Nos. 22-566 and 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 IN OPPOSITION OF CLASS REPRESENTATIVE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held that the district court did not abuse its discretion when it certified a settlement class under Rule 23(b)(2) and found the settlement agreement, which included a *cy pres* award and preserved class members' rights to bring individual damages actions, fair, reasonable, and adequate under Rule 23(e).

2. Whether the Second Circuit correctly concluded that class representative service awards are not *per se* impermissible in Rule 23(b)(2) class action settlements.

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STATEMENT OF THE CASE

Petitioners William Yeatman and Richard Estle Carson III each seek this Court's review of a decision of the United States Court of Appeals for the Second Circuit that affirmed the district court's certification and approval of a Rule 23(b)(2) class-action settlement over Petitioners' objections.

Respondents are Class Representatives who took out federal student loans to pay for their education, along with Navient Corporation and Navient Solutions LLC (together, "Navient"), the private for-profit company that serviced these loans. When Navient failed to provide accurate advice about borrowers' eligibility for forgiveness of the Class Representatives' loans under the Public Service Loan Forgiveness program ("PSLF") and thereby stymied their efforts to have the loans forgiven, the Class Representatives sued Navient on behalf of a putative nationwide class. The United States District Court for the Southern District of New York (Cote, J.) dismissed all but one of Plaintiffs' claims, and expressed grave doubts about the possibility of certifying a damages class under Federal Rule of Civil Procedure 23(b)(3).

After protracted arms-length negotiations and mediation, Plaintiffs and Navient agreed to a settlement in which Navient changed its business practices to deliver better and more accurate information to borrowers about their PSLF eligibility and the requirements for achieving loan forgiveness, and promised to contribute a *cy pres* award to establish a nonprofit organization. That organization would counsel student borrowers about loan forgiveness options, provide advice to help borrowers determine whether they have claims to redress individual

harm, and make referrals to outside organizations for assistance with individual litigation. In exchange, the class agreed to release their claims for non-monetary relief and the right to bring damages claims through aggregate actions, but class members retained the right to sue Navient individually for money damages.

The district court certified a settlement class under Rule 23(b)(2) and approved the settlement under Rule 23(e) as "'fair, reasonable, [] adequate,' and 'in the best interest of the Settlement Class as a whole.'" Yeatman App. 3a. Petitioners appealed, arguing that the district court erred in certifying the class, approving the settlement, and (with respect to Petitioner Carson) approving service awards of $15,000 to the Class Representatives. They contended that the settlement did not benefit the class, that a waiver of aggregate damages claims is not allowed in a Rule 23(b)(2) settlement, and that service awards to class representatives are impermissible. The court of appeals affirmed, holding that the district court did not abuse its discretion in certifying the class and approving the settlement.

A. Factual Background and District Court Proceedings

In 2007, Congress enacted the Public Service Loan Forgiveness program, Pub. L. No. 110-84, 121 Stat. 784 (2007), to address the crushing burden of student debt facing public servants such as teachers, nurses, police officers, and teachers. *E.g.*, C.A. App. 30 ¶ 1 (cost of higher education has risen more than 700% since 1983, with over 40 million people in the United States having taken out student loans). The PSLF statute provides

that the balances on student loans owned by the federal government will be forgiven once a public-service worker makes 120 on-time monthly payments under a qualifying repayment plan. *See* Yeatman App. 4a.

The Department of Education contracted with, among others, Navient to service borrowers' loans and guide borrowers in navigating the complexities of PSLF eligibility. *See id.* Because not all loan repayment plans qualify for PSLF, it is essential that a public servant who wants to obtain forgiveness make informed decisions about their repayment plan both at the outset of and throughout the 120-month repayment period. Part of Navient's responsibilities under its servicing contract was to assist borrowers in making optimal choices by giving them accurate information about repayment and loan forgiveness options—an obligation that Navient itself touted to borrowers. C.A. App. 34–36 ¶¶ 8–16.

In 2018, Respondents Kathryn Hyland, Melissa Garcia, Jessica Saint-Paul, Rebecca Spitler-Lawson, Michelle Means, Elizabeth Kaplan, Jennifer Guth, Megan Nocerino, Elizabeth Taylor, and Anthony Church ("Class Representatives") sued Navient on behalf of a putative nationwide class of borrowers employed in public service for Navient's failures in implementing the PSLF program. As alleged in the complaint, Navient failed to "live up to its obligation to help vulnerable borrowers get on the best possible repayment plan and qualify for PSLF." Yeatman App. 4a. Navient "[d]eceived borrowers by [erroneously] informing them PSLF was not available to them," "[m]isled borrowers by stating they were 'on track' for PSLF when in fact their repayment plan did not qualify for PSLF," and "[a]dvised borrowers not to

submit paperwork that would verify their employment and other qualifying factors for PSLF." Yeatman App. 4a. As a result, borrowers were forced to make excess payments, accrue additional interest on their loans, or lose PSLF eligibility altogether. *Id.* 4a–5a. In short, public servants who could have qualified for the program "were 'denied loan forgiveness at alarming rates.'" *Id.* 4a; C.A. App. 37 ¶ 17.

Navient vigorously contested Plaintiffs' suit. The United States District Court for the Southern District of New York (Cote, J.) dismissed all but one of Plaintiffs' claims. With respect to the remaining claim for violation of New York's consumer protection law, the court noted that the Class Representatives' claim turned on oral representations made by Navient to individual borrowers, and cautioned that it "just can't imagine there would be any uniform[] oral representation[s]." Yeatman App. 5a. In the court's view, there was "an enormous hurdle to certifying [a Rule 23(b)(3) damages class]" because common questions of fact would not predominate over individual questions, as Rule 23(b)(3) requires. *Id.* 5a.

Following extended negotiations and mediation led by a magistrate judge, the parties executed a Settlement Agreement and Release ("Settlement Agreement"). *See* Yeatman App. 6a, 47a–92a. Both sides agreed that Plaintiffs would seek certification of a nationwide Rule 23(b)(2) settlement class. Yeatman App. 57a–58a. Class members agreed to release claims for non-monetary relief and aggregate claims for monetary relief, but expressly retained the right to file individual lawsuits for monetary relief. *Id.* 6a. Navient agreed to business reforms intended to ensure that its representatives would provide

better and more accurate information to public service workers seeking loan forgiveness. *Id.* 66a.

Navient also agreed to fund a *cy pres* award with $1.75 million (later increased to $2.25 million). The *cy pres* recipient, a nonprofit organization, would "provide education and student loan counseling to borrowers employed in public service" to enable them to pursue loan forgiveness, and would also advise borrowers on whether they might have claims to redress individual harm and make referrals to outside organizations for assistance with potential litigation. *Id.* 6a. In addition, the *cy pres* recipient was tasked with "'generat[ing] administrative and legislative reforms' to improve PSLF." *Id.*; *see also id.* 94a–95a (describing organization's goals).[1] Navient also agreed to pay a $15,000 service award to each Class Representative, subject to court approval. *Id.* 75a.

The district court held a preliminary settlement approval hearing on June 10, 2020, and subsequently granted conditional certification of a Rule 23(b)(2) injunctive-relief settlement class and preliminary approval of the Settlement Agreement and proposed *cy pres* recipient. *See* Yeatman App. 7a. The court found that certification of a settlement class pursuant to Rule 23(b)(2) was appropriate. The court recognized that absent class members would release aggregate damages claims but

1. Petitioner Carson mischaracterizes the *cy pres* organization as a "political-lobbying organization" that would advance positions favored by Class Representatives' union. Carson Pet. 4. In fact, the new organization is a nonprofit under Section 501(c)(3) of the Internal Revenue Code, Yeatman App. 93a, and thus is limited by statute in its ability to engage in lobbying, *see* 26 U.S.C. § 4911.

underscored that "the class members aren't giving up really a viable claim for relief, that is, a class action claim for damages," C.A. App. 276:2–11, and further, the absent class members would retain individual claims for damages, *id.* 646:18–25. Additionally, the court found that "the Settlement was entered into at arm's length by experienced counsel, including after an in-person mediation," and preliminarily found that the settlement was "fair, reasonable, and adequate." C.A. App. 291 ¶¶ 1–3.

Petitioners objected on the purported grounds that "the *cy pres* award would not benefit the class, that the settlement improperly released monetary claims, and that class counsel were compromised by a conflict of interest." Yeatman App. 7a–8a.

The district court held a fairness hearing at which it heard from all class members who had requested time, including both Petitioners' counsels. At the hearing, the court reiterated that the case "was unlikely to succeed as a [damages] class action if litigation proceeded further." C.A. App. 606:3–5. According to the court, "[a]ny misrepresentations that may have been made by Navient or any omissions, [or] failures to speak, would have arisen in response to questions asked by borrowers," and that presented "an enormous hurdle to finding that there were common questions of fact that would bind the class and for finding that individual fact issues and questions would not overwhelm this litigation if pursued as a [damages] class action." C.A. App. 606:5–7; 10–14; *see also* Yeatman App. 42a.

The court addressed various potential concerns about the settlement raised by the objectors. Noting that

Rule 23(b)(2) class action settlements do not permit class members to opt out, the court found any concern on that point was "adequately dealt with by the fact that individual class members retain their right to bring individual lawsuits." Yeatman App. 44a. The court also addressed a recent Second Circuit decision holding that Rule 23(b)(2) certification is appropriate only where "all class members stand to benefit from injunctive relief." *Berni v. Barilla S.p.A.*, 964 F.3d 141, 143 (2d Cir. 2020). The court found that the settlement satisfied *Berni*, crediting the parties' submissions explaining how all class members stood to benefit from the reforms to Navient's business practices and the *cy pres* organization. Yeatman App. 44a; D. Ct. Dkt. 111.

In response to objections that there was no direct monetary relief for class members, the court emphasized that there "is no sound argument to suggest[] that there could be a class action that would result in a monetary award to individual class members because the circumstances for each individual member differ so dramatically." Yeatman App. 42a. Thus, the court concluded, "the only avenue for obtaining a monetary award for an individual class member is to pursue [their] own individual action," *id.*, and the settlement identified and preserved that crucial right.

Turning to the specifics of the settlement, the court noted that while Navient could have "withst[ood] a greater judgment," the settlement was "absolutely within the range of reasonable settlements," especially "because there [was] a grave risk that there would have been no recovery at all" had the case proceeded. Yeatman App. 43a–44a. The court recognized "the great debt our nation

owes [public servants], and to the extent that settlement will benefit public service employees, it is all to the good. And to the extent that this settlement benefits Navient by causing it to improve its practices and training, that is all to the good as well." C.A. App. 607:17–22.

With respect to the *cy pres* award, the district court rejected Yeatman's objection that prior relationships between class counsel and certain attorneys who would likely work with the *cy pres* organization created the appearance of a conflict of interest. The court praised the *cy pres* organization for its "independent, well-qualified board overseeing the work of its employees in the education and training and outreach that will help public service employees be better informed and better able to take advantage of all their rights." Yeatman App. 46a.

The district court expressed concern about Plaintiffs' request, made pursuant to the Settlement Agreement, for $500,000 in attorneys' fees to partially reimburse the payment of hourly legal fees by the American Federation of Teachers ("AFT"),[2] and directed that the amount be paid to the *cy pres* organization instead, in accordance with the terms of the Settlement Agreement. Yeatman App. 44a–46a. The court emphasized that its denial of attorneys' fees "is not a criticism of AFT and should not be heard as such." *Id.* 46a. Indeed, the court found

2. Contrary to Petitioner Carson's aspersions, Carson Pet. 3, proper notice of the fee request was provided to the class at the time the court set for attorneys' fees applications in accordance with Rule 23(h)(1), C.A. App. 638:17–639:3; *see also* Yeatman App. 19a n.4 ("We agree with Plaintiffs, however, that '[n]othing in Rule 23 required that the class notice disclose the proposed reimbursement [to AFT].'" (alterations in original)).

that "the motive behind AFT acting as it has and the commitment it has shown in this litigation and funding fully this litigation is nothing but admirable." *Id.* "[B]ecause of AFT's work and its decision and its generosity," the court concluded, "the class has achieved a significant benefit, and that significant benefit will have or may have a profound impact on all public service employees." *Id.*

The district court issued a final approval order on October 9, 2020. The court ruled that certification under Rule 23(b)(2) was appropriate, Yeatman App. 27a–28a, and noted that class members were releasing "all claims for monetary relief brought on an aggregate or class basis or for non-monetary relief arising out of the same facts underlying this lawsuit," *id.* 28a. The court further noted that the Agreement "does not release or discharge, but instead expressly preserves, the right of [class members] to file individual lawsuits for monetary relief." *Id.* 29a. The court approved the service awards, emphasizing that "the class representatives opened their lives to scrutiny," "laid bare their financial circumstances, their career choices, and their personal histories," and even "suffered personal attacks because they have served in their role as named Plaintiffs in order to benefit all class members." *Id.* 30a. The court also observed that the Class Representatives waived the right to sue Navient individually, even though the service awards would "compensate each Class Representative for only a fraction of the debt that they held at some point in time." *Id.* Finally, the court denied the sole request for attorneys' fees and directed that the requested amount be added to the amount distributed to the *cy pres* recipient, for a total of $2.25 million. Petitioners appealed.

B. Second Circuit Proceedings

The United States Court of Appeals for the Second Circuit affirmed. First, the court of appeals rejected arguments from both Petitioners Yeatman and Carson that the class lacked standing because some class members' loans were no longer serviced by Navient, noting that "[a]t least six of the named plaintiffs continue to have a relationship with Navient." Yeatman App. 11a.[3]

Second, the court of appeals explained why certification of a Rule 23(b)(2) class was proper. It found that all members of the class stood to benefit from the proposed injunctive relief: Reforms to Navient's business "will benefit class members whose loans continue to be serviced by Navient," and "will also benefit the remaining class members … by providing them accurate information about PSLF and helping them determine whether they have viable individual claims for damages."[4] Yeatman App. 12a–13a. The court of appeals further concluded that the record supported Plaintiffs' allegations that "Defendants … acted or refused to act on grounds that apply generally to the Settlement class." Yeatman App. 14a.

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3. Yeatman's assertion that "nearly half of all class members … no longer had loans serviced by Navient or were otherwise now unqualified for PSLF," Yeatman Pet. 14, is wholly unsupported by the record.

4. Petitioner Carson's claim that the *cy pres* organization "is designed primarily to serve *future* borrowers," Carson Pet. 7, is wrong, as both the district court and court of appeals found. *See, e.g.*, Yeatman App. 13a n.2, 46a.

While the court of appeals emphasized that the reforms to Navient's business were independently sufficient to justify Rule 23(b)(2) certification, Yeatman App. 13a & n.2, the court further found that in addition to the business reforms, "the settlement's *cy pres* award also benefits the whole class by funding a nonprofit, Public Service Promise, that will help all borrowers learn whether or not they are eligible for loan forgiveness and 'provid[e] guidance on [PSLF] applications or assistance in challenging denials,'" *id.* Citing with approval *In re Google Inc. Cookie Placement Consumer Priv. Litig.* ("*Google Cookie*"), 934 F.3d 316 (3d Cir. 2019), the court concluded that "[w]here, as here, the parties in a Rule 23(b)(2) injunctive class action reach a settlement that requires the defendant to make a monetary contribution to a third party, the award is more accurately described as a mandatory injunction to establish or contribute to a selected organization than as a refashioning of monetary relief." Yeatman App. 13a n.2.

The court of appeals rejected Yeatman's argument that because the settlement waived aggregate claims for monetary damages, it was an abuse of discretion to certify a Rule 23(b)(2) class, rather than a Rule 23(b)(3) class. The court stressed that "'individual class members [in fact] retain their right to bring individual lawsuits,' and the settlement does not prevent absent class members from pursuing monetary claims." Yeatman App. 15a–16a. Indeed, the court noted, "one of the functions of [the *cy pres* organization] is to advise class members of their litigation options and refer them to outside organizations for further assistance." Yeatman App. 15a n.3.[5]

5. Petitioner Carson's assertion that Plaintiffs expected the settlement to "effectively bar the vast majority of Class Members

Third, the court of appeals affirmed the district court's approval of the settlement as fair, reasonable, and adequate under Rule 23(e). Yeatman App. 16a–17a. It found that the district court had "carefully analyzed" the relevant factors and "reasonably concluded that … the settlement was 'absolutely within the range of reasonable settlements,' especially 'because there [was] a grave risk that there would have been no recovery at all' had the case proceeded." Yeatman App. 16a–17a.

The court of appeals embraced the conclusion of its "sister circuits" that "class members can 'benefit—albeit indirectly—from a defendant's payment of funds to an appropriate third party.'" Yeatman App. 17a (quoting *In re Google Inc. St. View Elec. Commc'ns Litig.*, 21 F.4th 1102, 1116 (9th Cir. 2021), and citing *Google Cookie*, 934 F.3d at 330; *In re Lupron Mktg. and Sales Practices Litig.*, 677 F.3d 21, 35 (1st Cir. 2012)). That was true here, the court found, because the *cy pres* organization will "assist[] all class members in navigating PSLF and determining whether they have a viable individual monetary claim against Navient." Yeatman App. 17a–18a.

As for both Petitioners' insistence that a *cy pres* award is improper if it is feasible to distribute funds directly to the class, the court explained this concern was misplaced here because it "misconstrues the settlement fund as a damages award that was redistributed to Public Service Promise through the *cy pres* doctrine." Yeatman App. 18a. In reality, "the settlement fund never belonged to class members as damages." *Id.*

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from seeking any relief at all," Carson Pet. 5–6, is baseless, as the court of appeals indicated, Yeatman App. 15a n.3.

"[T]he class members expressly reserved their individual right to later sue Navient for money damages[], and there is no evidence to suggest that Navient would have otherwise agreed to distribute the funds to the class." *Id.*; *see also* Yeatman App. 20a (observing that the parties' settlement came "only after the District Court indicated that Rule 23(b)(3) certification would likely fail"). The court also rejected both Petitioners' arguments that the *cy pres* award unlawfully compels speech in violation of the First Amendment. As the court explained, "[t]he settlement agreement does not involve state action that implicates the First Amendment" because the district court's "review of the settlement agreement in this case essentially determined whether it was 'fair, reasonable, and adequate' and was merely an exercise in compliance with Rule 23(e)," which under controlling precedent "is not sufficient to constitute state action." Yeatman App. 18a–19a (internal quotation marks omitted).

The court of appeals found ample support for the district court's rejection of both Petitioners' complaints about the relationship between Plaintiffs' counsel and AFT. Petitioners did not "point[] to any evidence that conflicts with [the district court's] finding that 'the motive behind AFT acting as it has and the commitment it has shown in this litigation … is nothing but admirable.'" Yeatman App. 20a. Nor did the court of appeals identify any evidence impugning class counsel's conduct. *Id.*

With respect to the fee request, the court held that Rule 23 did not require disclosure of the proposed reimbursement to AFT in the class notice; the district court took the issue into account in denying all fees; and neither Petitioner had shown how any alleged deficiencies

in the notice would be grounds for invalidating the settlement. Yeatman App. 19a n.4.

Finally, the court of appeals affirmed approval of the Class Representative service awards, noting that such awards are permitted under the circuit's precedent and that the district court "offered compelling reasons for compensating the class representatives" that "were supported by the record." Yeatman App. 22a.

REASONS FOR DENYING THE PETITIONS

Neither petition warrants this Court's review. Yeatman's petition, which focuses on the inclusion of a *cy pres* award in a class action settlement, ignores the fundamental distinctions between Rule 23(b)(2) injunctive-relief class actions and Rule 23(b)(3) damages class actions in a bid to conjure up a circuit split. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361–63 (2011) (Rules 23(b)(2) and (b)(3) have different "justifications," "structure[s]," and "procedural protections"). The legal standard applied by the Second Circuit in affirming the district court's certification of a Rule 23(b)(2) class and approval of the settlement, including the *cy pres* award, comports with the only other circuit to address the inclusion of a *cy pres* award in a Rule 23(b)(2) class action. And even if the standards governing *cy pres* awards in Rule 23(b)(3) class actions were relevant (which they are not), there is no split among the circuits on that issue either.

Not only is there no circuit split on point, but this case would be a poor vehicle for addressing Yeatman's manifold objections to *cy pres* awards. Yeatman's central concern is the diversion of class member damages to *cy*

pres awards. That issue is not implicated by a Rule 23(b)(2) class action settlement, where by definition individual damages awards are unavailable. Nor is this case a viable vehicle to tackle any potential concerns about whether *cy pres* awards create the risk of inflated attorneys' fees, bad incentives for district courts choosing *cy pres* recipients, and forum shopping. Those issues are not presented in this case.

Carson's petition, which focuses on the permissibility of class representative service awards, likewise offers no good reason for this Court's review. The Second Circuit's ruling on this issue is fully consistent with the decisions of two of the three other circuits to have addressed Carson's argument.[6] The Eleventh Circuit's contrary ruling in *Johnson v. NPAS Solutions, LLC* is an outlier. 975 F.3d 1244 (11th Cir. 2020) ("*Johnson I*"), *reh'g en banc denied*, 43 F.4th 1138 (11th Cir. 2022) ("*Johnson II*"), *cert. filed sub nom. Johnson v. Dickenson*, No. 22-389 (Oct. 21, 2022), *and Dickenson v. Johnson*, No. 22-517 (Dec. 5, 2022). The disagreement among the federal circuits on the question is shallow and provides no compelling grounds for a grant of certiorari.

At bottom, both Petitioners ask this Court to grant certiorari to correct what they believe to be erroneous factual findings made by the district court and affirmed by the Second Circuit. They argue that the benefits of the settlement were insufficient, air what they call "political" disagreements about the details of the *cy pres* relief, and

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6. *Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 353 (1st Cir. 2022); *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785–87 (9th Cir. 2022).

speculate about alleged conflicts of interest regarding class counsel and the proposed *cy pres* recipient. Each of those complaints was addressed and rejected by the lower courts, and Petitioners' requests that this Court revisit those fact-bound determinations provide no good basis for this Court's review.

I. Yeatman's Petition Does Not Warrant Review by This Court

A. There Is No Conflict Among the Circuits on *Cy Pres* Awards

Yeatman asks this Court to address whether, or in what circumstances, a court may certify a class under Rule 23(b)(2) or approve a settlement as adequate under Rule 23(e) when the relief includes a *cy pres* award. Yeatman Pet. i. No circuit split exists as to either issue.

At the outset, Yeatman's petition ignores the key distinction between different types of class actions that this Court has emphasized. Class actions in which plaintiffs seek individualized damages awards must be certified under Rule 23(b)(3), and there must be notice to class members and the opportunity to opt out. *Dukes*, 564 U.S. at 361, 363. Class actions seeking "final injunctive relief or corresponding declaratory relief" must be certified under Rule 23(b)(2). Fed. R. Civ. P. 23(b)(2); *see also Dukes*, 564 U.S. at 360. Crucially for this case, "individualized award[s] of money damages" are unavailable in Rule 23(b)(2) class actions. *Dukes*, 564 U.S. at 361. "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy,'" which "must perforce affect the entire class at once." *Id.* at 360–62.

Because "each class member's individualized claim for money" is not at stake, notice and the opportunity to opt out are not required. *Id.* at 363.

This distinction between Rule 23(b)(2) and Rule 23(b)(3) is of substantial consequence, as this Court recognized in *Dukes*, 564 U.S. 338, and it matters for both of the issues that Yeatman raises in his Question Presented. The requirements for certifying a Rule 23(b)(2) versus Rule 23(b)(3) class are different under the text of the Rule itself. *See id.* at 360–63. As for adequacy, a court must consider what the settlement provides as compared with the best possible recovery. *See* Fed. R. Civ. P. 23(e), 2009 Adv. Comm. Notes; *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). In a Rule 23(b)(2) action, individual damages are by definition unavailable and thus not relevant in evaluating adequacy, *see Dukes*, 564 U.S. at 360–61, but they must be carefully considered in analyzing the adequacy of a Rule 23(b)(3) settlement, *see* Newberg and Rubenstein on Class Actions § 13:51 (6th ed. 2022) (collecting approaches to evaluating adequacy of damages settlement).

Class certification. Yeatman identifies no circuit split on class certification under Rule 23(b)(2). The only case Yeatman cites as part of his purported circuit split, Yeatman Pet. 22–24, that addressed class certification is *Google Cookie.* There, the Third Circuit reached the same conclusion as the Second Circuit below: A *cy pres* award can be appropriate relief in a Rule 23(b)(2) class and does not preclude certification. *Google Cookie*, 934 F.3d at 331; Yeatman App. 14a n.2. And indeed, the Second Circuit cited *Google Cookie* with approval. Yeatman App. 17a. Yeatman's remaining cases do not address certification. In

any event, they involve classes certified under Rule 23(b)(3) and thus are inapposite to the question whether a class may be certified under Rule 23(b)(2), as noted above. *See Dukes*, 564 U.S. at 360.

Yeatman's position on certification before this Court represents a substantial departure from his arguments below. Before the Second Circuit, Yeatman argued that Rule 23(b)(2) certification was improper because not all members of the settlement class stood to benefit from the injunctive relief, and that a *cy pres* award cannot count as a benefit to class members for purposes of ascertaining whether a Rule 23(b)(2) class can be certified. Yeatman App. 12a–13a & n.2; *see also* Yeatman C.A. Br. at 18–25. The Second Circuit rejected these arguments, holding that the reforms to Navient's business were a sufficient benefit to support Rule 23(b)(2) certification. Yeatman App. 12a–13a. While the Second Circuit agreed with the Third Circuit that a *cy pres* award is appropriate Rule 23(b)(2) relief, that determination was not necessary to its ruling on certification; it held that even if the settlement here had not included a *cy pres* award, the benefits of the settlement's business practice enhancements to class members sufficed to certify the class. Yeatman App. 12a–14a.[7]

7. For that reason—and also because this is a Rule 23(b)(2) action, not a Rule 23(b)(3) action—this case does not present the concern raised by Justice Thomas in *Frank v. Gaos* concerning "*cy pres*-only arrangement[s]" in which a "settlement agreement … provided no other form of meaningful relief to the class" except a *cy pres* award. 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting).

Yeatman does not meaningfully challenge the Second Circuit's determination that Navient's business reforms are independently sufficient to support Rule 23(b)(2) certification.[8] Thus, the inclusion of *cy pres* relief could provide grounds for setting aside the lower courts' rulings on certification only if that alone rendered a class *per se* uncertifiable under Rule 23(b)(2). But Yeatman did not press that position below, and he identifies no cases that support such a position, let alone create a circuit split on the question.

Adequacy. Yeatman's challenge to the adequacy of *cy pres* settlements under Rule 23(e) fares no better. Every circuit to have addressed the adequacy of a Rule 23(b)(2) or Rule 23(b)(3) settlement with a *cy pres* component permits them, as do district courts in the four regional circuits that have not addressed the issue.[9] Yeatman

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8. In a footnote, Yeatman contends that the Second Circuit's "analysis of settlement benefit was separately flawed" because the standard for measuring whether class members benefited was purportedly too low. Yeatman Pet. 19 n.1 (citing *In re Subway Footlong Sandwich Mktg. Litig.*, 869 F.3d 551 (7th Cir. 2017)). Yeatman points to a Seventh Circuit case that reversed approval of a Rule 23(b)(2) settlement after finding the injunctive relief lacked any value. Contrary to Yeatman's contention, that decision creates no split on the fact-bound question of whether the specific business reforms here had value, and in any event, the lower courts' conclusion that the reforms benefited the class—even without the *cy pres* award—was well-supported.

9. *See In re Lupron Mktg. & Sales Pracs. Litig.*, 677 F.3d 21, 34–35 (1st Cir. 2012); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 435 (2d Cir. 2007); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172–73 (3d Cir. 2013); *Google Cookie*, 934 F.3d at 328; *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th

points to a purported split on whether a court must consider the feasibility of distributing damages to class members before allowing *cy pres* relief. First, all but one of the cases Yeatman cites, *see* Yeatman Pet. 18–26, are Rule 23(b)(3) damages class actions, whereas this case is a Rule 23(b)(2) injunctive-relief class action with no damages award. The remaining case is a Rule 23(b)(2) action, and it accords with the ruling below. Second, even if the Court looked to Rule 23(b)(3) actions, there is no true split on the standard for assessing *cy pres* awards in those settlements either.

With respect to Rule 23(b)(2) actions, the Second Circuit's standard for evaluating the adequacy of *cy pres* relief was fully consistent with the decision of the only other court of appeals to evaluate the adequacy of a *cy pres* award in the context of a Rule 23(b)(2) injunctive-relief class action. In *Google Cookie*, a class of consumers sued Google for its use of web browser cookies that tracked user data. 934 F.3d at 320. The district court certified an injunctive-relief class under Rule 23(b)(2), and the parties reached a settlement in which Google agreed to stop using the tracker cookies and pay a $5.5 million *cy pres* award to various organizations dedicated to internet privacy. *Id.* at

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Cir. 2011); *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 676 (7th Cir. 2013); *Jones v. Monsanto Co.*, 38 F.4th 693, 699 (8th Cir. 2022), *cert. filed sub nom. St. John v. Jones*, No. 22-554 (Dec. 16, 2022); *Google St. View*, 21 F.4th at 1113; *Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 435 (11th Cir. 2012); *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 476 n.15 (D. Md. 2014); *Michel v. WM Healthcare Sols., Inc.*, 2014 WL 497031, at *26 (S.D. Ohio 2014); *In re Universal Serv. Fund Tel. Billing Pracs. Litig.*, 2013 WL 2476587, at *3–5 (D. Kan. June 7, 2013); *In re LivingSocial Mktg. & Sales Pracs. Litig.*, 298 F.R.D. 1, 13–14 (D.D.C. 2013).

321–22. Unlike here, the class also released all individual damages claims. *Id.* at 321; Yeatman App. 6a. Yeatman's counsel represented the sole objector, who argued (as Yeatman does here) that a *cy pres* award should have instead been distributed to class members in individual damages awards.

The Third Circuit rejected this argument, citing *Dukes*. It held that "a *cy pres*-only (b)(2) settlement that satisfies Rule 23's certification and fairness requirements … 'belong[s]' to the class *as a whole*, and not to individual class members as monetary compensation" because "[d]irect monetary distributions typically would not accomplish the purpose of a (b)(2) class." *Google Cookie*, 934 F.3d at 328. The court endorsed Google's argument that "th[e] settlement fund was never intended to compensate class members monetarily," but instead "enhance[d] the settlement's deterrent effect by funding data privacy institutions that will work to prevent similar potential privacy invasions from occurring in the future." *Id.* The court remanded solely on questions concerning the relationship between the *cy pres* recipient and class counsel and whether there could be a class-wide release of individual damages claims in a Rule 23(b)(2) class action. *Id.* at 329–31.

The Second Circuit's decision here is in complete accord with *Google Cookie*. The court of appeals below held that "the settlement fund" here is not "a damages award that was redistributed to Public Service Promise," because it "never belonged to class members as damages." Yeatman App. 18a. Instead, the court explained that the *cy pres* award was properly "characterized as injunctive,

or equitable, relief," and, as in *Google Cookie*, was not "aimed at repurposing funds that would otherwise have been distributed to the class as money damages." Yeatman App. 13a n.2 (citing *Google Cookie*, 934 F.3d at 328). Both circuits thus agree that *cy pres* awards can be adequate relief in Rule 23(b)(2) class actions because they do not displace individualized damages awards, but rather belong to the class as a whole and serve to enhance the settlement's deterrent effect. No other circuit court has addressed the adequacy of *cy pres* awards when a class is certified under Rule 23(b)(2).

Yeatman appears to suggest that the decision below deepens a split on whether a court must address the feasibility of distributing further damages to class members, Yeatman Pet. 18–22, but this ignores the distinctions between Rule 23(b)(2) and 23(b)(3) settlements. Because this is a Rule 23(b)(2) settlement, as the Second Circuit explained, feasibility is irrelevant, as "the settlement fund never belonged to class members as damages," Yeatman App. 18a—a conclusion that flows directly from this Court's holding in *Dukes*. By contrast, when considering Rule 23(b)(3) settlements involving *cy pres* awards, the Second Circuit has evaluated feasibility. *See Masters*, 473 F.3d at 436 (endorsing rule that *cy pres* awards are suitable when "direct distribution to class members is not economically feasible" and remanding for consideration of feasibility).[10] Yeatman's complaint that the Second Circuit's approach did not include a

10. Yeatman's list of cases favoring damages awards rather than *cy pres* relief, Yeatman Pet. 32–34, is irrelevant because each of those cases was a Rule 23(b)(3) class action in which damages awards were available, unlike here.

feasibility analysis, Yeatman Pet. 19–20, simply reflects a repackaged version of his disagreement with the district court's decision that Rule 23(b)(3) certification was impossible, and conversely, that Rule 23(b)(2) certification was appropriate. That boils down to a request for error correction.

Nor is there any conflict between the decision below and *Google Cookie* on how to evaluate potential conflicts of interest in class action settlements. *Google Cookie* remanded for further consideration of a *cy pres* award because the district court "conducted no fact finding, either through additional filings or an evidentiary hearing, to determine the nature of the relationships between the *cy pres* recipients and Google or class counsel." 934 F.3d at 330. Here, the district court held a multi-hour settlement approval hearing during which it found that an "independent, well-qualified board [would] oversee[]" the *cy pres* organization, that the "motive" behind the litigation was "admirable," and that "the class has achieved a significant benefit." Yeatman App. 46a. The Second Circuit agreed. *Id.* at 20a.

The circuit court likewise considered and rejected Yeatman's allegations that class counsel were conflicted, concluding that "counsel agreed to settle only after the District Court indicated that Rule 23(b)(3) certification would likely fail. Absent settlement, the class members here may not have received anything at all." *Id.* This thorough review by both courts below reflects precisely the analysis that the Third Circuit held was required in *Google Cookie*.

Along similar lines, Yeatman claims that the Second Circuit parted from other circuits in its consideration of

Section 3.07 of the American Law Institute's Principles of the Law of Aggregate Litigation (the "ALI Principles"). Yeatman Pet. 23. But as noted *infra* at 26, the Second Circuit has endorsed Section 3.07, and nothing in the decision below suggests otherwise. Yeatman's arguments on this point simply reflect his disagreement with the lower courts' fact-bound analysis—and rejection—of the conflicts he alleged.

Even if Rule 23(b)(3) cases were somehow pertinent to the certification and adequacy analyses in Rule 23(b)(2) cases, there is no split on the legal standard for assessing the adequacy of Rule 23(b)(3) settlements with *cy pres* awards. Yeatman claims the Third, Fifth, and Seventh Circuits allow *cy pres* awards only when distribution of further damages to class members is infeasible, Yeatman Pet. 21–22, but he misinterprets those cases. The Third Circuit in *Baby Products* expressly "decline[d] to hold that *cy pres* distributions are only appropriate" in cases "where further individual distributions are economically infeasible." 708 F.3d at 173. While the Fifth Circuit in *Klier* noted that courts should distribute damages to class members where feasible, it limited that point to "a distinct category of [] cases, in which funds have gone unused by a particular subclass," and described its approach as fitting "comfortably with the prior decision of … [its] sister circuits"—citing the Second Circuit as an example. 658 F.3d at 478 & n.28 (citing *Masters*, 473 F.3d at 436). The Seventh Circuit rejected a *cy pres* award in *Pearson v. NBTY, Inc.* because the claims process was ineffectual, 772 F.3d 778, 784 (7th Cir. 2014), and *Mirfasihi v. Fleet Mortgage Corp.* did the same based on inadequate notice, 356 F.3d 781, 786 (7th Cir. 2004). When the Seventh Circuit—in a decision Yeatman fails

to mention—confronted a case without such procedural defects, it encouraged the use of *cy pres* awards because they would promote consumer protection more effectively and at lower administrative cost than a direct distribution of *de minimis* damages. *Hughes*, 731 F.3d at 678.

Yeatman casts the First, Eighth, and Ninth Circuits as adopting more generous standards for *cy pres* awards, but that, too, is misplaced. He notes that the Ninth Circuit has permitted *cy pres* awards when damages distributions would be *de minimis*. *See, e.g.*, *In re EasySaver Rewards Litig.*, 906 F.3d 747, 761–62 (9th Cir. 2018). But that position accords with the Seventh Circuit's decision in *Hughes* and the First Circuit's position as well. *See Lupron*, 677 F.3d at 34–35 (rejecting further distributions in Rule 23(b)(3) action because absent class members who had not filed claims would benefit more from *cy pres* distribution). As for the Eighth Circuit's ruling in *Jones v. Monsanto Co.*, 38 F.4th at 699, its instruction that a district court should "make its own assessment of the damages 'that would be recoverable' by class members before approving distribution of the residual funds *cy pres*" is consistent with *Klier*, *Baby Products*, *Hughes*, and *EasySaver*. When courts assess whether further damages distributions are feasible or whether damages awards would be *de minimis*, they make an assessment of the damages that would be recoverable, which is exactly what *Jones* calls for.

Notably, Yeatman does not acknowledge that the Second Circuit applies the feasibility standard in Rule 23(b)(3) settlements, even though he cited a decision on that point repeatedly below. *Masters v. Wilhelmina Model Agency* remanded a *cy pres* settlement for reconsideration

because the parties did not contend that "it would be onerous or impossible to locate class members or [that] each class member's recovery would be so small as to make an individual distribution economically impracticable." 473 F.3d at 436; *see also id.* (approvingly citing draft ALI Principles limiting Rule 23(b)(3) *cy pres* relief to cases where damages awards are "not economically feasible"). This is exactly the standard Yeatman claims the Second Circuit has disavowed. *Masters* also approvingly cites and applies Section 3.07 of the ALI Principles, *id.*, defeating Yeatman's contention that there is any split on adherence to this provision.

Yeatman also complains that the decision below gives insufficient weight to class members' First Amendment rights. Yeatman Pet. 30–32. He cites no circuit split on this question, and none exists. The only other circuit to have addressed whether court approval of a private agreement to settle a class action represents state action reached the same conclusion as the Second Circuit: It does not. *See* Yeatman App. 18a–19a; *In re Motor Fuel Temperature Sales Pracs. Litig.*, 872 F.3d 1094, 1113 (10th Cir. 2017). Were it otherwise, any judicial determination of rights under private contracts would be state action and open private contracts to constitutional scrutiny. By comparison, the decisions of this Court that Yeatman cites, Yeatman Pet. 31, involved enforcement of state statutes, not private contracts, and thus the decision below creates no inconsistency with them, either. *See Janus v. AFSCME*, 138 S. Ct. 2448, 2460 (2018) (Illinois Public Labor Relations Act); *Harris v. Quinn*, 573 U.S. 616, 624 (2014) (same); *Knox v. SEIU*, 567 U.S. 298, 302 (2012) (California agency shop statute). Nor are there any meaningful First Amendment concerns about *cy pres* awards in any event.

The Ninth Circuit addressed the merits of Yeatman's First Amendment argument—after declining to reach the state action question—and held that *cy pres* awards do not violate the First Amendment. *Google St. View*, 21 F.4th at 1118–19. The Eighth Circuit has reached the same conclusion. *Jones*, 38 F.4th at 699–700.

B. The Case Is a Poor Vehicle for Addressing Any Concerns About *Cy Pres* Awards

Yeatman raises a host of objections to the Second Circuit's rulings on certification and adequacy, attacking the adequacy of relief to the settlement class, the approval of the *cy pres* recipient, and purported conflicts of interest. *E.g.*, Yeatman Pet. 19 n.1, 28. Those amount to requests for error correction and provide no grounds for review.

To the extent this Court wishes to address any concerns about whether *cy pres* awards inappropriately divert money away from individual class members or allow gamesmanship with respect to attorneys' fees, *see* Yeatman Pet. 27–30; *see also Marek v. Lane*, 571 U.S. 1003 (2013) (Roberts, C.J., respecting the denial of certiorari), this action does not squarely present them. Not only is this a Rule 23(b)(2) action—in which no funds are distributed directly to class members by definition—but the class members here retained the right to sue for individual money damages.

Nor would this case be a good vehicle to tackle Yeatman's other concerns. The district court declined to award attorneys' fees to class counsel, and thus any question about whether a *cy pres* award allows for inflation of fees, *see* Yeatman Pet. 28-29, is purely hypothetical. Nor could this settlement have "tempt[ed] [the district

court] to play benefactor with someone else's money": Unlike the cases Yeatman cites, here the parties—not the district court—agreed to a *cy pres* award and selected its recipient. Yeatman Pet. 30. And the case presents no opportunity to address any potential for forum shopping. Yeatman himself does not claim this occurred here and points instead to "the experience of other circuits" in Rule 23(b)(3) actions. Yeatman Pet. 34–36.

Yeatman has failed to identify any split among the courts of appeals with regard to their approach to *cy pres* awards in class-action settlements. Should the Court wish to address the propriety of *cy pres* awards in Rule 23(b)(3) actions, the pending petition in *St. John v. Jones*, No. 22-554, would allow it to do so.[11]

II. Carson's Petition Does Not Warrant Review by This Court

A. There Is Near Unanimity Among the Circuits on the Permissibility of Service Awards

There is no reason for this Court to grant certiorari to decide whether service awards to class representatives are permissible. Service awards have been "present in class action law for close to a half century," Newberg and Rubenstein on Class Actions § 17:2 (6th ed. 2022), and this Court has denied numerous petitions for certiorari on this question, including two from Carson's counsel. *See,*

11. Yeatman now asserts that class members in this case "indisputably have standing," Yeatman Pet. 17, and the court of appeals expressly concurred, Yeatman App. 9a-12a. But Yeatman squarely took the opposite position below, *see* Yeatman App. 9a, raising additional doubts about whether this case would be a good vehicle to resolve any questions about *cy pres* relief.

e.g., *Bowes v. Melito*, No. 19-504, *cert. denied*, 140 S. Ct. 677 (2019); *Craven v. Cobell*, No. 12-234, *cert. denied*, 568 U.S. 995 (2012).

With the sole exception of the recent *Johnson* decision from the Eleventh Circuit, the circuit courts have applied consistent standards. That body of precedent ensures that service awards appropriately compensate class representatives for their contributions and burdens, while not giving them an excessive benefit relative to other class members.[12] *See* Newberg and Rubenstein on Class Actions § 17:13 (6th ed. 2022) (describing circuit court standards). Indeed, Carson's catalog of cases invalidating specific service awards, *see* Carson Pet. 27–28, confirms that the lower courts are policing service awards with vigilance.

The Eleventh Circuit's categorical ban is an outlier, *see Johnson I*, 975 F.3d at 1266 (Martin, J., concurring in part and dissenting in part) (collecting cases); Newberg and Rubenstein on Class Actions § 17:4 (6th ed. 2022), and

12. *See, e.g.*, *Murray*, 55 F.4th at 353; *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011), *cert. denied sub nom. Murray v. Sullivan*, 566 U.S. 923 (2012); *Berry v. Schulman*, 807 F.3d 600, 613–14 (4th Cir. 2015), *cert. denied sub nom. Schulman v. LexisNexis Risk & Information Analytics Grp., Inc.*, 137 S. Ct. 77 (2016); *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir.), *cert. denied sub nom. Moore v. Johnson*, 540 U.S. 854 (2003); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir.), *cert. denied sub nom. Jansen v. U.S. Bank Nat'l Ass'n*, 537 U.S. 823 (2002); *Apple Device Performance*, 50 F.4th at 785–87; *Chieftain Royalty Co. v. Enervest Energy Inst. Fund XIII-A, L.P.*, 888 F.3d 455, 468–69 (10th Cir. 2017), *cert. denied sub nom. Chieftain Royalty Co. v. Nutley*, 139 S. Ct. 482 (2018); *Cobell v. Salazar*, 679 F.3d 909, 922 (D.C. Cir.), *cert. denied sub nom. Craven v. Cobell*, 568 U.S. 995 (2012).

does not reflect a sufficiently developed conflict to warrant this Court's review, either in this case or the pending petition in *Johnson*. This case, where the decision of the court below regarding service awards is in accord with every circuit but the Eleventh, would be an especially poor candidate to address any purported conflict.

Moreover, the near-unanimous view of the circuits permitting service awards is correct. Carson points to two nineteenth-century decisions that long predate Rule 23, modern class actions, and even the Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934). *See Trustees v. Greenough*, 105 U.S. 527 (1881); *Cent. R.R. & Banking Co. of Ga. v. Pettus*, 113 U.S. 116 (1885). As the Second Circuit explained in a prior case, which was in turn relied upon by the Second Circuit below, *Greenough* and *Pettus* did not "provide factual settings akin to" a Rule 23 class action and thus are "inapposite." Carson App. 23a & n.5 (citing *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir.), *cert. denied*, 140 S. Ct. 677 (2019)).

That "factual setting" is important. Rule 23 provides the foundation for class representative service awards because "class membership alone [is what] entitles the class representative" to the award. Newberg and Rubenstein on Class Actions § 17:4 (6th ed. 2022). Given that *Greenough* and *Pettus* predate the adoption of Rule 23, they cannot control the permissibility of Rule 23 service awards. Carson points to *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980), Carson Pet. 23-24, but that case was about attorneys' fees, not service awards, and the Court referenced *Greenough* and *Pettus* to illustrate the history of "traditional practice in courts of equity" regarding fee shifting, not to suggest those precedents bear on the interpretation of Rule 23. Indeed, this Court approvingly

referenced service awards as recently as 2018. *See China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1810–11 & n.7 (2018) (noting that a plaintiff who "lead[s] the class" may receive "an attendant financial benefit," including "a share of class recovery above and beyond her individual claim" (citing *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming $25,000 service award))).

B. The Second Circuit Properly Affirmed the Service Awards Here

The Second Circuit correctly affirmed the service awards here. The court of appeals properly found no abuse of discretion in the district court's determinations that *Greenough* and *Pettus* were inapposite. Yeatman App. 20a–22a. It noted the "compelling reasons for compensating the Class Representatives," including the "personal attacks" they suffered as a result of their service, and found that the district court's findings "were supported by the record." *Id.* at 22a.

The proceedings before the district court confirm that conclusion. The district court conducted a lengthy fairness hearing, and its analysis of the proposed awards was meticulous. As the district court noted, each Class Representative submitted a detailed declaration setting forth the extensive efforts they had expended throughout the case—on average, 125 hours per person, including substantive contributions to the filings, responses to discovery requests, and participation in settlement discussions and mediation. C.A. App. 402, 434, 443–44, 456–57, 651. The court found that the service awards would "compensate each Class Representative for only a fraction of the debt that they held," even though the Class Representatives agreed, in exchange, "to give up

the right to sue Navient individually." Carson App. 30a. The court also took account of "evidence that the Class Representatives [] suffered personal attacks because they have served in their role as named Plaintiffs." *Id.*

At the fairness hearing, Carson argued that service awards are prohibited by *Greenough* and *Pettus*. C.A. App. 618–19. His written submission further objected that the Class Representatives were receiving an outsized benefit, that the service awards suggested a conflict of interest, and that the Class Representatives did not submit detailed records comparable to attorney time sheets. D. Ct. Dkt. 167, at 17–22. The district court determined the awards to be justified for the reasons noted above.

The court also rejected the speculative conflicts that Carson raised, as well as his complaint that absent class members did not receive damages. It determined that "because individualized issues regarding any misrepresentations or omissions by Navient would likely have prevented [Rule 23(b)(3)] class certification, and therefore there is likely no monetary relief that could have been awarded to absent class members on an aggregate basis, there is little risk that the Class Representatives breached their duty to absent class members in agreeing to this settlement." Carson App. 32a.[13] For that reason, upon review of the Class Representatives' declarations,

13. Carson suggests that the Class Representatives and their counsel "arranged … for the Settlement to be submitted for approval under Rule 23(b)(2), rather than under Rule 23(b)(3)," Carson Pet. 6, but this flatly misrepresents the record that the Class Representatives and their counsel fought aggressively for Rule 23(b)(3) certification and turned to Rule 23(b)(2) certification only after the district court indicated that Rule 23(b)(3) certification would be impossible, *see* Yeatman App. 20a.

the Second Circuit found that the awards "did not lie outside the bounds of the District Court's discretion." Carson App. 22a.

Carson now levels accusations against AFT, complains of a "kickback" (his term for hourly attorneys' fees), and suggests (wrongly) that a settlement that expressly preserved individual damages claims would, in fact, bar class members from bringing such claims. *See* Carson Pet. 3–6. But the district court addressed each of Carson's objections, and the Second Circuit properly affirmed those factual findings. C.A. App. 648–52; Carson App. 24a. Carson's contention that the Circuit erred in doing so is a fact-bound request for error correction that does not warrant review.

* * *

CONCLUSION

The petitions for writs of certiorari should be denied.

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