NO. 15-765

IN THE

Supreme Court of the United States

THEODORE H. FRANK,

Petitioner,

v.

JOSHUA D. POERTNER, on behalf of himself and all others similarly situated, et al.,

Respondents.

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

Brief of the Cato Institute as *Amicus Curiae* in Support of Petitioner

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QUESTIONS PRESENTED

This case involves a class-action settlement in which class counsel received $5,680,000 and their millions of class-member clients realized only $344,850 combined. In other words, class counsel received *over 94%* of the total cash recovery provided in the settlement. Breaking with other circuits, the Eleventh Circuit held that the district court did not abuse its discretion in approving that settlement because it added to the settlement's value other "benefits"—including a *cy pres* award requiring the defendant to donate some of its product to a charity of its choosing. The questions presented are:

1. Whether, or in what circumstances, a settlement that provides a disproportionate allocation of its pecuniary benefit to class counsel is "fair, reasonable, and adequate," under Federal Rule of Civil Procedure 23(e)(2).

2. Whether, or in what circumstances, the use of a *cy pres* remedy in lieu of attempting further distributions to actual class members is "fair, reasonable, and adequate," under Federal Rule of Civil Procedure 23(e)(2).

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. The present case concerns Cato because it involves a threat to the integrity of the adversarial legal system and thus to constitutional due process.

SUMMARY OF ARGUMENT

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

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[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no party's counsel authored this brief in whole or in part and that no person or entity other than *amicus* funded its preparation or submission.

The opt-out mechanism currently used to govern class action lawsuits results in minimal-to-no participation by class members. As a result of lax supervision by the class, class counsel are free to engage in self-dealing and collusion with defendants, selling class claims at a steep discount while maintaining high attorney fees. *Cy pres* awards are being increasingly used because they facilitate that collusion, and also because they enable even greater self-dealing—allowing class counsel and defendants to burnish their public-relations images by funding charitable efforts with the money that rightfully belongs to the class.

Class members' due process rights are violated because the actions of class counsel fall short of the adequate representation guaranteed by the Constitution. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). These rights are also implicated by the judiciary's complicity in the deprivation of legitimate legal claims without compensation and without meaningful opportunity to consent. To remedy this unfortunate dynamic, courts must apply a "rigorous analysis" under Rule 23 in order to forestall a wholesale deprivation of class members' due process rights. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2552 (2011).

Class members also suffer a deprivation of their First Amendment rights when a court approves a *cy pres* award as part of a class action settlement, because it forces class members to "endorse[] . . . ideas that [the court] approves." *Knox v. Service Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012). The opt-out system used in the class action context is problematic because it presumes "acquiescence in the loss of fundamental rights" to be

free from compelled speech and places the burden on absent class members. Id. at 2290. Even more problematic is the possibility that, as here, the victims of wrongdoing might be compelled to surrender the value of their legal claims in support of a charity *controlled by the defendant*.

Most importantly in the context of a cert. petition, the deprivation of all of these rights is not limited to this case—or even to the Eleventh Circuit—but will be suffered by class members nationwide, as class counsel file claims in the jurisdiction that exercises the least scrutiny over potential self-dealing.

ARGUMENT

I. WITHOUT MEANINGFUL JUDICIAL OVERSIGHT OF PROPOSED *CY PRES* CLASS ACTION SETTLEMENTS, CLASS MEMBERS ARE DEPRIVED OF THEIR LEGAL CLAIMS WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FIFTH AMENDMENT

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

The current opt-out regime governing class action lawsuits in federal court raises serious due process

concerns by allowing named plaintiffs, class counsel, and defendants to dispose of the legal claims of absent class members without meaningful consent. The only bulwark against this deprivation of property in federal court is the requirement that district courts approve "proposals [that] would bind class members" only after determining that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Approval of a *cy pres* class action settlement that provides no benefit to class members removes this bulwark, deprives class members of due process, and leaves class members protected only by the good will of class counsel and defendants.

A. Present Opt-Out Mechanisms for Class Action Participation Result in Effectively Zero Participation by Class Members

The evolution of class actions in U.S. courts has yielded a system where litigation is controlled by class counsel and defendants, bargaining over class certification and settlement. Named plaintiffs are likely allowed to offer token input, as required by class counsel's professional obligation, but the vast majority of class members have no way of making their voices heard. This result is not surprising, given the incentives faced by class counsel and the absent class members, but the lack of meaningful participation by absent class members borders on a violation of due process even in the absence of concerns regarding *cy pres* awards.

The Court has stated that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Shutts*, 472 U.S. at 812.

If due process protections are to be meaningful in the class-action context, the absent plaintiff's "opportunity" must be meaningful. The Court, in *Shutts*, said as much as it described a Kansas opt-out statute and concluded that the opportunities afforded plaintiffs were "by no means *pro forma*" and concluded that the constitution required no more protection for plaintiffs who could be "presumed to consent to being a member of the class by his failure to [affirmatively opt out]." Id. at 813. See also *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 799 (1996) ("the right to be heard ensured by the guarantee of due process has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest").

Rule 23 provides that class members be notified of the lawsuit, ostensibly providing class members with an opportunity to become informed about their legal claims and participate meaningfully in legal proceedings. Fed. R. Civ. P. 23(c)(2). This is the theoretical foundation for concluding that class members can be presumed to have consented to being part of the class. That foundation falls apart, however, when subjected to a critical review under a practical lens. *See generally* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71 (2007). *See also Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071-72 (2013) (Alito, J., concurring) (inaction in response to a class arbitration opt-out form is not consent).

Having suffered relatively small injuries, class members have little incentive to learn of the existence of class actions in which they may have

legal interests. Class counsel, meanwhile, having already assembled their named plaintiffs, have no incentive to provide meaningful notice to the rest of the class. As a result, when notices arrive at class members' homes, they are likely to resemble little more than the piles of junk mail that most people receive on a daily basis. (Anecdotally, undersigned counsel have experienced this phenomenon in our own households.) Most class members, not being on the lookout for class action "opportunities," will dispose of such notices without any comprehension of the fact that they have forfeited their right to opt out. Class counsel are then able to proceed with the case unencumbered by an informed and participating class that could object to the uncompensated extinguishing of its legal claims.

B. Without Meaningful Class Participation, Class Actions Are Rife with Principal-Agent Problems and Resulting Conflicts of Interest

The attorney-client relationship is a classic case of the principal-agent relationship. As with all principal-agent relationships, the most difficult task is to constrain the self-interest of the agent, especially where the agent has a significant informational advantage over the principal. Standards of professional ethics, enforced by state bar associations, provide some constraint on lawyers' tendencies to enrich themselves at the expense of their clients but, as shown by the number of disciplinary actions commenced each month, professional standards are often not enough. As unfortunate as this truth is, the situation becomes even more problematic when the agent (class counsel) is aware that the vast majority of the

principals (class members) are not monitoring the agent's actions. In fact, most of these "principals" are unaware of the existence of the "agent" or the fact that he is acting in their names and binding them.

Because class counsel need not worry about class members involving themselves in the litigation, they are largely free to pursue their own interests, even when doing so prejudices the interests of absent class members. The Court has previously stated that due process is violated when the named plaintiffs' interests are in line with those of the defendant, rather than the absent class members. *Hansberry v. Lee*, 311 U.S. 32, 45-46 (1940). Self-dealing by class counsel, especially in collusion with defendants, violates the due process rights of absent class members in precisely the same way.

Self-dealing on the part of class counsel could take a number of forms—including advancement of a particular political agenda—but it typically takes the form of pursuing larger attorney fees. One way that class counsel can inflate fee awards is to be over-inclusive when identifying the class. A larger class means more aggregated damages and, consequently, a larger fee award.

The emergence of *cy pres* awards in the class action context provides circumstantial evidence of this phenomenon. *Cy pres* was initially proposed as a way of disposing of the unclaimed portion of the damages fund. *See generally* Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617 (2010). Most scholars account for the disparity between awarded and claimed damages by arguing that the

damages to be claimed did not justify each class member's cost of obtaining his share. *See id.* It is at least plausible, however, that many of those whose alleged injuries went into the damages calculation were not actually harmed, making their failure to claim damages not only reasonable but ethical.

This raises a related conflict of interest, that class counsel and defendants have a strong incentive to collude in reaching a settlement. Class counsel want to inflate the size of the class in order to maximize damages awards. Defendants want to inflate the size of the class so that a settlement will eliminate more potential legal claims at a discounted rate. Class counsel can agree to the discount and still increase their payoff due to the increased class size. *See Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) ("Would it be too cynical to speculate that what may be going on here is that class counsel wanted a settlement that would give them a generous fee and Fleet wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself?"). This collusion works well for defendants and for class counsel, but legitimate class members suffer because their injuries are compensated at a discounted rate, to say nothing of those outside of the legitimate class, who suffer because their separate claims have been improperly categorized and disposed of through settlement.

Of course, the existence of incentives to engage in self-dealing does not mean that class counsel will do so, but there is plentiful evidence that class counsel engage in self-dealing, thereby failing to provide adequate representation to absent class members as required by due process. *Shutts*, 472 U.S. at 812. The Court has recently dealt with two such examples of

self-dealing by class counsel. In *Dukes*, for example, the Court rejected an attempt to limit damages to back-pay claims in order to make the class action mandatory. *Dukes*, 131 S.Ct. at 2559. The Court rejected this self-interested attempt by class counsel because it would have precluded class members' compensatory damages claim. In *Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345, 1348-49 (2013), class counsel attempted to stipulate to less than $5 million in damages, in order to avoid federal jurisdiction under the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005). While the Court decided that case on other grounds, it did acknowledge that the attempted stipulation would have reduced the value of class members' claims. *Knowles*, 133 S.Ct. at 1349. Lower courts have also rejected selective pleading, waiver, or abandonment of claims in order to achieve certification of the class, even though doing so would impair class members' ability to raise abandoned claims at a later date. *See, e.g.*, *Arch v. American Tobacco Corp., Inc.*, 175 F.R.D. 469, 479-80 (E.D. Pa. 1997); *Pearl v. Allied Corporation*, 102 F.R.D. 921, 922-23 (E.D. Pa. 1984); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 602 (S.D.N.Y. 1982); *Kreuger v. Wyeth, Inc.*, No. 03-cv-2496, 2008 WL 481956, at *2-4 (S.D. Cal. Feb. 19, 2008).

Now, not every principal-agent problem or conflict of interest that arises in the class action context is the result of class counsel's nefarious motives. For example, it is impossible to effectively communicate with the entire class, which will inevitably lead to some class members being disadvantaged. Courts should be aware of the strong potential for self-dealing by class counsel, however, and should refuse

to condone it by certifying classes and approving settlements that appear self-serving. By reviewing class action certification requests and settlements with a skeptical eye, courts will be better able to protect the due process rights of class members to adequate representation.

C. Fed. R. Civ. P. 23(e)(2)'s "Rigorous Analysis" Provides a Bare Minimum Check on Abuses by Class Counsel

Our current class action regime raises significant due process concerns, but it also contains a safeguard against actual due process violations, by requiring the trial court to engage in a "rigorous analysis" of the plaintiffs' claims. *Dukes*, 131 S.Ct. at 2552 ("Rule 23 does not set forth a mere pleading standard . . . certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied") (internal quotation marks omitted). While the Court in *Dukes* only needed to address the due process requirements of the certification process, due process violations are possible at all points in class action litigation, and especially in the settlement context. The Court should therefore apply its "rigorous analysis" standard to the entirety of Rule 23.

A trial court that ignores its responsibilities under Rule 23, engaging in no review—or only cursory review—of class counsel's actions will further erode any remaining incentives for that counsel to consider and protect the due process rights of absent class members. A trial court that takes its responsibilities under Rule 23 seriously will be alert for those areas where self-dealing by class counsel is likely, and will be better able to protect the interests

of those most vulnerable in this context—those absent class members whose liberty and property interests are in the hands of class counsel whose interests are misaligned from those of the class.

D. Due Process Concerns Are Heightened When the Proposed Settlement Includes a *Cy Pres* Component

1. Class counsel can maximize fee awards by using *cy pres* to inflate settlement amounts

Class counsel seeking higher fees after a settlement must normally increase the total amount of damages agreed to by the defendant. In a more traditional class action context, that means that he must increase either the number of class members covered by the settlement or the estimated damages suffered by each class members. Trial courts have experience in scrutinizing both class composition and damages, and have the capacity—if not always the willingness—to reject any attempts by class counsel to engage in self-dealing in these two areas. Introduction of the *cy pres* mechanism into a settlement changes the dynamic in ways that pose increased risks to the due process rights of absent class members.

Cy pres awards provide class counsel an additional method for inflating the total settlement amount without having to justify expansion of claimed damages or inclusion of additional class members. Instead, the settlement amount gets larger in a far more public-relations-friendly manner, with large sums of money being directed towards charitable causes. Class counsel also need not be bothered with determining how to process damages

payments to the actual injured parties. Because it is a settlement, defendants will not object to the additional funds. In fact, by agreeing to a *cy pres* award, defendants may receive a significant amount of goodwill from apparent acceptance of responsibility and willingness to engage in charitable giving. *See S.E.C. v. Bear, Stearns & Co. Inc.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) ("In general, defendants reap goodwill from the donation of monies to a good cause.") A clever defendant might realize that it can offset the *cy pres* award by a reduction in planned charitable donations, achieving additional benefits for itself without any increase in actual outlays. In extreme cases, the defendant may not object because it *directly* benefits from the *cy pres* award—partially controlling the charity designated to receive the award. *Id.* ("[D]efendants may also channel money into causes and organizations in which they already have an interest.").

It is theoretically possible that the various methods for augmenting the settlement amount are perfect substitutes, so that an increase in *cy pres* awards will be exactly offset by a reduction if attempts by class counsel to improperly increase the class size or damages calculation. But class counsel have strong incentives to increase their monetary payoff from each case in whatever way possible. The far more likely result is thus that class counsel will use *cy pres* awards at the margin, increasing total settlement awards as a means of increasing the total fee award. Only enhanced scrutiny of settlement agreements by the courts can properly counter this trend and minimize self-dealing by class counsel.

2. Class counsel can double-dip by choosing *cy pres* award recipients controlled by or benefitting class counsel

The use of *cy pres* awards raises a related concern over self-dealing by class counsel, that the choice of charity designated in the settlement agreement might allow class counsel to reap significant monetary and other benefits. In one case, class counsel steered $5.1 million to the alma mater of the lead plaintiffs' lawyer. *See* Ashley Roberts, *Law School Gets $5.1 Million to Fund New Center*, GW Hatchet (Dec. 3, 2007). *Cy pres* awards can be made to charities that have direct financial ties to class counsel or their family members, but even if there is no such direct link, class counsel can benefit from having "caused" the contribution, generating goodwill and possibly alleviating the annual charitable-giving goals of the lawyers involved.

3. Class counsel can improperly lobby presiding judges by selecting cy pres awards that directly or indirectly benefit presiding judges

Even more troubling than self-dealing by class counsel is the fact that class counsel have a strong incentive to corrupt the judicial process by engaging in a form of what public choice economists would call "rent-seeking." In essence, class counsel can choose as the *cy pres* award a charity or charities with ties to the trial judge in an attempt to improperly encourage the court to approve the settlement. In *Fairchild v. AOL,* LLC, No. CV09-03568 CAS (PLAx) (C.D. Cal. 2009) (class action settlement agreement), for example, the *cy pres* award included payment to

the Legal Aid Foundation of Los Angeles, a charity on whose board the trial judge's husband sat. Such an award might normally be a great benefit to society, but "the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety." *Bear Stearns*, 626 F. Supp. 2d at 415.

4. Judges have an incentive to approve *cy pres* awards that benefit themselves

Class counsel have strong incentives to engage in inappropriate rent-seeking. Worse still, judges have an incentive to succumb to rent-seeking pressures and distort their judgment and approve otherwise questionable settlements that benefit charities in which they have an interest. In other contexts, this could be cause for mandatory recusal. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) ("[T]he Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has 'a direct, personal, substantial, pecuniary interest' in a case. This rule reflects the maxim that '[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.'") (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1948); The Federalist No. 10). However, this due process concern typically arises in the context of settlement approval, so the defendant has already approved and will not challenge the settlement. If the trial court fails to engage in a rigorous analysis of the settlement, as was the case here, due process rights of absent class members will go unprotected in yet another way.

5. Class members often get little or no benefit from *cy pres* settlements

All of these concerns might be overblown if class members are receiving something of reasonable value in return for the settlement of their legal claims. Hence the requirement that trial courts engage in rigorous analysis to determine whether the settlement is fair, reasonable, and adequate. In the case of *cy pres* awards, however, the award of damages to charitable organizations represents money that defendant is paying, ostensibly in restitution for injuries inflicted, but which will never be received by those who were injured. Not only are the absent class members deprived of any direct compensation for their injuries, but "[t]here is no indirect benefit to the class from the defendant's giving the money to someone else." *Mirfasihi*, 356 F.3d at 784. That is especially the case when the "someone else" that receives the money is the defendant or a charitable organization controlled by the defendant.

The substitution of *cy pres* awards for actual compensation to class members also begins to call into question the entire notion of class action lawsuits. "A consumer class action is superior to individual suits because it allows people with claims worth too little to justify individual suits-so called negative-value claims-to obtain the redress the law provides. But if the consumer class action is likely to provide those with individual claims no redress . . . the consumer class action is likely not superior to individual suits." *Hoffer v. Landmark Chevolet Ltd.*, 245 F.R.D. 588, 603 (S.D. Tex. 2007).

E. The Court Should Require the Eleventh Circuit to Abide by Its Rule 23 Obligations and Avoid Deprivations of Due Process

The lower court, in its cursory decision to affirm approval of the settlement agreement, did not even acknowledge its basic responsibilities under Rule 23. *Poertner v. Gillette Co.*, 618 Fed. Appx. 624 (11th Cir. 2015). The court never referenced Rule 23's review requirements, nor did the phrase "rigorous analysis" appear anywhere in the unpublished opinion. Only twice did the Eleventh Circuit describe its review with any type of elevated adjective. *Id.* at 628 ("Based on our *thorough* review of the record") (emphasis added); *id.* at 630 (After *carefully* reviewing the settlement in this case . . .") (emphasis added). In doing so, it downplayed the importance of its review, ignoring the strict procedural requirements of Rule 23 and describing its role as a mere mechanical check on broad district-court discretion. *Id.* at 627 ("[W]e review the approval of a class action settlement for abuse of discretion . . . [the district court's decision] will not be disturbed as long as it stays within [the court's range of choice].").

The Eleventh Circuit was obviously unwilling to inquire too rigorously into the nature of the *cy pres* award, upholding it for the lack of "precedent prohibiting this type of cy pres award." Id. at 629. By casually dismissing concerns over the *cy pres* award, the court exhibited a fundamental misunderstanding about the impact of such awards on the incentives faced by class counsel and defendants. This misunderstanding is further illustrated by the Eleventh Circuit's penultimate justification for approving the settlement agreement: that class counsel and defendants had engaged in "extensive

arms-length negotiations." Id. at 630. Only by refusing to acknowledge the incentives for collusion here could the Eleventh Circuit have concluded that these "negotiations" protected class interests—rather than being the equivalent of two wolves arguing over dinner arrangements that also involve a sheep.

The Eleventh Circuit seemed willfully blind to what the likelihood of collusion between class counsel and defendants means for the due process rights of class members. Counsel was able to protect its own interests—$5.68 million in fees without objection from defendants—in exchange for a settlement that provides class members with nothing more than a claims process that even the district court described as having a "somewhat illusory" valuation of $50 million. *Id.* at 626 (quoting the district court's finding). In reality, the value to the class is likely measured in the hundreds of thousands, not millions. The Eleventh Circuit essentially admitted as much by relying on the "value" to class members of the *cy pres* award in justifying the award of fees to class counsel. *Id.* at 630. For its part, the defendant was able to dispose of the claims of 7.26 million individuals by merely promising to: (1) continue to not sell a product it had already discontinued; (2) burnish its public relations image by donating to charities; and (3) set up an "illusory" claims process.

Even though the Eleventh Circuit was casually dismissive of the evidence of self-dealing, this settlement agreement exhibits numerous "red flags of unfairness" to class members. *Id.* A "rigorous analysis," as required by Rule 23, would have demonstrated that class counsel was not adequately representing class interests, thereby violating their due process rights.

If allowed to remain as Eleventh Circuit precedent, this decision will lead to greater levels of self-dealing by class counsel, more collusion between class counsel and defendants, and greater rent-seeking pressures on judges to corrupt their rulings for personal gain. These deprivations of due process will not be limited to those living in the Eleventh Circuit, however, because class counsel nationwide will choose to file claims in whichever forum has exhibited the least desire to police self-dealing.

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

When a class action is settled, the damages funds belong solely to the class members. *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). When a trial court approves a *cy pres* award, therefore, it ratifies a mandatory transfer of value from class members to a charitable organization. That organization will use the funds provided by the settlement agreement to pursue its own goals, including (understandably) by engaging in various forms of speech. In effect, the court forces class members to support groups whose views may be disagreeable to them. *See Knox*, 132 S. Ct. at 2289 ("Closely related to compelled speech . . . is compelled funding of other private speakers or groups.").

This type of *cy pres* imprimatur is problematic because the Court has held that the government "may not . . . compel the endorsement of ideas that it approves." *Knox*, 132 S. Ct. at 2288. "First Amendment values are at serious risk if the

government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001).

The Court has approved a narrow class of compelled speech which might not violate the First Amendment: When the government implements a comprehensive regulatory scheme that mandates association among a defined group—such as a trade or professional association—compelled contributions for the benefit of that group may be allowed. *Id.* And even then, the contribution can only be sustained "insofar as [it is] a necessary incident of the larger regulatory purpose which justified the required association." *Id.* (internal quotation marks omitted).

To state the obvious, the forced subsidization of charitable organization that arises from *cy pres* awards in class action settlements does not meet the initial criteria for that narrow class of permissible compelled speech. Class actions are governed by Rule 23 and the diverse state and federal laws that can give rise to the legal claims, not a comprehensive regulatory scheme. Likewise, association among class members is voluntary, even if not based on full and meaningful consent. *See supra* at I.A.

The Court has also expressed doubts about the use of opt-out systems where compulsory subsidies are involved. *See Knox*, 132 S. Ct. at 2290-96. While there are significant differences between the context of the present case and that of *Knox*, certain principles are the same, such as that courts "do not presume acquiescence in the loss of fundamental rights." *Id.* at 2290. "Once it is recognized, as our cases have, that a nonmember cannot be forced to

fund a union's political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment?" *Id*. Similarly, class members should not be forced to subsidize class counsel's, defendants', or the trial judge's preferred charitable goals. Whether or not an opt-out mechanism is proper for a traditional class action, once a *cy pres* award is introduced, an opt-in mechanism is required because courts can no longer presume acquiescence by class members in the loss of their First Amendment rights.

A. Class Members Are Likely to Be Diverse in Their Political and Social Views, While *Cy Pres* Award Recipients Are Likely to Share the Views of Class Counsel, Defendants, and the District Court

In order for a class action to be certified, the class has to be "so numerous that the joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The only required commonality between members of the class pertains to their legal claims, not their personal preferences, or political persuasion. It would therefore be truly extraordinary if members of the class were uniform in their preferences for charitable giving. Some class members could be misanthropes, preferring to avoid all philanthropy. Most class members might agree with the notion of charitable giving generally, but would disagree as to the type of organizations that were worthy of support. In light of this diversity of views among class members, it is inappropriate for class counsel *and defendants* to presume to select a "worthy" charitable organization to be the recipients of funds that represent damages owed to class members.

That a trial or appellate court sanctions the choice is immaterial to the question of class members' First Amendment rights to be free from compelled speech. Such a government imprimatur simply adds one additional external entity that has "approved" the compulsion, but it does not change the nature of the speech from compelled to voluntary.

B. If Defendants Control *Cy Pres* Funds, Class Members Will Be Compelled to Support the Views of the Individual or Entity that Caused the Injury at Issue, and May Even Be Compelled to Support a Repetition of the Injurious Actions

One thing that class members must have in common is an injury caused by the defendant. Fed. R. Civ. P. 23(a)(3); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). The result of a fair and just trial should be a transfer of wealth from perpetrator to victim, not the other way around. As a result of the settlement, the defendant admits—impliedly or explicitly—that the victims have a legal right to restitution. To compel the class members to return their rightful compensation to the one who injured them is repugnant to basic principles of justice and is a particularly pernicious example of Thomas Jefferson's adage that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Irving Brant, James Madison: The Nationalist 354 (1948) (quoted in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 n.31 (1977)). To add insult to injury—quite literally—the money that should have made the class members whole is, instead, used to burnish the image of the one who inflicted the damages that gave rise to the lawsuit.

From a more practical perspective, if the defendant is rewarded for its role in damaging class members, it will feel less reluctance to engage in future activities in the same vein, creating the perverse possibility that the class members will be forced to fund their future, repetitive victimization. This peculiar form of unconstitutional compelled speech can be avoided if courts fulfill their responsibilities under Rule 23, for it cannot be argued that forcing victims to fund their victimizers is fair, reasonable, or adequate.

The use of *cy pres* awards in class action settlements, particularly those that enable the defendant to control the funds, are an emerging trend, one to which courts must attend in order to preserve the due process and free speech rights of class members. If not prevented by proper application of Rule 23's rigorous analysis requirements, class counsel, defendants, and judges will be free to collude in enriching themselves at great cost to absent class members.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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