g.*, *Google Street View*, 21 F.4th at 1121-1122; *In re*

Baby Products Antitrust Litig., 708 F.3d 163, 178-179 (3d Cir. 2013); *Masters*, 473 F.3d at 437. In any event, this case presents no such concerns, given that the district court denied class counsel *any* fees at all.

Yeatman also misses the mark in asserting that this settlement involves "lawyers' use of *cy pres* to promote their own personal, financial, political, or charitable preferences." Yeatman Pet. 29. Courts have increasingly reined in *cy pres* by requiring the recipient to have a close nexus to the plaintiffs and their claims. *E.g.*, *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038-1041 (2011). Here, Public Service Promise was formed solely for the purpose of educating student borrowers about PSLF. It is difficult to imagine how the *cy pres* remedy could be better aligned with class members and their claims.

3. Yeatman's call for prescriptive rules about the proper uses of *cy pres* may be answered through revisions to Rule 23, rather than by using this case to opine on *cy pres* remedies generally. *See* Br. of Legal Aid Orgs. at 17-22, *Frank v. Gaos*, 139 S. Ct. 1041 (2019) (No. 17-961).

Just a few years ago, the Advisory Committee on Civil Rules considered a proposed amendment to Rule 23(e) that would have expressly addressed *cy pres* in class-action settlements. That proposed amendment was modeled on Section 3.07 of the ALI's *Principles*. Draft Minutes of the Meeting of the Advisory Committee on Civil Rules 37 (Apr. 9, 2015), *in Agenda Book of the Advisory Committee on Civil Rules* 59 (Nov. 5–6, 2015). The Committee agreed that it "probably is not a good idea" to forbid *cy pres* remedies altogether, *id.* at 39, but it ultimately abandoned the

proposed amendment in light of the prevalence of *cy pres* remedies and "the difficulty of knowing how to craft a good rule." Draft Minutes of the Meeting of the Advisory Committee on Civil Rules 25 (Nov. 5, 2015), *in Agenda Book of the Advisory Committee on Civil Rules* 65 (Apr. 14–15, 2016). The same factors that led the Advisory Committee to drop the effort to craft a generally applicable rule also weigh against the Court's granting review here to offer the "guidance" Yeatman seeks.

C. This Case Is a Poor Vehicle for Addressing Issues of *Cy Pres* Remedies.

This case would be a poor vehicle for the Court to provide "guidance" about the use of *cy pres* in class action settlements, as a general matter. Questions about the propriety of *cy pres* awards typically arise in Rule 23(b)(3) damages class actions where they are used when it is infeasible to distribute settlement funds to individual class members or when doing so would provide some class members an unjustified windfall. In those contexts, a *cy pres* remedy is the "next best" thing to awarding money damages to individual plaintiffs—the principal goal of class actions certified under Rule 23(b)(3). *See* 4 *Newberg & Rubenstein* § 4:47 ("Rule 23(b)(3) class actions are money damages class actions.").

As noted, however, this class was certified under Rule 23(b)(2), which is principally used to secure classwide prospective relief and is *not* a means of obtaining individual money damages awards. *See* Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amendment; *see Wal-Mart*, 564 U.S. at 360-363.

When used in a (b)(2) action to fund an entity that provides injunctive-like forward-looking relief, *cy pres* relief serves a function that is different from *cy pres* awards in (b)(3) damages cases. *See* Pet. App. 13a n.2; *Google Cookie Placement*, 934 F.3d at 328. That difference addresses many of the questions Yeatman poses, *see supra* pp.11-14, 15-18, and also makes this case an unsuitable vehicle for the Court to address when and how *cy pres* relief may be used in (b)(3) cases.

The settlement at issue here does not short-change the absent class members. Facing a near certainty that they would be denied class certification under Rule 23(b)(3), and thus obtain *nothing* for the class, plaintiffs and their counsel obtained meaningful injunctive relief, in the form of tangible business-practice enhancements by Navient, and the formation of a nonprofit dedicated to educating borrowers about PSLF. Among other things, those measures will benefit borrowers who seek to obtain PSLF (including those who borrowed from private lenders but can obtain PSLF by refinancing their debt with a Direct Consolidation Loan). In exchange, class members waive the ability to sue Navient on these facts for injunctive or declaratory relief. They cede the right to aggregate their individual damages claims in a class or mass action, but the prospects that a class could ever be certified on plaintiffs' theory were remote, at best. Significantly, class members (other than the named class representatives) preserve the ability to sue Navient individually for damages, a right that remains meaningful. Yeatman Pet. 7-8; DC Dkt. 127-136.

II. Carson's Petition on Incentive Payments to Class Representatives Does Not Warrant Review at This Juncture.

The Court should deny Carson's petition in No. 22-566. Carson is correct that one court of appeals has concluded that this Court's decisions in two nineteenth-century cases, *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), categorically bar courts from providing for "incentive" or "service" payments to class representatives in Rule 23 class actions. Carson Pet. i. But the circuit split is recent, having solidified less than a year ago. It is also shallow, posing three circuits against the Eleventh Circuit, which stands alone in categorically forbidding incentive awards. And it is narrow, concerning only the permissibility of *otherwise reasonable* incentive payments. Regardless of the merits of Carson's challenge to incentive payments, Navient respectfully suggests that review would be premature and the Court could benefit from allowing other courts of appeals an opportunity to weigh in on the question before the Court considers whether to address it.

A. This Court's Review of Whether Incentive Payments for Class Representatives Are Categorically Prohibited Would Be Premature.

1. A circuit split has arisen recently about whether otherwise-reasonable incentive payments to class representatives are permitted in Rule 23 class actions. In the last several decades, it has become common in class actions for the class representatives or named plaintiffs to receive "special payment[s] in recognition

of their service to the class." 5 *Newberg & Rubenstein* §§ 17:3, 17:7. These payments "compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation and ... reward the public service of contributing to the enforcement of mandatory laws." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011) (en banc) (quotation marks omitted).

In 2020, a divided panel of the Eleventh Circuit departed from the apparent consensus view that had approved of incentive payments in class-action litigation. *See Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1257-1258 (11th Cir. 2020) ("*Johnson I*"). In the Eleventh Circuit panel majority's view, these payments were prohibited by two nineteenth-century cases, *Greenough* and *Pettus*. *Greenough* held that a bondholder that successfully sued parties who were wasting assets pledged as security for the bonds could be reimbursed by fellow bondholders for the "reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit," but not "a personal salary for 10 years and lavish travel expenses, totaling more than $1.4 million in today's dollars." *Johnson v. NPAS Sols., LLC*, 43 F.4th 1138, 1143 (11th Cir. 2022) ("*Johnson II*") (J. Pryor, J., dissenting from denial of reh'g en banc); *see Greenough*, 105 U.S. at 537-538. *Pettus* reiterated this distinction between chargeable and "personal" expenses while concluding that attorneys were entitled to be paid for their professional services from the fund those services created for their clients. 113 U.S. at 127-128. In the Eleventh Circuit's view, incentive payments in modern class-actions are "part salary and part bounty," and thus barred by *Greenough*. *Johnson I*,

975 F.3d at 1258-1259. The Eleventh Circuit subsequently denied rehearing *en banc*. *Johnson II*, 43 F.4th 1138.

Petitioner does not identify any other court of appeals that has agreed with the Eleventh Circuit's panel decision in *NPAS*. Three other courts of appeals have disagreed and concluded that *Greenough* and *Pettus* do not categorically prohibit incentive payments to class representatives in Rule 23 class actions. *See Murray v. Grocery Delivery E-Servs. USA*, 55 F.4th 340, 352-354 (1st Cir. 2022); *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785-87 (9th Cir. 2022); Pet. App. 22a-24a (2d Cir.) (adhering to the Second Circuit's pre-*NPAS* decision in *Melito v. Experian Mkt. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir. 2019)).

2. Regardless of the merits of the dispute, review by this Court is not warranted at this juncture because the circuit split is recent and shallow. The panel decision creating the split is less than three years old, and the split was confirmed only last year, when the Eleventh Circuit declined, over four judges' dissent, to rehear the case *en banc*. Even now, only four circuits have weighed in on the split, and only three have addressed the question at any length. And the split remains lopsided, with only the Eleventh Circuit categorically forbidding incentive payments in class-action settlements. In these circumstances, this Court's review is not urgently needed, and "allow[ing] the various [circuits] to serve as laboratories in which the issue receives further study before it is addressed by this Court" may benefit any consideration the Court may give this issue in the future. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting the denial of certiorari).

B. There Has Not Been a Showing That the Issue Raises Significant Problems in Class Settlements Because Rule 23 Is Available to Address Unreasonable Payments.

The split is also narrower and less important than Carson contends because courts already have tools to reject class-action settlements that include excessive incentive payments. Although incentive payments to class representatives are common in class settlements, they are typically not very large, averaging between $10,000 and $15,000 per class representative. 5 *Newberg & Rubenstein* § 17:8. Moreover, Rule 23(e) already mandates judicial scrutiny of incentive payments to class representatives and requires courts to reject settlements that inequitably overcompensate them. *See* Fed. R. Civ. P. 23(e)(2)(A), (D) (instructing courts to review whether class-action settlements are "fair, reasonable and adequate," based partly on consideration of whether "the class representatives ... have adequately represented the class" and whether "the proposal treats class members equitably relative to each other").

In light of these provisions, courts that have declined to adopt the Eleventh Circuit's categorical prohibition have made clear that class settlements cannot include *unreasonable* incentive payments. *See Murray*, 55 F.4th at 353; *Apple Device*, 50 F.4th at 786-87; *Johnson*, 975 F.3d at 1266-67 (Martin, J., concurring in part and dissenting in part); *see also* Pet. App. 22a; *Dornberger v. Met. Life Ins. Co.*, 203 F.R.D. 118, 124-125 (S.D.N.Y. 2001). The recent, narrow circuit split thus concerns only whether courts may approve *otherwise reasonable* incentive payments—a narrower question than the one Carson presents.

CONCLUSION

The petitions for certiorari should be denied.

Respectfully submitted,

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